Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-307

IN THE MATTER OF

JAMES A. MAJOR, II

AN ATTORNEY AT LAW

Decision

Argued: October 17, 1996

Decided: December 9, 1996

Michael N. Boardman appeared on behalf of the District IIA Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board based on a recommendation for discipline filed by the District IIA Ethics Committee (DEC). The complaint charged respondent with gross neglect, in violation of RPC 1.1(a), failure to act with reasonable diligence or promptness, in violation of RPC 1.3, and failure to communicate, in violation of RPC 1.4(a).

Respondent was admitted to the New Jersey bar in 1960. Until very recently, he maintained an office in Hackensack, New Jersey. Respondent received a private reprimand in 1986 for his repeated failure to produce a client for deposition, in violation of a court order.

During 1988, respondent was associated with attorney Caryl J. Sonnabend in Sparta, New Jersey. Sonnabend was retained by Kenneth Malkin to file a lawsuit against a landlord for breach of a commercial lease. Malkin operated a laundromat in a shopping center. The lease provided that the laundromat would have the exclusive use of a specific septic system. However, construction was taking place at the shopping center and a contractor tied into the septic system, causing it to fail. The Board of Health closed the laundromat and the landlord sent an eviction notice. The laundromat business was evicted in January 1987, with an unexpired lease term of more than three years remaining, plus a five-year renewal.

Although Sonnabend was retained as counsel, respondent admitted that he was responsible for the case. He prepared and filed the complaint in November 1988, and later filed an answer to a counterclaim. Respondent did not conduct any discovery. Apparently, the complaint was dismissed at some point for the plaintiff's failure to answer interrogatories. The complaint was subsequently restored by consent order. Respondent did not notify Malkin that the complaint had been dismissed and restored. Malkin discovered these facts only as a result of the DEC's investigation. During the period between the filing of the complaint, November 1988, and 1991, communication between Malkin and respondent was sporadic. Malkin called every couple of months or so to obtain the status of the case and respondent would indicate that the court in Sussex was "backlogged."

At some undisclosed point, respondent discontinued his association with Sonnabend and returned to an office in Hackensack that he shared with another attorney. During 1992, Malkin was unable to communicate with respondent. On January 29, 1993, Sonnabend filed a substitution of attorney designating respondent as counsel for Malkin. By letter dated February 3, 1993, Sonnabend sent a copy of the substitution of attorney to respondent. Sonnabend's cover letter to respondent stated:

> I advised Ken Malkin that you would be calling him. If you haven't already done so, perhaps it would be timely.

Malkin did not receive a copy of the substitution of attorney or a copy of a notice of trial containing a trial date of February 1, 1993. Sonnabend notified Malkin of a trial date of April 5, 1993. Malkin met respondent at the courthouse on April 5, 1993. At that point, Malkin had not seen respondent for approximately four years and had barely spoken with him about the case. Malkin had not been prepared by respondent for trial. Respondent had not engaged in any discovery or contacted his client.

At the courthouse on April 5, 1993, the judge conducted a settlement conference, which was not successful. Counsel met with the judge outside the presence of Malkin. Afterward, respondent told Malkin that the case had been adjourned to April 13, 1993. Respondent further stated that he would reschedule the trial because he had a criminal matter listed for the same date. When Malkin left the courthouse, his understanding was that the April 13, 1993 trial date would be adjourned.

Malkin's next contact with respondent was at the DEC hearing. In the interim, respondent had not succeeded in adjourning the April 13, 1993 trial date. Instead, he appeared before the judge, who suggested that respondent voluntarily dismiss the complaint with the understanding that defense counsel would not oppose a motion to restore the matter. Without advising Malkin or obtaining his consent, respondent entered into a voluntary dismissal of the case. Respondent never notified Malkin of this development. Malkin made repeated efforts to contact respondent, all to no avail. He also requested Sonnabend to assist in his attempts to contact respondent.

Sonnabend wrote to respondent on three occasions. In the first letter, dated July 12, 1993, Sonnabend stated, in part:

> As you no doubt anticipated, Ken Malkin is more than aggravated over your handling of his case and your failure to contact either him or myself. I cannot understand your attitude and your failure to cooperate. I feel we have been more than patient with you and the very least you could do is contact Ken Malkin and myself in order that this case can be properly completed. Kindly call me at once.

Respondent failed to reply to Sonnabend's letter, prompting a second letter, dated December 7, 1993, stating:

> I have just this instant gotten off the telephone with Ken Malkin who, because of the fact that you have completely failed to respond to my correspondence or be in touch with him as to the status of his case and are holding the file captive, feels he has no choice but to file the necessary complaints to bring this matter to a head. . . .
>
> Needless to say, I see no reasonable explanation for what has happened in this matter. UNLESS YOU CONTACT MR. MALKIN AND MYSELF AT ONCE, I FORESEE NOTHING BUT DISMAL CONSEQUENCE FOR YOU AND MYSELF INCIDENTALLY FOR HAVING RECOMMENDED YOU TO HANDLE THIS MATTER.

> You have done nothing in response to my many phone calls or prior correspondence to avoid this matter arriving at the point where it now is and I am concerned, appalled and thoroughly disappointed.

Finally, on February 7, 1994, Sonnabend sent to the respondent a third letter, as follows:

> What can I say to you that will get you to do a simple act of contacting this office or my home in order that we can arrange to pick up Ken Malkin's file .... Ken has just advised me that he is filing a complaint because of the fact that he has ascertained that you settled his case without discussing or advising him of that fact. As you are well aware, I have written you several times, called you several times and left messages with you with no response and as to why I have no idea....

Although the letter indicated that respondent settled the case, respondent, as noted above, agreed to a voluntary dismissal of the complaint. In February 1994, Malkin, having received no contact from respondent, telephoned the court and learned of the dismissal.

The DEC presenter contacted Malkin and obtained his authority to request respondent to file a motion to restore the complaint. By letter dated May 6, 1994, the presenter notified respondent that Malkin did not object to his moving to restore the case and suggested that respondent attend to that task as a matter of priority. However, the motion was not filed until approximately eleven months later. By letter dated June 14, 1994, the presenter asked respondent to advise if the motion had been filed. Subsequently, by letter dated July 8, 1994 to respondent, the presenter noted that, on June 23, 1994, respondent advised his office that he anticipated filing the motion by the next motion day and that he would contact the presenter the following week. The

letter indicated that respondent failed to contact the presenter. According to a third letter, dated August 12, 1994, sent to respondent by the presenter, respondent left a message on August 5, 1994 that "Sussex County is a world unto itself" and that he would contact the presenter that week regarding the motion to restore.

Finally, in April 1995, almost one year after being advised to do so, respondent filed a motion to vacate the order of dismissal. The motion was decided on the papers by a different judge and was not opposed.[1] However, the motion was denied on June 13, 1995, with the following notation: "Unopposed. Needs additional documentation per rule." Respondent testified that when he contacted the judge's chambers to ascertain what additional documentation was required, the judge's secretary assured him that she would find out and call him. This conversation took place the day before the DEC hearing. As of the date of the DEC hearing, respondent had not heard from the judge's secretary. At that hearing, respondent assured the panel that he would take the necessary action to get the matter restored.

Sonnabend passed away in the early part of 1995.

Respondent testified at the DEC hearing. To his credit, he fully admitted that he was responsible for the handling of the file and that he had failed to communicate with Malkin. Respondent noted that he communicated with Sonnabend, however, albeit those

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[1]There is no indication in the record of whether respondent requested that the motion be assigned to the same judge who suggested the voluntary dismissal or of any reason that that judge could not have heard the motion.

communications were neither timely nor frequent. He acknowledged that he was the attorney of record and that he should have communicated directly with Malkin. Respondent accepted full responsibility for not having prepared the case for trial. He explained that entering into the voluntary dismissal was a means of calendar control. In this fashion, the case would be off the calendar and no one would need to request further adjournments. The understanding with defense counsel was that, at any time the case was ready, respondent would move to restore the complaint and the motion would not be opposed. Respondent acknowledged that to get the case ready would simply involve preparing Malkin and possibly the only other witness, the building inspector, for trial.

With reference to the motion to restore the complaint, respondent acknowledged the delay, but offered no explanation. He admitted receiving the letters from Sonnabend and claimed that he telephoned Sonnabend, although not timely. Respondent testified that he had dictated the motion in the fall of 1994, but "held off on it", without explaining the reason for the delay. Respondent mentioned several times that he told Sonnabend that another attorney should handle the Malkin case. He thought either Sonnabend or Malkin would obtain a new attorney, but that never happened. Finally, respondent noted that neither he nor Sonnabend were paid for the Malkin matter; the arrangement was that respondent and Sonnabend would each receive fifty percent of the fee.

At the hearing before the Board, respondent stated that after the DEC hearing, Malkin retained new counsel to represent him in restoring the complaint. As a result, respondent was not aware of the status of the complaint.

* * *

The DEC found that respondent violated RPC 1.4 (a) by failing to contact Malkin from the date of the voluntary dismissal of the complaint, April 3, 1993, to the date of the DEC hearing. The DEC noted respondent's acknowledgement that the lack of contact with Malkin was inappropriate and that communication with Sonnabend was not sufficient to keep Malkin informed about the status of the matter.

The DEC further found that respondent violated RPC 1.3 by waiting from April 1993 to April 1995 to file a motion to restore the complaint. However, the DEC found no violation of RPC 1.1 (a), based on respondent's adversary's agreement not to oppose the motion to restore the complaint. The DEC recommended that respondent be given a reprimand.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

Respondent clearly failed to communicate with his client after the complaint was voluntarily dismissed, as the DEC found. He also clearly failed to act with reasonable diligence and promptness in representing a client, in violation of RPC 1.3, as determined by the DEC. The Board agreed with the DEC's dismissal of the violation of RPC 1.1 (a).

Generally, in cases involving failure to act with reasonable diligence and failure to communicate, a reprimand constitutes appropriate discipline. See In re Carmichael, 139 N.J. 390 (1995) (reprimand where attorney failed to act with reasonable diligence and promptness and failed to communicate in two matters; a prior private reprimand had been imposed).

Here, respondent engaged in unethical conduct over a five-year period, during which time he failed to conduct any discovery, prepare the case for trial, or communicate with his client. In addition, he agreed to a voluntary dismissal of the complaint, without notifying his client or obtaining his consent and never informed his client of the dismissal. Further, there was the potential harm to the client. As of the date of the DEC hearing, the complaint had not been restored. At the Board hearing, respondent indicated that he did not know whether the complaint had been restored because Malkin had retained other counsel. If the complaint is not restored, Malkin will be precluded from seeking compensation for the loss of his business. Finally, in aggravation, respondent received a private reprimand for failure to produce a client for deposition, in violation of a court order. In

mitigation, respondent cooperated with the ethics authorities and quite candidly admitted his wrongdoing.

After a consideration of the relevant circumstances, the Board unanimously determined to impose a reprimand.

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

Dated: 12/9/96

By: ______________________
LEE M. HYMERLING
Chair
Disciplinary Review Board