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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-364

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| IN THE MATTER OF | : |
| MERRI R. LANE, | : |
| AN ATTORNEY AT LAW | : |

Decision of the
Disciplinary Review Board

Argued: November 15, 1995

Decided: July 15, 1996

F. J. Fernandez-Vina appeared on behalf of the District IV Ethics Committee.

Henry J. Tyler appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based upon a recommendation for discipline filed by the District IV Ethics Committee (DEC). The complaint alleged that respondent violated RPC 1.1(a)(gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 1.5 (accepting an unearned fee), RPC 3.3 (false statement of material fact) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1982. During the time relevant to the within events, she practiced law in a series of office arrangements, all in Cherry Hill, Camden County. She also maintained an office in Philadelphia, Pennsylvania. Respondent has no history of discipline.

On September 26, 1986, Bernard McNulty, Jr., retained respondent to file a Chapter 7 bankruptcy petition in his behalf. Respondent did not provide Mr. McNulty with a written retainer agreement but requested a payment of $500. Mr. McNulty did not recall a discussion about costs for the proceeding, but understood that $500 was the "total amount".

Mr. McNulty's father, Bernard McNulty, Sr., who was present at the meeting, gave respondent a check for $300 on that date. The remaining $200 was to be billed to Mr. McNulty, Jr. (He never received a bill from respondent.) During their initial meeting, Mr. McNulty gave respondent some financial information, including a list of his creditors. Respondent assured him that she would file a Chapter 7 petition "right away". T5/19/95 10.

In 1987, Mr. McNulty continued to receive letters from his creditors, stating that his accounts were delinquent. In addition, Mr. McNulty's credit problems were appearing on his father's credit report. Accordingly, in mid-September 1987 Mr. McNulty met with respondent for assistance. As of that time, one year after Mr. McNulty had retained respondent, he had not received any correspondence from respondent or the court indicating that a bankruptcy petition had been filed, had not signed any documents in connection with the proceeding, had not attended a meeting of creditors and had not appeared in court. According to Mr. McNulty, respondent told him that he would not need to appear in court. Mr. McNulty believed that the bankruptcy was proceeding apace.

Mr. McNulty testified that, after his September 1987 meeting with respondent, he received no further letters from collection agencies.[1] During the meeting, at Mr. McNulty's request, respondent gave him a copy of the bankruptcy petition. She informed him that the matter was progressing normally.

In or about May 1989, more than two and one-half years after Mr. McNulty retained respondent, he applied for financing to purchase a truck. His application was denied. One year later, in May 1990, Mr. McNulty attempted to get financing to purchase a car. This application, too, was denied. Neither credit report obtained in connection with the desired purchase reflected a bankruptcy proceeding. On both occasions Mr. McNulty contacted respondent, who stated that she would take care of the matter.

Similarly, in early 1992, Mr. McNulty applied for a credit card through his union. His application was denied. In July 1992, Mr. McNulty attempted to obtain a mortgage loan. He was told by the realtor that, based on a credit report dated July 1992, he would not qualify for a mortgage. That report listed debts that Mr. McNulty believed had been discharged in the bankruptcy proceeding. Again, on both occasions, Mr. McNulty called respondent. She again indicated that she would take care of the

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[1] Respondent did not recall any discussions with Mr. McNulty about his creditors in 1987 but only about McNulty, Sr.'s problem with his credit report. The cessation of the letters, however, may indicate that her recollection must be faulty and that she must have taken some action in Mr. McNulty's behalf. For instance, one creditor began to send letters to Mr. McNulty in 1989. Respondent contacted that creditor when Mr. McNulty brought it to her attention and the letters stopped. In addition, the record contains a September 18, 1987 letter from respondent to Credit Bureau Associates about Mr. McNulty Sr., bringing the error in his credit report to their attention. Exhibit R-1.

matter. Respondent apparently took no action in Mr. McNulty's behalf.

On August 28, 1992, Mr. and Mrs. McNulty went to respondent's Philadelphia office, arriving at 9:00 A.M. They were told by respondent's staff first that she had a flat tire and then that she had an emergent root canal treatment performed that morning. When the McNultys asked for an appointment to see respondent, her secretary allegedly told them that respondent did not make appointments. After waiting three or four hours, the McNultys left respondent's office.

According to respondent, on that day she arrived at her office between 12:30 and 1:00 P.M., after the McNultys had already left, despite her earlier instruction to her staff to tell them that she would be in after 12:30 P.M.[2] Before the McNultys left, they stated that they would be back every day until they saw respondent. They did not return and respondent made no attempt to contact them. In evidence is respondent's dental bill, revealing that she did in fact have an emergent root canal procedure on August 28, 1992. Exhibit R-3.

According to Mr. McNulty, during the period of the representation, respondent assured him that she would send him copies of all letters written in his behalf. She forwarded only

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[2] Mr. McNulty stated that, when he was in respondent's Philadelphia office, he noticed her business card had a Cherry Hill office listed. When Mrs. McNulty called the telephone number on the card, the call was forwarded to respondent's Philadelphia office. Call forwarding is a violation of the bona fide office rule, R.1:21-1. Respondent was not, however, charged with or otherwise placed on notice of such as violation, and the Board makes no finding with regard to this issue.

the above mentioned September 18, 1987 letter in behalf of Mr. McNulty, Sr. Mr. McNulty never attempted to communicate with respondent in writing. He did, however, testify about a number of telephone calls he and his wife had made to respondent and about the fact that, although respondent spoke to him on occasion, a number of calls went unanswered. According to Mr. McNulty, whenever respondent did speak with him, she told him that the bankruptcy was proceeding apace.

Respondent, in turn, denied telling Mr. McNulty that the bankruptcy was proceeding. She contended that, whenever he called her, it was not to address the bankruptcy proceeding itself but, rather, a specific issue or creditor. Respondent admitted that she did not return Mrs. McNulty's calls because of her view that Mrs. McNulty was abusive on the telephone.

On an undisclosed date, Mr. McNulty attempted to obtain a copy of his bankruptcy file and was told that his name did not appear in the records of the bankruptcy computer system.

Mr. McNulty filed an ethics grievance against respondent on September 4, 1992. From September 1986, when he retained respondent, until he filed his grievance, six years later, Mr. McNulty had never attended a meeting of creditors, had never appeared in bankruptcy court and had never received discharge papers.

* * *

The bankruptcy petition respondent gave to Mr. McNulty in September 1987, Exhibit P-3, bears his name as petitioner, but was not signed by him, although his signature is required by the bankruptcy court. By way of explanation for the missing signature, respondent stated that she often used a multi-part form and that often the petitioner's signature could not be seen on the last copy. In response to Mr. McNulty's testimony that he never signed anything, respondent stated, "[w]ell, if he didn't sign anything, I don't know why he believed it would have been filed because it was very carefully explained. I very carefully would have explained the process of filing the petition". T5/19/95 161.

The petition was filed on November 6, 1986 and is stamped with file number 86-06945. In fact, the bankruptcy court records indicate that file number 86-06945 was assigned to a different petitioner, John Dannunzio, who was also represented by respondent. As noted above, there is no record of a petition filed in Mr. McNulty's behalf.

Respondent testified that, in 1986, approximately seventy percent of her practice was in the area of bankruptcy. Her usual procedure was to file three or four bankruptcy petitions at one time. The record contains three other bankruptcy petitions filed by respondent on November 6, 1986, the filing date that appears on Mr. McNulty's petition. Although she had no independent recollection of the events, respondent contended that she had filed

Mr. McNulty's petition and that, apparently, Mr. McNulty's petition had been inadvertently attached to the petition filed in behalf of John Dannunzio. Indeed, as noted above, his petition bears docket number 86-06945, the same number that appears on Mr. McNulty's petition.

Respondent testified about her procedures in bankruptcy matters. She explained that, after filing a bankruptcy petition, she would send a letter to the creditors, advising them of the bankruptcy proceeding and asking them to cease collection activities. She would also send a letter to the client with a copy of the filed petition, stating that the court would contact them about a date for a meeting of creditors. In addition, the letter directed the client to contact respondent upon receipt. Respondent did not present any such correspondence on this matter, apparently because she did not have the McNulty file.

In each of the three petitions filed by respondent on the day in question, she paid $60 of the $90 filing fee. Respondent testified that it was up to the clients to pay the additional $30 and that it was made clear to them when the balance would be due. (During the DEC hearing, it was noted by one of the two presenters that the balance in the other three petitions in question had been paid by respondent. She stated that the clients may have given the $30 directly to her.)

Respondent testified that, in or about 1989, she asked Mr. McNulty, who had come to her office, if he had paid the balance of the filing fee. Respondent believed that the case had been

dismissed, based on Mr. McNulty's failure to pay the balance of the filing fee, although she did not recall receiving a notice of dismissal.

Respondent also testified that, in 1992, she told Mr. McNulty that she was "99% certain that his bankruptcy had been dismissed," and that he was better off working the situation out with his creditors, rather than having a bankruptcy reference on his credit report. T5/19/95 142. Respondent added that the fact that the bankruptcy proceeding was not mentioned on Mr. McNulty's credit reports did not surprise her, explaining that she had seen similar references, notwithstanding the filing of a bankruptcy petition. She also was not surprised that the bankruptcy was not mentioned because she knew at the point that she saw the report that the case was no longer active.

* * *

The three bankruptcy petitions that respondent filed on the day in question were docketed in the bankruptcy court by Norma Rivera (now Sader), the intake clerk at the division of bankruptcy in 1986. Although Ms. Sader had no independent recollection of the McNulty petition, she testified at length before the DEC about the general procedures for filing a bankruptcy petition. The only explanation she had for what occurred in this matter matched respondent's: that the McNulty petition had been inadvertently attached to the Dannunzio petition and that she had stamped it,

thinking it was a copy of the Dannunzio petition. Ms. Sader explained that the fact that the McNulty petition bore a stamp of her name and not her signature evidences that it was treated, not as an original, which she would have signed, but as a copy. Ms. Sader further testified that the fact that Mr. McNulty had not signed the petition could have gone unnoticed if she thought that she was looking at a copy; signatures are required on the original only.

Mary Shashaty, an employee of the bankruptcy court, also testified as to filing procedures. She stated that a daily log maintained in 1986 by the intake clerks could not be located. She confirmed Ms. Sader's testimony regarding procedures. Mrs. Shashaty added that she could not recall any instances where the same numbers had been issued to two different petitions.

* * *

The DEC determined only that "[t]hrough gross neglect, [respondent] failed to properly file the petition or to keep Mr. McNulty aware of its progress. She additionally failed to follow up on the filing or status of the bankruptcy proceeding with the Bankruptcy Court. As a result of these failures, she failed to carry out the legal services for which she was engaged. These failures constitute gross negligence pursuant to R.P.C. 1.1".

The DEC specifically found that the McNulty petition had been inadvertently included in the petition filed in behalf of Mr.

Dannunzio and that respondent had not falsified the document she gave to Mr. McNulty. Thus, the DEC "declined to find that [respondent] engaged in deceit, fraud or intentional misrepresentation".

The DEC did not make individual findings as to the other specific violations charged.

* * *

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.

It is not possible to determine exactly what happened to the McNulty bankruptcy petition. Serious allegations were made that respondent had never filed a petition in Mr. McNulty's behalf and had fabricated the petition that she gave him. There is, however, no clear and convincing evidence of that charge. Similarly, there is no clear and convincing evidence that respondent intentionally misrepresented the status of the petition. It is possible, under the circumstances, that she truly believed it had been filed and dismissed. Thus, the Board agreed with the finding of the DEC that there was insufficient proof that respondent had acted with dishonesty or deceit. Accordingly, the Board did not find a violation of RPC 3.3 and/or RPC 8.4(c). In addition, the Board did not find a violation of RPC 1.5.

Even if respondent genuinely thought that the bankruptcy petition had been filed and dismissed, she nonetheless failed to act appropriately in this case. Granted, where a bankruptcy is proceeding, ordinarily the attorney has little contact with the client after the meeting of creditors and the file does become inactive. If the facts were as respondent believed, Mr. McNulty would have been notified of the dismissal of the petition. A red flag should have gone up at some point during Mr. McNulty's numerous contacts with her office over the six-year period to lead respondent to obtain information on the status of his case. In light of these contacts, it was respondent's responsibility to investigate or, at a minimum, to confirm her own unsubstantiated belief that the petition had been dismissed. The onus to clarify the matter was even greater because, according to respondent's testimony, she did not have Mr. McNulty's file.[3]

Respondent's testimony before the DEC best evidenced her lack of understanding of her responsibilities:

> Q. Didn't you ever perceive that it was your responsibility to reach out to the Clerk of the Bankruptcy Court to see after some period of time how come there has not been notice generated for a meeting of the creditors to the McNulty file?
>
> A. I don't know that I didn't do that. I don't have the file.

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[3] Respondent joined a law firm in 1988. For reasons unexplained in the record, she was allegedly "locked out of that firm" in August 1989 and was unable to retrieve her files. Respondent did not file a motion with the court to get her files. To the best of her knowledge, that firm still had possession of Mr. McNulty's file. In response to a subpoena from the DEC, the law firm with which respondent had been associated forwarded to the DEC all of respondent's files in their possession. Mr. McNulty's file was not among them.

Q. Well, assuming that you had done that, wouldn't you then have ascertained that there was no McNulty file on record in the Bankruptcy Court?

A. If that was the --yeah, if that's what they told me.

Q. Well, they wouldn't have told you we have a McNulty file and a petition number that is non-existent, correct?

A. Correct.

Q. So the question is did you ever follow up or make some effort to determine what is happening in the Bankruptcy Court with the McNulty petition?

A. Maybe not.

Q. Whose responsibility was that?

A. My responsibility.

Q. And that wasn't done in '87, '88, '89 or '90, for that matter, was it?

A. I don't have a lot of recollection about what happened with Mr. McNulty's file specifically, no.

Q. And if I am not mistaken, you said in 1989 when you met with Mr. McNulty, perhaps when he was looking to buy the car or in that time frame and you met with him, you were 99% sure that the petition had been dismissed?

A. Yes.

Q. Now, even with that, you still didn't pick up the phone or write to the Bankruptcy Court to try to determine for your client what had happened to his petition, did you?

A. At that point in time -- that was not [Mr. McNulty's] thrust. It wasn't I want my bankruptcy, I want my Bankruptcy. It was I want to take care of these creditors. It was let's take care of the creditors and, at that point in time, that would have been the thing to do.

Q. My question to you is didn't you feel as his attorney and somebody familiar with bankruptcy practices that it was your responsibility to make some effort to ascertain how, what, where, why and when his petition was dismissed?

A. It was pretty clear to me by 1992 -- by 1990 why his petition had been dismissed.

Q. But my question to you is did you feel it was your responsibility to make some effort or some inquiry, especially if he didn't even have a file to look at, to make a phone call to the Bankruptcy Court and ask anybody when was this dismissed and why was it dismissed and how was it dismissed?

A. No, I was never asked to do that and I never took it upon myself to do that.

Q. Did you perceive it to be your responsibility?

A. At that point in time, probably not.

Q. Why not?

A. Because I hadn't talked to [Mr. McNulty] for a couple of years. I hadn't been paid anymore [sic] money. He hadn't paid his money to the Bankruptcy Court. It was pretty clear to me if he wanted to do something we would go to something different.

Q. How do you know they didn't pay?

A. Because they told me at one point.

Q. What did you say to him at --

A. I said well, then if you haven't heard from the Court your case has probably been dismissed.

Q. Did you have a file out on your desk?

A. I didn't have the file.

Q. That's not until 1989.

A. That's right.

Q. That's three years later. You had a file in 1988; correct?

A. Perhaps I should have called.
[T5/19/95 at 165-168]

The DEC found that respondent had been guilty of gross neglect and, although no additional findings were made, the record supports

a finding of lack of diligence, a violation of RPC 1.3 and failure to communicate, a violation of RPC 1.4. This misconduct, standing alone, and in the face of respondent's heretofore unblemished record, would generally warrant the imposition of an admonition.

On the other hand, respondent's neglect in this matter was serious, particularly in light of the repeated inquiries from her client. There is no doubt that she should have picked up the telephone and called the bankruptcy court when the client first inquired about the case in 1987.

In an apparent attempt at mitigating her misconduct, respondent, through counsel, stated that Mr. McNulty is now no worse off than he would have been if the bankruptcy petition had been granted, because he has been in "a state of limbo," and "[g]enerally a bankruptcy is bad for your credit." T5/19/95 181. The Board gave this argument no weight.

The Board is of the unanimous opinion that the magnitude of respondent's inaction, her lack of understanding of her responsibilities and lack of recognition of wrongdoing warrants a reprimand. See In re DeStefano, 138 N.J. 170 (1994).

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

Dated: 7/25/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board