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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-345

IN THE MATTER OF

BARBARA K. LEWINSON

AN ATTORNEY AT LAW

Decision

Argued: October 15, 1998

Decided: April 5, 1999

Lorraine Pullen appeared on behalf of the District VIII Ethics Committee.

Evan L. Goldman 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 on a recommendation for discipline filed by the District VIII Ethics Committee ("DEC"). Respondent was admitted to the New Jersey bar in 1981 and maintains a law office in East Brunswick, Middlesex County.

At the June 11, 1998 Board meeting, the Board decided to suspend respondent for six months for misconduct in a matter, including gross neglect, failure to communicate, lack of

diligence and misrepresentations to her client and the court. The case was brought as a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"). That matter is under review by the Supreme Court. In the Matter of Barbara K. Lewinson, Docket No. DRB 98-175.[1]

On January 28, 1992 the Court imposed a public reprimand for failure to maintain adequate business records for two years and for a series of negligent misappropriations of clients funds. In re Lewinson, 126 N.J. 515 (1992).

I. The Harris Matter

The complaint alleged violations of RPC 1.1(a) (gross neglect) and (b) (pattern of neglect), RPC 3.2 (failure to expedite litigation) and RPC 8.4(a) (attempt to violate the Rules of Professional Conduct).

In or about October 1994 respondent represented Ivory Harris in a medical malpractice suit against Robert Wood Johnson Hospital and others after his wife, Camilla Harris, died while in their care in 1992.

On March 29, 1996 the trial court ordered respondent to file an expert report within thirty days. When she did not, the Harris complaint was dismissed with prejudice on June 7, 1996. There is little testimony about the medical malpractice case. However, the trial

[1] After this decision was drafted, the Supreme Court entered an order for a six-month suspension on March 23, 1999. The suspension is to be effective on April 19, 1999.

court judge's decision on respondent's motion for reconsideration of the dismissal of Harris' matter is part of the record. In denying that motion, the judge stated as follows:

> As an initial matter, there is no valid reason why the matter could not have been brought to the court's attention sooner. There were three prior motions, including two summary judgment motions, regarding the production of expert reports. Plaintiff thus has had numerous occasions to raise the issue either at oral argument or in opposition to the motion. Obviously, this would have been in her best interests to inform the court of any problems that she was encountering. Therefore, this eleventh hour representation of extenuating circumstances is questioned.
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> However, even accepting this representation as true, it's not justification for submission of the report at this late date. . . There's no explanation why it should take fifteen months for a plaintiff to produce their expert report. It's a three-page report. . . . . The plaintiff should have been aware of the possibility, should have been prepared to obtain another expert report within the time period prescribed. . . . It's uncontroverted that the plaintiff has failed to comply with two prior court orders. . . . While this result may appear harsh to the individual plaintiff, there may be other causes of action that this individual plaintiff may pursue if applicable. However, there's nothing that would warrant reconsideration of this summary judgment motion and your application is denied.

Having failed to persuade the trial judge that another bite at the apple was warranted, respondent filed a notice of appeal with the Appellate Division. A pre-argument conference was scheduled in the Appellate Division for October 18, 1996, prior to which respondent was required to file a concise statement of the issues on appeal. Respondent did not file that statement and failed to attend the October 18, 1996 conference.

In March 1997, Sheila Glackin, the attorney for the defendant hospital, filed a motion to dismiss Harris' appeal for lack of prosecution, arguing that respondent's failure to file a statement of issues or attend the pre-argument conference in October 1996 warranted dismissal.

Respondent filed opposition papers on March 7, 1997, indicating that an expert had recently been retained and that the expert report would be filed within ten days. When no report was filed by March 17, 1997, the Appellate Division dismissed Harris' appeal with prejudice. On March 21, 1997, respondent attempted to file the expert report with the Appellate Division. It was returned unfiled because of the March 17, 1997 dismissal.

Glackin testified at the DEC hearing that she received an Appellate Division notice to appear at the October 18, 1996 pre-argument conference. Accordingly, she prepared and filed a concise statement of issues and was prepared to discuss all aspects of the case at the conference. She further testified that her cover letter to the Appellate Division included the date of the pre-argument conference. Finally, Glackin testified that she sent respondent a copy of those papers.

For her part, respondent testified that she had obtained an expert report to be used in the underlying litigation. However, respondent added, the report was damaging to Harris' position. Respondent also testified that she filed the appeal as a "stop-gap" measure while she and her client decided how to proceed. Respondent denied receiving notice from the Appellate Division of the October 18, 1996 pre-argument conference. Respondent also

denied receiving Glackin's statement of issues and cover letter about the upcoming pre-argument conference. Respondent admitted, however, receiving Glackin's motion to dismiss the appeal, to which respondent objected. Instead, however, of raising a defense that she had not received notice of the pre-argument conference the obvious argument that respondent should have made if, in fact, she had not been given notice her opposition papers stated merely that dismissing the appeal would be "injust [sic] in the extreme" because her client's claim was meritorious.[2] Her papers made only a passing reference to the pre-argument conference issue:

> A pre-argument conference was held before the Honorable Robert E. Gainer [sic], J.A.D. on Friday, October 8, 1996. No settlement was reached.

In short, nowhere in respondent's papers did she make an excuse for her absence by alleging lack of notice of the conference. In fact, a reading of respondent's above statement could lead anyone to conclude that she had attended the pre-argument conference.

Following the Appellate Division's dismissal of her appeal, respondent filed a petition for certification with the Supreme Court.

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[2]Respondent asserted in her answer to the formal ethics complaint that the Harris matter and Purnell matters (discussed below) were without merit from their very outset. That assertion is in direct conflict with her testimony at the DEC hearing that both cases had merit. It stands to reason that either respondent misrepresented the strength of the Harris and Purnell claims in her answer to the complaint or she filed two frivolous lawsuits and pursued appeals in each case all the way to the New Jersey Supreme Court. The record in the case, however, does not contain sufficient evidence to establish a violation of RPC 3.1 (filing of frivolous suits). Nonetheless, the Board considered respondent's conflicting testimony in assessing her overall credibility and deemed her lack of credibility to be an aggravating factor.

Respondent testified that it was at Harris' urging that she had filed the petition. Respondent alleged that, at that juncture, she again tried unsuccessfully to obtain a "positive expert report" to substantiate Harris' claims. Finally, respondent asserted that, only after exhausting these avenues, was it clear to her that Harris' claims were without merit.

II - The Purnell Matter

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 3.2 (failure to expedite litigation), RPC 1.4(a) (failure to communicate with the client) and RPC 8.4 (a) (attempt to violate the Rules of Professional Conduct).

On or about February 25, 1995, respondent filed a medical malpractice action on behalf of Janice Purnell for injuries allegedly sustained after a surgical procedure. In June 1996 respondent's complaint was dismissed on a summary judgment motion for failure to file an expert report. In July 1996 respondent filed a notice of appeal. However, respondent failed to order a transcript of the trial court proceeding. Therefore, on October 25, 1996, the notice of appeal was dismissed for lack of prosecution.

Purnell testified that she retained respondent in or about February 1994. According to Purnell, over the next four years she tried in vain to obtain information about her case. Frustrated in her attempts to obtain information from respondent, Purnell contacted the trial court. She was told that her matter was "on reconsideration." Not knowing what that meant, Purnell went directly to respondent's office for an explanation. According to Purnell,

respondent told her that her case had been dismissed and that the dismissal was on appeal.

Unconvinced that respondent had put the case back on track, Purnell corresponded directly with the Appellate Division case manager assigned to her matter. She found out that respondent had indeed filed a notice of appeal. The appeal, however, was in jeopardy of dismissal for failure to file a transcript of the trial court hearing below. Thereafter, Purnell contacted the transcriber directly to obtain a copy of the transcript. She also corresponded with the Appellate Division to request an extension of time to file the transcript and to retain new counsel.

According to Purnell, respondent called her immediately after receiving that letter and convinced her not to retain a new attorney:

> In fact, I had a call from [respondent] after I had c.c.'d her, and she received the letter. She said, 'Janice, don't take the case from me. Janice, don't take the case from me.' And I told her, 'You know, I was going to look for another attorney.'

Based on respondent's assurances that she would now diligently handle the case, Purnell gave the transcript to respondent for filing and left the matter in respondent's care. Despite respondent's assurances to Purnell, however, the appeal was dismissed for lack of prosecution.

With respect to respondent's alleged failure to communicate with her, Purnell testified as follows:

> I tell you the truth, I don't know what happened with the case. Ms. Lewinson had not informed me.
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> One of the things was, my problem with her was that she never sent me any correspondence letting me know when there was a hearing or what hearing was coming up, what motions or anything, anything from the other attorney, anything.
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> And I had written her several letters asking her to keep me informed. The only way I knew about any court dates is because I would call Somerville. And the people up there would look it up and tell me.

For her part, respondent admitted that the case was dismissed at the trial court level for failure to submit an expert report. That report was not presented until her adversary's motion to dismiss the complaint was filed. Thereafter, respondent filed a notice of appeal, which, respondent admitted, was dismissed for failure to file a transcript of the hearing below. On this issue, respondent asserted that she thought that she had ordered the transcript. She claimed that she was surprised when Purnell told her that the transcript had not been ordered. Respondent did not produce any evidence of an attempt to obtain the transcript.

As in Harris, respondent filed a petition for certification with the Supreme Court, which was denied.

Lastly, respondent produced no evidence that she communicated with Purnell during the litigation or the appeal. Indeed, the only correspondence that Purnell received from respondent was respondent's ill-fated and untimely notice of motion to vacate the order dismissing the appeal.

* * *

In the Harris matter the DEC found that "the only evidence presented to the panel regarding any wrong doing [sic] involves a non appearance [sic] regarding a pre-argument conference. This in and of itself is an insufficient basis for concluding that there is an ethical violation." Therefore, the DEC dismissed all charges in the matter.

In the Purnell matter, the DEC found violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b), based on respondent's failure to produce an expert in the underlying matter, failure to prosecute the appeal and failure to communicate with Purnell.

* * *

Upon a de novo review of the record, the Board was satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The Board was unable to agree with the dismissal of the Harris matter. The record contains clear and convincing evidence of unethical conduct, which continued through the appeal. With regard to the alleged violation of RPC 1.1(a), the trial court judge's decision to dismiss the case with prejudice and not to reconsider the matter is telling. The judge laid the foundation for a finding of gross neglect when he stated that "there's no explanation why it should take 15 months for a plaintiff to produce their expert report. It's a three-page

report." Indeed, either on the appeal or before the DEC, respondent did not contest that aspect of the judge's findings. Clearly, her conduct in this regard amounted to gross neglect.

To make matters worse, respondent continued to neglect the case after she filed an appeal. In her defense, respondent claimed that she did not receive two critical documents: the Appellate Division's notice of the pre-argument conference and her adversary's statement of issues that included a reference to the upcoming conference. Herein lies the rub. It was respondent's testimony that she knew nothing of the pre-argument conference until her adversary filed a motion to dismiss the appeal. That motion was premised solely on respondent's failure to appear at the conference and to file a statement of issues. Inexplicably, in her opposition to the motion, respondent completely ignored Glackin's basis for the dismissal motion. Instead, respondent argued that Harris' claims were meritorious, urging the court to vacate the dismissal and to allow her to file an expert report at that late date. Respondent's failure to make the best argument available to her to defeat a dismissal of the appeal allows a logical inference that the defense of lack of notice was belatedly raised when she was confronted with disciplinary charges. At times, circumstantial evidence can add up to the conclusion that a lawyer committed an ethics infraction. In re Davis, 127 N.J. 118, 128 (1992). Thus, the record allows a conclusion that respondent knew about the pre-argument conference and that, having not attended it, she was guilty of gross neglect. RPC 1.1(a), RPC 3.2 and RPC 1.3. Although respondent was not specifically charged with a violation of RPC 1.3, the facts in the complaint gave her sufficient notice of the alleged

improper conduct and of the potential violation of that RPC. Furthermore, the record developed below contains clear and convincing evidence of a violation of RPC 1.3. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, the Board deemed the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

With regard to the alleged violation of RPC 1.4(a), Harris testified that he tried unsuccessfully on numerous occasions to obtain information about his case. Respondent did not contest that assertion. Moreover, respondent did not allege that she kept Harris informed about the developments in the case or produce any evidence whatsoever of communication with Harris over the entire representation. Thus, the Board found a violation of RPC 1.4(a).

In striking similarity to Harris, the Purnell matter was dismissed on a summary judgment motion because of respondent's failure to file an expert report, as ordered by the trial court. Purnell testified that, over the course of the representation, she was frustrated in her attempts to obtain information about the case. In a resort to self-help, Purnell contacted the trial court directly. She was told that her matter was "on reconsideration." Apparently, unbeknownst to Purnell, respondent had already filed the notice of appeal when Purnell made that inquiry. In fact, according to Purnell, when she confronted respondent with what she had found out and with her intention to retain new counsel, respondent assured her that she had rectified the problems in the case, thereby convincing Purnell not to engage new counsel.

Respondent's mishandling of the case continued on appeal. Respondent failed to order

the required transcript in a timely fashion, prompting the dismissal of the appeal. Unquestionably, respondent's failure to prosecute the Purnell matter in the trial court and her further failure to prosecute the matter on appeal constituted gross neglect, in violation of RPC 1.1(a), lack of diligence, in violation of RPC 1.3, and failure to expedite litigation, in violation of RPC 3.2.

With regard to the alleged violation of RPC 1.4(a), it is clear from Purnell's testimony that respondent failed to communicate to her even the most important events in the case. Only by contacting the trial court directly did Purnell learn for the first time that her case had been dismissed. Moreover, respondent did not notify Purnell about the notice of appeal, filed in an apparent attempt to overcome her prior negligence before the trial court. Furthermore, respondent submitted no evidence of communications with Purnell. For all of these reasons, the Board found that respondent violated RPC 1.4(a).

With regard to the allegation of a violation of RPC 1.1(b), the Board generally does not find violations of this rule where fewer than three instances of gross neglect are present. Only two instances of gross neglect are involved here. Therefore, the Board dismissed this charge.

Respondent's ethics history takes this case beyond the admonition or reprimand generally imposed for failure to prosecute appeals. See In re Stalcup, 140 N.J. 622 (1995) (where the attorney was reprimanded for failure to perfect an appeal and to so inform her client. The attorney also failed to withdraw from the representation when her services were

terminated); In re Russell, 110 N.J. 329 (1988) (where the attorney was publicly reprimanded for failure to file an appellate brief resulting in the dismissal of the matter and for improperly withdrawing from the representation. The attorney's prior ethics history was an aggravating factor, a mitigating circumstance was the length of time five years between discipline); and In re Gaffney, 133 N.J. 64 (1993) (where the attorney was publicly reprimanded for failure to file an appellate brief in a criminal matter and failure to respond to various orders of an Appellate Division judge, resulting in a finding that he was in contempt of court.) In aggravation, there is respondent's ethics history. The Board recently voted to suspend her for six months for similar misconduct in a Pennsylvania case, including misrepresentations to the court. In addition, respondent received a reprimand in 1992. Further, the Board questioned respondent's credibility by her inconsistent testimony about the merits of the Harris and Purnell matters. In light of the foregoing, the Board unanimously determined to impose a three-month suspension, to be served after the expiration of the six-month suspension imposed in the matter under Docket No. DRB 98-175. See In re Sternstein, 141 N.J. 16(1995)(where the attorney was suspended for three months for gross neglect, lack of diligence and failure to cooperate with the disciplinary authorities in four matters); In re Saginario, 142 N.J. 424(1995)(where the attorney was suspended for three months for grossly neglecting a matter by failing to file an appeal after

accepting substantial payment); and In re Brantley, 139 N.J. 465(1995)(where the attorney was suspended for three months for grossly neglecting two matters and failing to cooperate with the disciplinary authorities in a third case). The Board also required respondent, upon reinstatement, to practice under the supervision of a proctor, approved by the Office of Attorney Ethics, for a period of two years.

The Board also required respondent to reimburse the Disciplinary Oversight Committee for applicable administrative expenses.

Dated: 4/3/99

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Barbara K. Lewinson
Docket No. 98-345

Argued: October 15, 1998

Decided: April 5, 1999

Disposition: Three-Month Suspension

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali		x					
Brody		x					
Cole		x					
Lolla		x					
Maudsley		x					
Peterson		x					
Schwartz		x					
Thompson		x					
Total:		9					

By Isabel Frank 4/20/99
Robyn M. Hill
Chief Counsel