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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 97-359

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IN THE MATTER OF  
ROBERT J. FORREST,  
AN ATTORNEY AT LAW

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Decision

Argued: December 18, 1997

Decided: June 29, 1998

Steven R. Lane appeared on behalf of the District XII Ethics Committee.

Respondent waived appearance for oral argument.

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 XIII Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 3.3, more specifically 3.3(a)(5) (failure to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled); RPC 3.4, more specifically 3.4(a) (unlawfully obstructing another party's access to evidence of potential evidentiary value); and RPC 8.4, more specifically 8.4(c) (conduct involving dishonesty,

evidentiary value); and RPC 8.4, more specifically 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1984.<sup>1</sup> He maintains a law office in Somerville, New Jersey. Respondent received a private reprimand in 1991 for the inadvertent invasion of a client's funds and failure to maintain attorney business records in accordance with generally accepted accounting practices.

There was no hearing in this matter. The DEC rendered its decision based on respondent's admissions to the allegations in the complaint. The complaint charged the following:

During the relevant time period, respondent was employed by the law firm of Lieberman and Ryan. In March 1993 Robert A. Fennimore and his wife Maryann retained respondent's firm in connection with a personal injury action resulting from a car accident. The complaint was filed on April 5, 1993. Sometime after April 5, 1993, but before December 19, 1993, Robert died. At some point during that time period, Maryann notified respondent of her husband's death.

In December 1993 respondent served on his adversary, Christopher Walls, answers to interrogatories that were not certified. Neither the answers to interrogatories nor the cover letter to Walls revealed that Robert had died.

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<sup>1</sup>The complaint mistakenly cites 1983 as the year of respondent's bar admission.

Respondent and Maryann appeared at an arbitration proceeding on June 8, 1994. Before the proceeding, respondent told Maryann that she should not voluntarily disclose her husband's death during her testimony. When the arbitrator inquired about Robert's absence, respondent replied that he was "unavailable."

At no time before, during or within thirty days after the arbitration proceeding did respondent or Maryann Fennimore advise the arbitrator, the court or Walls that Robert had passed away. The arbitrator awarded \$6,000 to Robert and \$17,500 to Maryann.

Following the arbitration, respondent contacted Walls to explore the possibility of a settlement. Even then respondent did not mention that Robert had died. Thereafter, on three occasions Walls wrote to respondent, requesting that he produce Robert for a medical examination. Respondent did not reply to Walls' requests. Consequently, Walls sought a court order compelling Robert to appear for a medical examination. Respondent did not oppose or otherwise reply to Walls' motion. On September 9, 1994 the court signed an order directing Robert to submit to a medical examination. Respondent only disclosed Robert's death when Walls contacted him about Robert's failure to appear for the court-ordered medical examination.

In respondent's answer to the formal ethics complaint, he admitted the allegations of the complaint and set forth a number of mitigating factors. Respondent asserted that he did not knowingly or intentionally violate any of the Rules of Professional Conduct. He claimed that he believed that his acts were taken "under a duty to protect the confidences of his

client.” According to respondent, he believed that it was his obligation to obtain the best settlement offer possible for the Fennimores and that the only way that the defendant would put a fair value on the claim was to have the defendant evaluate it without considering Robert’s death. Respondent alleged that, on receipt of an offer, he would have informed the defendant of Robert’s death. Respondent further alleged that he would never have tried to settle the case without first notifying the defendant about the death of the co-plaintiff.

Respondent explained that, in his thirteen years of practice, it was the first time that a plaintiff he had represented had died after a lawsuit had been initiated; therefore, respondent claimed, for the first time he was “faced with the decision as to how to best serve his client’s interests. . . .”

Respondent also pointed out that he has never been the subject of public discipline (he did not disclose that he was privately reprimanded in 1991), that he cooperated with the investigation and that no prejudice was suffered by the defendant or his client. Respondent also noted that he has reviewed the Rules of Professional Conduct to insure future compliance with the standards of the profession.

In a letter to the DEC, respondent’s counsel stated as follows:

As a matter of negotiating strategy, thus, respondent undertook to elicit optimal settlement proposals in anticipation of invariably and sequentially having to negotiate a lower figure upon eventually disclosing the death of Robert A. Fennimore. That lower, negotiated figure after disclosure would have been higher, in respondent’s estimation, than any offer which would initially have been received subsequent to knowledge of the death.

[Exhibit C to presenter’s brief]

The letter also noted that respondent had not instructed Maryann Fennimore to make any misrepresentations, but merely not to volunteer information, and that respondent had been motivated by what, in retrospect, was recognized as an excessive and imprudent zeal to obtain the most favorable recovery for his clients.

The DEC found that respondent's conduct violated RPC 3.3(a)(5), RPC 3.4(a) and RPC 8.4(c). Based on respondent's admissions and mitigating factors, the DEC recommended the imposition of a reprimand.

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Following a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct is clearly and convincingly supported by the evidence.

Respondent's misconduct in this matter was not confined to one isolated omission of material information. Robert died sometime between April 5, 1993, the date the complaint was filed, and December 1993. Although respondent learned of the death during that time period, he failed to so inform his adversary through September 9, 1994, despite ample opportunity to do so. Respondent's omissions were not a matter of "overzealousness;" they can only be viewed as misrepresentations by silence to his adversary, to the arbitrator and to the court. Clearly, had respondent's tactic succeeded in obtaining a larger settlement, respondent, too, would have benefitted, to the extent that he would have realized a larger fee.

It can be inferred, therefore, that respondent had a personal interest in continuing to misrepresent or omit the true facts. His conduct was aggravated by his involvement of Maryann Fennimore in hiding the truth. The DEC, thus, properly found violations of RPC 3.3(a)(5) (failure to disclose a material fact to a tribunal with the knowledge it may be misled), RPC 3.4(a) (obstructing a party's access to evidence of potential evidentiary value) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The presenter urged the Board to impose a reprimand, relying on In re Whitmore, 117 N.J. 472 (1990). There, the attorney received a public reprimand for violations of RPC 3.3(a)(5) and RPC 3.3(a)(2) in his prosecution of a DWI matter. The officer who had administered the breathalyzer test to the defendant had deliberately made himself unavailable for the trial because he was afraid that the DWI conviction would have prevented the defendant from becoming a state police officer. Although Whitmore was aware of the improper motive for the officer's absence, he failed to disclose that fact to the municipal court. The Supreme Court noted that, although there was no purpose on the part of the attorney to corrupt the judicial process or to gain a personal profit or benefit, he had a duty of complete disclosure. The Court stated that "[a] lawyer has an obligation of being candid and fair with the Court. As an officer of the court, his duty can be no less." (Citations omitted). Id. at 477.

The Court also imposed a public reprimand in In re Mazeau, 122 N.J. 244 (1991), where the attorney made a false statement, in a brief to the trial court, that he had not

previously represented the client. In fact, the attorney had first represented the client, a minor, in a personal injury claim. Later, as the result of the same injury, after his client reached the age of majority, respondent sought the trial court's permission to file a late notice of claim under the Tort Claims Act (N.J.S.A. 59:8-9) against a public entity. When the trial court learned that the attorney had represented the same client in the earlier lawsuit, the court requested the attorney to provide all of the information concerning the facts and background of the earlier lawsuit. The attorney chose not to reply to the court's request. The Supreme Court found that the attorney had violated RPC 3.3(a)(1) (knowingly making a false statement of material fact to a trial judge) and RPC 3.3(a)(5) (failure to disclose to the trial court a material fact with knowledge that the court may tend to be misled).

In In re Mark, 132 N.J. 268 (1993), however, a three-month suspension was imposed. Mark made oral untrue representations to the trial court that his adversary had received medical reports and thereafter fabricated letters forwarding the reports to opposing counsel. The attorney also filed an untrue certification with the court. In a decision adopted by the Supreme Court, the Board found that the attorney believed that his statements to the court were true and that, accordingly, the statements had not been made with the intent to deceive the court. As to the letters, the Board believed that the attorney was unaware that the information in his letters was untrue; it was "only the exigencies of the moment" that prompted him to prepare them and attach them to his late opposition papers. The Board was persuaded that respondent's improprieties were induced by the pressures brought on him at

the time, not by a deliberate attempt to deceive the court. The Board noted that, after the attorney learned of the impropriety of his conduct, he took immediate action to confess and assume responsibility for his acts. See also In re Johnson, 102 N.J. 504 (1986) (three-month suspension for contriving an excuse to delay a trial); In re Kernan, 118 N.J. 366 (1990) (three-month suspension for lying in a certification to the court and fraudulently conveying property to own mother in order to avoid child support obligations).

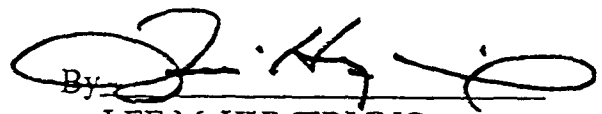
Here, too, the Board was convinced that a period of suspension is required. Based on the ongoing nature of respondent's misrepresentations and the fact that his misconduct wasted the time of both the court and the parties, the Board unanimously determined to impose a three-month suspension. Two members did not participate.

The Board also further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated

6/29/98

By



LEE M. HYMERLING

Chair

Disciplinary Review Board



**SUPREME COURT OF NEW JERSEY**

**DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

**In the Matter of Robert J. Forrest  
Docket No. DRB 97-359**

**Argued: December 18, 1998**

**Decided: June 29, 1998**

**Disposition: Three-Month Suspension**

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali							x
Brody		x					
Cole		x					
Lolla		x					
Maudsley							x
Peterson		x					
Schwartz		x					
Thompson		x					
<b>Total:</b>		<b>7</b>					<b>2</b>

By Label Frank 7/30/98  
Robyn M. Hill  
Chief Counsel