DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
NATHANIEL H. SPEIGHTS,	:	Bar Docket No. 346-98
Respondent.	:	

ORDER OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes before the Board on Professional Responsibility (the "Board") to review the Report and Recommendation of Hearing Committee Number Eleven issued on April 4, 2003 ("Hearing Committee Report").

The Office of Bar Counsel filed a Petition Instituting Formal Disciplinary Proceedings and a Specification of Charges ("Petition") which charged Nathaniel H. Speights with eight violations of the District of Columbia Rules of Professional Conduct in his representation of Eric Taylor. The Hearing Committee held three days of evidentiary hearing, and issued a twenty-eight page report which details the evidence, reflects the Hearing Committee's resolution of conflicts in testimony and its determinations as to the credibility of the witnesses.

The Hearing Committee Report concluded that Bar Counsel had not presented clear and convincing evidence showing any of the violations alleged, and it recommended dismissal of the Petition. Bar Counsel filed no exception to the Hearing Committee Report.

The Board has reviewed the record before the Hearing Committee and concurs with its findings and recommendation that this matter should be dismissed. For the reasons set forth in the Hearing Committee's Report and Recommendation, which is appended to this report and which we adopt and incorporate by reference, the Board, pursuant to D.C. Bar R. XI, § 9(c), hereby dismisses Bar Counsel's Petition.

It is so ORDERED.

BOARD ON PROFESSIONAL RESPONSIBILITY

By:
Joanne Doddy Fort, Chair

Dated: July 18, 2003

Mr. Timothy J. Bloomfield prepared this order for the Board. All members of the Board concur in this Report and Recommendation.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER ELEVEN

IN THE MATTER OF	)	
	)	
NATHANIEL H. SPEIGHTS,	)	Docket No. 346-98
	)	
Respondent.	)	

REPORT AND RECOMMENDATION
OF HEARING COMMITTEE NUMBER ELEVEN

I. PROCEDURAL HISTORY

This matter came before Hearing Committee Number Eleven (John Tanner, Esq., Chair, Dr. Patricia O. Quinn, and Robert E. O'Malley, Esq.) on a Petition Instituting Formal Disciplinary Proceedings and Specification of Charges filed by the Office of Bar Counsel against the Respondent, Nathaniel H. Speights, Esquire. Bar Counsel charged Respondent with eight (8) violations of the District of Columbia Rules of Professional Conduct in connection with Respondent's representation of Eric Taylor. Bar Exhibit ("BX") B.

The violations charged are: Rule 1.1(a), failure to provide competent representation; Rule 1.3(a), failure to represent client zealously and diligently within the bounds of law; Rule 1.3(b), intentional failure to seek the lawful objectives of a client and intentional prejudice or damage to client during the course of the professional relationship; Rule 1.3(c), failure to act with reasonable promptness in representing client; Rule 1.4(a), failure to keep client reasonably informed about status of a matter and /or comply with reasonable requests for information; Rule 1.4(b), failure to explain matter to extent reasonably necessary to permit client to make informed decision regarding

representation; Rule 1.16(d), in connection with his termination, failure to take timely steps to extent reasonably practicable to protect client's interests, such as giving reasonable notice to client, allowing time for employment of other counsel, and surrender of client's papers and property, and Rule 8.4(d), engaging in conduct seriously interfering with the administration of justice.[1]

Bar Counsel's Petition and Specification of Charges were filed on April 30, 2001. Bar Counsel's Exhibits ("BX") B. Respondent filed his Answer to the Specification of Charges on June 6, 2001. BX D. A pre-hearing conference was held on June 15, 2001, wherein Respondent, by counsel, requested time to interview Bar Counsel's witnesses and to prepare his defense, conduct discovery, and file dispositive motions. Transcript of Pre-Hearing Conference, June 15, 2001, at 25-26. Of chief concern to Respondent's counsel was his inability to interview the complainant, Mr. Eric Taylor, due to the unavailability of Mr. Taylor's most recent attorney. Id. at 23. The Hearing Committee declined to grant the requested relief in the absence of a showing that reasonable efforts had been made to obtain requested information, but noted that on a showing of the failure of reasonable efforts to obtain necessary information, the Hearing Committee would take appropriate action. Id. at 41. An evidentiary hearing was scheduled for July 23, 2001, subject to a showing of extraordinary circumstances warranting a continuance. Id.

On July 6, 2001, Respondent filed a Motion for Discovery by Deposition and by Production

[1] Bar Counsel's Proposed Findings of Fact and Conclusions of Law (at 28) and the Reply Brief of Bar Counsel (at 24-28) also include discussion of an alleged violation of Rule 1.1(b). Because the Specification of Charges, BX B, does not charge a violation of this Rule, we have not considered the charge.

and Inspection of Documents, pursuant to D.C. Bar R. XI, § 8(f), and Board Rule 3, seeking issuance of subpoenas for oral depositions of a number of witnesses and for production and inspection of documents.[2] Bar Counsel opposed the motion. The Committee found that Respondent had reasonable access to discovery pursuant to Board Rule 3.1, and that Respondent failed to demonstrate a compelling need for a deposition of witnesses under Board Rule 3.2. Order of July 17, 2001, at 3. Respondent's motion for reconsideration as to the deposition of Eric Taylor and a subpoena for telephone records from the Federal Bureau of Prisons, relating to Mr. Taylor's incarceration, also was denied. Order of July 20, 2001. The parties ultimately jointly pursued a narrowed group of prison telephone records, and determined that the Bureau of Prisons could locate no such records. Hearing Transcript of September 24, 2001 ("Tr. II"), 5-7.

On July 18, 2001, Melissa C. Lesmes, Esquire, and the law firm Arent, Fox, Kintner, Plotkin & Kahn, moved the Hearing Committee to quash a subpoena duces tecum issued by Respondent for the production of documents relating to civil litigation initiated by Respondent in 1987 on behalf of Eric Taylor, the complainant in this proceeding. The subpoena controversy was resolved when Ms. Lesmes consented to provide certain limited categories of information prior to the hearing date, and on July 20, 2001, the Hearing Committee denied as moot the motion to quash the subpoena.

[2] Respondent sought to subpoena: Eric Taylor; Elizabeth Taylor (Eric's mother); Terri Lea, Esquire, attorney for Eric Taylor in a malpractice action brought against Respondent and then dismissed; and Melissa C. Lesmes, Esquire, of Arent, Fox, who successfully moved for dismissal of the civil claims against Michael Durso which had been filed by Respondent as attorney for Mrs. Taylor, as next friend of Eric Taylor, a minor. See Complaint in Taylor v. District of Columbia, BX 21 at 124. Respondent also sought to subpoena: (a) prison telephone logs covering a period of Mr. Taylor's incarceration in 1993; (b) personal records allegedly in Eric Taylor's possession; (c) all documents provided to Bar Counsel by Eric Taylor's attorney, Ms. Lea; and (d) all investigative material, including prison telephone records, in Bar Counsel's file.

An evidentiary hearing in this proceeding commenced on July 23, 2001. Hearing Transcript of July 23, 2001 ("Tr. I"). Bar Counsel was represented by Assistant Bar Counsel Ross T. Dicker. Respondent was represented by Iverson O. Mitchell, III, Esquire. The hearing continued to conclusion on September 24, 2001. Tr. II. Bar Counsel called three witnesses: Mrs. Elizabeth Taylor, Ms. Melissa C. Lesmes, Esquire, and Mr. Eric Taylor, complainant herein. At the conclusion of Bar Counsel's case in chief, Mr. Dicker moved the admission of Bar Counsel's Exhibits 1-25. Tr. I at 220. These exhibits were admitted into evidence over Respondent's objection. Tr. I at 223.

Respondent testified on his own behalf on July 23, 2001 (Tr. I at 226-85), resuming on September 24, 2001 (Tr. II at 7-104). Respondent called no other witness. Respondent's Exhibits ("RX") T and U were moved into evidence at the initial hearing. Tr. I at 49, 145. Respondent's Exhibits A through U were admitted on the concluding day of the hearing, without objection. Tr. II at 105. Bar Counsel called Mrs. Taylor as a rebuttal witness (Tr. II at 107) and moved BX 27-35 into evidence, without objection (Tr. II at 122). Bar Counsel then rested. Tr. II at 123.

At the conclusion of this phase of the hearing, pursuant to Board Rule 11.9, the Hearing Committee met in executive session. The Hearing Committee then announced that it was unable to make a preliminary, non-binding determination at that time that a violation was established. Tr. II at 123-24. Accordingly, the Hearing Committee requested that the parties file post-hearing briefs on the merits, subject to further proceedings on sanction should the Hearing Committee deem that appropriate. Tr. II at 124.

II. FINDINGS OF FACT

After considering all of the record evidence and the briefs of Bar Counsel and Respondent,

the Hearing Committee makes the following findings of fact and conclusions of law.

1. Respondent was admitted to the practice of law before the District of Columbia Court of Appeals on June 15, 1978, and assigned Bar number 952036. BX A; Tr. I at 226. Respondent has continued in the practice of law since that time in both the public and private sectors. Tr. I at 229-30.

2. In 1986, following referral by attorney Lois Hochhauser, Respondent was retained by Mrs. Elizabeth Taylor to represent her son, Eric Taylor, on criminal charges in the District of Columbia of aggravated sexual assault. Tr. I at 230. Eric Taylor, born May 3, 1969, was then about to turn 17 years old. Tr. I at 29, 88.

3. The background of the arrest of Taylor and the subsequent legal activity that forms the setting for the instant matter is set forth most clearly and objectively in a decision of the District of Columbia Court of Appeals in Durso v. Taylor, 624 A. 2d 449 (D.C. 1993) (BX D, Attachment A, at 25-28, 35-38.) Briefly, Eric Taylor was arrested on April 14, 1986 based upon a complaint that Eric, while armed, had raped a 15-year-old Wilson High School student. The crime allegedly had been perpetrated in the Taylor home in February 1986. Eric was charged as an adult. The arrest took place at Wilson High School, and at the time of his arrest Eric Taylor had on his person a concealed weapon, a blackjack, the possession of which was a crime in the District of Columbia. Upon the arrest of Eric Taylor and following expressions of fear of Eric by the alleged victim, the then-principal of Wilson High School, Michael Durso, suspended Mr. Taylor from school. The day following the arrest, Principal Durso met with Mrs. Taylor and arranged a home-study program for Eric. Mrs. Taylor met with an assistant superintendent of schools on April 21, 1986. Both the assistant superintendent and Mr. Durso urged Mrs. Taylor that her son should be transferred to

another school, and both believed that they had obtained her concurrence; indeed, Mrs. Taylor subsequently acknowledged that she told them, "Fine, go ahead." Mrs. Taylor appears to have had mental reservations which she did not express at the time, however, as she promptly requested and obtained an administrative hearing at the earliest possible date, April 28, 1986. At the hearing she obtained an oral order that Eric Taylor be allowed to return to Wilson; the written order issued on May 5. When Eric Taylor returned to Wilson on April 29, Principal Durso refused to admit him despite the oral order of the previous day. On April 30 the Superintendent ordered Principal Durso to readmit Eric; Principal Durso admitted Eric, but at the same time Mr. Durso in essence resigned as principal of Wilson in protest: he requested reassignment to another school and a leave of absence in the interim. There were student demonstrations at Wilson on April 30, and Principal Durso stated to the press that he was concerned for the safety of the accused and the victim; Principal Durso did not, however, mention the name of Eric Taylor or any individual involved. On May 1, the Board of Education adopted an emergency rule confirming or clarifying the Superintendent's authority to transfer a student without a hearing under circumstances such as those involving Mr. Taylor. Id. at 25-28, 35-38.

4. Respondent represented Eric Taylor in the criminal matter and in the administrative hearing. Tr. I at 31. Respondent was successful in representing Mr. Taylor at the hearing and in getting the readmission order enforced, as noted above. Tr. I at 30-31. Respondent also obtained dismissal of the felony charges against Mr. Taylor by persuading the prosecutors that the charged sexual contact was consensual, and also avoided statutory rape charges against Mr. Taylor, which prosecutors also were contemplating. Tr. I at 231-32. As a result of Respondent's multiple interventions, Eric Taylor was able to graduate from high school with his class in the spring of 1987

at age 18. Tr. I at 90, 233-34. Respondent received no compensation from the Taylors for this work, but treated these cases as pro bono work because he knew Mrs. Taylor could not afford to pay. Tr. I at 234.

5. Subsequent to Eric Taylor's readmission to Wilson High School, Mrs. Taylor, on behalf of her minor son, retained Respondent to file an action against the District of Columbia and Michael Durso for violation of her son's civil rights in connection with the suspension and attempted transfer. Tr. I at 234.

6. No retainer agreement for this civil litigation was placed in evidence. Mrs. Taylor did not recall ever seeing one. Tr. I at 33. Respondent had no specific memory concerning such an agreement, and was unable to produce a copy because his records from the matter had been destroyed.[3] Tr. II at 21. Respondent testified, however, that it was his firm's practice to prepare such an agreement in each case. Tr. II at 36. Mrs. Taylor recalls that Respondent took the case on a contingent fee basis; she does not remember paying him anything. Tr. I at 32. Respondent has no specific memory regarding the terms, but does not dispute that he took the case on a contingent fee basis, and the subsequent history of the matter accords with a contingency fee arrangement; accordingly, we find that such an arrangement existed, although the exact terms and conditions are unknown. Further, any fee arrangement was with Mrs. Taylor, rather than with Eric, who was a minor at the time. No separate or subsequent agreement respecting representation was signed after Eric turned 21. Tr. I at 129.

7. On June 8, 1987, the day on which Eric Taylor graduated from Wilson High School, Respondent filed a civil complaint on behalf of the Taylors in the District of Columbia Superior

[3] There is no claim or evidence that the loss of the case file resulted from any fault on the part of Respondent, as opposed to the custodian of the file.

Court captioned Eric Taylor and Elizabeth Taylor v. District of Columbia and Michael Durso, which was assigned civil action number 87-004825. BX 21; Tr. I at 114. The caption reflects that Eric Taylor, by then 18, was a minor and that Mrs. Taylor was filing on behalf of herself, individually, and, in a representative capacity, on behalf of her son as his next friend. Id. at 123. Count I of the suit alleged that the District of Columbia and Mr. Durso as its employee and agent had violated Eric Taylor's federal constitutional and statutory rights, 42 U.S.C. §§ 1983, 1985, 1986; Count II, that Mr. Durso in his official and individual capacities had denied Eric Taylor a public education; Count III, that Mr. Durso infringed his privacy and cast him in a false light; and Count IV, that Mr. Durso slandered him as unchaste and immoral. Id.

8. It was the practice of Respondent to communicate with Eric Taylor regarding the case through Mrs. Taylor. Respondent directed copies of correspondence relating to the case to that address and called Mrs. Taylor directly, when appropriate. BX 13 at 1105; Tr. I at 192. Eric Taylor agreed with the procedure of his mother as Respondent's point of contact, and the procedure was followed with success in such matters as the return of discovery responses. Tr. I at 190, 256. While the testimony of all parties is not entirely consistent, we conclude that Mrs. Taylor was a regular and reliable point of contact concerning the case as Eric moved about as discussed below throughout the period covered by this matter.

9. When this civil suit was filed, Eric Taylor resided with his mother at 521 G St., S.W., in the District of Columbia, and continued to reside with her while in the District of Columbia, except for a period when he lived on Ontario Place, apparently in the mid-late 1990s. Tr. I at 90, 118-119. Mr. Taylor enrolled in college at Norfolk State University for the fall semester of 1987. Tr. I at 33, 90-91. Neither Mr. Taylor nor his mother notified Respondent of this move nor the move to Ontario

Place, but Respondent ultimately learned that Mr. Taylor was in college. Tr. I at 43, 115-119, Tr. II at 90.

10. Until Eric Taylor reached age 21, the age of majority, Respondent represented Mr. Taylor through his legal representative, Mrs. Taylor. Respondent's representation of Mrs. Taylor, individually, ended when the trial court dismissed her individual claim on November 10, 1987. RX A.

11. The docket sheet for Taylor v. District of Columbia reflects frequent activity, including motions to dismiss and for default, discovery, and discovery-related motions, and thus reflects vigorous efforts on the part of Respondent and other counsel in the case during the period through 1990. BX 20. Notably, defendants Durso and the District of Columbia separately moved to dismiss the complaint in August and July 1987, respectively, and Respondent filed oppositions on behalf of both clients. Id. at 112. Initially, the District's motion was denied, but by Order of November 10, 1987, the trial court granted Mr. Durso's motion in part, and dismissed Count II of the Complaint involving Eric Taylor's claim of denial of a public education; however the court refused to dismiss Counts I (against the District of Columbia), III and IV (relating to statements to the press by then-Principal Durso and the one-day exclusion from class on April 29 following the April 28 oral administrative order). RX A; BX 20 at 114. The court also dismissed all of the claims of Mrs. Taylor "in her individual capacity." RX A (emphasis in original.) Mrs. Taylor continued in her capacity as next friend of Eric Taylor, who had not yet reached the age of 21. Tr. I at 256-57, 260. Respondent advised the Taylors of this development. Tr. I at 115.

12. The District of Columbia filed its answer to the complaint in November 1987. BX 20 at 115. Defendant Durso filed an amended answer as well as a counterclaim against both Taylors,

seeking $250,000 for filing a frivolous action. BX 27. On January 4, 1988, Respondent filed an answer to Durso's counterclaim on behalf of Eric Taylor. BX 28. On February 10, 1988, Respondent filed an answer on behalf of Mrs. Taylor. BX 20 at 116. Respondent did not prepare a separate retainer agreement to cover the counterclaim, since he considered this new claim to be part of the same litigation. Tr. II at 37. Respondent filed plaintiffs' responses to defendant Durso's interrogatories and request for documents in March 1988, and vigorous activity continued in the case. BX 20 at 117.

13. On May 5, 1988, Respondent noticed the deposition of defendant Durso. BX 20 at 118. The deposition was intended as discovery with respect to Mr. Durso's January 4 counterclaim against the Taylors. Tr. II at 21-35. Mr. Durso resisted Respondent's attempts to depose him. BX 30. On August 15, 1988, Respondent filed a motion on behalf of Eric Taylor to compel discovery or for leave to take Mr. Durso's deposition. BX 29 at 224. Defendant Durso filed an opposition. BX 30. On December 6, 1988, the court granted Eric Taylor's motion, ordering Mr. Durso to submit to a deposition "on or before January 31, 1989." BX 31(a). No such deposition ever was taken or filed. BX 20.

14. On February 26, 1988, counsel for Mr. Durso noticed Eric Taylor's deposition, and, consistent with his regular practice in this matter, Respondent notified Mrs. Taylor of her son's scheduled deposition, and asked her to advise her son, and she did. Tr. I at 177. Eric Taylor was then in college at Norfolk State University, and from the dates of record, it appears that the deposition was scheduled to coincide with spring break. Tr. I at 116. Although the details of that deposition are murky (Eric Taylor's testimony is inconsistent as to whether Respondent was present, Tr. I at 177, 184-85; and there was difficulty in getting Mr. Taylor to attend the deposition, Tr. I at

246), Mr. Taylor's deposition was filed with the court on May 6, 1988. BX 20 at 118. On June 7, 1988, Mrs. Taylor's deposition was filed in court. Tr. I at 119.

15. Defendant Durso moved for summary judgment on June 29, 1988, and Respondent filed an opposition on behalf of both Taylors on July 22, 1988, and the court denied the motion on December 6, 1988. BX 20 at 119, 120. Defendant Durso sought reconsideration of the court's orders as to summary judgment and discovery, contending that he was immune from suit. BX 20 at 120. On January 18, 1989,

Respondent filed an opposition. BX 32. On March 29, 1989, the trial court denied the motion for reconsideration and directed Mr. Durso to sit for a deposition within 20 days. BX 20 at 121.

16. On April 18, 1989, within that 20-day period, defendant Durso filed a notice of appeal from the denial of his motion for summary judgment and order to submit to discovery. BX 33.

17. While the interlocutory appeal was pending, the case was set for mediation in Superior Court in late May 1989, and then for trial in February 1990. BX 20 at 121, 122; Tr. I at 235. When the Taylors did not appear at the mediation, Respondent called Mrs. Taylor and obtained full settlement authority so that the mediation could go forward. Tr. I at 239-40, 261. Neither Eric Taylor nor Mrs. Taylor recalls being advised of the mediation conference, but their testimony on this issue was hazy and unreliable (see, e.g., Tr. II at 115-116, where the question is asked in the potentially misleading context of the subsequent 1993 decision in the case) in the absence of any hint at this stage that Respondent was being less than vigorous and thorough in the litigation.

18. The case did not settle. On the February 1990 trial date, Respondent appeared without Eric Taylor, and consented to postpone the trial until after disposition of defendant Durso's

interlocutory appeal because he did not know his client's whereabouts. Tr. I at 235.

19. Mr. Taylor had arrived home in Washington in the summer of 1989, but did not disclose to his mother, who thought he was still in school, that he had at some unspecified point dropped out of college. Tr. I at 34, 43. Mr. Taylor had been indicted on April 1, 1989 in the Eastern District of Virginia on charges relating to a conspiracy to use the telephone to traffic in cocaine; he remained in the District of Columbia until he was arrested in December 1989. Tr. I at 34, 211-212. Mr. Taylor was tried on the drug charges in March 1990, convicted, and sentenced in May 1990, around the time of his 21st birthday, to a prison term of six and one-half years. Tr. I at 92-93. Mr. Taylor was incarcerated successively in Bureau of Prison facilities in Danbury, Connecticut; Allenwood, Pennsylvania; and Morgantown, West Virginia, before he was released to a half-way house in the District of Columbia in August 1993 preparatory to his release from custody in December 1993. Tr. I at 93-95. Mr. Taylor resumed college studies at Howard University on August 25, 1993, while at the half-way house, and continued his studies through the Spring of 1996, at which point he was 30 hours short of his degree. Tr. I at 92-93. He remained in the District of Columbia and worked for two years as director of promotions of a nightclub before starting his own on-line service advertising parties and events. Tr. I at 88-90.

20. Neither Eric Taylor nor his mother notified Respondent of the fact of his arrest, conviction or incarceration; indeed, Mrs. Taylor retained another attorney to defend Mr. Taylor in the drug case. Tr. I at 44-45, 122-23, 237.

21. Mr. Durso's interlocutory appeal in Taylor v. District of Columbia was argued and submitted on October 16, 1990. BX 23 at 137-53. The District of Columbia Court of Appeals decided the case on January 29, 1993, reversing in part, affirming in part, and remanding for further

proceedings. BX 3(b) at 70-88. The Court of Appeals reversed the trial court's denial of qualified immunity for the actions of Mr. Durso on the federal law claims, the denial of official immunity on the local law claims, and the discovery order relating to these claims. Id. The court denied immunity to Mr. Durso for his refusal to readmit Eric Taylor to Wilson after the hearing officer's decision and, based on the undeveloped state of the record, on his public statements. Id. The case was remanded to Superior Court for further proceedings consistent with the opinion. Id. Mr. Durso's counterclaim was not part of the appeal; it

remained pending in the trial court during the appeal, but no action ever was taken by Mr. Durso to press his counterclaim. BX 20 at 122.

22. On April 14, 1993, the case was received back in Superior Court. BX 20 at 122. The Honorable Richard S. Salzman, Associate Judge of the Superior Court, to whom the case was reassigned, recused himself in an Order filed April 27, 1993. BX 20 at 122; BX 24. On the Order of recusal, the Deputy Clerk noted that the case was reassigned to Associate Judge Mitchell (BX 24; RX G), but this reassignment never was noted on the court docket sheet, nor did it ever take place; instead, the file never was sent to Judge Mitchell or any other judge. BX 20 at 122; Tr. I at 226-27.

23. Had the court file been directed properly, and had any judge been aware of the matter and called the case for trial, Respondent was ready to proceed, if his client had so directed. Tr. I at 238, 262, 264. All that remained were severely truncated versions of the original claims, as to which Respondent was barred from seeking further discovery against Mr. Durso. BX D, Attachment A at 42. It is possible that Respondent would have been obligated to supplement discovery responses in

light of Eric Taylor's criminal conviction, although the record does not contain the details of any such discovery; but at this point Respondent was not aware of such imprisonment, and as far as Respondent then knew, the case was ready for trial.

24. At Respondent's direction, a copy of the Court of Appeals decision was sent to Mr. Taylor at his mother's address, pursuant to his regular practice, and he discussed the case with her. BX 3(b); Tr. I at 37, 235. Respondent explained that the principal claims against the defendants had been dismissed, and that defendant Durso, the sole remaining defendant, was judgment-proof. Tr. I at 237. Following Respondent's explanation, Mrs. Taylor told Respondent that she did not wish to pursue the case. Tr. I at 268. Respondent pointed out that her son had reached his majority, and must determine himself whether he wished to pursue this case: if not, he should come to the office to sign a praecipe dismissing the case; if so, Mr. Taylor would have to sign a retainer agreement, which Respondent advised should include an hourly rate of payment for continued litigation. Tr. I at 36, 92, 237, 268-69. To this point, because Eric Taylor had been incarcerated since he turned 21 and by all accounts out of direct communication with Respondent, Respondent had no prior occasion to arrange for a retainer agreement with Eric Taylor. Although Respondent sought an hourly fee, we cannot make the factual leap to a conclusion that Respondent, who had initiated his representation of the Taylors in a major criminal matter on a pro bono basis and later was dismayed that the Taylors had not retained him for Eric Taylor's second criminal case, presumably again on a pro bono basis, would (or could) have withdrawn or otherwise have deliberately failed to take the relatively minimal steps necessary to complete his obligations in the Durso matter unless he had been paid.

25. Respondent asked Mrs. Taylor to have Eric Taylor call him. She agreed to do so, and

reported to her son the gist of the conversation, including that Mr. Durso was judgment-proof. RX T; Tr. I at 36-37, 125, 269. Mrs. Taylor testified inconsistently on this point (compare Tr. I at 48 and 54, and Tr. I at 60, where Mrs. Taylor testified that Respondent had told her that the case had been tainted by Eric Taylor's incarceration, although Respondent did not know of the incarceration at the time.) We find that this contradiction resulted from a general haziness in memory, and that such a conversation did take place among their regular telephone communications while Eric was in prison.

26. The testimony is in dispute as to whether Eric Taylor then contacted Respondent to discuss the status of the case and his decision whether to continue the litigation. It is clear from the evidence that Eric Taylor was incarcerated in federal prison from May 1990 until August 1993. Tr. I at 90-94. Prisoners were not allowed to receive incoming calls, and for part of Mr. Taylor's term of imprisonment, he could only make outgoing calls on a collect or reversed charges basis. Tr. I at 124, 149. Eric did not make a collect call to Respondent. Tr. I at 255-56. At some point in Eric's confinement, the Bureau of Prisons allowed prisoners to make direct calls from a separate account so as to minimize the cost of calls to the families of prisoners, although the date that this policy was adopted was not presented to the Committee, nor are any Bureau of Prisons records extant which would document any such call to Respondent. Tr. I at 167, Tr. II at 5-7.

27. Such a call is documented in a diary kept by Eric during the time of his imprisonment. RX T. An entry for May 25, 1993, indicates that Eric Taylor talked to Respondent, who told him

that Mr. Durso was judgment-proof, and that Mr. Taylor told him to "hold on." Id.

28. Respondent denies that he heard from Eric Taylor directly after the case was remanded until five years later. Tr. I at 242; BX 7 at 96. At the time of the remand, Respondent explains, he assumed that when the case was docketed for trial, he would have Mr. Taylor come in from college and the case would go forward, if that was his client's decision. Tr. II at 101. Respondent viewed the case as ready for trial upon remand, with no need to depose Mr. Durso on the remaining claims. Tr. I at 264.

29. When Respondent did not hear from Mr. Taylor within a reasonable time, he says, he called the Taylor residence a number of times and left voice mail messages to call him. RX U reflects Eric Taylor's frustration at his mother's failure to call Respondent, and RX T (June16, 1993) reflects that Mrs. Taylor told her son that she had spoken with Respondent on an unspecified matter. Tr. I at 53-56, 150, 153-55. Respondent also alleged that he sent letters to the Taylors. BX D at 2. In the absence of the file in the matter, this cannot be firmly established or refuted. Under the circumstances, we find that Respondent did make a number of efforts to communicate with Mrs. Taylor and her son subsequent to the 1993 decision.

30. Respondent testified that he subsequently learned through Lois Hochhauser, the attorney who had referred the Taylors to Respondent, that Eric had been incarcerated. Tr. I at 239; Tr. II at 96-97, 101-102. Respondent testified that when he spoke with Mrs. Taylor concerning the matter in or around 1996, she explained that she had been too embarrassed to tell him of Eric's arrest. Tr. I at 239. Respondent testified at the September 24, 2001 hearing that he attempted to contact Mrs. Taylor during the 1995-1996 time period concerning Eric's incarceration, and was unable to speak to her but left messages on her answering machine. Tr. II at 99-101. Mrs. Taylor testified that she

had no messages from Respondent concerning the specific issues of a possible trial or a new retainer agreement, but that testimony was hazy and unreliable. Tr. II at 114-15. We find that Respondent did make efforts to communicate with Mrs. Taylor and through her, with Eric Taylor.

31. Eric Taylor's version of events during the 1993-94 period is very different. Mr. Taylor claims he called Respondent from prison, understood that Mr. Durson was judgment-proof, and told Respondent to "hold on" until he could return home in several months. RX T; Tr. I at 126.

32. Mr. Taylor testified that within six months to a year of his release from prison, he went to Respondent's office. Tr. I at 94-95, 102-03, 119, 127, 195. In his view, the meeting was "unproductive," and Mr. Taylor left because Respondent was disrespectful of him by adverting to Mr. Taylor's criminal conviction. Tr. I at 201. Specifically, according to Mr. Taylor, Respondent said, "For Christ's sake, Eric, you're a convicted felon" and that the Durso case was not something on which Eric should focus. Tr. I at 195-196. Mr. Taylor walked out and subsequently avoided Respondent. Tr. 118-19, 208. Based on the testimony of the witness, we are not convinced that this specific conversation occurred.

33. Mr. Taylor and Respondent met by chance at a neighborhood park in June 1998 and talked about Respondent's legal work in a particular matter, but Mr. Taylor did not mention the Durso case at all. Tr. I at 128, 196-97.

34. Respondent provided a number of reasons for his reluctance to press the court for a trial date at this stage. On the practical level, Respondent felt strongly that it would be unseemly and decidedly counterproductive to badger the judge, and he had never done so in his years of law practice, and indeed was unaware of an appropriate procedure for doing so. Tr. II at 81-82; Tr. I at 265. More important, Respondent also testified that it would have been inappropriate to push for

a trial since he did not have reason to believe his client wished to proceed, and absent some clear indication from his now adult client, Respondent could not push for a trial. Tr. II at 81, 101. In fact, Mr. Taylor did not wish to proceed, but instead hoped to put off litigation until he had graduated from college and established himself as more than an ex-felon, although it does not appear he ever communicated this to Respondent or made himself available to Respondent to discuss his hopes or any other matter. Tr. I at 208.

35. On March 29, 1996, John Risher, Esquire, counsel for Mr. Durso, filed a motion to dismiss Mr. Taylor's complaint for failure to prosecute. BX 25(b). The accompanying memorandum recited the lack of activity in the case and indicated that counsel for the parties had not communicated with each other since the 1993 ruling, i.e., that neither had contacted the other. BX 25(b) at 207. The failure to communicate continued as counsel for Durso failed to contact Respondent in advance of filing the motion, as required by D.C. Superior Court Rule 12(1)(a), to advise him of the filing of the motion and to ascertain his position on the motion. Tr. I at 80, 271. If Respondent had received the call required by the Rule, he would have attempted an immediate conference call with the court. Tr. I at 272.

36. The motion and memorandum were mailed, but had been misaddressed and were returned. Tr. I at 73-74. Melissa Lesmes, Esquire, the associate assigned to assist Mr. Risher on the limited matter of this motion, telephoned Respondent's office to ascertain the correct address. Tr. I at 81. She called the main number and confirmed the correct address, but did not speak to Respondent or other counsel in his office, and again failed to provide the notice required by Rule 12(1)(a). Ms. Lesmes entrusted the package to the office staff and attempted to resend it to the correct address. Tr. I at 74, 81-83. Counsel for Mr. Durso did not advise the court that the motion

to dismiss had been misaddressed to Respondent so that the deadline for response could be accurate, or correct the address for Respondent that they had supplied to the court for purposes of mailing out any order granting the motion. Tr. I at 82-83. Ms. Lesmes testified that she took steps to have the motion re-sent, but with no confirmation of Respondent's receipt of the re-sent motion requested or obtained; the Arent, Fox files contain no copy of a new, properly dated cover letter. Id.

37. On April 24, 1996, the court entered an Order dismissing the action. BX 26. The Order submitted by counsel for Mr. Durso was edited by the court to characterize the Motion as "unopposed" and to delete language of "any opposition thereto, a hearing having been held" as if Respondent's concurrence in the Motion had been obtained prior to filing or the Motion had been served consistent with the Certificate of Service and not contested. Id.

38. If Respondent had been contacted respecting the motion as required by the Rule or if he had received a copy of the motion or the subsequent Order, he would have been prepared to try the case, if that had in fact been necessary. Tr. I at 272, 276-77; Tr. II at 24-25, 69-70. Respondent was never served with a copy of the motion and never received the court's Order dismissing the action. Tr. I at 241, 271.

39. In June 1998, Eric Taylor visited the District of Columbia courthouse in the company of attorney Terri Lea, Esquire, and learned that his claim against Mr. Durso had been dismissed with prejudice in 1996 based upon Mr. Durso's "unopposed" motion to dismiss for lack of prosecution. BX 20 at 122; BX 25(b) at 197; Tr. I at 104-05.

40. Soon after Mr. Taylor's discovery, Mr. Taylor contacted Respondent and asked why his case was dismissed for lack of prosecution. Tr. I at 106. Respondent was completely surprised by

this news, never having received any such motion or order. Tr. 120, 200, 241.

41. Respondent confirmed from the docket sheet that Mr. Taylor's claim was dismissed and that Durso's counterclaim against the Taylors was still alive. Tr. I at 241, 244. Respondent then contacted Mr. Taylor and asked whether he wished Respondent to look into the dismissal. Tr. I at 243-44. Mr. Taylor rejected the offer and advised Respondent that he intended to take unspecified action against Respondent. Id.

42. Respondent next contacted Mr. Risher (now deceased), Mr. Durso's then-attorney, who confirmed the information. Tr. I at 244. Respondent complained about the manner in which Risher's office had handled the motion, and advised them that Mr. Taylor would probably want to reopen his case. Tr.

I at 244. Respondent observed that he was "technically not [Mr. Taylor's] lawyer anymore" since Eric Taylor was filing ethical charges against him. Id.

43. Under Superior Court Rules, Civil Rule 60, generally, the time for relief from judgment is one year. By the time Respondent learned of the dismissal, more than one year had elapsed. Under the circumstances of this matter, however, where the dismissal resulted from a clear Rule violation by the dismissed party, it is not at all clear that the complaint could not have been revived had Mr. Taylor so desired.

44. On August 3, 1998, Eric Taylor filed a complaint against Respondent with Bar Counsel, alleging that Respondent had neglected Taylor's civil rights case and failed to keep Taylor informed of its status. BX 1 at 43.

45. Respondent believed that the statements of Mr. Taylor and the ethical complaint against

him effectively terminated his representation of Eric Taylor. Tr. I at 244.

46. Mr. Taylor found, or by then had found, new representation. On June 25, 1999, Bar Counsel suspended action on the disciplinary complaint against Respondent during the pendency of a malpractice case filed against him earlier by Mr. Taylor. BX 15 at 107. The attorney for Mr. Taylor in that case was Terri Lea. Tr. I at 245.

47. The conduct of Mr. Taylor during the malpractice action against Respondent raises remarkable parallels to his conduct with respect to Respondent in the Durso case. Mr. Taylor testified that he had no recollection of any conversation with his attorney, Mss. Lea, concerning the action. Tr. I at 156, 159. He did not cooperate with Ms. Lea in the prosecution of the lawsuit, and failed to answer interrogatories or to appear for his deposition. RX K; RX S; Tr. I at 245-48. Mr. Taylor professed an utter lack of memory regarding important details of the case. Tr. I at 133. Mr. Taylor testified that his counsel failed to inform him of court-ordered mediation. Tr. I at 156. Mr. Taylor failed to appear at the mediation session, and subsequently, through his counsel, advised the court that he was unable to attend the March 28, 2000 mediation due to emergency surgery. RX R. In fact, Mr. Taylor had the surgery for removal of a benign tumor on an out-patient basis on February 15, was out of bed and working on his on-line business within two days, and was off medication by February 29, 2000. Tr. I at 164, 166, 203-205. Upon consideration of all of the testimony of Mr. Taylor concerning the 1999-2000 malpractice action, we find that it bears heavily on the reliability of his memory as to events that transpired long before, and undermines his credibility.

48. A Show Cause Order issued for failure to appear at the mediation. RX Q. At the show cause hearing on this Order, Respondent recalled that Mr. Taylor advised the court, through his

attorney, that he wished to voluntarily dismiss, inter alia, the malpractice suit as well as his ethical complaint against Respondent. Tr. I at 249. This recollection is corroborated by the stipulation filed by Mr. Taylor in that action, which reads in pertinent part:

> 1. Plaintiff desires to resolve and conclude this matter & any kind & every claim, demand, right or cause of action, of whatever kind or nature, judicial and nonjudicial, administrative, and/or disciplinary on account of or in any way growing out of this matter.

Attachment ("Exhibit D") to Respondent's Motion for Discovery by Deposition and By Production and Inspection of Documents, filed July 6, 2001; BX 35, p. 4; Tr. I at 136, 183.

49. As described in paragraph 6, supra, Respondent's file in Taylor v. District of Columbia had been destroyed. There is no evidence that Respondent failed to provide any extant papers to Ms. Lea or otherwise failed to communicate or cooperate with Mr. Taylor's new attorney in any way; indeed, the evidence is to the contrary. Tr. I at 251-53. There is no indication that Mr. Taylor, through Ms. Lea or any other attorney, attempted to revive the remainder of the case against Mr. Durso, although there is no evidence of any insurmountable obstacle to the revival of the case in light of the circumstances of its dismissal.

50. At the outset of the representation, Respondent saw his role in the Taylor v. District of Columbia litigation as attorney for Eric Taylor through Eric's guardian and next friend, Elizabeth Taylor. That representation never changed, in Respondent's view, because Eric never requested direct representation upon reaching age 21. BX 10 at 100; BX 12 at 103. Mrs. Taylor was dismissed as a plaintiff in her individual capacity only and retained her representational capacity and

as cross-defendant.

51. As the Taylor v. District of Columbia case was still pending at the time of the hearing, and Respondent does not assert that he filed a motion to withdraw, it appears that Respondent remained counsel of record up to and through this proceeding.

52. The counterclaim of Mr. Durso, which was not included in the 1990 appeal, has remained pending in Superior Court since 1990 to the present day. BX 20 at 122. The docket reflects that during that entire period, no action has been taken to advance the claim. Id. It is not credible that counsel regularly checked the docket in the case and regularly reported to their client without taking any action in the matter during the past 13 years.

III. DISCUSSION

First, there is no claim that Respondent failed in any way in his representation of the Taylors prior to the 1993 Court of Appeals decision. He clearly was vigorous, active, and successful in many particulars: Eric avoided a serious felony charge as well as lesser criminal charges, and was back in school promptly under circumstances that allowed him to graduate with his class and gain admission to college. There is no claim or indication that Respondent's lack of success in overcoming the defense of sovereign immunity resulted from any lack of competence or zeal.

Instead, Bar Counsel's charges are based solely on the undisputed fact that Respondent took no affirmative or effective action on the scant remnants of the Taylor case during the five years following the January 29, 1993 decision of the Court of Appeals dismissing the Taylors' principal claims in that case. That fact is troubling, even alarming, standing alone, or in the context of facts

such as proposed by Bar Counsel and those in the cases on which Bar Counsel relies. That fact does not stand alone, however. The first salient fact is the decision of the Court of Appeals itself and the actual posture of the case. What remained following the January 29, 1993 decision was a claim that Eric Taylor's rights were violated under local law only by his exclusion from school by Durso on the single day of April 29, 1986; and by the public statements made by Durso with respect to the arrest. The discussion of those issues by the Court of Appeals was decidedly unfavorable to Eric's cause.[4] In dismissing the federal law claims, therefore, the Court appears to have left scant hope for success in pursuing any claim under local law.[5] The posture of the case was weakened by other objective developments with respect to Mr. Taylor that would bear on his case. He had dropped out of college but remained in Norfolk without telling his mother. He had entered the illegal trade in drugs, and he had been convicted of a felony and sentenced to federal prison. There also remained extant Mr. Durso's counterclaim against Eric and his mother alleging that the lawsuit was frivolous, so that in theory if not in fact, pursuit of the action by respondent cannot be said to have been completely risk-free. Durso was judgment-proof. There was no prospect of any monetary benefit for his client from pursuit of the case. Respondent had prepared the case for trial and was prepared to try the case once the Court set a date. We have found that Respondent advised Mrs. Taylor of the status of the case, that she understood its gist, that Respondent likely attempted to contact Eric

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[4] "The one day that Durso excluded [Eric Taylor] from school is not so substantial as to raise a due process claim . . . . It was surely reasonable for Durso to conclude that Taylor's presence at Wilson...posed the threat of disrupting the academic environment, particularly in light of the reactions and demonstrations by students and the reaction of the complaining witness which were reported to the principal . . . . It was also reasonable for [Durso] to believe that the hearing officer lacked the authority to overrule Durso's non-disciplinary decision that Taylor should be placed in home-study." BX D, Attachment A at 36-39.

[5] In terms of local law itself, the Board of Education essentially ratified Durso's conduct in a May 1, 1986 meeting, and in 1991 enhanced automatic penalties for students found to carry dangerous weapons, such as the blackjack found on Eric at the time of his arrest at Wilson High School. BX D, Attachment A at 27-28, 35 n. 8.

Taylor multiple times through the best available channel, and that he had no reason to believe that Mr. Taylor did not fully concur in the completely reasonable assessment of Respondent and Mrs. Taylor that the case should not be pursued.

Under the circumstances, the inaction by Respondent, which Bar Counsel charges violates Rule 1.3(c), was objectively reasonable. There was no clear reason to move forward with the case, no likely benefit for his client, and no indication that his client wanted to go forward. Respondent was in substantially the same position as Arent, Fox as counsel for Durso with respect to their counterclaim against the Taylors, which they now have let sit dormant for over a decade: further activity would only lead to time ill-spent, frustration, and possibly a revival of the notoriety that surrounded the original case. Such a revival of publicity had the potential of being particularly unwelcome to Eric Taylor in light of his subsequent troubles and efforts to lead a better life. Fortunately, Mr. Taylor appeared to be largely successful in his efforts to lead a better life. Tr. at 207-08. While it would have been tidy for both sides to tie up the loose ends, the fact that neither did does not form a basis for an ethical violation, especially where only one "offending" party in a given matter is charged.

Rule 1.1(a)

Bar Counsel urges that Respondent violated Rule 1.1(a) in that he failed to provide the "thoroughness and preparation necessary for the [competent] representation of his client" through his failure to consult the court docket sheet or to contact the court. On the facts of this matter, Respondent had no basis to press the court in the absence of direction from his client, who never gave any indication that he wanted the case tried, and who had proved unreliable in appearing for scheduled court-related events. We trust that in light of the prosecution of this matter and

demonstration of the results that can flow from failure of opposing counsel to follow court rules, Respondent will be more diligent in consulting the court docket; however, the absence of action by Respondent in the face of comparable inaction by opposing counsel in the very same matter establishes conclusively that the conduct did not violate the Rule as enforced in the District of Columbia.

Rules 1.3(a), 1.3(b) and 1.3(c)

Bar Counsel urges that Respondent failed to prosecute the action by failing to explain the import of the January 1993 Court of Appeals decision to Mrs. Taylor. Respondent did explain the import of the January 1993 decision to Mrs. Taylor. Bar Counsel urges that Respondent violated Rule 1.3 by failing to take steps to have the case set for trial. In fact, Respondent lacked instructions to take the case to trial, his client did not want the case tried during the period in question, and, as discussed supra, the circumstances include good and sound reasons why a trial would have been unwise.

Bar Counsel contends that Respondent should have taken discovery from Mr. Durso. Respondent was barred from taking further discovery from Mr. Durso on the substantive matters of his claim, and had a reasonable legal basis for using the failure of Mr. Durso to comply with discovery as a bar to the counterclaim. Bar Counsel contends that Respondent failed to communicate with the Taylors. We have found, however, that he did communicate adequately with Mrs. Taylor, who in turn dependably communicated the information to her son, and that Respondent made reasonable efforts to speak to Mr. Taylor, who by his own testimony avoided Respondent, as he seems to have avoided his subsequent attorney, Ms. Lea.

Rules 1.4(a) and 1.4(b)

Bar Counsel urges that Respondent violated Rule 1.4(a) by failing to keep his clients reasonably informed, and Rule 1.4(b) by failing to explain the status of the case well enough to allow the Taylors to make informed decisions regarding the representation. We have found that Respondent did keep his clients fully informed as to the substance of the case so that he could make informed decisions, despite the unavailability of Mr. Taylor, and he made himself available to them at all times.

Rule 1.16(d)

Bar Counsel urges that Respondent violated this Rule by his failure to turn over the files in Mr. Taylor's case against Mr. Durso to Mr. Taylor or an attorney for Mr. Taylor. It is uncontroverted, however, that the file in question had been destroyed, and Bar Counsel has failed to identify any extant

papers that could have been turned over but were not. Mr. Taylor found new counsel promptly, and Respondent clearly cooperated fully with such counsel.

Rule 8.4(d)

Bar Counsel urges that by failing to file an application pursuant to Civil Rule 101(c) to withdraw as counsel for the Taylors in the suit against Durso, Respondent engaged in conduct that seriously interfered with the administration of justice and "undermined the court's ability to maintain an orderly system of justice and to conduct its business."

A violation of the Rule "must taint the process in more than a minimal way." In re Hopkins, 667 A. 2d 55, 61 (D.C. 1966). That is not the case here. Unlike the active litigation cited by Bar Counsel in In re Lewis, 689 A. 2d 561 (D.C. 1997), the case here was left dormant by both parties

for years. The case had been misfiled or lost by the court itself. There is no reason to believe that Respondent would not have acted appropriately if any document had been filed in the case in conformity with local rules. Among the various (and, we believe, forgivable) mis-steps committed by various counsel in connection with these matters, this is among the smallest and least significant, and clearly de minimis. The failure of Bar Counsel to charge more egregious conduct in the same matter establishes that the conduct of Respondent did not violate the Rule as enforced in the District of Columbia.

IV. CONCLUSION

In summary, this is a close and difficult case, with many ambiguities in the testimony and evidence; however, on balance we find that there has not been shown by clear and convincing evidence any violation

by Respondent of any District of Columbia Rule of Professional Conduct. We therefore recommend that the Board dismiss Bar Counsel's Petition and Specification of Charges.

Respectfully submitted,

_____
John K. Tanner, Esquire
Chair

_____
Dr. Patricia O. Quinn

Robert E. O'Malley, Esquire

Dated: April 4, 2003