BK

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 99-288
DRB 99-341

IN THE MATTER OF

MARC J. GORDON,

AN ATTORNEY AT LAW

Decision

Argued: November 18, 1999 (Docket No. DRB 99-288)
December 16, 1999 (Docket No. DRB 99-341)

Decided: June 12, 2000

Donald F. Scholl, Jr., appeared on behalf of the District XIII Ethics Committee (Docket No. DRB 99-288).

Respondent appeared pro se.

Argued: December 16, 1999 (Docket No. DRB 99-341)

William J. Gold appeared on behalf of the District XIII Ethics Committee (Docket No. DRB 99-341).

John F.X. Irving appeared on behalf of respondent.

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

These matters were before us based on a recommendation for discipline filed by the District XIII Ethics Committee ("DEC"). Respondent was admitted to the New Jersey bar in 1959.

The formal ethics complaint alleged that respondent grossly neglected a personal injury case and failed to inform his client of its dismissal.

On October 16, 1990 respondent received a public reprimand for gross neglect, pattern of neglect, failure to communicate, misrepresentation and failure to protect his client's interests in two personal injury cases. In re Gordon, 121 N.J. 400(1990). On April 20, 1995, respondent received a public reprimand for gross neglect, lack of diligence, failure to communicate and failure to return a file to a client. In re Gordon, 139 N.J. 606(1995). On July 10, 1997 respondent was suspended for three months for gross neglect and failure to keep clients reasonably informed about the status of their matters. In re Gordon, 150 N.J. 204(1997). That matter proceeded on a default basis under R. 1:20(f)(1).

* * *

Docket No. DRB 99-288

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) in a personal injury action.

In or about November 1989 the grievant, Howard Deemer, severed his hand while operating a machine at his place of employment, J.T. Baker & Co. ("Baker"). Sometime thereafter, Deemer retained respondent to file several actions in his behalf: a workers' compensation claim, a federal products liability action and a state court litigation. Respondent's handling of the products liability action led to the filing of the within ethics grievance.

Deemer, now an elderly Florida resident, did not testify at the DEC hearing. The DEC determined that, based upon respondent's various admissions during his own testimony, Deemer's testimony was unnecessary. Therefore, respondent was the only witness at the July 14, 1999 hearing.

According to respondent, on November 8, 1991 he filed a complaint in the United States District Court for the District of New Jersey against Baker and several "John Doe" defendants, including the machine manufacturer. Shortly thereafter, in December 1991, counsel for Baker wrote a letter to respondent regarding the case. That letter stated as follows:

> I am advised by J.T. Baker that it is unable to identify the manufacturer of the machinery in question. The production machinery that was involved in Mr. Deemer's accident is still in Baker's possession. However, there are no visible markings or plates on the machinery to help identify the source of the equipment. Baker's purchase and maintenance records for the machine has long since been destroyed.
>
> I regret that we cannot be of assistance. If you want to go to the site to examine the machine or photograph it we will be happy to oblige you. Other

than that I do not know what we can do.

[Exhibit C-2]

Respondent admitted that, despite this clear invitation to examine the machine, he elected not to do so. In fact, based solely on the contents of the above letter, respondent determined that Deemer had a "1,000 to one" chance of success on the merits. Respondent further testified that he determined that it was not in Deemer's best interest to pursue the case further. By his own admission, he did not advise Deemer at the time that he believed the case to be unworthy of further pursuit.

Thereafter, on September 10, 1992, the matter was dismissed without prejudice for failure to prosecute. Respondent had done no further work on the file and had not attended a September 8, 1992 hearing regarding the dismissal. Respondent explained that, even after the dismissal, "that case [was] alive as far as I am concerned." Further, respondent admitted that, although he was aware of the pending dismissal, he did not bring it to the attention of his client. Respondent testified as follows:

> I wouldn't waste my time and [Deemer's] time. I could never do any work for any clients if I notified every client and I think that applies to many of us, notifies [sic] every client every time there is a move made of this nature procedurally calendar wise on his or her case. I would never have time to investigate the good cases.
>
> [T48]

Indeed, respondent had no recollection of ever discussing the case again with Deemer after its dismissal. Respondent specifically recalled not advising Deemer that the products liability action had been dismissed. The only hint of Deemer's participation in the products

liability case is contained in a June 12, 1998 letter to the district court in which he claimed that he had just learned of the 1992 dismissal, despite his numerous attempts to contact respondent over the intervening years. Indeed, Deemer continued, it was through his own efforts that he was able to obtain records indicating the dismissal. Deemer concluded the letter by suggesting that respondent had lied to him about the status of his case. Exhibit P-7. Respondent objected to the introduction of Deemer's letter on hearsay grounds. The DEC allowed the letter in evidence over respondent's objection, but solely for the purpose of illustrating Deemer's state of mind — that he did not know the status of his case.

In his defense, respondent argued that he was handling all of Deemer's legal matters during the time that the products liability action was pending. Respondent stated that he was much more concerned about Deemer's workers' compensation case, which occupied much of his time. According to respondent, Baker paid Deemer in excess of $300,000 on that claim alone. Respondent stated that those payments negatively affected Deemer's probability of success in the products liability case. Indeed, respondent continued, he only filed the products liability action in case Deemer had a claim against unknown defendants.

Finally, respondent opined that there was no need to keep Deemer informed about all aspects of the representation. Respondent considered the products liability action to be only one small aspect of his overall representation of Deemer. According to respondent, his only failure was not to inform Deemer of the dismissal. That alone, respondent urged, did not warrant the imposition of discipline.

* * *

II. Docket No. DRB 99-341

In or about 1995 Harry Frey retained respondent to represent him in a workers' compensation matter. The alleged misconduct did not arise out of the workers' compensation case. It appears that the parties in that matter had arrived at a tentative settlement in 1995, which was pending court approval when, in June 1997, Harry Frey passed away. Thereafter, respondent represented Mrs. Frey on a dependency claim, as evidenced by his July 8, 1997 letter to her, which requested information needed to file the claim. Exhibit P-3.

At about the same time, on July 10, 1997, the Supreme Court suspended respondent for three months, effective August 6, 1997. The Court order directed respondent to comply with the provisions of R. 1:20-20, dealing with suspended attorneys. In particular, R. 1:20-20(b)(11) required that respondent,

> except as otherwise provided by paragraph (d) of this rule, as to litigated or administrative proceedings pending in any court or administrative agency, promptly give notice of the suspension...to...each client.... Even if requested by a client, the discipline or former attorney may not recommend an attorney to continue the action.

Shortly thereafter, on July 30, 1997, respondent sent Mrs. Frey the following letter:

> I am writing to you to advise you that I am transferring many of my Worker's Compensation cases to another attorney, Anthony M. Tamasco, Esq. Tony will be in touch with you shortly so that any necessary or helpful discussions or other communications can take place, so as to keep things moving along and current.

There will be no change in the total amount of legal fees you will pay in connection with the case (s).

The Court system requires that a formal document entitled a 'Substitution of Attorney' be filed with the court so that there will be a clear indication to all concerned that I am going to be replaced as the attorney of record in this litigation.

Of course, you have the right to retain other counsel but if you do not respond within sixty days of this letter Tony will continue to represent you.

[Exhibit P-1]

Mrs. Frey testified at the DEC hearing that she knew very little about the workers' compensation case because her brother, James Tarpey, whom she likened to the "head of the family," handled that matter for her. Indeed, Mrs. Frey admitted that she did not open correspondence from respondent, which she gave directly to her brother.

James Tarpey also testified at the DEC hearing. A retired Internal Revenue Service accountant, Tarpey took a keen interest in the financial aspects of the workers' compensation case. According to Tarpey, who filed the grievance in Mrs. Frey's behalf, a tentative settlement was reached in the case in 1995, but no agreement was ever executed . Therefore, the case remained open on the court's docket. On June 17 and July 6, 1997, Tarpey corresponded directly with the court to set up a meeting to discuss respondent's handling of the case. Tarpey stated that he and Mrs. Frey were unhappy with respondent's progress in the case and wished to discuss it with the judge. The supervising judge, in a July 25, 1997 letter to Tarpey, replied as follows:

> I respond to your letters of June 17, 1997 and July 16, 1997. The rules governing the conduct of Judges and attorneys do not permit a conference with a litigant in the absence of counsel for both parties so I cannot grant your request for a meeting with me and Senior Deputy Attorney General Lois Gregory.
>
> I inform you however that the Supreme Cour[t] of New Jersey has suspended Marc J. Gordon from the practice of law for a period of three months, effective August 6, 1997 for gross negligence and failure to keep clients reasonably informed. The court rules require that Mr. Gordon give you notice of this suspension and advise you to obtain another attorney.
>
> [Exhibit P-4]

Furthermore, according to Tarpey, upon receipt of respondent's July 30, 1997 letter, which failed to mention the suspension referenced in the court's letter, he and Mrs. Frey set up a "sting" operation to test respondent's forthrightness. Indeed, Mrs. Frey spoke to respondent by telephone, while Tarpey listened on another extension. Tarpey recalled that Mrs. Frey asked respondent specifically why he had transferred her case to attorney Tamasco, as stated in respondent's July 30, 1997 letter. According to Tarpey, respondent simply stated "I don't want to get into that over the telephone." It was at that point that he and Mrs. Frey sought the aid of another attorney.[1]

Although the record is not entirely clear on the specific dates involved, apparently the Division of Workers' Compensation received respondent's July 30, 1997 letter with the notification of the transfer of the files to another attorney and contacted the Office of Attorney Ethics ("OAE") about its contents. On August 19, 1997 the OAE sent respondent

[1]It appears that respondent cooperated in the transfer of the case to the new attorney.

a letter advising him that his July 30, 1997 letter failed to comply with the requirement in R. 1:20-20 that a suspended attorney promptly notify clients of a suspension from the practice of law. Exhibit P-5.

Finally, on November 3, 1997, respondent sent a second letter to Mrs. Frey, which revealed that he had been suspended from the practice of law. The letter further stated that Mrs. Frey had the right to obtain a new attorney of her choice. Exhibit P-2.

Although respondent did not contest the basic facts detailed above, he denied that he did violate R. 1:20-20 or RPC 8.4(d) for the following reasons.

With regard to the allegation that respondent failed to promptly notify Mrs. Frey of his suspension, respondent claimed that Mrs. Frey's husband, not she, was his client. Indeed, according to respondent, as no executor or executrix had been appointed between Harry Frey's death in June 1997 and respondent's suspension in August 1997, he did not have an attorney/client relationship with Mrs. Frey. Moreover, according to respondent, the underlying workers' compensation case had been settled in 1995. Therefore, respondent stated, he "owed Mrs. Frey no duty." Respondent admitted, however, that no order of settlement had ever been issued in the case and that it remained open on the court's docket as of the date that he transferred the case to attorney Tamasco.

With regard to respondent's unilateral determination to transfer Mrs. Frey's file to attorney Tamasco, respondent stated that he transferred approximately 150 workers' compensation files on July 30, 1997, prior to the effective date of his suspension.

Respondent maintained that, for several years, he had intended to sell the workers' compensation portion of his practice and was spurred on to accomplish the transfer with the imminent suspension looming before him. Respondent was adamant that R. 1:20-20 did not prohibit him from unilaterally transferring those scores of cases, because he had not yet been suspended. Respondent urged that he was primarily attempting to "keep the cases moving" by transferring them to Tamasco, admitting that a "financial arrangement" for the transfer did exist.

The remaining charge against respondent alleged that he failed to file a detailed affidavit of compliance with the OAE, in contravention of R. 1:20-20(b)(14). The rule requires the filing of such an affidavit within thirty days after the date of the attorney's "prohibition from practice." The former ethics complaint in this matter was filed on August 24, 1998. Respondent had not, as of that date, filed his affidavit with the OAE. In fact, according to a January 28, 1999 letter from the OAE to respondent's counsel, respondent did not file that affidavit with the OAE until September 1998. Exhibit R-3.

Respondent argued, in mitigation of his failure to file the affidavit, that he suffered two heart attacks at critical points in time. The first heart attack occurred in August 1997, several weeks after the effective date of his suspension. According to respondent, that heart attack impaired his ability to reissue a letter to all of his clients advising them of his suspension. Respondent suffered a second heart attack in March 1998. According to

respondent, respondent, that heart attack prevented him from complying with the affidavit requirement of the rule.[2]

Respondent proffered another argument with respect to his failure to file the affidavit. Respondent alleged that he had interpreted the OAE's August 19, 1997 letter to mean that the affidavit of compliance was not needed until he sought reinstatement to practice. Respondent pointed to the following excerpt from that letter:

> This is to advise you that you must comply with R. 1:20-20; indeed, prior to reinstatement you must show that you complied with the rule.
> [Exhibit P-5]

There is no indication in the record that respondent ever contacted the OAE regarding the inconsistency in his interpretation of the OAE's letter and the clear language of the rule.

With regard to the alleged contempt of court, in violation of RPC 8.4(d), for respondent's failure to promptly comply with all aspects of the Court's July 10, 1997 suspension order, respondent relied on his interpretation of R. 1:20-20 for the proposition that he had not violated the Court order.

Finally, according to respondent, the OAE's January 28, 1999 letter clearly stated that his September 1998 affidavit brought him into compliance with the rule. Furthermore, according to respondent, no clients were harmed by his actions.

* * *

[2]Apparently, the DEC accepted respondent's representations regarding the alleged heart attacks, without further proof.

In Deemer, the DEC found violations of RPC 1.1(a), RPC 1.4(a) and RPC 1.1(b), without offering any explanation or basis for its findings. The DEC dismissed the charge of a violation of RPC 8.4(c) and did not address RPC 1.3 in its hearing panel report. The DEC recommended the imposition of a suspension of unspecified duration.

In Frey, the DEC found that respondent "clearly and knowingly violated R 1:20-20 in an attempt to profit from the transfer of his cases before his suspension took effect. He further attempted to hide the fact of his suspension from his clients." It is not clear from the hearing panel report if the DEC found a further violation of the rule for respondent's failure to file his affidavit of compliance with the OAE within thirty days of his suspension. The DEC also found a violation of RPC 8.4(d), without specifying the misconduct that formed the basis for its finding.

* * *

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

In essence, respondent admitted the facts alleged in the Deemer complaint. However, he believed that his actions did not rise to the level of unethical conduct. Respondent is wrong.

Unquestionably, respondent is guilty of misconduct in his handling of Deemer's matters. First, respondent unilaterally determined that Deemer's case had little chance of success. Respondent based his determination on a letter from his adversary, stating that the

machine in question had no markings to identify it . Respondent's adversary's letter notwithstanding, an inspection of the machine was in order to confirm that information. A very real possibility existed that the machine could have been identified. However, respondent made no attempt to inspect the machine or to otherwise ascertain the identity of its manufacturer. Instead, he unilaterally determined that the entire case was worthless and failed to advise his client of this opinion. The Board finds that respondent's failure to inspect the machine was an act of lacking diligence, bordering on gross neglect, and in violation of RPC 1.3. Second, respondent did not contest that he allowed the products liability action to be dismissed and took no further action to restore the matter. Indeed, respondent never served the summons and complaint. This misconduct was grossly negligent, in violation of RPC 1.1(a) and RPC 1.3.

With regard to RPC 1.4(a), respondent kept Deemer in the dark for years about the true status of the case. He admitted never specifically telling Deemer that the case had been dismissed, despite frequent contact with Deemer between 1992 and 1997. Respondent's failure to keep Deemer advised of important aspects of the case was in violation of RPC 1.4(a). On this score, it is troubling that respondent believed that Deemer did not need to be informed about such important aspects of his case. Attorneys are required to convey essential aspects of the representation to their clients. Clearly, the dismissal of a products liability action against the manufacturer of a machine that severed his hand was a critically important aspect of the representation and would have been of great interest to Deemer. In

fact, respondent hid that fact from Deemer until June 1998, when Deemer learned for the first time, through his own investigation, that the case had been dismissed. Respondent led Deemer to believe that his case was alive by not advising him of the dismissal for almost six years. Respondent's continuing silence from 1992 to 1998 was a misrepresentation by silence and a violation of RPC 8.4(c). Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347(1984).

Respondent's conduct was aggravated by several factors. During the same time period, 1992 - 1998, respondent received a reprimand and a three-month suspension for gross neglect, lack of diligence, failure to communicate with clients and failure to return a file to a client. Clearly, respondent did not learn from those prior mistakes. In addition, respondent refused to acknowledge any wrongdoing. Contrary to his assertion, the dismissal of the action against the manufacturer of the machine that severed Deemer's hand was not, as respondent put it, a "procedural move" that did not have to be communicated to his client. It was a critical event that required respondent's disclosure to Deemer. For respondent to call it a waste of time is alarming.

With respect to RPC 1.1(b), we find a pattern of neglect either when there are at least three instances of gross neglect in the present matters or when combining present gross neglect with gross neglect from prior discipline. Respondent was found guilty of gross neglect in each of his prior disciplinary matters. Therefore, we find a pattern of neglect in this case with the addition of respondent's prior acts of gross neglect.

In Frey, the relevant facts are not in dispute. On July 10, 1997 the Supreme Court ordered respondent's suspension from the practice of law for misconduct in a prior matter. The suspension was to be effective August 6, 1997. On July 30, 1997 respondent transferred approximately 150 workers' compensation cases to attorney Tamasco. By respondent's own admission, although he had long planned to divest himself of that portion of his practice, the Supreme Court order spurred him on in this regard. Respondent conceded that he did not obtain the prior consent from any of those clients, (including Mrs. Frey) prior to the transfer. On that same day, July 30, 1997, respondent sent his clients a letter notifying them of the transfer to Tamasco, but omitting that he had been suspended from the practice of law effective August 6, 1997.

Respondent argued that he was free to transfer his cases en masse on the eve of his suspension because he "was not yet suspended." This argument is without merit. R. 1:20-20(b)(11) is clear that "[a]n attorney who is suspended . . . shall . . . promptly give notice of the suspension, to . . .each client." Respondent was notified of his suspension on July 10, 1997, the date of the Court's order. Clearly, thus, he transferred the files to attorney Tamasco in order to beat the effective date of August 6, 1997. Moreover, R. 1:20-20 prohibits a suspended attorney from recommending another attorney to take over the representation, even if a client asks for such a recommendation. Respondent's unilateral transfer of files, including Mrs. Frey's, was in complete disregard of this aspect of the rule. Respondent's claim that Mrs. Frey was never his client is also implausible. After all, he

treated her as such in correspondence dated July 8, 1997, barely two weeks before his mass file transfer. Equally untenable was respondent's assertion that the workers' compensation case was over in 1995, when a proposed settlement was apparently negotiated. The case lingered on into June of 1997, prompting Tarpey's direct intervention with the workers' compensation court. Indeed, had the case been concluded, there would not have been any need to transfer the matter.

In short, there is no excuse for respondent's failure to notify Mrs. Frey and his other clients of his suspension when he penned his July 30, 1997 letter to them. Likewise, there is no conceivable reason, other than a desire to divest himself of his workers' compensation cases before they became valueless upon his suspension, for respondent's "fire sale" of his case load. Respondent clearly violated R. 1:20-20(b)(11).

With regard to the requirement that respondent file an affidavit of compliance with the OAE within thirty days of his suspension, respondent did not file such an affidavit until September 1998, over one year later. Respondent argued that his August 1997 and March 1998 heart attacks affected his ability to comply with this requirement. While there is no evidence in the record in support of respondent's alleged heart attacks, we accept respondent's representations, as did the DEC at the hearing level.

Respondent also offered a second argument with regard to his failure to comply with the affidavit requirements of R. 1:20-20. According to respondent, he interpreted the OAE's August 19, 1997 letter to mean that he did not have to file the affidavit until he sought

reinstatement. Even if respondent is to be believed, he still had a duty to check the rule and its requirements regarding the affidavit of compliance. With his interpretation of the OAE's letter in such clear conflict with the rule, respondent had an obligation to investigate further. He did not do so. It could be that respondent's health problems interfered with his ability to investigate that discrepancy in a timely fashion. We gave respondent the benefit of the doubt in this regard, given this ultimate compliance with the rule.

Finally, the DEC found that respondent's failure to abide by all aspects of the Supreme Court's suspension order violated RPC 8.4(d). However, such conduct is a further failure to comply with R. 1:20-20, rather than conduct prejudicial to the administration of justice. Accordingly, we dismissed the charge of a violation of RPC 8.4(d).

As to the issue of discipline. Ordinarily, one matter involving gross neglect, lack of diligence, failure to communicate and misrepresentation, standing alone, would warrant a reprimand. In re Wildstein, 138 N.J. 48(1994)(reprimand imposed for gross neglect and lack of diligence in two matters, with failure to communicate with the client in a third matter) and In re Gordon, 121 N.J. 400(1990) (reprimand imposed for gross neglect and failure to communicate in two matters.) The continuing misconduct during years 1991 to 1998 was magnified by both respondent's refusal to learn from his mistakes and his refusal to recognize any wrongdoing on his part.

Ordinarily, one matter involving gross neglect, lack of diligence, failure to communicate and misrepresentation, standing alone as they do in Deemer, would warrant a

reprimand. Likewise, the R. 1:20-20 violations in Frey would likely yield similar discipline. However, we cannot view respondent's misconduct in these cases in a vacuum. When these two cases are viewed against a backdrop of respondent's considerable ethics history, the repetitive nature of the misconduct, and respondent's inability to accept any blame for his transgressions, we are compelled to impose significant discipline. For the totality of respondent's misconduct in these matters, we unanimously determined to impose a one-year suspension, retroactive to the expiration of respondent's prior three-month suspension, which was effective August 6, 1997. We required respondent, within six months of his reinstatement, to show proof that he completed the skills and methods core courses. We further required that, upon reinstatement, respondent practice law under a proctor, to be approved by the Office of Attorney Ethics, for a period of two years.

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

Dated: 6/14/00

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Marc J. Gordon
Docket No. DRB 99-288 & DRB 99-341

Argued: **November 18, 1999 (Docket No. DRB 99-288)**
December 16, 1999 (Docket No. DRB 99-341)

Decided: **June 12, 2000**

Disposition: **One Year Suspension**

Members	Disbar	One Year 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:		9					

Robyn M. Hill 8/16/00
Robyn M. Hill
Chief Counsel