SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-123

IN THE MATTER OF	:
ROBERT G. MAZEAU,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 26, 1990

Decided: December 3, 1990

Thomas J. McCormick appeared on behalf of the District IIB Ethics Committee.

Anthony R. Ambrosio appeared on behalf of respondent.

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

This matter is before the Board based upon its determination to treat as a presentment a recommendation from the District IIB Ethics Committee that respondent be privately reprimanded. Respondent was admitted as a member of the New Jersey bar in 1966 and maintains a law office in Hackensack, New Jersey.

This matter came to the committee's attention by referral from the Superior Court judge who heard the underlying matter. In that matter, respondent filed a motion to allow a late notice of claim against a public entity under the Tort Claims Act (N.J.S.A. 59:8-9). The judge took issue with respondent's failure to disclose a material fact to the court in his legal briefs i.e, his prior representation of the same client. The brief stated that one of

the reasons why the client should be excused from compliance with the strict ninety-day provision on late notices was "the late date at which New Jersey counsel was brought into the matter and apprised of the possible claims against public entities." (J-3 in evidence, at 6).

In 1984, respondent's client, Kerry Boyle, then fourteen years old, sustained serious injuries while on a school-sponsored skiing trip. On January 21, 1986, respondent filed a complaint in the United States District Court for the District of New Jersey, in behalf of Kerry Boyle, an infant, by her guardian ad litem, Carol Reilly (her mother) and Carol Reilly, individually, against the Camelback Ski Corporation.[1]

About the time the original complaint against the ski area was filed, respondent discussed with Kerry's mother the possibility of suing the school board. Her mother did not want to sue the school while Kerry and her sibling were still attending it. The school district, thus, was not made part of the first lawsuit.

Kerry testified at the committee hearing that she was present during these conversations (T74). Respondent does not believe that Kerry was present during these conversations (T139) and that, even if she was present, she was a minor lacking the "maturity and judgment to understand the import of her injuries and her right to sue" (Respondent's letter brief of August 23, 1990).

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[1] According to Carol Reilly's testimony, the lawsuit against Camelback Ski Corporation settled in February 1988 for approximately $20,000.

Under N.J.S.A. 59:8-8, a person having a tort claim against a public entity may not file a lawsuit unless that person first submits a notice of claim to that entity within ninety days of the accrual of the cause of action. This ninety-day period for filing a notice of claim, however, is not absolute. Under N.J.S.A. 59:8-9, a claimant may apply to the court for permission to file a late notice of claim for up to one year. In general, a court may waive the ninety-day requirement if the claimant shows that the public entity has not been substantially prejudiced by the late filing and the claimant shows sufficient reasons for failing to file the claim within the proper time period. In this case, the accrual of the cause of action began when Kerry Boyle turned eighteen on June 17, 1987. The ninety days' statutory tolling occurred on September 17, 1987; the one-year eligibility extended the time to June 17, 1988.

On June 15, 1988, respondent filed a motion seeking permission to file a late notice of claim. Respondent hired a per diem lawyer, Mr. G., to prepare the brief that accompanied the motion. The brief, which was signed by respondent, stated that respondent had been retained by Kerry Boyle in early 1988. Mr. G. had prepared several briefs in connection with the earlier lawsuit. Although he knew of the earlier lawsuit's existence, he had no knowledge of any discussions among respondent, Kerry, and her mother, about Kerry's knowledge of her right to sue the school (T97). Mr. G. testified that he thought the earlier lawsuit was irrelevant because it was his understanding that Kerry Boyle had recently retained respondent in her status as an adult.

Respondent testified as follows at the committee hearing:

A. "I read the brief and I was aware that the brief did not say anything in it about the prior lawsuit.

Q. Did you make any judgment when you signed the brief with reference to its adequacy to accomplish the purpose for which you were submitting it?

A. I remember it was a very hasty situation. There were deadlines to be met and I remember reading it and signing it. In terms of the law and what I was focusing on, the new case and the motion, it seemed adequate. In terms of the issue that we're here about today, I didn't think about it specifically.

[T141-142.]

The judge's law clerk testified that she called respondent's office to request further documentation, before oral argument, about the time when respondent began his representation of Kerry Boyle. It was her normal procedure to request a specific certification as to when the client first came to the attorney and told the attorney of the accident. However, she did not specifically recall if she asked for a certification in this case (T34). Respondent testified he had a sixty-second phone call from the clerk, who requested a copy of the retainer, which he provided (T155).

On July 8, 1988 the motion was argued before the court. Respondent had another attorney, Mr. S., argue the matter for him. Mr. S. shared office space with respondent and had also done other work for respondent on the earlier case. At the hearing, the judge asked Mr. S. if there was a suit filed against the ski area. Mr. S replied that there was an earlier lawsuit:

The Court: Let me ask another question. Was there any claim of suit filed against the ski area?

Mr. S: Yes.

The Court: Is that pending or has that been resolved?

Mr. S: That is not pending. That has been resolved.

(defense counsel): I would just like to point out for the Court I have no knowledge whatsoever of any prior suit.

The Court: And which attorney handled that matter?

Mr. S: Mr. Mazeau.

The Court: Do you know how long ago that case was filed?

Mr. S: I could not represent that to the Court, no.

The Court: It is my impression that the plaintiff is going is [sic] have a difficult time satisfying under all circumstances that there is sufficient reason for this late filing. I will allow, however, some additional time for supplemental certification to be provided in a timely fashion[,] for defendant to be able to review it an[d] investigate it and make appropriate response, that certification must include the facts and background about the other suit, when counsel was consulted, when the suit was filed and what the outcome was, not because I am suggesting in any way that the outcome should be determinative of the late filing issue here, but it may very well be determinative to go to the background of that case in order to determine whether there is sufficient reason for this late filing, and I want all of the information presented to the Court.

[J-4 in evidence, at 8-9.]

The judge adjourned the matter for four weeks to permit respondent to file the certification. In the interim, defense counsel investigated the earlier case and requested in a letter to the judge that counsel fees and costs be imposed on respondent for the bad faith shown in his lack of candor with the court (J-5 in evidence). Respondent signed a response brief that was prepared by Mr. S. (J-6 in evidence). This brief did not provide the certification requested by the court. As stated in the brief:

> The Court sought in further certification the identity of prior litigation instituted by plaintiff before her pending notice of motion for late claim. This was not a court order; it was to be included with a further certification by plaintiff. Counsel insinuates plaintiff has failed to comply with the court's "order" in bad faith. Plaintiff, as is her right, declines to supplement her motion and understands that the Court shall decide her motion based on its previous vocal concerns. In other words, plaintiff stands mute.
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> [J-6 in evidence, at 1.]

Despite the above language in the brief that respondent signed, respondent testified he was not aware that the judge wanted further information (T153-154). Respondent made a legal distinction between his representation of Kerry with the guardian ad litem in 1986, and Kerry Boyle, as an adult, in 1988. The hearing panel was not persuaded by this legal distinction and stated in its report that, if respondent was so secure in this distinction, he should have submitted this argument with his motion papers. Furthermore, respondent argued that his representative did

disclose the prior suit in oral argument, which cured the oversight of the earlier brief, and that disclosure did occur when it became material.

The panel found that respondent had failed to disclose this fact of prior representation in his first brief and at oral argument, in violation of RPC 3.3(a)(1) and (5). The panel recommended a private reprimand.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of violation of RPC 3.3(a)(1) and (5) are supported by clear and convincing evidence. The Board does not agree, however, with the committee's recommendation that respondent should be privately reprimanded.

RPC 3.3(a)(1) states that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. In this matter, respondent represented a minor through her guardian ad litem from 1986 until June 17, 1987, when that minor became an adult. He continued to represent her as an adult until she signed settlement papers in the first lawsuit, in February 1988. Nonetheless, he provided the court with a brief indicating that this same client had retained his services for the first time in early 1988. This provision of a false statement in a brief to the

court was found by both the committee and this Board to be a knowing violation of RPC 3.3(a)(1).

Furthermore, on July 8, 1988, the judge made it clear that she wanted all of the information concerning the facts and background of the earlier lawsuit in order to determine whether there was sufficient reason to grant the late notice of claim motion. Respondent chose not to respond to the court's request. RPC 3.3(a)(5) states that a lawyer shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure (emphasis added). In his formal answer to the complaint, respondent stated that he was unaware of RPC 3.3(a)(5) and was under the impression that he could stand mute before the court. Ignorance of the law, however, is no defense to an ethical violation. Cf. Matter of Hollendonner, 102 N.J. 21 (1985); In re Eisenberg, 75 N.J. 454 (1978).

Respondent offered the defense that, at the court hearing, his representative did tell the judge about the earlier lawsuit, thus curing any error in the brief. However, although respondent's representative did admit that there had been an earlier suit, he did not do so voluntarily, but only in response to the court's questions about whether a lawsuit had been filed against the ski area. This representative was unable to answer many of the court's questions, and when the judge adjourned the hearing for four weeks so respondent could cure the lack of information so as not to be misleading, respondent declined to follow the court's directive.

Finally, respondent advised the committee that his failure to disclose the prior representation was not relevant because of the legal distinction between his representation of Kerry as a minor with a guardian ad litem and his representation of Kerry as an adult. The committee, however, found that this claim was an "afterthought" presented to it. The Board agrees with the committee's conclusion that this legal distinction was not the motivating force behind respondent's actions.

In all disciplinary matters, public confidence in the bar requires the acknowledgement of the ethical infractions. The quantum of discipline must accord with the seriousness of the misconduct in light of all circumstances. In re Nigohosian, 88 N.J. 308, 315 (1982).

The Court has previously dealt with a similar lack of candor to a tribunal. In Matter of Silber, 100 N.J. 512 (1985), an attorney was publicly reprimanded for failing to notify the court of his discovery that his law clerk, a non-lawyer, had misrepresented her status to the court when she improperly appeared on behalf of the attorney's client. Like respondent here, the attorney in that case was given several opportunities to correct the misrepresentation and did not do so.

In the recent case of Matter of Whitmore, 117 N.J. 472 (1990), a municipal prosecutor was publicly reprimanded for failing to inform the trial judge that the police officer had an improper motive for making himself unavailable to testify, even though the

prosecutor attempted to prevent the officer's departure and was not involved in the police officer's improper action. In holding that the attorney needed to provide complete disclosure, the Court stated that "[a] lawyer has an obligation of being candid and fair with the Court. As an officer of the Court, his duty can be no less." (citations omitted). Matter of Whitmore, 117 N.J., supra, at 477.

Respondent argued that the duty imposed on a municipal prosecutor is different from that imposed on a private practitioner. However, RPC 3.3 does not make a distinction between the duty owed by an attorney and the duty owed by a prosecutor.[2] As stated by the Court, the commitment to protect the public from attorneys who do not live up to their professional responsibilities is heightened in the context of the administration of criminal justice. That, however, that does not decrease the duty owed by all officers of the court. As such, respondent breached that duty when he failed to disclose the prior lawsuit.

Similarly, In Matter of Marlowe, __ N.J. __ (1990), the Court imposed a public reprimand on an attorney who authored a letter to the court, signed by his associate, falsely representing that the attorney had the consent of all counsel to the adjournment of the matter.

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[2] RPC 3.8(d) does place a special burden on a prosecutor to disclose to the defense all evidence known to the prosecutor that supports innocence or mitigates the offense. However, the Whitmore matter did not deal with such a fact pattern.

Finally, the Board found, as an aggravating factor, that respondent has received two prior private reprimands, in 1975 and in 1984.[3]

Based on the totality of respondent's conduct, as well as respondent's prior disciplinary history, the Board unanimously recommends that respondent receive a public reprimand.

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

DATED: 12/3/1990

By _____
Raymond R. Trombadore
Chair
Disciplinary Review Board

[3] The 1984 private reprimand concerned a failure to institute suit and failure to timely advise his clients of this fact, which led to their cause of action being barred by the statute of limitations. The letter concerning the 1975 reprimand is unavailable.