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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-410

IN THE MATTER OF

H. MICHAEL ZUKOWSKI

AN ATTORNEY AT LAW

Decision

Argued: January 23, 1997

Decided: June 30, 1997

Karen L. Kuebler appeared on behalf of the District VI Ethics Committee.

Louis Serterides appeared on behalf of respondent.

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 VI Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1980 and most recently, maintained an office in Union City, New Jersey.

Respondent has no prior ethics history. However, respondent has a matter pending in New York in which he was temporarily suspended for non-cooperation with the ethics investigation of alleged misuse of client funds. The Office of Attorney Ethics ("OAE") filed a petition for respondent's temporary suspension based on the New York temporary suspension, but withdrew it as respondent is now cooperating with the New York disciplinary authorities.

At the Board hearing, respondent's court-appointed counsel expressed concern from his inability to reach respondent since about October 1996. In fact, counsel indicated that, in an attempt to locate respondent, he went to his office location at 3711 Kennedy Boulevard, Union City, only to find respondent's office no longer there. Counsel's repeated attempts to reach respondent by telephone also proved fruitless. Counsel voiced his fear that respondent may have abandoned his New Jersey practice entirely.

I. THE STRASSMEIR MATTERS - DISTRICT DOCKET NO. VI-91-15E

A. THE WORKER'S COMPENSATION CASE

The complaint charged respondent with violations of RPC 1.1 (gross neglect); RPC 1.3 (lack of diligence); and RPC 1.4(a) (failure to communicate).

In or about 1984 or 1985, Dieter Strassmeir ("Grievant") was terminated from his job at a tablecloth manufacturing company in Jersey City. Grievant claimed that he was psychologically injured as a result of the job loss.

Grievant testified at the DEC hearing. He is an elderly man, born abroad, who has difficulty with the English language. The language barrier was compounded by his apparent difficulty in focusing his attention on the proceedings. He was also cantankerous, if not belligerent, to the panel. This notwithstanding, the following facts could be culled from the record:

At lunch time one day in 1984 or 1985, grievant was approached by a superior at his job and summarily dismissed. He was told that the company was downsizing and that he was no longer needed. Grievant believed that the true reason for his dismissal was that, on the very same day, a car had been broken into on the premises and some items stolen from it. Grievant believed that he was a suspect, but admitted that he was never confronted as a suspect. After his termination, grievant complained of insomnia and emotional distress. He retained respondent to represent him in an action against the company.

Respondent testified that he recalled filing a civil action in or about 1985 (presumably against the company), but was asked by company counsel to dismiss it. No evidence was presented to substantiate this contention. In any event, in 1994, respondent filed a worker's compensation claim against the employer alleging that grievant had incurred "inhuman psychological trauma" as a result of his dismissal. That action was not filed until after the disciplinary authorities became involved in June 1994, about nine years after the original incident. The matter was active, but unresolved at the time of the DEC hearing.

Respondent referred grievant to a psychiatrist, who examined him at least twice. The record is unclear about when the examinations took place. Respondent asserted that the first

psychiatrist did not have a good rapport with grievant and that grievant was unwilling to continue under his care. Grievant saw a second psychiatrist on respondent's instruction, but, again, no dates were furnished for that care. The case was scheduled for a pre-trial hearing on September 24, 1996. As the DEC hearing took place in March 1996, the record is silent as to what transpired on that date.

B. THE GAS STATION INCIDENT

The complaint alleged violations of RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate).

In or about August 1984, grievant purchased gasoline from a station in North Bergen, New Jersey. According to grievant, he attempted to pay for the gasoline with a credit card. The attendant informed him that the credit card machine was broken and refused to return grievant's credit card. An argument or altercation ensued. Grievant left the scene and returned some time later that day, at which time the attendant returned the card and advised grievant that he had used another machine at a different location to debit the card for the earlier gasoline purchase.

Thereafter, grievant contacted respondent and informed him of the incident. According to respondent, grievant was in an excited state of mind and had stated that he had been physically assaulted by the gas station attendant, who had stolen his credit card. Grievant, in turn, denied having told respondent that the attendant had assaulted him, adding

that respondent had advised him to claim that he had been physically assaulted. Grievant maintained that the case was respondent's fabrication.

When grievant was questioned by respondent's attorney about the incident, the following exchange took place:

Question:	Did you tell Mr. Zukowski, 'Look, I was never hurt at the gas station'?
Answer:	He knows that. I explained it to him. I never said anybody hurt me. The stitches and everything else, he brought it in, and nobody but him.
Question:	Mr. Strassmeir, this is going to be much easier to allow me to complete the question before you start answering. Did you ever ask Mr. Zukowski to stop any action that he had filed on your behalf regarding an allegedly [sic] assault at a gas station?
Answer:	No.
Question:	Had Mr. Zukowski gotten you money then - -
Answer:	We would have been partners, because that's the way he put it to me.
Question:	Let me finish . . . Had Mr. Zukowski gotten you money on this obviously fraudulent claim?
Answer:	Which he made me put in.
Question:	Would you have prepared to share in the proceeds of that action?
Answer:	I don't know what you are talking about.
Question:	Well, let's say he got you $50,000 and he said, 'Here, here is your share'- -
Answer:	He probably couldn't get you two cents, that's how stupid he is. Now leave me alone. I don't want to answer no more.
Question:	Alright. Fine, no further questions.
Answer:	You're talking stupid now.

[T33-34][1]

[1]T refers to the transcript of the DEC hearing conducted on March 20, 1996.

For his own part, respondent testified that some foreign clients have difficulty understanding the concept of a contingent fee. According to respondent, he told grievant that they would be partners in the case, in the sense that grievant would receive two-thirds and respondent one-third of any proceeds. Respondent apparently used this method to explain matters to foreign clients who might not otherwise understand the contingency fee arrangement. There is no retainer agreement in the record.

With respect to grievant's contention that he fabricated the assault at the gas station, respondent stated:

> I remember, this was back about ten years ago, maybe eleven years ago, maybe even twelve years ago, about '84, somewhere in '84, I believe, Mr. Strassmeir called my home number at that time, that was 8 Burdette Place in Fairview and the phone number he called and he was in a real panic. He was screaming, 'They beat me up, they beat me up at the gas station. They took my credit card and they beat me up.'

Grievant, still present in the room, interrupted:

> You lying son of a bitch. I want to take a lie detector test. I want a lie detector test. I want a lie detector test. I want one. I'm entitled to one. That's an out and out lie. Let me wait -- I don't even want to hear it, please, the lying. Why are you lying about this.
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> [T76]

The record reflects that grievant then voluntarily left the room in a frenzy.

At some point, respondent obtained the names of the owners of the gas station from the records of the town hall. On July 25, 1985, respondent filed a complaint against the gas station and its owners. He encountered difficulty serving the complaint on the various

defendants due to changes in ownership and testified that he advised grievant of his inability to serve the defendants. He requested additional funds in order to continue his attempts to serve them. At that time, grievant told respondent not to pursue the case any further. Grievant agreed that he had requested respondent to drop the case. Respondent testified that, from that point on, he heard nothing more about the matter until the grievance was filed in 1991.

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II. THE LIBERMAN MATTER-DISTRICT DOCKET NO. VI-92-12E

The complaint charged respondent with violations of RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(a) (failure to communicate); and RPC 1.1(b) (pattern of neglect). The complaint also charged respondent with violations of R. 1:21-7 and RPC 1.5 for a non-compliant retainer agreement. However, no testimony was taken with regard to the retainer agreement, nor was the agreement reviewed by the DEC. Therefore, those charges were dismissed by the DEC.

Joel Liberman ("Grievant") was injured in a "hit and run" automobile accident on March 5, 1990. He retained respondent to represent him in a subsequent personal injury action. Respondent filed a complaint, which was dismissed on three occasions for lack of prosecution. The last dismissal occurred on October 20, 1995. The driver of the automobile that struck him from behind fled the scene and was not identified with any degree of certainty.

Grievant's vehicle was struck in the rear while stopped at a red light. It was then pushed into the vehicle in front of grievant's. According to grievant, the driver of the vehicle that struck him from behind asked grievant to pull over so that they could exchange information and inspect the damage to grievant's vehicle. As grievant pulled over, the rear vehicle driver fled. The front vehicle driver also fled before the police arrived. Although the front vehicle driver fled the scene, his name and address were stated on the police report. No insurance information was recovered at the scene and the police report describes the incident as a "hit and run" accident.

Grievant is an elderly gentleman who, admittedly, does not read and understand English very well. Grievant and Dieter Strassmeir, the grievant in the preceding matter, are very good friends. In fact, Strassmeir referred grievant to respondent.

Grievant testified that he gave respondent a copy of the police report generated after the accident. Respondent obtained a copy of grievant's insurance policy, timely filed a complaint on his behalf and referred grievant to a doctor, who treated him for soft tissue injuries. Apparently, grievant paid those bills out of his own pocket.

Respondent then conducted several "infosearches" to ascertain whether the defendant identified in the police report, Francisco Munoz, had any insurance coverage. Curiously, Munoz is identified in the police report as the owner of the rear vehicle. The searches proved fruitless. Respondent did not search the Division of Motor Vehicle records or put grievant's insurance carrier on notice of grievant's claim; hence the first of three dismissals.

When questioned about his failure to establish an uninsured motorist claim on behalf of grievant, respondent testified that he thought that Munoz was the right defendant.

Grievant stated that he called respondent several years after retaining him to inquire about the status of his case. He was informed that it would be concluded the following year. When it was not, grievant pressed for information from time to time. According to grievant, he was never adequately advised about the case.

According to respondent, he visited grievant numerous times at grievant's barber shop to apprise him of the status of the case. Furthermore, respondent testified that he utilized the services of a messenger in order to deliver correspondence to grievant. Respondent stated that, when things did not go well in the case, he filed another complaint on December 8, 1993 under a breach-of-contract theory. That complaint was also dismissed for lack of prosecution on July 22, 1994, despite the fact that, during the ethics investigation, respondent was alerted to the uninsured motorist issue by the ethics investigator. By the time the complaint was dismissed, the statute of limitations had already run. What is more, when questioned, respondent gave no reason for his inaction. Respondent filed a motion to restore the case, which motion had not yet been heard at the time of the DEC hearing.

Respondent acknowledged that his inaction resulted in grievant's inability to recover on his claims and expressed a willingness to make restitution to grievant. Respondent maintained that he approached the case in a proper manner and was both diligent and communicative. Respondent also claimed that he spoke enough German to communicate with

grievant and grievant's daughter on occasions when grievant was incapacitated for health reasons.

At the DEC hearing, grievant denied filing a grievance in this matter. Although he identified his signature on the grievance, he denied having written the body of the document (which was not included in the record). It is even unclear if grievant understood why he was testifying at the hearing (T69-70).

* * *

In the Strassmeir worker's compensation matter, the DEC found a violation of RPC 1.1(a) (gross neglect) as well as a pattern of neglect:

> The panel has carefully considered and reviewed the testimony and evidence and has concluded that respondent's conduct constituted ethical misconduct and that with respect to Dieter Strassmeir, instead of having filed a Worker's Compensation Petition, given the facts that respondent was aware of, he should have filed a wrongful discharge complaint. This failure, coupled with his failure to pursue an uninsured motorist claim in behalf of Joel Liberman, [a grievant in an unrelated matter] was violative of RPC 1.1, 'Competence' and this exhibited a pattern of neglect constituting gross negligence.
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> [Panel Report at 12]

The DEC dismissed the Strassmeir matter in connection with the gas station incident, due to grievant's assertion that the assault had been fabricated.

In the Liberman matter, the DEC found a violation of RPC 1.1 by combining respondent's failure to file an uninsured motorist claim with its findings in Strassmeir. It appears that the DEC found gross neglect and a pattern of neglect, in violation of RPC 1.1(a)

and RPC 1.1(b), respectively. The DEC also found a violation of RPC 1.3 (lack of diligence) for respondent's naming of the wrong parties in the hit-and-run case and a violation of RPC 1.4(a) (failure to communicate), for respondent's communication by messenger or by mail with a grievant who did not speak or read English very well and did not appear to understand the documents sent to him in the case.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct was clearly and convincingly supported by the evidence.

With regard to the Strassmeir worker's compensation matter, the Board, unlike the DEC, found that respondent's misconduct did not rise to the level of gross neglect. Filing the wrong type of action on grievant's behalf does not necessarily equal gross neglect. After all, respondent filed a worker's compensation action, which is still pending. For that reason, the Board dismissed the charge of a violation of RPC 1.1(a) (gross neglect).

The Board did, however, find a violation of RPC 1.3 (lack of diligence) for respondent's failure to diligently prosecute the worker's compensation claim. In his May 31, 1994 letter to the DEC, respondent stated as follows:

> I believe that I had filed an action a long time ago in the superior court in 1986 or 1987 in the matter. There was an issue whatever [sic] Mr. Strassmeir was an independent contractor or an employee. He was originally not very clear as to whatever [sic] that he was working for another company, or a company other than the company for which he was performing. . . . I believe that the company's lawyer contacted me and asked me to withdraw the civil action. I told Mr. Strassmeir I could

> file a worker's compensation petition. . . . I recently prepared a[sic] Employee's Claim petition for Mr. Strassmeir's signature. I sent the petition to Mr. Strassmeir on June 14, 1994 for his signature and proper notarization.[2]

Respondent took no action on grievant's behalf for nine years – until 1994. Respondent did not assert in his answer that he filed a claim for benefits on behalf of grievant prior to 1994 or introduce evidence to overcome the charges. In fact, respondent did not offer testimony on this issue. Neither did the DEC explore it at the ethics hearing below.

With respect to the alleged violation of RPC 1.4(a) (failure to communicate), grievant maintained that respondent did not keep him apprised of the status of his case and that respondent never showed him any papers dealing with the case. On the other hand, respondent contended that he always kept grievant informed, even though he was a very difficult client at times. However, in support of this contention respondent submitted no documentation, other than the June 14, 1994 cover letter and claim petition. That letter with claim form was drafted nine years after the incident and appears to be the only documentation in the case from 1985 onward. Based on this record, the Board found a lack of communication with the client, in violation of RPC 1.4(a).

Like the DEC, the Board dismissed the charges related to the gas station incident. There was no way to tell where the truth lies in that matter. Grievant and respondent pointed

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[2]It is unclear how respondent could have sent the petition to Mr. Strassmeir on June 14, 1994 when the reference to having sent it is contained in his May 31, 1994 letter to the DEC. A review of the employee's claim petition indicates that it was prepared for a June 1994 signature of Strassmeir and was sent under a cover letter dated June 14, 1994. The document submitted to the DEC, however, was not signed or dated by Strassmeir.

the finger of fabrication at each other with equal force. Their testimony was in near-equipoise. The fact that grievant wished respondent to drop the case suggests that he may have embellished the facts or created the assault. In view of the lack of clear and convincing evidence, the Board determined to dismiss the matter in its entirety.

With regard to the Liberman matter, as previously noted, the DEC found gross neglect and a pattern of neglect, in violation of RPC 1.1(a) and RPC 1.1(b). The Board concurred with the finding of gross neglect, albeit not for the reasons stated by the DEC. Respondent was guilty of gross neglect because the case was dismissed three times over a four-year period and because he failed to correct the deficiencies brought to his attention by the DEC investigator before the statute of limitations ran. Undeniably, respondent's conduct was improper in this context. As a result, grievant forever lost his uninsured motorist claim. The Board dismissed the charge of a violation of RPC 1.1(b) (pattern of neglect), however, as inapplicable to this situation.

There was also ample evidence to support the finding of a violation of RPC 1.3 (lack of diligence), in that respondent allowed the case to be dismissed three times over a four-year period. Although respondent cited problems with service upon the defendants, he did not seek alternative approaches to the case; it languished instead. Diligence required more effort than simply filing motions to restore upon each dismissal.

With regard to the alleged violation of RPC 1.4(a) (failure to communicate), respondent asserted that he kept grievant informed at all times about the case, while grievant contended that he was not adequately informed about the case. Without more concrete

recollections than those offered by grievant, the Board was unable to find support for a violation of RPC 1.4(a). Contrary to the conclusions drawn by the DEC, the use of a messenger and the mail, instead of other means of communication with grievant, does not constitute failure to communicate. Although it appears that there was a failure on grievant's part to understand respondent, the true reasons for that failure were not explored by the DEC. In fact, it is unclear if grievant even knew the purpose of his testimony before the DEC. On this issue, grievant's testimony was not credible. Accordingly, the Board dismissed the charge of a violation of RPC 1.4(a).

Respondent's conduct closely resembled that found in three recent cases that resulted in the imposition of a reprimand. See In re Gordon, 139 N.J. 606 (1995) (where the attorney showed a lack of diligence and failure to communicate in two matters, with gross neglect and failure to return a file in one of the two matters. The attorney had received a prior public reprimand); In re Carmichael, 139 N.J. 390 (1995) (where the attorney showed a lack of diligence and failure to communicate in two matters. The attorney had received a prior private reprimand.); and In re Wildstein, 138 N.J. 48 (1994) (where the attorney failed to communicate in three matters, showed a lack of diligence in two of the three matters and gross neglect in two of the three matters).

Respondent showed a lack of diligence in both Strassmeir and Liberman, failed to communicate in Strassmeir and grossly neglected Liberman. In light of the foregoing, the Board unanimously determined to impose a reprimand for respondent's misconduct.

With regard to respondent's apparent disappearance from his practice in New Jersey, the Office of Attorney Ethics has been notified, in order to take whatever action it deems appropriate.

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

Dated: 6/30/97

LEE M. HYMERLING
Chair
Disciplinary Review Board