Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 94-435

IN THE MATTER OF	
JOEL C. BALSAM	
AN ATTORNEY AT LAW	

Decision
of The
Disciplinary Review Board

Argued: February 1, 1995 and March 15, 1995

Decided: August 11, 1995

Joseph P. Depa, Jr., appeared on behalf of the District XII Ethics Committee on February 1, 1995.

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics on March 15, 1995.

Respondent did not appear on February 1, 1995, despite proper notice of the hearing. Respondent appeared pro se on March 15, 1995.

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 discipline filed by the District XII Ethics Committee ("DEC"). The four formal complaints charged respondent with violations of RPC 1.3 (lack of diligence); RPC 1.4 (failure to communicate); RPC 1.15(c) (failure to safeguard property); RPC 1.16(b) (improper withdrawal from representation); RPC 3.1 (filing a lawsuit knowing that there was no meritorious claim); RPC 3.2 (failure to expedite litigation); RPC 3.3 (a) (knowingly presenting to a court a

document with a forged signature); and RPC 8.1(b) (mistakenly cited as RPC 8.4) (failure to cooperate with disciplinary authorities).

On February 1, 1995, the Board reviewed this matter on its merits. The Board, however, subsequently required the appearance of both respondent and an attorney from the Office of Attorney Ethics ("OAE") on March 15, 1995, to review the issue of respondent's compliance with a Supreme Court Order dated September 9, 1992, directing him to continue with psychotherapy, to undergo random screening for alcohol use and to participate in an Alcoholics Anonymous program, with monthly reports to be submitted to the OAE by respondent's sponsor, attesting to his sobriety and participation in the program. (On February 11, 1993, respondent was ordered to pay a $250 sanction to the Ethics Financial Committee for failure to comply with the above Order).

Respondent was admitted to the New Jersey bar in 1973. He was privately reprimanded on February 27, 1989 (failure to file a complaint and misrepresentation that the complaint had been filed). He was again privately reprimanded on May 26, 1992 (failure to provide written retainer agreement, keep financial records and keep client reasonably informed).

THE GILSTON MATTER (XII-92-5E)

Respondent had specialized in labor law at the law firm of Sills, Beck in the mid-1980s. Gerald Gilston, now of Florida and a former AT&T district manager from New Jersey, had met respondent while he was employed at Sills, Beck. In 1985, Sills, Beck filed

a federal lawsuit against AT&T Corporation, AT&T Communications and three high-level managers. In 1986, Sills,Beck terminated Gilston's representation because of a conflict of interest with another attorney in the firm, who had cases involving AT&T. Gilston was referred to Sandra Helbig, Esq., an attorney in West Orange, who continued to handle the litigation until mid-1989, when she withdrew from representation as a result of the closing of her practice. In the summer of 1989, Gilston retained respondent, who had left Sills, Beck in December 1986, and who by then maintained a sole practice of law.

On or about October 5, 1989, AT&T filed a motion for summary judgment. According to Gilston, respondent requested certain information from him during a telephone conversation. Gilston replied in a nine-page letter, also in October 1989. Gilston heard nothing further from respondent, despite his numerous letters to him from 1989 through 1992, at least two of which had been sent via certified mail, in January and in September 1991, with return receipts bearing respondent's signature.

Respondent submitted no opposition to the motion for summary judgment before the initial deadline scheduled by the court or before later deadlines extended several times by the court. On December 22, 1989, the court order setting forth the procedural history and repeating the peremptory return date of January 3, 1990 was ordered to be mailed to Gilston (then in Virginia) as well as to respondent. On February 14, 1990, summary judgment was granted in favor of defendants. Exhibit R-1 in the Gilston matter.

In March 1990, respondent filed an appeal from the order granting summary judgment. That appeal was dismissed in July 1990, reopened by respondent's motion in August 1990, and dismissed again on September 13, 1990, for failure to file the brief and appendix. Exhibit P-2 in the Gilston matter. Gilston testified that he learned about the status of the case through his own calls and letters in early 1991 to the federal courts, not through respondent, who did not return messages Gilston had left with respondent's wife and daughter. Gilston tried to contact respondent a number of times and eventually did reach him. Gilston could not remember the date of that telephone conversation, but recalled that respondent told him not to worry; "he was working on the appeal." On February 20, 1991, the Third Circuit Court of Appeals wrote to Gilston, with a copy to respondent, suggesting a motion to reopen the appeal. In October and November 1991, Gilston and the appellate court were still corresponding with each other about the case history and the lack of a motion to reopen the appeal. Exhibit P-2 in the Gilston matter. In late 1991, Gilston requested his file from respondent by telephone. Although respondent told Gilston that he would send it, Gilston never received it.

Respondent, on the other hand, testified that he had prepared a brief in opposition to defendants' motion for summary judgment. Exhibit R-2 in the Gilston matter. (The record does not indicate whether his twenty-four-page undated brief was filed with or received by the court). Respondent also testified that he reviewed

over 400 exhibits, tens of thousands of pages of documents and about six audio tapes provided to him by Gilston. Respondent further testified that he had provided copies of some documents to Gilston. Indeed, in his letter to respondent dated January 7, 1991, Gilston referred to the substantive contents of the trial judge's February 1990 order granting summary judgment, which he apparently had received or discussed with someone prior to his January 4, 1991 telephone call to the federal courts. 1T51.

Respondent attempted to justify his inaction by claiming that Gilston had not abided by their fee arrangement. Indeed, one of the disputed issues between Gilston and respondent was the fee arrangement. Respondent did not prepare a written fee retainer or agreement, but contended that he had agreed orally with Gilston that the fee arrangement would be the same as it had been with Sills, Beck. Respondent testified that he had expressly informed Gilston that an appeal of an adverse summary judgment ruling would not be covered by the initial fee of $3,000. Respondent further testified that he had offered to represent Gilston at the appellate level for an additional $3,000 plus expenses. (The record is not clear, however, as to whether the estimated fee of $3,000 was to be paid by each of the plaintiffs — Gilston's co-plaintiff Bhandari is not a grievant — or whether it was to be paid in the aggregate). Thereafter, Gilston paid $500, which, according to respondent, was spent on copying and filing an appendix, without a brief, in the Third Circuit Court of Appeals. Respondent acknowledged, "I should have made an application to the Third

Circuit to withdraw. I just let the appeal lapse because no monies were paid. [Gilston] was advised of this." 2T168.[1]

However, Gilston testified that he had not heard from respondent between October 1989 and 1992. When asked about fees and costs, Gilston explained: "[Respondent] asked for money on I believe two occasions and I think the sum total was about 35 to $3,700." 1T37. Later, a DEC panelist asked Gilston: "Did [respondent] ever say anything that the monies you gave him were to cover expenses?" Gilston replied: "No. Frankly, at that point in time I had no reason to distrust [respondent] at all.... I had no problem giving him money." 1T56. Gilston also claimed that, in late 1991, he had requested his documents, audiotapes and file from respondent, who assured Gilston "he would be sending it," but did not. 1T36-37.

THE WALLICK MATTER (XII-93-50E)

The facts and issues in the Wallick matter are similar to those in the Gilston matter.

According to Wallick, now of Minnesota and an AT&T district manager in New Jersey until November 30, 1984, he had met Gilston at an AT&T outplacement seminar, presumably between 1984 and 1986. Wallick learned that Gilston had discussed with respondent, during his affiliation with Sills, Beck, the filing of a lawsuit against AT&T for wrongful termination of employment and related claims. As

[1] 1T refers to the transcript of the DEC hearing held on November 12, 1993. 2T refers to the transcript of the DEC hearing held on March 17, 1994.

in the Gilston matter, Sills, Beck withdrew from representation. Sandra Helbig, Esq., also represented Wallick between 1986 and 1989.

In 1987, a federal lawsuit was filed in Wallick's behalf, presumably by Helbig. In 1989, Wallick, too, retained respondent to continue the litigation. In December 1990, AT&T filed a motion for summary judgment. Respondent did not answer most of Wallick's calls or letters, although he did call Wallick approximately eight times in 1989 and 1990 about scheduling depositions for Wallick to attend in New Jersey. After respondent's several telephone requests to the court for extensions — without the required follow-through conference calls with opposing counsel — the court received no opposition papers from respondent. The court granted summary judgment in favor of the defendants on July 23, 1991. Respondent did not inform Wallick of the order. 1T76.

Respondent stipulated that most of the facts and allegations contained in the Wallick grievance were true:

> I admit error in the case of Mr. Wallick...I do feel a certain and very distinct degree of responsibility for what happened ... I do admit to a degree of laxity and failure to perform what I said I would do.
> [1T7-17]
>
> * * *
>
> There was a motion for summary judgment... and I did not respond to it ...I do not present any realistic defense. A brief should have been filed....Excuses, there are none. Justifications, there are none. I was going through a difficult time at that point...there was an alcohol problem ...there was a divorce proceeding going on at the same time ...there was...a DWI with an imprisonment and a rehab.
> [2T16-17]

At some point, Wallick requested his file from respondent, but did not receive it. At the DEC hearing, respondent claimed that at least part of the file was probably in public storage for auction, pursuant to respondent's filing of his own bankruptcy petition. 2T31-32.

The formal complaint charged respondent with violations of RPC 1.3, 1.4, 3.2, 1.15(c) and 8.1.

THE HARRIS MATTER (XII-93-15E)

Respondent represented Robert Harris in a municipal court drug matter arising from a search that occurred on or about May 28, 1992. Respondent met with Harris' mother, Katherine Harris, the owner of the house that had been searched, as well as with Harris' girlfriend, Terri Skill, who lived with Harris in the downstairs portion of the house. Respondent prepared a certification for Mrs. Harris' signature, in support of a motion to suppress evidence taken by the local police department. 2T161, Exhibit P-1 in the Harris matter.

Mrs. Harris testified that she did not remember seeing the certification prior to the date of the DEC hearing. Moreover, she stated that the signature on the certification was not hers, that she did not know what the document was for, and that she did not remember meeting respondent at his office. 2T102-105.

In contrast, Harris' girlfriend, Terri Skill, recalled the earlier office conference with respondent and Mrs. Harris. 2T76-79. She also recalled that, at some later date, respondent and his

legal assistant, Anne Marie Bellerjeau, had arrived at Mrs. Harris' house and had told Mr. Harris and Ms. Skill that the certification needed to be in court by 1:00 p.m. that day. According to Ms. Skill, because Mrs. Harris was not at home and because Harris' arm was wrapped up in bandages, respondent had given the paper to Ms. Skill saying, "Here, Terry, you sign that." Ms. Skill testified that she had signed Mrs. Harris' name in respondent's presence. 2T77-78.

Ms. Bellerjeau, in turn, testified that she and respondent had left the certification with Mr. Harris and Ms. Skill, while she and respondent left the premises and went to lunch. She did not observe Ms. Skill sign Mrs. Harris' name, although she had heard that Ms. Skill had done so at times. 2T122-128. Both Ms. Bellerjeau and Ms. Skill recalled previous discussions with Mrs. Harris about the content of the certification and that the final draft contained information wholly consistent with the prior conferences. The certification primarily detailed the separate living arrangements of the mother and son in the house and the issues of consent and limitation of consent to search.

The certification was used in support of a suppression motion that was heard on or about February 10, 1993. 2T161. The record does not indicate the outcome of the suppression hearing. Apparently, the dispute over the signature arose later, when Mr. Harris questioned respondent's bill. 2T199.

The formal complaint charged respondent with violations of RPC 3.3(a) (certification with forged signature filed with the court) and 8.1 (failure to cooperate with the DEC).

THE PIZZI MATTER (XII-93-45E)

In September 1992, Anne Marie Bellerjeau, respondent's legal assistant, received a traffic summons in New Providence, New Jersey, which cited a court date of October 14, 1992. From October 12 until October 19, 1992, Ms. Bellerjeau was in Overlook Hospital for severe coronary and pulmonary problems. The record indicates that a friend of Ms. Bellerjeau attended the municipal court session to advise the court of Ms. Bellerjeau's hospitalization. The court, however, required a letter from her physician attesting to the hospitalization. Ms. Bellerjeau then appeared in municipal court in November 1992, at which time she requested that counsel be appointed to represent her because of her indigent status. The court granted her request.

On the next scheduled date, December 23, 1992, the assigned counsel, a partner in a New York City law firm, sent a relatively new patent attorney, an associate of the firm, to appear in court. At that time, Ms. Bellerjeau presented to the court medical records and a certification from her primary physician, which had been prepared for another matter. The court refused to accept the documents as a basis for the adjournment, requiring instead a letter from her primary physician or from a cardiologist, specifically prepared for that matter. The court then began to

hear the case and forbade Ms. Bellerjeau from leaving the courtroom, except to use the restroom and only if accompanied by a police officer.

On or about February 14, 1993, respondent filed a suit on behalf of Ms. Bellerjeau against the municipal court judge for unlawful restraint and "knowing and wilful infliction of emotion and physical harm," seeking compensatory and punitive damages. Exhibit P-1 in the Pizzi matter. Copies of the summons and complaint were informally delivered to the municipal court judge's home, the day before the next municipal court hearing, and prior to the actual filing of the complaint with the Superior Court.

In March 1993, the judge filed a motion for summary judgment, citing his immunity against suit because of his status as a municipal court judge. Respondent filed, belatedly, a brief in opposition to the motion, which brief was not considered by the court. The judge's motion for summary judgment was granted. The municipal court judge then filed a grievance against respondent.

The formal complaint charged respondent with violations of RPC 3.1 (knowingly filing a non-meritorious claim) and RPC 8.1 (failure to cooperate with the DEC).

FAILURE TO COOPERATE

Respondent was charged with violation of RPC 8.1 for his failure to file an answer, failure to reply to the DEC investigator's correspondence and failure to provide documents in the Wallick and Pizzi matters. The investigator reported that "the

only case I ever received anything from you on was [the Harris matter]." 2T21.

* * *

Respondent cited numerous personal problems in mitigation of his conduct, including alcoholism, divorce, and the death of his mother. He advanced such mitigation, notwithstanding his remarks that there were "no excuses or justifications" in the Wallick matter.

Respondent entered a rehabilitation program in 1987 and again in February 1991. 2T29, 172, 185. He described his drinking in late 1990 as heavy, but erratic. He was incarcerated occasionally for DWI, including on an unspecified date for his second offense in April or May and for his third offense in February through July 1992. 2T29. In 1990 his divorce proceedings started, resulting in a judgment on June 24, 1991. His mother died the next day. 2T170-171. He filed for bankruptcy (no date or year indicated) and was trying to recover his office files, including Wallick's and Gilston's, from the bankruptcy trustee. 2T32-33.

* * *

The DEC did not find clear and convincing evidence of a violation of RPC 1.3 (lack of diligence) or 1.4 (lack of communication) in the Gilston matter because Gilston's own letters

to respondent indicated that Gilston was aware of the status of the case and of the contents of the trial court's opinion. As to the termination of representation, the DEC found clear and convincing evidence that respondent violated RPC 1.16(b)(4), (b)(5) and (d). The DEC noted that respondent had failed to disabuse his client of the notion that, so long as he had not officially withdrawn as counsel, Gilston might continue to get a "free ride" from either respondent or the court on the appeal. The DEC further found a violation of RPC 1.15(c), in that respondent failed to safekeep Gilston's handwritten notes and diary entries, which Gilston had wanted to review for the appeal, and which the DEC interpreted to have intrinsic value. It appears that Gilston's own documents, as well as client files, may still be in the possession of respondent's bankruptcy trustee.

In the Wallick matter, the DEC found clear and convincing evidence that respondent had violated RPC 1.3, RPC 1.4 and RPC 8.1(b), in failing to diligently pursue litigation, to communicate with his client and to cooperate with the DEC's investigation. The DEC noted that respondent had no malpractice insurance policy and that, therefore, Wallick could not be made whole after respondent missed the statute of limitations and the lawsuit was dismissed. However, the DEC did not find clear and convincing evidence that respondent violated RPC 1.15(c), based on the DEC's interpretation that safekeeping property did not include the client's file.

In the Harris matter, the DEC considered that the testimony of the witnesses was in equipoise, that is, that there was no clear

and convincing evidence that the signature on the certification had been forged. Accordingly, the DEC recommended the dismissal of that matter.

In the Pizzi matter, the DEC found that the allegations made against the judge, as described in the complaint and the brief, were colorable under existing case law and, therefore, not frivolous. The DEC noted that, had the court considered respondent's brief, the municipal judge's motion for summary judgment might well have been denied. The DEC also found that the informal service on the judge was appropriate, since the judge was thereby made aware that an action was being instituted against him and he could, therefore, recuse himself from the hearing on the next day. The DEC recommended the dismissal of the Pizzi matter.

* * *

Following an independent, de novo review of the record, the Board is satisfied that the DEC's conclusions that respondent's conduct was unethical are fully supported by clear and convincing evidence. Respondent's misconduct was aggravated by several factors: his failure to file an answer with the DEC and failure to cooperate with the DEC investigator in 1993 and in 1994; his prior private reprimands in 1989 and in 1992; and the injury to at least one client, Wallick, in missing the statute of limitations and not maintaining malpractice insurance to cover any client losses.

Respondent admittedly dropped the Gilston matter without proper notice to his client and without returning the client's own notes on the matter. Respondent contended that his alcoholism had affected his conduct in the Gilston matter, although he conceded that his divorce and his mother's death had not. He explained that he was in the throes of alcoholism when he missed deadlines, failed to file briefs or filed them late. Respondent also claimed that Gilston had been informed of the trial court's decision, in particular the court's rationale that the corporation had legitimate business reasons for cutting down staff and that the statistics involved too few people to consider discrimination as a valid claim. Furthermore, respondent claimed that Gilston knew that additional fees were necessary to continue with the appeal. Respondent admitted that a "motion should have been made to withdraw on the basis of I was failed [sic] to be paid because all I received after [the motion for summary judgment] was $500 from Mr. Gilston which barely paid for putting together the appendix in terms of copying." 2T182. Respondent acknowledged that he "let it lapse and that is where my error lies. I should have just moved to the Third Circuit and said I'm going to let it lapse because I haven't been paid, and this is not a criminal matter." 2T184.

Although in Gilston, the true fee arrangement cannot be gleaned from the record, one thing is clear: even if it is true that respondent did, under no uncertain terms, tell Gilston that he would not continue the representation until his fee was paid, respondent should have made an application to withdraw as counsel.

Because he did not, Gilston relied on respondent for continued representation. It is clear, thus, that respondent violated RPC 1.16 in this matter. In addition, respondent's failure to file opposing papers and lateness in filing documents violated RPC 1.1(a) (gross negligence).

Respondent conceded that he was not diligent in pursuing the Wallick matter, in violation of 1.3, or in communicating its status to his client, in violation of RPC 1.4(a). Respondent's failure to file opposing papers also violated RPC 1.3.

In Harris, the dispute centered on who signed the certification and, if Mrs. Harris did not, whether respondent knew about it. Mrs. Harris and Ms. Skill both testified that Mrs. Harris did not sign it. In fact, Ms. Skill testified that she signed it at respondent's direction, a contention that respondent denied. Respondent admitted that he left the papers with Ms. Skill at Mrs. Harris' home while he went to lunch, but he denied knowledge that Ms. Skill had signed it. Although the evidence does not clearly and convincingly establish that respondent instructed Ms. Skill to sign the document in Mrs. Harris' stead, respondent was cavalier about it. Prudence dictated that he ask who signed the papers, if he did not see Mrs. Harris sign them when he delivered or collected the papers. By filing the certification with the court, respondent, at a minimum, violated RPC 1.1(a) for his failure to ensure that it bore the signature of the proper party.

As to the Pizzi matter, the Board agrees with the DEC's analysis and dismissal of the allegations of unethical conduct.

As to the charge of a violation of RPC 8.1(b), respondent failed to file an answer to the formal complaint, which, in and of itself, constitutes disrespect to the Supreme Court and to the ethics system. In re Skokos, 113 N.J. 389, 392 (1988).

Lastly, respondent failed to comply with the Supreme Court Order of September 9, 1992. Specifically, the Order required respondent to continue with psychotherapy, to continue to attend Alcoholics Anonymous sessions, to undergo random screening for alcohol use and to submit monthly reports by his sponsor to the OAE. According to the OAE, respondent has not undergone psychotherapy since August 1993, has not submitted results of random screenings since July 1993 and has never submitted a sponsor's report. Respondent admitted that he failed to fully comply with the Order, but argued that he had substantially complied with its provisions. Respondent claimed that he did not continue with psychotherapy after August 1993 because he could not afford it. Respondent explained that he had been suffering from lymphoma for the past fifteen months and that he had been unable to work. Respondent informed the Board that, in a fashion, he had resumed psychotherapy from November 1993 through January 1994, when he participated in an alcohol-rehabilitation program. Respondent informed the Board that he currently attends Alcoholics Anonymous sessions four to five times a week and that he has a sponsor.

Nevertheless, it is unquestionable that respondent has not submitted to random screening for alcohol use since July 1993 and never supplied the OAE with a sponsor report. In addition, if respondent was unable to afford psychotherapy, he should have notified the OAE or applied for a modification of the Court Order.

For his numerous ethics violations and for his failure to abide by the Supreme Court Order, respondent is to be suspended for six months. But for the latter violation, the Board would have imposed a three-month suspension. See, e.g., In re Smith, 101 N.J. 568 (1986) (gross neglect in an estate matter, failure to communicate with the clients and failure to cooperate with the DEC and the Board.) In addition, during the period of suspension, respondent is to provide proof that he is attending Alcoholics Anonymous meetings. Also, prior to reinstatement, respondent shall submit proof that he is alcohol-free. The Board's decision was unanimous. Three members did not participate.

The Board further requires respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 7/11/95

RAYMOND R. TROMBADORE
Chair
Disciplinary Review Board