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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-299

IN THE MATTER OF	:
DONALD J. RINALDI	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 17, 1996

Decided: December 18, 1996

Stuart Gold appeared on behalf of the District VC 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 VC Ethics Committee ("DEC"). The four-count complaint charged respondent with violations of RPC 1.1(a)(gross neglect) (count one); RPC 1.3 (lack of diligence) (count two); RPC 1.4 (failure to communicate) (count three); and RPC 8.1(b) (failure to respond to a lawful demand for information

from a disciplinary authority) (count four). [The complaint charged respondent with a violation of R. 1:20-3(6), instead of RPC 8.1(b)]. The heart of this matter is the DEC's finding that respondent created three letters after the DEC investigation had begun, in order to give the impression that he had handled the file diligently and responsibly.

Respondent was admitted to the New Jersey bar in 1972. He maintains a law office in Nutley, New Jersey. Respondent does not have a history of discipline.

* * *

In April 1990, Timothy Forshay, the grievant, and his father, David, purchased a condominium in Sussex County, New Jersey. Shortly thereafter, Forshay became aware of structural problems with the unit. Among other problems, water that accumulated under the condominium was creating a potential fire hazard and causing the unit to smell of mildew. Sometime in 1990, Forshay accepted a $3,500 settlement under his homeowners' warranty insurance policy and apparently signed a release in the matter.

Two years later, in October 1992, Forshay met with respondent to discuss the continuing problems with his unit. Forshay claimed

that he informed respondent of his settlement with the homeowners' association at that time, a contention respondent denied.

Prior to meeting with respondent, Forshay had consulted with another attorney about the problems with his condominium. The other attorney had quoted him a $10,000 to $15,000 sum to pursue the matter. According to Forshay, when he informed respondent of this estimate, respondent replied he would charge him less.

Respondent agreed to represent Forshay. In a letter dated November 12, 1992 (Exhibit C-3), respondent memorialized their fee agreement. Forshay had agreed to pay respondent a retainer in the amount of $2,500. Respondent's letter informed Forshay that he would obtain the file on the purchase of the condominium from Forshay's prior attorney, Reed W. Easton. Respondent enclosed a letter to be signed by Forshay, addressed to Easton, requesting the release of Forshay's file.

In the letter to Forshay, respondent also wrote the following:

> After reviewing the photographs that you left at my office, it is obvious that there is a major structural defect to the common area immediately below your condominium. This defect is certainly causing a health hazard, and may also be causing a fire hazard. It appears that this defect has affected your use, occupancy and quiet enjoyment of your condominium. Although I cannot guarantee the result of a lawsuit in this matter, it is my opinion that you certainly have a cause of

> action and should be reimbursed for all monies expended by you as well as for damages sustained by you.
>
> [Exhibit C-3]

It is unclear what steps, if any, respondent took in connection with Forshay's case from November 1992 until December 1993. It is not even clear whether respondent sent the request for Forshay's file to Easton. However, in a letter to Easton dated March 3, 1993 (Exhibit C-20), respondent noted Easton's failure to reply to the first request for the file and asked for an opportunity to review the file.

According to Forshay, he contacted respondent's office on numerous occasions to learn about the status of his case. Respondent's secretaries corroborated that Forshay called respondent frequently. Most of Forshay's calls went unreturned.

At some point, respondent advised Forshay that he would contact the homeowners' association and state and county officials, among others, with regard to the conditions in the condominium. The record does not disclose whether he communicated with any of these individuals. It appears that Forshay contacted the governmental authorities to inspect the condition of the condominium. According to Forshay, respondent advised him to withhold payment of the association maintenance fees until the

matter was resolved. Respondent denied giving Forshay such advice. Forshay testified that he had withheld the association fees for all of 1993.

Forshay did not know whether respondent had actually contacted anyone in his behalf because he did not receive any copies of correspondence about the matter. At one point, Forshay even contacted his former attorney and ascertained that respondent had not requested his file.

In April 1993, Forshay received a letter from the homeowners' association's attorney, Glenn Glerum, informing him that a lien would be filed against his unit and that foreclosure proceedings would be instituted if Forshay did not pay the association fee. Exhibit C-11. On April 23, 1993, Forshay "faxed" a copy of the letter to respondent, along with his cover letter, noting that he wanted to "beat [the association] to the punch" by instituting legal action against the association. Exhibit C-12. In an ensuing conversation between Forshay and respondent, respondent assured Forshay that Glerum's letter was "just a formality" respondent told Forshay not to worry, he would "take care of it." T28.[1] According to Forshay, respondent informed him that he would get an injunction

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[1] T denotes the transcript of the April 26, 1996 DEC hearing.

against the association to fix the property. Respondent, in turn, denied making such a statement. Nevertheless, Forshay believed that respondent would file suit in his behalf.

Forshay did not believe that respondent had taken any action in his behalf from April through August 1993. He, therefore, scheduled a meeting with respondent to try to move matters along. At the DEC hearing, both Forshay and his wife, Susan, insisted that a meeting had been scheduled for August 13, 1993 at 5:00 P.M. Respondent, however, claimed that that was impossible because, on that date, he was on vacation and out-of-state. While the Forshays may have been mistaken about the actual date of the proposed meeting, they both unequivocally testified that, when they arrived for their appointment, respondent was not there.

Forshay testified that he had to "pursue" respondent to meet with them. Eventually, on or before August 17, 1993, respondent met with the Forshays. At that meeting, respondent printed from his computer two pages of a complaint that he was preparing in their behalf. Respondent informed the Forshays that he could not complete the complaint until they submitted certain information. He also informed them that he was not sure in which county he would file the complaint: the county where the condominium was located or the county where Forshay's father (the co-owner of the unit)

resided. Thereafter, Susan Forshay forwarded the requested information to respondent under cover letter dated August 17, 1993. Exhibit C-23. The Forshays never received a final copy of the complaint.

Between the meeting in August 1993 and November 1993, Forshay called respondent on numerous occasions to determine whether the complaint had been finalized and filed. At different times, respondent told Forshay either that the complaint had been finalized, or that it had been misplaced, or that it was on his desk, or that he would file it once he determined the appropriate county — Passaic or Sussex. In October 1993, respondent told Forshay that the complaint had been filed.

In November 1993, Forshay contacted both the Sussex County and Passaic County courthouses, only to learn that the complaint had never been filed.

Respondent alleged that, by letter dated September 14, 1993 (Exhibit C-7), he had advised Forshay that the fact that Forshay had accepted a settlement under his homeowners' warranty insurance policy "[might] have serious consequences" in the matter. He also claimed that the case had taken a great deal of his time and effort and that he would review the time spent on the file, which exceeded the $2,500 retainer originally paid. He promised to do his best,

but added that he could not work for free. Forshay never received this letter.

On December 9, 1993, Forshay wrote to respondent indicating that he had been trying to talk to him for the last month about the status of his case. He notified respondent that, if he did not hear from him by the first of the year, he would try to settle the matter himself. Exhibit C-4. By letter dated December 30, 1993, Forshay requested an appointment with respondent or someone else on respondent's staff to review his file. Exhibit C-5. In a letter bearing the same date (Exhibit C-6), Forshay terminated respondent's representation and requested a refund of his retainer. Forshay listed the following reasons for terminating respondent's services: respondent failed to return telephone calls, did not forward any documentation to him, failed to file a lawsuit, failed to obtain or file an injunction for repairs on the premises, failed to call Forshay's former attorney for the file, failed to show up for or to cancel two appointments, failed to give Forshay documentation memorializing conversations with banks, attorneys or the board of directors of the condominium association, and failed to follow through with an inspection of the property. Forshay noted that he had been "misrepresented" by respondent and that

respondent's lack of attention to the case hurt him personally and financially.

Thereafter, Forshay met with respondent in January 1994, at which time respondent told him he needed more money, approximately $10,000, to pursue the matter. Respondent also told Forshay that he had never advised him to withhold the association fees.

In a letter dated February 19, 1994 to respondent, Forshay asked respondent to refund his entire retainer or else he would file a "complaint" with the Office of Attorney Ethics. Exhibit C-21.

In August 1994, Forshay's matter was apparently settled, without respondent's assistance. The record is silent as to the terms of the settlement.

* * *

The DEC investigator, Martin J. Brenner, testified that Forshay's grievance of March 10, 1994 was referred to him on September 8, 1994. On September 9, 1994, Brenner left a message for respondent to return his call, but respondent failed to do so. Brenner sent a letter to respondent on September 15, 1994 by certified mail, return receipt requested, seeking a reply to the

grievance and a copy of Forshay's file within ten days. As of September 22, 1994, Brenner had not received a reply. He, therefore, called respondent, who informed him that he had not received the package. The package was returned to Brenner as "unclaimed." Brenner forwarded to respondent a second package on September 22, 1994. Respondent sent a reply to Brenner on October 3, 1994. Brenner requested additional information and documents by letter dated October 27, 1994. As no reply was submitted, Brenner again wrote to respondent on November 10, 1994. As of November 16, 1994, no reply had been received. Brenner "faxed" another request for the outstanding information. On that date, respondent "faxed" a letter back to Brenner indicating that the requested information was included, but it was not. Brenner "faxed" another request for the information on November 21, 1994, to which respondent replied on November 22, 1994.

Within the information submitted to Brenner were three letters to the condominium's attorney, Glenn Glerum. Respondent admitted that he never sent any of the letters to Glerum and never showed them to Forshay. Respondent denied, thus, that they had been drafted with the intent to mislead Forshay. In the first letter to Glerum, dated April 26, 1993, respondent introduced himself as Forshay's attorney, advised Glerum of the uninhabitable conditions

in Forshay's unit and informed him that he did not believe that Forshay would continue to pay his maintenance fees unless something was done to cure the flooding. Exhibit C-25.

A May 4, 1993 letter addressed to Glerum stated:

> I am in receipt of your correspondence with regard to this matter. Mr. Forshay will continue to pay his monthly fees, but I will seek payment into an escrow fund once the complaint is filed.
>
> [Exhibit C-16]

The references to the maintenance fees are illogical in light of respondent's claim, at the DEC hearing, that he did not advise Forshay to withhold the fees and that respondent was aware, as of April 23, 1993, that the association was planning to file a lien against Forshay's unit and institute foreclosure proceedings if Forshay failed to pay the association fees.

Finally, a July 1, 1993 draft stated:

> It has been almost several months since I forwarded you the Complaint in this matter. As you are aware, the problem is not resolved and becomes more serious each day . . . . If I do not receive a proposal from your office soon, I will have no alternative but to proceed with this matter.
>
> [Exhibit C-17]

Despite the fact that respondent was obviously rebuking Glerum for not reacting to the complaint, when respondent wrote this

letter he had not even finalized the complaint, which was never filed.

Respondent explained that, although he had typed the letters himself, he had not sent them. Glerum confirmed that he had never received any correspondence from respondent. In an attempt to explain the existence of these letters, respondent claimed that, on occasion, he prepares letters, but does not send them out until he has cleared them with his client. At the Board hearing, respondent claimed that he did not manufacture the letters to deceive anyone and had not even reviewed his file prior to forwarding it to the investigator. He, therefore, did not know that the letters were in the file.

* * *

Respondent admitted that he requested additional funds from Forshay to pursue the matter, but denied that he had requested an additional $10,000. He claimed that, while he did not keep contemporaneous records of the hours spent in the matter, the time was considerable. He explained that another attorney with whom he shared office space assisted him by conducting some research in the

matter. Respondent only prepared a bill in the matter after Forshay filed a grievance.

Respondent acknowledged that he should have kept accurate time records. He claimed in mitigation that, during that time period, both of his parents had developed cancer, were in and out of the hospital and passed away in January 1996. He was, therefore, frequently absent from the office.

Respondent claimed that he should have documented his file better and that he did not bill Forshay for all of the time spent on the file. He believed that he had not done anything wrong. Although he could have easily avoided a grievance against him by returning Forshay's retainer, respondent claimed, "I refused to do it because I honestly didn't think I did anything wrong. I still don't think I did anything wrong except the time records that I kept, the way I did those time records." T278.

* * *

The DEC found that, based on the record before it, respondent did not do much of anything to advance Forshay's litigation after September 9, 1993. The DEC found that, at least by the end of 1993

and certainly by early 1994, the attorney/client relationship between respondent and Forshay had completely deteriorated. By early 1994, Forshay had demanded the return of his retainer and file and retained new counsel.

The DEC acknowledged that Forshay made numerous attempts to communicate with respondent regarding the status of the litigation. The DEC was concerned with the quality and the timeliness of respondent's communications with Forshay. The DEC found that the record clearly demonstrated that respondent did not adequately communicate with Forshay about the status of the case. The DEC noted that Forshay had been left with the impression that the litigation had already been started when, in fact, no complaint had ever been filed.

The DEC also found no evidence in the record to establish that respondent had sent any status report to Forshay or even a bill for any services rendered. Accordingly, as the DEC pointed out, Forshay had no way of knowing how much of the retainer had been used or what services or activities respondent had performed as part of the representation.

As to respondent's failure to cooperate with the ethics investigation, the DEC found that respondent did not always reply to its requests for information in the time limits prescribed by

the rules. There was also one instance where respondent failed to include certain documents in his correspondence to the investigator. The DEC, however, did not make any findings with respect to this aspect of the complaint.

More serious was the DEC's finding that respondent created three letters, Exhibits C-16, C-17 and C-25, after the start of the ethics investigation, to give the impression that he had performed certain work on the file, when, in fact, that was untrue.

The DEC found that the foregoing letters gave the impression that, between April and July 1993, respondent was actively representing the interests of his client, had drafted a complaint and was ready to proceed with litigation. According to the DEC, that impression, was completely false. As noted earlier, respondent had not even finalized the complaint when he wrote the letters to Glerum. Respondent tried to explain this conduct by claiming that, since neither Glerum nor Forshay was shown the letters, no one could have relied on them. The DEC found, however, that the investigation process was impeded because the letters created the false impression of activity on respondent's part.

The DEC, therefore, found that, based on all of the facts relating to the matter and all reasonable inferences to be drawn therefrom, the three letters to Glerum had been created after the

ethics investigation had begun, with the intention of hindering the investigation.

The DEC pointed to the following factors leading to the above conclusion: (1) it was difficult to believe that respondent had three letters in his file, on his letterhead, in final form, that were never sent out; the presenter learned that the letters had not been sent out only after he contacted Glerum; (2) exhibit C-17, the letter dated July 1, 1993, indicated that "it has been almost several months since I forwarded you the complaint in this matter." The DEC found that this letter made no sense because respondent had not yet drafted a complaint and had certainly not sent it to Glerum. The DEC found, therefore, that it was illogical for respondent to chastise Glerum for not having replied to a non-existent complaint. The DEC also considered respondent's failure to give a credible explanation as to why the letter had been drafted. Respondent claimed that he believed that maybe he had drafted an earlier complaint; (3) respondent had typed all three of the letters on his own computer; (4) the three letters were on the same letterhead and the type face and layout were exactly the same on each one; (5) the letters were printed on letterhead that was distinctly different from the letterhead of other correspondence. Two other letters, Exhibit C-20, a letter to Easton dated March 3,

1993, and Exhibit C-7, a letter to Forshay dated September 14, 1993, were typed on paper containing a different form of letterhead. According to the DEC, respondent could not come up with a consistent explanation about this discrepancy; and (6) if respondent had prepared these letters in draft form, pending approval by Forshay, it would have made more sense to type them on plain paper, not on letterhead stationary.

The DEC found that the overwhelming weight of the evidence, largely uncontradicted and frequently admitted, established that respondent represented Forshay for over a year without starting litigation and without advising his client about the results of his legal analysis.

The DEC concluded that respondent's conduct did not amount to gross negligence because there was no evidence that any of his actions substantially or substantively prejudiced Forshay's claims. The DEC found, however, that respondent failed to act with reasonable diligence or promptness in representing Forshay; that he did not adequately communicate with Forshay; and that he failed to cooperate with the investigation by creating letters to mislead the DEC, all in violation of RPC 1.3, RPC 1.4 and RPC 8.1(b) [cited by the DEC as R. 1:20-3(g)(3) and (4)]. The DEC did not mention RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or

misrepresentation) or RPC 8.4(d)(conduct prejudicial to the administration of justice) as rules violated by respondent's creation of the letters to Glerum and misrepresentations to Forshay that the complaint had been filed.

Based on the foregoing, the DEC recommended the imposition of a reprimand.

* * *

Following 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 supported by clear and convincing evidence.

The DEC's findings of a violation of RPC 1.3 and RPC 1.4 are proper. However, because respondent ultimately supplied the investigator with the information sought, a finding of a violation of RPC 8.1(b) is unwarranted. The Board, however, found violations of RPC 8.4(c) and RPC 8.4(d) because of respondent's misrepresentations to his client about having filed a complaint in the matter and his creation of three letters to the condominium's attorney in an attempt to improperly portray to the DEC that he had performed certain services in the matter. The Board did not find plausible respondent's explanation of the existence of the letters.

Respondent claimed before the Board that he had no notice that the three letters were at issue. However, he himself presented the letters to the DEC investigator and the issue of the creation of the letters was fully litigated at the DEC hearing without objection by respondent. Accordingly, respondent had a full opportunity to defend himself. In re Logan, 70 N.J. 222 (1976); In re Miller, 135 N.J. 342 (1994); In re Frunzi, 131 N.J. 342 (1993).

Respondent's misconduct in this matter included lack of diligence, lack of communication, misrepresentations to Forshay and the fabrication of the three letters to mislead the DEC investigator. Short-term suspensions have been imposed in other matters involving serious misrepresentations. See, e.g., In re Kernan, 118 N.J. 361(1990)(three-month suspension for, among other things, failing to amend a false certification of his assets to conceal the transfer of ownership of property, in his own matrimonial action, thereby imperiling the ability of the court to determine the truth of the matter and reach a just result); and In re Johnson, 102 N.J. 504(1986)(three-month suspension where attorney made misrepresentations to the trial court about his associate's purported illness for the purpose of securing an adjournment of a trial).

Based on the foregoing, a six-member majority voted to impose a three-month suspension. Two members believed that a reprimand was sufficient discipline for respondent's conduct, finding insufficient evidence of an intent to deceive the DEC. One member did not participate.

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

Dated: 12/18/96

LEE M. HYMERLING
Chair
Disciplinary Review Board