SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-130

IN THE MATTER OF

EDWARD S. FODY,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 22, 1994

Decided: September 27, 1994

Barry N. Shinberg appeared on behalf of the District X 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 on a recommendation for public discipline filed by the District X Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.4(a) (failure to keep client reasonably informed), RPC 1.16(d) (failure to take necessary protective measures upon termination of representation) and RPC 8.1(b) (failure to cooperate with disciplinary authorities). Respondent did not file an answer to the complaint.

Respondent was admitted to the New Jersey bar in 1974. He has no prior disciplinary history. Respondent was charged with misconduct in two separate matters.

The Hayes Matter

In 1985, respondent was retained by Barbara Hayes ("grievant") to represent her in an action for injuries she sustained on February 13, 1985, when she fell on ice in the parking lot of a company called Thomas N. Betts ("Betts"). At the time of the accident, grievant had been employed by Horizon Graphics ("Horizon"), which had contracted her out to Betts as an on-site graphics artist or illustrator. Since grievant sustained her injuries during the course of her employment, respondent filed a worker's compensation claim petition in grievant's behalf, naming Horizon as the respondent. In addition, respondent filed a third-party negligence action against Betts as the owner of the property. While it is not clear when either of these actions was filed, it appears that both were timely filed and were progressing simultaneously.

Grievant testified that, during the summer of 1986, she appeared in court for trial. At that time, she gave testimony regarding the nature and extent of her injuries. After her testimony, the judge deliberated and made an award for her injuries. Grievant maintained that, after the judge announced his award (apparently ten percent of total permanent disability), he advised grievant, in respondent's presence, that he had awarded her an amount lower than the actual value of her injuries simply because she would have to reimburse the compensation carrier for any amounts it had paid in her behalf upon settlement or judgment in the third-party action. Respondent strongly disputed this and

maintained instead that the judge merely reminded grievant, in his presence, that, upon settlement or judgment in the third-party action, she would be obligated to reimburse the compensation carrier for any sums it had paid her. There was no other evidence, documentary or otherwise, to support grievant's recollection of the judge's statement.

At some point thereafter, grievant was called in for non-binding arbitration on her third-party claim against Betts. According to respondent, while waiting to be called in before the arbitrator, respondent discussed with grievant the possibility that the arbitrator might make no award against Betts in her favor and that he might instead find that grievant was the employee of Betts, thereby barring any negligence claim against it. Grievant did not recall any such conversation.

The arbitrator made an award that respondent considered insufficient. Specifically, the amount of the award was less than the amount grievant would have to reimburse to the compensation carrier. In effect, therefore, grievant would receive no monies from the third-party claim. For that reason, respondent determined to file a demand for a trial de novo, although it is not clear whether he actually advised grievant of his proposed action or of the reasons therefor.

Subsequently, according to respondent, the attorney for Betts advised him that no offer for settlement would be made because the carrier for Betts considered grievant's third-party action against it to be barred by the worker's compensation statute. In that

regard, the defense attorney provided respondent with an affidavit from grievant's employer, indicating that grievant had spent her entire work week at Betts and not just a fraction of the week. In addition, Betts had apparently been reimbursing Horizon both for its payments of temporary disability benefits to grievant and for its payment of the permanent disability award. On the basis of that information, respondent did some research and determined that defendant's position was probably correct. Nevertheless, defendant Betts did not take any action at that time to dismiss the complaint. The matter, therefore, was called for trial sometime in 1988.

According to grievant, respondent met with defense counsel in chambers to conference the matter. At the conclusion of that conference, respondent advised her that defense counsel intended to make a motion for dismissal (presumably at the end of her case) on the basis of the bar of the Workers' Compensation Statute. The judge, therefore, had recommended that respondent return to compensation court, presumably to reopen her case, and to have the compensation judge determine whether Betts was, indeed, an employer under the statute. According to respondent, the judge showed some predisposition toward defendant's position, with which, by this point, respondent also agreed. Respondent testified that he did not want to begin trial and incur the expense of bringing in experts, in the face of a substantial risk of dismissal at the end of his case or an appeal by defendants, as had been promised, in the event his case survived a motion to dismiss. The parties,

therefore, agreed to voluntarily dismiss grievant's action without prejudice. Defense counsel further agreed to waive the statute of limitations for a period of three years so that respondent could re-file the third-party complaint, in the event the compensation judge denied the petition to re-open grievant's compensation claim.

Since grievant apparently was still treating with physicians and continued to experience some disability for some time even beyond the original compensation award, respondent did, indeed, file an Application for Review or Modification of Formal Award ("reopener") on or about July 21, 1988. See Exhibit R-1. In the meantime, however, according to respondent, grievant had taken it upon herself to begin treatment again with doctors who had not been approved by the compensation carrier. Respondent testified that he warned grievant that payment for such treatment could be denied by the carrier and that grievant would become responsible for the payment of any bills incurred. (Grievant recalls only that respondent asked her if she had private insurance to cover the bills, to which she responded in the negative). Respondent then called Dr. Lewandowski, with whom grievant was treating, and told him essentially the same thing. He added, however, that, even if he could persuade the carrier to cover such bills, they generally would not be covered beyond the amount of $250. Respondent testified that the doctor was apparently satisfied with that information and continued to treat grievant. He did so, however, to the tune of $1,500.00, a fact of which respondent had not been aware. But see Exhibit P-5.

It appears that the reopener, though filed in July 1988, remained inactive for quite some time. Grievant testified that respondent continued to advise her that it would take time for the compensation court to reach her petition. Respondent, essentially, agreed, claiming that he had on many occasions telephoned the Division of Compensation in Morris County to learn the status of that petition. On each occasion, he was advised that the file on the original claim and award had not yet been received from Trenton, where it probably remained in storage, and that the claim could not be listed until that time. He apparently took no further action to hasten that process.

At some point and for some reason not disclosed by the record, respondent refiled the third-party action against Betts (perhaps to avoid the expiration of the three-year waiver of the statute of limitations). The attorney for Betts, however, filed a motion for summary judgment on the basis of the bar of the Workers' Compensation Statute. Respondent maintained that, because he had found substantial caselaw supporting defendant's position and none to support his own, he did not oppose the summary judgment motion, which was subsequently granted. He testified, however, that grievant's petition for modification was not affected by the dismissal of the third-party claim against Betts. In fact, at least as of the date of the DEC hearing, that petition remained open. In addition, while Horizon did not elect to follow respondent's suggestion that it make Betts a co-respondent on the petition for modification, there is no reliable evidence to suggest

that the original award would have been higher, had Betts initially been named as a co-respondent. Indeed, respondent correctly maintained that compensation awards are set by statute and are not affected by the number of respondents.

At some point, grievant became frustrated both at the inactivity in her matter and at her allegedly failed attempts to reach respondent in order to obtain information about the status of her case. Grievant was unclear both as to the timing and the frequency of those attempts. In addition, it appeared from her testimony that she had, on occasion, spoken with respondent, who then advised her of the progress of her matter. See T69-70, 72.[1] That notwithstanding, in or about July 1990, grievant contacted another attorney, John Hoyt, who agreed to represent her in the third-party action only, conditioned upon his review of her file. She, therefore, executed an authorization for release of her file, which Hoyt then forwarded to respondent, along with a request for the file. See Exhibits P-1 and P-2. When respondent received that request, he telephoned grievant, ostensibly to determine why she was dissatisfied. At that point, grievant, who had known respondent since childhood (respondent's daughter was grievant's closest childhood friend), felt uncomfortable taking the case away from respondent and expressed that discomfort to Hoyt — albeit couched in terms of "intimidation." In any event, although respondent never forwarded grievant's file to Hoyt, Hoyt assumed

---

[1] T denotes the DEC hearing transcript of February 10, 1994.

that she had had a change of heart and had elected to remain with respondent. That, in fact, appears to have been the case.

Subsequently, in or about October 1992, grievant again consulted another attorney, Daniel Lynn, regarding her compensation claim. At that point, grievant was being pursued for the payment of medical bills, which she believed should have been covered by the compensation award. Grievant, however may have been referring to bills incurred after the entry of the original award, as previously discussed. In any event, Lynn wrote to respondent on October 13, 1992, advising him that grievant wished him to assume the handling of both the compensation and the third-party claims. He enclosed a signed authorization from respondent. Although Lynn testified that respondent never forwarded the files to him, respondent testified that his secretary advised Lynn's secretary that the file was voluminous and that he did not want to transfer it to Lynn by mail. (This seems to be confirmed by the fact that respondent did, ultimately, release grievant's file to her father, upon his promise to personally pick it up). Furthermore, respondent testified that grievant again agreed to keep the file with him. In this regard, grievant admitted that, although Lynn encouraged her to directly contact respondent to obtain her files, she declined to do so, though it is not clear why.

Grievant apparently consulted with two other attorneys at some point. Ultimately, her father personally obtained her file from respondent and brought it to another attorney. It is not clear what that attorney is pursuing in grievant's behalf. It appears,

however, that the petition for modification remains open, at least as of the date of the DEC hearing.

The only other person to testify in the Hayes matter was Christine Poplaski, who was Dr. Lewandowski's office manager. Ms. Poplaski testified about the number of times she attempted, unsuccessfully, to reach respondent to inquire about the status of the petition for modification. See Exhibit P-7. Obviously, the status of that petition would affect the payment of Dr. Lewandowski's bill for treatment. There is no question but that Ms. Poplaski was, on a number of occasions, able to speak with respondent's secretary, who advised her that the matter was still pending.

The Comiskey Matter

On or about May 18, 1978, respondent prepared the Last Will and Testament of Edward C. Comiskey, in which he was named Executor of the estate. Mr. Comiskey and respondent were, apparently, longtime friends or acquaintances. In or about March 1990, Comiskey's sister, also a longtime friend or acquaintance of respondent, and Comiskey's brother ("grievant") visited respondent at his office and advised him that Edward Comiskey had very recently passed away, while residing in Florida. Because respondent was the named personal representative of Edward Comiskey's estate, the decedent's siblings, the beneficiaries under the will, brought him certain bills to be paid, such as, for instance, funeral bills. Thereafter, grievant and Comiskey's

sister, Bladek, continued to send respondent bills to be paid from estate funds.

Ultimately, a dispute arose with the insurance carrier for Comiskey's employer about the payment of life insurance proceeds as well as pension benefits. Respondent was, apparently, able to resolve that dispute in behalf of the estate. At some point, respondent had requested that grievant provide him with a list of his brother's assets, ostensibly to probate the will, but never received any such list from him. In addition, respondent testified that he telephoned the Florida Surrogate's Office on many occasions to obtain a copy of any necessary forms to be filed, in order to probate the will. However, he never received the forms. Therefore, although Comiskey died in March 1990, respondent was never able to probate the will. Nevertheless, he maintained that he kept in frequent telephone contact with grievant over the one-and-one-half years that he handled the estate and that he made grievant aware of everything he was doing in behalf of the estate. According to respondent, grievant never complained to him about his performance. (While the presenter alluded to some letters from grievant and other family members, expressing dissatisfaction with the amount of time it was taking respondent to conclude the estate, those letters were never entered into evidence).

During one of their telephone conversations, respondent voiced to grievant some concern over the fact that he had not been able to conclude the estate and suggested that he, respondent, go down to Florida to meet with a Florida attorney. However, according to

respondent, because the value of the estate was somewhat modest, grievant did not want respondent to travel to Florida or to retain an attorney to represent the estate. In this regard, respondent steadfastly maintained that, at no time, was he retained to represent the estate as an attorney. He contended that whatever actions he took in behalf of the estate were undertaken in his capacity as executor. At no point did he charge or even discuss a fee. Nor was it ever his intention to charge for his services, due to his relationship with both the decedent and Bladek. Since no portion of respondent's file was produced at the DEC hearing, the credibility of respondent's position cannot be evaluated. Similarly, because neither grievant nor Bladek testified at the hearing, it cannot be determined whether they considered respondent to be acting as the attorney for the estate or merely as the personal representative.

Respondent testified, that, at some point and for some reason unknown to him, grievant became upset with respondent and expressed a desire that someone else "handle" the estate, to which respondent posed no objection. He then received some letters from attorney Janet L. Poletto of the law firm of Bumgardner, Hardin and Ellis. Respondent spoke with Poletto on at least one occasion and apprised her of his efforts to obtain the necessary documentation from Florida, ostensibly to probate the will. According to respondent, that information apparently satisfied Poletto. However, as respondent testified, "the next thing I know was the fact they wanted the file over in that office." T132. While respondent had

no problem with transferring the file to the law firm, he did not do so, he maintained, because he did not have a signed authorization from any of the beneficiaries. He testified, however, that he ultimately came to the realization that he, as personal representative of the estate, had such authority. Respondent, therefore, ultimately turned the file over to the Bumgardner firm in or about November 1991. Thereafter, he received from that firm a declination-of-appointment letter for his signature. Apparently, Florida's probate procedures, rules or statutes do not permit a non-resident to act as personal representative of an estate. Respondent testified that he received that request around the holidays and was unable to attend to it until early January 1992. A member of the Comiskey family personally picked up the executed letter of declination and delivered it to the Bumgardner firm. That firm then referred the matter to Florida counsel.

Only two other witnesses testified about the Comiskey matter: Janet Poletto, Esq. and Ann Marie Daniel, Esq., both of the Bumgardner firm. Poletto testified that she initially wrote to respondent on April 23, 1991, at her sister-in-law's request (Bladek's daughter). Apparently, Bladek had complained to Poletto, through her daughter, that respondent was taking too much time to probate the will and that he had not replied to her requests for information. Poletto's purpose in writing the letter was simply to encourage some action on his part. She stated, however, that she never received any reply from respondent. Thereafter, in or about

September 1991, she assigned the matter to Ann Marie Daniel to handle.

Daniel testified that she began telephoning and/or corresponding with respondent in or around September 20, 1991. On that date, she was able to speak with respondent, who advised her that he would attempt to probate the will within that week and would send her confirmation of probate. When she did not hear from respondent, she wrote to him, on October 2 and 10, 1991, to confirm their September 20 telephone conversation. She was able to speak with respondent on October 9, 1991, when he again advised her that he was still attempting to contact the Florida Surrogate's Office to probate the will.

At some point between that last telephone conversation with respondent and November 22, 1991, Daniel received the estate file, which contained the original unprobated will. However, upon review of the file, it appeared to her that respondent had indeed completed some tasks in behalf of the estate. See T48-49. She ultimately referred to file to Florida counsel in January 1992.

While there was some allegation that the estate suffered losses as a result of respondent's action or inaction, there was no testimony or other evidence offered to support that allegation.

The Failure to Cooperate Charges

Respondent admitted that he failed to reply to the Hayes and Comiskey grievances and to answer the formal complaint, despite the DEC's requests that he do so. He maintained that he simply

experienced a "psychological block" when faced with those grievances. T168. He appeared, however, at the DEC hearing.

* * *

The DEC found respondent guilty of unethical conduct in both the Comiskey and Hayes mattes. Specifically, in the Comiskey matter, the DEC found respondent guilty of failure to keep his client adequately and accurately informed, in violation of RPC 1.4(a). In addition, the DEC found respondent guilty of a violation of RPC 8.1(b), both for his failure to reply to the Comiskey grievance and to file an answer to the formal complaint. The DEC declined to find respondent guilty of gross neglect, as he had clearly performed some work in behalf of the estate. Similarly, the DEC did not find respondent guilty of a violation of RPC 1.16(d).

In the Hayes matter, the DEC found respondent guilty of a violation of RPC 8.1(b), both for his failure to reply to the grievance and for his failure to file an answer to the formal complaint. Because the evidence established that respondent had, indeed, filed a petition for modification in his client's behalf, the DEC declined to find a violation of RPC 1.1(a), as alleged. Instead, the DEC found that respondent failed to diligently pursue that petition, in violation of RPC 1.3. While the complaint did not specifically charge respondent with a violation of RPC 1.3, the DEC amended the allegation to conform to the proofs presented during the hearing. The DEC declined to find, by clear and

convincing evidence, that respondent failed to keep his client informed, in violation of RPC 1.4(a).

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. Respondent's failure to reply to either of the grievances and to file an answer to the formal complaint was in clear violation of RPC 8.1(b). Given respondent's prior experience with the disciplinary system, where he was charged with failure to cooperate in an unrelated matter, his obligation to cooperate at all stages of the investigation should be crystal clear. Respondent offered no credible explanation for his conduct in this regard.

The Board is unable to agree, however, with the DEC's conclusion that respondent was guilty of any other misconduct in the Comiskey matter — specifically RPC 1.4(a). In the Board's view, the record does not support a finding of the existence of an attorney-client relationship between respondent and the estate. There is no evidence of a fee agreement or other evidence showing that respondent held himself out to be, or otherwise advised anyone that he was, the estate attorney. No one, including grievant or any other beneficiary, was produced at the DEC hearing to testify that, because of respondent's status as an attorney, he or she considered respondent to be the legal, in addition to the personal,

representative of the estate. Had any such evidence existed, it certainly would have been simple enough to produce. Everything respondent did in behalf of the estate could have been done by a personal representative of an estate. Without clear and convincing evidence to the contrary, the Board cannot find that an attorney-client relationship existed in the Comiskey matter.

Were the Board to so find, however, there is no evidence to support the conclusion that respondent did not keep his clients informed. No file was produced to show the existence of unanswered requests for information and no one was called to testify about the existence of any such requests. The only evidence presented on that issue was respondent's testimony, which supports the opposite proposition, i.e., that he remained in frequent contact with grievant.

Similarly, the record does not clearly and convincingly show that respondent grossly neglected the matter. The paltry evidence presented in this regard supports the opposite conclusion — that respondent performed certain essential tasks in behalf of the estate, including the collection of insurance proceeds.

The Board recommends that all charges in the Comisky matter be dismissed, with the exception of the charge of a violation of RPC 8.1(b) for respondent's failure to cooperate with the disciplinary authorities.

In the Hayes matter, too, the proofs fall short of the requisite standard with regard to a violation of RPC 1.1(a) and RPC 1.4(a). Like the DEC, the Board recommends that the charges of

gross neglect and failure to communicate with the client be dismissed. It is undeniable, however, that, although respondent took the necessary steps to file a petition for modification of the worker's compensation award, he thereafter did little else to pursue that petition, despite his knowledge of his client's continued disability and financial difficulty. Respondent's conduct on this score violated RPC 1.3.

As to the appropriate discipline for respondent's ethics infractions, the Board unanimously recommends that he be publicly reprimanded for his lack of diligence in the Hayes matter and failure to cooperate with the ethics system in both matters. One member did not participate.

The Board further recommends that respondent reimburse the Ethics Financial Committee for administrative costs.

Dated: 9/27/1994

By: Raymond R. Trombadore
Chair
Disciplinary Review Board