SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-268

IN THE MATTER OF :
:
EDWARD D. FAGAN :
:
AN ATTORNEY AT LAW :

Decision

Argued: October 18, 2001

Decided: March 5, 2002

A. Lawrence Gaydos appeared on behalf of the District VC Ethics Committee.

Raymond Barto 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 VC Ethics Committee ("DEC"), arising out of respondent's handling of a personal injury matter. The complaint charged respondent with violations of RPC 1.1(a) (gross neglect),[1] RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The grievant, Diane

[1]The caption of count one of the complaint refers to failure to communicate and the language of that count sets forth facts pertaining primarily to that alleged violation. The actual charge,

Gibbons, did not testify before the DEC.

Respondent was admitted to the New Jersey bar in 1980 and the New York bar in 1985. He currently maintains an office for the practice of law in Jersey City, Hudson County.

In April 1996 Diane Gibbons retained respondent in connection with a personal injury action against North American Food Concepts ("North American") and Corning Metpath Clinical Laboratories ("Corning"). Gibbons, a temporary worker at Corning, had been burned while carrying a tray of containers filled with hot liquid.

In May 1996 respondent filed a complaint in Gibbons' behalf. In August 1986 he served interrogatories and discovery demands on the defendants. Thereafter, Corning filed a motion to dismiss Gibbons' complaint for failure to answer interrogatories. Respondent did not oppose that motion, which was granted. The complaint was dismissed without prejudice on May 30, 1997. Thereafter, on or about September 10, 1997, Corning filed a motion for dismissal of the complaint with prejudice.[2] Again, respondent did not oppose the motion, which was granted on October 10, 1997.

By way of explanation for his inaction, respondent testified that he did not answer the interrogatories or oppose defendant's motions for dismissal because Gibbons had filed a workers' compensation suit, in which she was represented by other counsel. Respondent testified that, when he filed the complaint, he was unaware of the workers' compensation

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however, is made in count two. Count one charged respondent with gross neglect.

[2]Respondent testified that he did not recall being aware of the pending motion. That issue was not pursued at the DEC hearing or raised by respondent as a defense in this matter.

claim against Corning. According to respondent, who communicated with Corning's attorney and Gibbons' counsel in that matter, the workers' compensation action would have been an absolute bar to any recovery from Corning. In addition, respondent stated, he had been concerned that his response might have compromised the workers' compensation claim. According to respondent, he believed that they had "nowhere to go with Corning Metpath" and saw no reason to move to vacate a dismissal in a case that would ultimately be dismissed.

Respondent's counsel stated the following in his brief:

> . . . Had the interrogatories been truthfully answered, they would have led to a quick dismissal and a likely motion for counsel fees for bringing a patently frivolous claim. Caught between a rock and a hard place, Respondent Fagan chose not to answer the interrogatories and to permit the defendant to obtain a dismissal - including, eventually, a dismissal with prejudice - of Ms. Gibbons' claims.

Respondent testified that he explained to Gibbons why he was not answering the interrogatories and why Corning's first motion should not be opposed. According to respondent, he also explained to Gibbons that Corning's motion had misrepresented the status of discovery and that, if he and Gibbons determined to take further action, he could move to vacate the court order, based on the misrepresentation. Respondent testified that he and Gibbons also discussed the case in November 1997, after he received the second order of dismissal. According to respondent, he did not realize at that time that the case had been dismissed as to both defendants, Corning and North American.

* * *

On May 21, 1998 respondent wrote the following letter to Gibbons:

> I am writing to give you an update on the status of your case.
>
> A Motion to Vacate Prior Orders, Strike Defendants Answers & Affirmative Defenses, to Compel Responses to Plaintiffs Discovery and for other relief is returnable for mid-June 1998. In plain English this means we will be in Court to move the case in the next few weeks. What the defendants did before was very simple is they did not tell the Court at the time they made their Motions that they were in default of the discovery demands we served on them in August 1996 - even before they served discovery demands on us. *A copy of our discovery demands to defendants is enclosed.* The Motion is being sent under separate cover with the filing stamp on it.

In reality, respondent did not file any motions with the court. He testified that his letter to Gibbons explained "one of the bases for relief from the – from the Order, if, in fact, [they] were going to make a motion." He conceded that his language was "inartful." Respondent testified that he spoke with Gibbons between May and July 1998 and advised her that he had not filed the motion. He was unable to explain clearly why his letter stated that he was moving to vacate the prior orders, if he had already determined that he could not proceed against Corning because of the workers' compensation bar.

On May 2, 1999, over eighteen months after the court order dismissing Gibbons' case with prejudice, respondent sent her the following letter:

> . . . In any event, your case is back moving again. I expect the case to move according to the timetable we discussed a few months ago. Since we met, (i) I have received the entire compensation medical file & award from your compensation lawyer and (ii) I have sent for the updated medicals. I expect to have depositions in a few months and get the case ready for a pre-trial mandatory settlement conference by the end of the year.

Respondent did not file motions or set up depositions, however. He testified that the language "your case is back moving" meant that he was again working on the matter personally. According to respondent, at some point in 1999, after he resumed working on the file, he became aware of problems in the case, particularly the inconsistent statements that Gibbons had made about the circumstances of her accident. He, therefore, determined that Gibbons could not mount a successful action against either Corning or North American. Respondent expressed his belief that, because of the inconsistencies, had he filed a motion in the case, he would have been sanctioned for making a frivolous claim. He testified that he met with Gibbons in September or October 1999 and told her about the problems in her case. Finally, he stated that in 1998 or 1999 he had spoken with an attorney with whom Gibbons' had consulted and had turned over the file to Gibbons, at her request, in October 1999.

Gibbons' grievance alleged that she had left 300 messages for respondent and had sent him over 100 "faxes." Respondent denied those contentions. He testified that he and Gibbons spoke several times between 1997 and 1999.

By way of mitigation, respondent pointed to his work in the "Swiss Banks Case," in which he is pursuing recovery for Holocaust victims, and to his involvement in additional pro bono matters of import.

The DEC found that respondent had violated RPC 1.3 for his failure to answer the interrogatories and to oppose Corning's motions.[3] The DEC also found a violation of RPC

[3]The panel report stated that, after the hearing, the DEC amended the charge of a violation of

8.4(c) in connection with respondent's letters to Gibbons, misrepresenting that he would be taking further action in her behalf.

As to the May 21, 1998 letter, the DEC stated as follows:

> Mr. Fagan admits that he did not file any such papers with the Court. Nor did he have a date scheduled for a court appearance. This letter is completely misleading and was written to deceive Ms. Gibbons. His argument that his language was 'inartful' is unacceptable and lacking in credibility and served only as an attempt to protect him further [sic] litigation by the Grievant. Moreover, the letter was written some seven months after the last Court order dismissing Grievant's complaint. Mr. Fagan, given his understanding of the Court rules, would have an uphill battle in convincing the Court to vacate Court orders after such a lengthy period of time.

As to the May 2, 1999 letter, the DEC stated the following:

> First, [the chair notes] that in a letter dated September 24, 1996 from Kenneth H. Wind (Exh. C-2-4/11/01), Mr. Fagan was forwarded 'pertinent portions' of Grievant's worker's compensation file. During the hearing he did not provide any evidence that he had sent for medicals or scheduled any depositions. Again, Mr. Fagan claims that his use of the words in his letter was 'inartful.' Again, Mr. Fagan's letter was written to mislead the Grievant and to protect him from further litigation.

The DEC did not find a violation of RPC 1.4 (mistakenly cited in the panel report as RPC 1.2), based on insufficient evidence without the testimony of the grievant.

In mitigation, the DEC noted Gibbons' failure to appear for the hearing and pointed to respondent's "socially conscious activities." The DEC recommended a reprimand.

RPC 1.1(a) to a violation of RPC 1.3, finding that respondent's actions did not amount to gross negligence, under the circumstances of the case. In his brief, counsel for respondent objected to the amendment because respondent had no notice and was not heard on the charge. In fact, the complaint did charge respondent with a violation of RPC 1.3 originally.

* * *

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical is supported by clear and convincing evidence. We are unable to agree, however, with the DEC's finding that respondent exhibited lack of diligence. For the reasons expressed in respondent's brief, we dismissed the charge of a violation of RPC 1.3:

> The Hearing Panel in this matter has recommended discipline against the Respondent for lack of due diligence in circumstances in which, had he followed the Panel's reasoning, he would have run deeply afoul of these rules concerning frivolous motions and defenses. Specifically, the Panel states that Fagan should have controverted the motions of Corning Metpath for dismissal. However, as he said during the hearing, having recognized the long established Workers' Compensation bar to the Gibbons claims against this entity, any motion defense aimed at avoiding the preclusive effect of the compensation action (and its subsequent award by settlement) would have violated the rules aimed at avoiding frivolous litigation. This is not a lack of diligence; this is an appropriate embrace of the undisputed legal and technical faults inherent in a claim the merits of which the client initially misrepresented to her counsel. To the extent that Fagan did not unnecessarily prolong the matter, he cannot be said to have failed to act diligently.

On the other hand, we agree with the DEC's dismissal of the charge of failure to communicate with Gibbons. Her claim of 300 calls and 100 "faxes" appears exaggerated, particularly because there are indications in her own letters to respondent that he did, in fact, speak with her about the case. Furthermore, respondent's testimony in this context was uncontroverted. It is clear from Gibbons' letters that she thought her matter was proceeding. Respondent testified that he talked to Gibbons, in September or October 1999, about the

"bottom line" in her case. In fact, Gibbons' last letter bears an earlier date and it was in October 1999 that she requested her file. That supports respondent's contentions that he advised her then that her case against North American could not be pursued. Although Gibbons' letters reflect her difficulty contacting respondent, without her testimony we do not have clear and convincing evidence of a violation of RPC 1.4(a). It is possible that respondent allowed Gibbons to continue to believe that her case was proceeding apace. On this record, we cannot reach that conclusion, however.

As to the allegation of a violation of RPC 8.4(c), it is undeniable that respondent's May 1998 and May 1999 letters to Gibbons contained statements clearly intended to lead her into believing that he was taking action in her behalf. The language in the May 1998 letter was more than "inartful." Respondent clearly stated that he had filed a motion, had a court date and the matter was proceeding apace. None of that was true. As to the May 1999 letter, as the DEC pointed out, at a minimum respondent was unable to show that he had requested medical records or scheduled depositions. We, thus, found that respondent violated RPC 8.4(c) by misrepresenting to Gibbons the status of her case.

Respondent testified that, between 1997 and 1999, he traveled frequently because of his human rights work. It is possible that his efforts in this regard took his focus away from matters like Gibbons'. Indeed, respondent's answer stated that he had suggested to Gibbons that she might be better served by another attorney. The onus, however, was on respondent to withdraw from the representation, if he found himself neglecting his client's matter. That

respondent might be performing far-reaching and laudable work does not excuse or mitigate his mishandling of Gibbons' case.

It is well-settled that "intentionally misrepresenting the status of lawsuits warrants public reprimand." In re Kasdan, 115 N.J. 472 (1989). Nothing in this case compels us to deviate from established precedent. Indeed, respondent made misrepresentations to Gibbons on at least two occasions - in his May 1998 and May 1999 letters. For respondent's violation of RPC 8.4(c) we unanimously determined to impose a reprimand.

Three members did not participate.

We further required 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 Edward D. Fagan
Docket No. DRB 01-268

Argued: October 18, 2001

Decided: March 5, 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:			6				3

Robyn M. Hill 3/18/02
Robyn M. Hill
Chief Counsel