SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-102

IN THE MATTER OF :
STEPHEN P. KERNAN, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 19, 1991

Decided: August 2, 1991

Theodore S. Ridgway appeared on behalf of the District I Ethics Committee.

John P. Morris appeared on behalf of respondent.

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

This matter is before the Board based upon a presentment filed by the District I Ethics Committee.

Respondent was admitted to the practice of law in New Jersey in 1981. On May 23, 1989, Charles Nelson, a Maryland resident, was involved in an accident in Pittsgrove, New Jersey, when his automobile collided with a truck. Following emergency room treatment, Nelson found, in the Yellow Pages, the name of the law firm with which respondent was associated. Nelson telephoned the firm and made an appointment to see respondent later that day. After discussing the case with respondent, Nelson retained him to: (1) defend him in municipal court, (2) prosecute the driver of the truck in municipal court and (3) represent him in a personal injury

action.[1] Nelson signed a contingent fee agreement for the personal injury matter, as well as lost wage forms and medical authorizations.[2]

A traffic summons issued against Nelson charging him with careless driving and listing a court date of June 14, 1989. A cross-complaint was also brought against the truck driver.[3] For unknown reasons, the June 14 date was adjourned and both cases were rescheduled for July 19, 1989. On July 17, 1989, Nelson telephoned respondent and asked him whether he should meet respondent in his office or in court on July 19. Respondent told Nelson that he would be seeking an adjournment and therefore, Nelson need not appear in court on that day. Sometime between July 17 and July 19, respondent telephoned the court clerk and attempted to obtain a postponement. The clerk refused to grant the postponement, however, he told respondent to submit his request to the judge. Respondent did not advise Nelson that the request for a postponement had been denied. Respondent also failed to advise Nelson that, if he did not appear, the judge might dismiss the case

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[1]During his testimony at the ethics hearing, respondent denied that he was retained to prosecute the truck driver on behalf of the municipality. However, after examining respondent's statements in the transcript of the municipal court proceeding (C1 in evidence), the hearing panel found that respondent was, in fact, retained to represent Nelson in all three matters.

[2]Nelson testified that it was his understanding that respondent's fee for the municipal court matters would also come from the personal injury recovery (T2/26/91 36).

[3]Nelson did not recall whether he, or a police officer, brought the complaint against the truck driver. However, exhibit C-3 in evidence lists a New Jersey State Trooper as the complainant.

against the truck driver.

On July 19, 1989, respondent appeared in court without Nelson. The truck driver also appeared. Respondent told the judge that he had sought the postponement because, due to a mix-up in his office, he had failed to obtain the police report.[4] When the judge realized Nelson was not in court, he dismissed the case against the truck driver and rescheduled Nelson's case for August 16, 1989, over respondent's objections and requests for a postponement. Respondent did not advise Nelson of the judge's determination. During the ethics hearing, the following exchange took place with regard to respondent's handling of this matter:

> Q. After your telephone conversation with the clerk of the court, did you notify Mr. Nelson that she had denied your request of a continuance?
>
> A. No, I did not.
>
> Q. After she denied your request for the continuance, did you understand that if the judge did not grant your continuance by virtue of the fact that Mr. Nelson was not in court, that his complaint would be dismissed?
>
> A. The one against [the truck driver].
>
> Q. Yes.
>
> A. I would have understood that, yes, but I didn't expect that to happen, sir.

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[4]During the ethics hearing, respondent testified that he had no excuse for not obtaining the police report prior to the July 19 hearing or prior to the August 16 hearing (T2/26/91 76-77).

Q. Why was it that you did not expect that to happen?

A. I would have expected the court to allow the matter to be continued since I had not asked for a continuance before.

Q. Did you notify [the truck driver] of the fact prior to the hearing that you would be making a request for the continuance?

MR. MORRIS: Excuse me, you said [the truck driver].

MR. RIDGWAY: I meant [the truck driver].

THE WITNESS: I did not, no.

BY MR. RIDGWAY:

Q. Has it been your experience when a party is present in court, often the court will not give the continuance to the other party?

A. I have seen that happen, yes.

Q. Would it not have been a good practice to notify Mr. Nelson of the practice, that the clerk had denied your request, and that you were rolling the dice in making the request on the date of the hearing?

A. In retrospect, sir, yes.
(T2/2/6/91 69-70).

Nelson subsequently telephoned the court and learned that the case against the truck driver had been dismissed and that the hearing on July 19 had been rescheduled. Shortly before the August 16 hearing, Nelson telephoned respondent. He testified at the ethics hearing that, by this time, he was unhappy with respondent's handling of his matters, in that respondent appeared to be taking

no action on the personal injury claim and the case against the truck driver had been dismissed. Respondent and Nelson arranged to meet on the morning of the hearing. At that meeting, Nelson informed respondent that he would be discharging respondent in the personal injury matter. Respondent then offered to represent Nelson in municipal court at no fee.

Respondent explained to Nelson that, although he would be in another court that afternoon, another associate from his law firm would represent him in court.[5] Nelson arrived at court at approximately 1:00 and saw respondent, who was then appearing on his own behalf in a traffic matter, and thereafter in a matrimonial matter at 1:30. The associate attorney failed to appear for the 2:00 session, which ended at 3:10. Approximately ten minutes later, a man fitting the associate's description appeared in the courthouse. Nelson did not speak to him. Nelson had no further contact with respondent and subsequently retained another attorney to represent him.[6]

During the ethics hearing, respondent admitted that he never entered his appearance in Nelson's case, never entered his client's not guilty plea and never requested discovery. Respondent also admitted doing no work on Nelson's personal injury case.

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[5]During the ethics hearing, the associate testified that he had no recollection of Nelson's matter. He was not certain if he had gone to court on August 16 or if he had arrived late.

[6]New counsel appeared on Nelson's behalf on September 20, 1989, at which time the truck driver failed to appear and the charge against Nelson was dismissed. This attorney is also representing Nelson in the personal injury matter. There was no testimony at the ethics hearing as to the status of this matter.

Respondent testified that he had only a brief conversation with the associate from his law firm on the Nelson matter prior to the July 19 hearing. He testified he never provided Nelson's file to the attorney because there was nothing in the file that would assist in Nelson's defense. He explained that he did not believe the attorney would have any difficulty with the case, given his view that the judge usually dismissed cross-complaints in such cases.[7] Moreover, respondent testified he did not expect the truck driver to appear (T2/26/91 79).

The committee found that respondent had violated RPC 1.1(a), RPC 1.2, RPC 1.3, RPC 1.4(a) and RPC 1.4(b), in that he: (1) failed to defend Nelson in municipal court; (2) allowed the case against the truck driver to be dismissed by failing to advise Nelson that he had to appear in court on July 19, 1989; and (3) admitted he did no work on Nelson's case.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of violations of RPC 1.1(a) and RPC 1.3 are supported by clear and convincing evidence. However, the Board disagrees with the committee's findings of violations of RPC 1.2 (scope of

[7]Respondent testified that, in his experience, the judge believed that accident cases should be resolved by insurance companies (T2/26/91 64).

representation) and RPC 1.4(a) (communicating with a client regarding the status of a matter) and (b) (communicating with a client to the extent necessary to permit the client to make informed decisions regarding the representation). These rules are not applicable to this matter. Rather, respondent's failure to advise his client of the hearing date, thereby causing the ultimate dismissal of the case, falls more properly into the conduct contemplated in RPC 1.1(a) (gross neglect).

When retained, respondent owed his client a duty to protect his interests diligently. See In re Smith, 101 N.J. 568, 571 (1986); In re Schwartz, 99 N.J. 510, 518 (1985); In re Goldstaub, 90 N.J. 1, 5 (1982). Clearly, respondent is guilty of gross neglect and lack of diligence in his handling of the Nelson matter and has therefore violated RPC 1.1(a) and RPC 1.3. The panel noted in its report that, at the time of the ethics hearing, the only documents in respondent's file (exhibit C-5 in evidence) were: (1)medical authorizations and a wage verification authorization signed by Nelson; (2) a signed, blank contingent fee agreement; (3) notes from respondent's initial meeting with Nelson; (4) the summons and two notices of hearing dates; (5) a letter to Nelson, dated July 20, 1989; (6) medical bills and a doctor's report sent by Nelson to respondent; and (7) a letter to respondent from an insurance company, to which he admittedly never replied. The only other items in the file related to the ethics complaint. When asked at the ethics hearing why he had neglected Nelson's matter, respondent was unable to offer any excuse for his conduct (T2/26/91

77, 81).

Misconduct of this nature might normally merit only the imposition of a private reprimand. In this case, however, respondent has a record of discipline, having received a three-month suspension as well as a private reprimand.[8] This prior discipline must be considered as a serious aggravating factor.

In other similar matters, prior discipline has upgraded minor misconduct to a public discipline level. In In re Stewart, 118 N.J. 423 (1990), the attorney was publicly reprimanded for gross neglect in an estate matter and for failing to keep his client informed about its status. The attorney had received a private reprimand ten years earlier for personally paying monies toward the settlement of an insurance claim and offering to do the same in a matrimonial matter. Similarly, in In re Rosenblatt, 114 N.J. 610 (1989), the attorney was retained to handle a personal injury matter that he grossly neglected for four years. During the four-year period, the attorney repeatedly ignored the client's requests for information. The attorney received a public reprimand after having been privately reprimanded seventeen years earlier for neglect in two matters.

In determining the weight to afford respondent's previous

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[8]Respondent was privately reprimanded on December 2, 1986 for representing the buyer and seller in a real estate transaction, thus engaging in a conflict of interest. On March 30, 1990, respondent was suspended for three months for violating RPC 3.3 and RPC 8.4. Specifically, respondent fraudulently transferred real estate to his mother the day before a post-divorce support hearing. Respondent was reinstated to the practice of law on September 25, 1990.

discipline, the Board notes that the three-month suspension had not yet been imposed at the time of his misconduct in this matter. Although the district committee had found misconduct in the earlier matter, the discipline had not yet been imposed and, arguably, respondent was not yet aware of the seriousness of his transgression. Accordingly, this was not necessarily a case where respondent failed to learn from his prior mistakes. In addition, respondent's misconduct in both prior disciplinary matters is not similar to the misconduct now before the Board.

At the Board hearing, respondent's counsel advised the Board that respondent was about to be released from an in-patient alcohol rehabilitation program and that counsel did not believe respondent was capable of practicing law. Medical reports submitted to the Board indicate that respondent has been diagnosed as suffering from bipolar affective disorder and alcoholism. Subsequent to the Board hearing, respondent confirmed to his counsel that he is not currently capable of practicing law. Accordingly, the Board, by letter dated June 25, 1991, recommended to the Supreme Court that respondent be immediately transferred to disability inactive status, until such time as he is able to prove his fitness to resume the practice of law. The Court ordered respondent's transfer to disability inactive status on June 27, 1991.

With regard to discipline in the case at bar, the Board has considered respondent's prior disciplinary history. The Board has also taken into account respondent's current psychological difficulties and the fact that he has voluntarily removed himself

from the practice of law. Accordingly, the Board recommends that respondent be publicly reprimanded. The Board further recommends that, once respondent is able to show that he is capable of returning to the practice of law and is returned to active status, pursuant to R. 1:20-9, respondent should be required to practice under the supervision of a proctor approved by the Office of Attorney Ethics, for an indefinite period of time. The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for appropriate administrative costs.

Dated: 5/2/1991

By: Raymond R. Trombadore
Chair
Disciplinary Review Board