

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-355
District Docket No. X-07-035E

IN THE MATTER OF
DAVID UFFELMAN
AN ATTORNEY AT LAW

Decision

Argued: February 19, 2009

Decided: June 19, 2009

Karen Moriarty appeared on behalf of the District X 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 on a recommendation for discipline (two-year suspension) filed by the District X Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information), and RPC 8.4(c)

conduct involving dishonesty, fraud, deceit or misrepresentation). We determine to impose a reprimand.

Respondent was admitted to the New Jersey and New York bars in 1985. He has no history of discipline. Since September 2005, he has been ineligible to practice law in New Jersey for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

In the fall of 2004, Robert J. Tice retained respondent's law firm, Uffelman and Curry, to represent him in his defense of litigation arising from a business dispute.¹ The matter was initially handled by Lisa Curry, respondent's then partner, who filed an answer on Tice's behalf and served interrogatories and document requests on counsel for the plaintiff. When Curry left the firm, in December 2004, respondent took over the representation.

Tice stated that he had difficulty communicating with respondent. He recalled receiving only one or two returned calls from respondent, between December 2004 and September 2005,

¹ Two additional co-defendants in the underlying matter were also represented by respondent. There are no allegations arising from respondent's representation of the two co-defendants.

usually coming after Tice had written to respondent, asking for information on his case. Tice testified that, during those conversations, respondent assured him that the matter was going forward apace.

Respondent never served answers to interrogatories on the plaintiff and never produced the requested documents, despite having assured Tice that he would timely do so. As a result, plaintiff filed a motion to strike Tice's answer for failure to comply with discovery requests. On July 8, 2005, the court struck the answer without prejudice. Respondent admitted that he did no work on the matter until he received the July 2005 order, which, he stated, he received in August 2005. Tice was unaware of the motion and order in July 2005. He believed that the case was proceeding normally.

Respondent contended that he had no prior notice of the motion to strike the answer. He testified that he notified Tice, in September 2005, that the answer had been stricken. He did not file a motion to vacate the July 2005 order.

In September 2005, Tice met with respondent to complete answers to interrogatories. Respondent never forwarded the answers to interrogatories and never produced documents to

plaintiff's counsel. Tice was under the impression that the answers had been sent to plaintiff's counsel.

In October 2005, the plaintiff filed a motion to strike Tice's answer with prejudice. Tice was unaware of the motion. In November 2005, the court entered an order granting plaintiff's motion. Again, Tice was unaware of this development in the case. Respondent did not recall seeing the October 2005 motion or the November 2005 order.

Tice stated that, from October to November 2005, he attempted to reach respondent to obtain information about the status of his case, but was unable to reach him by phone or e-mail. In early December 2005, Tice and respondent received an order entering a default judgment against the defendants in the underlying litigation. Once again, respondent testified that he had not received notice of the motion. Rather, he claimed, he believed that there was an upcoming status conference in the case, of which he had received notice. Indeed, Tice testified that respondent seemed surprised by the default. Respondent told Tice that he would file a motion to vacate the judgment. He also advised Tice that Tice could pursue a malpractice claim

against him.²

From December 2005 through February 2006, respondent continued to assure Tice that he was "working on the motion." Despite his assurances, respondent did not file a motion to vacate the December 2005 judgment. Tice testified that he had been under the impression that respondent had filed a motion. In fact, in a certification submitted to the court in the underlying litigation, Tice stated that respondent confirmed that he had filed the motion to vacate.

Respondent, in turn, denied telling Tice that the motion had been filed. Indeed, respondent denied making any misrepresentations to Tice. He stated in his answer, "[a]t worst, his statements to Tice that Tice [sic] matter was 'being handled' were overly optimistic, given Respondent's personal situation at that time" (see discussion, infra).

On February 21, 2006, Tice retained Lisa Curry, respondent's former partner, to file a motion to vacate the default and stay a pending motion to enforce litigant's rights,

² As of the date of the DEC hearing, Tice was pursuing a malpractice claim against respondent.

filed by the plaintiff. Tice received notice of the motion by mail from plaintiff's counsel.

Curry testified that she had difficulty obtaining Tice's file from respondent, despite her several letters and telephone calls to him. Respondent turned over the file to Curry on or about February 27, 2006, after Curry confronted him in person. Because of respondent's six-day delay in turning over the file to Curry, she had to obtain some documents from plaintiff's counsel.³

Curry filed a motion to vacate the default judgment in early March 2006. Respondent provided some measure of advice to Curry on how to prepare Tice's certification, filed in support of the motion.⁴ Curry testified that a question arose as to whether respondent had received notice of the earlier motions and orders. She was satisfied that plaintiff's counsel had fulfilled his obligations and that respondent had received notice. The court granted the relief sought, but ordered Tice

³ Respondent was not charged with failure to turn over the file, a violation of RPC 1.16(d). We do not find that his delay in turning over the file was sufficiently lengthy to be considered as an aggravating factor.

⁴ Curry argued, in her motion, that Tice had not had notice of a November 4, 2005 proceeding, following which his answer had been dismissed with prejudice.

to pay plaintiff's attorney fees. Respondent offered to pay those fees.

Respondent admitted that he did not represent Tice properly. By way of mitigation/explanation for his actions, respondent testified that, in September 2004, his wife had begun divorce proceedings against him and that he had been suffering from extreme depression. Respondent stated that he had become suicidal and had voluntarily committed himself for hospitalization for one week.⁵ On his release, respondent was prescribed medication.⁶ In 2005, he had severe depressive episodes, particularly in the spring and early summer, although he was able to practice law on a reduced basis.

Respondent added that, in early January 2006, his mother fell and went into a coma, suffering from a traumatic brain injury. He was required to travel to Maryland, where his mother resided, about twice a week for six weeks. Moreover, although his divorce had been finalized in January 2006, ongoing unresolved issues caused him additional stress. According to respondent, all of the above problems distracted him from his

⁵ Respondent testified that his father had committed suicide.

⁶ Respondent provided no medical or psychological records in support of his testimony about his illnesses.

work at the time, but he thought that he could still represent Tice and vacate the default. He testified that he now recognizes that he was "overly optimistic."

Respondent also testified that, in January 2007, he was diagnosed with colorectal cancer and that he had been hospitalized five times and had undergone five surgical procedures that year, followed by chemotherapy. These events occurred after respondent's representation of Tice, but during the time that he failed to reply to the DEC's requests for information about the grievance.⁷

Respondent currently lives in Maryland, with family, and has not worked since 2006. He stated that he still suffers from depression and Attention Deficit Disorder ("ADD"), for which he is treated with medication. He testified that, due to his ADD and depression, he does not intend to practice law on his own, when he returns to the profession.

The DEC determined that respondent violated each of the charged RPCs. As to RPC 1.1(a), gross neglect, the DEC found it

⁷ Although respondent's failure to reply to the DEC is discussed in the transcript, he was not charged with violating RPC 8.1(b). His failure to cooperate could be considered an aggravating factor, but, in light of his medical/psychological condition during the relevant time and the fact that he ultimately filed an answer to the formal ethics complaint, we decline to do so.

undisputed that respondent neglected the Tice case, in that he failed to properly advise Tice, failed to provide discovery, which resulted in the suppression of the answer and the entry of a default judgment, and failed to file a motion to vacate the default. With regard to lack of diligence, a violation of RPC 1.3, the DEC pointed to respondent's failure to meet discovery deadlines and failure to act affirmatively to protect Tice's interests, when he received the July 2005 and December 2005 orders. As to respondent's violation of RPC 1.4(b), failure to communicate with the client, the DEC found that respondent failed to keep Tice advised about the status of the underlying litigation and that he was "grossly negligent" in failing to advise Tice of the motions and orders. The DEC found that respondent "compounded his transgressions" by failing to reply to Tice's calls and letters.

In connection with RPC 8.4(c), misrepresentation, the DEC found that

[t]he evidence presented by both sides unequivocally portrays conduct which involved material violations of this rule. The Respondent made representations to Tice that he would file a Motion to Vacate the Default contained in the Order of July 8, 2005 by supplying the required discovery to the plaintiff as well as representing that he would present a Motion to Vacate the

Default Judgment rendered by the order of December 2, 2005. Tice relied upon these representations which turned out to be detrimental to his case and financial interests. The Respondent further deceived Tice by failing to inform Tice as to his mental condition and the fact that he was unable to adequately practice his profession due to his episodes of depression and ADD symptoms. Because of disputed testimony from Tice and Respondent it is not clear if Respondent informed Tice that he had actually filed a Motion to Vacate.⁸

[HPR ¶11.]⁹

The DEC recommended that respondent be suspended for two years; that, prior to reinstatement, he prove his fitness to practice law; and that, upon reinstatement, he practice law under the supervision of a proctor.

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

⁸ Tice's certification in support of the motion to vacate the default in the underlying matter, exhibit C-2, lends support to his contention that respondent led him to believe that he had filed a motion to vacate the default. Even in light of that document, however, the DEC could not conclude by clear and convincing evidence that respondent had told Tice that he had filed the motion.

⁹ HPR refers to the hearing panel report.

The DEC was correct in its conclusion that respondent was guilty of gross neglect, lack of diligence, and failure to communicate with his client. It is not so clear, however, that respondent made misrepresentations to Tice that he had answered the interrogatories and/or that he had filed a motion to vacate the default. Respondent, who essentially admitted his misconduct in this matter, adamantly denied having ever made such misrepresentations to Tice. Indeed, the DEC who had the benefit of observing the witness' demeanor, was unable to conclude that respondent had told Tice that he had filed a motion to vacate the default.

If an attorney makes a statement believing it to be true at the time that he makes it, then it is not a misrepresentation. A misrepresentation is always intentional. It does not occur simply because an attorney is mistaken or his statement is later proved false, due to changed circumstances. However, in one egregious instance, we concluded that an attorney's misrepresentations to clients regarding actions he intended to take on their behalf had been intentionally made to deceive them. In re Spagnoli, 115 N.J. 504 (1989). In Spagnoli we found, and the Court agreed, that

[r]espondent did not act with gross negligence alone. He acted with malice Here, respondent accepted the clients' money, promised to take legal action in their behalf, induced the clients to rely on his promise, all the while never intending to take any steps whatsoever to protect the clients' property -- and in some cases liberty -- to the clients' great detriment. Respondent did not only abandon his clients. He defrauded them.

[Id. at 517.]

In this case, the evidence is not clear and convincing that respondent never intended to take action on his client's behalf and lied to him that he would. This is more of a situation in which an attorney assures the client that he or she will perform a particular service in the near future, but neglects to do so. In other words, this is more gross neglect than misrepresentation or some other form of dishonest conduct.

We note the DEC's finding that respondent continued to assure Tice that he was "working on the Motion." If by "working on the motion" respondent meant that it was his plan to file it soon, then his statement was not a misrepresentation, because he may have been intending to do so. If, however, he meant that he was actually, physically writing the motion, then his statement may have crossed the line to a misrepresentation. Similarly, respondent testified that, in January 2006, after the December

2005 order, he had told Tice that he was "in the process of filing a motion." The record, however, does not reveal what respondent meant by "in the process" or what work, if any, he had actually done on the motion. In light of the foregoing, the evidence of misrepresentations is not clear and convincing to warrant a finding in this context. We, thus, dismiss the charge of a violation of RPC 8.4(c).

A great deal of attention was given below to whether respondent had notice of the motions and orders in the underlying litigation. It gave us pause to wonder how respondent could have received some documents and not others. Be that as it may, assuming that respondent did not have notice of plaintiff's motions and orders, his failure to act in response to them, when he did learn of them, amounted to gross neglect. Moreover, there is no excuse for respondent's failure to keep Tice informed of the status of the matter.

Gross neglect, lack of diligence, and failure to communicate with clients ordinarily result in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history. See, e.g., In re Dargay, 188 N.J. 273 (2006)

(admonition for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior admonition for similar conduct); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (admonition for attorney who did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court when, in fact, the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file; violations of RPC 1.4(a) and RPC 1.3 found); In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (admonition for attorney whose inaction caused a trademark application to be deemed abandoned on two occasions; the attorney also failed to comply with the client's requests for information about the case; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(a)); In the Matter of Vincenza Leonelli-Spina, DRB 02-433 (February 14, 2003) (admonition for gross neglect, lack of diligence, and failure to communicate with the client); In the Matter of Jeri L. Sayer, DRB 99-238 (January 11, 2001) (admonition for attorney who displayed gross neglect, lack of diligence, and failure to communicate with the client; a workers' compensation claim was dismissed twice because of the attorney's failure to appear in

court; thereafter, the attorney filed an appeal, which was dismissed for her failure to timely file a brief); In the Matter of Jonathan H. Lesnik, DRB 02-120 (May 22, 2000) (admonition for failure to file an answer in a divorce matter, resulting in a final judgment of default against the client; the attorney also failed to keep the client informed about the status of the case); In re Aranguren, 172 N.J. 236 (2002) (reprimand for attorney who failed to act with diligence in a bankruptcy matter, failed to communicate with the client, and failed to memorialize the basis of the fee; prior admonition and six-month suspension); In re Zeitler, 165 N.J. 503 (2000) (reprimand for attorney guilty of lack of diligence and failure to communicate with clients; extensive ethics history); In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with the clients in two matters; in one of the matters, the attorney also failed to return the file to the client; prior reprimand); and In re Wildstein, 138 N.J. 48 (1994) (reprimand for misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients).

This matter seems to fall in the realm of the admonition cases because only one client was involved and because

respondent has an unblemished legal career of twenty-four years. However, harm to the client is a factor we frequently take into account in determining the appropriate quantum of discipline in a case. Here, Tice was forced to shut down his business for three months. Respondent contended, however, that he advised Tice that Tice had no need to take that action. Respondent stated, in his answer, that he "advised Tice that unless Tice was lying, the judgment did not bar Tice from selling his products." Either way, had respondent acted promptly on Tice's behalf, Tice might have been saved the close of his business. Although respondent was clearly dealing with a great deal of personal stress at the time, he still had an obligation to represent his client's interests diligently and responsibly.

In view of the above, we unanimously determine to impose a reprimand. We further determine that, within sixty days of the date of this decision, respondent must provide to the Office of Attorney Ethics ("OAE") proof that he is medically fit to practice law, as attested by a medical professional approved by the OAE.

Members Boylan and Lolla 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 David Uffelman
Docket No. DRB 08-355

Argued: February 19, 2009

Decided: June 19, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Boylan						X
Clark			X			
Doremus			X			
Lolla						X
Stanton			X			
Wissinger			X			
Total:			7			2


Julianne K. DeCore
Chief Counsel