SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-121
District Docket No. IIIB-06-013E

IN THE MATTER OF	
JOSEPH A. CARMEN	
AN ATTORNEY AT LAW	

Decision

Argued: September 17, 2009

Decided: November 17, 2009

John A. Zohlman, III 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 originated from respondent's failure to comply with the conditions imposed on him in an agreement in lieu of discipline. It was before us on recommendation for discipline filed by the District IIIB Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.3 (lack of diligence), RPC 3.2 (failure to expedite litigation), RPC 1.4(b)

(failure to communicate with a client), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The DEC recommended that we impose a censure. We determine that the more appropriate form of discipline is a reprimand.

Respondent was admitted to the New Jersey bar in 1971. In 1985, he received a private reprimand for engaging in a conflict of interest.[1] Specifically, respondent represented a union member in a disciplinary action. He later represented the union in a subsequent action brought against the union by his former client. Respondent also failed to promptly withdraw from the representation of the union when the conflict was brought to his attention. In the Matter of Joseph A. Carmen, DRB 85-211 (December 23, 1985).

In January 2004, Carl J. and Cheryl Satz Petruzzelli retained respondent to represent them and their company, Photo Works, in a breach of contract action against the Rosa International Middle School and the Cherry Hill Board of Education, regarding a contract for school years 2002-2005. Respondent entered into a written fee agreement with the Petruzzellis, who gave him a $3,000 retainer.

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[1] The stipulation of facts submitted to the hearing panel mistakenly states that respondent "has no prior record of attorney discipline." More accurately, respondent has no record of prior public discipline.

During the next five months, Carl called respondent on a number of occasions, seeking information on the status of his claim. Respondent did not return his calls. In June 2004, Carl was able to reach respondent. Respondent advised Carl that he had taken no action against the school district yet, but that he would institute suit shortly. Respondent told Carl that he was having health issues that hindered his ability to work. Specifically, respondent claimed that, from early 2004 until February 2006, he was suffering from hypertension and anxiety and that, as a result, a number of matters in his office did not receive the proper attention from him.

Following respondent's June 2004 discussion with Carl, respondent failed to return Carl's numerous subsequent calls.

In April 2005, respondent advised Carl that the lawsuit would be filed, interrogatories served in the next six weeks, and that depositions would take place in August 2005. Respondent stated that, when he made those statements, he thought that his medical condition was improving. In June 2005, however, his condition worsened. Over the next six months, respondent took no action on his clients' behalf.

At the hearing, respondent acknowledged that he should have contacted Carl to advise him of his medical condition and to

suggest that he get another attorney. Respondent maintained that he never misrepresented to Carl the status of the claim or the work that he had performed.

In October 2005, Carl faxed a letter to respondent, requesting information about his case. Respondent did not reply. On January 18, 2006, Petruzzelli sent a letter to respondent, requesting the return of the $3,000 paid to him. On February 4, 2006, respondent forwarded to Carl a check for $3,000, along with a letter explaining the health problems that he had been facing and their impact on his representation.

At the hearing, respondent recognized that, at the time of his illness, he should have sought assistance from other attorneys or withdrawn from the representation. He asserted that he would act differently if the situation arose again and would refer out his cases.

Respondent stipulated that he violated RPC 1.3, RPC 3.2, and RPC 1.4(b).

The DEC found that respondent violated RPC 1.3, RPC 3.2, and RPC 1.4(b), as stipulated. The DEC found no violation of RPC 8.4(c), reasoning that respondent "did not engage in outright dishonesty, fraud or deceit. However, respondent did make continuous promises to pursue this matter, which promises

were not kept." The DEC recognized that respondent had health concerns during the period in question, but opined that their magnitude did not justify his misconduct.

The DEC was concerned that, even with this experience behind him, respondent had not taken any specific measures to ensure that his clients would be protected, should his health issues return. The DEC also expressed concern over the length of time that the Petruzzelli matter went unattended, the fact that the Petruzzellis did not receive services that had been paid for, and the inconvenience to them.[2]

In determining the appropriate measure of discipline, the DEC considered respondent's cooperation, contrition, and his admission that he violated three RPCs. The DEC also weighed respondent's prior "unblemished" record over thirty years at the bar against the admitted misconduct.

The DEC recommended that respondent receive a censure and that he "be required to provide to the satisfaction of the Court that [he] has instituted a backup coverage plan for outside counsel to assist him in the event [he] should suffer from any

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[2] It does not appear that the Petruzzellis suffered financial harm due to respondent's inaction.

future health related or other difficulties in conducting the practice of law and representing future clients."

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

The record supports a finding that respondent violated RPC 1.3, and RPC 1.4(b), as stipulated. Because respondent never filed suit on the Petruzzellis' behalf, RPC 3.2 is not applicable. We, therefore, dismiss that charge. A question remains, however, about a violation of RPC 8.4(c).

Respondent was charged with misrepresenting the status of the breach of contract action to Carl, when he advised him that suit would be filed, interrogatories served, and a deposition scheduled. Respondent did not stipulate that he violated that rule and the DEC did not find that he did so.

We recently considered, and the Court recently decided, two matters that are helpful to us in determining whether the RPC 8.4(c) charge is sustainable on these facts. Although, in both matters, the attorneys received reprimands for the sum of their misconduct, we decided the RPC 8.4(c) question differently in the two matters.

At our February 2009 session, we considered In the Matter of David G. Uffelman, DRB 08-355 (June 19, 2009) (now In re

Uffelman, N.J. (2009)), where the attorney, for two months, advised his client that he was working on a motion in a litigated matter and never filed the motion. Uffelman suffered from extreme depression. We concluded that, at the time that Uffelman said that he would file the motion, he intended to do so. We expressed our view that, if an attorney makes a statement believing it to be true when he or she makes it, then it is not a misrepresentation. We did not find that Uffelman violated RPC 8.4(c). The Court reprimanded Uffelman.[3]

A few months later, we considered In the Matter of Clifford B. Singer, DRB 09-021 (July 8, 2009) (now In re Singer, N.J. (2009)). There, we reached a different conclusion about the attorney's misrepresentations, finding that he violated RPC 8.4(c). Singer, too, suffered from depression. The difference between Uffelman and Singer was the length of time that the attorney misrepresented that work was being done. Uffelman involved only a two-month period during which the attorney told the client that he was working on a motion. In Singer, however, for four years, the attorney periodically misrepresented that he

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[3] We determined that Uffelman should receive a reprimand, even without a finding that he violated RPC 8.4(c), because of the harm that his inaction caused to his client.

was working on the case. His explanation was that, throughout this period, he was thinking about the case. We found that, at some point, Singer knew that he was no longer pursuing the case, regardless of how much he thought about it. The Court reprimanded Singer.

Here, respondent had a physical condition that he knew was keeping him from competently serving the needs of his clients. At the ethics hearing, he acknowledged that he should have withdrawn from the representation.[4] Respondent agreed to represent the Petruzzellis in January 2004. It was not until February 2006 that he recognized that he would not be able to pursue his clients' matter for them and returned the $3,000 they had paid him. In our view, however, at the time that respondent told his clients that he would take action on their behalf, he, like Uffelman, continued to believe that he would soon do so. Thus, we decline to find a violation of RPC 8.4(c) in this instance.

That is not to say, however, that respondent's misconduct was not serious. He held on to the Petruzzellis' case for far longer than he should have, before realizing that his condition

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[4] In fact, under RPC 1.16(a)(2), respondent was required to do so. Respondent, however, was not charged with a violation of that rule.

was too great an impediment for him to overcome. In aggravation, we considered respondent's prior private reprimand, as well as his failure to withdraw from the representation when he realized that his condition materially impaired his ability to properly serve his clients' needs.

We determine that a reprimand is sufficient discipline for respondent's infractions. The condition suggested by the DEC -- that respondent should present to the Court a "backup coverage plan" -- is not something that we typically require and, given respondent's recognition that he should have done things differently, we find it unnecessary.

Member Baugh did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph A. Carmen
Docket No. DRB 09-121

Argued: January 30, 2009

Decided: November 17, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh						X
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel