Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-369

IN THE MATTER OF

ARTHUR MARTIN,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 18, 1992

Decided: December 28, 1992

James C. Orr appeared on behalf of the District VA Ethics Committee.

Robert O'Bryant Rix 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 on a recommendation for public discipline filed by the District VA Ethics Committee ("DEC"). The complaint charged respondent with lack of diligence, gross neglect, and failure to communicate in two matters. In addition, in a disciplinary stipulation covering two matters, respondent admitted gross negligence and failure to communicate with his clients.

By way of ethics background, this is respondent's third brush with the disciplinary system. In 1990, respondent was suspended for six months for grossly neglecting seven matters, negotiating settlements without the clients' authorization in two of those matters, and displaying a pistol to two clients during a heated

discussion, thereby frightening the clients. Respondent's conduct in those seven matters spanned a five-year period from 1980 through 1985.

In 1991, respondent was again suspended, this time for three months, for misconduct between 1985 and 1987. Respondent acted unethically in four matters, by failing to return to a client the unearned portion of a retainer after the client's case was dismissed, failing to pursue an appeal, failing to adequately communicate with clients in three of the four matters, and failing to respond to the committee's request for information.

Following the expiration of his three-month suspension, respondent was restored to practice, with the condition that he be supervised by a proctor for a period of one year, starting in September 1991. Respondent's counsel, Robert O'Bryan Rix, acts as his proctor.

A. The Sherman Matter

The facts are set forth in the stipulation, as follows:

> 2. Mr. Sherman retained respondent in October of 1978 to represent him in connection with the termination of Mr. Sherman's employment with the Johnstone Training and Research Center and Mr. Sherman's pension rights.
>
> 3. Respondent filed a civil action on Mr. Sherman's behalf in the United States District Court for the District of New Jersey captioned James E. Sherman v. Johnstone Training and Research Center, et al., Civil Action 79-3008 on or about October 9, 1979.
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> 4. The case was dismissed for lack of prosecution on April 14, 1980.
>
> 5. Plaintiff's motion to reopen was granted on May 27, 1980.

6. On May 29, 1980 defendant moved for a more definite statement.

7. Magistrate Devine granted defendant's motion for a more definite statement on July 14, 1980 requiring the filing of an Amended Complaint within ten (10) days.

8. The Amended Complaint was filed on December 3, 1980.

9. The Amended Complaint did not rectify the deficiencies in the earlier Complaint and was not filed on a timely basis.

10. Respondent failed to respond to a notice for call of dismissal dated June 24, 1981 and on July 24, 1981 the case was again dismissed for lack of prosecution.

11. Some eight months after the second dismissal, respondent moved to reopen the case.

12. In his Affidavit of March 18, 1982 respondent admitted responsibility for lack of diligence.

13. By an opinion filed May 24, 1982, the Honorable Harold A. Ackerman denied plaintiff's motion to reopen stating 'Counsel for plaintiff argues that because the case was dismissed through his inadvertence and neglect, I should exercise my discretion and reopen the case. I disagree. The procedural history of this case which spans 2 and 1/2 years, reveals an inexcusable lassitude and indifference in the face of repeated indulgence from the court.'

14. Judge Ackerman further stated that 'No reasonable excuse had been offered for the dilatory and half-hearted manner in which this case had been handled. The Rules of Civil Procedure, the notices and orders of the Court have been ignored, and the case properly dismissed twice.'

15. Respondent did not at that time inform Mr. Sherman of the dismissals for lack of prosecution or Judge Ackerman's refusal to vacate the second dismissal for lack of prosecution.

16. Respondent concealed the dismissal and advised Mr. Sherman that the case was still in progress. As a result of the failure to prosecute the case and the concealment of the dismissals and the Court's refusal to reinstate, grievant was deprived of the ability to seek other counsel or otherwise vindicate his rights.

17. Respondent's conduct prior to September 10, 1984 is

governed by the Disciplinary Rules then in effect.

18. Respondent's conduct subsequent to September 10,1984 is governed by the rules of professional conduct. The conduct of respondent outlined in ¶s 2 through 16 constitutes a violation of the following disciplinary rules and rules of professional conduct. D.R. 6-101(A)(1) gross negligence, D.R. 7-101(A)(3) prejudice or damage to client during a professional relationship and R.P.C. 1.4 failure to keep the client reasonably informed.

19. Respondent's advice to Mr. Sherman regarding his pension rights did not violate any applicable disciplinary rules.

B. The McClendon Matter

The facts of this matter are also set forth in the stipulation:

2. On January 10, 1985 the Grievant entered into a contract for legal services with the Respondent to represent her in an employment discrimination claim against her employer, General Foods Corporation. A $2,500.00 cash retainer was given at that time by Grievant to Respondent.

3. On January 14, 1985 the Grievant wrote to Jerry Paige, Regional Sales Manager, General Foods Corporation, 250 North Street, Plainfield, New Jersey and informed Mr. Paige that the Respondent was representing Grievant with respect to a sexual and racial discrimination claim against General Foods Corporation. On January 15, 1985 the Grievant filed a Charge of Discrimination against General Foods Corporation with the New York State Division of Human Rights and the Equal Employment Opportunity Commission. On January 25, 1985 William S. Ostan, Chief Labor Counsel of General Foods Corporation, responded to Respondent's January 14, 1985 letter and denied '... any sex or race discrimination'. On or about February 9, 1985 Grievant received an acknowledgement letter from the Equal Employment Opportunity Commission dated February 6, 1985 and forwarded same to Respondent.

4. On February 15, 1985 respondent wrote to Mr. Charles Hoxie of the Equal Employment Opportunity Commission and informed him that he was representing Grievant. On July

11, 1985 Respondent wrote again to Mr. Hoxie requesting a '... fact finding conference...'.

5. On February 14, 1986 respondent corresponded with Mr. Charles Hoxie and requested '..Right to Sue Letter...' based upon the fact that the matter had been pending for more than ninety (90) days. In fact, the matter had been pending for one (1) year.

6. On or about March 10, 1986 Grievant received a Notice of Right to Sue from the Equal Employment Opportunity Commission and forwarded same to Respondent.

7. Sometime prior to June 2, 1986 Respondent determined to engage Jose A. Rivera, Esq., 165 Remsen Street, Brooklyn, New York 11201 to act as New York counsel on behalf of Grievant. On June 2, 1986 Jose A. Rivera and Respondent filed a complaint with the United States District Court for the Southern District of New York, Docket No. 86 CIV. 4313 against General Foods Corporation claiming a civil right action for employment discrimination. On October 28, 1986 Grievant forwarded a memorandum to Respondent identifying the specifics of her allegations against General Foods Corporation.

8. Respondent acknowledges in a June 11, 1991 letter to E. Kenneth Williams, Jr., the District V-A Ethics Committee investigator, that, 'At some point it became apparent that I would have to re-file the complaint in that if the complaint has not been served, the court would dismiss same for lack of prosecution.' On August 27, 1987 respondent corresponded with Jose A. Rivera and inquired '...as to whether this matter has been re-filed as per our previous conversations'. In his June 4, 1991 letter to the investigator, Respondent claims to have '...apprised Ms. McClendon of this fact and began redrafting the complaint for re-filing.' In that same June 4, 1991 letter to the investigator, Respondent stated 'I then learned that Mr. Rivera had been suspended from the practice of law and I had to find new local counsel familiar with this area of the law.'

9. On March 11, 1990 Grievant corresponded with Respondent and expressed her disappointment at the lack of progress on the case and requested a status report. Grievant's letter alleges eight (8) telephone conversations between November 1989 and March 11, 1990 with no results. Grievant's March 11, 1990 letter demanded a return of her retainer fee with interest if she did not receive the requested status report by April 1, 1990.

10. On October 4, 1990, Grievant corresponded with Respondent and alleged that Grievant had '... never filed this case!' In the October 4, 1990 letter Grievant also demanded a return of her retainer, which together with interest aggregated $9,986.41. On November 5, 1990 Carolyn E. Wright-Bing, Esq. a former office associate of Respondent corresponded with Grievant and offered to return the original retainer in the amount of $2,500.00 by no later than November 10, 1990. On December 3, 1990 Grievant corresponded with Carolyn E. Wright-Bing and alleged a loss of '...in excess of $100,000.00' in claim benefits and again demanded a return of the retainer together with interest aggregating $9,986.41 by no later than December 30, 1990.

11. In his June 4, 1991 letter to the investigator, Respondent acknowledges that between August 17, 1987, when he became aware of the dismissal of Grievant's complaint and April, 1990 the date of his suspension from the practice of law, he had not re-filed or caused Grievant's complaint to be re-filed.

C. The Calvert Matter

In August 1986, respondent was retained by Leila Calvert to institute a malicious prosecution suit in her behalf. At that time she paid respondent a $1,000 retainer. Although respondent did file a complaint, it was dismissed for lack of prosecution because respondent failed to serve the defendant. In May 1988, after accomplishing virtually nothing on Calvert's behalf for a period of two years, respondent was relieved as counsel. When he failed to return the retainer to Calvert, she was forced to file suit in order to obtain a refund of a portion of the retainer.

D. The Allen Matter

In January 1984, respondent was retained by Lindsay Allen to pursue a claim for race and age discrimination in her behalf

against United Airlines. She also gave respondent a $1,000 retainer. Although respondent did file a complaint, it failed to include allegations of age discrimination. Respondent, however, did not make a motion to amend the complaint. Ultimately, in October 1984, respondent signed a stipulation of dismissal with prejudice without so informing Allen and without obtaining her consent thereto. Thereafter, for a period of five years, respondent failed to inform Allen that the complaint had been dismissed, despite her numerous requests for information about the matter.

* * *

The DEC found that respondent's misconduct in the four above matters violated RPC 1.3 (lack of diligence), 1.1(a) (gross neglect), 1.1(b) (pattern of neglect), and 1.4 (failure to communicate), in addition to D.R. 6-101(A) and 7-101(A)(3), the disciplinary rules in effect before September 1984. The DEC concluded that respondent's conduct demonstrated a "callous disregard of the respondent's clients." The DEC also found that respondent displayed a "pattern of taking retainers and after an initial flurry of effort, abandoning the representation while retaining the funds and misrepresenting the [status] of the litigation."

The DEC, however, recommended that no additional public discipline be imposed. The DEC reasoned that "[u]nder the

circumstances of this case where respondent has resumed the practice of law, the violations occurred prior to his initial suspension and the violations are similar to those for which he has been punished, we do not believe any useful purpose would be served by imposing additional public discipline." The DEC suggested that an extension of the proctorship for a substantially longer period of time might be warranted "so as to protect the public from a recurrence from the kinds of violations presented here."

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. The Board cannot agree, however, with the DEC's recommendation that no additional discipline be imposed on respondent.

In its report, the DEC remarked that, because the ethics transgressions in the within four matters occurred between 1980 and 1989, they were part of an overall pattern of misconduct for which respondent should not be further disciplined. While this consideration would ordinarily have some validity, in this case respondent's misconduct has spread over such a lengthy period — nine years — that the part-of-the-overall-misconduct argument is diluted.

There is a vast difference between several instances of misconduct that occurred during a reasonable period of time — thus revealing the existence of unusual circumstances that might have

explained the aggregate of the unethical acts — and an extensive pattern of misconduct that occurred not in a concentrated time frame but, rather, in a long span of nine years.

In view of the foregoing, the Board is unable to agree with the DEC's recommendation that respondent receive no further discipline for his misconduct under review. Respondent's ethics infractions include violations of RPC 1.1(a), 1.1(b), 1.3 and 1.4(a), as well as 8.4(c) for misrepresenting the status of the cases to his clients. The Board unanimously recommends that respondent receive a public reprimand, and that the period of proctorship be extended for one year, retroactive to September 6, 1992, the date of the expiration of the one-year proctorship ordered by the Court.

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

Dated: 12/28/1992

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board