SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-426

IN THE MATTER OF

ROBERT M. WALTON, JR.

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 25, 1993

Decided: April 27, 1993

William C. Slattery appeared on behalf of the District XIII 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 XIII Ethics Committee (DEC).

Respondent was admitted to the New Jersey bar in 1978 and maintains an office in Budd Lake, Morris County. The formal complaint charged him with three counts of misconduct and violations of RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) and RPC 8.1(b) (failure to cooperate with the DEC). The facts of these matters are as follows:

Count One (The Reistad Matter)

On or about December 14, 1989, respondent was retained by Karen Reistad to represent her in connection with a personal injury matter arising from an automobile accident that had occurred on December 5, 1989. Reistad and respondent met in his office on only one occasion. During that meeting, she gave respondent her insurance binder (T4/2/92 19). According to her testimony, Reistad was concerned about numerous unpaid medical bills and collection notices she was receiving. Over a twelve-month period, Reistad made repeated attempts to contact respondent, leaving messages on his answering machine or with his answering service. She stated that most of her calls to respondent went unreturned and that she talked with him no more than ten times (T4/2/92 62), an assertion disputed by respondent, who testified that he had discussed the case with Reistad twenty-five to thirty times between January and December 1990 (T4/2/92 123). Reistad also testified that she gave respondent "stacks" of medical bills. Respondent denied that assertion, stating that he had difficulty in getting the bills from Reistad and, in fact, did not receive them until September 1990 (T4/2/92 119). Although respondent had an authorization form signed by Reistad, he never sought to obtain her bills and reports because (1) he "didn't have all the names of the doctors" (T4/2/92 89-91), and (2) the medical records were incomplete inasmuch as treatment was ongoing (T4/2/92 92). Respondent also testified that he was confused as to what Reistad was doing with regard to her treatment (T4/2/91 96).

Although respondent contended that he spoke with several adjusters, his file reflects little activity in Reistad's behalf. According to respondent, in September 1990, he discovered a difficulty with regard to Reistad's PIP coverage. Allegedly, he was advised that Reistad's coverage had lapsed prior to her accident because of the non-payment of premiums. There was also allegedly a problem due to a second accident in which she had been involved. Respondent testified that he asked Reistad to produce proof of payment of the premiums but that she failed to do so.

Reistad denied that respondent requested the checks or other proof of the insurance coverage (4/2/92 28). According to respondent, he was told by an adjuster that Reistad contacted the defense carrier and indicated that she was interested in settling the matter quickly without an attorney. With regard to his failure to communicate with Reistad, respondent explained that he was out of his office during most of 1990 due to an injury (see discussion, infra), but that he had provided Reistad with his home telephone number. He testified that they had discussed her case, but that little could be done until coverage was confirmed.

In approximately December 1990, Reistad became dissatisfied with respondent's representation. She retained another attorney, Anthony J. Sposaro, who tried to contact respondent on two occasions. Respondent admitted receiving a certified letter from Sposaro in or about December 12, 1990, which he did not read for "a couple of months" (T4/2/92 141), due to his "physical and psychological problems at the time" (T4/2/92 147). Respondent

testified that, when he received the letter, he was in "an intensive period of therapy and treatment and [he] was very -- really not functioning" (T4/2/92 103). Sposaro was able to resolve the difficulty with Reistad's insurance company (apparently a computer error) (T4/2/92 29). According to respondent's testimony, he assumed that Reistad had everything in her possession that he had in his file.

Count Two (The Harris Matter)

In May 1988, respondent was retained by Lula V. Harris to represent Harris and her grandson, Corey Battle, in connection with an automobile accident with Paresi D. Dowdy on March 19, 1988. In early 1989, respondent received a settlement offer from Dowdy's insurance carrier. The DEC was unable to determine with certainty if the offer was communicated in its entirety to Harris. The carrier subsequently withdrew the offer upon learning that a third vehicle was allegedly involved in the accident. The DEC was also unable to determine if the withdrawal of the offer was communicated to Harris.

On October 26, 1989, respondent received a letter from Harris' uninsured motorist carrier requesting copies of medical bills and reports. Respondent did not comply with that request. On or about March 16, 1990, respondent filed a lawsuit. The complaint was never served and there were no further discussions with the insurance carriers. Five months after the complaint was filed, respondent received notice that it would be dismissed for lack of

prosecution. When respondent took no action to prevent the dismissal, an order of dismissal was entered. Respondent did not inform Harris of the dismissal. Approximately seven months later, respondent received a letter from the uninsured motorist carrier expressing interest in settling the claim. Although respondent claimed that he spoke with a supervisor at that company, he never sent the information that had been requested and never informed Harris that the carrier had contacted him.

In March or April 1991, Harris wrote to respondent and requested information about her case, threatening to file a grievance if he did not reply (T4/22/92 113). Respondent did not reply.

Respondent blamed Harris for not informing him that a third car was involved in the accident. He explained that he did not file the complaint until just prior to the running of the statute of limitations because he was afraid that the discovery process would reveal what a poor witness his client was, particularly regarding her lack of recollection of the third vehicle. Respondent further explained that he planned to send a copy of the complaint to both carriers before sending it to Harris, in the hope that the matter might then settle before the discovery process began. However, after filing the complaint, respondent made little or no effort to settle the claim, alleging that he became disabled the month after he filed the complaint.

In August or September, 1988, Harris and Battle moved to Texas. Harris sought respondent's assistance in resolving

difficulties she was having in enrolling Battle in high school. Apparently, the difficulties stemmed from a desegregation problem in Texas and questions about legal custody of Battle. Respondent testified that, although he took steps to assist her with that problem, Harris became upset with his inability to resolve the situation more rapidly (T4/22/92 85).

Respondent also contended that, near the end of Harris' representation, she had informed him that another attorney was willing to pay her $2,000 to transfer her case to him. Harris gave respondent the opportunity to match that offer because she was in need of money. Respondent took no further action in her behalf, allegedly because he had assumed that the other attorney was handling the case (T4/22/92 96).

Count Three (The Ricker Matter)

On or about September 19, 1989, Christine Ricker (Maddison) retained respondent to represent her in a divorce proceeding. The complaint for divorce was filed shortly thereafter. During the course of the proceeding, the parties agreed to split the cost of an appraisal of their residence. The appraisal was done by John J. Toohey, in January 1990, for $150. On February 5, 1990, a bill for $75 was sent to respondent by the attorney for Mr. Maddison, William Fullerton. Soon thereafter, Ricker sent a check for $75 to respondent. Respondent never sent the $75 check to Toohey, despite numerous requests that he do so. In fact, respondent held the check until the hearings before the DEC.

The divorce trial was scheduled for April 11, 1990. On that date, a settlement was placed on the record (T3/6/92 30). Respondent prepared a proposed judgment for divorce and mailed it to Fullerton on April 14, 1990. According to respondent, Fullerton had difficulties with the form of judgment and wanted a property settlement agreement drafted and attached to the proposed judgment. Fullerton telephoned respondent on several occasions, but was unable to contact him. He then began to write to respondent regarding both the judgment and the $75 and, again, received no response. Thereafter, Fullerton was forced to submit the unrevised proposed judgment to the court and pay the remaining $75. The divorce judgment was entered on October 17, 1990.

With regard to his failure to prepare the property settlement, respondent testified that he had never agreed to prepare it and, in fact, there had been no agreement on that score (T5/7/92 33). As to the $75, respondent explained that the letter from Toohey did not contain a basis for the value he had assigned to the property; in addition, a reference was made in Toohey's letter to an attached report and respondent wanted the referenced attachment. Respondent testified that Ricker had agreed that he should hold the $75 (T5/7/92 38-39). When respondent was asked why he simply had not sent a one-paragraph letter in response to the numerous letters from Fullerton and Toohey on this issue, the following exchange took place:

> [RESPONDENT] I'm sure I would have been able to clear this up too, but I was not really functioning very well at that time and the problems I thought I had were outweighing the $75 payment. It didn't seem very

important to me and that's the way I felt. I don't look at it the same right now, but at the time I felt that the $75 payment was very trivial and it wasn't worth all the attention it was getting. I didn't understand why I was getting all these letters about the $75.

[MR. GLYNN] Did you not understand it?

[RESPONDENT] That's how I felt. Why am I being bothered with this $75 when I have all these other problems. Also I continued to be upset by not getting anything to substantiate the value.

[T5/7/92 48].

Later in the proceedings, respondent was again asked about the numerous letters from Fullerton and his lack of response thereto:

Q. When he sent you a letter saying, "I'm sending you this just to see whether you're getting any mail at all," didn't it occur to you then maybe I should send Mr. Fullerton a letter to let him know I'm still alive and there's still some problems there? That didn't occur to you?

A. At that point it didn't.

Q. And the reason it didn't occur to you is because your mind was focused on your own particular disability at that time?

A. I was pretty wrapped up in my problems at that point. It didn't seem to have any consequence to me.

[T5/7/92 57].

Ricker alleged that respondent did not return her telephone calls, failed to act in a timely manner, failed to properly prepare her for court appearances and failed to adequately explain matters to her. She also alleged that he was not present for a presentation to the Early Settlement Panel. The DEC did not find clear and convincing evidence of these allegations.

Respondent was also charged with a violation of RPC 8.1(b), based upon his failure to reply to the DEC investigator's initial letter of March 25, 1991 until April 29, 1991. In addition, he was

charged with a pattern of neglect, in violation of RPC 1.1(b), based upon his conduct in the above three matters.

* * *

The DEC found that, with regard to count one, the Reistad matter, respondent's failure to reply to Reistad's requests for information constituted a violation of RPC 1.4(a). The DEC noted further that respondent had failed to respond appropriately to the insurance carriers.

In count two, the Harris matter, the DEC determined that respondent violated RPC 1.4(a), by failing to communicate with Harris. The DEC further determined that respondent violated RPC 1.1(a), by failing to serve the complaint in the underlying matter, failing to respond to the dismissal for lack of prosecution, and failing to inform Harris that the complaint had been dismissed and that he did not intend to take action on her behalf. The DEC found that these actions also constituted a violation of RPC 1.16(d) (improper termination of employment).

In the third count, the Ricker matter, the DEC found that respondent violated RPC 1.3 by his failure to pay the $75 to Toohey as well as his failure to respond to his adversary's letters and telephone calls.

With regard to all three counts, the DEC found a violation of RPC 1.1(b) (pattern of neglect). The DEC also found that

respondent violated RPC 8.1(b) due to his delay in responding to the investigator's letter.

In its report, the hearing panel indicated that it had accepted the presenter's recommendation that the complaint be amended to allege a violation of RPC 1.16(a)(2), which requires an attorney to withdraw from representation if his mental or physical condition materially impairs his ability to represent his client. The DEC recommended public discipline, a proctorship, counseling and psychological testing.

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.

Respondent set forth an affirmative defense based upon a recurring back problem, which frequently incapacitated him for lengthy periods of time, and related depression. As pointed out in the hearing panel report, respondent also testified about several accidents that aggravated his back condition and other physical ailments. Apparently, respondent's son developed an alcohol dependence, in addition to behavioral problems and has been in rehablitation.

In its report, the DEC noted that the burden is on respondent to show, by clear and convincing evidence, that his medical

condition is causally linked to his misconduct. The DEC concluded that respondent had not sustained that burden. The DEC pointed out that the periods of respondent's most severe disability did not coincide with the periods of his most severe neglect of his clients, noting that respondent's course of conduct spanned a three-year period. Indeed, although the bulk of the neglect to clients took place in 1990, respondent's failure to reply to the DEC occurred in 1991 and his behavior continued until the DEC hearings, by his failure to disclose to Harris that her complaint had been dismissed and by his retention of the $75 check for Toohey. The DEC also noted that respondent did not contend that his disability continued unabated for three years. Also of interest to the DEC was the fact that respondent took two vacations to Florida during the time period in question.

In connection with whether respondent was actually aware of his impairment, the following exchange took place before the DEC:

> MR. POPE: . . . At any time did your provider, either medical or psychological, psychiatric, try to help you understand your situation and give warning, if you will, about continuing to practice as you were treating?
>
> [RESPONDENT] Oh yes. Yes. That was brought up. I think I brought it up. I was very concerned.
>
> In fact, I saw John Irwin [sic], he used to be the Dean of Seton Hall Law School and he's got a practice in Morristown. He has a sideline in counseling attorneys. I went to see him a couple of times, because I was concerned what did you do if you're an attorney and you can't be an attorney anymore or you can't do what is expected of you.
>
> And at the time I was -- I saw him, I was very depressed and I didn't want to talk to any people. I didn't want to talk to anyone. I didn't want to communicate with them.

> I thought I had a lot worse problems and I'm trying to deal with my problems which are serious and important and your problems are not as important, maybe you should talk to someone else.
>
> And I discouraged a lot of business to people I had before, because I couldn't talk to them about their problems.
>
> [T4/2/92 159-160]

According to the DEC, respondent made no showing that he was unable to communicate with his clients from his residence or otherwise protect their interests. Indeed, respondent never explained why he had not contacted his clients to inform them of his medical and psychological conditions. As Reistad stated during her testimony " . . . I mean you're home sick, fine call. You have a phone next to your bed or your couch or something. All you have to do is call. . ." (T4/2/92 55).

At the Board hearing, respondent was allowed to submit additional documentation concerning his medical condition. After a review of all the evidence, it is obvious that respondent continues to suffer from a serious medical disability. However, the Board is troubled by the fact that, despite his awareness of his disability, respondent took no actions to protect his clients. According to respondent, he initially believed that his condition would improve and that he would return to practice. But even after time dragged on without an improvement of his condition, respondent did nothing to ensure that other counsel take over the clients' representation. In light of the three-year time lapse, it is undeniable that respondent's failure to protect his clients' interest was grossly negligent, in violation of RPC 1.1(a).

At the ethics hearing, the DEC amended the complaint to include a violation of RPC 1.16(a)(2) (failure to withdraw from representation when the attorney's mental or physical condition may impair the representation). The DEC then concluded that respondent had violated RPC 1.16(a)(2) when he failed to withdraw from representation after he became aware of his impairment. The DEC declined to accept respondent's condition as a mitigating factor on the basis that it was not causally connected to respondent's ethics infractions. The Board agrees with the DEC that respondent violated RPC 1.16(a)(2) after he recognized that his physical and mental conditions impaired his ability to properly represent his clients. Unlike the DEC, however, the Board believes that respondent's illness may serve to mitigate his conduct but only up to a certain period of time. After respondent's hopes for recovery in a short time did not materialize, then he should have taken appropriate action to have his clients' interests protected by other counsel. His illness should not serve to mitigate his indifference to the clients' well-being after he realized that his condition was not short-lived.

Respondent is guilty of gross neglect, lack of diligence, failure to communicate, pattern of neglect, improper withdrawal and failure to cooperate with the disciplinary system in three matters. This behavior generally merits the imposition of a public reprimand. See, e.g., In re Mahoney, 120 N.J. 155 (1990) (lack of diligence in four matters, pattern of neglect in four matters, failure to communicate in four matters, misrepresentation in one

matter, failure to maintain trust account records in one matter); In re Clark, 118 N.J. 563 (1990) (lack of diligence in four matters, failure to communicate in four matters and failure to return a retainer) and In re Wall, —— N.J. —— (1990) (lack of diligence in two matters, failure to communicate in two matters, gross neglect in one matter and improper sharing of legal fees with a non-attorney).

The Board unanimously recommends that respondent be publicly reprimanded. The Board also considered that the DEC was:

> struck by the number of irregularities, bizarre actions, apparent inability to comprehend basic principals [sic] nonsensical excuses, and apparent lack of focus displayed by the respondent during his course of representing these three Grievants, as well as during the testimony over four days of presentation of evidence.
> [Hearing Panel Report at 12]

Accordingly, the Board recommends that respondent submit to psychological counseling for an indefinate period and until discharged by his counselor, who is to file annual reports with the OAE. After one year, respondent may apply to be discharged, but he must first provide competent proof of his fitness to practice law.

The Board further recommends that the OAE request that respondent undergo a psychiatric examination to evaluate his fitness to practice law. In addition, the Board recommends that respondent practice law under the supervision of a proctor for a period of two years. Two members did not participate.

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

Dated: 4/27/1993

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