SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 96-177 and
DRB 96-215

IN THE MATTER OF	:
ALLEN C. MARRA,	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 17, 1996

Decided: October 15, 1996

Alan Wovsaniker 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.

These matters were before the Board based on two recommendations for discipline filed by the District VC Ethics Committee (DEC), arising out of allegations of misconduct in three matters.

One of the three, the Faretra matter, Docket No. VC-92-018E, was dismissed at the DEC hearing. The grievant did not wish to pursue the matter and would not communicate with the presenter.

Respondent failed to file an answer to the complaint in the Villard matter. The allegations in the complaint were, therefore, deemed admitted and default was entered against respondent. Although respondent's secretary was allowed to testify regarding

mitigating circumstances as to respondent's failure to file an answer, the DEC reserved decision as to whether the testimony would be considered, in light of the default. After hearing the testimony, the DEC found no reason to withhold entry of the default.

In the third matter, Nisivoccia, while the DEC had no record of respondent's answer, respondent stated at hearing that he had, in fact, filed an answer. The matter was, therefore, adjourned and treated as contested.

* * *

Respondent was admitted to the New Jersey bar in 1967. He is a sole practitioner in Montclair, Essex County.

Respondent was privately reprimanded, by letter dated June 19, 1992, for lack of diligence and failure to communicate with his client. On December 7, 1993, he was publicly reprimanded for failing to communicate with a client, having an office employee notarize false signatures, failing to deposit settlement proceeds into his trust account and failing to cooperate with the DEC. In re Marra, 134 N.J. 521 (1993).

The facts in these matters are as follows:

The Villard Matter (District Docket No. VC-92-38E)

As noted above, this matter proceeded on a default basis and the allegations of the complaint were deemed admitted. Although the DEC also considered the facts set forth in the investigative

report as true, the report is not incorporated in the complaint. Accordingly, the Board relied only on the facts alleged in the complaint.

On an undisclosed date, Jeanette Villard retained respondent in connection with a January 1988 automobile accident. Villard had sustained injuries in the accident and had been treated by two doctors. Her insurance carrier paid her chiropractor's bills, but not those of her family physician or bills for x-rays. Villard sought respondent's assistance in requiring the insurance carrier to pay the bills.

Villard's personal injury claim was settled. (Respondent's involvement with the settlement is not clear). At the time of the settlement and before signing releases, Villard asked respondent about the status of the unpaid medical bills. Respondent assured her that the insurance carrier would pay them. Subsequently, Villard learned that the medical bills had not been paid. She received demand letters and threats of litigation. Villard then attempted to contact respondent to find out what he had done to procure payment and to ascertain what else could be done. For a period of several months, respondent did not reply to Villard's calls and letters.

Ultimately, Villard consulted with another attorney, who advised her that respondent should have sought an arbitration on the unpaid bills. Although Villard contacted respondent to demand that he do so, he did not file for arbitration.

The complaint charged respondent with a violation of RPC 1.1(a) (gross neglect), RPC 1.2(a) (failure to abide by the client's directions), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) and R.1:20-3(f) [now R.1:20-3(g)] (failure to cooperate with the DEC). The complaint was amended to include an allegation of violation of RPC 8.1(b) (failure to cooperate with the DEC).

The DEC determined that the facts alleged in the complaint constituted violations of RPC 1.1(a), RPC 1.2(a), RPC 1.3 and RPC 1.4(a).

* * *

Respondent failed to file an answer in this matter. During the first DEC hearing, on December 21, 1995, respondent presented a letter to the investigator, dated May 7, 1993, written in reply to the grievance.[1] According to the hearing panel report, respondent asserted that he had "answered" the complaint by that letter. A review of the transcript, however, reveals otherwise. See 2T9.[2] Respondent's May 7, 1993 letter is relevant, however, with regard to the issue of his cooperation with the DEC. The DEC noted that respondent's letter was dated almost ten months after

[1] At that time, the presenter in this matter was Richard Wilkinson, Esq., to whom the letter is addressed. He was succeeded by and transferred his file to Alan Wovsaniker, Esq. The panel chair stated that respondent's May 7, 1993 letter was not in the DEC's file. Although this raised questions of whether the letter had been sent, the DEC assumed that the letter had been sent and received.

[2] 1T refers to the transcript of the proceeding before the DEC on December 21, 1995 beginning at 10:45 A.M. 2T refers to the transcript of the proceeding before the DEC on December 21, 1995 beginning at 11:20 A.M. 3T refers to the proceeding before the DEC on December 21, 1995 beginning at 11:45 A.M. 4T refers to the transcript of the proceeding before the DEC on February 5, 1996.

the investigator's July 14, 1992 request for a reply to the grievance, almost eight months after a September 10, 1992 second request for a reply and almost seven months after respondent's October 13, 1992 written representation to the investigator that he would reply within one week.

As noted above, after entering the default, the DEC agreed to hear testimony from respondent's secretary, Linda Nosiay, about respondent's failure to answer the complaint. The testimony covered only mitigating circumstances on the charge of non-cooperation with the DEC.

With regard to both the November 2, 1994 complaint and the follow-up letter, dated October 18, 1995, Nosiay did not associate the name "Villard" with respondent's client MacEachern (Villard's maiden name) or with the appropriate file. She testified that she did not bring the complaint to respondent's attention, and placed the follow-up letter on the wrong file (McGraw) and left it for respondent's review. (Respondent had allegedly connected Villard to a name beginning with "Mc").

The DEC did not find Nosiay's testimony credible for a number of reasons, including her obvious bias in favor of respondent, her unconvincing demeanor, poor recollection of the facts, inconsistent statements and lack of responsiveness in her testimony. In addition, the DEC noted various factors that belied Nosiay's claims of "lost" DEC correspondence and confusion as to the subject of the grievance. The DEC concluded that Nosiay volunteered to act as the scapegoat for respondent's failure to respond to the DEC.

The DEC found that respondent had violated RPC 8.1(b) and R.1:20-3(f) [now R.1:20-3(g)].

The Nisivoccia Matter (District Docket No. VC-94-009E)

The DEC was originally prepared to proceed with this matter on a default basis. During the first hearing in December 1995, respondent contended that he had filed an answer on or about January 17, 1995. Although neither the presenter nor the DEC had received a copy of the answer, the DEC treated the matter as contested and proceeded on that basis.[3]

Certain facts about respondent's representation of the grievant, Karen Nisivoccia, were uncontested. They are as follows:

On August 13, 1989, Nisivoccia was involved in an automobile accident with a vehicle driven by a New Jersey State trooper. She retained respondent in connection with that matter in February 1991, following receipt of the file from her previous attorney. When settlement negotiations proved unfruitful, respondent filed a complaint on August 6, 1991, one week before the statute of limitations would run. He thereafter continued the settlement negotiations with the defendants.

Respondent failed to serve the complaint on defendants within the ten-day period required by R.4:4-1. In fact, respondent waited approximately six months to serve the complaint. The statute of

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[3] By letter dated October 18, 1995, the DEC reminded respondent of his obligation to file an answer. The DEC noted that, although respondent filed his answer prior to that letter, he did not contact the DEC upon receipt of the letter. Respondent originally testified that he had not seen the October 18, 1995 letter. 3T6. He later testified that he did not specifically recall that particular letter. 4T230.

limitations expired after the ten-day period and before respondent issued process. Thereafter, the defendants moved to dismiss the complaint for failure to timely issue service of process. The trial court denied that motion on or about June 30, 1992. The defendants then moved for reconsideration. That motion was granted and the matter was dismissed by order dated August 31, 1992. On October 5, 1992, respondent filed a notice of appeal from the order of dismissal. By order dated September 23, 1993, the Appellate Division affirmed the trial court's dismissal of the complaint.

In July 1993, Nisivoccia retained another attorney, Ernest N. Giannone, Esq. Respondent did not turn over the file to Giannone until December 1993. In the interim, in October 1993, Nisivoccia filed a grievance with the DEC.

There is no dispute that respondent successfully obtained payment for Nisivoccia's property damage and lost wages. There is also no dispute that respondent communicated settlement offers to Nisivoccia, which were rejected.

* * *

Nosiay and respondent testified that after Nisivoccia's complaint had been filed, they realized that a claim for property damage was missing, and service was therefore withheld. According to respondent, he filed an amended complaint, which also was not served. Nosiay testified that service of the complaint had been her responsibility. She explained that she was ill at the time (she had been diagnosed with cancer in May 1991) and that the matter had "slipped through the cracks." Respondent testified

that, in February or March 1992, he received notice from the court that the matter would be dismissed for lack of prosecution. It was then that he examined his file and learned that the complaint had never been served.

While the basic facts of respondent's representation are uncontested, the parties disagree as to the extent of information exchanged during that representation. Nisivoccia had been referred to respondent by her father, Rocco L. Nisivoccia ("The Father"). The father was a past and present client of respondent. As the father was authorized by Nisivoccia to communicate with respondent and his office about her case, he called Nosiay and respondent from time to time to ascertain the status of the matter. Nisivoccia, too, communicated regularly with respondent's office, speaking with either respondent or Nosiay. Both Nisivoccia and the father were led to believe that the case was proceeding apace long after the dismissal.

Both Nisivoccia and the father testified that, during a meeting in January or February 1993, respondent did not tell them that the case had been dismissed or that there had been a problem with the case. Nor did Nosiay or respondent advise of the dismissal during subsequent repeated calls by Nisivoccia and the father, who continued to believe that the case was pending.

On July 29, 1993, Nisivoccia and the father retained Ernest N. Giannone, Esq. By letter of that date (mailed on August 4, 1993), Giannone informed respondent that he had been hired and forwarded to respondent Nisivoccia's authorization to release the file. A

second request was made on September 29, 1993. Again, respondent failed to return the file. Despite telephone requests by Nisivoccia and an in-person visit by the father, the file was not released until December 14, 1993, some four months after the first request.

In an attempt to explain the delay in turning over the file, respondent referred to his two-week vacation in the latter part of August 1993, followed by the beginning of a trial. He also claimed that he still expected to resolve the matter with Nisivoccia. Respondent claimed that he had spoken with Nisivoccia in October 1993, informed her of the determination of the Appellate Division, and discussed whether he should turn over the file to her. Until approximately early November 1993, respondent believed that he was to continue to try to settle the case. At that time, he alleged that Nosiay had received a call from Nisivoccia, during which Nisivoccia advised that respondent was to take no further action in her behalf. Nosiay testified that the conversation ensued after she told Nisivoccia that they had lost the appeal.

Supporting respondent's contentions in this regard is Exhibit R-6, an unsigned notice of appeal from the decision of the Appellate Division, dated November 8, 1993, apparently to the Supreme Court. The document bears a note at the top from LN (Linda Nosiay), stating, "As per Karen - Don't do anything further on file, Don't file anything re: her case." Indeed, thereafter, respondent took no further action in Nisivoccia's behalf.

Giannone offered testimony about respondent's October 1993 conversation with Nisivoccia. Giannone's file contained a memo from Charles Curreri, Esq., of Giannone's office, stating that Nisivoccia had spoken to respondent on October 13, 1993. According to the memo, respondent had told Nisivoccia that her case had been dismissed, but that the reason for the dismissal was complicated. Respondent told Nisivoccia to have Giannone call him. Because Giannone was in court that day, Curreri returned the call. It is unclear if Curreri left a message for respondent or spoke with him. In either event, respondent was to call Curreri back and did not. (In her grievance, Nisivoccia stated that respondent told her that the case "may have been dismissed.").

On an undisclosed date, Giannone learned from an article in the New Jersey Law Journal that Nisivoccia's case had been dismissed. He informed Nisivoccia's father of this fact. The father confirmed that he had learned of the dismissal from Giannone. Nisivoccia testified that it was not until Giannone had the file that she learned, for the first time, that the case had been dismissed.

* * *

While the testimony of respondent and Nosiay on the communication issue differed dramatically from Nisivoccia's and her father's, it is clear that, even by respondent's version, Nisivoccia was not directly advised by respondent of the dismissal until the early 1993 meeting, approximately five months after the case was dismissed.

While respondent testified that he told the father in November or December 1992 that Nisivoccia's case had been dismissed, that he was pursuing an appeal, and that the father instructed him to proceed and preferably not talk to Nisivoccia about the case because she was going through a "bad period of time" Nisivoccia's father vehemently denied having this conversation with respondent.

* * *

The DEC found that Nosiay lacked credibility, believing that she "had volunteered to fall on the sword" for respondent. The DEC determined that she did not tell Nisivoccia that the case had been dismissed and that what she told her "was, at best, vague and evasive and, at worst, affirmatively misleading and suppression of the truth."

The DEC was similarly unconvinced by respondent's testimony. With regard to respondent's November or December 1992 conversation with Nisivoccia's father, the DEC noted that, even if this conversation with the father did take place, it was over three months after the trial court had dismissed the complaint on August 31, 1992. The DEC added that, if respondent had intended to tell Nisivoccia about the dismissal, he would have done so without this substantial delay. Similarly, with regard to respondent's contention that he told Nisivoccia in early 1993 about the dismissal, the DEC noted that respondent's contention made no sense, in light of respondent's testimony that he had withheld that information from Nisivoccia in November or December 1992, at the father's urging.

The complaint charged respondent with a violation of RPC 1.1(a), RPC 1.4(a), RPC 4.1 (truthfulness in statements to others), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 1.1(b) (pattern of neglect), based on his misconduct in the within two matters combined with his prior public reprimand. The complaint was amended by way of the DEC's October 18, 1995 letter to include a violation of RPC 8.1(b) (failure to cooperate with the DEC). That charge was later withdrawn, based on respondent's claim that an answer was filed in January 1995.

The DEC determined that respondent had violated RPC 1.4(a) and RPC 8.4(c). As to RPC 8.4(c), the DEC reasoned in part that Nosiay's acts were "vicariously attributable" to respondent. The DEC also found respondent guilty of a pattern of neglect, based on the within two matters, his prior public reprimand and his failure to cooperate with the ethics authorities. The DEC did not consider respondent's prior private reprimand as a part of his pattern of neglect because it was not referenced in the complaint.

With regard to RPC 4.1(a)(1) (truthfulness in statements to others), the DEC stated that, if Nisivoccia's father, as her agent, was synonymous with the client, then the rule was not applicable. The DEC reasoned that, if it did apply, "even if [respondent's] statements were evasive, incomplete, and less than a full disclosure of the material facts," there was no violation of RPC 4.1(a)(1) based on the DEC's view that the rule applied to "affirmative falsehoods, and not mere omissions." Similarly, the

DEC did not find a violation of RPC 1.1(a), concluding that the failure to accomplish service of the complaint was negligent, but not grossly negligent or reckless.

* * *

In sum, in Villard, the DEC found that respondent had violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 8.1(b) and R.1:20-3(f) [now R.1:20-3(g)]. In Nisivoccia, the DEC found that respondent had violated RPC 1.4(a), RPC 8.4(c) and RPC 1.1(b). The DEC did not initially make a recommendation as to discipline. Subsequently, by letter dated April 1, 1996, the DEC recommended a public reprimand in Villard and a three-month suspension in Nisivoccia, to be followed by a nine-month proctorship.

* * *

Upon 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 fully supported by clear and convincing evidence.

In Nisivoccia, it is likely respondent made a mistake in not timely serving the complaint and then decided not to tell his client about the dismissal of the complaint, believing that he could straighten things out. The fact that he never told Nisivoccia of any of the proceedings until early 1993, supports the conclusion that he never intended to let her know. Regardless, however, of respondent's belief as to his ability to reinstate the complaint, he had a duty to keep his client informed of the status of the matter. Whether he affirmatively misrepresented the status

of the case or simply said nothing, he violated RPC 1.4(a) and RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336 (1984).

There is insufficient evidence in the record, however, to find that respondent instructed Nosiay to mislead Nisivoccia and the father about the status of the case. From all indications, it appears that Nosiay was, as she termed herself, respondent's "right arm" and took it upon herself to cover his and/or her error. That is not to say, however, that respondent should not bear responsibility for Nosiay's behavior. Although the Board does not make a finding of failure to supervise an employee, a violation of RPC 5.3, it finds that respondent should have taken a more active role in communicating with his clients, even if he thought that Nosiay was keeping them adequately informed.

The Board also agrees that there is insufficient reason to find respondent guilty of gross neglect in this matter. Failure to serve a complaint is more akin to a claim for malpractice than an ethics violation based on gross neglect. Likewise, the Board concurs with the DEC's determination that respondent did not violate RPC 4.1(a), not because his omissions were insufficient to violate the rule, but because the father stood in the same position as the client. The rule, therefore, does not apply to the circumstances of this case.

One other issue warrants mention in Nisivoccia. The Board recognized that respondent continued to represent Nisivoccia before

the Appellate Division even after informed of Giannone's retention as new counsel. The DEC did not explore whether respondent was guilty of a violation of any rules, specifically RPC 1.16(d). It appears from Nisivoccia's November or December 1993 call to respondent, when she directed that he was to take no further action in her behalf, that she knew that respondent was still pursuing the matter, despite Giannone's letters. It is possible, in the light most favorable to respondent, that Nisivoccia was not clear enough in her instructions to respondent. Thus, the Board makes no finding in this regard.

In Villard, it is unquestionable that respondent's conduct was unethical. He was guilty of gross neglect, failure to abide by his client's decisions, lack of diligence and failure to communicate with the client, in violation of RPC 1.1(a), RPC 1.2(a), RPC 1.3 and RPC 1.4(a).

With regard to respondent's failure to cooperate with the DEC, the Board concurs with the conclusion of the DEC that Nosiay's testimony was not worthy of belief. Although it is possible that one document could have been misplaced, a number of letters were forwarded by the DEC, some by both regular and certified mail. All of the correspondence could not have been misplaced, misfiled or lost. Furthermore, assuming that respondent's May 7, 1993 letter in Villard was actually sent to the DEC, would respondent not have wondered why he had heard nothing further on the matter? Of note is the fact that, in his prior disciplinary proceeding, respondent filed his answer to the complaint on the eve of the hearing. Under

these circumstances, a finding of failure to cooperate with the DEC is appropriate and the Board so finds.

Were this the sum total of respondent's misconduct, then a reprimand might suffice. Respondent, however, is not a newcomer to the disciplinary system. As noted above, he has received both a private reprimand and a public reprimand. Respondent's private reprimand for lack of diligence and failure to communicate was issued on June 19, 1992, in the middle of his representation of Nisivoccia. He was, thus, on notice of the questionable nature of his conduct for the other half of Nisivoccia's representation. (The formal ethics complaint had been filed in September 1990). Similarly, respondent was publicly reprimanded in December 1993, the same time that he turned over his file to Giannone and ended his involvement in the matter. Although respondent had not been publicly reprimanded during the course of his representation of Nisivoccia, the Board's recommendation had already been issued in May 1993 and the formal complaint had been filed in June 1991. At a minimum, respondent was on notice that his behavior was questionable. (The complaint in Villard did not supply information as to the dates of respondent's representation. Thus, no conclusions can be drawn in this regard). It is obvious that respondent did not learn from his previous mistakes.

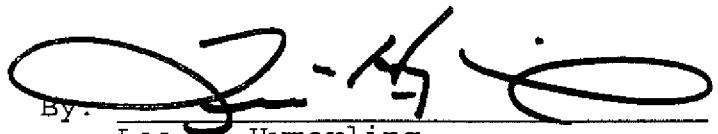
In light of the foregoing, a six-member majority of the Board determined to impose a three-month suspension. See In re Bernstein, 144 N.J. 369 (1996) (three-month suspension imposed for gross neglect, lack of diligence, failure to communicate,

misrepresentation and failure to cooperate with ethics authorities) and In re Weinstein, 144 N.J. 367 (1996) (three-month suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate and misrepresentation).

Two members dissented from the majority's determination, believing that respondent should be reprimanded, practice under the supervision of a proctor for a period of two years and perform 250 hours of community service. One member did not participate.

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

Dated: 10/15/96

By: 

Lee M. Hymerling
Chair
Disciplinary Review Board