SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-100

IN THE MATTER OF :
JAMES E. MOEN, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 19, 1991

Decided: August 2, 1991

Noel Schablik appeared on behalf of the District X Ethics Committee.

Erwin G. Goovaerts 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 X Ethics Committee.

Respondent was admitted to the practice of law in 1981. In August 1986,[1] James F. Mattei retained respondent to represent him in an eviction proceeding involving a tenant whose rent payments were in arrears and who had damaged rental property owned by Mattei. Respondent agreed to institute proceedings to evict the tenant and then to file suit for the arrearages and damages.

In late September 1986, Mattei telephoned respondent and requested information as to the status of the eviction

[1]Respondent testified that his initial contact with Mattei was no earlier than December 1986. However, the panel believed Mattei's testimony that the contact occurred in August 1986.

proceedings.[2] Respondent advised Mattei that papers were being drawn up and that it was not necessary for him to sign them. In or about the second week of October 1986, Mattei again telephoned respondent and was told that papers had been filed and that a court date was approximately one month away.[3] Approximately one month later, in early to mid-November, Mattei telephoned respondent, at which time respondent told him that, although no date had been set, the matter would probably be heard during the November term. Shortly before Thanksgiving 1986, Mattei again telephoned respondent. Respondent told Mattei that he had spoken with the judge, but that because no eviction proceedings would be undertaken during the holidays, the matter would be scheduled for the first week in January 1987. On or about December 24, Mattei telephoned respondent, at which time respondent indicated that he had sent Mattei a letter with information about the case. Respondent sent a letter, dated December 24, 1986, to Mattei, stating that there would be some delay in the court date due to changes in the assignment of judges.[4] The letter requested that Mattei telephone respondent on January 5, 1987 to discuss rescheduling the case. Mattei made several unsuccessful attempts to reach respondent. On

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[2]Mattei had some familiarity with the legal process and was aware that eviction proceedings are expedited.

[3]Mattei testified that he frequently had to telephone several times before actually reaching him.

[4]At the hearing before the ethics committee, respondent indicated that he did not recall drafting or signing the letter of December 24, 1986 (T4/5/89 99). Respondent retained two handwriting experts, both of whom determined that the signature on the letter was respondent's.

January 8, respondent telephoned Mattei leaving a message that eviction proceedings were scheduled for January 30, 1987. Shortly before that date, respondent telephoned Mattei and informed him that the judge who would be hearing the case had injured his back but that respondent would speak with the judge to determine what arrangements could be made to reschedule a hearing date. In early February 1987, Mattei telephoned respondent and was told that respondent had been unable to speak with the judge, but that the matter would be heard sometime that month. In late February, Mattei spoke with respondent and was told that the tenant had obtained counsel, a fact that would further delay the proceedings.

Mattei telephoned the court, in approximately late February 1987, to inquire about the status of the matter. He was unable to determine if a complaint had been filed; he did learn, however, that the judge had not been injured in the way that respondent had described. Mattei then telephoned the managing partner of respondent's law firm and, in Mattei's own words, "read off the riot act" (T4/5/89 39). According to Mattei, the managing partner indicated that he would speak to respondent and that Mattei would be hearing from the firm. The managing partner, in turn, testified before the committee that he had no recollection of this telephone call ever taking place (T4/5/89 167).

According to Mattei's testimony, he had several additional telephone conversations with respondent, in which he was advised that the matter was still being delayed.[5]

At one point, in May 1987, Mattei told respondent that he was considering filing a malpractice action against him. Mattei next received a letter from respondent, dated May 19, 1987, in which respondent detailed the work he had done on Mattei's matter. Respondent testified that, until that point in time, Mattei had never threatened him with a malpractice action (T4/5/89 118). Respondent testified further that he had learned that the tenant had vacated the property and that an eviction proceeding was, thus, unnecessary. Indeed, no eviction proceeding had ever been filed. Although Mattei knew this to be the case, in order to expedite settling the matter, he allowed respondent to continue to represent him in connection with the action for arrearages and damages to the rental property. Thereafter, the property was sold and respondent handled the closing on Mattei's behalf in November 1987. As of that time, Mattei believed that respondent would be pursuing the claim for the arrearages and damages to the property. As late as the date of the ethics hearing, Mattei had not received any payment on the claims. Respondent testified in this regard that, although he had discussed such an action with Mattei, he had never received instructions to proceed with it (T4/5/89 117).

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[5]Mattei testified that, between December and May, he sent approximately three letters to respondent, requesting information on the status of the matter. Mattei did not keep copies of these letters (T4/5/89 62-63, 80).

The panel found that respondent had violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b) and RPC 8.4.

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), RPC 1.3 and RPC 8.4 are supported by clear and convincing evidence. However, the Board disagrees with the committee's findings of violations of RPC 1.4(a) (communicating with a client regarding the status of a matter) and RPC 1.4(b) (communicating with a client to the extent necessary to permit the client to make informed decisions regarding the representation), which are not applicable to this matter. Respondent's misconduct regarding his communication with his client falls more properly within the conduct contemplated by RPC 1.1(a) and RPC 8.4(c).

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). Based upon the record developed below, it is clear respondent took no action on Mattei's behalf, but rather created an imaginary lawsuit, and embellished the case with creative details both to satisfy Mattei's inquiries and to avoid discovery of his failure to pursue the matter.

Of respondent's numerous violations in his handling of Mattei's matter, the most serious are his many misrepresentations to his client regarding the status of the case. In In re Kasdan, 115 N.J. 472 (1989), the Court addressed this issue, stating that "intentionally misrepresenting the status of lawsuits warrants public reprimand." Id. at 488. In addition to these violations of RPC 8.4(c), the record before the Board demonstrates clear and convincing evidence of gross neglect, in violation of RPC 1.1(a), and lack of reasonable diligence, contrary to RPC 1.3. These violations continued throughout the representation and even up to the ethics committee hearing, when the grievant apparently believed an action was pending.

In attempting to mitigate his conduct, respondent testified that, since his admission to the bar, he had worked at Honig and Honig under the supervision of the late Emanuel Honig, Esq. Respondent explained that, after Mr. Honig died, respondent was overworked and left without adequate supervision and support. The committee found that respondent's misconduct was due, in part, to his lack of experience and supervision, but that those circumstances could not excuse his deliberate misrepresentations to Mattei. While the lack of experience and supervision may serve to mitigate -- albeit not to condone -- respondent's inaction in the matter, it certainly does not excuse or mitigate in any way his misrepresentations to Mattei about the status of the matter. See

In re Barry, 90 N.J. 286 (1982).[6] A distinction must be drawn between an attorney's neglect due to a heavy caseload, and deliberate misrepresentations made to clients. As the hearing panel remarked "[l]ack of experience and pressure cannot and should not excuse what is clearly and convincingly deceitful" (Hearing Panel report at 7).

In determining the appropriate quantum of discipline, the Board has considered that respondent has no prior record of discipline and that he did acknowledge his responsibility for the delay in his client's matter (T4/5/89 103). However, the Board is concerned by respondent's serious misconduct in the form of a chain of misrepresentations made to a client. The Board is cognizant of the pressure placed on young associates, as well as the disorder that can erupt upon the death of a senior member of a law firm. Nevertheless, nothing can justify lying to a client. Respondent's numerous instances of misrepresentation to his client are particularly troubling and can not be tolerated. Accordingly, the

[6] In Barry, the attorney performed no work on numerous client files, while misrepresenting that the cases were in various stages of litigation. In addition, the attorney borrowed money from clients and offset legal services against his indebtedness to them. Further, the attorney gave money to a client to prevent the discovery of the mishandling of his affairs. The Court noted that, ordinarily, respondent's violations would call for the imposition of severe discipline. However, a three-month suspension was imposed due to substantial mitigating circumstances. When his misconduct surfaced, the attorney not only admitted the violations, but brought additional matters to the attention of the disciplinary authorities. The attorney also voluntarily withdrew from the practice of law and sought psychiatric help. In addition, the attorney was suffering from psychiatric difficulties at the time of his misconduct.

Board recommends that respondent be suspended from the practice of law for a period of three months. Two members dissented from this recommendation, one voting for a suspension of six months and one for a public reprimand.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 8/2/1991 By: ______________________

Raymond R. Trombadore
Chair
Disciplinary Review Board