SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-237

IN THE MATTER OF

AARON S. FRIEDMANN

AN ATTORNEY AT LAW

Decision

Argued: October 16, 2003

Decided: December 8, 2003

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

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 us based on a recommendation for discipline filed by Special Master John F. Kearney, III. The complaint charged respondent with violations of *RPC* 1.1(a) (gross neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.4 (failure to communicate

with a client), *RPC* 1.16(d) (failure to protect a client's interests upon termination of representation), *RPC* 3.3(a) (lack of candor toward a tribunal), *RPC* 3.4(b) (fairness to opposing parties and counsel), *RPC* 4.1(a) (false statements to a third party), *RPC* 8.4(b) (commission of a criminal act), *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and *RPC* 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1983. He has no disciplinary history.

Respondent's ethics problems stem from his representation of a client in a medical malpractice case. With one notable exception, the facts generally are not in dispute. The Office of Attorney Ethics ("OAE") and respondent submitted a stipulation of facts to the special master before the ethics hearing took place. Although at the hearing, respondent admitted that he had unintentionally made misrepresentations to the court, he argued that his conduct was not unethical. In the brief submitted to us, however, respondent admitted that he had mishandled the medical malpractice litigation and had made various misrepresentations. He denied, however, the allegation that he had forged another attorney's signature on a stipulation filed with the court.

On February 17, 1993, respondent filed a medical malpractice lawsuit in Atlantic County on behalf of Wanda Gonzalez and her husband, Angel Rodriguez. Gonzalez had been referred to respondent by another client. In the lawsuit, respondent alleged that on

October 9, 1991 Gonzalez' medical providers failed to diagnose an ectopic pregnancy, resulting in the loss of the fetus. He also alleged that, because Gonzalez had had only one fallopian tube, she was rendered infertile by the medical malpractice. The complaint charged that the failure to perform an internal ultrasound examination constituted negligence.

The defendants and their attorneys were:

- Shore Memorial Hospital and Gardy Marcelin, M.D., represented by Robert E. Paarz.
- Richard L. O'Laughlin, M.D., M.G. Fried, M.D., and Jean Shor, M.D., represented by Richard J. Bolger.
- Henry E. Seidel, M.D., represented by Steven Drake.
- E.C. Dunn, M.D. and Dr. Dunn, P.A., represented by Michael P. Stanton.
- Dr. Fried, P.A. was not represented and did not file an answer to the complaint.

Although named as defendants, no entities known as Dr. Dunn, P.A. or Dr. Fried, P.A. ever existed. On January 1, 1990, an entity known as Drs. Dunn and Fried, P.A., was renamed Shore Imaging, P.A. ("Shore Imaging"), by the filing of an amended certificate of incorporation. This entity was a radiology practice employing Dr. Dunn, Dr. Fried, and Dr. O'Laughlin. In December 1990, well before the alleged malpractice occurrence on October 9, 1991, Dr. Dunn retired. When served with the complaint, Dr. Dunn retained Michael Stanton, an attorney he knew from his membership on the Ocean City school

board. Stanton, who was not a medical malpractice attorney, filed an answer on behalf of Dr. Dunn, individually, and Dr. Dunn, P.A., just in case such an entity existed. No answer on behalf of the non-existent Dr. Fried, P.A. was filed. Dr. O'Laughlin, the radiologist who performed only an external ultrasound, was the primary defendant.

In a letter dated May 12, 1993, Robert P. Lang informed respondent that he represented Shore Imaging, formerly Drs. Dunn and Fried, P.A., and that Dr. Dunn had retired on January 1, 1991. Respondent stipulated that he received that letter and that he did not take action to amend the complaint to add Shore Imaging as a defendant at that time. Stanton submitted to respondent an affidavit dated May 24, 1993, signed by Dr. Dunn, which mentioned that as of December 1989, Drs. Dunn and Fried, P.A. became known as Shore Imaging, P.A. Respondent admitted that he had received the affidavit. Although Lang asked respondent to accept his representation that Dunn had retired, respondent insisted that Lang provide documentation of that event. On July 2, 1993, Lang sent a copy of the retirement agreement to respondent, mentioning once again that Shore Imaging was formerly known as Drs. Dunn and Fried, P.A.

On October 27, 1993, Lang sent the following letter to all counsel in the litigation:

> Please be advised that I do not represent Shore Imaging in the above-captioned matter. In fact, in speaking with Richard Bolger, Esquire, he indicates to me that Shore Imaging is not even a party to the lawsuit.
>
> In the event that Shore Imaging is made a party to the lawsuit, it is my understanding that Mr. Bolger will represent its interests in the same

way that he is currently representing the interests of Drs. O'Laughlin, Shor and Fried, or all employees of Shore Imaging.

Accordingly, I would appreciate it if you would remove me from the counsel list, and future communications should be with Mr. Bolger who was appointed by the insurance company to represent the interests of the radiologists who are made parties defendant herein.

Respondent admitted that, although he received the above letter, he did not reply or seek to amend the complaint to add Shore Imaging at that time.

On June 7, 1994, Judge John G. Himmelberger entered an order, upon consent of counsel, dismissing the lawsuit against defendants Seidel, Shor, Fried, individually, and Dunn, individually. In Bolger's cover letter dated June 2, 1994, to the judge, he mentioned that the only remaining defendants in the lawsuit were Dr. O'Laughlin, Shore Memorial Hospital, and Dr. Marcelin. Respondent received the letter but did not indicate to the court or any of the parties or attorneys that Dr. Dunn, P.A. and Dr. Fried, P.A. remained as defendants in the litigation. Respondent also did not advise Gonzalez of the dismissals against the four doctors.

On July 6, 1994, respondent took Dr. O'Laughlin's deposition, stating in his opening remarks that Dr. O'Laughlin, Shore Memorial Hospital and Dr. Marcelin were the only remaining defendants in the case.

About one year later, on June 15, 1995, Judge Himmelberger granted summary judgment dismissing the complaint against defendants Dr. Marcelin and Shore Memorial

Hospital. Respondent did not advise his client of these dismissals. By order dated June 23, 1995, Judge Himmelberger granted summary judgment dismissing the complaint against Dr. O'Laughlin, the primary defendant in the case, due to respondent's failure to produce his expert witness for deposition. Although respondent had obtained an expert report opining that Dr. O'Laughlin had committed malpractice, respondent could not obtain Bolger's agreement either to travel to Delaware, where his expert was located, for the expert's deposition, or to pay a portion of the costs to have the expert travel to New Jersey for the deposition. After the court denied a motion for reconsideration of the dismissal order, respondent failed to file an appeal. He did not notify Gonzalez of the order dismissing Dr. O'Laughlin from the case.

After the civil case manager's office listed the matter for trial, Bolger sent a letter dated August 29, 1995, indicating that, because the complaint had been dismissed against all defendants, the case should not be listed for trial. Although respondent received a copy of the letter, he did not contact the court, Bolger, or any other party to dispute Bolger's statement that the case had been dismissed in full, or to amend the complaint to add Shore Imaging.

Despite Bolger's letter, the civil case manager's office continued to issue notices of trial in the *Gonzalez* matter. In a letter dated September 19, 1996, respondent notified the civil case manager that he could not appear at the trial listed for September 23, 1996.

Respondent also stated that, "Furthermore, a conference was to be re-scheduled regarding the litigation clarification as to the Radiology Group, Dunn and Fried, P.A. being the remaining defendant." Respondent sent a copy of this letter to Bolger, but not to Stanton. At the ethics hearing, respondent could not explain why he had sent the letter to Bolger. On September 20, 1996, Stanton sent a "fax" to respondent, apparently in reply to his question, indicating that Robert Lang represented Shore Imaging.

On October 2, 1996, respondent sent to Stanton the following stipulation to amend the complaint:

> The undersigned, remaining counsel in the within matter do hereby consent and agree that all references to the Radiology Group of Dr. Dunn, P.A., Dr. Fried, P.A. and/or Dunn and Fried, P.A. be amended to reflect the correct title of Shore Imaging, P.A. which employed Dr. O'Laughlin at all times material hereto.

On October 17, 1996, respondent submitted the stipulation to Judge Himmelberger, with a letter stating:

> I enclose for your approval the Stipulation to Amend Caption to reflect Shore Imaging, P.A. as the sole remaining defendant in this matter.
>
> By copy of the approved Order, I will have Shore Imaging's counsel attend a pre-trial Settlement Conference to endeavor to settle this matter.

On October 21, 1997, Judge Himmelberger signed the order amending the complaint to name Shore Imaging as a defendant in place of Dr. Dunn, P.A. and Dr. Fried, P.A. Respondent did not send a copy of the stipulation to amend the complaint, or

a copy of the executed order, to Lang, Bolger, or any of the defense attorneys who had appeared in the *Gonzalez* case.

The matter was listed for trial on January 6, 1997. Because respondent was unavailable, a colleague appeared at the trial call on his behalf. The court directed the colleague to submit an order entering a default against Shore Imaging for failure to appear at the trial call. On January 21, 1997, respondent submitted a form of order to Judge Himmelberger, stating that a copy of the order was being sent to "opposing counsel and the defendant." The letter indicated that copies were sent to Michael Stanton and Shore Imaging. Judge Himmelberger signed the default order on February 5, 1997.

In a letter dated August 6, 1997, to Judge Michael A. Donio, about an upcoming proof hearing, respondent stated, "I had obtained the default when the defendant, subsequent to proper written notice, failed to appear. Copies were sent to the defendant and its prior counsel." Respondent did not notify Lang or Bolger of the proof hearing, which was held on August 17, 1997 before Judge Donio. No one appeared on Shore Imaging's behalf at the proof hearing.

Respondent conceded that he made the following misrepresentations to Judge Donio at the proof hearing:

- Shore Imaging had been served with the complaint and had filed an answer to it.
- Stanton represented Shore Imaging, Drs. Dunn and Fried, P.A. and the doctors individually.

- In a recent conversation, Stanton told respondent that an insurance coverage dispute was preventing a "live attorney" from representing Shore Imaging.

- Respondent had "been trying over the last ten months to get somebody in to get somebody to negotiate . . . I don't know why they have failed to attend. We have made valiant attempts to get this thing to conclusion."

Several times during the proof hearing, Judge Donio appeared baffled by the failure of an appearance by Shore Imaging. Despite respondent's awareness that no one had appeared because he had failed to notify the proper parties, he expressed similar surprise to the court.

After taking testimony from Gonzalez and reviewing the report prepared by respondent's expert, Judge Donio awarded damages of $300,000 to Gonzalez. An order for judgment was entered on August 26, 1997.

Respondent did not take action to collect the judgment. He waited more than one year to docket the judgment because *Rule* 4:50 sets a more difficult standard to vacate a judgment after one year has elapsed from its entry.

Gonzalez mentioned to Vincent Sgro, an attorney representing her son, that although she had "settled" her case, she had not received either any funds or an explanation for respondent's failure to distribute settlement proceeds. On January 26, 1999, after Sgro contacted respondent, respondent informed Sgro that he had been in the process of writing a comprehensive memorandum to Gonzalez and that he would send a

copy to Sgro. In a letter dated March 6, 1999, Sgro told respondent that he had not received the promised memorandum and asked that he call Sgro with the information about the case so that he could explain the matter to Gonzalez. Although respondent did not contact Sgro, on May 27, 1999 he sent to Gonzalez forms for executing on the judgment, stating that the sheriff would be contacting him "upon delivery to confirm garnishments."

On February 22, 2000, respondent advised Gonzalez that the delay in collecting the judgment was due to a dispute between the radiology group and the insurer. On March 29, 2000, more than a year after first contacting respondent, Sgro informed him that Gonzalez "has evidenced a desire to again attempt to retrieve her file from your office which I am directing her to do at her convenience." Gonzalez filed the grievance against respondent on June 22, 2000.

On November 7, 2001, Judge Daryl F. Todd vacated the judgment that respondent had obtained against Shore Imaging. Respondent failed to appear at the hearing, despite proper notice. In vacating the judgment, Judge Todd found:

> The Court's nothing less than shocked at Counsel for the plaintiff who pursued a proof hearing in a matter in which there was a corporate defendant involving medical practitioners when already those medical practitioners had been represented by Counsel previously and there had been multiple references to it.
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> Either Mr. Friedman was being devious, perhaps even fraudulent but the Court makes no finding of that. The Court only raises the spectra [sic] of its

> possibility. But the Court does conclude and finds that Mr. Friedman was more than sloppy in his handling of this litigation. That he was not forthcoming in his dealing with all other Counsel in providing them with necessary information to be able to fairly conclude this matter, based upon the merits.

The validity of Stanton's purported signature on the stipulation was disputed at the ethics hearing. Stanton testified that although he did not recall signing the stipulation, the signature appeared to be his. Respondent's counsel showed Stanton approximately thirteen documents relating to the *Gonzalez* litigation that had been retrieved from Stanton's file. Stanton similarly did not recall receiving any of those documents. Respondent contended that after he had obtained Stanton's signature on the stipulation, he then forwarded it to Judge Himmelberger for entry. Respondent speculated that, because there was neither a cover letter returning the stipulation from Stanton, nor a cover letter submitting it to the court, he must have used a courier who personally delivered the document directly from Stanton's office to the court. In turn, the OAE investigator testified that, when he specifically questioned respondent about this issue, respondent never mentioned that he may have used a courier.

For his part, respondent offered the following, not as an excuse, but as an explanation for his failure to handle the lawsuit properly. Respondent asserted that, at the time that he undertook Gonzalez' representation, he was an associate in a small firm with a high-volume practice. According to respondent, although this was his first medical

malpractice case, he received no assistance from the firm's partners, one of whom constantly berated his staff. In addition, he claimed that he usually had to beg or cajole one of the law firm partners to obtain a check for expenses, whether small or large.

Respondent testified that, because he did not have corporate documents when he filed the lawsuit, he named as defendants Dr. Dunn, P.A. and Dr. Fried, P.A. in an effort to stack coverage by naming individual doctors and the group practice. Respondent contended that he and Bolger, Dr. O'Laughlin's attorney, could not agree on arrangements for the deposition of respondent's medical expert. As a result, Bolger obtained summary judgment dismissing Dr. O'Laughlin from the litigation. Respondent stated that he consented to the dismissal of the other defendants because he had no direct case against them.

At this point, with the dismissals of almost all of the defendants, respondent became concerned that he might lose his job. He suspected that he would be sued for legal malpractice. Upon his subsequent review of the file, he discovered that Dr. Dunn, P.A. and Dr. Fried, P.A. remained in the case and believed that, as Dr. O'Laughlin's employers, they could be held liable for medical malpractice. Respondent, hopeful that he could revive the lawsuit, prepared a stipulation to amend the complaint to change all references from Dr. Dunn, P.A. and Dr. Fried, P.A. to Shore Imaging. Respondent explained his strategy:

> I did it as a stipulation to amend complaint because had I tried to join in an entirely new entity at that point. It was several years after the statute of limitations had run, but because it was a successor entity, my feeling technically and accurately at the time was that the successor entity could have just been amended.

According to respondent, after he telephoned Stanton and determined that he was willing to sign the stipulation, he mailed it to Stanton on October 2, 1997. Respondent testified that Stanton was interested in signing the stipulation because it removed Dr. Dunn, P.A. as a defendant. He stated that the only attorney who could have signed the stipulation for a defendant was Stanton, because he represented Dr. Dunn, P.A., the only defendant who had filed an answer and had not been dismissed. Respondent contended that, even though Bolger represented Shore Imaging, Bolger could not sign the stipulation because all of his clients had been dismissed from the lawsuit. Respondent asserted that he continued to send correspondence to Stanton, even after he obtained the judgment, because Stanton was "the only lawyer left in the case." In turn, Stanton denied having any discussion with respondent about the stipulation and denied that he had had a reason to sign it.

As to the proof hearing, respondent stated that he had no intention of making any misrepresentations to Judge Donio, and that, when he left the courtroom, he did not believe that he had done so. He conceded, however, that he had made misstatements and that Judge Donio could have been misled by them.

After respondent sent a copy of the default judgment for $300,000 to Shore Imaging and Stanton, he expected to hear from someone questioning how he had obtained the judgment. He was surprised that Stanton did not contact him about it. Respondent asserted that he took no action to enforce the judgment because he recognized "how frail it was . . . and was terrified by the fact that it was a certain malpractice."

Wanda Gonzalez testified at the ethics hearing that respondent often failed to return her telephone calls; that she had never seen the three orders entered on June 7, June 15, and June 23, 1995, dismissing the complaint against various defendants; that respondent had told her that the proof hearing was a "settlement;" that respondent had informed her that he was trying to collect the settlement; and that she was able to obtain her file from respondent only with help from her son's attorney, Sgro.

In mitigation, respondent presented fourteen "character witnesses," who testified about respondent's honesty and good character. He also submitted more than fifty letters on his behalf from clients, attorneys, and others.

The special master found that respondent violated *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4, *RPC* 1.16(d), *RPC* 3.3(a) and (d), *RPC* 3.4(b) and (e)[1], *RPC* 4.1(a)(1), and *RPC* 8.4(c)

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[1] Respondent had not been charged with violating *RPC* 3.3(d) or *RPC* 3.4(e).

and (d). He did not find clear and convincing evidence that respondent had violated *RPC* 8.4(b).

The special master found that respondent had exhibited gross neglect and a lack of diligence, characterizing respondent's representation of Gonzalez as "abominable" and "consistently slipshod, grossly negligent, and anything but diligent."

The special master found, and respondent conceded, that respondent's misrepresentations to Judge Donio during the proof hearing violated his duty of candor to a tribunal and constituted false statements to a third party. The special master also determined that respondent violated *RPC* 3.3(d) by failing to disclose to the court that (1) he had not sent notice of the proof hearing to Bolger and Lang, Shore Imaging's attorneys; (2) he submitted the stipulation to amend the complaint years after the statute of limitations had lapsed and years after he had been on notice of Shore Imaging's identity; and (3) he never served the stipulation to amend the complaint on Shore Imaging, Lang, or Bolger. The special master also found that, by failing to serve Lang or Bolger with the stipulation and with the executed order, respondent knowingly disobeyed an obligation under the rules of a tribunal because, pursuant to *Rule* 1:4-8(a)(1) and (2), the signing of a paper submitted to a court constitutes an attorney's certification that the paper is not being presented for an improper or frivolous purpose.

The special master found that respondent violated *RPC* 8.4(c) by: (1) sending the stipulation to amend the complaint to Stanton, who he knew would be happy to be out of the case, and not to Shore Imaging, Lang, or Bolger; (2) failing to send the notice of the trial call to Lang or Bolger; (3) giving the court the impression that all of Bolger's clients had been dismissed and, therefore, Bolger need not receive notice of the trial call; (4) making misrepresentations to Judge Donio at the proof hearing; and (5) misrepresenting to Gonzalez that his (nonexistent) efforts to execute on the judgment were hampered by a (nonexistent) insurance coverage dispute.

Furthermore, the special master determined that respondent's violations of *RPC* 3.3, *RPC* 3.4, *RPC* 4.1(a), and *RPC* 8.4(c) constituted conduct prejudicial to the administration of justice.

The special master found that respondent violated *RPC* 1.4 by failing to return Gonzalez' telephone calls; failing to keep her informed of the status of the matter, such as informing her when the various defendants were dismissed from the lawsuit; and misleading her as to his efforts to enforce the judgment.

Finally, the special master found that, by not promptly turning over his file to Gonzalez, respondent violated *RPC* 1.16(d).

The special master did not find clear and convincing evidence that respondent forged Stanton's signature on the stipulation to amend the complaint. The special master

observed that Stanton admitted that the signature on the document appeared to be his own and that, although Stanton could not recall signing it, he also could not recall receiving thirteen other documents that had appeared in his file. He, thus, recommended the dismissal of the charge that respondent violated RPC 8.4(b).

In summarizing respondent's misconduct, the special master stated:

> Shore Imaging, Inc. had a $300,000 judgment entered against it with no notice to the attorneys Respondent knew were interested in its defense. Judge Donio entered the judgment on the basis of Respondent's false and misleading affirmative representations as well as his omissions to disclose circumstances that it was the obligation of an ethical attorney to disclose. Wanda Gonzalez, whose claim had substantial facial merit, not only had her case eviscerated by Respondent's gross neglect and lack of diligence, but also has suffered because of Respondent's coverup of his own negligence, the vacation of the judgment in November, 2001 . . . As a result, at least as of that time, she had waited 10 years for her opportunity to be made whole after being victimized by medical negligence; and now in order to be made whole, must seek relief against Respondent in yet another proceeding for his legal negligence and thus, unfortunately has been twice victimized. Such conduct as this prejudices the judicial process, and brings the legal profession into disrepute.

The special master recommended a one-year suspension.

Following a *de novo* review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is supported by clear and convincing evidence. As respondent acknowledged, he mishandled Gonzalez' medical malpractice lawsuit. Respondent's first mistake may have been to undertake the representation at all. He was aware that he worked in a high-volume, high-pressure environment that offered

him no support. He had never handled a medical malpractice case as primary attorney. He either knew or should have known that, to support the allegation of medical malpractice, he would be required to produce an expert opinion that one or more of the defendants had been negligent. He also knew or should have known that the retention of a medical expert represented a fairly large expense. Although respondent did not argue that his law firm's failure to pay his medical expert's deposition expense contributed to his failure to arrange the deposition, the record supports such an inference. In other words, respondent had neither the legal assistance nor the financial resources to undertake the *Gonzalez* representation. He created the recipe for the disaster that inevitably followed.

Next, respondent erred by naming in the lawsuit Dr. Dunn, P.A. and Dr. Fried, P.A., nonexistent entities. Although respondent claimed that he did not have the corporate documents when he filed the complaint, obtaining those documents would have been a simple task. Because respondent had filed the complaint about eight months before the expiration of the statute of limitations, he had sufficient time to complete his investigation of the identity of the defendants. Had respondent obtained the corporate documents, he would have become aware that, three years earlier, Drs. Dunn and Fried, P.A. changed its name to Shore Imaging, P.A., and the proper party would have been sued.

Moreover, respondent failed to amend the complaint to name Shore Imaging as a defendant, despite his receipt of information from Lang about Shore Imaging only three months after the filing of the complaint. Respondent stipulated that, although he had received Lang's letter dated May 12, 1993, informing him that Lang represented Shore Imaging, he took no action to amend the complaint at that time. Within the next few months, respondent received several documents containing information that Shore Imaging was formerly known as Drs. Dunn and Fried, P.A. Furthermore, in a letter dated October 27, 1993, sent to all counsel, including respondent, Lang stated that Shore Imaging had not been named as a party in the lawsuit. Yet, respondent took no action to add Shore Imaging as a defendant.

Not only did respondent fail to add a necessary party to the litigation, but he also permitted the dismissal of other defendants. On June 7, 1994, he consented to the dismissal of Drs. Seidel, Shor, Fried, and Dunn as defendants. On June 15, 1995, an order granting summary judgment in favor of Dr. Marcelin and Shore Memorial Hospital was entered. Respondent then failed to make satisfactory arrangements for the deposition of his out-of-state expert witness. *Rule* 4:10-2(d)(2) provides that "the party taking the deposition shall pay the expert or treating physician a reasonable fee for the appearance, to be determined by the court if the parties and the expert or treating physician cannot agree on the amount therefor." In addition, *Rule* 4:14-7(b)(2) provides that, if an expert