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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-071

IN THE MATTER OF
AARON M. SPIEZER,
AN ATTORNEY AT LAW

Decision

Argued: April 15, 1999

Decided: August 23, 1999

Andrew B. Kushner appeared on behalf of the District IV Ethics Committee.

Carl D. Poplar 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 IV Ethics Committee ("DEC"). A four-count 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 with client) (count one); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.4(d) (conduct prejudicial to the administration of justice)

(count two); RPC 5.5(a) (failure to maintain a bona fide New Jersey law office) (count three) and RPC 5.5(a) (practicing law while ineligible) (count four).

Respondent was admitted to the New Jersey bar in 1990, the Pennsylvania bar in 1988 and the Illinois bar in 1977.

Respondent currently maintains a law practice in Camden, New Jersey and maintains an office in Philadelphia, Pennsylvania to receive telephone calls and mail. Respondent has no history of discipline.

From 1988 through May 1994 respondent was employed by Bernard L. Kubert and Associates in Philadelphia, Pennsylvania. In the fall of 1989 he was assigned to meet with Edna T. Cushing, the grievant, about a possible malpractice action. At the time, neither respondent nor any of the other attorneys at the firm were admitted to practice in New Jersey.

Mrs. Cushing had allegedly suffered injuries from surgery in a New Jersey hospital. She resided in Millville, New Jersey, where the surgeon apparently had his practice. Mrs. Cushing explained that, because Millville was a small town, she thought that it was better to retain an attorney from out of the area. She found respondent's firm in a Philadelphia telephone directory. Several days after contacting respondent's law firm, in late October 1989, someone from respondent's firm telephoned Mrs. Cushing to set up an appointment with respondent. According to Mrs. Cushing, respondent met with her and her husband at their home. After discussing her operation with respondent, he informed her that it looked like she had a good case.

Mrs. Cushing described her injuries from the surgery as follows. In May 1989 she entered the hospital to have her "discs cleaned." She believed that the surgery was a simple procedure. During the operation, an artery and vein were severed. Respondent's husband, Frederick Cushing, explained that, immediately after the procedure, Mrs. Cushing's vital signs began to deteriorate. The doctors believed that she was having a heart attack. A cardiac specialist performed an EKG, but found nothing wrong. Thereafter, a "cat scan" determined that she was suffering from internal bleeding. Her abdomen had filled up with blood, requiring emergency surgery to have the vein and artery repaired. Mr. Cushing indicated that her condition was very serious and that it was not certain that she would survive.

What Mrs. Cushing believed would be a two-day hospital stay stretched into a thirty-day stay. She remained in the intensive care unit for ten days. When she was released, she needed medication for the pain and temporarily needed a wheel chair, physical therapy and the subsequent use of a walker. Although Mrs. Cushing anticipated that she would only be out of work for ten days, she was unable to work for six months. She could not perform her normal household chores. Mrs. Cushing remained under a doctor's care for an entire year and required medication. She testified that she was still taking medicine as of the date of the DEC hearing. A third surgery was also required in September 1989 to remove some polyps caused by tubes that had been inserted in her throat.

Mrs. Cushing testified that, when respondent met with her and her husband in October 1989, he informed them that it looked like she had a good medical malpractice case against

the surgeon. Mrs. Cushing recalled that respondent had told her that the case had to be worth at least \$150,000 for his firm to accept the case. Respondent also told the Cushings that he would be able to represent her and that he had an office in New Jersey. That was untrue. Respondent informed the Cushings that an expert was required to look at her case.

After their initial meeting, respondent forwarded medical authorizations to Mrs. Cushing by letter dated October 24, 1989. According to Mrs. Cushing, she signed and returned them to respondent within a few days.

Mrs. Cushing had no further contact with respondent until November 1990. At that time respondent forwarded a complaint by cover letter dated November 8, 1990, requesting that she sign the verification to the complaint. According to Mrs. Cushing, she signed the complaint and sent it to respondent within a few days, but did not date the verification page. The complaint was not filed until May 1991, some six months later.

Mrs. Cushing testified that, despite repeated telephone calls to respondent, she had no oral communications with him from the time of their initial meeting, October 1989, until the Spring of 1992, when depositions were scheduled. She stated that she would call respondent approximately every three months. Mr. Cushing testified that his wife had become frustrated with respondent's failure to return calls, prompting him to make several calls as well. He, too, received the "runaround" from whomever answered the telephone. He was told that whoever was handling the matter would get back to him. Mr. Cushing testified that "[t]hey used just about every excuse you can think of, and I felt they were probably telling me the truth and that this was just a case that these lawyers are very busy

and they don't have time and so to [sic] wait." 1T74¹. Mr. Cushing claimed that they never received a return telephone call.

According to the Cushings, respondent's firm contacted them only to make appointments for the initial meeting and for depositions. By letter dated May 18, 1992 respondent wrote to Mrs. Cushing to advise her of depositions scheduled for June 11 at his New Jersey office at "The Executive Quarters, Building 'Q' 1930 East Marlton Pike, Cherry Hill, New Jersey." The letter enclosed copies of Mrs. Cushing's answers to interrogatories and medical reports. It requested that she review the documents prior to the meeting so that they could discuss the matter. Mrs. Cushing was instructed to contact respondent's secretary to confirm the appointment.

At some point prior to the depositions, the case was transferred to Cumberland County. Respondent never notified the Cushings that a motion had been filed to change venue or that the motion had been granted.

Following the depositions, respondent contacted a doctor by the name of Maurice Romy to request an expert opinion. By letter dated July 28, 1992 respondent forwarded to Dr. Romy copies of the transcripts of the Cushings' and the surgeon's deposition, as well as Mrs. Cushing's medical records. Respondent's letter indicated that Mrs. Cushing had suffered from a herniated disc in her lower back and that her surgeon had admitted her into the hospital for a "laminectomy." Following Mrs. Cushing's operation, her blood pressure

¹ 1T denotes the transcript of the January 30, 1998 DEC hearing.

had dropped. When the surgeon could see no reason for the drop in blood pressure, he "closed and completed the operation." Thereafter, in the recovery room, Mrs. Cushing's blood pressure continued to drop. A "cat scan" revealed a laceration of the left iliac artery and the vena cava. Respondent requested that the expert, Dr. Romy, address the issues of 1) whether the physical findings before the surgery indicated that surgery was necessary; 2) whether the surgeon had chosen the proper course of surgery; 3) whether the surgery had been performed properly; 4) whether, after the vascular accident during the surgery, the surgeon had responded properly to the drop in blood pressure; and 5) whether the post-operative treatment had been proper. According to Mrs. Cushing, she was never informed that her records had been sent to Dr. Romy.

At some point not specified in the record, the defendant filed a motion to compel the production of an expert report. In December 1992 the court entered an order requiring the submission of an expert report. After respondent failed to obtain a report, on January 23, 1993 the court dismissed the case with prejudice. Respondent did not advise his client of the motion or of the dismissal of the complaint.

Three days after the dismissal, on January 26, 1993, Dr. Romy wrote that he had reviewed the hospital records, as well as the surgeon's records and the depositions of the parties. Dr. Romy's letter to respondent indicated that, according to the surgeon, Mrs. Cushing's blood vessel had been injured by the instrument he had used to remove disc material. The report stated that

[t]he cause of Mrs. Cushing's injuries was either that [the surgeon] slipped in his use of the instruments with which he was working, or that he misjudged the depth of the disc and forced the instrument too far into the disc space. In either event, there was an error on his part which led to the injuries suffered by Mrs. Cushing.

Although the mistake made by [the surgeon] in the course of the operation is one which sometimes occurs during the course of this kind of operation, it is a mistake nonetheless. It is not unavoidable. It can only occur when the instrument is pushed too far into the disc space. Forcing the instrument through the disc space and into the blood vessels on the other side cannot be called proper or acceptable procedure. For this reason, the doctor's conduct did not meet the standard of care required of a doctor performing a laminectomy.

[Exhibit G-6]

Respondent claimed that he was not aware of that letter and that he had not seen it at the time it had been sent to him. The Cushings were never informed of Dr. Romy's report.

The Cushings continued to call respondent in 1992 and 1993. Mrs. Cushing estimated that she had called his office about eight or ten times, but never received a return telephone call or any correspondence from respondent. Because her attempts to call respondent were unavailing, Mrs. Cushing sent two letters to respondent's firm, in October and November 1994. By this time respondent was no longer affiliated with that firm. Although Mrs. Cushing obtained signed receipt cards indicating that the letters had been received, no one from respondent's former firm contacted her.

It was only after Mrs. Cushing contacted the DEC that she was told that respondent was no longer at that firm and, much to the Cushings' surprise, that the case had been dismissed. Thereafter, the Cushings filed an ethics complaint in New Jersey and Pennsylvania and a malpractice suit against respondent.

During the course of an Office of Attorney Ethics', ("OAE") investigation into the matter, the issue of the bone fide office arose when the investigator attempted to send a subpoena to respondent. OAE investigator Alan Beck visited respondent's New Jersey address at the Executive Mews Complex in Cherry Hill to see if it was a legitimate office. Beck found that the Executive Mews was a small group of low-rise buildings. Building Q was unmarked, except for the designation "Building Q." Beck saw no sign outside of Building Q indicating that respondent maintained an office there. Upon entering Building Q, Beck saw a large room with a receptionist in the center. When Beck questioned the receptionist, she informed him that respondent did not maintain an office at that location and that she did not know him. There was, however, a placard behind her desk with a list of names, including respondent's name, as well as names of a number of other attorneys and non-attorneys.

Another OAE investigator, Julie Bakle, testified that she subpoenaed respondent's lease agreement with the Executive Mews. The agreement was titled "Service Agreement for Business Identity Program" and had been executed with the Executive Quarters in Willow Grove, Pennsylvania. Bakle testified that the agreement provided for the use of a large or a small conference room for either a half or a full day, two days a month for two hours each usage, for a total of four hours a month. The agreement also permitted respondent to have mail delivered at the building and then later forwarded to him, to have a telephone line, including the forwarding of telephone messages, and to have an address for use on business cards and stationary.

When Bakle interviewed respondent, he contended that he had kept the Cushings apprised of the status of the matter, including his inability to locate an expert for their case. Because Bakle was unable to locate any written communication to the Cushings, she assumed that respondent's alleged communications had been orally conveyed. Mrs. Cushing, however, denied that respondent had communicated with her or ever told her that he was having difficulties obtaining a favorable expert's report.

According to Bakle, respondent admitted to her that he should not have filed the complaint without a written expert's report. He explained, however, that the statute of limitations was about to expire and that Kubert would not give him the names of other possible expert witnesses. Respondent further denied seeing Dr. Romy's January 26, 1993 report, sent to him after the Cushing matter had been dismissed.

Bakle also interviewed Dr. Romy, who informed her that he had reviewed the matter at respondent's request and had issued a second report dated February 13, 1996. The letter was addressed to an attorney apparently involved with the Pennsylvania ethics proceeding. Dr. Romy's second report was prepared after respondent received notice that he was being investigated by the New Jersey and Pennsylvania disciplinary authorities.

Dr. Romy's second report stated, in relevant part:

I have performed many of these operations myself. I informed Mr. Spiezer that the operation involves removing a disc from between the vertebrae of the patient. After an incision is made in the back of the disc, the disc material is carefully removed with instruments. This is when a retroperitoneal vessel can be injured. This circumstance constitutes a complication. Malpractice would be if this complication is unrecognized and harms the patient, although this was not the case here.

In this particular case, it appears that the doctor carefully examined the patient, together with the anesthesiologist and the anesthetist to determine if she was bleeding before the incision site was closed. When the patient had difficulty during recovery, her doctor was there to have her sent back to the operating room, where the blood vessel was repaired.

Considering the circumstances of this case, I could not then, and cannot now, point to anything that the doctor did that constituted obvious negligence and led to the further injury of the patient.

[Exhibit G-12]

Bakle stated that, when she questioned Dr. Romy about the discrepancy in his two reports, he claimed that the "first letter should be construed the same as the second letter, that there was really no difference." According to Bakle, Dr. Romy tried to explain that the first letter should be interpreted to mean that there was no malpractice in the case because, even though the blood vessels had been injured, there had been no harm to the patient. Bakle stated that Dr. Romy tried to make her understand that both letters or reports were the same.

Respondent, in turn, testified that he stopped working for Bernard Kubert and Associates in May 1994. He opened offices in Philadelphia and New Jersey, as described above. Respondent stated that, while he worked for Kubert, the firm had a number of clients with New Jersey matters. Any litigation was referred out to New Jersey firms. At some point, Kubert no longer wanted to refer the cases and decided to open up a New Jersey office in October 1990, when respondent became licensed to practice in New Jersey. The Executive Quarters was a "service" provided at a building in the Executive Mews. The Executive Quarters provided space on an as-needed basis, answered telephone calls and collected mail.

Respondent claimed that, when he initially met with Dr. Romy, he did not ask for a report, believing that Dr. Romy would issue an unfavorable report. Respondent also claimed that he had not seen Dr. Romy's January 1993 report.

Respondent admitted that he failed to reply to the defendant's motion to dismiss, because he did not have an expert. Respondent was aware of the dismissal at the time, but allegedly did not recall whether he had informed Mrs. Cushing of that unfavorable event. Respondent asserted, however, that he had informed Mrs. Cushing that he was having difficulty obtaining an expert and that the case could not go forward without an expert. Respondent also alleged that, after Mrs. Cushing's case was dismissed, the defendant's attorney offered to hold the file open to allow respondent to reinstate the matter if he was able to retain an expert. According to respondent, he had informed Mrs. Cushing that he was continuing to look for an expert. Respondent's testimony, however, contradicted his claim that he did not recall if he had told Mrs. Cushing about the dismissal.

Respondent also claimed that he had discussed the Cushing matter with "other doctors." He was, however, unable to identify them, with the exception of a Dr. Lewis, located in Florida. Respondent maintained that Dr. Lewis was willing to give him insight into cases, at no charge. Respondent could not recall whether he had forwarded Mrs. Cushing's medical records to Dr. Lewis.

Respondent conceded that he was solely responsible for the Cushing matter. When questioned about his failure to send a letter to Mrs. Cushing informing her that her case had

been dismissed, respondent replied that it was his "hope that we could still get an expert and proceed with the case." 2T174.² However, respondent stated, Mr. Kubert would not give him the names of any experts to contact and would only authorize the expenditure of \$500 on an expert. Respondent admitted that, after he left the Kubert firm in May 1994 – sixteen months after the Cushing matter was dismissed – he did not advise the Cushings of his departure, claiming that Kubert, not he, had such responsibility.

Respondent testified that, after the Pennsylvania ethics matter was filed, his attorney advised him to contact Drs. Lewis and Romy to confirm their opinions. Respondent then requested that Dr. Romy write a report memorializing their 1992 conversations about the case. Respondent stated that the report had been requested on the advice of counsel, because of the Pennsylvania and New Jersey investigations into allegations of misconduct on his part. The Pennsylvania ethics matter was dismissed for unknown reasons.

As to any contacts with the Cushings from November 1990 through 1995, respondent maintained that, if they had in fact called him repeatedly, he certainly would have returned their calls. Respondent stated that, although there were instances when he did not call clients back for days or even a couple of weeks, he never let one or two months go by without returning calls. Respondent alleged that his communication with the Cushings had been oral, not written.

² 2T denotes the transcript of the March 6, 1998 DEC hearing.

As to the two reports issued by Dr. Romy, respondent stated that, although the conclusions seemed to differ, he did not believe that they were different in their legal impact on the case.

Lastly, respondent testified that he closed his New Jersey office and terminated his arrangement with the Executive Mews when his first New Jersey attorney informed him about "the New Jersey decision" – presumably In re Kasson, 141 N.J. 83 (1995) – prohibiting such types of arrangements. Respondent stated that afterwards he opened a temporary office in his house, then rented office space in Vineland and later in Camden.

* * *

The DEC found that respondent had only taken minimal efforts in the Cushing case before filing the complaint. The DEC concluded that this lack of attention was a violation of RPC 1.3 (lack of diligence). The DEC further found that respondent's conduct after filing the complaint – his failure to produce an expert report, resulting in the dismissal of the case with prejudice, and the failure to take action to reinstate the complaint – rose to the level of gross neglect, in violation of RPC 1.1(a).

The DEC also found that respondent's testimony lacked credibility, noting that he at first could not recall transmitting documentation to Dr. Romy and then later acknowledged that it was his signature on the transmittal letter dated July 28, 1992. Moreover, the DEC concluded that respondent's testimony about Dr. Romy's two opinions was not believable,

since the letters expressed completely opposite opinions. The DEC remarked that, while the substance of Dr. Romy's first opinion might not have been legally sufficient to withstand a motion for summary judgment, it was sufficient to constitute compliance with the order requiring the production of an expert report. The DEC was unable to understand why Dr. Romy's report, favorable to Mrs. Cushing, had been issued after the date of the order dismissing the case. The DEC also found incredible respondent's testimony that he was unaware of Dr. Romy's first report, which had been addressed to respondent and which had been physically located at respondent's firm for sixteen months.

The DEC concluded that respondent violated RPC 1.4(a) (failure to communicate), believing the Cushings' testimony that respondent virtually ignored their requests for information about the case. The DEC found that respondent failed to inform the Cushings 1) that there was an order compelling the production of an expert report; 2) that his failure to obtain an expert report resulted in the dismissal of their case with prejudice; 3) that he had not filed a motion to reinstate the matter; and 4) that he was leaving the Kubert law firm.

The DEC also found that respondent violated RPC 8.4(c) when (1) he failed to disclose to Mrs. Cushing that the complaint had been dismissed with prejudice; (2) he told the Cushings, at their first meeting, that he could handle the case in New Jersey; (3) he denied knowledge of Dr. Romy's first report; and (4) he requested a second report that was contradictory to the first.

The DEC further found that respondent's request for the second report from Dr. Romy to "answer the inquiries raised by the Pennsylvania and New Jersey investigations" also violated RPC 8.4(d) (conduct prejudicial to the administration of justice).

Additionally, the DEC determined that the Executive Quarters arrangement was nothing more than a mailing address and answering service, in violation of R.1:21(a). The DEC did not find, however, that respondent violated RPC 5.5(a) when he took on the Cushing case before being admitted in New Jersey. The DEC reasoned that "[i]t is only the technical defense of the lack of appearance before our Courts which prevents the panel from finding a violation."

Lastly, the DEC found that Mrs. Cushing was harmed by respondent's failure to act. The DEC did not find any mitigating factors. The DEC, thus, recommended the imposition of a six-month suspension.

* * *

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

Undeniably, respondent's conduct in the Cushing matter was improper. He acknowledged that, once the Kubert firm accepted the case, he was responsible for handling the matter. After his initial meeting with the Cushings in October 1989, he did not discuss

the case with them or meet with them again until depositions were scheduled, June 11, 1992. In the interim, although respondent forwarded the complaint and verification to Mrs. Cushing on November 8, 1990, he did not file the complaint until May 1991, some six months later. Moreover, he did not attempt to obtain an expert report until July 1992, more than one year after he filed the complaint. Finally, after a motion to compel the production of an expert report was filed, the matter was dismissed with prejudice, in January 1993, for the plaintiff's failure to produce a report. In short, respondent took no action to further Mrs. Cushing's case, failed to advise her of the status of the matter and failed to reply to the Cushings' telephone calls, despite his assertions to the contrary. Respondent's conduct in this regard violated RPC 1.1(a), RPC 1.3 and RPC 1.4(a).

As to the charges that respondent violated RPC 8.4(c), respondent admitted that he contacted Dr. Romy after ethics grievances were filed against him in Pennsylvania and New Jersey. He claimed that his attorney had advised him to obtain a report from Dr. Romy indicating that the surgeon had not committed malpractice. The DEC did not believe respondent's testimony that he was unaware of Dr. Romy's earlier report indicating that the surgeon did not observe the standard of care required for a laminectomy. The Board disagreed with the DEC's conclusion. In the Board's view, there is insufficient evidence in the record to establish that respondent knew of the first report and commissioned the second report to cover up the effects of his neglect in the matter. The Board, thus, dismissed the charges of RPC 8.4(c) and RPC 8.4(d), as they relate to Dr. Romy's second letter.

The Board concurred, however, with the DEC's conclusion that respondent's failure to inform the Cushings that the case had been dismissed was a misrepresentation by silence, in violation of RPC 8.4(c). Although the complaint does not specifically allege these facts, the evidence supports a finding in this regard. The complaint is, therefore, deemed amended to conform to the proofs. In re Logan, 70 N.J. 222, 232 (1976).

As to the bona fide office issue, the arrangement that respondent had with the Executive Mews in Cherry Hill was merely to receive mail and to forward telephone messages to Pennsylvania. He did not have a bona fide office in that location. He, thus, violated RPC 5.5(a) as well.

The DEC did not find a violation of RPC 5.5(a) for respondent's acceptance of the Cushing representation before being admitted to the New Jersey bar. The record shows that respondent first met with the Cushings in October 1989 and, at that time, agreed to represent them in a New Jersey action. During that same month, respondent forwarded medical authorization forms to Mrs. Cushing for her signature in order to begin working on her case. Notwithstanding the fact that respondent did not file a complaint until 1990, presumably at or near the time of his admission to the New Jersey bar, he still represented himself as capable of representing Mrs. Cushing in New Jersey, prior to his admission to the bar, and rendered legal advice on New Jersey law when he first met with the Cushings. It is not only appearances in court that amount to legal representation. Respondent's advice to the Cushings about the case, the forwarding of medical authorization forms and the preparation

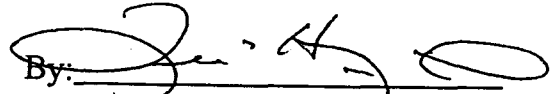
to file a complaint clearly constitute legal representation. Respondent's conduct was, therefore, a violation of RPC 5.5(a).

In short, respondent's conduct in this matter included violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 8.4(c) (misrepresentation to the client) and RPC 5.5(a) (failure to maintain a bona fide office and the unauthorized practice of law).

Conduct that involves a failure to maintain a bona fide office requires the imposition of a reprimand. See In re Kasson, 141 N.J. 83 (1995). Similar discipline is imposed when an attorney intentionally misrepresents the status of a case to a client. In re Kasdan, 115 N.J. 472, 488 (1989). Here, respondent's misconduct was compounded by gross neglect, lack of diligence, failure to communicate with the client and the unauthorized practice of law. Ordinarily, thus, a three-month suspension would be the appropriate discipline for the totality of respondent's conduct. See, e.g., In re Hodge, 130 N.J. 534 (1993) (three-month suspension for failure to communicate, failure to turn over property to clients in three matters, gross neglect, lack of diligence in one of the three matters, pattern of neglect, failure to cooperate with the ethics system and failure to maintain a bona fide office). Accordingly, the Board unanimously determined that respondent should be suspended for three months. Two members did not participate.

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

Dated: 8/23/99

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Aaron M. Spiezer
Docket No. DRB 99-071

Argued: April 15, 1999

Decided: August 23, 1999

Disposition: Three-Month Suspension

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Cole		x					
Boylan							x
Brody		x					
Lolla		x					
Maudsley		x					
Peterson		x					
Schwartz		x					
Thompson							x
Total:		7					2

Robyn M. Hill 9/15/99
 Robyn M. Hill
 Chief Counsel