

## **DISCIPLINARY ACTION**

### **Private Admonition With Conditions - Board Case No. 7, 2004. Date of Sanction:**

**April 20, 2004.** A panel of the Preliminary Review Committee ("PRC") offered the sanction of a private admonition to a lawyer in Board Case No. 7, 2004, for violations of the Delaware Lawyers' Rules of Professional Conduct (the "Rules"). The lawyer consented to the private admonition.

This disciplinary matter arose in connection with the lawyer's representation of a client who was the plaintiff in a medical malpractice case. The lawyer's initial inquiries failed to locate an expert witness who would provide support for the client's claims of medical malpractice. The lawyer prepared a draft medical malpractice complaint. However, the lawyer terminated the representation based upon deterioration of the lawyer-client relationship. The client, acting *pro se*, initiated the medical malpractice action by filing the complaint in court.

Several months later, at the client's request, the lawyer entered an appearance in the case. The medical malpractice case was governed by a statute, pursuant to which the filing of the answer commenced a 60 day time limit for the client to provide the defendant with an affidavit of merit, executed by an "appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards of treatment practices." The affidavit of merit statute also provided that "[t]he court may grant no more than one additional period, not to exceed 60 days, to file the affidavit ..., upon a finding of good cause."

Shortly after the court had denied the defendant's motion for change of venue, the defendant filed its answer, thereby triggering the 60 day time limit under the affidavit of merit statute. Despite the passage of time since the lawyer first met with the client over two years before, the lawyer had not found an expert witness to support the client's claim of medical malpractice.

The court issued a scheduling order, which included, among other deadlines, a discovery cutoff date. The defendant filed its mandatory discovery responses, and sent a first set of interrogatories and requests for production to the lawyer. The lawyer provided the defendant with certain mandatory initial disclosure documents, but subsequently failed to produce responses to the defendant's interrogatories and requests for production of documents. The defendant filed a motion to dismiss the medical malpractice action, on the ground that the client had failed timely to provide the defendant with an affidavit of merit as required by statute. The lawyer filed no response to the motion to dismiss. The defendant filed a motion requesting an order to compel the filing of an answering brief by the lawyer on behalf of the client. The defendant also moved the court to compel discovery responses. The court ordered the client to file an answering brief within 20 days of the date of the order, or else the court would decide the motion on the basis of the papers submitted. The court also issued an order on the same date granting the defendant's motion to compel discovery responses, including, but not limited to, the designation of an expert and production of an expert report. The court's order directed the client to provide those discovery responses within 30 days, or else the sanction of dismissal with prejudice would be imposed.

The lawyer's client file contained no documents reflecting that the client was provided with copies of the motion to dismiss; the motion to compel the filing of an answering brief and discovery responses; or the court's orders compelling the filing of an answering brief and the production of discovery responses. The lawyer did not recall bringing to the client's attention the specific developments regarding the motion to dismiss and the court's order regarding the filing of an answering brief. However, the lawyer did send a letter to the client during the same general period as the motion to dismiss was filed, informing the client about the scheduling of mediation.

The lawyer did not file an answering brief within 20 days as required by the court order. The lawyer's later explanation for the non-filing was "at that point, certainly I didn't have the ability to argue against the ... motion because I did not have an expert to provide me with a report

or an affidavit of merit.” The lawyer also did not provide the defendant with discovery responses within 30 days, as required by the court’s order.

The defendant requested that the scheduled mediation be canceled. By letter to counsel, the court canceled the mediation. The lawyer called the client and informed the client that the mediation had been canceled. Subsequently, the lawyer met with the client on two occasions within a two-week period to discuss the case. However, the lawyer did not recall specifically advising the client that a motion to dismiss had been filed, or advising the client of the failure to file an answering brief as directed by the court’s order. The lawyer recalled informing the client that the case “could be dismissed” if an expert witness was not found to support the claim of medical negligence.

\_\_\_\_\_By memorandum opinion, the court granted the defendant’s motion to dismiss the medical malpractice action, with prejudice, on the basis of the client’s failure to comply with the New Jersey affidavit of merit statute. The client learned about the dismissal when contacting the court clerk’s office about the status of the case a few weeks after the date of the opinion. When the client subsequently telephoned the lawyer about the dismissal, the lawyer offered to continue efforts to find an expert who could provide the required affidavit of merit, and if successful in finding one, the lawyer would file a motion to vacate the judgment of dismissal.

Over the months that followed, the lawyer made efforts to obtain expert assistance for the client’s case. On one occasion, the lawyer communicated with a medical expert consulting service, and requested a legal assistant to forward copies of the client’s medical records to the service with a check. This task was not completed, but the lawyer did not learn of this until well after the request had been made. Later, the client informed the lawyer of an upcoming appointment with a local doctor. After that appointment, the lawyer provided a letter to the doctor, with copies of the client’s medical records and a check, and requested a report. By letter, the doctor informed the lawyer that he did not find that the client’s physical disabilities resulted from deviation from the appropriate standard of care in the medical procedure in question. Prior to sending this letter, the doctor did not request additional information from the lawyer or request

a written summary of the medical records. Ultimately, after a second, more favorable consultation with that doctor and after retaining another lawyer, the client terminated the representation by the lawyer/respondent, and filed a legal malpractice action. That action was settled and dismissed by stipulation.

At all times pertinent to the lawyer's conduct in this matter, **Rule 1.2(a)** stated that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation ..., and shall consult with the client as to the means by which they are to be pursued." The lawyer violated **Rule 1.2(a)** by (a) failing to consult with the client about the provisions of the affidavit of merit statute, or about the filing of the defendant's motion to dismiss and the court order requiring the filing of an answering brief, (b) failing to file an answering brief in response to the defendant's motion to dismiss and as required by the court order, and (c) failing to produce discovery responses as required by the court order.

At all times pertinent to the lawyer's conduct in this matter, **Rule 1.3** stated that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The lawyer violated **Rule 1.3** by (a) failing to engage in a more active and organized effort to find an expert witness to support the client's medical negligence claim, particularly in view of the 60 day time limit under the affidavit of merit statute, (b) failing to file an answering brief in response to the defendant's motion to dismiss and as required by the court order, and (c) failing to produce discovery responses as required by the court order.

At all times pertinent to the Respondent's conduct in this matter, **Rule 1.4(a)** stated that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." The lawyer violated **Rule 1.4(a)** by (a) failing to keep the client reasonably informed about the status of the lawyer's efforts to find an expert witness to support the client's claim of medical negligence, (b) failing to inform the client about the filing of the defendant's motion to dismiss, the court's orders requiring the filing of an answering brief and the production of discovery responses, and the lawyer's failure to file an answering brief, and (c) failing to inform the client within a reasonable time about the court's

opinion and order dismissing the client's medical malpractice case.

At all times pertinent to the lawyer's conduct in this matter, **Rule 1.4(b)** states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The lawyer violated **Rule 1.4(b)** by (a) failing to explain to the client that the affidavit of merit statute required an expert affidavit to be provided to the defendant within 60 days of the filing of an answer, (b) failing to explain to the client that the defendant had filed a motion to dismiss based upon the failure to comply with the affidavit of merit statute, and failing to discuss the options available to her in responding to that motion, (c) failing to explain to the client that the court had issued orders requiring an answering brief to be filed and compelling the production of discovery responses, and (d) failing to explain to the client that the lawyer had failed to file an answering brief.

In assessing whether the sanction of a private admonition with conditions should be offered to the lawyer in this matter, the PRC considered the fact that a judgment of dismissal with prejudice was entered against the client, without the client's prior knowledge of the filing of the motion to dismiss or the court order directing the lawyer to file an answering brief to the motion. The PRC also considered the applicable aggravating and mitigating factors. In aggravation: the lawyer's substantial experience in the practice of law. In mitigation: (1) the absence of any prior disciplinary record; (2) the substantial remedial measures undertaken by the lawyer and the lawyer's firm to prevent a recurrence of the problems which occurred in the handling of this medical malpractice case; (3) the absence of a dishonest or selfish motive; and (4) the lawyer's full cooperation with the ODC in its investigation of this disciplinary matter.

The PRC offer that was accepted by the lawyer included the following conditions:

(1) For a period of two (2) years, the lawyer will maintain and update, on a monthly basis, an inventory of all civil litigation matters, both filed and unfiled, for which the lawyer has primary responsibility, with an accurate synopsis of current status and pending activities. During this two (2) year period, the lawyer will not engage in the solo practice of law. The lawyer will meet on a monthly basis with a designated partner in the lawyer's law firm, to be approved by

the ODC, to review the inventory, in order to assure that those civil litigation matters are progressing appropriately and that communications problems with clients are not developing. On a quarterly basis, the designated partner will report to the ODC on the status of the lawyer's compliance with the conditions. The lawyer will cooperate with the ODC.

(2) The lawyer shall reimburse the ODC for the costs of its investigation, pursuant to Procedural Rule 27.