Bank

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-125

IN THE MATTER OF

JEROME T. WILLIAMS,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 22, 1994

Decided: September 27, 1994

Vincent Marino appeared on behalf of the District XI 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 on a recommendation for public discipline filed by the District XI Ethics Committee ("DEC"). The formal complaints, consolidated for hearing, charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to keep client reasonably informed) and RPC 3.3(a)(1) (false statement of material fact to a tribunal). Respondent filed answers to the complaints, essentially denying all of the allegations. In addition, respondent raised an affirmative defense of mental and physical fatigue.

Respondent was admitted to the New Jersey bar in 1979. He has no prior disciplinary history.

Respondent was charged with misconduct in two separate matters.

The Harris Matter

In or about 1985, respondent was retained by Sandra Harris ("grievant") to represent her in an arbitration proceeding against an automobile manufacturer and dealer for defects in a new automobile purchased by grievant. The arbitration decision was rendered in February 1985. Both grievant and respondent were dissatisfied with the arbitration result. Pursuant to grievant's instructions, respondent filed suit against the dealer and manufacturer in Superior Court, on or about March 14, 1986.

At some undetermined point, grievant received a complaint filed by Midlantic Bank ("Midlantic"), which had financed the purchase of the automobile. Grievant testified that she had previously ceased making payments to Midlantic on respondent's advice. The suit, therefore, was for default on that loan. Grievant forwarded that complaint for respondent to handle, together with all other correspondence she received from Midlantic. Grievant testified that she had always assumed that respondent represented her in that matter as well, since she had received from him copies of correspondence written to Midlantic in her behalf, in which respondent acknowledged his representation of her interests.

Grievant personally telephoned respondent regarding the status of her matters every two months. On each occasion, respondent gave her "a different story," such as, that a defendant had "changed hands," that he was waiting to be served (although it is not clear to what he might have been referring), that the matter(s) should be concluded in the near future and, generally, that things were progressing well. 1T13-15.[1] When grievant moved to Florida (between 1989 and 1991), she continued to maintain telephone contact with respondent. In addition, during that period, her family, particularly her brother, who was a childhood friend of respondent, was in constant contact with him.

After grievant returned to New Jersey in May 1991, approximately six years after she initially retained respondent, she became concerned that her matter was taking too long to be concluded. Therefore, in the Spring of 1981, grievant telephoned both the county clerk's office and the Superior Court clerk's office. It was then that grievant learned, for the first time, that her complaint against the manufacturer and the dealer had been dismissed, at some unspecific point, for lack of prosecution. When she telephoned respondent to confront him with her discovery, he insisted that she had received inaccurate information and continued to assure her that her complaint was still viable. Nevertheless, because grievant did not believe respondent, she filed a grievance against him with the DEC.

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[1] 1T denotes the DEC hearing transcript during the morning hours of March 17, 1993.

In addition to her discovery that her complaint had been dismissed, at some unknown point grievant received a copy of a judgment in the amount of $11,000, entered against her in the suit filed by Midlantic. Presumably, that judgment was obtained as a result of respondent's failure to file an answer to Midlantic's complaint.

Grievant's brother, Lawrence McDougle, also testified before the DEC. McDougle essentially confirmed his sister's testimony and added that he had been in substantial contact with respondent regarding his sister's matters. McDougle testified that he always conveyed whatever information he received from respondent to his sister, although he was not specific about the nature of the information. The essence of that information, however, was that things were progressing and "parties were changing."

After six or seven years, McDougle began to suspect that something was amiss. He, therefore, contacted another lawyer, who apparently advised him that the suit against the manufacturer and dealer should have been concluded by then. McDougle also telephoned the clerk's office, in or about August or September 1991, and learned that his sister's case had been dismissed (or was in the process of being dismissed) for lack of prosecution. When McDougle called respondent to confront him with this information, respondent asserted that McDougle, too, had received wrong information from the clerk's office. Respondent assured McDougle that the suit was ongoing. Respondent promised to travel to Trenton the following day to correct any misunderstanding that

might exist. Apparently, that was the last time that McDougle had any contact with respondent.

Respondent admitted that grievant's complaint had been dismissed for lack of prosecution, in 1987 or 1988, because of his failure to serve any of the named defendants. He maintained, however, that he did not learn of that fact until he personally travelled to Trenton, after his telephone conversations with McDougle and grievant. Furthermore, while he admitted that he had not served any of the defendants in that matter, respondent maintained that he had not received a notice of dismissal from the court, which would have been the usual practice. (Respondent's file was not produced at the hearing; nor was there any request for respondent to do so.) Respondent testified that, after he returned from Trenton, he advised McDougle that the case had, in fact, been dismissed. He, nevertheless, made no attempt to reinstate the matter.

Although respondent maintained that he had not advised grievant of the dismissal of her case — because he had only learned of it after travelling to Trenton in 1991 — he testified earlier that, before grievant moved to Florida, he prepared, but did not file, a motion to reinstate grievant's complaint and to consolidate it with the Midlantic action. Respondent added that McDougle (or grievant) had signed a certification in support of that motion. 1T55-58. When later confronted with that testimony, in light of his disclaimer of any previous knowledge of the

dismissal, respondent steadfastly asserted that the motion he had prepared was for consolidation only. 1T62-63.

Asked why he had not attempted to serve any of the named defendants in the action, respondent answered that, since the filing of the complaint, the named car dealership was no longer operating under the name designated in the complaint and, further, that the manufacturer had ceased conducting business. Although respondent asserted that he made subsequent efforts to discover the proper identity of the parties, the extent and nature of those efforts are unclear. It is equally unclear why respondent did not make a motion for substituted service, pursuant to R. 4:4-4. In any event, respondent maintained that he had always advised McDougle of these identification and service problems and that he had assumed that McDougle had relayed that information to grievant.

With regard to the Midlantic matter, respondent admitted that he had received a copy of the complaint from grievant before the deadline for filing an answer. He never fully explained why he had not filed an answer in that matter, except to say that he never had the opportunity to file the motion to consolidate the two actions. He further contended that he never advised grievant that he would file an answer in her behalf, although he admitted that he had not advised her that he would not. He also asserted that he had not been retained by grievant to represent her in the suit against the automobile dealer and manufacturer and had done so merely "out of friendship." 1T65-66. He admitted, nevertheless, that it had always been his impression that grievant understood that he would

be representing her in both actions. There is no evidence to suggest that respondent made any attempt to disabuse grievant of that notion. Indeed, he admitted that he filed a complaint in one matter and that he also corresponded with Midlantic in the other.

Finally, respondent testified that he had indeed advised McDougle that default had been entered in the Midlantic matter and that he had proposed a motion to consolidate both matters and to set aside the default.

The McDougle Matter (XI-92-015E)

In or about November 1988, respondent was retained by Denise McDougle to represent her in an action for injuries sustained on October 29, 1988, when she fell on a sidewalk or alleyway adjacent to a commercial property. Denise McDougle was the wife of Lawrence McDougle, respondent's longtime friend and the grievant in this matter. Lawrence McDougle remained in fairly frequent contact with respondent from the time he was retained. On each occasion that they discussed Mrs. McDougle's case, respondent assured McDougle that everything was progressing well. In fact, McDougle testified that respondent advised him, in December 1988, that he had already filed a complaint in Mrs. McDougle's behalf. During their conversations, respondent never expressed any concern to McDougle regarding the viability of his wife's action.

At some unidentified point, Mrs. McDougle began to pressure her husband to obtain from respondent a copy of the complaint filed in her behalf. Thereafter, sometime in 1992, respondent visited

the McDougles' home and brought with him a copy of the complaint. Exhibit G-3. The face of the complaint shows a filing date of either January 3 or 8, 1991 — over two months beyond the applicable two-year statute of limitations. Furthermore, paragraph one of the complaint identifies the date of the accident as October 29, 1989, instead of 1988. When the McDougles expressed concern to respondent over the apparently late filing date, he assured them that the statute had tolled, although the basis for respondent's belief is not clear. Respondent further assured the McDougles that the incorrect designation of the accident date was a typographical error on his part.

After respondent left, McDougle consulted another attorney about the possible tolling of the statute of limitations. That attorney advised him that there was no basis to argue that the statute had been tolled for any reason and that Mrs. McDougle's complaint would be considered time-barred. On February 22, 1992, McDougle wrote to respondent advising of that attorney's opinion and requesting respondent's reply. Included in that letter was a reference to bringing the matter to the attention of the "State Bar Association." Exhibit G-5. Thereafter, respondent telephoned McDougle and advised him that he disagreed with the other attorney's assessment and that he continued to believe that Mrs. McDougle's case was still viable. McDougle, nevertheless, brought the complaint to other attorneys in Morris County, who apparently agreed to represent McDougle in a future malpractice action against

respondent. McDougle also filed a grievance against respondent. He has had no contact with respondent since then.

Mrs. McDougle's complaint was dismissed in or around July 1992. There is no documentary evidence explaining the reason for the dismissal. Although McDougle initially testified that it had been dismissed upon the defendant's motion (due to the statutory limitation), he later suggested that the complaint had been dismissed for lack of prosecution.

Respondent admitted that Mrs. McDougle's complaint had been dismissed in July 1992. However, he denied that the dismissal was based on a motion by the defendant for non-compliance with the statute of limitations. Had he received such a motion, he testified, he would have opposed it on substantive grounds. Specifically, it was respondent's belief that Mrs. McDougle's injury (a knee injury requiring arthroscopic surgery) did not manifest itself until after the expiration of the two-year statutory period. Respondent, therefore, believed that the statutory period would have been considered tolled until the discovery of that injury. (In reality, respondent's position would not have been successful since Mrs. McDougle had consulted and treated with a physician for a knee injury within the two-year statutory period. Similarly, respondent had received medical records documenting those consultations in that period).

Respondent maintained that the complaint had been dismissed, instead, for lack of prosecution. Admittedly, he had never served the defendants with the summons and complaint. Respondent

testified that he had previously advised McDougle that he was not serving the complaint for two reasons. He did not believe that he could prove that Mrs. McDougle suffered any injuries as a result of the fall and, in addition, Mrs. McDougle continued to refuse to go to a doctor. McDougle disputed that he and respondent had engaged in any such conversations. McDougle admitted, however, that he and respondent had discussed his wife's injuries and that respondent encouraged Mrs. McDougle to have the arthroscopic surgery that she had been reluctant to undergo earlier. Regardless of whether a dispute existed over the nature, extent or treatment of Mrs. McDougle's injuries, respondent admitted that he never sought to withdraw from representation on the basis of any such disagreement. Respondent testified that he received the motion for dismissal for lack of prosecution at some point after he received McDougle's grievance against him. He did nothing to oppose that motion because he believed it would have been unethical for him to have done so, under the circumstances. He, nevertheless, made no formal motion to withdraw from representation at that point.

Respondent steadfastly maintained that the appearance of the incorrect date in the complaint was nothing more than a typographical error on his part and not an attempt to mislead the court or anyone else into believing that the complaint had been filed within two years of the accident. As previously noted, respondent contended that it had always been his intention to argue that the statute had been tolled, had he been confronted with a motion for dismissal on that basis. A review of the complaint

disclosed several typographical errors and respondent testified that he frequently made such errors. He testified that, consequently, it was his practice to have his clients review their complaints before filing. He believed that Mrs. McDougle had done so, although McDougle denied that to be the case. (Mrs. McDougle did not testify). Respondent further testified that he did not file an amended or corrected complaint with the court because he received McDougle's grievance soon after the discovery of the error.

* * *

The DEC found respondent guilty of unethical conduct in both the Harris and the McDougle matters. In the Harris matter, the DEC found that respondent violated both RPC 1.3 and 1.1(a) by his failure to diligently pursue the litigation against the automobile dealer and manufacturer and by allowing the litigation to be dismissed. Similarly, the DEC found respondent guilty of violations of both RPC 1.1(a) and RPC 1.3 for his failure to file an answer in the Midlantic matter, resulting in the entry of a judgment against his client. In addition, the DEC found respondent guilty of a violation of RPC 1.4(a) for what it characterized as a failure to truthfully apprise his client of the status of her matters.

In the McDougle matter, the DEC found that respondent violated both RPC 1.3 and 1.1(a) by his failure to timely pursue his

client's claim. The DEC further found respondent guilty of a violation of RPC 1.4(a) for respondent's failure to communicate with his client and to truthfully apprise her of the status of her suit over a period of almost three years. Finally, the DEC found respondent guilty of a violation of RPC 3.3(a)(1) for his recitation of an erroneous accident date in the complaint. The DEC viewed that action as a deliberate attempt to avoid the bar of the statute of limitations. The DEC did not accept as credible respondent's explanation that the wrong date was a typographical error.

Finally, the DEC rejected respondent's affirmative defense that any misconduct on his part was the result of physical and mental fatigue. The DEC noted that respondent offered no evidence of the existence of any such condition, other than his own testimony. The DEC recommended public discipline for respondent's conduct.

CONCLUSION AND RECOMMENDATION

Following an independent 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.

In the Harris matter, respondent failed to diligently pursue his client's claim against the automobile manufacturer and dealer over several years. The record discloses no significant effort on

his part to either identify the proper parties or to serve, at least by substituted service, the parties already designated as defendants in the complaint. The latter course of action would have, at a minimum, avoided the dismissal of the action. Respondent's failure to protect his client's rights constitutes a violation of RPC 1.1(a) and RPC 1.3.

Similarly, respondent's conduct in the Midlantic suit cannot be excused. Although respondent may have considered it desirable to consolidate that action with the action against the automobile manufacturer and dealer, the fact of the matter is that he did nothing. Respondent advanced no reason why he could not file an answer in that matter without first consolidating it with the other. Indeed, there is none. Respondent's contention that he was not retained in the Midlantic matter because he never specifically advised Sandra Harris that he would file an answer in her behalf is contradicted by the record. Respondent admitted that he had corresponded with Midlantic on several occasions in Harris' behalf and, further, that it had always been his impression that Harris and her family considered him to be representing her in all matters.

On the other hand, the DEC's finding that respondent failed to communicate with his client is not supported by clear and convincing evidence. Harris testified that either she, her brother or another family member was in fairly constant contact with respondent regarding her matters. That arrangement apparently suited her. The problem seems to lie in the nature of those

communications, thereby raising the issue of misrepresentation. It appears from the record that the information imparted by respondent to Harris and her various family members was frequently somewhat general in nature. Although this was not specifically explored below, it may very well be that, because respondent and McDougle had attended law school together, respondent believed that general information to be sufficient at least to keep McDougle adequately advised so that he, in turn, could convey information on the case to Harris. Under those circumstances, the evidence is insufficient to find a violation of RPC 1.4(b).

The more pressing inquiry, of course, is whether respondent knew about the dismissal of Harris' complaint and failed to so inform her. Here, too, the proofs do not satisfy the requisite standard of clear and convincing. According to respondent's testimony, it was only after he went to the clerk's office in Trenton that he learned of the dismissal of the complaint. Accordingly, the Board recommends that the allegation of misrepresentation (mistakenly charged as RPC 1.4 in the complaint) be dismissed. The same holds true for the charge of misrepresentation in the Midlantic matter. Respondent testified that he specifically advised McDougle that a judgment of default had been entered against Harris and that respondent proposed to file a motion to set aside that judgment and to consolidate it with the other action.

The Board is also unable to agree with the DEC's finding of lack of diligence and gross neglect in the McDougle matter. Without the benefit of specific testimony or documentary evidence in that regard, the Board cannot make any determination of gross neglect or lack of diligence on a clear and convincing basis. By the same token, if respondent's explanation for not having filed the complaint within two years of the accident date is true, then no finding of gross neglect or lack of diligence may be sustained to a clear and convincing standard.

Lastly, in light of respondent's testimony explaining his failure to file the complaint within the statute of limitation and of the absence of other evidence tending to show that respondent deliberately altered the accident date in the complaint, the Board cannot conclude, to a clear and convincing standard, that respondent's conduct was aimed at defrauding the court. It is possible that a typographical error was responsible for the incorrect date. Indeed, the complaint appears to have been sloppily prepared and contains several other typographical errors. Furthermore, when the McDougles brought the error to his attention, respondent's immediate response was that it was a mistake. There is no proof, beyond the simple and circumstantial fact that the date was incorrect, that this response was a fabrication on respondent's part to avoid responsibility for the late filing.

In view of the foregoing and of respondent's lack of contrition, the Board unanimously recommends that respondent receive a public reprimand for his gross neglect and lack of

diligence in the Harris matter, which included the suit against the car dealer and the manufacturer as well as the Midlantic suit. The lack of competent evidence precludes the Board from making any finding that respondent's misconduct was mitigated by mental and physical fatigue.

One member did not participate.

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

Dated: 9/27/1994

By: Raymond R. Trombadore
Chair
Disciplinary Review Board