

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 88-289

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IN THE MATTER OF :  
DONALD G. HOWARD :  
AN ATTORNEY-AT-LAW :

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Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: December 21, 1988

Decided: November 21, 1989

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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 IIIB Ethics Committee.

Respondent was admitted to the bar in 1968. In December 1982, Leslie Nirdlinger fractured his ankle during the course of his employment by Burlington County Asphalt/ Mount Holly Construction Company of Pennsauken. Also during December 1982, but shortly after his accident, Mr. Nirdlinger consulted respondent to assist him in collecting temporary disability payments and to pursue a

workers' compensation claim against his employer.<sup>1</sup> At the district ethics hearing, Mr. Nirdlinger testified that, at the time of his initial consultation with respondent, he signed medical authorizations to enable respondent to pursue the matter in Mr. Nirdlinger's behalf.

After his consultation with respondent, Mr. Nirdlinger made numerous telephone calls to respondent's office and a number of appointments to see him. Mr. Nirdlinger testified, however, that respondent never returned any of his phone calls. T12-4 to 8; T65-1 to 4.<sup>2</sup> Further, Mr. Nirdlinger testified that, whenever he visited respondent's office, the receptionist informed him that respondent was busy. Additionally, Mr. Nirdlinger told the panel that, on two occasions, respondent canceled appointments after Mr. Nirdlinger had arrived. T11-11 to 19. Mr. Nirdlinger also testified about another instance when respondent agreed to see him between 5:00 pm and 5:30 pm, but when Mr. Nirdlinger arrived, the office was closed. T11-20 to 24.

Although Mr. Nirdlinger acknowledged that he was generally poor at recalling specific dates, he did remember an occasion when he and his daughter went to see respondent at his office. Respondent was then unable to locate Mr. Nirdlinger's file and had

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<sup>1</sup> Respondent had previously represented Mr. Nirdlinger and his wife in other workers' compensation claims. Respondent also drafted personal wills for the Nirdlingers. However, the record is unclear as to whether this was before or after the instant matter.

<sup>2</sup> T refers to the transcript of the district ethics committee hearing on March 3, 1988.

lost the medical authorizations Mr. Nirdlinger had previously signed. Mr. Nirdlinger testified that, at one point, respondent left the conference room for approximately fifteen or twenty minutes. Upon his return, respondent asked Mr. Nirdlinger the date of his accident. Mr. Nirdlinger told the panel, "...I kind of felt like we were starting all over again because I remember a little bit about what he had asked me the first time." T53-23 to 25.

To the best of Mr. Nirdlinger's recollection, he met with respondent on four occasions: at the initial office conference; at the second conference, when he executed an additional set of medical authorizations; a third time approximately eight days before the statute of limitations expired, at which time respondent assured Mr. Nirdlinger "not to worry about it" and that "everything was filed" (T13-4 to 5); and a fourth time when Mr. Nirdlinger and his wife executed wills. Mr. Nirdlinger testified that, from the time of the initial consultation to the time of the expiration of the statute of limitations, he believed he telephoned respondent approximately fifty times. Furthermore, although Mr. Nirdlinger saw respondent shortly before the statute of limitations ran, and although respondent had advised him that the papers had been filed, no claim petition was ever filed in his behalf. As a result, his cause of action has been lost.

Respondent, in turn, testified that he felt he had responded to Mr. Nirdlinger's telephone calls and that he was often unable to reach Mr. Nirdlinger because of the nature of Mr. Nirdlinger's work. Respondent could not recall specific details about this

matter during the ethics hearing, but in his answer indicated that he had some recollection of Mr. Nirdlinger's having suffered a minor foot injury which he and the client discussed. Respondent testified that because of a change in the workers' compensation laws, Mr. Nirdlinger might not have a viable claim. Respondent stated, "I don't see anything in that particular case, as I hear today, that anything could have been done for [Mr. Nirdlinger]." T72- 6 to 8. He went on to say he might have been remiss in not notifying Mr. Nirdlinger that he did not want to accept representation of the case. T72-20 to 24. Finally, respondent was unable either to furnish the hearing panel with any written correspondence concerning this matter or to produce a file or any phone records that would evidence conversations with Mr. Nirdlinger.

The panel concluded that it was clear from the testimony submitted that respondent took no concrete steps to represent Mr. Nirdlinger's interest in the workers' compensation case. No file was opened, no letters of communication were sent, no calls were made, no medical reports were procured, and no medical authorizations were sent to Mr. Nirdlinger's treating physician. Respondent testified that, at some point, he concluded Mr. Nirdlinger's case was not worth handling. However, he failed to express this opinion to Mr. Nirdlinger, to advise him that the statute of limitations was about to run without resolution of the matter, or to recommend that Mr. Nirdlinger seek the advice of another attorney.

Furthermore, the panel found that respondent failed to cooperate with the district ethics committee investigation in this matter. Several letters and phone calls, as well as a number of appointments, were necessary to obtain any input from respondent. Once an appointment was scheduled, respondent was unable to produce a file. Although he was given an extension of time to produce information, respondent failed to contact the investigator to advise him that there was no additional information.

The panel determined that respondent's conduct was clearly unethical and that he violated (a) RPC 1.3, when he failed to represent Mr. Nirdlinger in a diligent manner; (b) RPC 1.4, when he failed to communicate with his client about the status of the matter; (c) RPC 3.2, when he failed to expedite litigation by not filing a petition in his client's behalf; and (d) RPC 8.1(b), when he failed to cooperate with the district ethics committee. Additionally, the panel concluded that respondent violated RPC 8.4(c), when he made intentional misrepresentations to Mr. Nirdlinger and, in so doing, prevented Mr. Nirdlinger from obtaining new counsel and from preserving his cause of action. The panel recommended a private reprimand for respondent's violation of RPC 1.3, RPC 1.4(a), and RPC 3.2, and public discipline for his violation of RPC 8.1(b) and RPC 8.4(c).<sup>3</sup>

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<sup>3</sup> The Rules of Professional Conduct replaced the Disciplinary Rules effective September 1984. Respondent's conduct occurred before and after that date. Hence, both the Disciplinary Rules and the Rules of Professional Conduct apply.

CONCLUSION AND RECOMMENDATION

Upon a review of the full record, the Board is satisfied that the conclusions of the ethics committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence. The Board, however, does not concur with the committee's specific findings as to the disciplinary rules violated. The Board also disagrees with the committee's recommendation for the imposition of bifurcated discipline.

From December 1982, when he initially consulted with Mr. Nirdlinger about a workers' compensation claim pertaining to his fractured ankle until the time the statute of limitations expired, respondent grossly neglected the matter. Despite respondent's determination, at some point, that Mr. Nirdlinger's case was not worth handling, he failed to so advise his client or to suggest that Mr. Nirdlinger obtain other counsel. Once retained, respondent owed his client a duty to pursue his interests diligently. See Matter of Smith, 101 N.J. 568, 571 (1986); Matter of Schwartz, 99 N.J. 510, 518 (1985); In re Goldstaub, 90 N.J. 1,5 (1982). The Board finds that respondent's conduct constituted gross neglect and lack of due diligence, violative of DR 6-101 (A)(1), DR 7-101(A)(1) and (2), and superseding RPC 1.1(a) and RPC 1.3.

Furthermore, respondent violated his obligation to expedite litigation by failing to file a petition in Mr. Nirdlinger's

behalf, in violation of DR 7-101(A)(1) and (2) and RPC 3.2. Not only did respondent fail to file a petition for Mr. Nirdlinger, but he misrepresented to Mr. Nirdlinger that all papers had been filed and that there was "nothing to worry about." Public confidence in the bar is diminished when an attorney represents to a client that the case is proceeding smoothly although the attorney knows that it is not. Clients should not continue to suffer the consequences of being told their case is under control, when it is not. In re Goldstein, 97 N.J. 545,549 (1984). Truthfulness and professionalism are paramount in an attorney's relationship with the client. The Board finds respondent's misrepresentations to Mr. Nirdlinger violative of both DR 1-102(A)(4) and superseding RPC 8.4(c).<sup>4</sup>

In addition to the misrepresentations, respondent persistently failed to communicate with Mr. Nirdlinger about this matter. Respondent's conduct in ignoring Mr. Nirdlinger's many phone calls was unethical and violative of both DR 7-101(A)(2) and superseding RPC 1.4(a). An attorney's failure to communicate with a client diminishes the confidence the public should have in members of the bar. In re Stein, 97 N.J. 550, 563 (1984).

The Board is particularly disturbed by respondent's lack of cooperation with the ethics committee. Respondent failed to return phone calls and to respond to correspondence from the

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The record is not entirely clear as to when the misrepresentations took place. It appears, however, that they occurred both before and after September 1984, the effective date of the Rules of Professional Conduct.

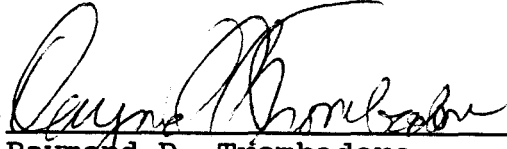
investigators. When a meeting was finally scheduled, respondent produced no file or other records pertinent to Mr. Nirdlinger's case. An attorney has an obligation to cooperate fully with ethics proceedings. Matter of Winberry, 101 N.J. 557, 566 (1986).

Given the clear and convincing evidence of unethical conduct, the appropriate quantum of discipline must be determined. The purpose of discipline, however, is not to punish the attorney but to protect the public from the attorney who does not meet the standards of responsibility of every member of the profession. Matter of Templeton, 99 N.J. 365, 374 (1985); In re Goldstaub, 90 N.J. 1,5 (1982). The quantum of discipline must comport with the seriousness of the misconduct in light of all relevant circumstances. In re Nigohosian, 88 N.J. 308, 315 (1982).

Respondent's conduct, when considered in its totality, constitutes disregard of ethical responsibilities not only to his client, but to the profession as well. Such conduct cannot be countenanced. Accordingly, a requisite majority of the Board recommends a public reprimand. One member dissented, believing that a private reprimand would be sufficient discipline. One member did not participate.

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

Dated: November 21, 1989

By:   
Raymond R. Trombadore  
Chair  
Disciplinary Review Board