SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-222

IN THE MATTER OF	:
BARRY F. ZOTKOW,	:
AN ATTORNEY AT LAW	:

Decision of the
Disciplinary Review Board

Argued: October 26, 1995

Decided: December 4, 1995

Scott R. Lippert 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 pursuant to R. 1:20-15(f)(4), based on a recommendation for an admonition filed by the District IIA Ethics Committee (DEC). In a three-count complaint, respondent, Barry F. Zotkow, was charged with violations of RPC 1.1(a)(gross negligence), RPC 1.3 (lack of reasonable diligence and promptness in representing a client); RPC 1.4(a)(failure to keep a client reasonably informed about the status of a matter and to respond promptly to reasonable requests for information); RPC

3.2(failure to expedite litigation consistent with the interests of the client), and RPC 3.4(d)(failure to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party) (count one); RPC 4.1(a)(while representing a client, making a false statement of material fact or law to a third person) and RPC 4.1(b)(while representing a client, failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); RPC 4.4(in representing a client, using means that have no substantial purpose other than to embarrass, delay or burden a third person)(count two); and RPC 1.1(b) (pattern of neglect)(count three). At the DEC hearing, the complaint was amended to include a fourth count for respondent's violation of RPC 8.1(b)(failure to respond to a lawful demand for information from a disciplinary authority).

These charges stemmed from respondent's failure to pursue an action filed in behalf of the grievant, Helen E. Wiegland, against Maxell Corporation of America (Maxell) for wrongful termination of employment. After the case was dismissed, respondent sent a "letter of protection" to a doctor who had examined grievant in connection with the matter, stating that he was waiting for a trial date.

Respondent was admitted to the New Jersey bar in 1971. He maintained an office in Fort Lee, New Jersey. Respondent received a three-month suspension on July 17, 1995 for gross neglect, lack of diligence, failure to communicate, failure to expedite

litigation and failure to comply with proper discovery requests by an opposing party. Respondent also received a private reprimand in 1992 for failure to oppose an adversary's motion to dismiss a complaint, which resulted in a ruling favorable to the adversary. Respondent subsequently failed to inform the client that the complaint had been dismissed and failed to take remedial action to have it reinstated.

* * *

Grievant met with respondent in September 1989 about her claim for wrongful discharge from Maxell. After grievant's meeting with respondent, he filed a complaint in her behalf on October 6, 1989, charging the defendants with wrongful termination of employment on the basis of several claims, including age discrimination.

According to grievant, she did not have much telephone contact with respondent, although she received "a lot of correspondence" from him setting forth court dates and postponements. T21.[1] Grievant claimed that she was advised of approximately five trial dates, the last of which had been postponed because of respondent's vacation plans. She believed that the last postponement occurred in 1992, but could not be certain of the date. Unbeknownst to grievant, her complaint had been dismissed in December 1991.

Grievant recalled that she attended one meeting with respondent and the attorneys from Maxell. From her brief description and responses on cross-examination, it appears that the meeting was an attempt to settle the matter. Grievant stated that

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[1] T denotes the transcript of the February 16, 1995 DEC hearing.

no court reporter was present during the meeting, but that she was questioned about her years with the company and "the incidents." T23.

Grievant contended that respondent never instructed her to answer interrogatories or informed her that the defendant had propounded interrogatories. However, the following exchange occurred between grievant and respondent at the DEC hearing:

> Q. At some point in time after we instituted suit, that's when we answered these interrogatories, correct?
>
> A. That's correct.
>
> [T29-30]

It is not clear whether grievant forgot that she answered interrogatories, whether she did not realize she had answered them or whether she misunderstood respondent's question.

On December 2, 1990, a consent order for discovery was entered against grievant, as plaintiff. Exhibit B to Exhibit C-1. The consent order required grievant to submit fully responsive answers to interrogatories by January 18, 1991 and to appear in respondent's office for a deposition at a mutually agreeable time prior to February 13, 1991. The consent order further provided that, upon grievant's default of either provision, the complaint could be dismissed without prejudice upon an ex parte application by the defendant.

Apparently, respondent furnished inadequate or incomplete answers to interrogatories to his adversary because, on September 23, 1991, an order was entered requiring grievant to comply with

the defendant's request for production of documents and with the notice of depositions, to supply more "definitive" answers to the defendant's first set of interrogatories, to produce documents by October 15, 1991 and to set a date certain within thirty days to produce grievant for depositions. The order further provided that grievant's complaint would be dismissed for lack of compliance, pursuant to the December 21, 1990 order. Exhibit C to Exhibit C-1.

By order dated December 4, 1991, grievant's complaint was dismissed without prejudice for failure to comply with the earlier orders. Exhibit D to Exhibit C-1.

Grievant contended that she tried to call respondent every month to obtain information about the status of her case. She did not indicate whether she spoke to respondent. She stated only that she received correspondence from respondent and that the correspondence stopped after the last court date had been adjourned, which, according to her earlier testimony, was sometime in 1992. Grievant claimed that, thereafter, she attempted to contact respondent and "half the times . . . would never get through to him." According to grievant, when she would get through, respondent would tell her that "they're working on it or they're, you know, trying to get another court date or the courts are backlogged, you know." T24.

The complaint was dismissed in December 1991. Respondent failed to take any action to reinstate the complaint and failed to apprise grievant of its dismissal.

Prior to the dismissal, respondent had referred grievant to a psychiatrist because she had been "emotionally upset" from the termination of her employment. T26. The doctor treated grievant from July 30, 1990 to September 20, 1990 and sent grievant a bill for $1,000. Grievant forwarded the doctor's bill to respondent, whereupon he advised her not to pay it. T27. Grievant, however, continued to hear from the doctor. Eventually, the doctor's wife contacted grievant about the bill, whereupon grievant again tried to reach respondent. Thereafter, on August 10, 1993, respondent sent a "letter of protection" to the doctor, assuring him that his bill would be "protected by his office from the proceeds of any settlement." The letter further informed the doctor that they were waiting for a trial date to be set by the court and that future bills should be sent to respondent. Grievant also received a copy of the letter. Exhibit E to Exhibit C-1.

Grievant did not learn that her case had been dismissed until sometime in the fall of 1993, when she telephoned respondent and he finally confessed that the complaint had been dismissed. Respondent told grievant that he did not know why the case had been dismissed but would look into it. When grievant called respondent again several days later, respondent told her that it would take about forty-five days to reinstate the complaint.

Grievant claimed that, after the forty-five days had passed, she once again called respondent's office and demanded to speak with him. Respondent informed her that he was still trying to get her case reinstated. Grievant testified that respondent then told

her, "Well, you can always sue me," to which she replied, "Don't tempt me." T25. At the DEC hearing, grievant testified that at some unspecified point she retained a new attorney, who believed that he would be able to reinstate her claim. T28. The record is silent as to whether grievant's case was in fact reinstated.

Respondent did not dispute the substance of the ethics complaint. In his own defense, he argued that he had been practicing law since 1971 without incident until the "recent matters" had emerged. He also referred to an ethics complaint filed against him in 1975 that was resolved in his favor. He did not, however, inform the DEC of his earlier private reprimand. It was not until he was cross-examined that he admitted that he had earlier been disciplined, claiming that he assumed that he would be questioned about it.

Respondent maintained that from 1988 until 1992 he had had problems that were unknown to him at the time. In 1992, he was diagnosed as suffering from bipolar disorder. T42. He began taking medication in 1992 and stopped it in late 1993. T50. At the DEC hearing, respondent neither offered the testimony of his doctor nor submitted any other evidence regarding his condition, claiming only that the purpose of his testimony was to present mitigation, instead of a defense.

As to his misrepresentation to grievant's doctor, respondent asserted that, as a matter of course in all pending matters, his secretary would send "letters of protection" — such as in grievant's case — to all doctors. Respondent denied that the

"letter of protection" in this matter had been sent to defraud anyone. He testified that grievant's case had slipped through the cracks because he was operating at less than full mental capacity.

Respondent admitted that his file contained the order dismissing the complaint, but he did not recall receiving the order. He claimed that, if he had, he would have acted promptly to restore the complaint. He contended that he had to "go down to the court and look in the court file to find the dismissal" because he did not realize that his own file already contained the order. T52.

After respondent became aware that the case was dismissed, he did not try to restore the matter. Instead, he advised grievant to get another attorney. He believed that it was his obligation to do so because he had "screwed up her case." T56. He was embarrassed and felt that he no longer had grievant's confidence as her attorney.

The formal ethics complaint was served on respondent under cover letter dated November 17, 1994. Respondent did not file an answer within the required ten days. By letter dated November 29, 1994, respondent was again requested to file an answer within five days and was advised that, if he failed to do so, he would be charged with a willful violation of RPC 8.1(b). Exhibit C-5. Respondent did not file an answer and the complaint was amended at the DEC hearing to include such violation.

* * *

The DEC found, in count one, clear and convincing evidence that respondent had violated RPC 1.3, RPC 1.4, RPC 3.2 and RPC 3.4(d). The DEC did not find, however, a violation of RPC 1.1(a).

As to count two, the DEC found either that respondent's secretary automatically had sent a "letter of protection" to grievant's doctor in the regular course of business or that it had been sent when respondent still believed that the case was pending. The DEC did not find that the letter had been sent with the intent to make a false statement of material fact to a third party or to embarrass, delay or burden a third person. The DEC, therefore, did not find violations of RPC 4.1(a) or RPC 4.4.

Based on the facts before it, the DEC did not find a pattern of neglect, as charged in count three. It did, however, find a violation of RPC 8.1(b) for respondent's failure to file an answer to the formal ethics complaint.

The DEC concluded that respondent's conduct in this matter was "mitigated" by his "undiagnosed disorder." The DEC was convinced that respondent would not engage in the same type of behavior again. Because of respondent's condition, the DEC recommended an admonition.

* * *

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

The DEC found violations of RPC 1.3, RPC 1.4, RPC 3.2, RPC 3.4(d) and RPC 8.1(b). It did not find a violation of RPC 1.1(a) (gross negligence). The Board disagrees. Respondent's conduct in failing to comply with discovery requests and court orders, leading to the dismissal of his client's matter, and his subsequent failure to have the matter reinstated constituted gross negligence. Similarly, unlike the DEC, the Board found that respondent's actions in this matter, viewed in conjunction with his conduct in the 1992 and 1995 matters, established a pattern of neglect in violation of RPC 1.1(b).

The DEC properly found that respondent's conduct did not violate RPC 4.1(b) (misrepresentation to a third person). The Board agrees with that conclusion, given the absence of clear and convincing evidence that respondent sent the "letter of protection" to mislead the doctor or grievant.

As to his claim of bipolar disease, at the DEC hearing respondent provided only his own self-serving statements. Neither doctor's testimony nor medical reports were submitted in support of his claim of bipolar disease. Similarly, the record was bereft of any other evidence concerning the effects of either the alleged condition or the medication on his ability to function properly. At hearing before the Board, respondent did submit a letter from a licensed psychologist, indicating that respondent had started therapy with him in April 1994. That psychologist had not, however, treated respondent during the time of his misconduct. The psychologist stated that, when he started treating respondent, it

was apparent that respondent was at the "tail end of a depression which earlier on must have been of some severity." Although the psychologist provided a synopsis of respondent's problems and treatment starting in 1989, the psychologist did not indicate whether, in reaching his conclusions, he had reviewed any files or notes of doctors who had earlier treated respondent. It appears, thus, that the psychologist relied entirely on respondent's own recitation of the events leading to the onset of his disease and the treatment provided by other professionals.

In assessing the proper weight to ascribe to respondent's claim of bipolar disease as a mitigating factor, the Board considered that respondent did not raise this claim in an earlier disciplinary matter that involved similar ethics violations. Respondent's conduct in that matter spanned from May or June 1989 until November 1990. The DEC hearing in that case took place in 1993, at a time when he knew of the bipolar diagnosis. Respondent did not offer his mental condition as mitigation for his conduct in that matter, despite his current claim that the disease started in 1988 and was diagnosed in 1992. Indeed, in that earlier matter, respondent claimed, in his defense, that it was in fact his litigation strategy to "delay, obfuscate and stonewall," with his clients' knowledge.

Here, while it is clear that respondent took some action in grievant's behalf, his misconduct continued for nearly three years - between 1990 and 1993. He allegedly started taking medication in 1992 and discontinued it in late 1993. Respondent testified that,

during the time he was on medication, he was not medicated to the point that his senses were dull. He claimed that his condition was under control and that he was "functioning perfectly well," equal to his level of functioning at the time of the DEC hearing. T51. In light of that testimony, respondent should have been capable of restoring his clients' case, or at a minimum, should have been able to determine the status of the case. The Board, therefore, could accept respondent's claim that his bipolar disease mitigated his misconduct.

* * *

Respondent's conduct in this matter violated RPC 1.1(a), RPC 1.1(b), RPC 1.3, RPC 1.4, RPC 3.2, RPC 3.4(d), and RPC 8.1(b). The Court has imposed discipline ranging from a reprimand to a short term of suspension where ethics violations have included mixed combinations of gross neglect, pattern of neglect, failure to communicate and misrepresentation. See In re Stewart, 118 N.J. 423(1990)(public reprimand for gross neglect in an estate matter and failure to keep client informed of its status; the attorney had received a prior private reprimand); In re Williams, 115 N.J. 667(1989)(public reprimand for gross neglect in one matter, failure to communicate in one matter, failure to file answer and lack of cooperation with DEC); In re Rosenblatt, 114 N.J. 610(1989)(public reprimand for gross neglect in a matter spanning four years; failure to respond to request from client for information in those four years; the attorney had been given a private reprimand seventeen years earlier for neglect in two matters); and In re

Smith, 101 N.J. 568(1986)(three-month suspension for neglect in an estate matter, failure to communicate with a client and failure to cooperate with the DEC and Board).

The Board considered that respondent's misconduct in this case began at least as early as September 1991, when he failed to reply to court-ordered discovery. Respondent was then already aware of an ethics investigation against him that resulted in the 1992 private reprimand. The second ethics proceeding against respondent, which resulted in a three-month suspension, began in April 1992, and a formal complaint was filed in July 1993. Nevertheless, respondent's ethics violations in the matter now before the Board continued through at least the fall of 1993, when grievant learned that her case had been dismissed and respondent failed to have it reinstated. Thus, respondent's ethics offenses in this matter continued despite his knowledge of earlier problems.

Under other circumstances, had the within misconduct occurred simultaneously with the misconduct that led to respondent's current three-month suspension, additional discipline would, most likely, not have been imposed. That cannot be the case here, however. Respondent was on notice, when he continued to act unethically in the within matter, that his prior conduct in two other matters was either under scrutiny by the ethics authorities or had already resulted in discipline. Yet he failed to mend his ways. Accordingly, five members voted to impose a three-month suspension, to begin on November 7, 1995, the day after his earlier three-month suspension would otherwise expire. Two members voted to impose a

three-month suspension, retroactive to the effective date of the prior three-month suspension. Two members did not participate.

The Board further directed that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 12/4/95

LEE M. HYMERLING
Chair
Disciplinary Review Board

Supreme Court of New Jersey
Disciplinary Review Board

Voting Sheet

IN THE MATTER OF BARRY F. ZOTKOW

DOCKET NO. DRB 95-222

HEARING HELD: October 26, 1995

DECIDED: December 4, 1995

	Disbar	3 Month Suspension	Reprimand	Admonition	Dismiss	Dis qualified	Did Not Participate
BUFF		X					
COLE		X					
HUOT		X *					
HYMERLING		X					
MAUDSLEY		X *					
PETERSON							X
SCHWARTZ							X
THOMPSON		X					
ZAZZALI		X					

Robyn M. Hill 12/7/95
ROBYN M. HILL
CHIEF COUNSEL

*retroactive to original suspension on July 17, 1995.