



**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY**

In the Matter of	:	
	:	
BARRY J. NACE, ESQUIRE	:	Disciplinary Docket No. 2015-D123
	:	
Respondent	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals	:	
Bar No. 130724	:	
Date of Admission: June 22, 1972	:	
	:	

**RESPONDENT’S ANSWER TO SPECIFICATION
OF CHARGES, AND AFFIRMATIVE DEFENSES**

1. Whether or not jurisdiction exists is a legal conclusion to which no response is required. To the extent a response is required, the allegation concerning jurisdiction is denied. Respondent admits the allegation concerning his bar membership.

2. Respondent admits the allegations in Paragraph 2. Respondent notes that his Pennsylvania license is voluntarily inactive.

3. It is Respondent’s understanding that the first sentence of Paragraph 3 is accurate and he therefore admits this allegation, though he does not have personal knowledge concerning it. Respondent denies that his firm was retained five months after Ms. Gilbert’s injury. Respondent admits that he was retained by Ms. Gilbert’s parents to bring a medical malpractice action against Ms. Gilbert’s medical providers associated with Ms. Gilbert’s treatment. Respondent admits the allegations in the last sentence of Paragraph 3 – *i.e.*, Respondent was, at the time, the firm’s sole owner and one of two lawyers employed there.

4. Respondent admits that he was not licensed to practice law in Virginia, but that Gabriel Assaad, an associate and employee of the firm, was licensed in Virginia.

5. Respondent admits that he intended to handle the significant depositions in the case. The phrase “other substantive aspects” is vague, and hence Respondent cannot admit or deny it. To the extent a response is required, it is denied. Respondent notes that he planned to seek admission, *pro hac vice*, to appear in the Gilbert case.

6. Respondent admits that on July 24, 2006, Mr. Assaad filed a complaint in Virginia state court on Sarah Gilbert’s behalf. Whether the statute of limitations was about to expire, and whether the complaint was in fact improperly captioned, are legal conclusions to which no response is required. To the extent responses are required, they are denied.

7. Respondent admits that Mr. Assaad took the action alleged in Paragraph 7.

8. Respondent lacks sufficient knowledge to admit or deny the allegations in Paragraph 8. To the extent a response is required, these allegations are denied.

9. Respondent does not specifically recall if he received or reviewed “a second letter addressed to another party’s counsel (although Respondent’s name was misspelled ‘Nance’) alerting him that the defendants had filed a motion to dismiss.” To the extent a response is required, this allegation is denied, though discovery may well disclose that this letter was sent to Respondent.

10. Respondent does not specifically recall if Mr. Assaad consulted with Respondent on October 25, 2006. To the extent a response is required, these allegations are denied. It is Respondent’s understanding that a complaint with a revised caption was filed which added Ms. Gilbert’s parents as parties suing in their individual capacities.

Whether this new complaint was “properly captioned” is a legal conclusion to which no response is required.

11. Respondent lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 11. To the extent a response is required, the allegations are denied.

12. Respondent lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 12. To the extent a response is required, the allegations are denied.

However, it is Respondent’s understanding that Dr. Atkins’s deposition was cancelled.

13. The allegations in Paragraph 13 are consistent with Respondent’s current understanding of the Court’s action on February 26, 2007, though Respondent does not admit seeing or being aware of the order that day. Respondent avers his understanding that the dismissal referenced in Paragraph 13 was without prejudice.

14. Respondent admits that Mr. Assaad attended the referenced hearing on June 18, 2007. Respondent lacks sufficient knowledge of what the judge stated in court that day to admit or deny the second and third sentences of this paragraph. To the extent a response is required, they are denied. It is Respondent’s understanding that Ms. Gilbert’s claims in the October 25, 2006 complaint were dismissed with prejudice and that her parents’ economic damages claims survived the dismissal.

15. Respondent believes that the allegations in Paragraph 15 are correct, but avers his understanding that the first complaint was dismissed without prejudice. The second complaint was dismissed with prejudice.

16. Respondent denies the allegations in Paragraph 16 to the extent these allegations suggest that Respondent was involved in appealing the decision “[f]or the next two years.”

Respondent avers that he was not directly involved in the initial appeal that was filed, but was involved in the appeal that was filed in September of 2008.

17. Respondent denies this allegation to the extent that it suggests that Respondent switched insurance carriers because of any wrongdoing on his part. Respondent sought a new insurance policy, according to his recollection, because Philadelphia Insurance was discontinuing its professional liability insurance product line. Respondent admits the remaining allegations in Paragraph 17.

18. Respondent denies this allegation to the extent it implies that Respondent intentionally misled Chicago Insurance when he stated “no” in response to the referenced question. Respondent further avers that he was hospitalized for two weeks in March, 2007, having recently undergone a series of operations on his foot. Two weeks after returning home, he returned to the hospital for another operation, and two weeks after that, he had yet another surgery. He then had a central catheter line peripherally inserted for an additional ten weeks and used a wheelchair during this time. He was mainly on bed rest, and largely was out of the office on sick leave during the referenced time period. Further, the Order of August 3, 2007, referenced in Paragraph 15, had not yet been issued, and the original order of dismissal was without prejudice. Respondent admits that he answered “no” in response to the referenced question on the insurance form. The remainder of the allegations in this paragraph are denied.

19. Respondent admits the allegations in Paragraph 19, except to the extent that they state a legal conclusion, to which no response is required.

20. This paragraph states legal conclusions to which no response is required. To the extent a response is required, these legal conclusions are denied. Further,

Respondent denies these allegations to the extent they imply that Respondent intentionally omitted mention of the Gilbert case in order to avoid triggering the “known risk” exclusion, or otherwise with the intent to deceive.

21. Respondent denies this allegation to the extent that it implies that Respondent made any intentional misrepresentation to Chicago Insurance when he filed his renewal application. He admits that he submitted the referenced renewal application, and that this application does not reference the Gilbert case.

22. Respondent admits the allegations in Paragraph 22.

23. Respondent admits that he applied to renew his professional liability insurance on May 20, 2009, and that in connection with this application, he informed his insurance company concerning the Gilbert case. He does not presently recall informing the insurer of the Gilbert case on a prior occasion.

24. Respondent admits that he received an email from Chicago Insurance on July 22, 2009 requesting more information on the Gilberts’ case. The next day, on July 23, 2009, he faxed information to Chicago Insurance in response to its request. Respondent did state in this fax that he became aware of the alleged error in 2008, and that the alleged captioning error had occurred in 2008. The remainder of this paragraph is denied. In particular, Respondent denies any allegation or implication that his statements referenced in this paragraph were knowingly or intentionally false.

25. Respondent admits the allegations in Paragraph 25.

26. Respondent admits that he filled out a supplemental claim/incident form on July 5, 2010, seeking to obtain liability insurance for his firm. Respondent denies that his statements that the error occurred in 2008 or that he became aware of the matter in 2008, were false.

Further, Respondent denies any allegation or implication that his statement that the alleged captioning error had occurred in 2008 was knowingly or intentionally false.

Respondent further denies any implication that his statement that he reported the error to Chicago Insurance in 2008, rather than 2009, was knowingly or intentionally false.

27. Respondent admits that he submitted an insurance application to Lloyd's Insurance in July, 2011. He admits that he stated on this application that the error in the Gilbert case had occurred on July 24, 2006. He further admits that, in response to "Date Reported to Insurance Company," he wrote "2/25/10." However, he denies any allegation or implication of any intentional or knowing falsehood.

28. Respondent is without sufficient knowledge to admit or deny allegations about when Chicago Insurance discovered any facts, including those asserted in this paragraph. To the extent a response to these allegations is required, Respondent denies them. Further, Respondent denies any allegation or implication of intentional delay on his part in notifying Chicago Insurance concerning the Gilbert case. Respondent admits to the last sentence of Paragraph 28.

29. Respondent does not specifically recall replying to Chicago Insurance with the quoted statement, but admits that the language quoted in the first sentence of Paragraph 29 may be what he stated to Chicago Insurance. With respect to what Respondent "did not deny," the document will speak for itself. To the extent a further response to this paragraph is required, it is denied, as is any implication that Respondent intentionally withheld information from the insurer with the intent to deceive.

30. Respondent admits the allegations in Paragraph 30.

31. Respondent admits the allegations in Paragraph 31.

32. To the extent this Paragraph asks Respondent about the language in a particular document provided to him by Disciplinary Counsel, the document speaks for itself. Respondent does not know precisely what inquiry from Disciplinary Counsel is referenced in this paragraph, and hence denies these allegations.

32A. Respondent admits that he submitted to Disciplinary Counsel copies of correspondence with Chicago Insurance dated May 20, 2009, July 23, 2009 and July 5, 2010. He further admits that he submitted correspondence to Disciplinary Counsel on April 24, 2017. Each of these items of correspondence may well have referenced the year “2008,” but Respondent denies any intentional falsehood in doing so.

32B. Respondent may well have submitted correspondence to Chicago Insurance on the asserted dates, and that correspondence may have referenced the year “2009,” but Respondent denies any intentional falsehood in doing so.

32C. The assertion is admitted, but any intentional falsehood is denied.

32D. The assertion is admitted, but any intentional falsehood is denied.

33. Respondent does not specifically recall whether the assertions specified in this paragraph were made, and thus is without sufficient information to admit or deny that they were made. The record in this regard will speak for itself. To the extent a response is required, Respondent denies them. To the extent this paragraph alleges or implies intentional falsehood on his part, that is denied.

34. Respondent does not specifically recall whether the assertions specified in this paragraph were made, and thus is without sufficient information to admit or deny that they were made. The record in this regard will speak for itself. To the extent a response is required,

Respondent denies them. To the extent this paragraph alleges or implies intentional falsehood on his part, that is denied.

35. This paragraph is denied.

AFFIRMATIVE DEFENSES

For his affirmative defenses, Respondent states as follows:

FIRST AFFIRMATIVE DEFENSE

The claims are barred by laches, and by delay so substantial as to deny Respondent his due process rights.

SECOND AFFIRMATIVE DEFENSE

The claims are barred by waiver.

THIRD AFFIRMATIVE DEFENSE

The specification of charges fails to state a violation of Rule 8.4.

FOURTH AFFIRMATIVE DEFENSE

Respondent relied in part on advice of counsel.

Date: May 26, 2020

Respectfully submitted,

/s/ Barry Coburn

Barry Coburn, Esq.

D.C. Bar No. 358020

Coburn & Greenbaum, PLLC

1710 Rhode Island Ave., NW

Second Floor

Washington, D.C. 20036

Phone: (202) 643-9472

Fax: (866) 561-9712

Email: barry@coburngreenbaum.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true copy of this submission upon the following counsel via email, this 26th day of May, 2020:

Office of Disciplinary Counsel
515 Fifth Street, NW
Building A, Room 117
Washington, D.C. 20001

Attn: Traci Tait, Esq.
taitt@dcodc.org

Attn: Andrea de la Torre
delatorrea@dcodc.org

/s/ Barry Coburn
Barry Coburn