

Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-362

IN THE MATTER OF :
: :
DAVID BRANTLEY, :
: :
AN ATTORNEY AT LAW :
:

Decision

Argued: November 20, 1996

Decided: January 6, 1997

Jay M. Silberner appeared on behalf of the District VB 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 on a recommendation for discipline filed by the District VB Ethics Committee ("DEC"), arising out of respondent's handling of an estate matter. The complaint charged respondent with violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 1.15 (failure to safeguard client property) and RPC 8.1(b) (failure to cooperate with the DEC).

Respondent was admitted to the practice of law in New Jersey in 1970. During the time relevant to the within matter, he maintained an office in East Orange, Essex County. Respondent now practices in Verona, also in Essex County.

Respondent was suspended for three months by Order dated April 4, 1995 for a pattern of neglect, lack of diligence and failure to communicate in two matters, and failure to cooperate with the DEC. In re Brantley, 139 N.J. 465 (1995). He had been previously suspended for one year, by Order dated March 19, 1991, for misconduct in four matters. Specifically, respondent was found guilty of various combinations of gross neglect, a pattern of neglect, lack of diligence, failure to communicate, failure to carry out a contract of employment, misrepresentation and failure to cooperate with the DEC. In re Brantley, 123 N.J. 330 (1991).

In addition, respondent was privately reprimanded on three occasions. He received the first private reprimand on March 29, 1982 for failure to represent a client zealously. On February 29, 1988, respondent was privately reprimanded for driving with a suspended license and failing to pay a moving violation summons and a series of parking tickets. On May 25, 1988, respondent was again privately reprimanded for neglect, misrepresentation and failure to execute a retainer agreement in a personal injury matter.

The facts of this matter are as follows:¹

On November 14, 1992, Lillian Wortham, the grievant herein, retained S. Dorell King, Esq., to represent her as executrix of the estate of Wortham's deceased aunt, Anna Beatrice Hawk. Wortham and her cousin, Cynthia Smith, were the beneficiaries of the estate.

¹ Respondent arrived late for the DEC hearing. By then, grievant had completed her testimony. The DEC chair summarized her testimony for respondent, who then cross-examined grievant.

Respondent is King's husband. Respondent stated that, during the time in question, he and King had separate office suites in the same building and maintained separate law practices. According to Wortham, she met respondent when she retained King. Although Wortham specifically retained King, she viewed King and respondent as a "husband and wife team."

King proceeded to assist Wortham in administering the estate and communicated with Wortham on an ongoing basis. According to Wortham, respondent was always present when she met with King and would explain aspects of the estate to her. Wortham testified that, approximately one year after she retained King, King stopped communicating with her. At an undisclosed time, Wortham received a letter from King explaining her lack of communication, alleging that she had been ill and that she and respondent had been out of the country. Wortham went on to say that, thereafter, "[e]very time we needed to go to the bank or pay somebody, [King] would send [respondent] for me to sign a check, which I did on several occasions. And [respondent] was the one that went to the bank to resolve the accounts or deposit the checks or whatever." Indeed, sometime after November 17, 1992, respondent accompanied Wortham and the other beneficiary of the estate, Smith, to open an estate bank account. The only signatory on the account was Wortham. Prior to going to the bank, Wortham and King discussed the account, including the fact that bank statements would be sent to King. Wortham never received a copy of the bank statements.

As these facts make clear, there is no question that, at some point, respondent became involved in handling the estate. As noted above, Wortham viewed respondent and King as a "team." Respondent questioned Wortham about her understanding of his connection with the Hawk estate:

Q. . . . Were you told at any time by S. Dorell King that she was no longer representing the estate of Anna Beatrice Hawk and no longer representing you? Had she ever told you that?

A. No.

Q. Have I ever told you that I was the attorney for the estate of Anna Beatrice Hawk and that I was representing the estate of Anna Beatrice Hawk?

A. You didn't say that to me, that I remember.

Q. Okay.

A. I didn't find it necessary, being you were working together. I wouldn't have paid attention to that anyway.

Q. My question to you is: Have I ever told you or in writing had you sign and I sign any document or paper indicating that I was the attorney or that I was representing the estate -

A. No.

Q. - of Anna Beatrice Hawk?

A. No.

Q. Have you ever received or seen any document, written document, which indicates that S. Dorell King and my office are associated. That I am an associate of her office or she is an associate of my office?

A. No. If it's not letterheads that I received from you, I wouldn't have seen it, but no I haven't seen any associates.

Q. Okay. Have I ever told you that I was an associate of the office of S. Dorell King?

A. No. You didn't say that.

Q. Did Mrs. King ever tell you that she was an associate of the office of David Brantley?

A. No. She didn't say that?

* * *

Q. Okay. Mrs. Wortham, at any time that I rendered any service to you, was it clear to you that I was operating as doing a favor for the office of S. Dorell King, and assisting S. Dorell King and you and Cynthia on this matter?

A. I would say, yes, because like I said as for [sic] - as I am concerned you both were one package. You were helping Dorell. I mean I didn't -

Q. But my question -

A. - think of it.

Q. But my question to you was: That you never retained my office to represent you in this matter?

A. No, I did not.

Q. You never set foot in my office with respect to this matter?

A. No, I did not.

Q. And that any time that I assisted you, it was in helping Mrs. King to get this matter processed?

A. Yes.

[T5/21/96 69-73]

The presenter also questioned Wortham about her understanding of respondent's role in handling the Hawk estate:

Q. Do you view Mr. Brantley as your attorney?

A. Yes.

Q. Did he give you any - did he ever say to you I am not your attorney?

A. No.

Q. Did he ever - when you say you thought he simply was doing a favor for Mrs. King, did you think that it was a

favor in the sense that he was not getting paid for what he was doing or did you know, in fact, what the relationship between Mrs. King and Mr. Brantley was in terms of the fee?

A. No. I had no idea how that worked. Like I said, they were a team as far as I was concerned, husband and wife team.

[T5/21/96 75-76]

In May 1993, respondent prepared a transfer inheritance tax return, reflecting his office address as that to which correspondence should be addressed. Respondent explained that, at that time, King was out of the office due to illness and that his office had prepared the document. According to respondent, his secretary had mistakenly put his name on the return. Despite her illness, King came to the office to meet with Wortham. Respondent explained that, upon review of the tax return, King noticed that the documents were to be returned to respondent's office. King and respondent then decided that he would deliver the documents to King once they were received in his office. Wortham signed the return and the check for taxes due.

Thereafter, by letter dated October 1, 1993, respondent advised Wortham that the estate audit had been completed and that, because the estate account had only \$128.01, in order to expedite the receipt of the tax waivers he had paid \$141.54 in additional taxes in behalf of the estate. Respondent informed Wortham that the tax waivers were expected within two weeks and that, upon their receipt, the remaining sums in each bank account could be released. Respondent also addressed additional tax issues. Respondent enclosed an estate account bank statement and a copy of his

September 30, 1993 correspondence to the State of New Jersey Division of Taxation, forwarding the additional \$141.54 and directing that the waivers be sent to him.

The record contains two tax waivers, dated October 27, 1993. Exhibit R-5. By letter dated November 16, 1993, respondent confirmed a conversation with Wortham scheduling an appointment for them to go to the bank to release the remaining estate funds. In fact, respondent accompanied Wortham to the bank on more than one occasion.

In December 1993, respondent personally delivered a number of documents to Wortham, including a letter to her dated December 18, 1993, specifying various fees and expenses to be paid out of the estate funds and checks for her signature as executrix, including one payable to herself.² One of those checks was to respondent for \$147.72 and was designated "Balance of Attorneys Fees." According to respondent, King decided that he should receive those funds for his work on the matter. (Wortham testified that she did not know if respondent had received any fees).³

Of import is a statement in respondent's December 18, 1993 letter to Wortham about a final accounting. Specifically,

² The record reveals that disbursements were made to Wortham, Smith (the other beneficiary) and King during respondent's involvement in the matter. Smith, who died while this matter was pending, had retained King to handle a criminal matter. It appears that King's fees for that matter were to be paid from estate funds. One of the checks respondent brought to Wortham on December 18, 1993 was for King's fees.

³ Given that there was no agreement to the contrary and that King's retainer agreement set forth her minimum fee and hourly rate, Exhibit P-5, there was no impropriety in disbursing the attorney fees before the final distribution of estate assets to the beneficiaries.

respondent stated, "I shall furnish you with a full accounting as soon as possible. And, will schedule a future appointment for you to come in and sign all drafts in connection with paying the medical expense." Contrary to his promise, however, respondent did not supply the accounting. Indeed, respondent took no further action on the matter and, as of the DEC hearing, did not know if the estate had been finalized. The following exchange took place between respondent and the panel chair:

[Panel Chair]: Did you furnish her with a complete accounting[?]

[Respondent] Well, furnish her with a full accounting, was that at this point I believe Mrs. King was out and I was going to receive that from Mrs. King and get that to Mrs. Wortham. But -

[Panel Chair] Was it done in this case?

[Respondent] I don't know because Mrs. King had the file. I don't know whether it was done or not.

[T5/21/96 116-117]

Wortham claimed that, in 1994, she made repeated calls to the telephone number King had given her, seeking to speak with King or respondent. (Wortham testified that she thought they had the same phone number. In fact, the 1994 Lawyers' Diary lists different numbers for King and respondent. Wortham did not recall how the office was identified when the phone was answered). The record does not reveal what Wortham was told when she called to ask that someone get back to her. Wortham's calls were not returned, with the exception of one call from respondent. Wortham also testified that, on one occasion in 1994, she went to the building where their offices were located. A security guard denied her access because

she did not have an appointment. Wortham added that it was possible that neither King nor respondent was in the office at the time she attempted to see them.

Respondent testified that King's secretary never advised him of any calls or correspondence from Wortham. Respondent contended that, had he known Wortham had tried to reach him, he would have called her. Respondent did not recall any request from King in 1994 or 1995 that he take any action in the Hawk estate.

Respondent maintained that King represented the Hawk estate and that he never held himself out as the attorney for the estate. Respondent explained that King had been suffering from unspecified illnesses and, that, in 1992 and 1993, she had been involved in two motor vehicle accidents. She was, from time to time, unable to tend to her practice. Respondent contended that he would take action in King's cases as a favor to her:

If she [King] asked me to do something on the case, I would do something on the case. If something was needed to be done on the case, and I was aware of it, and she was out ill, I would take the file and do that for her with her full knowledge and consent.

[T5/21/96 104]

Respondent testified further that each time he met with Wortham it was at King's direction. He described his role as that of an "intermediary."

* * *

The formal complaint alleged that respondent established an estate checking account, had Hawk's funds deposited into the account and failed to make Wortham aware of the amounts deposited

or of Hawk's total assets. In reply to that allegation, respondent testified:

With respect to this particular allegation, Mrs. Wortham was the only person authorized to sign checks from the account. And each time there were distributions made from the account, Mrs. Wortham signed those checks. So she was aware to the extent that she signed the checks. And each time there were disbursements made on the account, either they were made by her signing the checks or by her being present in the bank and checks being issued directly from the bank to Mrs. Wortham or to Cynthia Smith or directly payable to Mrs. King.

[T5/21/96 90]

The complaint also alleged that, despite Wortham's repeated requests for information, respondent never accounted to her for the estate account. Specifically, Wortham was unaware of the estate assets, debts paid, distributions made, the balance in the estate account or the amounts in Hawk's accounts. To this charge, respondent replied as follows:

With respect to that particular count, any bank statements and any records with respect to this account were delivered and are directed directly to the offices of S. Dorell King, and not to my attention. So with respect to any control over this account, I had no control over this account.

With respect to any request for any information regarding this account, when Mrs. Wortham set this account up, she set this account up at the direction of Mrs. King to have any and all bank statements forwarded to Mrs. King. As far as that was concerned, that's exactly what was done. In this situation and up to and including today, those statements are still addressed to and are being received by the office of S. Dorell King, and not my office.

[T5/21/96 91]

Respondent later added:

At no time during the course of my involvement with this matter did I ever have funds that I was entrusted with, or have the responsibility of monitoring or distributing on behalf of the estate for Mrs. Wortham.

[T5/21/96 119]

Respondent, did, however, prepare checks for Wortham's signature. Respondent explained that either he would refer to the file to ascertain what needed to be paid or that King would tell him what to do.

* * *

Shortly before the DEC hearing, Wortham and respondent were sent copies of two letters dated May 17, 1996 from King to the bank holding Hawk's funds. Exhibits P-7 and P-8. One letter confirmed that the bank had received the inheritance tax waiver, enclosed a copy of the account statement and asked for a print-out of the last account balance. The second letter referenced a conversation of that date and confirmed that the last bank statement King received had been in January 1996. The letter also described King's difficulties with her mail delivery, forwarded a new address to which bank statements should be sent and requested copies of the statements from February, March and April 1996. Wortham stated that the letters were the first communication she had received from King or respondent in "several years."

As of the date of the DEC hearing, May 21, 1996, Wortham had not received a final accounting of the estate assets.

* * *

In February 1995, Wortham filed a grievance against respondent.⁴ By letter dated July 10, 1995, the DEC investigator asked that respondent reply to Wortham's grievance. Respondent did

⁴ Although Wortham filed a grievance against King as well, the Office of Attorney Ethics' computer system has no record of this grievance.

not. Respondent contended that he never received the presenter's letter, which, he noted, was incorrectly addressed. (The DEC's letter was addressed to "Suite One," rather than "Suite One-J"). In addition, as noted above, respondent was suspended effective May 1995 and his office was closed at the time of the DEC's letter. Respondent relocated his office when he was reinstated to practice in January 1996.

The DEC's July 10, 1995 letter, apparently sent only via regular mail, was not returned to the presenter. The record does not disclose any additional attempts by the presenter to communicate with respondent before the filing of the formal complaint, on March 28, 1996. That letter, which respondent received, was addressed to his present office and to his former office, with no suite number designated. (Respondent stated that the letter sent to his former office was forwarded to him). Respondent filed an answer, dated April 29, 1996. Respondent maintained that, although in November 1995 he was made aware of Wortham's grievance from an unexplained source, the complaint was the first written notice he received of Wortham's complaint.

* * *

The complaint charged respondent with a violation of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 1.15 and RPC 8.1(b).

The DEC concluded that, through respondent's actions beginning in or about May 1993 and pursuant to his December 18, 1993 letter, he had assumed the representation of Wortham and of the Hawk

estate. The DEC found that Wortham "had a reasonable right to believe that he was acting as her attorney in that regard."

The DEC determined that respondent was guilty of lack of diligence, in violation of RPC 1.3. The DEC relied particularly on respondent's representation in his December 18, 1993 letter to Wortham about the accounting and his subsequent failure to take any action until his suspension, approximately eighteen months later. The DEC, without explanation, found insufficient evidence of gross neglect. In addition, the DEC found inadequate proof of a failure to communicate, reasoning that there may have been confusion as to who was actually handling the file and whether calls were placed to respondent's office or to King's office. With regard to the alleged violation of RPC 1.15, the DEC found that the rule was inapplicable and that there was insufficient evidence of any impropriety in any event. Furthermore, the DEC did not find respondent guilty of failure to cooperate with the DEC, concluding that it was not clear that he had received the presenter's July 10, 1995 letter, which was not properly addressed, and also noting that respondent filed an answer when he received the formal complaint. Lastly, with regard to the alleged pattern of neglect, the DEC found that, since there was no clear and convincing evidence of gross neglect, it could not be found that respondent was guilty of a pattern of neglect.

Based on respondent's disciplinary history, the DEC was compelled to recommend a reprimand, rather than an admonition.

* * *

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. The Board agreed with each of the findings of the DEC and with the conclusion that respondent was guilty only of a lack of diligence in this matter.

The Board found believable respondent's contentions that Wortham did not retain him, meet with him in his office or call him directly. The Board also recognized that respondent took action in this matter as a favor to King when she was unable to pursue the case. The problem, however, was Wortham's perception of respondent's role in her matter, a perception that respondent, by his own actions, brought about.

At the start of the representation, Wortham's assumption that respondent and King would act as a "team" to represent her might not have been reasonable. Wortham's retainer agreement was with King's law office; respondent's name does not appear on that agreement. Subsequent events, however, even when viewed in the light most favorable to respondent, made it reasonable for Wortham to believe that respondent was also her attorney. Indeed, Wortham received letters from respondent on his letterhead; respondent accompanied Wortham to the bank on more than one occasion; respondent met with Wortham (whether he did so in his office or in King's is relevant, but not a determinative factor); respondent

prepared the inheritance tax return,⁵ and respondent presented Wortham with a check for her signature, payable to himself for attorney fees.

Setting aside Wortham's belief about who was representing her, at some point, whether respondent wanted it or not, the Hawk estate became his responsibility. Once respondent took steps in probating the estate and held himself out on the inheritance tax return as the attorney for the estate, the matter became his obligation. Whether or not respondent viewed Wortham as his client, once he knew that King was incapacitated he had some responsibility to complete the estate because, due to his own actions, Wortham considered him as her attorney. Arguably, respondent may have assumed that King would complete the matter when she was able, but Wortham and Smith (the other beneficiary) could not be left hanging indefinitely.

Fatal to respondent's argument that the Wortham matter was not his responsibility was his promise to Wortham in his December 18, 1993 letter that he would furnish an accounting to her. Respondent contended that he thought King would supply the accounting. However, after his assurance to Wortham that he would furnish her with an accounting, it became his responsibility to do so.

There is no question that respondent was guilty of lack of diligence. The Board, by a seven-member majority, voted to

⁵ Schedule D of that document lists a deduction for counsel fees in the amount of \$1,647.72. Respondent is listed as the attorney to whom the fees were owed. Exhibit R-2. Respondent stated that his name was listed in error. It is not clear that Wortham reviewed the tax return. Thus, although this "error" may not have added to her confusion, it is relevant to show that respondent did significant work on the file, confirming his representation of the estate.

reprimand respondent and to require him to practice under the supervision of a proctor - an attorney other than King - for a period of three years. Within that three-year period, respondent must complete thirty hours of ethics courses, at least ten hours of which are to be taken each year.

By way of this decision, the Board is putting respondent on notice that any further misconduct will be met with extremely harsh discipline, which could include disbarment. The public must be protected from further harm from this respondent.

One member dissented from the majority's determination. In that member's opinion, respondent should be disbarred based on his total indifference to his ethical responsibilities. See In re Cohen, 120 N.J. 304 (1990). One member did not participate.

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

Dated: 1/6/97

By: 

Lee M. Hymerling
Chair
Disciplinary Review Board