

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-177

IN THE MATTER OF :
RICHARD M. FOLEY, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 25, 1990

Decided: August 15, 1990

Robert A. Hicken appeared on behalf of the District IIIB Ethics Committee.

Thomas A. McCormick appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter is before the Board based on a recommendation for public discipline filed by the District IIIB Ethics Committee for Burlington County.

Respondent, who has been a member of the bar of New Jersey since 1974, is engaged in the private practice of law in Marlton, New Jersey. In late 1984, respondent was retained by Vance Evans to represent him in a claim for defamation against his former

employer, United Insurance Company. On December 5, 1984, respondent contacted both his client and United Insurance Company by letter. Respondent advised his client that he had prepared a three-count complaint against United Insurance Company at that time, and would require a meeting with his client to both go over the complaint and execute a contingent fee agreement. In his letter of that same date to United Insurance Company, respondent stated that a complaint would be filed within the next ten days. Thereafter, respondent received a report from an investigator retained by him, which report, he claims, indicated that his client had a questionable cause of action.¹ Additionally, respondent testified that he was advised by United Insurance Company that Evans had stolen funds from the company, which fact, in the company's view, justified whatever statements it had made concerning Evans. Respondent contended that, based on this information, he determined not to take further action on the matter. He never advised his client of that fact, however, although he had contact with his client from 1984 through approximately March 1987, two months before Evans' death.

In June 1987, respondent received an inquiry from Maryland National Bank, indicating that the bank intended to pursue a claim against the estate of Vance Evans for a balance owed on a lease of

¹ Respondent did not provide the investigator's report at hearing, although he offered to obtain same. The Committee advised respondent that the report was unnecessary, and that it would assume that respondent had been led to believe that the case on behalf of Evans did not have merit.

an automobile. Respondent replied by letter of June 17, 1987, and advised that he was not representing Evans' estate. He further stated in that letter, "I am handling a minor claim which resulted from a dispute (Evans) had with his former employer, United Insurance Company. The validity of the claim is somewhat suspect, but may result in a modest recovery for Mr. Evans' estate sometime in the near future." At that time, the statute of limitations for a defamation action had already run. At the subsequent ethics hearing, respondent indicated that he believed that there might still be a valid claim for unfair trade practice and malicious interference, which was governed by a separate statute of limitations. Despite this theory, and despite the fact that he never advised grievant that he did not intend to proceed with the case, respondent did not tell grievant that she should seek other counsel to pursue the matter. T47².

Evans' daughter, Elaine Evans, (hereinafter Grievant), testified that, following her father's death on May 21, 1987, she contacted respondent to ascertain the status of her father's claim against United Insurance Company. She testified that she spoke with respondent on July 10, 1987, at which time he advised her that he would "follow up" with her. She made several additional attempts to determine the status of the case from respondent. When the answer was not forthcoming, she hired another attorney. This attorney wrote to respondent on June 8, 1988. (Exhibit C-4 in

² T represents the transcript of hearing before the District IIIB Ethics Committee on March 12, 1990.

evidence). Respondent did not reply to that inquiry. Thereafter, the attorney advised grievant to contact the ethics committee.

By letter dated February 21, 1989, the committee investigator wrote to respondent to obtain his position on the grievance. Respondent failed to reply to that request. A follow-up letter dated May 10, 1988 was forwarded to respondent. The investigator advised that, in the absence of a response within ten days, an ethics complaint would be filed.³

The ethics complaint was filed on October 20, 1989. Respondent was charged with gross negligence and pattern of neglect, in violation of RPC 1.1(a)(b), failure to act with reasonable diligence representing the client, in violation of RPC 1.3; failure to communicate with the client, in violation of RPC 1.4(a); and failure to cooperate with the investigation by the ethics committee, in violation of RPC 8.1 (b). On November 10, 1989, respondent wrote a letter to the District IIIIB Ethics Committee secretary, promising that he would deliver a formal answer to the secretary's office no later than Tuesday, November 21. No answer was ever filed by respondent.

Respondent appeared and presented his position at the ethics hearing. Following that hearing, the Committee concluded

³ The record indicates that a parallel ethics complaint was filed with the District IV Ethics Committee. Respondent apparently made one telephone call to the office of the Committee's secretary in response to a March 28, 1989 inquiry. Respondent did not submit a written reply. The District IV Ethics Committee matter was closed when that secretary was advised that the matter was pending before District IIIIB.

that respondent did nothing to pursue the claim against United Insurance Company, while leading his client and others to believe that it was still being processed. The Committee found that respondent's letter of June 17, 1987 to Maryland National Bank (Exhibit R-2 in evidence) supported this finding. The Committee concluded that respondent's conduct in this case violated RPC 1.1(b) in light of respondent's ethics history. He had previously received a private reprimand for settling a case without the authorization of his client in 1979. The Committee further noted its belief that respondent had been privately reprimanded for, inter alia, his neglect in two other cases. In fact, that matter is currently pending with the Supreme Court. The Committee found that proof of the facts of this case clearly and convincingly showed respondent's failure to act with reasonable diligence and promptness in representing his client, in violation of RPC 1.3. The Committee further found that respondent had violated RPC 1.4(a) due to his failure to keep his client informed about the status of the case, as well as his failure to comply with his client's reasonable requests for information. The Committee found, in fact, that respondent had purposely misled his client concerning the status of his matter.

With regard to the charged violation of RPC 8.1(b), the Committee did not find credible respondent's claim that he had never heard from the committee investigator. The Committee found that respondent's failure to supply information both to the investigator and to the secretary of the District IV Ethics

Committee, as well as his failure to file an answer to the complaint, sustained the charged violation of RPC 8.1(b). The Committee concluded that "the nature of the violations of this matter and the pattern of neglect that respondent has shown in legal matters generally requires public reprimand as the minimum appropriate recommendation in this matter.

CONCLUSION AND RECOMMENDATION

Upon de novo review of the full record, the Board is satisfied that the conclusions of the Ethics Committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence.

The record demonstrates that, following a limited investigation of the Evans' claim, respondent did nothing to pursue the matter against United Insurance Company. All the while, respondent did not correct Evans' belief that he was processing the case. Similarly, he led both grievant and the Maryland National Bank to believe that the case was pending, although he had no intention of pursuing the matter. His conduct violated RPC 1.1(a) (gross negligence); RPC 1.3 (failure to act with due diligence), and RPC 1.4(a) (failure to comply with requests for information and to keep the client reasonably informed).⁴

The Evans matter is not the first case involving respondent

⁴ Although respondent was not retained by grievant, as administratrix of her father's estate, she had the right to request information about the status of the matter.

to come before the Board. In 1981, the Board issued a letter of private reprimand to respondent for, inter alia, grossly neglecting a client's case. Similarly, in October 1989, this Board reviewed three separate grievances filed against respondent. In two of these matters, the Board sustained the committee's findings of unethical conduct, including gross negligence, and recommended a private reprimand to the Court.⁵ The misconduct in those cases began as early as 1978 and continued into 1984. The Board, therefore, is of the view that, when the Evans matter is considered with the prior disciplinary matters, a pattern of negligence exists, in violation of DR 6-101⁶ and RPC 1.1 (b).

In addition to respondent's violations of the Rules of Professional Conduct in the Evans matter, respondent failed to cooperate with the ethics committee. He never responded to the investigator's letters, although there is every indication that he received his mail. Additionally, he failed to provide the material requested by the secretary of the District IV Ethics Committee. Finally, despite his promises to the contrary, he never filed an answer to the complaint. These instances of failure to cooperate with the disciplinary process constitute separate violations of RPC 8.1(b).

⁵ These matters are pending with the Court and have been scheduled for argument on September 24, 1990.

⁶ The Rules of Professional Conduct replaced the Disciplinary Rules in September 1984. The described pattern of neglect occurred both before and after that date. Therefore, both the Disciplinary Rules and the Rules of Professional Conduct apply.

In making its recommendation for a private reprimand in the matters now pending before the Court, the Board believed that respondent's difficulties were limited in scope because no other complaints were then pending. This case, however, demonstrates that the 1981 private reprimand had little impact on respondent's errant ways: he has continued to fail in his duty to pursue clients' interests diligently, and has similarly continued to fail in his obligation to communicate candidly with his clients. These obligations apply even where the attorney has determined that a case may not be worth his or her time and effort. The client is, at the very least, entitled to notice of the attorney's position so that the option of seeking other counsel to pursue the cause of action is not irretrievably lost.

In cases similar to the matter at hand, the combination of gross neglect, failure to communicate with a client, and failure to cooperate with the disciplinary system, has resulted in public reprimand. See Matter of Lester, 116 N.J. 774 (1989), where the attorney, who was not previously the subject of discipline, was publicly reprimanded for gross neglect of two matters, and for his lack of cooperation with the district ethics committee; Matter of Stewart, 118 N.J. 423 (1990), where the attorney, who had been privately reprimanded in an earlier matter, received a public reprimand for his failure to communicate and gross negligence in his handling of one estate matter; and Matter of Rosenblatt, 118 N.J. 559 (1990), where the attorney, who previously received both a private and a public reprimand, was publicly reprimanded for,

inter alia, misrepresenting the status of a case, grossly neglecting that same matter, and not cooperating fully with the ethics system.

The Board considered respondent's prior discipline as an aggravating factor, in determining the appropriate level of discipline. In mitigation, respondent advised the Board of his decision that he can no longer continue to practice law as a sole practitioner, and that he is actively seeking employment in the public sector. Moreover, he was both candid and contrite at his appearance before the Board.

The Board finds significant similarities between this matter and Stewart and Lester, supra, and, therefore, unanimously recommends that respondent be publicly reprimanded for his conduct in this case. The Board also recommends that, unless respondent obtains employment in a supervised position, he must practice under the supervision of a proctor, approved by the Office of Attorney Ethics, for a period of one year. One member did not participate.

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

Dated: _____

8/15/1990

By: _____



Raymond R. Trombadore
Chair
Disciplinary Review Board