SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 99-020 and 99-051

IN THE MATTER OF

LEON MARTELLI

AN ATTORNEY AT LAW

Decision
Default [R. 1:20-4(f)]

Decided: August 24, 1999

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

Pursuant to R. 1:20-4(f)(1), the District IV Ethics Committee ("DEC") certified the record in this matter directly to the Board for the imposition of discipline, following respondent's failure to file answers to two formal ethics complaints. On October 23, 1998, the DEC served respondent with a copy of the complaint in the Harper and DiLullo matters (DRB 99-020) by certified mail sent to his last known address. The certified mail return receipt was returned indicating delivery on October 26, 1998. The signature was illegible.

On November 19 1998, a second letter was mailed to the same address by certified and regular mail. The certified mail receipt was returned indicating delivery on November 20, 1998. The signature was illegible. The regular mail was not returned.

On December 3, 1998, the DEC served respondent with a copy of the complaint in the Davino matter (DRB 99-051) by certified and regular mail sent to his last known address. The certified mail receipt was returned indicating delivery on December 4, 1998. The person accepting delivery was a Beth Walsh. The regular mail was not returned.

On January 7, 1999, a second letter was sent to respondent by certified and regular mail to the same address. Neither the certified nor the regular mail was returned.

Respondent was admitted to the New Jersey bar in 1993. At the relevant times he maintained an office in Cherry Hill, New Jersey.

I. In The Harper Matter, (Docket No. DRB 99-051, District Docket No. IV-98-010E), in April 1994, Garfield and Sheila Harper retained respondent to represent them in personal injury cases arising out of an automobile accident in New York. On May 24, 1994, Garfield and Sheila each executed a power-of-attorney to respondent and a contingent fee agreement. The fee agreement entitled respondent to one-third of the recovery amount plus reimbursement for costs.

Respondent settled the Harpers' cases on April 3, 1996. The settlement amount was $23,000: $12,500 for Garfield and $10,500 for Sheila. Respondent advised the Harpers that

his fee would be $7,666, or one-third of $23,000.

On April 16, 1996, respondent issued a check to himself for $7,600 as his legal fees. On April 19, 1996, respondent issued a check to Garfield and a check to Sheila in the amount of $7,667 each, leading the Harpers to believe that the settlement had produced equal amounts for them, that is, $11,500 for each. Respondent never prepared a settlement statement showing his receipt of the settlement funds, the remittances to the clients, the fee to himself or the methods of his calculation.

Although the Harpers' insurance covered their medical expenses, shortly after receiving settlement the Harpers learned that there remained one unpaid bill in the amount of $210 for medical reports sent to respondent and for photocopying expenses. The Harpers repeatedly called respondent and forwarded him the invoices they were receiving. When respondent finally returned the Harpers' telephone calls, he assured them that he would take care of the problem. He failed to take any action, however, causing the matter to be turned over to a collection agency. Presumably, the Harpers then satisfied the debt because, on March 9, 1998, respondent gave them $210.

When the OAE requested respondent's records relating to this matter, he stated that he was unable to produce copies of the deposit items to his trust account or the disbursement checks to the Harpers because his ex-wife had stolen his records. Respondent made no attempt to retrieve his trust account records from his former wife.

The complaint charged respondent with violations of RPC 1.3 (failure to act with

reasonable diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(a) (charging an improper fee), RPC 1.5(c) (failure to provide settlement statements to clients), ACPE *Opinion 635* (improper use of power-of-attorney) and RPC 1.15(d) (failure to comply with recordkeeping requirements).

II. In The Dilullo Matter, (Docket No. DRB 99-020, District Docket No. IV-98-010E), on February 21, 1996 respondent made a "split" deposit of $2,500 (part of a $5,000 check) to his trust account, ostensibly to cover expenses in connection with a matter titled DiLullo. Respondent was unable to produce a ledger card for DiLullo. Initially he was unable to recall what he did with the other half of the check ($2,500) that was not deposited in his trust account. Later, however, respondent informed the OAE that this half represented reimbursement to him for paralegal expenses previously incurred, which he had paid with his own funds. Respondent produced copies of canceled checks to a paralegal service, totaling $6,000, and invoices from the service in the total amount of $6,068.90. Although the checks and invoices indicated that they were for the DiLullo matter, it was apparent that they also covered work for other matters.

On March 5, 1996, respondent issued to the paralegal service a trust account check for $1,000, drawn against the $2,500 that he had deposited in his trust account on February 21, 1996. Two subsequent checks, one for $500 and the other for $150, were issued to a transcription service and to respondent, respectively. The latter check was allegedly a

reimbursement to respondent for DiLullo expenses.

The complaint charged respondent with violations of RPC 1.5(a) (unreasonable fee), RPC 1.15(a) (failure to hold property of a client separate from an attorney's property) and RPC 1.15(d) (recordkeeping violations). The complaint also charged respondent with a violation of RPC 8.1(b) (failure to cooperate with disciplinary authorities).

III. In The Davino Matter, (Docket No. DRB 99-051, District Docket No. IV-98-010E), in August 1997, Davino retained respondent in connection with her divorce matter. She had previously been represented by another attorney. Davino provided respondent with all relevant documentation pertaining to the divorce action.

Respondent never provided Davino with a written retainer agreement and never communicated to her his rate or basis for the fee, in writing. Pursuant to R. 1:21-7A, retainer agreements in all family actions must be in writing.

From August 1997 to February 1998, Davino attempted to contact respondent "numerous" times by telephone, leaving messages for him. Several of the messages stated that she would like to sell the house that she and her husband owned jointly. In November 1997, respondent called Davino and told her that her husband had agreed to sell the house. That was the only time that respondent contacted Davino.

In December 1997, Davino wrote respondent asking that he address some issues in the divorce case, including her husband's failure to pay the tuition for their daughter's

education, as ordered by the court. Respondent did not take any action.

Between September 1997 and January 1998, the husband's attorney wrote eight letters to respondent concerning various issues. Each time, the attorney requested that respondent contact him. Respondent did not reply to any of the eight letters. In February, 1998, Davino obtained new counsel.

The complaint charged respondent with violating RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 1.5(a) (charging an improper fee) and RPC 1.5(b) (failure to reduce basis or rate of fee to writing).

* * *

Service of process was properly made in this matter. Following a review of the record, the Board found that the facts recited in the complaint support a finding of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R 1:20-4(f)(1).

In the Harper matter, respondent violated RPC 1.3, RPC 1.4(a), RPC 1.5(c) and RPC 1.15(d). The complaint also charged that respondent's fee was unreasonable. This charge is apparently based on the fact that respondent took $7,600 for his legal fee, even though a $210 expense remained unpaid. The contingency agreement with the Harpers properly entitled respondent to one-third of the recovery plus reimbursement of costs. If, however, there were

litigation expenses to be paid out of the settlement proceeds, then respondent had to calculate his one-third fee from the net proceeds, not the gross recovery. Had respondent calculated his fee based on the net proceeds, the fee would have been $7,596. Although R.1:27-7 was technically violated, respondent's action in this regard did not rise to the level of unethical conduct warranting discipline. The charge of a violation of RPC 1.5(a) was, therefore, dismissed.

The charge that respondent violated ACPE Opinion 635 must also be dismissed. Although the complaint charged respondent with improper use of a power-of-attorney, under certain circumstances, an attorney is allowed to utilize a client's power of attorney in personal injury matters. *Notice to the Bar, 136 N.J.L.J.*638 (1994)[1]. The complaint did not contain sufficient facts to support the charge that respondent misused his client's power of attorney.

Except for the recordkeeping charge, the charges relating to the DiLullo matter must also be dismissed. There are insufficient facts to support the allegation that respondent collected an unreasonable fee or failed to hold his client's property separate from his own.

In the Davino matter, respondent clearly failed to act with reasonable diligence and promptness and failed to communicate with his client. Furthermore, by failing to enter into

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[1] Although respondent had advised the Harpers that his fee would be $7,666 (one-third of the gross recovery), he actually took only $7,600. The complaint does not indicate what happened to the remaining $66, although respondent eventually paid the $210 to the Harpers.

a written retainer agreement in a matrimonial matter, respondent violated R.1:21-7A (all fee agreements in family matter shall be in writing).

The charge of a violation of RPC 1.5(a), however, must be dismissed. The complaint did not state sufficient facts to determine whether respondent's fee was unreasonable. At worse, respondent kept a $1,000 retainer after performing four hours of work in a divorce matter. A rate of $250 per hour may be high, but is not, on its face, unreasonable.

In summary, respondent violated RPC 1.3, RPC 1.4(a), RPC 1.15(d) and R. 1:21-7A. Ordinarily, conduct of this sort, involving a small number of cases, requires discipline ranging from an admonition to a reprimand. See, e.g., In the Matter of Byron R. King, Docket No. DRB 94-246 (November 2, 1994) (admonition for misconduct in two matters, including lack of diligence and failure to communicate in two matters and gross neglect in a third matter). In another case, an attorney was reprimanded when he represented an estate but took action only so far as required to take his fee. In re Mandle, 157 N.J. 68 (1999).

The purpose of discipline is not to punish the attorney, but to protect the public from an attorney "who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Rosenthal, 118 N.J. 454, 464 (1990) (citing In re Stout, 75 N.J. 321, 325 (1978)). It is clear that respondent has not measured up to this standard and that the public is at risk.

Although ordinarily an admonition or a reprimand would be sufficient discipline for respondent's ethics violations, because of the default nature of these proceedings, the Board

unanimously determined that respondent's conduct warrants a three-month suspension. Prior to reinstatement, respondent must submit a certification, prepared by a certified public accountant approved by the OAE, that his records are in compliance with the recordkeeping requirements of R. 1:21-6.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 8/24/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Leon Martelli
Docket Nos. DRB 99-020 and DRB 99-051

Decided: August 24, 1999

Disposition: Three-Month Suspension

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Boylan							x
Brody		x					
Cole		x					
Lolla		x					
Maudsley		x					
Peterson		x					
Schwartz		x					
Thompson							x
Total:		7					2

Robyn M. Hill
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Chief Counsel