SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-390

IN THE MATTER OF :
:
ELLIOTT D. MOORMAN, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 18, 1992

Decided: February 7, 1993

E. John Wherry appeared on behalf of the District VII Ethics Committee.

Milton Diamond 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 upon a recommendation for public discipline filed by the District VII Ethics Committee (DEC).

Respondent was admitted to the New Jersey bar in 1977 and has been engaged in practice in Newark, Essex County. This disciplinary case arose from respondent's handling of a personal injury matter and small claims matter for Charles Dawud.

In or about May 1989, Hilton Davis, an attorney from whom respondent leased office space, requested that respondent take over representation of Dawud. Dawud was the plaintiff in a personal injury action which arose from a July 18, 1985, motor vehicle accident. After Davis filed a complaint, the case was dismissed on

or about July 20, 1989, at an arbitration proceeding attended by respondent. Respondent testified that he reviewed Dawud's file in preparation for the arbitration. His review revealed that there were causation and permanency issues, including the lack of a medical report proving permanency of the injuries and questions regarding the medical threshold (T8/1/91 119-120).[1] Respondent testified that, although he was aware of the problems he would have to face proving permanency without a doctor's report, he hoped to prove it through Dawud's testimony. Respondent stated that he believed there was permanency, but that there was a question about which of several accidents involving Dawud had caused the injuries. Respondent also stated that he hoped the arbitrator would find causation.

Respondent testified that, in addition to reviewing the file, he met with Dawud twice: first when they were introduced by Davis, and later in June 1989, prior to respondent's full review of the file.

Respondent stated that he did not begin to prepare for the arbitration until one or two days prior to the scheduled date. Respondent's preparation of Dawud was limited to instructing him to answer respondent's questions. Respondent did not send Dawud to any doctors to obtain reports to establish causation and/or permanency. Respondent believed that it would have been unethical to do so and that such fraudulent techniques are responsible for

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[1] Respondent stated that Davis had sent the medical reports to the deputy attorney general with the answers to interrogatories. Respondent did not attempt to obtain the reports prior to the arbitration.

the current insurance crisis (T10/24/91 34). When asked why he did not remove the case from the arbitration list, after he learned of the causation and permanency problems, respondent replied that it was not his practice because it was helpful for the client to hear from the arbitrator that the case had problems (T8/1/91 125). Respondent contended that an arbitration often gives the client insight into the case without risk. He also asserted that he had told Dawud about the problems with the case at their June meeting (T10/24/91 133-134).

The arbitration was scheduled for July 20, 1989. Respondent's file contains a notice thereof from the court dated June 27, 1989, directed to Davis. Respondent received the notice on July 14, 1989; by letter dated July 18, 1989, two days prior to the proceeding and four days after his receipt of notice, he notified Dawud of the hearing.

Dawud arrived at the hearing three or four hours late; he was unable to testify. Respondent made his opening statement at the arbitration and the deputy attorney general moved for dismissal. Respondent testified that he told the arbitrator that he had just received the case and needed time to expand the file. His request was denied, whereupon the arbitrator announced his intention to dismiss the case. Respondent then sought an adjournment from the assignment judge in order to obtain additional medical reports. Respondent's request was denied.[2] The arbitrator ruled that there

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[2] Although respondent testified that the request was made before Judge Thompson (T8/1/91/46, 48, T10/24/91 42), his July 10, 1990 letter to the presenter stated that it was Judge Paul Murphy.

was no cause of action and dismissed the case. His report indicated that respondent had not presented a medical report showing permanent injury to Dawud. Respondent stated that, when Dawud finally arrived at the arbitration, Dawud told the DAG and the arbitrator of his continuing pain due to the accident; the arbitrator, however, pointed to the lack of competent medical evidence to that effect.

According to respondent's testimony, after the arbitration he spent approximately one hour with Dawud explaining his right to a trial de novo upon payment of a fee within sixty days.[3] Respondent testified that he also told Dawud that the case had been dismissed and that Dawud should let him know if he wanted to proceed.

During the DEC hearing, respondent described Dawud as a difficult man who had problems expressing himself and understanding others. Respondent stated that, after the results of the arbitration were explained to Dawud, he was very angry. Subsequent to the arbitration, respondent never spoke to Dawud again. Respondent testified that he tried repeatedly to contact Dawud by telephone at various numbers, to no avail (T8/1/91 39). Respondent also testified that he was on vacation for three weeks in August and September and had not received any messages from Dawud. Respondent's July 10, 1990 letter to the presenter states that Dawud called twice, in September and October 1989, that respondent returned those calls and also that he called Dawud on subsequent

[3] In its report, the DEC pointed out that the application for a trial de novo must be filed within thirty days.

occasions. Respondent never sent Dawud a letter informing him that the case had been dismissed and advising about the procedures for requesting a trial. Respondent testified that "[m]aybe I was not thinking as clearly as I should have, maybe in retrospect I should have written to him, but I didn't" (T8/1/92 150). Respondent stated that it would have been improper for him to file for a trial de novo without Dawud's authorization, using the $150 fee he had already received.

The small claims case, which Dawud had filed pro se, arose from Dawud's dissatisfaction with repairs to his automobile. According to respondent, Dawud told him, at their second meeting, that he had filed the complaint pro se and that he wanted respondent to take over the representation. Respondent testified that he sent a letter to the court clerk requesting information on the hearing date and that, after receiving no response, he sent a second letter, again asking about a date (T10/24/91 61-61). Respondent took no further action on the case.

On October 18, 1989, Dawud consulted with Ernest H. Thompson, Jr., Esq., and requested that the latter handle the personal injury and small claims cases. On October 20, 1989, Thompson wrote to respondent requesting Dawud's file and enclosing an authorization from Dawud. Thompson wrote to respondent again on October 27, 1989, requesting the file and enclosing Dawud's authorization.

Respondent testified that he had attempted to contact Thompson by telephone, unsuccessfully. Indeed, Thompson stated that he

might have recalled telephone messages back and forth, but was not certain. Respondent forwarded the file to Thompson on or about July 18, 1990, nearly nine months after the request. Respondent's cover letter blames the delay on his twenty-eight day hospitalization and recovery period (see discussion infra) and on Dawud's pending ethics complaint. Respondent advised Thompson that the case had been dismissed as a result of Dawud's failure to prove permanent injury and reminded Thompson that he was not the original attorney of record. Respondent testified that, after he received Thompson's letter, he assumed that Thompson had taken over the small claims matter. Respondent so assumed, notwithstanding his failure to transfer the file to Thompson for nine months.

With regard to his failure to turn over the file, respondent testified that he was advised by the Essex County DEC that the matter was being transferred to Mercer County and that he should wait to hear from the Mercer County DEC. Respondent contended that he did not forward the file because he was waiting to hear from the Mercer County DEC (T8/29/91 73-74). He also testified that he took no further action on the small claims matter because of his belief that an attorney no longer represents a client after that client files an ethics complaint against the attorney.

During the ethics hearing, the complaint was amended to allege a failure to cooperate with the DEC, in violation of RPC 8.1(b). In its report, the panel cited several instances where respondent failed to comply with the DEC's directives to, among other things, obtain counsel and submit to a medical examination by a date

certain.

The complaint was also amended during the hearing to include an alleged violation of RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal). Respondent was given adequate time to respond to the added allegations during the hearing. In re Logan, 70 N.J. 222 (1976).

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The DEC determined that respondent was guilty of violating RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect),[4] RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate),[5] RPC 1.16(d) (failure to turn over a file), RPC 3.2 (failure to expedite litigation), RPC 3.4(c) (failure to obey a tribunal) and RPC 8.1(b) (failure to cooperate with the DEC).

With regard to respondent's preparation for Dawud's arbitration, the DEC found negligence and lack of diligence, in that, although respondent knew of the permanency and causation problems, he made no attempt to obtain any medical reports. The DEC noted that, if respondent believed the case to be without merit, he should have withdrawn as counsel (Panel report at 8). The DEC found respondent guilty of gross neglect with regard to his

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[4] This allegation was based upon respondent's alleged misconduct in the within matter and earlier misconduct for which he was publicly reprimanded. In re Moorman, 118 N.J. 422 (1990).

[5] The panel report mistakenly refers to RPC 1.13 and RPC 1.14.

actions after the arbitration, along with lack of diligence and promptness, and failure to keep Dawud reasonably informed. The DEC was troubled by respondent's failure to file for a trial de novo, even in the absence of directions from Dawud in this regard, particularly in light of the fact that respondent had already received $125 of the required $150 filing fee. The DEC also concluded that, in view of the difficulty in communicating with Dawud, respondent should have sent him a letter. The DEC found that respondent's belief that Dawud should have contacted him was not reasonable; the burden was, in the DEC's opinion, on respondent and not on his client.

With regard to the small claims matter, the DEC determined that respondent was guilty of negligence, lack of diligence and promptness, failure to keep Dawud reasonably informed and failure to expedite litigation. In addition, the DEC found that respondent failed to promptly turn over Dawud's file to Thompson.

Further, the DEC found respondent guilty of a pattern of neglect, in violation of RPC 1.1(b), based solely on his conduct in the matter now under review. The DEC also found that respondent failed to cooperate with the hearing panel, pointing to his actions over the three months spanned by the hearings. The DEC was concerned with respondent's lack of preparation for the August 1, 1991 hearing, noting that

> it was obvious he had not bothered to review either the Dawud file or his own answer to the ethics complaint, and his testimony throughout the five days of hearing contradicted both. The respondent came to the formal

hearing as unprepared as he had appeared for the grievant's arbitration in July 1989.
[Panel report at 20]

In its report, the DEC noted that respondent had not learned from his mistakes, had exhibited no regret for his actions and was unwilling to admit any wrongdoing, even in the matters for which he had already been disciplined. The DEC also concluded that respondent's conduct during the proceeding indicated that he did not take it seriously.

The DEC recommended that respondent practice under the supervision of a proctor, regardless of whether he was found guilty of the alleged violations of the Rules of Professional Conduct (Panel report at 22).

CONCLUSION AND RECOMMENDATION

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

The Board disagrees, however, with the DEC's determination that respondent violated RPC 1.1(b). The DEC correctly concluded that, contrary to the presenter's assertions, respondent's prior disciplinary matter should not be the basis for a finding of a pattern of neglect; although that matter encompassed grievances filed by several clients, there was no finding of neglect in any of those matters. Instead, the DEC based its finding of a pattern of neglect on respondent's conduct in the within personal injury and small claims matters. However, the Board is of the view that these

two instances of simple neglect are insufficient to find a pattern of neglect. Accordingly, the Board recommends that the finding of a violation of RPC 1.1(b) be reversed.

The DEC determined that respondent violated RPC 1.4(a), although not in the usual sense of failing to reply to the client's requests for information. Indeed, there is no evidence in the record of Dawud's attempts to contact respondent; in fact, the presenter admitted that he had not proven that there were repeated requests for information from Dawud to respondent (T10/25/91 68). Rather, the DEC's finding was based upon what it deemed to be insufficient efforts on respondent's part to contact Dawud.

The Board agrees that, given respondent's knowledge of the difficulty he had contacting Dawud and the difficulty Hilton Davis had as well, respondent's attempts to reach Dawud were insufficient.[6] Respondent should have informed Dawud by letter of his options in the matter, including the time constraints on filing for a trial de novo. Respondent's oral advice to Dawud after the arbitration was not sufficient, particularly in light of respondent's own belief that his client had difficulty understanding him.

The Board is of the opinion that a finding of violation of RPC 1.4(b) (providing information to enable the client to make informed decisions regarding his case) is also appropriate in this matter.

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[6] Indeed, the presenter confirmed his own heroic efforts to telephone Dawud (T8/1/92 19-21).

The DEC was concerned with respondent's failure to cooperate with it during the ethics proceeding. More specifically, the DEC concluded that respondent's failure to abide by its directives violated RPC 8.1(b). The Board cannot agree, however. In the Board's view, while respondent's conduct in this regard was inappropriate, it did not rise to the level of a violation of RPC 8.1(b). The Board is also unable to agree with the conclusion that respondent's conduct violated RPC 3.4(c), a rule that addresses an attorney's demeanor in the course of representation of a client, rather than in a disciplinary proceeding.

With regard to his handling of the arbitration, respondent testified that he thought it beneficial for Dawud to learn the proof problems with his case, an opportunity provided, without risk, by the arbitration proceeding. Respondent also testified that it was his opinion that Dawud's testimony would be sufficient proof of the permanent nature of his injuries. Considered in the light most favorable to respondent, his conduct prior to the arbitration might not have constituted gross neglect, particularly because of his awareness that he could always file an application for a new trial.

It is undeniable however, that respondent's actions after the arbitration did amount to gross neglect. As noted above, respondent had questions regarding Dawud's ability to understand him. Respondent was unable to contact Dawud by telephone after the arbitration and, thus, allowed the time to file his application for a new trial to expire. A reasonably prudent attorney would have

filed the application simply to preserve his client's rights, should the client decide to pursue the claim later on. Respondent's failure to do so violated REC 1.1(a).[7]

Respondent's representation of Dawud in the small claims matter was similar to that in the personal injury matter. Although respondent wrote two letters to the court on this case, he did nothing further, even after he did not receive a reply from the court. Again, respondent failed to take reasonable steps to protect his client's interests. While the Board does not find that respondent was grossly negligent, he failed to act diligently, in violation of RPC 1.3.

Two procedural questions raised before the DEC must be addressed. First, during the DEC hearing and in his brief to the Board, respondent's counsel questioned the fact that Dawud was not called as a witness. As noted by the DEC, however,

> [i]t is not necessary that a complainant appear before an Ethics Committee. Complaints that should be and are pressed against respondents sometimes reach the Committee from anonymous sources or result from information to which a committee member becomes privy in some accidental way. Normally, of course, the complainant appears and testifies but there is no jurisdictional requirement that this occur.
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> [In re Krakauer, 81 N.J. 32, 34 (1979)].

Furthermore, there is clear and convincing evidence in the

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[7] As the panel pointed out in its report, pages 6-7, respondent received $125 from Dawud. There is conflicting evidence in the record as to what that payment covered. Respondent testified that part of it was to pay to reinstate the case, which had already been reinstated. The remainder of the sum was apparently for respondent's costs; given that the case was taken on a contingency basis, it was improper to have Dawud pay those costs. In respondent's July 10, 1990 letter to the presenter, he stated that the funds were a retainer in the small claims matter. Although no allegation of misconduct was made based on these facts, it does call into question respondent's credibility.

record, even in the absence of Dawud's testimony, that respondent's conduct with respect to the arbitration was unethical.

The second issue raised by respondent was the fact that the presenter had called respondent as his witness. The Board agrees with the DEC that there was no violation of due process, in that respondent was given an extensive opportunity to present his own position.

Although respondent testified about his difficulties with alcoholism[8] and his treatment, his counsel withdrew the claim of alcoholism as a defense (T8/29/91 48). There was, however, significant testimony regarding respondent's treatment at the Marworth Clinic and his post-treatment conduct that was considered by the DEC.[9] Of particular concern was the report of Dr. Stanley Kern, who examined respondent. Dr. Kern's report confirmed the DEC's concerns with respondent's post-Marworth treatment, his lack of understanding of basic AA tenets and the fact that respondent was less than truthful as to when and where he attended AA meetings (Panel report at 22). Although Dr. Kern's report did not indicate signs of current alcohol and/or drug abuse, the report is not definitive, due to a delay in respondent's testing. Regardless of whether respondent does or does not have a substance abuse problem, the DEC was "convinced that the respondent minimizes the impact of past or present abuse and is still in denial" (Panel Report at 22).

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[8] Respondent testified that his alcoholism was most acute in 1989 (T8/1/91 154).

[9] Respondent was admitted to Marworth Clinic on January 16, 1990 and released on February 14, 1990 (T8/1/91 57).

Although such difficulties do not excuse misconduct, they may be considered in mitigation, if proven to be causally connected to the attorney's unethical actions. In In re Templeton, 99 N.J. 365 (1985), the Court held that

> [i]n all disciplinary cases, we have felt constrained as a matter of fairness to the public, to the charged attorney, and to the justice system, to search diligently for some credible reason other than professional and personal immorality that could serve to explain and perhaps extenuate, egregious misconduct. We have always permitted a charged attorney to show, if at all possible, that the root of transgressions is not intractable dishonesty, venality, immorality or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment.
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> [Id. at 373-4]

The question of causation arises in this matter. Respondent's behavior since achieving sobriety seems substantially unchanged from his behavior while experiencing alcohol problems. He still appears unable to fully live up to his responsibilities, as seen by his conduct during the DEC hearing. Although respondent did not appear belligerent, he was clearly unable to do what was expected of him. The panel thus did not find alcoholism as a mitigating factor, noting that "his attitude and preparation for this formal hearing differs little from his representation of the grievant in 1989 when he claimed to be in the depths of alcoholism" (Panel Report at 23).

Respondent is guilty of gross neglect, lack of diligence, failure to communicate, failure to promptly turn over a file and failure to expedite litigation arising from his representation of

one client. Standing alone, the within misconduct would likely merit a public reprimand. See, e.g., In re Grinchis, 75 N.J. 494 (1978) (severe public reprimand for neglect in one matter for a period of five years. Grinchis was "callous and uncooperative with the investigator appointed by the Committee to inquire concerning these matters." Id. at 496); In re Williams, 115 N.J. 667 (1989) (public reprimand for gross neglect, failure to respond to a client's reasonable requests for information, failure to cooperate with the ethics investigation and failure to file an answer to the complaint in connection with one matter); and In re Lester, 116 N.J. 774 (1989) (public reprimand for gross neglect in two matters, as well as for submitting untimely answers to the ethics complaints, which answers were found not to be candid).

However, this is not respondent's first brush with the disciplinary system. He was publicly reprimanded in 1990 for failure to maintain proper time records to support a legal fee in an estate matter, failure to preserve the identity of client funds, and failure to cooperate with the DEC. With regard to respondent's earlier discipline, the Board noted that respondent's representation of Dawud began in May 1989. His previous public reprimand was imposed on January 10, 1990, during the time of that representation. Therefore, during the arbitration process and the time in which he might have filed for a trial de novo, respondent was at least on notice that his prior conduct was questionable.

The Board's overall sense is that respondent has not learned from his previous errors. Even the circumstances surrounding his

appearance before the Board show that respondent is not able to live up to what is expected of him and to appreciate the seriousness of ethics proceedings. Respondent informed the Board that he had scheduled a criminal matter for the morning of the Board hearing despite significant advance notice of the Board proceeding. He then allowed himself only forty-five minutes to arrive in Trenton, a trip that ordinarily takes one and one-half hours. He was at least one and one-half hours late for the Board hearing.

Accordingly, the Board unanimously recommends a three-month suspension. Unlike the DEC, the Board does not believe that a proctorship is necessary and does not recommend that one be imposed. However, the Board recommends that, prior to reinstatement, respondent provide a medical report verifying that he is free of drugs and alcohol. One member did not participate.

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

Dated: 2/7/95 By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board