SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-088

IN THE MATTER OF

DAVID M. GORENBERG

AN ATTORNEY AT LAW

Decision

Argued: May 16, 2002

Decided: July 24, 2002

Nancy D. Gold appeared on behalf of the District VII Ethics Committee.

Steven B. Sacharow appeared on behalf of respondent.

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 VII Ethics Committee ("DEC"). The two-count complaint charged respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client), RPC 1.16(d) (upon termination of representation, failure to take steps to the extent reasonably practicable to protect client's interests) and RPC 8.4(c) (conduct

involving dishonesty, fraud, deceit or misrepresentation) (count one) and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) (count two). The RPC 8.4(c) charges were premised on respondent's alleged misrepresentations to his client, over a five-year period, that he was working on her case, that he was consulting with doctors and that he had filed a complaint.

Respondent was admitted to the New Jersey bar in 1991. At the relevant times, he maintained a law practice in Moorestown, New Jersey.

In April 2002 he was reprimanded for violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client), RPC 3.3(a)(1) (lack of candor to a tribunal), RPC 3.4(b) (fairness to opposing counsel) and RPC 8.4(c) (misrepresentation). In re Gorenberg, 172 N.J. 31 (2002).

At the DEC hearing, the parties agreed that, under R.1:20-9(g), the medical records of both the grievant and respondent, as well as testimony relating to their medical problems, would be sealed.[1] Although no formal motion was made or order issued, we determined to issue a protective order to keep the transcript and documents confidential.

The parties entered into a stipulation of facts relating to respondent's handling of Theresa McLaughlin's medical malpractice case. The following facts were culled from the parties' stipulation:

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[1] R.1:20-9(g) states as follows:

Protective orders may be sought to prohibit the disclosure of specific information to protect the interests of a grievant, witness, third party or respondent. An application for a protective order shall be made by the investigator, presenter, ethics counsel or respondent. On application or on its own motion, and for good cause shown, the Supreme Court, the Board or the trier of fact may issue the protective order.

1. McLaughlin retained respondent in December 1993 to represent her in a medical malpractice action alleging the failure to diagnose and treat Lyme's disease.

2. A written retainer agreement was signed by both parties indicating that McLaughlin would be billed on a contingent fee basis.

3. For some period of time respondent told McLaughlin that he was working on her case.

4. Respondent told McLaughlin that he had consulted with doctors about the case.

5. Although McLaughlin repeatedly telephoned respondent seeking information about her case, a number of the telephone calls were not returned.

6. In July 1998, respondent met with McLaughlin to have her sign authorizations for the release of medical records and information.

7. Respondent failed to turn over McLaughlin's file to new counsel, when originally requested. This was due to the effects of respondent's then-existing major depressive disorder.

8. McLaughlin filed a grievance in September 1998.

9. Respondent did not act with reasonable diligence and promptness in representing McLaughlin, in violation of RPC 1.3, because of the effects of his then-existing major depressive disorder.

10. Respondent did not promptly comply with reasonable requests for information, in violation of RPC 1.4(a), because of the effects of his then-existing major depressive disorder.

11. Respondent did not take steps reasonably practicable to protect his client's interests when terminating her representation, in violation of RPC 1.16(d), because of the effects of his then-existing major depressive disorder.

12. On December 12, 1998 the DEC wrote to respondent a second time, seeking a response to McLaughlin's grievance. Respondent submitted a written reply on December 20, 1998.

13. The Office of Attorney Ethics ("OAE") requested any additional comments from respondent by March 2, 1999. The comments were received on March 1, 1999.

14. On June 16, 1999 the OAE investigator scheduled an appointment to review McLaughlin's file at respondent's office. At the time of the scheduled appointment, June 21, 1999, the file was not available for review.

15. A subpoena duces tecum was served on respondent on June 28, 1999, requiring him to produce the entire original file by July 12, 1999. Although respondent did not produce the file on that date, it was ultimately produced.

16. During the time periods in question, respondent suffered from major depressive disorder for which treatment, including hospitalization, was ultimately sought and received.

17. At the present time, respondent continues in treatment and has voluntarily closed his law practice.

At the DEC hearing, McLaughlin testified that she first met respondent at the law offices of Klein and Halden, where respondent was an associate. She originally met with Klein, who turned the case over to respondent. McLaughlin believed that she had been improperly diagnosed and, therefore, not given the proper treatment. As a result, she claimed, she suffered from irreversible problems. All of her medical records were given to respondent for his review.

McLaughlin testified that, at some point, she tried to contact respondent at Klein and Halden, only to learn that he had left the firm and had started his own practice. A secretary from the firm gave her respondent's new telephone number. McLaughlin was adamant that she had never received an announcement from respondent notifying her of his new office address, despite respondent's statements to the contrary.

When McLaughlin met with respondent, he told her that he would have a doctor look at her case and then get back to her. Thereafter, he never informed her specifically about the status or progress of her case, other than to say that things were "coming along and everything looks good." McLaughlin tried to reach respondent by telephone more than fifty times, but received only a few responses. As a result, she made appointments to see him in person. During the course of respondent's representation of McLaughlin, approximately five years, she received only one piece of correspondence, a copy of a letter from respondent to a doctor, requesting that he review her case.

Eventually, McLaughlin asked respondent if he had filed a complaint. According to McLaughlin, respondent told her that he had and that "things are coming along." Over the course of five years, McLaughlin requested a copy of the complaint from respondent three times, the last time by letter dated August 10, 1998. The letter confirmed an earlier telephone call in which she had requested her entire file, including a copy of the complaint and docket number. When she received no reply, she became suspicious and called the Camden County Courthouse, at which time she was informed that a complaint had not been filed.

McLaughlin last met with respondent in July 1998, when he assured her that things were proceeding smoothly and had her sign an authorization for the release of her medical records.

Finally, in 1998, McLaughlin hired a new attorney, who requested that respondent turn over McLaughlin's file. Respondent did not comply with that request.

Contrary to her earlier testimony, on cross-examination McLaughlin admitted that respondent had told her that he could not find an expert witness for her case. She claimed, however, that she had given respondent the name of a doctor who would act as her expert. McLaughlin insisted that she never received anything in writing from respondent articulating that she did not have a good case.

McLaughlin's testimony revealed some inconsistencies, including errors about the date that respondent opened his own practice and discrepancies about her illness and the number of times that she met with respondent.

For his part, respondent testified that he opened his office in May 1997 and sent out announcements to his clients, including McLaughlin. Respondent voluntarily closed down his practice in September 1999 and is currently working for the Old Republic Exchange Facilitator Company in Marlton, New Jersey, in a non-legal capacity.

As an explanation for his violations, respondent offered his August 1998 diagnosis of major depressive disorder. He stated that he is currently taking Prozac, Klonapin and Deseril. Respondent submitted a 2001 letter from a licensed social worker, stating as follows:

> Mr. Gorenberg began suffering from Depressive symptoms approximately three years ago and subsequently began outpatient treatment in January 1998 with a previous therapist. . . . .
>
> During the course of his illness, Mr. Gorenberg's ability to make sound decisions and to use good judgment was severely limited, as is typical with a diagnosis of Major Depressive Disorder. His reaction to stressful situations and overwhelm had been one of fear and avoidance. His daily functioning was severely impaired, caused by the emotional paralysis that accompanies his diagnosis.

> Mr. Gorenberg has made excellent progress since his decision to leave private practice. He is no longer suffering from Depressive symptoms, and has learned to appropriately manage stress in his life. His reaction to challenges is no longer one of fear and avoidance. Throughout his course of treatment with me, he has demonstrated an ability to manage both personal and professional problems with good judgment and competence.
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> [Exhibit G-2]

Respondent denied telling McLaughlin that he had filed a complaint. He admitted that he determined early on, after conferring with some doctors and attorneys, that McLaughlin had no cause of action. He claimed that he so informed her. He also admitted that McLaughlin's records were sent to one of the doctors with whom he had a personal working relationship, as late as December 1996. He claimed that he did so to show McLaughlin that, even if he went to someone with whom he had a personal working relationship, he still could not validate her claim. As to McLaughlin's authorization for the release of medical records in July 1998, he claimed that he had asked her to sign the release in order to placate her.

According to respondent, he told McLaughlin on an ongoing basis that she did not have a claim. He conceded, however, that he never sent her anything in writing. He explained that McLaughlin did not want to hear his unfavorable assessment of her case.

Lastly, respondent contended that he never intentionally failed to cooperate with the OAE, explaining that its request for information had been made just before one of his hospitalizations. Therefore, he argued, he did not knowingly fail to turn over the file to the OAE. In addition, he claimed, the subpoena had been served on him weeks before his second hospitalization.

Respondent stipulated, and the record clearly and convincingly established, that his conduct violated RPC 1.3, RPC 1.4(a) and RPC 1.16(d). Unlike the DEC, however, we did not find that respondent's conduct rose to the level of gross neglect. While it is true that he accepted McLaughlin's case in 1993, he testified that, in the interim, he spoke with several doctors and informed her that he was having trouble locating an expert. Respondent also testified about his unsuccessful communications with other lawyers and doctors about the case. We were, thus, unable to find clear and convincing evidence of a violation of RPC 1.1(a).

As to a violation of RPC 8.4(c), respondent adamantly denied telling McLaughlin that he had filed a complaint in her behalf. McLaughlin's letter of August 10, 1998 to respondent stated only that she had requested a copy of her entire file, including the complaint and the docket number. By a five-member majority, we found that, in light of the inconsistencies in McLaughlin's testimony, a violation of RPC 8.4 has not been proven by the requisite clear and convincing standard. Our three public members, however, found McLaughlin's testimony credible in this regard. They reasoned that McLaughlin would not have written to respondent requesting a copy of the complaint and docket number, had respondent not misled her that he was working on her case and that he had filed a complaint. Moreover, the minority found that, after receiving McLaughlin's letter, respondent took no action to correct her mistaken impression about the complaint. They also considered that respondent is capable of making misrepresentations, as demonstrated by his earlier ethics matter. Lastly, those three

members noted that, despite respondent's counsel's attempts to impeach McLaughlin's testimony because of its inconsistencies, the DEC found it credible.

Finally, we agreed with the DEC that, because respondent eventually cooperated with the OAE's investigation, albeit late, he did not violate RPC 8.1(b). We, therefore, dismissed that charge.

One more point needs to be addressed. Respondent urged us to consider his depression as a mitigating factor. According to his own expert report, however, his depression began in 1998. There is nothing in the record to conclude that the depression started any earlier. Because respondent's conduct in this case began in 1993, we cannot find that his condition mitigated his ethics infractions from 1993 to 1998.

The DEC recommended a one-year suspension. Under the facts of this case, we found this recommendation to be unduly harsh. Generally, similar violations have resulted in reprimands. See, e.g., In re Baiamonte, 170 N.J. 184 (2001) (attorney reprimanded for lack of diligence, failure to communicate, failure to turn over client's file after termination of representation and failure to expedite litigation); In re Neiman, 167 N.J. 616 (2001) (reprimand for gross neglect, lack of diligence and failure to communicate with clients); In re Magid, 167 N.J. 614 (2001) (reprimand for lack of diligence, failure to communicate with client and failure to take reasonably practicable steps to protect interests of client on termination of representation); and In re Farkas, 166 N.J. 296 (2001) (reprimand and transfer to disability inactive status for lack of diligence, failure to communicate with client, failure to provide client with written retainer agreement and failure to turn over file to new counsel).

Taking into account respondent's prior reprimand and the nature of the ethics transgressions, we unanimously found that a reprimand is the appropriate discipline for respondent's lack of diligence, failure to communicate with his client and failure to turn over the file to his client's new counsel. One member did not participate.

We also determined to require respondent to provide, within three months from the date of the Court's order, proof of fitness to practice law, as attested by a mental health professional approved by the OAE.

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

By: ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David M. Gorenberg
Docket No. DRB 02-088

Argued: May 16, 2002

Decided: July 24, 2002

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson			X				
Maudsley			X				
Boylan							X
Brody			X				
Lolla			X				
O'Shaughnessy			X				
Pashman			X				
Schwartz			X				
Wissinger			X				
Total:			8				1

Robyn M. Hill 8/12/02
Robyn M. Hill
Chief Counsel