Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-108

IN THE MATTER OF	:
JAMES EASTMOND	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 15, 1997

Decided: June 30, 1997

John J. Bolan appeared on behalf of the District VB Ethics Committee.

Eldridge Hawkins 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 VB Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1973 and maintains an office at 59 Washington Street, East Orange, New Jersey. Respondent has no prior ethics history.

In 1983 Phyllis E. Doster ("grievant") met with respondent to discuss a possible medical malpractice action against a doctor who performed throat surgery on her minor daughter in 1983. According to grievant, who testified at the DEC hearing of February 15, 1996, the surgery had to be performed a second time after poor results were obtained from the initial operation.

During their conversation, grievant told respondent about the history of her daughter's birth and, in particular, that an emergency caesarean section had to be performed after it was disclosed that the infant was not breathing; her neck was apparently entangled in the umbilical cord and extreme measures were taken to deliver the child safely.

It is uncontroverted that a malpractice action based in the allegedly faulty throat surgery was never pursued, apparently because the better cause of action appeared to be in connection with the daughter's difficult birth. Indeed, neither grievant nor respondent ever discussed the throat surgery again. Grievant testified, however, that she left respondent's office that day with the clear understanding that respondent would pursue a malpractice claim against the hospital and others for problems surrounding her daughter's birth.

Grievant also testified that she returned to respondent's office on or about June 7, 1983 to sign release forms needed to obtain hospital records (Exhibit G-2).

Grievant alleged that, approximately two months later, she called respondent's office to get information about the case and, respondent told her that he was experiencing difficulty obtaining records from the hospital. Thereafter, grievant called respondent periodically to request information about the case. On May 13, 1985, grievant met respondent for lunch to discuss the case. According to grievant,

> . . .I called Mr. Eastmond and asked him how much would it take to get [the case] started. And that is what he said, $1,500, and that 's what I wrote the check for.
> [T12-13][1]

Grievant delivered the $1,500 check to respondent at the lunch meeting. Allegedly, grievant called respondent the next day to request that he confirm, in writing, that he had received the $1,500, that he would use the $1,500 to defray expenses in the case, and that he specify the manner in which the funds would be used. On May 28, 1985 respondent wrote a detailed letter to grievant outlining the costs supposedly incurred to date and how

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[1] T refers to the transcript of the DEC hearing of February 15, 1996.

the funds would be used. According to the letter, grievant had incurred a $121 fee for the hospital records; a $350 fee for the review and evaluation of the file by an internist, Dr. Russomanno; and a $1,000 fee for respondent's time, postage, telephone, copying, consultation and inquiries concerning various experts. Respondent also indicated that cash disbursements to date amounted to $471.

The letter also stated that "[t]he $1,500 provided by you will be used to cover part of the expenses for reports from the named doctors" and that a medical malpractice suit would be filed if the reports indicated that malpractice had occurred (Exhibit G-8).

Grievant testified that, after she received the May 28, 1985 letter,

> I didn't hear anything from Mr. Eastmond. I telephoned him to inquire about the progress of the case. When I called him he would tell me that the information was out at consultants. If they weren't at a consultant, they were out at a physician. That went on from 1985 all the way up to 1992. Every time I telephoned him he told me that the case — that the information was at a consultant.
>
> At one point he told me, after reading this letter, he told me that the consultant that he sent it to had stated that the hospital had implicated negligence by the statement that they had to resuscitate my daughter three times, three to four times. He told me that

> basically – you know, it was looking good. He's just waiting to see.
>
> At the same time I knew the financial situation of myself and he would mention the malpractice suit takes money even though he was aware from the beginning that I was not financially able to totally pursue it.
> [T14-15]

Grievant testified that from October 1983 to May 28, 1985 she called respondent approximately every two to three months for information about her case and sometimes met with respondent regarding other matters that he was handling in her behalf.

One such matter was a dispute with the Social Security Administration. Respondent resolved that matter in grievant's favor and obtained a $9,000 settlement in her behalf. Grievant indicated that she was quite satisfied with the results of that representation and initially asserted that respondent received one-third of the settlement amount for his fee. Later, however, grievant maintained that respondent's fee was to come directly from the Social Security Administration (T38).

Grievant alleged that the last communication that she received from respondent regarding the medical malpractice case was the May 28, 1985 letter. According to grievant, the letter " . . . gave me the assurance that my $1,500 was going to the pursuit of the malpractice" (T25).

Finally, grievant denied that respondent had been retained solely for the purpose of looking into the viability of a malpractice action. According to grievant, she and respondent had reached an oral agreement that respondent " . . .was going to take and handle a malpractice suit on behalf of my daughter understanding that I was not financially able to do it" (T30).

Indeed, when pressed on cross-examination, grievant testified as follows:

> There's no documentation from any of the consultants. When I met with [respondent] in August, August 10, 1989, I asked him to produce my daughter's file.
>
> When I got there, sir, Mr. Eastmond handed me a manila folder like this, handwritten, with my daughter's name on it, and inside that folder, he had three pieces of paper.
>
> Now, please help me understand something. From 1989 to 1992, every time I telephoned you and you were sending information out to consultants, whether it was positive or negative, wouldn't you have had some kind of documentation in the folder? He did not. I never received anything from Mr. Eastmond, from the consultant, saying that she don't [sic] have a case; that she has a case. That is my point.
>
> All I wanted Mr. Eastmond to do for me and my daughter was to tell me whether I had a legal matter against medical people who were screwing up. That's it.
>
> [T32-33]

For his own part, respondent testified that at the initial conference he discussed the malpractice action with grievant and explained to her that he would obtain and review her daughter's birth records from the hospital. Respondent contended that he advised grievant that he did not have the expertise to handle a medical malpractice case and that, upon his receipt and review of the hospital records, he would seek medical expert opinions to determine the viability of a lawsuit. Respondent denied that he was ever retained to bring a medical malpractice action; rather, he insisted, he was retained solely to determine if a valid claim existed. According to respondent, on more than one occasion, he explained this issue to grievant, as well as his intention to refer the matter to another attorney if there was a viable claim.

Respondent admitted that, even though grievant was a new client, there was no retainer agreement for the medical malpractice matter. Respondent explained that his relationship with grievant was rather "loose," as evidenced by the Social Security matter, in which no retainer agreement was ever signed and for which he did not request a fee from grievant. Similarly, respondent went on, grievant had come to him with a wage garnishment issue, for which he had not charged a fee.

Indeed, according to respondent, grievant was so grateful for his help in the Social Security matter that she wanted to give him a monetary "tip." Respondent added that grievant had arranged the lunch meeting, at which time she had given him the check for $1,500. According to respondent, the $1,500 was his "tip":

> I assume that's when she called the next time and asked for some letter referring to what was I going to do with the money and I told her, 'It is my money. I'll do with it as I please,' and we had some words. Under any circumstances, we hang up [sic].
>
> She called me a number of times after that and I finally acquiesced. I mean it was aggravating. I finally acquiesced, that was the product of that letter. I came to the conclusion that somewhere along the line she had changed her mind. And I assumed that she had spoken to someone and that was an assumption on my part. And that she gave me $1,500, whatever the case may be, but under any circumstances that letter was the product of that.
>
> I had also examined the check before I deposited [it] and noted the attorney expenses without designating which particular item it was for and I had some concerns. I said, what the heck, our relationship seemed to be good. It would only be for the thing she said it was for. And I deposited it and I considered it to be my money.
>
> [T82]

Respondent asserted that he was annoyed by grievant's request that he meet her at a restaurant to receive his "tip":

Answer: It was upsetting to me because I wanted her to come to my office, okay. I went with the express idea that I was going to receive a tip. The amount I did not know. I didn't particularly care for the word 'tip' but I went because I had done a lot of work on the social security case, a considerable amount of work.

Question: And it was successful?

Answer: And it was successful, yes.

When the question came up, she had a checkbook out and she was sort of doing this on the table as we are eating.

MR. MCDONALD: For the record, tapping her hands on the table?

THE WITNESS: Tapping her checkbook.

MR. MCDONALD: On the table?

THE WITNESS: On the table.

Question: And she said, 'What is the status of Shauna's matter?'

Answer: I said to her, 'Ms. Doster, I did not come here to discuss Shauna's matter. I came here because you called me. You told me you were going to give me a tip. And that's all I am here for, to transact, okay.'

And I did not think that that pleased her. But notwithstanding that, she then wrote the check out and I did not know the amount she was writing out for because I never gave her an amount for anything. She handed it to me and said; 'Is that correct?' and I said, 'Yes, it is adequate, thank you' and put it in my pocket.

> We spent a couple of — I don't even think I finished my lunch, okay. And we spent a couple of minutes more and we left.
>
> In her initial testimony to the [committee], it would appear as though nothing ever happened. That there was no mention of the meeting. That there was no mention of doing any work for her. That there was no mention of the frequent contact we had by phone.
>
> [T85-87]

Respondent testified that he had written grievant the May 28, 1985 letter to "get her off my back" (T87) because she was dissatisfied with respondent's answers about her medical malpractice matter.

Respondent was still in contact with grievant as late as June 1990, when he sent her a letter regarding the wage garnishment issue. At that time, respondent learned that grievant was moving to North Carolina. Respondent testified that he told grievant at that time that he wanted to "wrap up" all pending legal matters with her because he did not wish to maintain a "long-distance legal relationship" with her. Respondent claimed that from August 1990 to August 1992 he never heard another word from grievant. In fact, according to respondent, grievant appeared unannounced in his office on or about August 13, 1992 to review the file on the medical malpractice matter. Respondent was apparently surprised to see her, having "emphatically" told her in August 1990 that he was

terminating his legal relationship with her. Respondent testified that grievant's August 13, 1992 visit was significant because it was within days of the daughter's eighteenth birthday, upon which the statute of limitations for the filing of a medical malpractice action might run.

Thereafter, grievant wrote a letter on August 19, 1992 attaching a request that respondent release her file to a new attorney (Exhibits G-4 and 5). Respondent denied receiving the letter or the request to release the file. Respondent cited problems with mail delivery to his office. To substantiate his claim respondent offered a letter to the Postmaster in another case as well as the Postmaster's reply (Exhibit R-5). Those letters, however, were dated July 1995, almost three years after grievant's correspondence.

Respondent also alluded to grievant's "ulterior motives" in delaying contact from 1990 to 1992. Respondent did not explain what those motives might have been.

Respondent testified that between 1983 and 1990 he had asked several medical experts and several attorneys to review the medical malpractice file, but that he did not receive a written opinion from any of the individuals who had reviewed the file. Respondent claimed that he did not correspond in writing with these

individuals; rather, he hand-delivered the file to each of them. Therefore, there was no record of his attempts to further grievant's claim.

On cross-examination, respondent admitted that the May 28, 1985 letter to grievant was incorrect in several respects. With regard to the claimed $121 fee for hospital records, only $31 was actually expended by respondent. The alleged $350 fee to Dr. Russomanno was never paid because the doctor never issued a report. Indeed, respondent admitted that no expert ever rendered any written opinion in the case. Finally, respondent acknowledged that he did not notify grievant in writing that he was withdrawing from the representation either in August 1990, when he first learned that grievant was moving out of state, or thereafter.

* * *

The DEC found violations of RPC 1.3(lack of diligence) and RPC 1.1(a)(gross neglect) for respondent's failure to prosecute the case over the nine years that it was in his hands; RPC 1.5(fees) for respondent's failure to sign a contingent fee agreement; and RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation) for respondent's retention of the $1,500 deposit

despite his letter to grievant stating that the funds would be used for expenses. The DEC recommended the imposition of discipline greater than an admonition.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct is fully supported by the record.

Grievant allegedly left her initial meeting with respondent in early 1983 believing that, if she had a valid claim, he would represent her in her medical malpractice case and that he would do whatever was required to determine if, in fact, she had a valid claim against the hospital and others for negligence. Respondent claimed that he made it clear to grievant from the outset that he would help her in the determination of that issue, but that he would not represent her in a medical malpractice suit because he did not have expertise in that area.

Without a retainer agreement, it is difficult to determine the purpose of the representation. Respondent argued that the lack of a retainer agreement was indicative of his retention to merely assess the case, instead of litigating it. Respondent's argument

is weakened, however, by the fact that no retainer agreements were signed in any of his matters with grievant.

In 1983 grievant signed medical authorization forms for the release of the hospital records regarding her daughter's birth. Grievant and respondent were in contact on a bi-monthly basis from 1983 to about May 1985. During that time, respondent represented grievant in another matter regarding the Social Security Administration, which netted grievant $9,000. On or about May 13, 1985, grievant and respondent met for lunch at grievant's suggestion. What happened at that meeting is in dispute.

Grievant claimed that she requested the meeting because she wanted to move the medical malpractice case along, but knew that the case would be expensive to prosecute. Grievant testified that at that time she gave respondent a check for $1,500 to fund expenses of the case in an effort to move the matter forward. Respondent, in turn, claimed that grievant asked him to lunch ostensibly to give him a "tip" for his good work on the Social Security case.

Notwithstanding that representation of events, grievant claimed – and respondent did not contest – that she called respondent the very next day to make sure that he intended to use the funds for the medical malpractice case and asked respondent to

send her a confirming letter. According to respondent, in an effort to get grievant "off his back," he wrote the May 28, 1985 letter detailing how the funds had been and would be used in the medical malpractice case. Respondent then retained the funds for his own use.

The DEC also determined that respondent violated RPC 1.5 by the absence of a retainer with grievant, a new client. However, the predecessor of RPC 1.5, (DR 2-106), which was in effect in 1983, when respondent was retained, did not require that the representation be set forth in writing. Therefore, the Board dismissed the charge of a violation of RPC 1.5.

With respect to the alleged violation of RPC 1.4(b), the Board did not find clear and convincing evidence that respondent failed to explain the matter to the extent necessary for grievant to make an informed decision regarding the representation. The charged violation of RPC 1.4(b) was, therefore, also dismissed.

With respect to the alleged violations of RPC 1.3(lack of diligence) and RPC 1.1(a)(gross neglect), the evidence was more compelling. Regardless of the scope of the representation, grievant did not receive proper representation. Respondent held her daughter's medical records from 1983 to 1992. During that time he allegedly spoke to three medical doctors and three other

attorneys about the viability of grievant's claim. Nothing supports respondent's assertions regarding his contact with those individuals. Respondent claimed that he hand-delivered the file to each and every doctor and attorney who reviewed it, thereby attempting to explain why his file contained no cover letters or correspondence of any kind with those individuals. Indeed, respondent contended that not one medical doctor or attorney gave a written account of his or her file review. In light of the lack of documentation as to respondent's efforts, the Board cannot find credible respondent's version of the events. An inference is raised that he made no effort to "process" grievant's claim. The extent of respondent's inaction is illustrated by the fact that, when grievant first met respondent, her daughter was nine years old. The daughter had reached the age of eighteen in 1992. By that time respondent still had not rendered an opinion about the viability of her claim. Respondent's misconduct was a clear violation of RPC 1.3 and RPC 1.1(a).

The most troubling aspect of respondent's behavior concerned the $1,500 check from grievant and the alleged violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent claimed that grievant lured him to lunch under the guise of "tipping" him for a job well done in the Social Security matter and that, once there, grievant pressed for information regarding the medical malpractice case. Even if respondent was correct, there is no question that grievant was entitled to information about the case. Nonetheless, respondent claimed that he deserved the $1,500, either as a "tip" or as fees in the social security case, considered it to be his and rightfully deposited it in his business account. Grievant, on the other hand, claimed that the $1,500 was intended to fund the medical malpractice case and that she requested a letter from respondent the day after the lunch meeting to confirm that fact. Regardless of where the truth lies about their conversation at the lunch meeting, it is unquestionable that, even if respondent believed that he had been given a "tip," the next day grievant changed her mind and sought to change the agreement regarding the disposition of those funds. Respondent willingly acquiesced to grievant's wishes, as confirmed by his May 28, 1985 letter to her stating that the $1,500 had been and would be used for expenses associated with the medical malpractice case. It is undeniable that respondent did not use the $1,500 for expenses in the medical malpractice case. Feeling that he either earned a fee or a "tip," respondent used the funds for his

benefit.[2] By his own hand, respondent agreed that the funds had been and would be used for expenses, but none was incurred beyond the copying costs of the hospital records.

The DEC concluded that respondent had violated RPC 8.4(c) by misrepresenting to grievant the manner in which the $1,500 had been and would be used. Respondent's May 28, 1985 letter indicated that the entire amount of money would fund expenses of the case. The letter stated that, as of the date it was written, respondent had "incurred" $1471 in expenses, with an "actual cash disbursement" of $471. In truth, respondent's out-of-pocket expenses were limited to $31 for the hospital records. Presumably, had respondent diligently pursued grievant's claim, other expenses would have been incurred and paid. The letter, however, unquestionably misrepresented the amount of expenses in the case. Accordingly, the Board found a violation of RPC 8.4(c).

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[2] It should be noted that, pursuant to R. 1:21-6, and In re Stern, 92 N.J. 611, 619(1983), retainers and expenses may be deposited in an attorney's business account (as happened here) and used in the ordinary course of business. The $1,500 was never required to be in trust and, therefore, did not trigger an inquiry regarding a possible misappropriation of client funds.

There are no mitigating or aggravating factors to be considered. The record does not disclose the value, if any, of grievant's claim or whether the claim was forever lost. The Board is, therefore, unable to find that grievant suffered financial harm.

Respondent's misconduct was confined to a single instance of gross neglect, lack of diligence and misrepresentation and closely resembles that found in recent cases resulting in a reprimand. See In re Gordon, 139 N.J. 606 (1995) (where the attorney showed a lack of diligence and failure to communicate in two matters, with gross neglect and failure to return a file in one of the two matters. The attorney had received a prior reprimand); In re Carmichael, 139 N.J. 390 (1995) (where the attorney showed a lack of diligence and failure to communicate in two matters. The attorney had received a prior private reprimand); and In re Wildstein, 138 N.J. 48 (1994) (where the attorney failed to communicate in three matters, showed a lack of diligence in two of the three matters and gross neglect in two of the three matters).

After consideration of the relevant circumstances, the Board unanimously determined to impose a reprimand for respondent's misconduct. One member recused himself.

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

Dated: 6/30/97

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James Eastmond
Docket No. 97-108

Hearing Held: May 15, 1997

Decided: June 30, 1997

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:			8			1	

Robyn M. Hill

Robyn M. Hill
Chief Counsel