SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-374

IN THE MATTER OF

SIXTO L. MACIAS

AN ATTORNEY AT LAW

Decision

Argued: November 19, 1998

Decided: April 5, 1999

Bennett A. Robbins appeared on behalf of the District VI Ethics Committee.

Ivan M. Sutherland appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based on a recommendation for discipline filed by the District VI Ethics Committee ("DEC"). Respondent was admitted to the New Jersey bar in 1980 and maintains a law office in Union City, Hudson County.

ETHICS HISTORY

On July 9, 1991 respondent received a public reprimand for exhibiting a pattern of neglect and lack of diligence in four matters. On September 18, 1990 respondent received a public reprimand for his failure to cooperate with the Office of Attorney Ethics by not properly certifying that recordkeeping deficiencies found during a random audit had been corrected.

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The complaint alleged violations of RPC 1.1(a) (gross neglect), 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).

In or about May 1990 Celestino Francisco, Jr., the grievant in this matter, retained respondent to represent him in connection with a personal injury claim arising from a May 3, 1990 multi-vehicle automobile accident. According to Francisco, he met with respondent in his office within about one week of the accident.

Francisco testified that, at their initial meeting, respondent referred him to a doctor, who treated him weekly for several years. Indeed, Francisco verified that claim with numerous medical bills spanning a three-year period. Francisco also testified that, on numerous occasions during the representation, he attempted to meet with respondent, but that

only respondent's associate, Amarilis Diaz, was available to discuss the case with him. According to Francisco, he did not know that Diaz was an attorney in the office, only that she worked there. Accordingly, he stated, he did not feel free to speak with her about the case and held out for a meeting with respondent.

On or about May 4, 1992 respondent signed and filed a complaint in Francisco's behalf. The complaint named the drivers of the three automobiles as defendants. The only other pleading in the record is dated February 2, 1993. On that date respondent filed an "Affidavit Explaining Delay" in opposition to the court's motion to dismiss the case for failure to prosecute. In the affidavit respondent explained that only one of the defendants, Giuseppe Aiello, had been served with a copy of the complaint on May 14, 1992 and that the sheriff's office had been unable to serve the remaining defendants, José Herrera and José Alvia. Respondent's affidavit indicated that he would be filing a motion for substituted service upon Herrera and that he would again attempt to serve Alvia upon receipt of a new address from the New Jersey Division of Motor Vehicles. There is no evidence in the record that respondent did either. Also, although there was some testimony that defendant Aiello had answered the complaint, respondent apparently made no effort to enter a default judgment against Aiello.

Diaz testified that she shared office space with respondent and worked on some of his cases, including Francisco's, from approximately September 1991 through 1993 or early 1994. According to Diaz, she prepared the Francisco complaint, which respondent signed

prior to its filing on May 4, 1992. Diaz testified that the complaint was dismissed in May 1993 due to difficulties in serving the defendants.

According to Diaz, in August 1993 Francisco disclosed to her that a "psychic reading" had predicted that he would soon be involved in another automobile accident. That comment, combined with some information that Diaz had gathered during the case, led her to believe that the May 3, 1990 accident might have been staged and, furthermore, that Francisco was about to engage in another fake accident.[1] Diaz recalled advising respondent of her concerns in or about August 1993 and announcing her refusal to work further on the case.

Francisco's account of the alleged August 1993 meeting with Diaz and the alleged "psychic reading" is unknown. He was not questioned about it at the DEC hearing.

Diaz further claimed that Francisco often visited the office and talked to her about his case. Francisco denied this latter contention.

Finally, Francisco testified that, approximately four or five years after the accident, he returned to respondent's office to retrieve his file, as he intended to retain another attorney to represent him. According to Francisco, respondent asked him to leave the file with his office so that another associate could review it. Francisco refused and engaged another

[1]Diaz testified that she had learned early in the case that all of the individuals in the various automobiles involved in Francisco's accident were at least acquaintances and, in several cases, friends of one another.

attorney to file a malpractice action against respondent. According to Francisco, he learned for the first time that day that the case had been dismissed in mid-1993.

For his own part, respondent testified that he first represented Francisco, in or about 1989, in an unrelated incident wherein Francisco and another individual (who, coincidentally, was also involved in the 1993 auto accident) had been accused of stealing a gas pump nozzle. Respondent further testified that the first personal contact he had with Francisco regarding the within matter occurred in late 1993 or early 1994, some five months after Diaz claimed to have alerted him to her concerns about the case.[2] In response to Francisco's assertion that his initial meeting in 1990 was with respondent, respondent testified that his brother had met with Francisco at that time. In or about May 1990 respondent's brother, a Pennsylvania attorney not licenced in New Jersey, had assisted respondent in the office, ostensibly without practicing law. According to respondent, it was his brother's responsibility during that time to open personal injury files in the office. Respondent testified that his brother handled the matter until Diaz' arrival to the office, in or about September 1991. According to both respondent and Diaz, Diaz was primarily responsible for the handling of the file from that time and until her departure from the office, in late 1993 or early 1994.

Respondent admitted signing and filing Francisco's complaint. Also, respondent recalled drafting, typing and signing an August 1992 letter to Francisco requesting that he

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[2]Respondent also recalled a conversation with Diaz, in which she expressed her concerns about the case. Respondent was unsure if it had occurred in August or later in 1993.

contact Diaz about his case. Finally, respondent admitted signing and filing the affidavit in opposition to the dismissal of the complaint. Respondent conceded taking no action in the case prior to its dismissal in May 1993, claiming that Diaz was handling the case. Indeed, in his answer respondent blamed Diaz for any mishandling of the case. However, when pressed at the DEC hearing, respondent admitted that he was ultimately responsible for all of the files in his office, including Francisco's.

Respondent remembered reviewing the Francisco file after Diaz expressed concern about the legitimacy of the accident. According to respondent, he met with Francisco shortly thereafter, in late 1993 or early 1994. Respondent stated that, at that time, he had told Francisco that the case had been dismissed, that he could no longer represent Francisco based on his belief that the accident had been staged and that, should Francisco wish to press ahead, he should retain another attorney. Respondent admitted not documenting that conversation with Francisco. Francisco, on the other hand, denied that this conversation ever took place, alleging that he did not know that his case had been dismissed until four or five years after the accident, when he sought the return of his file. Indeed, respondent admitted, but could not adequately explain, Francisco's frequent unanswered visits to the office into 1995, well beyond Diaz' 1993 departure. Respondent stated that, whenever he saw Francisco on those occasions, he advised him to consult another attorney about the case. According to Francisco, respondent refused to meet with him about the case until 1995, when he, not respondent, terminated the representation and asked for the return of his file.

Respondent produced only one letter evidencing contact with Francisco over the course of the representation: the August 27, 1991 letter requesting Francisco to schedule a meeting with Diaz.

* * *

The DEC concluded that respondent violated RPC 1.1(a) and RPC 1.3 by not diligently prosecuting the case and allowing it to be dismissed for lack of prosecution, with no further attempt to restore the complaint. The DEC found a violation of RPC 1.4(a), in that respondent "never made it clear to the grievant as to who [sic] was actually representing him, he failed to tell the grievant that his case had been dismissed, he failed to advise the grievant to seek other counsel, failed to make a motion to be relieved as counsel and failed to meet with the grievant when the grievant came to respondent's office." The DEC did not find a violation of RPC 8.4(c), finding no evidence that respondent had misrepresented to Francisco the identity of the person assigned to handle his case.

The DEC recommended a reprimand, based on respondent's two prior public reprimands. The DEC further recommended that respondent be required to practice under the supervision of a proctor for a period of one year.

* * *

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

The Board found that, although no single witness' version of the events in this case is entirely believable, including respondent's, there is sufficient evidence to find respondent guilty of unethical conduct.

Respondent's failure to adequately supervise Diaz was a violation of RPC 5.1. Although respondent was not specifically charged with a violation of RPC 5.1, the facts in the complaint gave him sufficient notice of this alleged improper conduct and of the potential violation of that RPC. Furthermore, the record developed below contains clear and convincing evidence of a violation of RPC 5.1. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, the Board deemed the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

It is clear from the record that respondent had little or no idea of the status of Francisco's case from the time that Diaz prepared the complaint, in May 1992, through August 1993 (three months after the case was dismissed), when Diaz alerted respondent to her concerns about the staging of the accident. Respondent admitted as much at the DEC hearing. RPC 5.1 (b) required respondent, as Diaz' supervisory attorney, to take reasonable

measures to ensure that Diaz conformed with the rules. Respondent made no effort to monitor Diaz' handling of the case. Even without respondent's admission that he bore the ultimate responsibility for Francisco's case, the evidence is clear that respondent violated this aspect of RPC 5.1.

Furthermore, respondent was the attorney of record in the matter. When Francisco first retained respondent (whether through respondent himself or through his brother), there were no other attorneys in respondent's office. Although the personal injury action was later managed mostly by Diaz, respondent signed and filed the pleadings. In fact, respondent, not Diaz, filed an affidavit in opposition to the court's motion to dismiss the case for failure to prosecute. Under RPC 5.1(c)(2), a supervising lawyer is responsible for the ethics violations of a supervised attorney if the supervising attorney knows of the conduct at a time when its consequences could have been avoided or mitigated and fails to take reasonable remedial action. As detailed below, the Board found respondent to be accountable for Diaz' misconduct, pursuant to RPC 5.1(c)(2).

Undoubtedly, Diaz neglected this case. Giuseppe Aiello was served with a copy of the complaint on May 14, 1992. Although he apparently filed an answer, no attempt was made to enter a default judgment against him. Service upon the remaining defendants, Herrera and Alvia, was unsuccessful. Neither Diaz nor respondent filed a motion for substituted service upon Herrera or attempted to serve Alvia at his new address. Although Diaz' conduct might not have risen to the level of gross neglect, it clearly equated to lack of diligence.

Respondent, in turn, failed to monitor the case and, more importantly, to take any remedial action to remedy Diaz' mistakes, once they were brought to his attention in August 1993. For this reason, the Board concluded that respondent violated RPC 5.1(c)(2) by failing to ensure Diaz' compliance with RPC 1.3 and RPC 1.4(a).

With respect to respondent's own failure to communicate with Francisco, the Board found that, for the time that Diaz was managing the case, respondent reasonably believed that Diaz was communicating regularly with Francisco. This scenario is further supported by respondent's sightings of Francisco at the office, when it was reasonable for respondent to assume that Francisco was there to see Diaz. In fact, the record does not allow a finding that respondent violated RPC 1.4(a) by not disclosing to Francisco that the complaint had been dismissed. It is possible that respondent reasonably assumed that Diaz so informed Francisco. In the absence of any testimony on this issue, either from respondent or from Diaz, and in the face of Francisco's questionable credibility on the issue, the Board determined to dismiss this charge.

With regard to the allegation of a violation of RPC 8.4(c), the DEC was correct to dismiss that charge. The Board found no evidence in the record that respondent ever misrepresented to Francisco who the attorney assigned to his matter was. It is more likely that Francisco was confused about this aspect of the case, given respondent's total lack of involvement in the matter.

Normally, an admonition or a reprimand would be sufficient discipline for a single instance of gross neglect, lack of diligence and failure to communicate in one or just a few matters. Here, however, respondent received the first of two public reprimands on September 18, 1990 — some four months after Francisco first retained him for this matter. Again, on July 9, 1991, respondent received a second public reprimand for exhibiting a pattern of neglect and lack of diligence in four matters. By this time, Francisco's case had been in respondent's office for fourteen months and the complaint still had not been filed. In fact, it would remain unfiled for an additional ten months. Because of his two reprimands, respondent was fully aware by this time that he had to conform his behavior to the standards expected of an attorney. It is troubling that respondent, after having received two public reprimands during the pendency of Francisco's matter, did not appreciate the importance of acting ethically and responsibly. For these reasons, the Board unanimously determined to impose a three-month suspension, instead of an admonition or a reprimand. Three members did not participate. See, e.g., In the Matter of Aslaksen, DRB 95-391 (1995) (admonition imposed where the attorney showed gross neglect, lack of diligence and failure to communicate in a medical expert malpractice case; the attorney failed to serve answers to interrogatories, retain medical expert or advise the client of the ultimate dismissal of the complaint, despite the client's requests for information.); In the Matter of Onorevole, DRB 94-294 (1994) (admonition imposed where the attorney exhibited gross neglect, lack of diligence and failure to communicate in an insurance matter); In re Carmichael, 139 N.J.

(1995) (reprimand imposed where the attorney showed a lack of diligence and failure to communicate in two matters; the attorney had a prior private reprimand); In re Wildstein, 138 N.J. 48 (1994) (reprimand imposed where the attorney showed gross neglect and lack of diligence in two matters and a failure to communicate in a third matter); In re Gordon, 121 N.J. 400 (1990) (reprimand imposed where the attorney showed gross neglect and a failure to communicate in two matters); See In re Zotkow, 143 N.J. 299 (1996) (three-month suspension for violations in one matter, including gross neglect, failure to communicate, failure to expedite litigation and to cooperate with ethics authorities; the attorney received enhanced discipline based on his prior private reprimand and three-month suspension for similar misconduct.) See, also, In re Olitsky, 154 N.J. 177 (1998) (three-month suspension for violations in three matters, including gross neglect, lack of diligence, failure to communicate and to use a retainer agreement; the enhanced discipline was based on the attorney's prior private reprimand, admonition and three-month suspension.)

The Board also required respondent to reimburse the Disciplinary Oversight Committee for applicable administrative expenses.

Dated: 4/5/99

LEE M. HYMERLING
Chair
Disciplinary Review Board