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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-201

IN THE MATTER OF :

BARRY F. ZOTKOW :

AN ATTORNEY AT LAW :

Decision

Argued: October 14, 1999

Decided: April 12, 2000

James R. Stevens appeared on behalf of the District IIA 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 IIA Ethics Committee (DEC).

Respondent was admitted to the New Jersey bar in 1971 and maintains an office for the practice of law in Fort Lee, Bergen County.

The complaint alleged that, in a personal injury matter, respondent exhibited a pattern of neglect, lack of diligence and failure to communicate with the client. In addition, the complaint charged that respondent made misrepresentations to the DEC.

* * *

Respondent was privately reprimanded on January 2, 1992 for (1) allowing a complaint to be dismissed after he failed to oppose his adversary's motion to dismiss the complaint, (2) failing to inform the client that the complaint had been dismissed and (3) failing to take remedial action to reinstate the complaint. On July 12, 1995 respondent received a three-month suspension for gross neglect, lack of diligence, failure to communicate, failure to expedite litigation and failure to make reasonably diligent efforts to comply with proper discovery requests in a litigation matter. On February 6, 1996 respondent was suspended for three months for gross neglect, pattern of neglect, lack of diligence, failure to communicate, failure to expedite litigation and failure to cooperate with the ethics authorities.

* * *

On or about April 18, 1989, the grievant, Carmine Sabia, retained respondent to

represent him in connection with injuries sustained when Sabia fell into a pothole in the City of Paterson ("the City").

On or about October 29, 1990 respondent filed a complaint on Sabia's behalf in Passaic County. The City filed an answer on January 2, 1991. An arbitration hearing was held on October 30, 1992, at which time a $15,000 award was entered in favor of Sabia. When the City filed a demand for a trial de novo, the matter was listed for trial on March 9, 1993. Through no fault of respondent, several further trial dates ensued: June 28, 1993; November 9, 1993, March 15, 1994 and July 12, 1994. On July 16, 1994 the complaint was dismissed for failure to prosecute the case.[1] Despite that dismissal, the case was again listed for trial on December 5, 1994. Respondent's alleged misconduct occurred primarily after the July 12, 1994 trial date.

The Dismissal of the Case

At the DEC hearing, respondent testified as follows:

> On that date my case was probably fourth or fifth in line to be tried. And we were placed on an hour's call and, in fact, I never heard from the court on the 12th after I left the courthouse, never heard from the court on the 13th. I never heard from the court on the 14th. I never heard from the court on the 15th.
>
> What happened on the 16th, I don't know. The case got dismissed by [the judge] for failure to prosecute, but I don't know why. It's not as alleged in Mr. DeDio's brief that it was because of our inability to produce an expert witness.

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[1]Respondent did not deny that the complaint was dismissed. However, it is unclear from the record whether the court actually entered an order of dismissal. Respondent and opposing counsel never received such an order. The original court file was apparently lost and was, therefore, unavailable for review by the DEC investigator.

That is not true. We were ready at all times to try this case. I had sent letters to the doctors. I had them on call.

[T7/7/98 167]

Months later, however, at the DEC hearing of November 2, 1990, respondent gave an entirely different version of those events:

. . .as I did in the past, I gave Mr. Sabia a notice of the trial date and on the day of trial, I went down to answer the call on behalf of Mr. Sabia.

. . .We were on the so-called one-hour call. By the time that one-hour call came in I was on my feet in Bergen County . . .

. . . — The reason I did not appear in Passaic County when it was actually called for trial was not because the doctors weren't notified, not because of Mr. Sabia's unavailability, it was strictly because I was already on my feet in Bergen County, and at that point it was my understanding that the case was going to be recycled and, in fact, to my knowledge it was recycled, because I received a trial notice from the court for December 5.

[T11/2/98 107-108]

* * *

I frankly didn't even expect the case to be reached that week, because there were a number of older cases ahead of me. So when the call [from the court] did come through and my secretary did mention to me that [the judge] had called, she said, I just told him you weren't available, and that was the end of the conversation. I am not even sure that [the judge] called. It might have been somebody from his chambers called just to see if I was available to come in.

[T11/2/98 111-112]

In contrast to respondent's earlier testimony, respondent was apparently notified by the court of the trial date, July 16, 1994. Admittedly, respondent did not monitor the case in the days that followed. Respondent stated that, because he was unavailable to try the case,

he believed that the court would "recycle" the case and reschedule it for trial. However, respondent produced no evidence of the court's awareness that he might be unavailable for trial. Likewise, respondent did not communicate with the court to ensure that his unavailability would not jeopardize the process of the case.

Two documents contradict respondent's version of the events that transpired in the four-day period between July 12, 1994 and July 16, 1994. The first document was authored by Louis F. Treole, Esq. and sent to respondent on April 3, 1995. Sabia had asked Treole, who represented him in an unrelated matter, to look into his case in early 1995, because of Sabia's difficulty in obtaining a status update from respondent. Treole's letter read as follows:

> This matter was dismissed on 7/16/94 by [the trial judge] for failure to prosecute. It appears from the file of Mr. Lisbona [the City's attorney] in my discussions with his office telephonically that on July 14, 1994 before [the trial judge] the matter was to be tried. Somehow or another, the matter was not tried but a tried or dismissed order by [the trial judge] to you required that you try the case on the 16th. Evidently you failed to show up for Court on the 16th and the matter was dismissed by [the trial judge]. However, no order from [the assignment judge's] office was submitted to any of the attorneys. Further, that is why there were September and December trial dates in 1994 although I am told those trial dates were canceled.
>
> [Exhibit J-4]

Treole declined to take the case after determining that the possibility for success had been fatally hampered by the dismissal, as well as by the City's apparent unwillingness to renew settlement negotiations thereafter.

The second document was prepared by the City's attorneys. In August 1995 Sabia retained Richard E. Novak, Esq. to file a motion to restore the case. In their opposition papers to the motion, the City's attorneys stated the following:

> This defendant, the City of Paterson was prepared, ready and able for trial on July 12, 14 and 15, 1994. In fact, the plaintiff requested an adjournment on July 15 but same was denied. At that time, the plaintiff was unable to produce his expert witness and the case was dismissed without prejudice.
> [Exhibit C-2]

Respondent claimed at the DEC hearing that his case was always ready for trial on July 12, 1994. He reasserted that he was "on his feet" on another matter in Bergen County from July 13 through July 16 and that his secretary communicated that fact to the court. Respondent produced no evidence that he was involved in another matter in Bergen County or that he had notified the Passaic trial court or his adversaries of that fact.

In early September 1994 the trial court mistakenly generated a new trial notice listing the case for trial on December 5, 1994. Yet, no motion to restore the complaint had been filed. According to respondent, he notified Sabia of the new trial date and told Sabia not to appear in court, but to remain available at home in case the matter was called for trial. Respondent claimed that he appeared in court on December 5, 1994 and that Sabia's case was not listed for trial. Respondent stated that he remained in court through the entire calendar and, that, before leaving the courthouse, he asked court personnel about the status of Sabia's case. Respondent testified as follows:

> [Respondent] I went to Nancy Ladd's office which is next to Judge Mandak's chambers and courtroom at that time because

they devoted it exclusively to arbitration. That's where the civil assignment clerk's office was. They have a number of women on computers there.

I went to a woman Elizabeth I think that Nancy directed me to just to call the case up on the computer to see what the status was. She dialed in the docket number. The case came up and she saw a trial. She saw a trial date for December 5, that the case had been listed for trial on the computer and that a notice had been sent to me.

So then they didn't know why it wasn't on the trial calendar call because there was no indication on the computer that the case had been dismissed. I spoke to Nancy and said we don't know what's going on here.

[Panel member] Did you call Lisbona's office?

[Respondent] No.

[Panel member] Why?

[Respondent] Because Nancy said, I don't know what's going on here.

[Panel member] You see you're not on the calendar, right?

[Respondent] Right.

[Panel member] They don't call you?

[Respondent] Right.

[Panel member] Lisbona's office is all over this case, wasn't there?

[Respondent] Well they were there but not on this case.

[Panel member] That's what I'm saying. They're not there. You tell Judge Mandak you have a question about this. You talked to Nancy Ladd you talked to the other woman Elizabeth. You haven't put in a call to Lisbona's office yet?

[Respondent] There was no reason to.
[T7/7/98 173-174]

Incredibly, knowing that his adversaries were in court that day on another matter, respondent did not ask them about the status of Sabia's case.

The questioning at the DEC hearing then turned to whether or not Nancy Ladd had ever contacted respondent with her findings. Respondent testified that, in early January 1995, he grew concerned about the status of the case and returned to the courthouse to review the court's file. Respondent stated that there was no indication in the court's file of problems in the case, and that it contained no order of dismissal. Respondent made no further attempts to determine the actual status of the case, claiming that he was awaiting a new trial date. At no time did respondent attempt to advise Sabia of these events.

The $5,000 Settlement Offer

In early 1993, during a settlement conference, the City offered to settle the case for $5,000. Respondent rejected that offer. According to respondent, it was Sabia's intention to use any settlement proceeds to offset a claim by Sabia's former girlfriend for outstanding child support obligations. To that end, respondent wrote to the former girlfriend's attorney, Anthony Marinello, on March 11, 1993. Respondent's letter stated, in part, as follows:

> The $5,000 settlement letter was rejected by me on behalf of Mr. Sabia. However, there was an indication from counsel that the City might settle the case for $5,000 plus Mr. Sabia's out-of-pocket medical expenses which are substantial and which are also liens on the file. Accordingly, I am writing to inquire whether your client would authorize such a settlement with the understanding that she would receive approximately $3,000 'net' from that

settlement which would have to be acceptable by her in full settlement of all arrearages regarding child support.

[Exhibit J-2]

Respondent explained that he rejected the $5,000 offer from the City because the alleged child support arrearages were between $15,000 and $45,000. Respondent contended that Sabia had authorized him to reject the City's offer and to take the case to trial because there would be no money for Sabia out of a settlement.

Sabia, however, testified that he was completely unaware of the City's 1993 settlement offer and would have accepted it. Sabia claimed that Marinello was asserting unwarranted child support claims and that Sabia's outstanding support obligation was only $450. According to Sabia, he could have paid the obligation out of the $5,000 settlement.

There is nothing in the record to substantiate any of respondent's claims, other than a letter from the Marinello law firm, dated June 12, 1989, which makes no reference to outstanding child support arrearages. Likewise, there is no evidence that respondent made any effort to confirm the existence of an obligation before negotiating with Marinello in this regard. Moreover, there is no proof that respondent advised Sabia of the settlement offer or of his rejection of it. Also, respondent did not send Sabia a copy of his March 11, 1993 letter to Marinello, which discussed the City's offer.

As noted above, Sabia was certain that he never authorized respondent to reject the City's offer and testified that he did not know of the offer until 1995, when he retained new counsel.

Failure to Communicate with Client

Sabia testified that respondent failed to communicate the City's $5,000 offer to him, as previously discussed. Sabia stated that he was otherwise satisfied with respondent's communications with him during the case until the December 5, 1994 trial date. On that day, Sabia testified, he appeared for trial, but could not locate respondent in the courthouse. Sabia further testified that, without respondent's assistance, he was able to determine that his case was not listed for trial, looked for respondent in the courtroom and then left the courthouse. Later that day, according to Sabia, he attempted to reach respondent at his office, but was unsuccessful. Sabia recalled speaking to respondent's secretary, who told him that respondent was in court at the time and would return his call. According to Sabia, respondent never called him back.

Respondent, in turn, testified that he was always available to speak to Sabia. Respondent further asserted that he was present in court on December 5, 1994, but did not see Sabia. Respondent claimed that, contrary to Sabia's testimony, he had called and spoken to Sabia from the courthouse on December 5, 1994. According to respondent, in that conversation he explained to Sabia that the case was not listed for trial and that court personnel were trying to determine the true status of the matter.

Sabia vehemently denied that he spoke to respondent that day. Sabia further testified that, on one other occasion after December 5, 1994, when he attempted to obtain an update on the case, respondent never returned his telephone call. It is uncontroverted that, in the

months to follow, respondent did not attempt to contact Sabia about the status of the matter. In fact, respondent had no further contact with Sabia until subsequent counsel demanded the return of the file, in or about April 1995.

* * *

During respondent's DEC summation, and in an effort to mitigate his actions in this matter, he explained that, prior to 1992, he had suffered from undiagnosed, severe depression, which had affected his practice of law. He claimed that he was placed under a doctor's care and that he was treated with psychotherapy and a Prozac regimen. Respondent presented no evidence to support his contentions, claiming that he had supplied that information in a previous disciplinary matter. In any event, respondent freely admitted that he had ceased his treatments voluntarily prior to 1994, when the misconduct in this matter occurred. Respondent added that, in his view, he had served Sabia well throughout the representation. He blamed the court for any mishandling of the case, pointing to its failure to enter an order that would have alerted him to the dismissal of the case.

The DEC found violations of RPC 1.3, RPC 1.4(a) and RPC 1.1(b)(pattern of neglect). In finding a pattern of neglect, the DEC relied on respondent's past instances of gross neglect, for which he had already received discipline. The DEC also found a violation of RPC 8.4(c), for respondent's false testimony at the ethics hearing, reasoning as follows:

> Finally, the panel believes the grievant when he testified that the respondent did not appear at the trial call on December 5, 1994. If he had, it is highly suspect that he did not subsequently write a letter to the Court or attempt to contact Mr. Lisbona to have the problem rectified. He did not call the grievant to advise of the problem. Instead, he did nothing for two months until he was contacted by the respondent's new attorney.

The DEC recommended a suspension of unspecified duration.

* * *

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.

At the outset, it should be noted that, although respondent testified in great detail when recounting the events in this case, his testimony was sometimes inconsistent. One example is his recollection of Nancy Ladd's "promise" to find out about the status of the case after the December 5, 1994 trial date. The DEC found respondent so unworthy of belief that, despite respondent's lengthy account of the events of December 5, 1994, it concluded, on the basis of Sabia's testimony, that respondent had not attended the trial call on that date.

Putting credibility issues aside for the moment, the following is clear from the record. Respondent agreed to represent Sabia in the personal injury action. It appears that respondent's representation progressed smoothly until July 1994. The record is spotty with regard to the specific events of July 12 through 16, 1994. We know that respondent was

aware of the July 12, 1994 trial date and, according to the account of the City's attorney, respondent may have requested an adjournment on July 15, 1994. We also know that, not until his summation before the DEC did respondent recall for the first time that his office received a "one-hour" call from the court, requiring his appearance for trial on July 16, 1994. With that admission, it is clear that respondent knew the case would be dismissed if he did not appear on that date.

Respondent took no action after the July 16, 1994 dismissal, claiming that he did not know that the matter had been dismissed. Indeed, it appears that the court may not have issued a written order dismissing the case. Respondent took no further action until early September 1994, when he received a new trial date of December 5, 1994. Instead of calling the court to determine the true status of the matter, respondent accepted that the matter was proceeding apace by sending trial notices to Sabia and the attorney for Sabia's ex-girlfriend, Marinello. Respondent did not pursue the case further until his alleged appearance at trial on December 5, 1994. At this point, respondent should not have rested until he found out why the case was not listed for trial that day. Nonetheless, respondent took insufficient action to correct the situation, choosing instead to leave the matter in the hands of the court personnel who assisted him that day.

Respondent asserted below that any problems in the case were created by the court, even after December 1994. Respondent testified that he reviewed the court's file in early January, but found no order of dismissal. Certainly, at that point diligence required him to

contact the court directly to find out if and when the case had been dismissed. He did not do so. Instead, he claimed that the problem was court-related and that court personnel would straighten the problem out. Respondent blamed the court for any problems caused by the July 16, 1994 dismissal. It was respondent's duty, however, to protect Sabia's interests and to prevent the dismissal in the first instance. Prudence required respondent to find out where the matter stood with the court at all times and to take affirmative action to put the matter back on track, if necessary. Respondent's conduct in this regard constituted gross neglect and lack of diligence, in violation of RPC 1.1(a) and RPC 1.3, respectively.

With regard to the allegation of a violation of RPC 1.4(a), respondent relied on the bare assertion that he informed Sabia of the City's $5,000 settlement offer and rejected that offer in Sabia's behalf. However, respondent offered no evidence that he communicated the offer to Sabia. Respondent produced a letter to Marinello that mentioned the offer; respondent did not send Sabia a copy of the letter. In fact, Sabia denied any knowledge of the offer and testified that, had respondent relayed it to him, he would have readily accepted it.

After respondent failed to appear at the July 16, 1994 trial date, he neglected to so inform his client. This failure to communicate to his client important aspects of the case continued into December 1994, when he failed to alert Sabia to problems in the case or to respond to Sabia's inquiries. Finally, after discovering problems in the case in January 1995, respondent again failed to advise Sabia of the developments in the case. Sabia was left with

no alternative but to seek new counsel. Respondent's failure to inform Sabia about critical aspects of the matter violated RPC 1.4(a).

With regard to the alleged violation of RPC 8.4(c), we are unable to agree with the DEC's finding of misrepresentation. The DEC believed that respondent misrepresented that he had appeared at the trial call on December 5, 1994, reasoning that, "if he had, it is highly suspect that he did not subsequently write a letter to the court or attempt to contact Mr. Lisbona to have the problem rectified. He did not even call the grievant to advise of the problem." While it is true that respondent's testimony was peppered with inconsistencies, there is no evidence that respondent was not in court that day. It is possible that he and Sabia simply missed each other. Therefore, we dismissed the charge for lack of clear and convincing evidence.

Finally, with regard to the violation of RPC 1.1(b), the DEC relied on respondent's prior ethics history, which contained prior instances of gross neglect, to find a pattern of neglect. Because, however, the neglect in the within matter was unrelated to the previous matters and because the prior misconduct occurred from 1988 through 1992 (the misconduct in this matter occurred in 1994 and 1995), we dismissed this charge as well.

With respect to the issue of mitigation, respondent urged the DEC to consider that he had suffered from and been treated for depression. The DEC did not question respondent's truthfulness in that regard and, in fact, need not have questioned it, as respondent's claimed depression was not relevant to Sabia's matter. Respondent admitted that he had ceased

treatment prior to the July 1994 dismissal of Sabia's complaint. Therefore, we cannot find that respondent's actions were mitigated by illness.

Ordinarily, we defer to the DEC's credibility findings. As the trier of fact, the DEC is generally in a better position to assess the credibility of witnesses, through observation of their demeanor. Here, the DEC found that respondent lacked any contrition for his actions. Clearly, this assessment by the DEC influenced some of its findings, as well as its recommended form of discipline for respondent. It could be that, before the DEC, respondent was unrepentant for the mishandling of Sabia's case. Before us, however, respondent acknowledged his wrongdoing and showed remorse for his conduct. We believed respondent's belated expression of regret and took it into account in fashioning the appropriate degree of discipline for his ethics infractions. Unquestionably, however, respondent's conduct was troubling. Generally, such conduct, when combined with a prior ethics history similar to respondent's, would warrant a term of suspension. See In re Smith, 140 N.J. 212 (1995) (six-month suspension for lack of diligence and failure to cooperate with disciplinary authorities; the attorney had previously been privately reprimanded and suspended for one year.); In re Ortopan, 147 N.J. 330 (1997) (six-month suspension for lack of diligence, failure to communicate, failure to deliver a file and failure to cooperate with disciplinary authorities; the attorney had previously been suspended for three months for the same type of violations.); and In re Martin, 122 N.J. 198 (1991) (three-month suspension for

mishandling four matters for two years; the attorney had been previously suspended for six months the year before for a pattern of neglect in seven matters during a five-year period).

Respondent's prior ethics history is significant. It is our hope, however, that he has finally recognized his shortcomings and that henceforth he will observe strictly the ethics principles that govern the profession. Based largely on respondent's newly found recognition of his misconduct, we unanimously determined to impose only a reprimand. Respondent is forewarned, however, that any future encounters with the disciplinary system will not be viewed with the same indulgence and will be met with stern discipline.

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

Dated: 4/12/00

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Barry F. Zotkow
Docket No. DRB 99-201

Argued: October 14, 1999

Decided: April 12, 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				2

Robyn M. Hill 4/24/00
Robyn M. Hill
Chief Counsel