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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 95-093

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IN THE MATTER OF :  
ALTHEAR A. LESTER, :  
AN ATTORNEY AT LAW :

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Decision of the  
Disciplinary Review Board

Argued: May 17, 1995

Decided: October 2, 1995

Robert M. Goodman appeared on behalf of the District VA Ethics Committee.

Alan Roth appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based upon a recommendation for discipline filed by the District VA Ethics Committee (DEC) arising out of three matters. The complaint charged respondent with a violation of RPC 1.3 (lack of diligence) in the Desir matter and RPC 1.4(a) (failure to communicate) in the Cunningham matter. Respondent was also charged with a violation of R.1:20-3(f) (failure to cooperate with the DEC) in connection with those two matters. Respondent was further charged in the Galloway matter with a violation of RPC 1.4(a), RPC 1.16(a)(3) (failure to withdraw from representation), RPC 3.4(c) (disobeying an order of a tribunal) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1969. He maintains an office in Newark, Essex County.

Respondent was privately reprimanded, by letter dated May 26, 1992, for failure to keep three clients informed about the status of their matters. Respondent had received a public reprimand, by order dated July 13, 1989, for gross neglect and failure to carry out contracts of employment in two matters.

The Desir Matter (District Docket No. VA-90-004E)

Jacques Desir retained respondent in late 1988 in connection with a "reopener" of a workers' compensation matter. Mr. Desir had previously received an award in 1985 for partial permanent disability arising from a 1981 accident and claimed that his condition had since worsened. The reopener had been filed by another attorney. After a disagreement with that attorney, Mr. Desir retained respondent.

Before respondent or Mr. Desir's prior attorney could have him examined by a physician, Mr. Desir suffered a stroke that resulted in his total disability. A medical report obtained by respondent found no causal relationship between Mr. Desir's original back injury and his subsequent stroke. Exhibit C-2. Since there had been no orthopedic evaluation performed after the first workers' compensation award was entered, since no causal relationship existed with the stroke, and since Mr. Desir originally claimed one hundred percent disability, it was difficult to prove increased disability. In March or April 1989 however, respondent obtained an

offer of approximately \$18,000 to settle the matter in exchange for a release of all future claims arising from the accident. Respondent explained to Mr. Desir the difficulty in proceeding and suggested that he take the offer. Mr. Desir rejected the offer and, according to respondent, claimed that respondent was "selling him out" (1T67).<sup>1</sup>

By letter dated December 6, 1989, respondent notified Mr. Desir that the case had been scheduled for a hearing on December 12, 1989. Mr. Desir and his estranged wife appeared in court on that date, waiting there until 4:00 P.M. Respondent failed to appear. According to Mr. Desir's estranged wife, the Desirs telephoned respondent's office and his secretary assured them that he was on his way. The alleged misconduct in the complaint in this matter stemmed only from respondent's failure to appear on that date.

Respondent was unable to provide documentary evidence to establish where he was on December 12, 1989. (His 1989 Lawyer's Diary could not be located.) He testified, however, that, in any given week during that time period, he had thirty-five to forty workers' compensation matters listed in various counties in northern New Jersey. On almost any day, respondent had conflicting scheduling between counties. He explained that his procedure was to notify the court of the conflict and go to the county where the

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<sup>1</sup> 1T, 2T, 3T, 4T and 5T refer to the transcripts of hearings before the DEC on April 8, May 26, September 1 and October 4, 1994 and January 11, 1995, respectively. Please note that the transcript of January 11, 1995 is misdated 1994.

oldest case was or where a trial was scheduled. If the judge did not release him from court, he would not appear in the other counties. Respondent would periodically call his office and tell his staff to advise the other judges of his location. Respondent testified that his clients knew this might occur. Respondent claimed that he explained the procedures to Mr. Desir "but [respondent] was never satisfied that he understood fully that -- the process" (2T46).

Respondent admitted that he did not appear on behalf of Mr. Desir on December 12, 1989. Respondent had appeared at previous hearings and appeared at subsequent hearings after December 12, 1989.

On December 15, 1989, Mr. Desir filed a grievance against respondent. Thereafter, on April 23, 1990, respondent moved to withdraw as counsel. Respondent believed that, regardless of the outcome of the workers' compensation matter, Mr. Desir would have been dissatisfied with respondent's representation. Respondent, thus, thought it best to withdraw from the case. Respondent's motion to withdraw was granted in October 1990. A copy of the order was given to Mr. Desir and the file was turned over to Mr. Desir on January 8, 1991. Respondent explained that the delay in surrendering the file was due to the fact that he wanted Mr. Desir to have another attorney to whom he could turn over the file. Respondent stated that other attorneys had called him and that, although he encouraged them to take the case, they had declined. Therefore, he ultimately turned the file over to Mr. Desir.

In its report, the DEC noted that Mr. Desir, a native of Haiti, testified through an interpreter and with great difficulty because of his physical condition.

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The DEC did not find respondent guilty of misconduct in this matter, determining that, even if respondent failed to appear on Mr. Desir's behalf because of forgetfulness or a mistake on his calendar, this incident, in isolation, would not constitute a violation of RPC 1.3. The DEC noted, however, that the testimony elicited gave rise to "a specter of a possible pattern of neglect." The DEC felt that, given the narrow charge in the complaint, the issue had not been fully developed at the hearing.

The Cunningham Matter (District Docket No. VA-90-051E)

The only allegation against respondent in this matter was a failure to communicate with his client from 1988 through 1990. The events leading up to that time are fully set forth in the record. Because they are not the subject of the complaint, however, they are summarized herein as follows:

David Cunningham was involved in a motorcycle accident in March 1983. In October or November 1983, he retained respondent. Respondent undertook to ascertain whether Mr. Cunningham had insurance and to resolve a question of ownership of the motorcycle, to no avail. In addition, while Mr. Cunningham was in the hospital, he suffered a hearing loss, which was the subject of a separate medical malpractice action filed by respondent.

After Mr. Cunningham was released from the hospital, he and respondent had a number of meetings. For several reasons, however, respondent lost contact with Mr. Cunningham in early 1985. In February 1985, despite respondent's lack of communication with Mr. Cunningham, respondent filed two complaints in Mr. Cunningham's behalf, in the motorcycle and medical malpractice cases, in order to toll the statute of limitations. In the motorcycle case, the complaint listed fictitious defendants, as their identity had not yet been determined. The medical malpractice claim was filed against, among others, St. Michael's Hospital. Because respondent had been unable to contact Mr. Cunningham and obtain answers to the hospital's interrogatories, the defendant's motion to dismiss was granted on June 6, 1986.

In early spring 1987, respondent located Mr. Cunningham. Thereafter, respondent met with Mr. Cunningham and obtained answers to the interrogatories. Despite respondent's efforts to have the case reinstated, his motion was denied on July 2, 1987. Shortly thereafter, in July 1987, he met with Mr. Cunningham and informed him that the court had denied the motion to restore the malpractice case. They discussed pursuing an appeal. Respondent testified that he learned at that time that Mr. Cunningham had bed sores and it was Mr. Cunningham's intent to sue based not on the hearing loss, but on the bed sores. Respondent told Mr. Cunningham that he would not pursue that claim for him and that the malpractice case was over. Respondent apparently did not send a letter to Mr. Cunningham withdrawing from the representation.

As noted above, respondent had also filed a claim, arising from the motorcycle accident, against unspecified defendants. Respondent advised Mr. Cunningham at their July 1987 meeting that he could not proceed on the motorcycle case without further information from him. Despite respondent's efforts to keep the matter active, it was apparently dismissed in April 1988. Respondent did not inform Mr. Cunningham of the dismissal because he had already told him that he could not pursue the case without more information and he did not feel he had to apprise him of these additional developments.

Mr. Cunningham contended that, from 1988 to 1990, he made numerous calls to respondent to obtain information about his matters, to no avail. Respondent testified, contrarily, that during that time period he received numerous calls from attorneys and other individuals calling in Mr. Cunningham's behalf, wanting to know the facts surrounding the case. Respondent maintained that he replied to each of these calls. Ultimately, respondent delivered the file to another attorney, who currently represents Mr. Cunningham.

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The DEC was of the opinion that the testimony offered in Cunningham raised questions as to a possible pattern of neglect, but no charge had been made and the issue was not developed. As noted above, respondent did not reply to the DEC investigator's requests for information. A majority of the DEC was of the opinion that, had respondent replied to the investigator's requests and

submitted his file, then the investigator could have made a better determination as to what charges to bring against respondent. The DEC was, therefore, hesitant to make a finding based on the narrow charge against respondent, believing that this "might reward Respondent for his non-cooperation." (Original emphasis). Thus, the DEC recommended a new investigation in the matter and suggested three particular areas of inquiry relating to respondent's handling of the Cunningham matter.

The Galloway Matter (District Docket No. VA-90-070E)

Janet Galloway was involved in an accident on September 9, 1987 and retained respondent, who had been a social friend. Ms. Galloway was also a close friend of respondent's then longtime secretary. Respondent filed suit, answered interrogatories and obtained medical reports, but was unable to obtain a settlement offer from the insurance carrier.

Ms. Galloway testified that, early in the representation, she communicated with respondent and obtained information on her case. From November 1990 to January 1991, however, she was unable to get any information from respondent on how the case was proceeding. By letter dated January 16, 1991, Ms. Galloway asked that her file be forwarded to Kenneth Sunberg, Esq. Respondent did not reply to the letter. Mr. Sunberg telephoned respondent and discussed with him Ms. Galloway's dissatisfaction with their lack of communication. Apparently, the situation did not improve and, by letter dated February 19, 1991, Mr. Sunberg forwarded a substitution of



attorney. Mr. Sunberg also requested that respondent deliver the file to him, along with a list of expenses. Mr. Sunberg indicated that he would contact respondent regarding legal fees. Respondent did not forward the file or reply to the letter.

Thereafter, Mr. Sunberg filed a motion to compel the substitution of attorney on April 29, 1991. Respondent did not reply. The motion was granted by order dated May 16, 1991. Mr. Sunberg forwarded the order to respondent by letter dated May 21, 1991. Thereupon, Mr. Sunberg telephoned respondent on at least six occasions. Respondent neither replied to his calls nor forwarded the file to Mr. Sunberg. On June 21, 1991, Mr. Sunberg filed a motion to hold respondent in contempt. Respondent finally forwarded the file to Mr. Sunberg on July 2, 1991. (By this time, Ms. Galloway had filed a grievance with the DEC. She attempted unsuccessfully to withdraw the grievance when the file was turned over.)

Respondent's letter to Mr. Sunberg accompanying the file indicated that a bill for disbursements would follow shortly. Mr. Sunberg eventually settled the case in Ms. Galloway's behalf. In May 1992, Mr. Sunberg forwarded to respondent a check for \$171.75 for costs. Mr. Sunberg did not recall any communication with respondent regarding the costs, other than the above mentioned statement in respondent's letter accompanying the file. He was unaware of how he learned of the \$171.75 amount.

Respondent testified that, when he received the February 19, 1991 letter from Mr. Sunberg, he instructed his staff to copy the

file, obtain reimbursement for costs from Mr. Sunberg and forward the file. According to respondent, he did not attempt to get an agreement about a fee, reasoning that he could work that out with Mr. Sunberg at the conclusion of the case. Respondent claimed that the issue of costs had been discussed during a telephone conversation with Mr. Sunberg on an unspecified date. Respondent indicated at that time that he would forward the file if Mr. Sunberg sent the reimbursement for costs.

When the motion to compel the substitution of attorney was filed, respondent instructed his staff to obtain reimbursement for costs and forward the file. When he received the May 16, 1991 order, respondent again told his staff to have Mr. Sunberg send the money for costs and to forward the file. Respondent contended that, when he received the motion to hold him in contempt, he was surprised that the file had not been released. He directed his staff to send the file at that time, despite the fact that the costs had not been reimbursed.

Respondent maintained that it was possible that he did not receive the telephone messages from Ms. Galloway. He explained that he relied on his office staff to reply to telephone calls in his behalf; that was particularly true in this case, based on the social relationship between Ms. Galloway and respondent's secretary. Respondent added that he would periodically see Ms. Galloway at social functions.

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The DEC determined that respondent violated RPC 1.16(a)(3), by

failing to withdraw from the representation until six months after he had been discharged and then only after the contempt motion had been filed. The DEC also found a violation of RPC 3.4(c) (knowingly disobeying an order of a tribunal). The DEC concluded that respondent had an obligation to be aware of orders and correspondence and could not rely on his office personnel to do those things for him. The DEC also found that respondent violated RPC 8.4(d), based on the six-month delay in pursuing the case and the burden respondent's failure to act placed on Mr. Sunberg and the court. Lastly, the DEC found respondent guilty of a violation of RPC 1.4(a). Although the time period in question in the complaint was brief - November 1990 to January 1991 - Ms. Galloway also testified that, prior to November 1990, she had called respondent "constantly" without success (4T15).

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During the course of the hearing, respondent testified about his extensive workload - approximately 500 cases. He has apparently cut back on the number of active workers' compensation files.

Respondent further testified about a back injury he suffered in 1982 that caused his hospitalization five times, including March 1987 and March 1992. That injury has been a recurring problem. Respondent also testified that he suffered a heart attack in February 1993.

### Failure to cooperate with the DEC

By letters dated April 11, April 25, June 6, September 13 and September 24, 1990 and May 22, 1991, the DEC investigator attempted to obtain information from respondent about the grievances filed by Mr. Desir and Mr. Cunningham. Respondent replied to the allegations in Mr. Desir's grievance by letters dated October 23, 1990 and June 6, 1991, stating primarily that he had been relieved as counsel and had turned over the file to new counsel. He was, thus, unable to provide information about the status of Mr. Desir's case. The presenter argued to the DEC that this reply was insufficient because not only did respondent still have a photocopy of the file, but he had been asked to reply to Mr. Desir's allegations, not to provide information about the status of the case.

During the hearing, the DEC presenter sought to add a charge of a violation of RPC 8.1(b). The presenter relied on a letter from the DEC secretary to respondent, dated January 18, 1994, advising respondent that his answer to the complaint was six months late and informing him that his failure to answer was a violation of RPC 8.1(b).

With regard to his failure to reply to the DEC, respondent testified that, at that time, he was represented by an attorney. Respondent contended that it had been his belief that the attorney had replied on his behalf. Respondent also believed that it was possible that he had never seen the letters from the DEC because of his heavy reliance on his staff. Respondent also pointed to his

health problems as a reason for his failure to communicate with the DEC.

With regard to the presenter's attempt to amend the complaint to include a violation of RPC 8.1(b) (based upon the letter from the DEC secretary to respondent informing him of his violation of that rule), the DEC determined that "this was not a complaint as such before it, and in any event would add little to the numerous similar allegations against Respondent for failure to answer communications from the committee which was before [the DEC]." Thus, the DEC made no finding of a violation of RPC 8.1(b). The DEC found, however, that respondent had violated R.1:20-3(f) in Desir and Cunningham, as charged in the complaint.

The DEC considered respondent's failure to cooperate as an aggravating factor. By way of mitigation, however, the DEC remarked on the difficulty in communicating with Mr. Desir and Mr. Cunningham, noting they would be difficult to represent and might not have understood what respondent told them. The DEC recommended discipline and a proctor to monitor respondent's practice.

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Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The DEC found that respondent had violated R.1:20-3(f) for failing to cooperate with the committee in two matters. Ordinarily, when a respondent does not cooperate with the DEC

investigator but files an answer to the complaint (albeit late, in two of these three cases) and cooperates at the DEC hearing, the Board does not find failure to cooperate. In this case, however, respondent is a recidivist who knows how the disciplinary system works. In addition, a number of cases are involved. Thus, the Board agrees with the DEC and finds a violation of R 1:20-3(f), and, by reference, RPC 8.1(b).

As noted above, the DEC made no findings in the Cunningham matter, believing that the matter should be remanded for a fuller investigation of respondent's conduct. Respondent's testimony, however, covered the areas that would have been investigated, had he been charged with gross neglect and lack of diligence. His attorney did not object to that line of questioning at the DEC hearing. Accordingly, the complaint is deemed amended to conform to the proofs. After a careful review of the record, the Board is unable to find clear and convincing evidence of misconduct in this regard. It is not clear that respondent had been aware of Mr. Cunningham's whereabouts. Respondent undoubtedly sought to protect Mr. Cunningham's rights by filing the complaints. Without further information or input from his client, respondent was unable to pursue them to fruition. True, respondent should have sent a letter to his client after their July 1987 meeting, informing him that he would not pursue a malpractice claim for bed sores and that, unless he provided information as to the insurance coverage on the motorcycle, he would also not pursue that matter. That conduct, however, although not prudent, did not rise to the level

of an ethics violation.

As to the Desir matter, unfortunately, respondent's practices are a reflection of the way workers' compensation matters are handled. Respondent's situation with regard to scheduling conflicts was not out of the norm. Apparently, respondent's procedure in handling those conflicts is also an accepted practice. What likely occurred on December 12, 1989 was a misunderstanding with a client who had a limited command of the English language and was already dissatisfied with the progress of his case. This might be, as characterized by respondent's counsel, a case of the client "blaming, in essence, the messenger bringing him the message" (5T24). Thus, the Board dismissed this matter.

The Galloway matter is more weighty. Again, the facts present what might be a misunderstanding, this time about turning over a file. The difference here, however, is that fault is directly attributable to respondent. Even accepting as true respondent's testimony that he instructed his office staff to obtain reimbursement for his costs and forward the file, respondent is still to blame. It was his responsibility to see to it that his instruction was carried out; his reliance on his staff is no excuse.

The DEC determined that respondent had violated RPC 1.16(a)(3), RPC 3.4(c) and RPC 8.4(d) in connection with his failure to turn over the file in Galloway. More appropriately, however, respondent's conduct was a violation of RPC 1.15(b). Furthermore, the misconduct here is not the type for which the

Board would usually find violations of RPC 3.4(c) and RPC 8.4(d). The Board, therefore, dismissed the violations found by the DEC and, instead, found that respondent's transgressions were violative of RPC 1.15(b) and RPC 5.3(b) (failure to supervise).

The DEC's finding of a violation of RPC 1.4(a) was sound. Respondent relied on his staff to reply to telephone inquiries to a greater extent than is appropriate. It seems that staff did not reply to Ms. Galloway's reasonable requests for information. The fact that respondent and his secretary had a social relationship with Ms. Galloway and might have spoken with her outside of the office setting is of little moment.

In essence, respondent's misconduct consisted of failure to communicate with his clients, failure to turn over a file, failure to supervise his staff and failure to cooperate with the DEC. Standing alone, that would most likely require the imposition of an admonition. It is difficult, however, to view respondent's misconduct in isolation given his previous discipline (a private reprimand and a public reprimand). The Board noted, however, that respondent's private reprimand was issued in May 1992, after the misconduct in these three matters. His public reprimand was issued in July 1989, prior to the Galloway matter. In light of respondent's previous discipline, the Board unanimously determined to impose a reprimand. See In re Rosenblatt, 114 N.J. 610 (1989) (where the attorney received a public reprimand for gross neglect in a personal injury matter for four years. During that four-year period, the attorney repeatedly ignored the client's requests for



information. He had been privately reprimanded seventeen years earlier for neglect in two matters).

The Board further determined that respondent should practice under the guidance of a proctor for one year. One member recused himself.

The Board further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 10/2/55

By: 

Lee M. Hymerling  
Chair  
Disciplinary Review Board