Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-309

IN THE MATTER OF

LOUIS N. CAGGIANO, JR.

AN ATTORNEY AT LAW

Decision

Argued: November 18, 1999

Decided: March 7, 2000

James G. Gavin appeared on behalf of the District IIIB Ethics Committee.

Respondent appeared pro se.

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

This matter was before us based on a recommendation for discipline filed by the District IIIB Ethics Committee ("DEC"). The first of two complaints (District Docket No. I-99-012E) charged respondent with violations of RPC 1.3 (lack of diligence) (count one); RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information) and RPC 1.4(b) (failure to

explain matter to extent reasonably necessary to permit client to make informed decision regarding the representation) (count two); and RPC 1.1(a) (gross neglect) (count three). The second complaint (District Docket Nos. IIIB-97-023E and 98-06E) charged respondent with violations of RPC 1.4(a) and (b) and RPC 1.1(b) (pattern of neglect) (count one); and RPC 1.3 (lack of diligence) and RPC 1.1(b) (count two).

Respondent was admitted to the New Jersey bar in 1981. He currently maintains an office in Mount Laurel, New Jersey. Respondent has no history of discipline.

District Docket No. I-99-012E
The Foell Matter

The first matter, District Docket No. I-90-12E, was initially the subject of an agreement in lieu of discipline (diversion). The agreement stated that respondent's conduct "could be considered" a violation of RPC 1.3, due to his failure to pursue with reasonable diligence and promptness the grievant's personal injury and property damage claim. The agreement further stated that respondent's conduct "could be considered" a violation of RPC 1.4, because he failed to keep the grievant reasonably informed about the status of her matter. When respondent failed to comply with the conditions set forth in the agreement, ethics proceedings were reinstated against respondent.

From the DEC hearing the following facts were gleaned:

In June 1992 Carol A. Foell was hit by a car while driving a motorcycle. That week she retained an attorney to represent her in connection with a lawsuit. Before the complaint

was served, the attorney died in October 1992. A week or two later respondent contacted Foell to inform her that he was taking over the attorney's cases and to inquire whether she wanted him to represent her in the personal injury matter. Although Foell consented to respondent's representation, she did not sign a written retainer agreement. Foell claimed that, once respondent took over her case, she had very little contact with him and received no correspondence from him. She stated that she contacted respondent only when her medical bills needed to be paid. She also stated that she often stopped at respondent's office and that, because she was unable to catch him, she left him notes or telephone messages. According to Foell, respondent failed to reply to these attempts to reach him. Foell claimed that this continued for approximately two or three years after her accident.

Foell's case was dismissed in August 1993. She testified that she found out about the dismissal several years later, through an attorney who was handling a child support matter for her. Foell stated that, when the attorney contacted the court for information about the status of her personal injury case, he was advised that there was nothing on file. According to Foell, between the time she retained respondent and the dismissal of her case, even though she spoke to respondent between three and five times, he never informed her of the dismissal. Thereafter, Foell retained another attorney to handle her case.

At the time of the DEC hearing, Foell did not know the status of her case. She believed that her new attorney had also "dropped the ball" and failed to pursue the matter.

During cross-examination, Foell admitted that she did, in fact, have some contact with respondent, who advised her that he was attempting to settle the case. Foell's continuing problems with her foot, even after treatment, apparently prevented the settlement from being finalized. As of the date of the DEC hearing, Foell did not know if all of her medical bills had been paid.

At the conclusion of the DEC hearing, Focll stated as follows:

> With all due respect, I hope you take [respondent's] license, because what he has done to us, nobody has a right to do to anybody. You guys are lawyers, we put our faith and trust in you and you screw us out of money, time, physical ability and emotional stress. It's just not necessary. What I went through physically was bad enough, what you put me through, then [the other attorney] is just - where do you go? How do you trust another lawyer and go to somebody else for counseling? You can't.
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> [T249[1]]

Respondent learned in September 1993 that Foell's case had been dismissed, but claimed, as of the date of the DEC hearing, that he did not know the reason for the dismissal. Despite the fact that the case was dismissed in August 1993, respondent met with the claims adjuster in September 1993. According to respondent, they were still negotiating a settlement and he did not see the dismissal as a problem because of the "serious" ongoing settlement negotiations. While respondent acknowledged that he did not specifically inform Foell of the dismissal, he claimed that he advised her "that there was an anomaly of a problem with the court, but I didn't see it as a problem. . . ." T212.

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[1] T denotes the transcript of the February 23, 1999 DEC hearing.

Although respondent's testimony was somewhat vague, apparently he attempted to reinstate the complaint in 1996. Respondent alleged that he had filed a motion for reconsideration earlier, which had been denied. However, respondent did not reference this motion for reconsideration in his 1996 motion and did not produce any evidence of that earlier filing. According to respondent, Foell's case was reinstated in October 1996 and was, thereafter, taken over by another law firm.

Finally, respondent testified that he never filed a substitution of attorney form when he took over the Foell matter, because he did not know how to do it; he had, however, obtained an order, dated January 11, 1993, permitting him to handle the deceased attorney's matters.

Apparently the judge involved in the personal injury case referred this matter to the DEC.

Docket Nos. IIIB-97-023E and IIIB-98-06E
A - The Wydra Matter

Elizabeth Wydra was involved in a slip-and-fall accident in 1987. She retained the firm of Steinberg and Girsh in Philadelphia to represent her in connection with that matter, as well as in a social security disability claim. Respondent was assigned to represent Wydra as, at that time, he was the only attorney in the firm who was licensed to practice in New Jersey. Respondent filed a complaint in March 1989, but shortly thereafter left the firm.

Respondent never told Wydra that he was leaving the firm. He believed that it was the firm's responsibility to notify the client. The case was then assigned to another attorney from the firm, who was also licensed to practice in New Jersey. At one point, the attorney contacted Wydra to inform her that she, too, was leaving the firm and that no other attorneys were working on Wydra's case. She advised Wydra to retain a New Jersey attorney to handle her two matters.

Thereafter, Wydra hired an attorney to handle her social security disability matter. That attorney informed Wydra that he would also consider taking on her personal injury case. In September 1989, however, the attorney declined to represent Wydra in the personal injury matter, stating that his firm was not willing "to invest the time and effort necessary for the proper prosecution" of the matter. The attorney added that it was not his intention to imply that Wydra did not have a cause of action, but to advise her to consult other counsel about her case. That attorney did obtain a social security disability award in Wydra's behalf.

According to Wydra, not knowing where else to turn, she contacted respondent in September 1989. He told her that he had just started his own practice and would be willing to represent her. Wydra did not sign a retainer agreement.

Afterwards, Wydra did not hear much from respondent. She attempted to contact him repeatedly until finally, in January 1991, respondent called Wydra to come to his office to answer interrogatories. She never received a copy of the interrogatories after completing

them and did not know whether they had been filed. Moreover, unbeknownst to Wydra, her case had already been dismissed for failure to answer interrogatories.

Wydra stated that, throughout the representation, respondent assured her that she had a good case. She claimed that, following their January 1991 meeting, sometime in 1994 she "popped" into respondent's office, unannounced. According to Wydra, respondent reassured her that she had a good case and that "it won't be long now [before it is resolved]." T19. However, because of the significant amount of time that had passed, Wydra questioned respondent about whether the lawsuit had actually been filed. According to Wydra, respondent replied, "oh, yes, it has, it definitely has." When she inquired why the case was taking so long, respondent answered, "these things sometimes take a long time." Wydra testified that she continued to call respondent approximately every six months and that it would take approximately ten calls before she was able to get through to him.

Respondent conceded that Wydra had called him a number of times and that he had not returned her calls. The calls were made whenever Wydra got a letter from her insurance company indicating that it had a lien against her. Wydra claimed that she would contact respondent, who would tell her that he did not want her to be bothered with the letters and to forward them to him. According to Wydra, respondent continued to assure her that they would prevail in her case and that it would be settled shortly. Wydra admitted on cross-examination that respondent warned her about certain problems common to slip-and-fall cases.

Wydra testified that "last March" (presumably 1998) she went to respondent's office, at which time he informed her that he had not settled the case with the insurance carrier. He told her that he could not get her more than $10,000. Wydra already had more than $4,500 in medical bills; once she paid off the medical lien and respondent's fee, there would be nothing left for her. Respondent told Wydra that he would attempt to negotiate with the carrier again. Later, he told Wydra that he was unsuccessful in his attempts.

Eventually, someone advised Wydra to call the court about the status of her case. In April 1998, Wydra learned that there was nothing filed with the court. She was referred to an attorney on an ethics committee, but apparently only for that attorney to assess whether she would pursue Wydra's case. The new attorney contacted Wydra's insurance carrier, only to discover that Wydra's case had been dismissed almost ten years earlier. Wydra was shocked by the discovery. This attorney, too, declined to pursue Wydra's case.

According to Wydra, she has received nothing from the matter. She claimed that when she last saw respondent, he told her that her case was too old.

Respondent, in turn, asserted that he was the youngest and most inexperienced attorney working at the firm of Steinberg and Girsh. He was also the only attorney then licensed to practice in New Jersey.

Respondent explained that the insurance company took a "no pay" position in the matter. He testified that, after he obtained the file from Steinberg and Girsh, he informed Wydra that there were problems with the case. During the course of his testimony

respondent repeatedly stressed that, because of the severe problems with liability in the matter, any likelihood of recovery would be limited to the "MedPay benefit"; in other words, only medical payments would be paid by the property owner's insurer, the Fireman's Fund Insurance Company. Respondent explained that Wydra could recover up to $10,000 in MedPay benefits. As time passed, the medical liens against Wydra continued to rise. Respondent claimed that he did not try to "sugarcoat" the status of Wydra's case, but may have been looking at the matter as if "the cup was half full rather than half empty." T59.

Although respondent initially claimed that he did not know that the case had been dismissed until after Wydra met him at his office to answer interrogatories, he later admitted that he was already aware of the dismissal. He claimed, however, that he had hoped to negotiate with the lienholders who paid the medical bills, in order to compromise their lien and get something for Wydra. When respondent was asked to answer "yes or no" as to whether he had explained to Wydra that her case had been dismissed, respondent replied as follows:

> The language that I may [sic] used was that there were problems with the case, and I eluded [sic] to the liability as well as the procedure. In fact, that is why I thought at one time Ms. Wydra did understand that what we could get would be the MedPay and try to settle the case that way.
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> [T68]

Respondent further contended that, although he knew that the case had been dismissed, he was operating under the assumption that he "could still pull this out, work out the MedPay part of it and make some type of recovery for Ms. Wydra." T72. According to

respondent, he thought that he had an understanding with Wydra that, if she was to recover any money, it would be from the MedPay. Contrary to respondent's assertions, Wydra testified that she was unaware that her case was not being prosecuted. In fact, according to Wydra, even though respondent had told her that it was difficult to win slip-and-fall cases, he always led her to believe that she had a good case and that she would prevail; it was not until the last time she met respondent in 1997 that respondent mentioned anything to her about MedPay.

As of the date of the DEC hearing, respondent was still the attorney of record in the Wydra matter. No substitutions of attorney were ever filed. From 1990 to 1997, respondent never took any action to reinstate Wydra's case.

B - The Rodio Matter

Maureen Rodio was involved in a job-related injury in May 1991. She was originally represented by Joe Fineman in a personal injury matter relating to the accident. Fineman had filed a complaint in her behalf. In October 1994, Fineman referred the matter to respondent. A workers' compensation case was being pursued by another attorney, Cosmo Giovinazzi.

Respondent was representing Rodio in a third-party action against the owners of the property where Rodio had been injured. According to Rodio, it was her understanding that respondent had been able to negotiate a settlement of her claim and was able to compromise her workers' compensation section 40 lien.

In or about December 1995, Rodio executed a settlement distribution statement prepared by respondent, showing a total award of $55,000. The compromised section 40 lien was for $25,000, leaving $30,000: $15,000 for attorneys' fees and $15,000 for Rodio. Rodio received a $15,000 settlement check dated December 20, 1995.

Unbeknownst to Rodio, respondent failed to pay the section 40 lien until 1997. In the interim, Rodio had started receiving weekly workers' compensation payments from a permanency award. It was not until April 1997 that Rodio learned of problems with the settlement reached by respondent. By letter dated April 22, 1997 from VIK Brothers Insurance Group, the workers' compensation insurer, Rodio was informed that her lien of $36,469 had not been paid and was advised to contact the insurer to reimburse it for the outstanding lien. Thereafter, Highlands Insurance Group, who superseded VIK Brothers, wrote to Rodio on May 16, 1997, informing her that it was entitled to two-thirds of her settlement, less $200 for attorneys fees, for a total of $36,668.50. Since Rodio's receipt of the first letter, respondent paid $25,000 against the lien, leaving a balance due of $11,468.50. To satisfy the balance, the insurer reduced Rodio's permanency award from $110.57 per week to $36.86 per week.

According to Rodio, she was "devastated" by the reduction, particularly since respondent had assured her that the $25,000 payment was in full satisfaction of her lien. Respondent did not communicate with Rodio after the settlement was reached.

As a result of the problems with her workers' compensation award, Rodio retained a new attorney to represent her, while Cosmo Giovinazzi continued to represent her in connection with her workers' compensation matter.

According to respondent, he was having problems with the workers' compensation insurer's attorney. The attorney had authorized respondent to deal directly with the workers' compensation insurance adjuster. Respondent testified that he contacted the insurance adjuster, who orally authorized a settlement of the workers' compensation lien for the amount of $25,000. In light of this authorization, respondent was able to negotiate a higher settlement of Rodio's third-party claim, in the amount of $55,000. Respondent claimed that he had informed the workers' compensation adjuster that he was not authorized to negotiate Rodio's future workers' compensation benefits, only her past medical liens.

After the settlement was finalized, respondent obtained the settlement check, paid the attorneys their fees and Rodio her settlement, but failed to pay the workers' compensation lien. Respondent claimed that he did not know where he should send the check. According to respondent, he contacted the workers' compensation attorney only once, in an attempt to obtain the name and address of the payee; afterwards, "it slept in the trust account for the duration . . . ." T166.

Respondent admitted that he never obtained written confirmation of the settlement and that all of the negotiations were conducted orally. Respondent could not provide any writings to memorialize his telephone conversations with the insurer. Moreover, respondent

was unable to recall the individual with whom he had dealt, claiming that the name must have been written on the back of some papers that he was no longer able to find. Respondent testified that the settlement was reached on the eve of the trial, having been negotiated from the telephone banks at the courthouse.

Respondent admitted that, while attempting to settle the workers' compensation lien, he was informed that the insurer wanted one-third of the third-party settlement and also wanted to reduce Rodio's future workers' compensation benefits. According to respondent, he told the carrier that he did not represent Rodio in connection with her workers' compensation claim, only her third-party claim; the carrier, therefore, agreed to compromise its claim in the amount of $25,000. From the time that the case was settled in September 1995 until May 25, 1997, respondent allowed the carrier's settlement to sit in his trust account.

Respondent asserted that his inexperience with section 40 liens resulted in his uncertainty about how to proceed in the matter. He never entered the settlement on the record in a court proceeding, did not obtain an order setting forth the settlement and did not send any letters memorializing the terms of the settlement.

Although respondent admitted that he did not send Rodio a copy of any documents, he claimed that he had kept her apprised of what was going on in the matter. He admitted, however, that he never told Rodio that her future workers' compensation benefits would be jeopardized because he, too, was unaware of that circumstance.

One of the hearing panel members referred to the existence of three prongs in a workers' compensation matter: medical benefits, temporary benefits and a permanency award based on the individual's percentage of disability. Respondent claimed that, when he was negotiating the settlement, Rodio's workers' compensation attorney was still fighting over the medical benefits. According to respondent, he believed that Rodio had already obtained her permanency award. At the DEC hearing, respondent admitted that, while he was negotiating with the workers' compensation adjuster, he never asked if the compromised lien encompassed the temporary benefits, the medical benefits and the permanency award. Moreover, respondent admitted that, when the case was settled, he did not know whether Rodio had, in fact, received a permanency award; he only knew that it had been pending.

Originally, respondent claimed that, during negotiations, the workers' compensation lien was approximately $36,000. However, an October 2, 1995 letter listed the lien as totaling $151,000. Respondent was unable to reconcile this difference and admitted that he may have "misspoken" when he mentioned the earlier figure, as he did not know the exact amount of the lien when he settled the case.

At the DEC hearing, the presenter indicated that the prosecutor's office had looked into respondent's trust account records and determined that the settlement money had been left untouched during the entire period in question.

* * *

As to the Foell matter, the DEC found that respondent's failure to notify the court of the substitution of attorney and his failure to file an adequate affidavit to avoid the dismissal of the complaint caused a delay in the matter and constituted a lack of reasonable diligence and promptness in the representation of his client, in violation of RPC 1.3. The DEC also found that respondent failed to communicate with his client and to adequately explain the status of the matter to her, in violation of RPC 1.4(a) and (b).

In the Wydra matter, the DEC found that respondent failed to keep his client reasonably informed about the status of her matter and failed to explain the matter to her to an extent necessary to permit her to make an informed decision about her representation. The DEC concluded that respondent's conduct violated RPC 1.4(a) and RPC 1.4(b).

Finally, in the Rodio matter, the DEC found that respondent failed to act with reasonable diligence and promptness in representing his client once an oral agreement was reached with the workers' compensation carrier. The DEC concluded that respondent violated RPC 1.3.

As a result of respondent's overall conduct, the DEC found a pattern of neglect and lack of diligence in all three matters. The DEC, thus, found violations of RPC 1.1(b)and RPC 1.3, as well as RPC 1.4(a) and (b).

Two members of the panel recommended the imposition of a reprimand; the third member recommended a sixty-day suspension.

* * *

Following a de novo review of the record, we are satisfied that the DEC's finding of unethical conduct is supported by clear and convincing evidence.

In the Foell matter, respondent took over a deceased attorney's cases and failed to file a substitution of attorney. Respondent allowed the case to be dismissed and did not take any action to reinstate the claim until approximately three years later. During that time, respondent also failed to notify his client of the dismissal. Instead, he led her to believe that he was continuing to negotiate a settlement. Respondent's attempt to reinstate the matter failed and the case was only reinstated through the efforts of another attorney, in October 1996. Respondent also failed to promptly reply to his client's telephone calls. Respondent's conduct, thus, violated RPC 1.3 and RPC 1.4(a) and (b).

In the Wydra matter, respondent failed to promptly reply to his client's telephone calls. Here, too, the complaint was dismissed and respondent failed to inform his client about its dismissal. Instead, respondent continued to assure Wydra that she had a viable claim, that there was a strong likelihood that she would prevail and that the matter would be resolved

shortly. Only after Wydra learned that her case had been dismissed did respondent advise her that her only hope for a recovery was limited to "MedPay."

Respondent's testimony in this matter was less than forthright. Initially, he claimed that, when Wydra came to his office to answer interrogatories, he did not know that the case had been dismissed. Later in his testimony he admitted that he was already aware of the dismissal at that time. Moreover, when asked whether he had ever advised his client that the case had been dismissed, his testimony was evasive; he stated that he may have indicated to her that there were problems with the case. We find that respondent's conduct in this matter was a violation of RPC 1.4(a) and (b). Respondent was not, however, charged with lack of diligence or gross neglect for allowing Wydra's claim to be dismissed and failing to take steps to reinstate the matter. The complaint, though, charged respondent with a violation of RPC 1.1(b) (pattern of neglect). Clearly, there is sufficient evidence in the record to find that respondent's conduct in this matter rose to the level of gross neglect. The factual allegations gave respondent sufficient notice of this possible violation. We, therefore, deem the complaint amended to conform to the proofs. In re Logan, 70 N.J. 222, 223 (1976).

Likewise, respondent was not charged with a violation of RPC 8.4(c) (misrepresentation), even though he led his client to believe that her case was still active. It was not until ten years after the fact that Wydra learned from other sources that her case had been dismissed. The formal ethics complaint stated, though, that "Wydra was misleadingly provided positive assurances concerning the case, leaving her with different understandings

concerning the status of the matter and the prospect for recovery than the true status and prospect of which the respondent was aware." We, therefore, also find a violation of RPC 8.4(c) by deeming the complaint amended to conform to the proofs and finding that the factual allegations gave respondent sufficient notice of this possible violation. In re Logan, 70 N.J. 222, 223 (1976). The record contains clear and convincing evidence of that violation.

In the Rodio matter, respondent settled the workers' compensation lien without obtaining all of the information required to do so. As was evident from his testimony, at the time he settled the lien, he was unaware of the actual amount of the workers' compensation lien and made no effort to determine its extent. Once the case was settled, respondent paid Rodio her share of the settlement proceeds and paid himself as well as Giovinazzi their respective legal fees. Respondent, however, allowed the $25,000 due to the workers' compensation insurer to remain in his trust account until after the insurer contacted Rodio and informed her that the lien had never been paid. At a minimum, respondent's conduct in this matter was a violation of RPC 1.3. We also find, based on these facts, that his conduct rose to the level of a violation of RPC 1.1(a) (gross neglect).

Respondent's conduct in these three matters, thus, included violations of RPC 1.1(b) for his neglect of all three matters, RPC 1.4(a) and RPC 1.4(b) in both the Foell and Wydra matters, RPC 1.3 in the Foell and Rodio matters, as well as a violation of RPC 8.4(c) in the Wydra matter and RPC 1.1(a) in the Rodio and Wydra matters.

Although respondent's conduct was serious, in light of respondent's otherwise unblemished record and his professional inexperience at the time, we unanimously determined that a reprimand is sufficient discipline for his ethics infractions. See In re Eastmond, 152 N.J. 435 (1998) (reprimand where an attorney in a medical malpractice case engaged in gross neglect, lack of diligence and misrepresentation to his client); In re Fox, 152 N.J. 647 (1998) (reprimand for gross neglect, failure to communicate and misrepresenting status of case to two attorneys); and In re Wildstein, 138 N.J. 48 (1994) (reprimand for failure to communicate with clients in three matters, gross neglect in two matters and lack of diligence in two of those matters).

One member did not participate. One member recused himself.

We also determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: March 7, 2000

By: _____
ROCKY PETERSON
Member
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Louis N. Caggiano, Jr.
Docket No. DRB 99-309

Argued: November 18, 1999

Decided: March 7, 2000

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling						x	
Cole			x				
Boylan			x				
Brody			x				
Lolla			x				
Maudsley			x				
Peterson							x
Schwartz			x				
Wissinger			x				
Total:			7			1	1

Robyn M. Hill 4/10/00
Robyn M. Hill