SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-433

IN THE MATTER OF	
MICHAEL L. RUBERTON,	
AN ATTORNEY AT LAW	

Decision of the
Disciplinary Review Board

Argued: February 1, 1995

Decided: May 11, 1995

Daniel A. Zehner appeared on behalf of the District I Ethics Committee.

Burt Hill, III 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 I Ethics Committee (DEC). The first three counts of the complaint charged respondent with misconduct in connection with a business transaction with a client. Specifically, respondent was charged with a violation of RPC 1.8(a) (failure to disclose the terms of a business transaction with a client, failure to reduce the terms to writing and failure to advise the client to seek independent counsel), RPC 3.3(a)(1) and (5) (false statement to a tribunal and failure to disclose a material fact to a tribunal) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The fourth and fifth counts of the complaint, charged respondent with misconduct

arising out of a separate personal injury representation. Respondent was charged with violation of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 8.4(c). The charges in the personal injury matter were amended at the hearing panel's request to include a charge of a violation of RPC 1.8(h) (entering into a prospective agreement with a client to limit the attorney's malpractice liability, without advising the client to obtain independent representation).

Respondent was admitted to the New Jersey bar in 1988 and has been in private practice in Hammonton, Atlantic County. He was privately reprimanded on November 5, 1992 for entering into a business transaction with a client without advising the client to obtain independent counsel and for displaying a lack of diligence and gross neglect in that client's representation.

The Lucca Matter

Peter Lucca, a long term friend of respondent, was active in several business ventures, including a hair salon, a car dealership and real estate. Shortly after respondent passed the bar exam in 1988, he began to do legal work for Mr. Lucca in connection with a number of transactions. During the course of their relationship and also before respondent became an attorney, the two entered into a number of informal business transactions.

At some time prior to October 9, 1991, respondent's car, a 1987 Porsche 911S worth approximately $22,000, was repossessed by Chase Manhattan Bank ("The Bank"). At that point, respondent owed

approximately $16,000 on the car. Respondent asked Mr. Lucca, who was then a client, for a $3,800 loan to pay down the balance owed on the car and to recover it from the bank. Mr. Lucca agreed. On November 15, 1991, Mr. Lucca delivered $3,800 to respondent. In addition, Mr. Lucca became a co-guarantor of respondent's financial obligation to the bank. Mr. Lucca testified that no written record of the transaction was made at that time, that his written consent to the transaction was not obtained and that respondent failed to advise him of his right to consult with independent counsel. Respondent testified, however, that, at some time between October 15 and 30, 1991, he verbally advised Mr. Lucca of his right to seek independent counsel (5T 711).[1]

It was Mr. Lucca's understanding that the car was to be sold without delay at an auction and that he would be immediately repaid from the proceeds of the sale. The car, however, was vandalized while it was still in the bank's possession, as a result of which its return to respondent was delayed until December 1991.

Despite several requests by Mr. Lucca, respondent never signed a promissory note in connection with the loan. Respondent testified that he did not prepare a note in part because he was unaware of the total fees owed to him by Mr. Lucca and, therefore, was unaware of the amount he would be paying back to Mr. Lucca. See discussion, infra.

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[1] 1T refers to the transcript of the hearing before the DEC on May 2, 1994. 2T refers to the hearing on May 13, 1994. 3T refers to the hearing on August 5, 1994. 4T refers to the hearing on September 2, 1994. 5T refers to the hearing on September 30, 1994. Please note that the pages of the transcript were numbered continuously. For example, 2T begins on page 212.

An October 30, 1991 letter from respondent to Mr. Lucca (PL-16 in evidence, Exhibit A) purports to set forth the terms of the transaction, although it does not state the specific amount of the debt. Respondent contended that the letter was delivered to Mr. Lucca on or about October 30, 1991. He intended the letter to comply with the requirements of RPC 1.8(a). The letter states in part:

> Since I am your attorney and friend, If [sic] you have any trepidation whatsoever about this arrangement, then please contact another attorney of your choosing to review this matter. If you need a more formal written arrangement or note. [sic] If so than [sic] please arrange for same as I would be more than happy to draw any document another attorney would so desire to have replace this letter. Since I am more accustomed to drawing more complicated loan documents, I would not be comfortable trying to combine this arrangement into a simple note. In fact, I have yet to draw a simple note for any clients. Whatever may be your choice, please contact me with your decision.
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> [Exhibit PL-16, Exhibit A]

Mr. Lucca testified that he did not receive that letter until after he advanced the $3,800 and that the letter was sent to him between November 15 and December 1991, at the earliest, when respondent recovered his car from the bank.

When respondent did not pay Mr. Lucca the $3,800, in mid-January or February 1992 Mr. Lucca began to telephone respondent to request payment. In March 1992, respondent repaid approximately $2,800 by way of insurance proceeds that were ultimately turned over to Mr. Lucca. The proceeds represented payment to respondent for damage to his car while in the bank's possession. Respondent failed, however, to repay the remaining $1,000 balance, despite Mr. Lucca's requests.

On June 12, 1992, Mr. Lucca filed an action against respondent to recover the outstanding balance. The matter was scheduled for hearing on July 2, 1992. On the evening of July 1, 1992, between five and six o'clock, respondent appeared at Mr. Lucca's hair salon. Respondent gave Mr. Lucca a copy of an unfiled answer, counterclaim and motion to transfer the case to the Special Civil Part. Respondent's October 30, 1991 letter was attached to the counterclaim. The basis for the counterclaim was respondent's contention that Mr. Lucca owed him over $2,000 in legal fees and costs. According to the counterclaim, the terms of the transaction were that respondent could offset legal fees from any amount owed to Mr. Lucca. (The record does contain a letter from respondent to Mr. Lucca, dated June 9, 1992, which discussed Mr. Lucca's outstanding bill.) Respondent contended that, at the time that he gave Mr. Lucca the $2,800, the latter owed him money for legal fees; because, however, Mr. Lucca was in need of money, respondent gave him the check from the bank, which was the only money he had available. According to respondent, Mr. Lucca was to return the excess balance, but failed to do so.

Although Mr. Lucca was unable to recall exactly what respondent said to him on the evening of July 1, 1992, he was left with the impression that he did not have to appear in court the following day. (Because of the late hour, Mr. Lucca was unable to call the court to confirm the need for his appearance.)

Respondent, in turn, denied that he told Mr. Lucca not to appear. He claimed that he advised Mr. Lucca to read the documents

because he was planning to have the case removed to the Special Civil Part. Nevertheless, Mr. Lucca appeared in court the next morning, albeit late. Respondent had been present in the courtroom and had advised the judge that he needed to be at a bail hearing. By the time Mr. Lucca arrived, the case had been dismissed. Respondent encountered Mr. Lucca in the hall as the latter was entering and advised him that the matter had been dismissed because of his failure to appear. Mr. Lucca, however, was able to have the matter reinstated. Approximately one week later, Mr. Lucca received respondent's answer and counterclaim.

Despite the fact that respondent's counterclaim was filed on July 8, 1992, respondent advised Mr. Lucca, by letter dated July 22, 1992, that Mr. Lucca had a right to have the matter resolved through a fee arbitration proceeding. Mr. Lucca elected to proceed with the arbitration. After respondent did not appear at the fee arbitration hearing, the panel concluded that Mr. Lucca owed him no legal fees. Thereafter, respondent's counterclaim for legal fees was dismissed and Mr. Lucca obtained a default judgment for $1,000, in September 1993. Mr. Lucca finally collected the $1,000 after respondent's bank account was attached.

Much of the controversy in this matter centered around an allegation in respondent's counterclaim that Mr. Lucca wanted possession of respondent's car so that he could turn back the odometer to increase its resale value. Respondent claimed that he did not repay Mr. Lucca the amount he owed him because of that fact. Mr. Lucca denied ever making that statement to respondent.

After a lengthy colloquy over respondent's counsel's desire to have a number of Mr. Lucca's financial records provided to him, the DEC determined that the documents were not admissible. Mr. Lucca asserted his fifth amendment privilege when questioned on this issue.

Neither respondent nor Mr. Lucca impressed the DEC as particularly credible witnesses. The DEC noted their poor recollections of the events and the inconsistencies and gaps in their testimony.

The DEC found a violation of RPC 1.8(a), reasoning that

> [e]ven if one accepts [respondent's] claim that [Exhibit PL-16] was accurately dated and delivered -- and the panel has some doubts about that -- the letter clearly does not comply with the terms of the rule, for several reasons. It does not accurately and fully set forth the terms of the transaction between [respondent] and Lucca; it says nothing about Lucca's co-signing of the note. The letter expressly and improperly appears to offset the loan against legal fees, which, in the panel's opinion, makes the terms of the agreement unreasonable. Furthermore, at no time did [respondent] secure Lucca's written consent to this arrangement, as the rule requires.
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> [Panel report at 8]

The second count of the complaint alleged that respondent misrepresented the status of the collection matter to Mr. Lucca and to the court on July 1 and 2, 1992, in violation of RPC 3.3(a)(5) and RPC 8.4(c). The DEC dismissed this charge for lack of clear and convincing evidence. Similarly, the DEC dismissed the allegations of the third count of the complaint for insufficient evidence. That count alleged that respondent created the October 30, 1991 letter and made misrepresentations in his

counterclaim with regard to Mr. Lucca's conduct, in violation of RPC 3.3(a)(5) and RPC 8.4(c).

The DEC found that respondent was "astonishingly cavalier" about his obligation to avoid a conflict of interest with his client. The DEC concluded that, despite the fact that respondent was aware that there was a rule of professional conduct governing business transactions with clients, he was unaware of its specific terms and, indeed, failed to even read the rule.

The Angello Matter

James and Catherine Angello, husband and wife, were long time friends of respondent, who grew up with their now deceased son. The couple owned a real estate and insurance office and at one time employed respondent, prior to his admission to the bar. On October 20, 1989, while at a Soroptomist Club meeting in Pennsylvania, Mrs. Angello stepped in a gap between dais sections and fractured her ankle. In September 1990, after the Angellos were unable to reach a satisfactory resolution with the insurance adjuster, the couple retained respondent to pursue the matter. Mrs. Angello signed a retainer agreement.

Respondent took some action on Mrs. Angello's behalf. He communicated with the insurance adjuster several times, submitted Mrs. Angello's medical bills, spoke with a potential witness and referred Mrs. Angello to a physician. According to respondent's testimony, he had handled two or three other personal injury matters before the Angellos retained him. Respondent's testimony,

however, revealed an alarming lack of knowledge as to how to proceed in the matter. Respondent was of the opinion that the matter had to be brought in a Pennsylvania court because that was the location of the defendant hotel. He further believed that he could not file the complaint until the extent of Mrs. Angello's injuries was ascertained. Respondent's "research" into how to proceed consisted of asking other attorneys for advice.

Respondent's communication with his clients about this case consisted of periodic discussions about the case during conversations with Mrs. Angello on other matters. Mrs. Angello testified that she did not specifically ask about the status of her case; she assumed that it was proceeding apace. (Mr. Angello and respondent did not communicate after respondent was initially retained.)

In mid-September 1991, approximately one month before the statute of limitations was to run, respondent suffered an unspecified neurological attack that forced his hospitalization for several days and left him unable to work up to his full capacity immediately upon his release. Because of his medical condition, on September 18, 1991 respondent purportedly mailed Mrs. Angello's file to her along with a cover letter explaining his condition and the fact that the statute of limitations would soon expire. According to respondent, he went to the post office at approximately midnight on September 18, 1991 and placed the file in a mailbox, without first making a copy of the documents. Respondent blamed his failure to copy the file on fatigue from his

medical condition. The file was sent via regular mail. The Angellos' house is located only two blocks from respondent's house/office. Mrs. Angello testified that she never received the file or the letter. No complaint was filed on her behalf and the statute of limitations expired.

The DEC rejected respondent's testimony on this issue as not credible. In the DEC's opinion, it was more likely that respondent had missed the statute of limitations. The DEC added that, even if respondent's testimony was truthful, the condition of the file and the manner in which it was forwarded to Mrs. Angello evidenced gross neglect in respondent's overall handling of the matter.

The Angellos' daughter-in-law, Kathleen Angello, testified at the DEC hearing. Ms. Angello, who is a nurse, was acquainted with respondent and would assist him with medical questions arising in his cases. According to her testimony, during a conversation with respondent, he stated that he had returned the file. Ms. Angello indicated that Mrs. Angello had not received the file in the mail. Respondent thereafter went to see Mrs. Angello with a copy of his September 18, 1991 letter. (The parties disagreed as to when this meeting took place.) Respondent explained to Mrs. Angello that he had missed the statute of limitations, that she could sue him for malpractice and that he did not have malpractice insurance. He did not advise her that she had the right to seek independent counsel. That was respondent's last direct communication with the Angellos. He used intermediaries from that point forward.

After she was injured, Mrs. Angello received treatment from Dr. Virginia Fatato, a chiropractor. Payment of her bill had been deferred pending resolution of the civil matter. After the statute of limitations ran, Dr. Fatato sued the Angellos for the balance due on the bill. Mr. Angello negotiated a reduction in the bill to $520 and sought to have respondent pay that amount as compensation for having missed the statute of limitations. When respondent failed to return Mr. Angello's telephone calls, in late 1992 or early 1993 Mr. Angello sought assistance from Lewis C. Farsetta, Esq., respondent's cousin. Mr. Farsetta testified that he did not represent either party in this dispute but, rather, served as an intermediary. Mr. Farsetta contacted respondent, who agreed, in mid-January 1993, to pay the $520 bill. Respondent stated that, at that time, he would have liked the Angellos to release him from any potential malpractice claims upon his payment of the $520, but did not insist on the release.

Because of the delay in resolving the payment issue, the Angellos paid the $520 bill on January 27, 1993, rather than have a judgment entered against them. Respondent ultimately forwarded a check to counsel for Dr. Fatato in mid-February 1993. His check was returned to him because Mr. Angello had already paid the bill. Thereafter, respondent agreed to reimburse Mr. Angello, but did not.

During the course of these events, the Angellos' niece, Dorothy Angello, a legal secretary, also became involved in the matter. She contacted respondent on behalf of the Angellos to

discuss reimbursement of the $520 and indicated that the Angellos were prepared to sue him. Respondent then agreed to deliver a $250 check to the Angellos and to pay the balance of $270 upon their execution of a release. According to respondent, he insisted on the release at that point.

On April 23, 1993, respondent executed a $250 check and left it in his mailbox for Dorothy Angello to pick up. On that same date, respondent deposited $561.10 into the bank account on which the check had been drawn. On Dorothy Angello's advice, the Angellos decided not to deposit the check until they received the balance due. Respondent drafted a release, which the Angellos signed on May 28, 1993. On or about June 10, 1993, respondent delivered $270 in cash to Mr. Farsetta and received the signed release in return. On June 10, 1993, Mr. Farsetta gave the funds to Mr. Angello.

On or about June 14, 1993, the Angellos presented respondent's $250 check to the bank for payment. The check was returned for insufficient funds. Evidently, on April 15, 1993, in the period between the date the check was drawn and the date it was presented for payment, West Publishing Company had levied on respondent's bank account, allegedly without his knowledge, leaving the account with insufficient funds to cover the $250 check that the Angellos had been holding. Respondent contended that, although he became aware that other checks had been returned, because of the delay in the Angellos' check presentation for payment he did not become aware of a problem with the check until mid-August 1993, when he

received the grievance letter from the DEC. At that time, he telephoned Dorothy Angello, who told him about the bounced check.

According to respondent, the bank account in question was inactive and he did not look at his bank statements. By way of further explanation, respondent testified that there were other activities occupying him during that time period. Respondent had been preparing for a random audit of his attorney accounts by the Office of Attorney Ethics on July 14, 1993. He was married on July 24, 1993, returned from his honeymoon to find the Angellos' grievance, and learned that the check had been returned. Respondent stated that he never paid the Angellos the outstanding $250, apparently because he was never asked to. Of interest, however, is a letter from respondent to Mrs. Angello, dated August 11, 1993, asking that she contact him to arrange for the payment of the $250. The letter was misdelivered to Kathleen Angello. According to Kathleen Angello's testimony, when she received the letter, she so informed respondent. The record does not reveal if either individual ever forwarded the letter to Mrs. Angello.

Respondent never advised the Angellos of their right to consult with independent counsel in connection with the release. He claimed that he believed that they were either represented by his cousin, Mr. Farsetta, or by another attorney whose name was mentioned during conversations with Dorothy Angello. At one point, however, respondent testified that, at the time that he drew the check, he knew that Mr. Farsetta was not representing the Angellos.

Respondent never contacted the attorney that he believed was representing the Angellos. Further, respondent testified that he thought it was improper for him to contact the Angellos to ask if they were represented by counsel. Respondent in effect conceded that he violated RPC 1.8(h), but labelled it a "technical" violation.

The DEC determined that respondent violated RPC 1.1(a), based on respondent's inadequate handling of the file and on his actions after he missed the statute of limitations. The DEC did not find a violation of RPC 1.3. The DEC was of the opinion that respondent's "dilatory handling" of the matter was subsumed under RPC 1.1(a).

The DEC also found a violation of RPC 1.8(h) because of the manner in which the malpractice release had been handled.

The complaint charged respondent with a violation of RPC 8.4(c), based on the fact that the $250 check was returned for insufficient funds and that respondent failed to replace it with a good check. Although the DEC was troubled by respondent's conduct, it did not find clear and convincing evidence of a violation of RPC 8.4(c).

In conclusion, the DEC reiterated "its specific finding that [respondent's] testimony with respect to his handling of this matter was in several aspects, enumerated above, wholly incredible." Hearing panel report at 18.

* * *

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

In the Lucca matter, respondent contended that he meant his October 29, 1991 letter to fulfill the requirements of RPC 1.8(a), a rule he admitted he did not consult before entering into the transaction. Regardless of whether Mr. Lucca is correct in his claim that he did not receive that letter until after he had already given the funds to the bank, it is obvious that the letter still did not comply with the requirements of RPC 1.8(a). The letter does not state the terms of the transaction fully, Mr. Lucca never agreed to the terms in writing and he was never advised to seek independent counsel. Accordingly, it is undeniable that respondent violated RPC 1.8(a) in the Lucca matter.

Respondent also violated RPC 1.1(a) in the Angello matter. The Board, however, disagrees with the DEC's conclusion that respondent violated RPC 1.8(h). At the time that respondent prepared the release for the Angellos' signature, there was no question in anyone's mind that respondent was no longer representing the Angellos. At that juncture, the parties were clearly in an adversarial posture. The Angellos were trying unsuccessfully to collect the $250 from respondent. Indeed, the Angellos and respondent were not even speaking to each other at that point. Hence, the Angellos could not have thought that respondent was still representing them, thereby relying on

respondent to protect their interests and to explain the consequences of the release to them. Respondent was no longer the Angellos' attorney and the Angellos knew that. Under these circumstances, it is not so clear that respondent had an obligation to advise the Angellos to consult with other counsel about the release.

The intervention of respondent's cousin, attorney Farsetta, further complicated things. Although Mr. Farsetta testified that he was not acting as the Angellos' attorney, respondent could have thought that Mr. Farsetta had given the Angellos legal advice about the consequences of the release. In fact, respondent testified that he thought that another attorney was representing the Angellos at that point. Given this scenario, clear and convincing evidence of a violation of RPC 1.8(h) has not been presented.

As noted above, respondent clearly violated RPC 1.8(a) in the Lucca matter and RPC 1.1(a) in the Angello matter. Of concern is the fact that respondent was previously disciplined for precisely the same conduct displayed in the Lucca matter. As noted above, respondent was privately reprimanded, on November 5, 1992, for entering into a business transaction with a friend without advising the friend to seek independent counsel. Although the letter of private reprimand was issued after the date of Mr. Lucca's loan to respondent, the formal complaint was filed on September 11, 1991, two months prior to Mr. Lucca's loan. Respondent was, therefore, on notice that his conduct in that regard was, at best, questionable. Even more alarming is the fact that respondent

apparently still does not understand his ethics obligations. At the DEC hearing, he admitted that, although he was aware, at the time of the loan, of a rule governing business transactions with clients, he did not consult it.

In In re Guidone, 139 N.J. 272 (1994), the Court imposed a three-month suspension for a violation of RPC 1.7, RPC 1.8(a) and RPC 8.4(c). The attorney represented a club in the sale of real estate without disclosing his personal interest in the buyer company. In its opinion, the Court stated:

> '[w]e have generally found that in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline.' [Citations omitted]. Of course, when an attorney's conflict of interest causes serious economic injury to clients, we have not hesitated to impose a period of suspension. See In re Dato, 130 N.J. 400 (1992) (imposing one-year suspension on attorney who purchased client's property at below-fair-market price); In re Gallop, 85 N.J. 317 (1981) (imposing six-month suspension on attorney who took deed to housekeeper's real property to her disadvantage); In re Hurd, 69 N.J. 316 (1976) (imposing three-month suspension on attorney who counseled client to transfer title to real property to attorney's sister for twenty percent of property's value).
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> [Id. at 277]

Here, respondent violated RPC 1.8(a) in the Lucca matter and RPC 1.1(a) in the Angello matter. More significantly, it is clear that respondent has not learned from his prior mistakes and does not comprehend his obligation to conform to the standards of the

profession. Accordingly, the Board unanimously voted to suspend respondent for a three-month period.

The Board further determined that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 5/11/95

By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board