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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-169

IN THE MATTER OF :
MICHAEL J. MELLA :
AN ATTORNEY AT LAW :

Decision

Argued: July 17, 1997

Decided: November 18, 1997

Myra Wrubel and Paul Brickfield appeared on behalf of the District IIA Ethics Committee.

Respondent appeared pro se.

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 IIA Ethics Committee ("DEC"). The complaint arose out of grievances filed in three separate matters.

Respondent was admitted to the New Jersey bar in 1968. He has no prior ethics history.

The Rashti Matter

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 (b)(failure to explain matter to extent reasonably necessary for client to make informed decisions); RPC 1.7(b) and

RPC 1.8(a)(conflict of interest); RPC 3.2(failure to expedite litigation); and RPC 8.4(d)(conduct prejudicial to the administration of justice). The crux of this matter is whether respondent attempted to persuade his client to withdraw her ethics complaint through a promise to pay her a certain sum of money in settlement of a possible malpractice claim against him.

On July 5, 1994, Ferdose Rashti ("grievant") was struck by an automobile while a pedestrian in Queens, New York. Some time in late 1984 or early 1985, grievant retained respondent to represent her in a personal injury action stemming from injuries sustained in the accident. Those injuries did not require hospitalization.

On July 6, 1987, respondent filed the first of two complaints in Queens County, New York. Respondent attempted to serve the automobile owner and her husband, the driver, at their address in Queens, New York. However, unbeknownst to respondent, the couple had moved to Florida. Furthermore, the owner/wife had died on November 16, 1985. New York law required service of the summons and complaint on the surviving spouse residing in Florida within sixty days of the filing of the complaint; service on the estate of the deceased owner had to be made within eighteen months of the date of her death. Respondent failed to serve the defendants within the time allowed.

On July 28, 1989 the New York Supreme Court dismissed the action for respondent's failure to serve the defendants within the time specified by statute. Respondent then filed an appeal, which was denied. According to respondent, by letter dated April 2, 1990

he notified grievant of the dismissal and asked her to contact him to discuss the case. Grievant, in turn, testified that she learned of the dismissal from her daughter, Azita, and then only four years later, in 1993.

At the time of the accident, grievant was a California resident visiting New York. Indeed, grievant remained in California through the pendency of the civil action and remains there to date. Her testimony was taken at the DEC hearing via telephone on December 13, 1995. Grievant's first language is Persian. Her limited command of the English language is evident from a reading of the transcript. She did not recognize the documents of the case at the hearing because she could not read English.

Grievant could not recall when she first saw the complaint filed by respondent or whether her husband was a party to the suit. Grievant recalled only three things pertaining to her matter: (1) Respondent advised her that he would seek $500,000 for her injuries; (2) Respondent indicated to her that he had been negotiating a settlement with the defendants' insurance company; she did not recall when respondent conducted the negotiations; (3) She first learned of the 1989 dismissal from her daughter, Azita, four years later.

The DEC relied heavily on the testimony of grievant's three daughters, Azita, Mitra and Eliza. Of the three, Azita was the most familiar with the case. Indeed, she acted as grievant's translator at the DEC hearing. Azita drafted correspondence for

her mother regarding the civil case, drafted and filed the grievance for her mother and negotiated with respondent on her mother's behalf.

Azita testified that she became involved in her mother's case in 1992 or early 1993. According to Azita, grievant told her that, in a late 1992 telephone conversation with respondent, respondent had asked her if she would accept $15,000 to $20,000 in settlement of her claim. Azita remembered her mother's surprise because her mother thought that respondent was asking for $500,000.

At the suggestion of a California attorney, Donald Karpel, Esq., Azita drafted a letter for her mother, requesting respondent to send a copy of the entire file. That letter, dated February 11, 1993 was preceded by Azita's unaccepted collect telephone calls to respondent at his office. Azita feared "that Mr. Mella had probably settled the case and he's really stalling and the money didn't get forwarded to [her mother]. And so we thought maybe we should get in touch with the insurance company to find out what actually happened to her claim." T12/13/95 (2:00 p.m.) 34.

Hearing nothing in response to her February 11, 1993 letter to respondent, Azita drafted three more letters, all dated March 4, 1993. The first letter, addressed to respondent, renewed grievant's request for a copy of her file and terminated respondent's services as of that day. The second letter was addressed to the Colonial Penn Insurance Company and sought information regarding grievant's case. The third letter was an ethics grievance, addressed to the DEC.

Finally, Azita testified that only after filing the grievance did she and her mother realize that respondent had not been negotiating a settlement with or by Colonial Penn at all. The "$15,000 to $20,000 settlement" was, in fact, a payment that respondent intended to make to grievant to compensate her for respondent's failure to prosecute the case and, thus, in essence avoid a malpractice suit against him. Azita indicated that those negotiations continued through the day before the DEC hearing.

Another of grievant's daughters, Mitra, testified that her involvement in the civil matter was limited to negotiations with respondent to settle her mother's claim for approximately $15,000. While the record is not entirely clear, it appears that Mitra became involved in the case after 1993. By then it was clear to all concerned that the negotiations did not concern a settlement with the insurance company, but, instead, a settlement with respondent to compensate grievant for his inaction.

Mitra further testified that she contacted an attorney, David Goldstein, Esq., concerning the statute of limitations on the filing of a malpractice action against respondent in both New York and New Jersey. Mitra's objective was to avoid a limitation of her mother's action before they were able to resolve her mother's claim against respondent.

Eliza Rashti Cohn, the last daughter to testify, indicated that her mother was upset that respondent wanted to settle the case "through the insurance company for $15,000 and she [was] not sure what [was] going on, and she asked me to contact Mr. Mella."

T12/13/95 (2:00 p.m.) Eliza added that she had one conversation with respondent in mid-1992, at which time respondent indicated a willingness to settle the matter for $20,000; Eliza believed that respondent was relaying an offer from Colonial Penn. Eliza acknowledged that respondent had agreed to waive any fees earned in the case. However, Eliza denied being told by respondent that the settlement offer had come from him, not from Colonial Penn.

For his own part, respondent asserted that he represented grievant to his best ability. He admitted that he was not aware of the New York statute on service of process and that the case was dismissed due to his failure to properly serve the defendants.

Respondent testified that, before the dismissal of the case, he had hired a private investigator to locate the defendants in Florida. Respondent claimed that the driver of the automobile, grievant's husband, had in fact been served. Respondent argued that, given his lack of knowledge of the relevant statute, he had done everything in his power to diligently prosecute the case.

The appeal was dismissed on March 6, 1990. As noted earlier, respondent testified that he sent grievant a letter on April 2, 1990, indicating that the case had been dismissed and requesting that she call him "as soon as convenient to discuss this disappointing decision". Exhibit J-10.

According to respondent, grievant called him in response to the April letter. Respondent contended that he had told grievant at that time that, because they discussed a settlement of approximately $15,000 in the past, he felt responsible to grievant

and, therefore, would be willing to pay that amount himself. Respondent recalled several brief conversations with grievant on the settlement issue, prior to Azita's involvement in 1993. Respondent believed that the $15,000 offer was generous, given the limited extent of grievant's injuries.

Respondent further testified as follows about grievant's alleged expectation of a large settlement:

> [Grievant] indicated when she testified, I think, $250,000. And that because in our complaint in New York you're allowed to put in an amount in your complaint when you – prayer for relief.
>
> So in most cases - - in fact in every case it is always, you know, ballooned up to a point where no one expects to get the amount you put in.
>
> And I think she misunderstood that because we - - she - - we had never talked about $250,000 at all.
>
> So in any event, I thought the $15,000 was - - was appropriate.
>
> [T3/14/96 13]

Respondent admitted that he had settlement negotiations with grievant and her daughters from late 1993 through December 1995. He claimed that a fellow attorney had suggested an agreement to settle the malpractice and ethics matters. According to respondent, the other attorney went so far as to give him a copy of such an agreement. He added that he had not felt obligated to deal with the various attorneys in California and New York who periodically announced their involvement in behalf of grievant. With regard to allegations that respondent was dealing directly

with an individual who was represented by an attorney, respondent testified as follows:

> Now coming into this investigation several months before, around October, I received a phone call, one of the complaints that I - - that is against me is that I was negotiating with the client, I'll be honest with you, I - - I never considered that to be a complaint.
>
> I mean that it seems to me that we should have rights, all of - - all have rights - - clients have rights, I have rights.
>
> We should be able to talk to whomever is making a complaint against us, to discuss their problems to work it out between the parties.
>
> And I never really thought about [grievant] not being representative - - represented because quite honestly, had the attorney who - - the attorney who was - - when I originally spoke to her this fellow called me in the fall of 1989 before I offered the $15,000. I know she could check with him in terms of whether she would take - - she must have checked with him, because that is probably why she would not accept it.
>
> [T3/14/96 16-17]

It was respondent's position, thus, that there was nothing improper with his attempt to settle grievant's possible legal claims against him, even if the settlement negotiations post-dated grievant's filing of an ethics complaint against him. Indeed, it appears that grievant continued to negotiate directly with respondent well into 1996. Referring to the morning of March 14, 1996, the third day of hearings before the DEC, respondent apprised the DEC of a telephone call from an individual claiming to be either grievant or her daughter Azita's attorney:

> This morning - - this morning I received a

> phone call from Jeff Toback, one of the lawyers named in this particular document, and he said to me, I represent Mrs. Rashti.
>
> And I had no idea when I picked up the phone it was a phone call from Jeff Toback. I just picked it up. I didn't know what it was about, to be honest with you.
>
> He said, I represent Azita Rashti.
>
> I said, oh.
>
> He said, yes, Mrs. Rashti asked me to contact you to see whether or not you were willing to enter negotiations to settle her claim.
> [T3/14/96 20-21]

Respondent then suggested that grievant and her daughters had used the ethics process to pressure him to settle grievant's potential malpractice claim against him, pointing to the contact from attorney Toback on the morning of March 14, 1996 as evidence of improper motives on their part.

The Parducci Matter

The complaint alleged violations of RPC 1.3 and RPC 8.1(b).

In May 1989, John P. Parducci ("grievant") retained respondent to represent him in the purchase of a house. After a title search revealed a previously unknown lien on the property, grievant paid respondent an additional $1,000 to remove the lien. Respondent, however, failed to do so. Despite the presence of the lien, the closing of title took place, with respondent assuring the title insurance company that the lien would be removed.

Grievant testified at the DEC hearing about a series of telephone calls he made to respondent approximately six months

after the closing, inquiring about the status of the lien. According to grievant, respondent told him that the process to remove the lien was moving apace.

Five years later, in May 1994, when refinancing the property, grievant discovered that the lien had not been removed. According to grievant, when he confronted respondent with this discovery, respondent apologized, claiming an oversight on his part, and promised to have the lien removed.

Hearing nothing from respondent, on March 5, 1995 grievant sent a letter to the New Jersey Department of Consumer Affairs complaining about respondent's conduct. At about the same time, grievant filed his grievance with the DEC. The Department of Consumer Affairs forwarded grievant's matter to the DEC on April 18, 1995.

Also in March 1995, respondent finally set about removing the lien. Grievant testified that, shortly after his ethics grievance was filed, respondent called him to set up a meeting. At that meeting respondent asked grievant to withdraw the grievance. Grievant agreed to do so upon respondent's completion of the lien removal. Indeed, grievant sent a handwritten note to the DEC investigator requesting that the matter be dismissed. Although the note was undated, the investigator's date stamp indicates that it was received on September 14, 1995. Exhibit J-1.

For his own part, respondent admitted that the Parducci file was closed in error shortly after the real estate closing and that the oversight became apparent solely because of the refinancing.

Respondent claimed that he began the process to remove the lien in early March 1995, before he was aware of the grievance. Respondent could not explain, however, the ten-month delay between the time he first learned of his error and his attempts to cure it. Respondent stated that the matter was not concluded until September 1995, largely due to problems in serving defendants in California and Denmark. Respondent testified that he refunded grievant's $1,000 fee, less $170 for expenses, because he felt responsible for his mistake.

Respondent admitted that he met with grievant to discuss the grievance. Respondent recalled that by the end of the meeting he had agreed to remove the lien and to refund his fee to grievant, less expenses, in return for grievant's withdrawal of the grievance.

With respect to the alleged violation of RPC 8.1(b), respondent testified that he thought the matter had been dismissed, given grievant's desire to dismiss it. Respondent noted that he ultimately filed an answer, once he became aware that the ethics matter was still active.

The Levinson Matter

Richard Levinson ("grievant") filed a grievance against respondent on August 23, 1993, which was dismissed in December 1993. After grievant appealed the dismissal to the Board, the matter was remanded to the DEC for further investigation. In September 1994 the DEC investigator sent a letter to respondent

informing him of the need to conduct a new investigation and requesting that he contact the DEC. The letter also offered respondent an opportunity to submit additional materials. Respondent admitted receiving of that letter. He claimed, however, that he did not respond because he had no further submissions beyond those provided to the DEC when the matter was first heard.

In February 1995 the investigator sent respondent a letter by certified mail requesting respondent's reply to the investigation. Although the certified mail was admittedly received by respondent's office, respondent claimed that he never saw it. The investigator sent a third letter on April 7, 1995, informing respondent that he had two weeks to submit a required response. Respondent acknowledged receiving that letter and filed his response within the two-week period. Nonetheless — and notwithstanding that the second investigation did not yield any substantive violations — the DEC filed a one-count complaint alleging failure to cooperate with the disciplinary authorities, in violation of RPC 8.1(b).

* * *

In Rashti, the DEC did not find clear and convincing evidence of a violation of RPC 1.1(a), RPC 1.3 and RPC 3.2, reasoning that, because respondent filed a complaint and made reasonable efforts to locate the defendants (including hiring a private investigator to locate them), respondent's conduct did not rise to the level of gross neglect, lack of diligence and failure to expeditiously

litigate the matter. The DEC found, however, that respondent did not keep grievant informed about the status of the case or furnish her the information necessary to make informed decisions about respondent's representation. Therefore, the DEC found violations of RPC 1.4(a) and (b). The DEC also found a violation of RPC 1.7(b):

> Upon the appeal's dismissal, respondent became obligated to notify his client in an accurate manner and advise her that his representation may have been affected by his own interests . . . . He had no basis for believing that his representation could avoid being adversely affected [by] RPC 1.7(b)(1) and he did not provide the disclosure required by RPC 1.7(b)(2), to excuse or ameliorate such conduct.
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> [Hearing panel report at 17-18]

Lastly, the DEC found a violation of RPC 8.4(d) for respondent's attempts to negotiate a settlement of the malpractice claim on the condition that grievant agree not to testify or participate in the ethics investigation and hearing.

In Parducci, the DEC found no clear and convincing evidence of a violation of RPC 1.3 or RPC 8.1(b). The DEC gave no reasons for its findings. The complaint did not allege violations of RPC 1.1(a) or RPC 8.4(d) and the DEC did not address those issues.

In Levinson, the DEC dismissed the one-count complaint, noting that respondent had replied to the grievance within the time mentioned in the third letter.

* * *

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

The DEC properly found that respondent did not grossly neglect the Rashti matter, agreeing with respondent's assessment of his conduct in the case:

> Now, although I would admit that I did miss a statute here, but I don't think that is gross negligence.
>
> Gross negligence, perhaps would have been, had I just taken the file and put it in the corner of my office and did absolutely nothing with it, and then years later went to the client and explained I did absolutely nothing with your file.
>
> [T3/14/96 42]

Indeed, respondent prosecuted the case through an appeal of the order of dismissal. The problem arose when respondent could not find the defendants. He then hired a private investigator to locate them in Florida, once it was apparent that their Queens, New York address was no longer valid. After the complaint was dismissed, respondent sent grievant a letter dated April 2, 1990, informing her of the dismissal and urging her to contact him. Respondent acted diligently under the circumstances and did not fail to expedite the litigation of grievant's case. For these reasons, the Board dismissed the charged violations of RPC 1.1(a), RPC 1.3 and RPC 3.2.

With respect to the alleged violation of RPC 1.4(a),

grievant's daughter, Azita, testified that their attempts to contact respondent were unsuccessful. Indeed, respondent admitted that he did not contact grievant for a number of months. Consistent with that testimony is the lack of documentation, between July 28, 1989 and February 11, 1993, evidencing any communication with grievant. Moreover, it is clear from grievant's February 11, 1993 letter that she did not know the actual status of her case. Three weeks later, on March 4, 1993, grievant wrote to Colonial Penn in a desperate attempt to gather information about her case. The Board found that respondent's conduct in this context was a violation of RPC 1.4(a).

Respondent also failed to explain the actual circumstances of the case so that grievant could make informed decisions regarding his representation. Beyond his April 2, 1990 letter (that grievant denied receiving) advising grievant about the dismissal of the case, respondent made no apparent effort to inform her about problems in the case. Therefore, respondent's conduct in this regard also violated RPC 1.4(b).

With regard to the alleged violation of RPC 8.4(d), it is uncontroverted that respondent negotiated a settlement of grievant's malpractice claim against him. The negotiations took place throughout the disciplinary proceedings below. Respondent candidly admitted that he sought to prevent the "aggravation" associated with ethics matters and that he drafted a settlement agreement designed to prevent grievant from testifying in the ethics proceedings. In exchange for that promise, respondent was

to pay grievant $12,500. The agreement, although never executed, apparently was drafted after the statute of limitations for malpractice had already run. Respondent admitted that, with the malpractice claim barred, the sole benefit to be derived from the payment of the $12,500 was his freedom from the disciplinary authorities. By attempting to convince his client to withdraw her ethics grievance, respondent violated RPC 8.4(d).

In Parducci, it is clear that respondent knew of the lien on the property and closed the file without removing the lien. That mistake went undetected for five years. Although in May 1994 grievant reminded respondent of the existence of the lien, respondent did nothing to remedy the situation for another ten months. The five-year period that the case lay dormant would constitute gross neglect, had respondent been charged with such a violation. It is unquestionable, however, that his conduct violated RPC 1.3. While it appears that the existence of the lien did not prevent the refinancing, it is disturbing that respondent did not immediately take steps to remedy the situation after grievant informed him of the lien. Under these circumstances, due diligence required respondent to act immediately upon learning of his mistake. His failure to do so for an additional ten months constituted lack of diligence, in violation of RPC 1.3.

The Board dismissed the alleged violation of RPC 8.1(b) because respondent finally cooperated with the DEC by filing an answer and appearing at the DEC hearing. Lastly, the Board found a violation of RPC 8.4(d) (conduct prejudicial to the administration

of justice) for respondent's attempt to have grievant dismiss the pending grievance in exchange for the lien removal and a refund of the fee. The Board was not persuaded by respondent's argument that, when an attorney is moved by good faith, the attorney may negotiate the withdrawal of an ethics grievance directly with the client.

In Levinson, the Board dismissed the complaint as respondent had filed an answer within the time allowed.

* * *

There remains the issue of discipline. In Rashti, respondent violated RPC 1.4(a) and (b), as well as RPC 8.4(d). In Parducci respondent violated RPC 1.3 and RPC 8.4(d).

To his credit, respondent did not hide his attempts to circumvent the disciplinary process. He allegedly believed that he should be able to negotiate his way out of grievances, having been provided by a fellow attorney with a sample agreement designed to settle ethics matters. While respondent was certainly mistaken about the propriety of his actions, he did not act out of a wanton disregard for the rules.

Respondent's conduct is similar, albeit more serious, to that of an attorney who received a private reprimand in 1991 for negotiating and drafting a "Payment Affidavit and Cash Receipt" containing language that required the grievant to withdraw pending and future ethics charges against the attorney, in exchange for money, contrary to RPC 8.4(d). The attorney tried to purchase the

silence of a grievant in the same manner that respondent attempted to do so in the Rashti matter. In this case, however, respondent's conduct also included a failure to communicate and conduct prejudicial to the administration of justice in Rashti, as well as a lack of diligence in Parducci.

In view of the above, the Board unanimously determined to impose a reprimand for respondent's misconduct.

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

Dated: 11/18/97

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael J. Mella
Docket No. DRB 97-169

Argued: July 17, 1997

Decided:

Disposition: Reprimand

Members	Disbar	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				
Total:			9				

Robyn M. Hill 12/3/97
Robyn M. Hill
Chief Counsel