SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-073
District Docket No. IV-2014-0053E

IN THE MATTER OF	
ALBERT ANTHONY CIARDI, III	
AN ATTORNEY AT LAW	

Decision

Argued: May 18, 2017

Decided: September 12, 2017

William Mackin appeared on behalf of the District IV Ethics Committee.

Carl D. Poplar appeared on behalf of respondent.

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

This matter was before us on a recommendation for a reprimand, filed by the District IV Ethics Committee (DEC), based on respondent's violation of RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and RPC 8.4(d) (conduct prejudicial to the administration of justice). The violations stem from respondent's continued pursuit of a Pennsylvania lawsuit, seeking the payment of his legal fee, after he had submitted to fee

arbitration in New Jersey. We determine to dismiss the charges brought against him.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1991 and the Florida bar in 1991. At the relevant times, he maintained an office for the practice of law in Philadelphia, with a satellite office in Haddonfield. The law firm operated under the name Ciardi & Ciardi (the firm).

Respondent has no disciplinary history.

In a four-count formal ethics complaint, the DEC charged respondent with having violated

> RPC 3.4(c), by failing to send a R. 1:20A-6 pre-action notice to grievant Thomas Tomei prior to filing a civil action complaint in Pennsylvania to recover unpaid legal fees and by pursuing the lawsuit after Tomei had initiated the fee arbitration process;
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> RPC 3.3(a)(5), by failing to make "any mention of the pending fee arbitration process" in the amended complaint;
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> RPC 8.4(d), by obtaining judgments against Tomei, in Pennsylvania and New Jersey, on a claim for which Tomei "had absolutely no responsibility;" and
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> RPC 8.4(c), by obtaining a writ of execution on the New Jersey judgment, thereby "implicit[ly] assert[ing]" to the court that Tomei was liable for the debt and that respondent was entitled to collect the debt.

The DEC held a disciplinary hearing on September 13, 2016. On the day before, the parties executed a joint stipulation of facts.

The pertinent facts are set forth below, supplemented, when necessary, by the testimony received and the exhibits admitted in evidence at the hearing.

On November 10, 2006, the firm sent to Tomei's attention an engagement letter pertaining to its provision of Chapter 11 bankruptcy legal services to L&T Development, LLC (L&T) and M&T Marine Group, LLC (M&T), a Florida boat company.[1] The engagement letter was written on the firm's Philadelphia letterhead. Tomei, a New Jersey resident, signed the engagement letter as a member of both LLCs. He did not sign the letter in his individual capacity, and he did not personally agree to pay, or guarantee, the obligation.

On January 4, 2007, respondent filed M&T's chapter 11 petition in the United States Bankruptcy Court for the District of New Jersey. On March 8, 2007, the bankruptcy court entered an order converting M&T's case to a Chapter 7 proceeding.

Respondent did not file a fee application in the bankruptcy case. Instead, he sent Tomei "letters demanding payment." Tomei made no payments, as M&T had "no money."

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[1] L&T was the principal member of M&T, and both LLCs were New Jersey limited liability companies. According to Tomei, "L&T was pretty much [him]self and [his] children." Mike Drinkwine was the "M" in M&T, and Tomei was the "T."

On October 9, 2007, respondent filed a civil action complaint against Tomei in the Philadelphia County Court of Common Pleas (Pennsylvania action).[2] The first count of the complaint asserted a breach of contract claim against Tomei on the ground that he had failed to pay the legal fees incurred during the bankruptcy proceeding. The second count asserted an unjust enrichment claim, alleging that Tomei should be responsible for the unpaid legal fees because he and M&T had "appreciated the benefit of the legal services provided." The third count alleged that Tomei had falsely stated that he would pay the fees.

The parties stipulated, and respondent testified, that, prior to filing the complaint in Pennsylvania, respondent did not send Tomei a R. 1:20A-6 pre-action notice of his right to seek arbitration in New Jersey. Thus, the complaint filed in the Pennsylvania action did not allege that respondent had sent the notice to Tomei.

Douglas F. Johnson, Esq., of Earp Cohn P.C., represented Tomei in the Pennsylvania action. On December 3, 2007, Johnson filed

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[2] To be precise, the firm filed the complaint, and the named defendants were Tomei and his father Vincent, who was identified as "Trustee" (the trustee). The first two counts were against Tomei only; the third count was against both defendants; and the fourth and fifth counts were against the trustee only.

preliminary objections to the complaint.[3] Among other things, the preliminary objections asserted that there was no written or oral contract requiring Tomei to personally pay M&T's legal fees; that no benefit was conferred upon Tomei personally, which would render him personally liable for M&T's legal fees by way of unjust enrichment; that because the firm's representation of M&T was in a bankruptcy court located in New Jersey, the firm was "required . . . to comply with the rules regulating the practice of law in the State of New Jersey;" and that the complaint should be dismissed because respondent had failed to comply with New Jersey Court Rule 1:20A-6, which prohibits an attorney from filing a lawsuit to recover legal fees without first providing a pre-action notice of the right to request fee arbitration.

On January 7, 2008, respondent filed a response to Tomei's preliminary objections. Respondent admitted that the firm was required to comply with the New Jersey RPCs, but asserted that he was not bound by R. 1:20A-6 because the amount of his fee was not in dispute. Rather, the only issue was whether Tomei was responsible for payment of the fee.

On January 11, 2008, Tomei filed a motion to determine the preliminary objections. On February 4, 2008, while the motion was

[3] Johnson testified that a preliminary objection is "essentially a motion to dismiss" on a particular ground.

pending, respondent sent a R. 1:20A-6 notice to Tomei. On March 5, 2008, Tomei's lawyer submitted a request for fee arbitration, which the District IV Fee Arbitration Committee (FAC) docketed on March 31, 2008. Also on that date, the FAC secretary sent a letter to respondent, directing him to file an answer within twenty days. The letter provided respondent with information and instructions in respect of the fee arbitration process and concluded with the following statement: "If a lawsuit is pending regarding this fee, you must request that the suit be stayed pending resolution of the matter by the [FAC]."

On April 14, 2008, while Tomei's motion was pending, respondent filed with the FAC an Attorney Fee Response Form, which identified $69,980.97 as the amount of the final bill. Respondent based his entitlement to a fee from Tomei on the November 10, 2006 engagement letter, making no claim based on unjust enrichment. He did not see a stay of the Pennsylvania civil action.

On June 19, 2008, approximately two months after respondent had filed the fee arbitration response, the Court of Common Pleas sustained Tomei's preliminary objection to the breach of contract claim, in part, and to the fraud claim. The court overruled Tomei's preliminary objection to liability based on unjust enrichment, and permitted that count to stand. According to Johnson, the court "ignored" the objection based on the fee arbitration.

The June 2008 order directed respondent to file an amended complaint, within twenty days, "to assert whether the contract [that Tomei] allegedly breached was oral or written." Further, if the contract was written, respondent was to attach the writing upon which the claim was based.

Notwithstanding respondent's April 2008 submission to the fee arbitration process in New Jersey, on July 8, 2008, he filed a verified amended complaint in the Pennsylvania action, alleging that there was a written contract. The pleading made no mention of the R. 1:20A-6 pre-action notice that respondent had sent to Tomei or his submission to the jurisdiction of the FAC.

On August 1, 2008, Johnson filed an answer to the amended complaint on Tomei's behalf. The answer is not included in the record. Thus, we do not know whether Tomei raised the jurisdictional issue in that pleading.

On March 17, 2009, respondent filed a motion for summary judgment on the unjust enrichment claim. By this point, Johnson had been granted leave to withdraw as counsel for Tomei. Now pro se, Tomei did not file opposition to the motion.

On May 6, 2009, the Pennsylvania court granted summary judgment to respondent in the amount of $84,377.92. A judgment in that amount was entered against Tomei one week later.

On July 17, 2009, Tomei, through new counsel, Denise A. Kuestner, Esq. of Langsam, Stevens & Silver, filed a petition to open the Pennsylvania judgment, claiming that Tomei had not been served with the motion and, thus, lacked notice of its pendency; that he was not personally liable for any of respondent's legal fees; and that the amount sought by respondent was different from the amount that respondent had presented in his submission to the FAC. On August 19, 2009, the court denied Tomei's petition to open the judgment.

On August 31, 2009, Tomei filed a motion for reconsideration. On October 16, 2009, the parties agreed to discontinue counts one, three, and four of the amended complaint. The unjust enrichment claim remained. Accordingly, the motion for reconsideration was dismissed as moot.

On November 12, 2009, Tomei filed with the Superior Court of Pennsylvania a notice of appeal from the trial court's denial of the motion to open and the motion for reconsideration. Four days later, at respondent's request, the Superior Court of New Jersey entered the Pennsylvania judgment as a foreign judgment against Tomei, pursuant to the Uniform Enforcement of Foreign Judgments Act.

Through counsel, Tomei filed a motion to open the domesticated judgment, claiming, among other things, that the Pennsylvania

judgment should not have been entered in the first place, due to the stay created by the then-pending fee arbitration proceeding.

Respondent opposed the motion on several grounds. He asserted that, because Tomei had been properly notified of the motion for summary judgment in the Pennsylvania action but chose not to answer, the Pennsylvania judgment had been entered without opposition, rather than by default; that Tomei's appeal to the Pennsylvania Superior Court was not timely filed and, therefore, would be dismissed by that court; that the FAC lacked jurisdiction because there was no dispute as to the amount of the fees; and that the dispute concerned a breach of Tomei's promise to pay the fees incurred by his companies.

On March 8, 2010, the Superior Court of New Jersey denied Tomei's motion to set aside the entry of foreign judgment. The order is not part of the record.

On March 16, 2010, the FAC conducted a hearing. On May 3, 2010, the FAC issued an arbitration determination, finding that respondent could not recover any of the unpaid legal fees from Tomei because Tomei had not signed the original fee agreement, in his personal capacity, but, rather, in his representative capacity as a member of M&T. Accordingly, Tomei was not personally responsible for M&T's unpaid fees to respondent. The FAC suggested that respondent "look to" the March 17, 2010 unpublished Appellate

Division decision in Cole, Schotz, Meisel Forman and Leonard, P.A. v. Kleiman "for other options." Neither party appealed the FAC's determination.

Respondent denied that the FAC determined that he was not entitled to a fee from Tomei. Rather, in his view, the Cole, Schotz decision provided him with a basis to seek a remedy. Thus, as shown below, nearly two-and-a-half years later, respondent sought a writ of execution, in reliance on the FAC's reference to Cole, Schotz.

On December 18, 2012, respondent obtained a writ of execution on the November 2009 New Jersey judgment, in the amount of $97,136.61, including principal, interest, fees, and costs. More than three years after that, on February 3, 2016, he filed, in the Court of Common Pleas, a praecipe to satisfy judgment. On that same date, he filed a warrant to satisfy judgment in the Superior Court of New Jersey.

Neither respondent nor his firm had actually received satisfaction of the judgments, however, because there were "no assets" and, thus, "nothing to collect." Respondent testified that he filed the praecipe and warrant, after he had received notice of this ethics proceeding, and believed "it would be better for these judgments to be satisfied, so [he] satisfied them."

FAC secretary Daniel McCormack testified about the automatic stay imposed by R. 1:20A-3(a)(1), upon the filing of a fee

arbitration request form. According to McCormack, the FAC has no authority to stay an out-of-state case. Yet, if a New Jersey attorney willingly submits to the fee arbitration process in this State, McCormack believed that the attorney could not then "have it both ways," that is, participate in both the litigation and the fee arbitration proceeding.

Respondent offered the testimony of several character witnesses, who were either friends or professional acquaintances. The witnesses variously described respondent as a man of honesty and integrity, as well as a "tenacious" and excellent attorney. In addition, respondent offered letters from numerous others, attesting to his good character.

Respondent testified about the Military Assistance Project, which he founded in November 2011. The organization provides pro bono legal services to active duty reservists in matters of bankruptcy and pension benefits appeals. The Military Assistance Project operated in ten states, and, according to respondent, adds "a couple states every year." Respondent estimated that, as of September 2016, it had served about 1,000 clients that year alone. The organization has received multiple awards.

The DEC found that respondent violated only RPC 3.4(c) and RPC 8.4(d) and only in one respect. Specifically, when respondent "subjected himself" to binding fee arbitration in New Jersey, his

failure to stay the Pennsylvania action, as mandated by R. 1:20A-3(a)(1) and as directed by the FAC secretary, together with his "continued pursuit" of Tomei, "outside of the pending Fee Arbitration process," violated both RPCs. The DEC found that the record did not clearly and convincingly establish that respondent violated these Rules, however, when he failed to allege compliance with R. 1:20A-3(a)(1) in the complaint.

In respect of the RPC 3.3(a)(5) charge, although respondent failed to "include the pre-action notice in the Pennsylvania complaint," which left the court "unaware of the pending fee arbitration," the failure did not rise to the level of an ethics violation. In the DEC's view, the pending fee arbitration and its impact on the Pennsylvania action "appear to have been argued to the Pennsylvania tribunal."

Further, the DEC found that respondent did not violate RPC 8.4(c) and (d) when, despite the FAC's determination that Tomei was not personally liable for the payment of M&T's legal fees, respondent obtained judgments against Tomei in Pennsylvania and New Jersey and then obtained a writ of execution on the New Jersey judgment. The DEC acknowledged respondent's reliance on the Cole, Schotz case, in support of his argument that he was permitted to recover the legal fees from Tomei on a quasi-contractual basis and,

therefore, concluded that he was justified in obtaining and serving the writ of execution.

Finally, and for a similar reason, the DEC found that respondent did not violate RPC 8.4(c), by attempting to collect on a judgment that, based on the FAC's determination, Tomei was not obligated to pay. In this regard, the DEC interpreted the FAC's determination to be limited to the unenforceability of a contract for legal fees, but, in referencing Cole, Schotz, had provided respondent with a basis for pursuing a quantum meruit claim.

The DEC determined that a reprimand is the appropriate measure of discipline for respondent's violation of RPC 3.4(c) and RPC 8.4(d), citing In re DeMarco, 125 N.J. 1 (1991), and In re Nagel, 165 N.J. 565 (2000). According to the DEC, the (unidentified) aggravating factors did not outweigh the mitigating factors, which included respondent's unblemished disciplinary history, his discharge of the judgments in Pennsylvania and New Jersey, and the testimony attesting to his good character.

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Following a de novo review of the record, we cannot agree with the DEC's finding that the record contains clear and convincing evidence of unethical conduct on respondent's part.

Respondent was not prohibited from obtaining a judgment against Tomei in Pennsylvania and domesticating it in New Jersey.

Part I of the New Jersey Court Rules, including R. 1:20A-6, is "applicable to the Supreme Court, the Superior Court, the Tax Court, the surrogate's court, and the municipal courts." R. 1:1-1. By definition, then, R. 1:20A-6 requires an attorney to provide the client with a "Pre-Action Notice" prior to filing a lawsuit in New Jersey to recover a fee. An attorney is not required to provide the notice when he or she files suit in another jurisdiction. Arnold, White & Durkee v. Gotcha Covered, Inc., 314 N.J. Super. 190 (App. Div. 1998), certif. denied, 157 N.J. 543 (1998).

In Arnold, White & Durkee, supra, 314 N.J. Super. at 193, the Appellate Division considered whether New Jersey courts must honor a foreign judgment, based on fees owed by a client to its attorney for representation provided by the attorney in a New Jersey matter, despite the attorney's failure to comply with R. 1:20A-6. There, the defendants in a New Jersey federal court patent infringement suit hired a Texas law firm to represent them. Ibid. Two of the firm's attorneys were admitted to practice, pro hac vice, before the court. Ibid.

Soon after the case was settled, a fee dispute arose between the firm and its clients. Ibid. The firm sued the clients for the disputed fee in a Texas state court, without first notifying its clients of their right to arbitrate the fee dispute. Ibid.

The firm obtained a default judgment against its clients, which it then sought to domesticate in the Superior Court of New Jersey. Ibid. Although the New Jersey court acknowledged that full faith and credit was to be given a foreign money judgment, it dismissed the firm's complaint because its lawyers had agreed to be bound by the rules governing the practice of law in New Jersey. Those rules required service of a pre-action notice prior to the filing of a complaint for the collection of a fee. The court ruled that the firm's failure to provide its clients with that notice rendered the Texas judgment void. Id. at 194. The Appellate Division reversed. Id. at 202.

The Appellate Division ruled that the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, required that the Texas judgment be enforced in New Jersey, even if "the original judgment's underlying cause of action 'would not necessarily be a valid cause of action'" in this state. Id. at 194-95 (quoting City of Philadelphia v. Bauer, 97 N.J. 372, 377 (1984)). In a suit to enforce a foreign money judgment, the doctrine of merger prohibits a review of the validity of the claim underlying that judgment. Id. at 195. Rather, the judgment may be attacked only if the foreign state lacked jurisdiction, if the judgment was obtained through fraud, or if the judgment was entered contrary to due process. Ibid.

The Appellate Division reviewed a number of cases in which full faith and credit was accorded to foreign money judgments founded on claims that were contrary to the public policy of the state in which the judgment was to be enforced, and concluded:

> The procedural prerequisites of notice and opportunity to elect arbitration were in the nature of legal defenses to the [Texas] action. Once reduced to judgment, the cause of action and any defenses to it merged into the judgment. As such, plaintiff was entitled to the relief sought in its complaint: recognition and domestication of its Texas money judgment.
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> [Id. at 201.]

Under Arnold, White & Durkee, thus, respondent was entitled to seek a money judgment against Tomei in Pennsylvania, and the New Jersey court was duty-bound to enforce the judgment, despite the parallel arbitration proceeding in New Jersey. The question remains, however, whether respondent committed any ethics transgressions in following this route.

RPC 3.4(c) prohibits an attorney from knowingly disobeying an obligation under the rules of a tribunal. The complaint charged respondent with having violated RPC 3.4(c), based on his failure to provide Tomei with a R. 1:20A-6 pre-action notice prior to filing the Pennsylvania action, as well as his continued pursuit

of the Pennsylvania action after he had served Tomei with the notice and submitted to the fee arbitration process in New Jersey.[4]

The record did not establish, to a clear and convincing standard, that respondent was required to serve the mandatory pre-action notice on Tomei before suing him in Pennsylvania. Moreover, the record did not establish that, by proceeding with the Pennsylvania litigation after commencement of the fee arbitration matter, respondent knowingly disobeyed an obligation under the rules of a tribunal. In our view, although the submission of a fee dispute to arbitration automatically stays a lawsuit pending in a New Jersey court, nothing in R. 1:20A-3(a)(1) enjoins foreign courts from exercising jurisdiction over the dispute. Thus, we dismiss the RPC 3.4(c) charge.

RPC 3.3(a)(5) prohibits an attorney from failing to disclose to a tribunal a material fact, knowing that the omission is reasonably certain to mislead the tribunal. The second count of the ethics complaint charged respondent with having violated RPC 3.3(a)(5), based on his failure to disclose the pending fee arbitration proceeding in the amended complaint he had filed in the Pennsylvania action.

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[4] The DEC also found that this conduct violated RPC 8.4(d), but the complaint did not charge respondent with that violation based on this set of facts.

The DEC determined that the record lacked clear and convincing evidence that respondent had violated this Rule because the fee arbitration was brought to the Pennsylvania court's attention in other documents submitted to the court, before and after the filing of the amended complaint. Although we disagree with the basis of the DEC's determination in this respect, we agree with its conclusion that respondent did not violate RPC 3.3(a)(5) by his failure to disclose the pending fee arbitration proceeding in the amended complaint – but for other reasons. Specifically, he had no obligation to do so.

The amended complaint was filed several months after respondent had submitted to the jurisdiction of the New Jersey fee arbitration system and after the FAC had informed respondent that he was required to request a stay of any lawsuit regarding the fee. Respondent's failure to identify the pending fee arbitration in the amended complaint certainly precluded the Pennsylvania court from determining whether either the interest of justice or judicial economy or both might be advanced by a direct stay of the Pennsylvania action or by a dismissal without prejudice. Yet, "[t]he procedural prerequisites of notice and opportunity to elect arbitration were in the nature of legal defenses to the action," Arnold, White & Durkee, supra, 314 N.J. Super. at 201, which Tomei did not bring to the Pennsylvania court's attention until he filed

the petition to open the Pennsylvania judgment. The court was not moved by that argument. Neither was our Superior Court when the same argument was raised in Tomei's petition to open the domesticated judgment. Arnold, White & Durkee dictated that result.

The third and fourth counts of the formal ethics complaint are similar. The third count charged respondent with having violated RPC 8.4(c), by obtaining a writ of execution on the New Jersey judgment, an act by which he implicitly asserted that Tomei was liable for the debt. The fourth count charged respondent with having violated RPC 8.4(d), by obtaining judgments against Tomei, in Pennsylvania and in New Jersey, even though Tomei "had absolutely no responsibility" for the payment of those judgments.

RPC 8.4(c) prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. RPC 8.4(d) prohibits an attorney from engaging in conduct prejudicial to the administration of justice. Again, under Arnold, White & Durkee, these charges must be dismissed as a matter of law. Despite the DEC's allegations, respondent was permitted to obtain the judgments against Tomei in Pennsylvania and New Jersey. It follows, therefore, that he also was entitled to obtain a writ of execution.

In the DEC's view, the FAC's suggestion that respondent look to the Cole, Schotz case, which permitted an attorney to recover

legal fees on a quasi-contractual basis, justified the judgments and the writ of execution in New Jersey. In essence, Cole, Schotz, an unpublished decision, stands for the proposition that, when a law firm's services benefit both corporate and individual defendants, and the individual defendants accept the firm's services, the firm is entitled to collect fees from the individual defendants on a quantum meruit basis. Respondent obtained a judgment, in Pennsylvania, which he had domesticated in New Jersey, that was based on a claim of unjust enrichment. A fair reading of the record would support the conclusion that, in doing so, he interpreted the FAC's reference to Cole, Schotz to mean that he could now execute on the judgment because it had been obtained on that ground. That notwithstanding, in light of Arnold, White & Durkee, this issue is moot.

To conclude, we find no clear and convincing evidence in the record that respondent violated any of the RPCs with which he was charged. The retainer agreement was between Ciardi and M&T Marine Group. The Pennsylvania lawsuit, in contrast, was against Tomei individually, who had allegedly agreed to pay M&T's debt. Since Tomei did not sign the retainer agreement in his individual capacity, there arises a question whether the fee arbitration committee would have jurisdiction over a claim against him. Moreover, New Jersey's fee arbitration rules do not preclude a

lawsuit in a foreign jurisdiction – a point reinforced by the Pennsylvania court when it denied Tomei's attempt to stay the lawsuit in deference to the fee arbitration under the New Jersey Rules. Because we find no ethics violation for respondent to do what the New Jersey Rules do not prohibit and the Pennsylvania court explicitly approved, we dismiss the complaint in its entirety.

Member Gallipoli filed a dissent, voting to impose a censure. Vice-Chair Baugh and Members Rivera and Zmirich did not participate.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Albert A. Ciardi, III
Docket No. DRB 17-073

Argued: May 18, 2017

Decided: September 12, 2017

Disposition: Dismiss

Members	Dismiss	Censure	Did not participate
Frost	X		
Baugh			X
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman	X		
Rivera			X
Singer	X		
Zmirich			X
Total:	5	1	3

Ellen A. Brodsky
Chief Counsel