SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-131

IN THE MATTER OF :
LEROY CARMICHAEL, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 22, 1994

Decided: October 28, 1994

Marilyn Kline appeared on behalf of the District VII 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 upon a recommendation for public discipline filed by the District VII Ethics Committee (DEC). The complaint charged respondent with two counts of violation of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (a) and (b) (failure to communicate), RPC 1.16(d) (terminating representation) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), as well as one count of violation of RPC 3.1 (filing frivolous claims). The complaint was later amended to reflect a violation of RPC 8.1(b) (failure to cooperate with the DEC), based upon respondent's failure to file an answer to the complaint in a timely manner.

Respondent was admitted to New Jersey bar in 1971. He maintains an office in Trenton, Mercer County. On May 5, 1988, respondent was privately reprimanded for failure to communicate and misrepresentations to his client that a complaint had been filed in a civil matter.

This matter arose from respondent's handling of two cases on behalf of Eva Rodriguez, both arising from automobile accidents. These are designated as "the 1986 accident" and "the 1987 accident."

COUNT ONE

The 1986 Accident

On February 28, 1986, Mrs. Rodriguez was involved in an automobile accident from which she sustained injuries. The accident happened when Mrs. Rodriguez attempted to make a right-hand turn while not in the right-most lane and hit a car passing on her right. Both she and the driver of the other vehicle were given summonses by the police.

In March or April 1986, Mrs. Rodriguez retained respondent to represent her in connection with the accident. Respondent had previously represented members of Mrs. Rodriguez' family (1T37).[1]

On February 19, 1987, respondent appeared in municipal court on Mrs. Rodriguez' behalf. The summonses against both drivers were dismissed. According to respondent, it had been his opinion that

[1] 1T refers to the transcript of the hearing before the DEC on November 16, 1992. 2T refers to the transcript of the hearing before the DEC on February 8, 1993. (The February transcript is mistakenly dated February 8, 1992).

Mrs. Rodriguez did not have a strong claim against the other driver. Apparently, in addition to the issue of whether Mrs. Rodriguez was in the appropriate lane when she began her turn, there was a question of whether she had activated her turn signal.

Respondent testified that, immediately after the municipal court appearance, he advised Mrs. Rodriguez that he did not believe that a lawsuit would be successful (2T15). He testified further that he had explained to Mrs. Rodriguez that the insurance carrier was unwilling to pay anything on her claim. Respondent contended that he had told Mrs. Rodriguez that he would file a complaint only in the hopes of reaching a settlement on her behalf and, if the insurance company continued to refuse to settle the case, they would "back away from it" (2T15).

Respondent filed the complaint on February 26, 1988, two days before the expiration of the statute of limitations. Respondent testified that, after he filed the complaint, he consulted with other attorneys who were more experienced in the field. Those attorneys agreed with his assessment of the claim and declined his offer to take the case (2T16, 47). Thereafter, on or about April 14, 1988, respondent received interrogatories from counsel for the defendant. According to his testimony, at a meeting with Mrs. Rodriguez, respondent reiterated to her the insurance company's position and also explained that he had discussed the claim with other attorneys, who were unwilling to take the case (2T17). He voiced his opinion that Mrs. Rodriguez should allow the case to be dismissed, based on the unlikelihood of a recovery. According to

respondent, Mrs. Rodriguez agreed with his assessment of the case and understood that he would allow the case to be dismissed for failure to answer interrogatories. Respondent added that, by this time, Mrs. Rodriguez had been involved in a second accident, which was more likely to result in a recovery (2T17). Respondent testified that he informed counsel for the defendant that he would not be answering the interrogatories (2T20). Respondent, however, failed to provide any writings to Mrs. Rodriguez confirming his intent to allow the case to be dismissed. Respondent testified that he saw no need for such a writing because they had orally agreed on the course of action to be followed (2T86).

When respondent did not answer the interrogatories, counsel for the defendant filed a motion to dismiss the complaint, on September 6, 1988. Respondent did not oppose that motion. The complaint was dismissed by order dated September 30, 1988. Respondent's file contains a letter from defense counsel, dated October 11, 1988, notifying respondent of the dismissal. Respondent did not attempt to reinstate the complaint. Subsequently, the case was dismissed with prejudice on June 29, 1989. (The order mistakenly states that the case had been settled.)

Mrs. Rodriguez' testimony differed greatly from respondent's. She testified that he never advised her the case was not a good one (1T92). She further testified that he never told her that he would file the complaint solely to attempt to obtain a settlement (1T47). She also testified that she never agreed to allow the complaint to

be dismissed and was unaware that respondent had allowed the dismissal (1T49). In fact, she believed that the case was proceeding.

Israel Rodriguez, Mrs. Rodriguez' husband, also appeared before the DEC. His testimony substantiated Mrs. Rodriguez' regarding their expectations on the two lawsuits.

Curiously, by letter dated June 27, 1989, respondent notified Mrs. Rodriguez that she was to appear in court on August 10, 1989. Apparently, the case had mistakenly been scheduled for an arbitration. In addition, defense counsel erroneously indicated to the court that it had been settled (1T85). Mrs. Rodriguez testified that she received the letter two or three days before she was scheduled to appear. She telephoned respondent's office and was assured by his secretary that he would be in court with her (1T52). Mrs. Rodriguez appeared in court on the scheduled date, but respondent failed to appear. The arbitration did not take place. When Mrs. Rodriguez spoke with a court administrator, she was led to believe that the case had been dismissed, seemingly after a settlement. This was the first time that Mrs. Rodriguez learned that her case had been dismissed (1T55).

After learning that her case had been dismissed, Mrs. Rodriguez proceeded to respondent's office, where she confronted him with that information. She apparently believed that he had received settlement funds to which she was entitled and had failed to turn them over to her. Respondent denied that the case had been settled and, according to Mrs. Rodriguez, asked if she believed him

or the court (1T55). Respondent explained that he did not contact the court at this time to determine what had happened, because he knew that the case had been dismissed (2T60).

A question was raised at the DEC hearing as to whether respondent was certain that Mrs. Rodriguez understood the issues, as English is not her first language. According to Mr. Rodriguez, Mrs. Rodriguez occasionally did not understand respondent and he, Mr. Rodriguez, would translate for her. During one point in Mrs. Rodriguez' testimony, she expressed her belief that, if an individual is involved in an accident, even if it is that person's fault, his or her insurance company will pay the medical bills and other additional funds. She expressed her belief that the success of an accident case is unrelated to fault (1T92, 96).

Respondent, on the other hand, testified that Mrs. Rodriguez clearly comprehended what he was doing and agreed with the proposed course of action (2T43). He further stated that she understood the basis behind a lawsuit and was familiar with degrees of fault and its impact on recovery (2T75).

Mrs. Rodriguez underwent medical treatment for her injuries sustained in the accident. She brought her medical bills to respondent's office, pursuant to his instruction, to be presented to her insurance carrier (1T42). Respondent testified that the bills were submitted for payment (2T38). Although the record reveals that some of the bills were turned over for collection, it is not clear if they stemmed from this matter or from the 1987 accident, discussed below.

Mrs. Rodriguez testified that she and her husband checked on the status of her case "weekly or every two or three days" either by going to respondent's office or by telephone (1T52). Mr. Rodriguez, too, testified that he either would go to respondent's office two or three times a week or would call him (1T109). Respondent, in turn, denied that Mr. Rodriguez was in his office twice a week and further asserted that, although Mrs. Rodriguez might have been there frequently, he did not see her on each of those occasions (2T104).

On September 29, 1989, after learning that her case had been dismissed, Mrs. Rodriguez retained the law firm of Joseph D. Kaplan and Son to represent her. As seen below, Lionel A. Kaplan, Esq., a member of the firm, testified before the DEC as to the firm's attempts to obtain Mrs. Rodriguez' files from respondent.

* * *

The DEC determined that respondent violated RPC 1.3 by his failure to prosecute the case, failure to reply to the motion to dismiss and failure to submit Mrs. Rodriguez' medical bills. The DEC further found respondent guilty of a violation of RPC 1.4(a) and (b), in that he did not properly communicate with his client. In addition, the DEC determined that this matter, considered with respondent's acts of neglect in an earlier matter that was dismissed demonstrated a pattern of neglect, in violation of RPC 1.1(b).

The DEC did not find clear and convincing evidence of gross neglect. Further, the DEC was not convinced that respondent violated RPC 1.16(d), in connection with the transfer of Mrs. Rodriguez' files. Respondent testified that he attempted to turn over the file to Mrs. Rodriguez' new attorney. The DEC was of the opinion that, although it was clear that Mrs. Rodriguez wanted a new attorney, the events surrounding the transfer of the file were not set forth to a clear and convincing standard, given the absence of testimony from Seymour Kaplan, Esq. Similarly, the DEC found no violation of RPC 3.1, concluding that respondent's actions in filing the lawsuit were not frivolous but, rather, designed to obtain a small settlement for Mrs. Rodriguez. Finally, the DEC determined that there was no clear and convincing proof that respondent had violated RPC 8.4(c).

COUNT TWO

The 1987 Accident

On April 10, 1987, Mrs. Rodriguez was involved in a second motor vehicle accident in which she also was injured. Shortly after the accident, she retained respondent. Respondent testified that, from a recovery standpoint, this was a far better case for Mrs. Rodriguez to pursue than the 1986 accident case. Indeed, at one point in the DEC hearing, Mrs. Rodriguez testified that respondent had told her that the 1987 case was a better case (1T91). She understood this to mean that she would receive more money for the later case (1T92). However, at another point during

the DEC hearing, Mrs. Rodriguez testified that respondent had never told her that the second case was better than the first (1T74).

According to Mrs. Rodriguez, although respondent never directly stated that a complaint had been filed, she believed that the matter was proceeding apace. She claimed that he had told her that they were waiting for a court date. She assumed that this referred to both cases (1T61). Respondent, on the other hand, testified that, although he might have said that this second case was progressing, he did not say that they were awaiting a court date (2T26-27, 48).

In fact, the 1987 case was not proceeding at all. Respondent had failed to file a complaint and the statute of limitations had expired. According to respondent, during the period of time in which this case should have been filed, he employed a paralegal. He believed that that individual had taken care of the complaint. Respondent candidly admitted that he was negligent in this matter, noting that he had a duty to supervise his paralegal.

Mrs. Rodriguez testified that, as with the 1986 accident case, she had brought her medical bills to respondent's office to be submitted to her insurance carrier, at respondent's instruction (1T60). The bills were not submitted, however. Upon subsequent review of her file, respondent found Mrs. Rodriguez' medical bills, which, he believed, had not been submitted for payment by the paralegal but, instead, simply placed in the file (2T38).

As noted above, on September 29, 1989, after learning that the 1986 accident case had been dismissed, Mrs. Rodriguez retained the

law firm of Joseph D. Kaplan and Son to represent her in connection with these two matters. Lionel Kaplan, Esq., sent two letters to respondent, dated October 2, 1989 and October 20, 1989, requesting the file. The first letter also contained a memorandum from Mrs. Rodriguez discharging respondent. Respondent did not reply to these letters. By certified letter dated November 9, 1989, Kaplan notified Mrs. Rodriguez that his firm was withdrawing from representation because it had been unable to obtain either information or the files from respondent.

Mrs. Rodriguez herself attempted to obtain her file from respondent on an undetermined date. Respondent told her that he would not turn the file over to her, but only to another attorney. He further told her that he would deliver the file to her new attorney personally (1T82, 2T52). Respondent testified that, after speaking with Mrs. Rodriguez, he examined the file and found the two letters from Kaplan requesting the file, which letters he had not previously seen (1T31). Respondent further testified that he telephoned the Kaplan law firm about turning over the file and spoke with Lionel Kaplan's father, Seymour Kaplan, Esq. Respondent learned, during that conversation, that a complaint had not been filed in the 1987 case and that the statute of limitations had expired (2T25). According to respondent, Seymour Kaplan told him that he did not want the file because there was nothing that he could do about the case (2T26).

The Kaplan firm's file in this matter contains no notes of a conversation between respondent and Seymour Kaplan. However,

Lionel Kaplan testified that that fact was not dispositive of whether the conversation had taken place (1T136). He did not recall if he had personally spoken with respondent on this matter.

At the end of the first day of hearings before the DEC, respondent announced his intention to call Seymour Kaplan as a witness in this matter. However, on the second hearing date, respondent stated that he had spoken with Seymour Kaplan, who had no recollection of the events in question (2T8). Instead, the presenter, who had spoken with Seymour Kaplan two years earlier, read her notes of that conversation into the record. Those notes confirmed the Kaplan firm's difficulties in attempting to obtain the file (Exhibit J-3).

After the Kaplan firm declined the representation, Mrs. Rodriguez consulted with R. David Blake, Esq. regarding these matters. Although it was alleged that Blake made one telephone call to respondent, which went unanswered (1T21), respondent denied receiving a message from Blake (2T52). Blake did not undertake the representation.

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The DEC determined that respondent's conduct violated RPC 1.3 and RPC 1.4(a) and (b). The DEC also found respondent guilty of a pattern of neglect, in violation of RPC 1.1(b), when this matter, the 1986 matter and respondent's conduct in a prior matter that was dismissed were considered in concert.

The DEC did not find a violation of RPC 1.1(a), believing that the failure to file the complaint had not risen to the level of

gross neglect. The DEC also found no violation of RPC 1.16(d), based upon the lack of evidence surrounding respondent's attempts to turn the files over to the Kaplan firm. Lastly, the DEC found no violation of RPC 8.4(c).

Failure to Cooperate with the DEC

The ethics complaint was served on respondent on or about March 14, 1991. Respondent, who appeared pro se at the DEC hearing, was still represented by counsel at that time. Respondent's counsel failed to file an answer on his behalf within the time period allowed under the court rules. (The record does not reveal exactly when respondent's undated answer was filed. It is clear, however, that it was filed sometime before May 31, 1991. 1T11.) Respondent was unable to explain why his counsel had not timely filed the answer.

The DEC secretary sent a letter to respondent, dated April 30, 1991, advising him that the complaint had been amended to include a violation of RPC 8.1(b) (1T10). At the beginning of the DEC hearing, respondent stated that he did not recall receiving that letter and that it might have been sent to his counsel. According to respondent, he first learned of the additional charge at the DEC hearing (1T8-12). However, later in the proceeding, he stated that he had received the letter, which he had immediately taken to his counsel.

The DEC did not make a finding on the alleged violation of RPC 8.1(b).

CONCLUSION AND RECOMMENDATION

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 Board agrees with the DEC's dismissal of the alleged violations of RPC 1.1(a), RPC 1.16(d), RPC 3.1 and RPC 8.4(c). With regard to the alleged violation of RPC 8.1(b), the record does not reveal why respondent's counsel failed to timely file an answer on his behalf. Given the fact that the record is inconclusive as to what happened and that an answer was filed, albeit late, the Board found no violation of RPC 8.1(b).

The DEC found respondent guilty of a pattern of neglect of client matters, in violation of RPC 1.1(b). The DEC based this finding on the within acts of misconduct, the misconduct that led to respondent's previous private reprimand on May 5, 1988 and his actions in a matter that was dismissed prior to a hearing in 1988, after the grievant refused to cooperate and the investigator concluded that respondent's conduct did not extend beyond simple neglect. With regard to the time periods in question, the misconduct in this case occurred between 1986 and 1989. The misconduct for which respondent was privately reprimanded took place in 1982 through 1985. The other conduct considered by the DEC, which was dismissed, took place in 1984 through 1987. Although there is some overlap in the time periods in question, the Board declined to find a pattern of neglect in this case. The

Board noted, however, that respondent's misconduct took place, in part, after the imposition of his private reprimand. Therefore, during at least part of the time of the within acts, respondent was on notice that his conduct was improper.

Although not of great import to the Board's determination of the appropriate quantum of discipline for this misconduct, the Board nevertheless noted that Mrs. Rodriguez sued respondent, who agreed to pay her $10,000 for both cases (2T32). As of the DEC hearing, respondent had not yet made a payment (1T66). In addition, according to his testimony, respondent no longer handles negligence cases (2T29).

Taking into consideration that this is not respondent's first encounter with the disciplinary system, the Board unanimously recommends a public reprimand for respondent's violation of RPC 1.3 and RPC 1.4. See In re Girdler, 135 N.J. 465 (1994) (public reprimand imposed on an attorney who was guilty of lack of diligence, failure to communicate and failure to provide a written retainer in a personal injury case. The attorney allowed a complaint to be dismissed on two occasions for failure to prosecute and failed to so inform his clients. The attorney had previously received a private reprimand).

One member did not participate, one recused himself.

The Board further recommends that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 10/28/1994 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board

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═══ YEARLY SCREEN [Account #  0003655] ═══════════════════════
 Attrny's Lastname: CARMICHAEL              Firstname: LE ROY

 Year Admitted to Bar: 71  Specialty Cert:              Cert Date:

 1. Social Security No.: 155-26-6214     2. Birthdate: 07/24/37

 3. Home Address: 2 JOHN STREET          City: METUCHEN
                                         State:NJ              Zip: 08840
 4. List of all other states where licensed: a) Year 19      State
    b) Year 19       State                  c) Year 19      State
 5. Private Practice? (Y/N)  Y
═══ BACK OF CARD :    1. Time: A (Full-time)
 2. Firm Name: LEROY CARMICHAEL ATTORNEY AT LAW
      Address: 304 E STATE STREET    County: M (Mercer)
               P.O. BOX 40           City:TRENTON          State:NJ Zip:08608
 3. Telephone: (609)393-8249
 4. Nature: A (Sole Practice)                  5. Size: A (One)
 6. Accounts: Primary Trust Account          Primary Business Account
         Acc #: 3162012605                    1214887
          Bank: NATIONAL WESTMINSTER BANK     CAPITAL STATE BANK
          City: TRENTON                       TRENTON
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