SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-176
District Docket No. VA-05-0015E

IN THE MATTER OF	:
HERBERT J. TAN	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 15, 2007

Decided: December 17, 2007

Irvin M. Freilich appeared on behalf of the District VA Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for a reprimand filed by the District VA Ethics Committee (DEC).

The complaint charged respondent with violating RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter), RPC 1.4(c) (failure to explain a matter to the extent

reasonably necessary to permit the client to make informed decisions about the representation), RPC 1.5(a) (charging an unreasonable fee), and RPC 8.4(c) (misrepresentation).[1] Because we found no clear and convincing evidence of misconduct, we determined to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1998. He maintains a law practice in Newark, New Jersey. In 2006, he was reprimanded for violating RPC 8.1(a) (knowingly making a false statement of fact in connection with a bar admission application) and RPC 8.4(c) for stating falsely, on his bar application, that he had earned a bachelor's degree, when he was one course shy of that degree. In determining that a reprimand was sufficient discipline, we considered that respondent and his fiancée were ill at the time, that twice he made efforts to rectify the problem (but failed to follow through for fear of discovery), that his misrepresentations were the result of poor judgment and inexperience, and that the offense had occurred more than eight years earlier.

In February 2004, grievant Ruby Villafuerte retained respondent to represent her in connection with a matter before

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[1] The complaint does not specify which of its allegations relate to this charge. It appears that the misrepresentation charge refers to improper entries on the invoice given to the client. Indeed, at the DEC hearing, the presenter stated that respondent misrepresented the billing and financial terms of [the] representation.

the American Arbitration Association (AAA). The Hospital for Joint Disease, where Villafuerte had been employed as a nurse, terminated her employment in May 2003. Villafuerte had been suspended indefinitely prior to her termination, pending investigation of charges that she had threatened a co-worker and her supervisor with bodily harm. In addition, Villafuerte was sent for a "psychological" evaluation to, according to her, clear her "from insanity." She believed, however, that her termination had been for "sharing the gospel" or sharing her religious beliefs with co-workers. She was able to find more lucrative employment shortly after her termination.

Before retaining respondent, Villafuerte was represented by attorney Emanual Towns for five or six months. According to Villafuerte, Towns pressed her to settle her claim for $5000. Dissatisfied with the offer, she sought new counsel. One of her Filipino friends had referred her to respondent, describing him as a good and reliable attorney.

Villafuerte and respondent's fee agreement provided for a $500 retainer, a $75 hourly fee, and a flat fee of $1,000 or $500, depending on whether respondent had to attend an entire or one-half hearing day. The agreement further provided:

> The Law Firm cannot predict or guarantee what the bill for legal services will be. This bill will depend on the time on your case, and the amount of the other expenses. You

> hereby agree and understand that upon receipt of any bill, either interim or final, requesting the payment of legal fees, that [sic] payment will be made within twenty (20) days from the date of such request.
>
> [Ex.1.]

Villafuerte could not understand why respondent had sent her monthly bills in the amount of $500.[2] She paid a total of $4,000, even though the bills did not set forth details about the charges.

Villafuerte admitted communicating with respondent on several occasions, including the initial consultation of approximately one-half hour and conversations about the scheduled hearing date, its rescheduling because of respondent's vacation, and problems with the union, which had represented Villafuerte before. She also recalled meeting with respondent the day before the hearing, presumably to discuss the case. Villafuerte complained, however, that, on a few occasions, respondent had not returned her telephone calls. In addition, she did not recall receiving any written communications from respondent, discussing discovery with him, or being informed that he had contacted any witnesses.

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[2] According to paragraph 6 of the complaint, respondent advised Villafuerte that his fees would total between $2,500 and $3,000, and that he would bill her $500 per month. Paragraph 7 states that, pursuant to the retainer agreement and respondent's invoices, which requested a flat fee of $500 per month, Villafuerte paid respondent $4,000 over an eight-month period.

Villafuerte admitted that respondent encountered difficulties taking over her case from the union. He first had to file a claim with the National Labor Relations Board (NLRB), *in order to compel* the union to turn over her case to him.

As to the AAA proceeding, Villafuerte remembered that it had lasted from approximately 10:00 a.m. to 1:30 p.m. She recalled being introduced to the arbitrator, who requested that the parties try to settle the matter. She did not take part in the settlement negotiations. She stated, however, that respondent periodically left the negotiations' room to keep her informed about what was going on, including the defendant's settlement offers. She refused all of the offers until she had "to give up because [she] was so hungry, [she could not] stand it anymore." She believed that respondent had relayed a $22,000 offer to her. Respondent, however, testified that it was he who had suggested that amount to the defendant.

According to Villafuerte, respondent told her that he would charge her a contingency fee if she did not settle the matter. She did not understand the meaning of a contingency fee. Villafuerte was confused by the settlement agreement because it listed a gross payment to her of only $12,000, less applicable deductions, to be paid to her on or before January 31, 2005. It also included a payment to respondent of $10,000 before December

31, 2004. Villafuerte signed the settlement statement because she trusted respondent. She complained that her attempts to contact respondent to demand an explanation about the settlement were unavailing.

Villafuerte received respondent's January 15, 2005 letter and check for her share of the settlement. The letter showed the breakdown of expenses, including the return to her of a $7,846.02 sum, and a $6,000 fee to respondent. Villafuerte never received an explanation from respondent about the contents of the letter.

At the DEC hearing, the presenter showed to Villafuerte respondent's undated, four-page invoice for his total bill of $6,100. The invoice consisted of three pages of time entries and one page summarizing the fee payment terms. Villafuerte testified that she had not seen that invoice until after she had filed the grievance; the investigator/presenter had mailed a copy to her.

As to respondent's invoice, Villafuerte disclaimed discussing with him any of the services listed therein, such as, research, a letter to the union regarding settlement offers, or a proposed release and agreement.

For his part, respondent clarified that Villafuerte had retained him solely to represent her before the AAA, not for any

discrimination claims. Respondent never informed Villafuerte that there would be a cap on his fees.

Respondent found Villafuerte's case difficult because he had to apply to the NLRB to have the case turned over to him. He described the process as being similar to putting on a "mini trial."

As to the AAA proceeding, respondent recalled preparing Villafuerte for the hearing, going over the facts of the case with her, and discussing her testimony with her. Respondent was certain that he had spent two hours preparing her for the hearing.

Respondent had subpoenaed witnesses to testify before the AAA proceedings, but claimed that they did not appear. According to respondent, the most important witness was still employed at the hospital and did not want to jeopardize her job by testifying on Villafuerte's behalf. Villafuerte's supervisor was there, though, and ready to testify.

Respondent explained that, although he had initially demanded $22,000 to settle the case, he could not establish "pain and suffering or punitive damages" because Villafuerte's "out of pockets were very limited," in light of her new job at a higher salary. Respondent maintained that he had explained the settlement terms to Villafuerte. The settlement provided that her employment record would show that she had resigned in good

standing, there would not be a mark against her work record, and she would receive a monetary sum that, although not significant, was $7,000 more than the defendant had originally offered.

The breakdown of the $22,000 settlement showed payments of $12,000 for Villafuerte and $10,000 for her legal fees. The $10,000 figure represented a $4,000 reimbursement for the fee paid to the prior attorney and $6,000 for respondent's total fee. Because Villafuerte had already paid respondent $4,000, he kept only the remaining balance of his fee. Altogether, thus, respondent returned almost $8,000 to Villafuerte (minus minor costs and expenses).

As to respondent's undated invoice for the $6,000 fee, he testified that he had kept time "along the way." He claimed that he had prepared the invoice around January 15, 2005, and had submitted it to Villafuerte the same day that he had sent her the breakdown of her settlement and reimbursement of fees. The presenter noted, however, that the letterhead for each document was different. The invoice did not reflect the names of any other attorneys, unlike the settlement statement. Respondent was unable to clearly explain the difference between the two, other than to guess that the "Smart Masters" he used had different letterhead. He added: "[A]t that point I had a partnership with

[another attorney] and I don't know perhaps it was just incorrectly put in like my invoice -- I don't know."

Respondent explained that he went through his file to prepare the invoice. He wrote down the number of hours spent on the case and believed that he dictated his notes to his secretary. The presenter did not request that respondent produce his file.

The presenter questioned respondent about a number of entries on the invoice, among others: (1) whether he had met with Villafuerte on a Sunday, as reflected in the invoice, to which respondent replied that, if that is what appeared in the invoice, then he must have; (2) why it had taken him an hour to draft a letter to the arbitrator, to which respondent replied that he had prepared it and faxed it to all of the attorneys involved in the matter; (3) what he had researched for three hours, to which he replied that he had researched how to handle the trial process and updates in the AAA mediation procedure; and (4) what sort of research he had conducted for an additional hour and one-half that same day, to which respondent replied that he had researched the union's prohibiting him from representing Villafuerte. The presenter also questioned respondent about the amount of time billed for certain services and the dates on which those services purportedly occurred,

particularly those services that were performed on the weekend or a holiday.

Respondent admitted that he did not provide Villafuerte with an itemized monthly bill, but presumably explained to her that he would be billing her monthly. Respondent also admitted making a mistake on the invoice by charging Villafuerte $1,500 for a full day of hearing, when his retainer called for only $1,000.

The DEC found that respondent had done more than simply assist Villafuerte in her grievance before the AAA, including taking the steps necessary to take over Villafuerte's representation from the union. The DEC found further that respondent had engaged in reasonable communications with Villafuerte during the course of the representation, kept her reasonably informed about the status of her case, and replied to her inquiries.

Although Villafuerte questioned the adequacy of respondent's representation, respondent was not charged with gross neglect. The DEC, thus, found that the testimony relating to respondent's preparation of the matter was irrelevant to the ethics charges.

The DEC noted that Villafuerte had received a $19,846.02 settlement and that respondent had retained only $6,000 of the $10,000 he was paid, by crediting Villafuerte for the $4,000 she

had already paid him. The DEC also noted that respondent had set forth the breakdown of his fees in his January 15, 2005 letter to Villafuerte.

The DEC determined that, in light of the results that respondent had achieved for Villafuerte, the amount of his fee, which was less than one-third of the settlement, was reasonable.

The DEC concluded, however, that respondent's invoice must have been created after the fact, not on January 15, 2005, when his representation of Villafuerte had ended. Noting the difference in the letterheads of the settlement statement and the invoice, which, respondent claimed, had been prepared contemporaneously, the DEC was "convinced that the document was prepared after the fact as an outcome determinative justification for the attorneys fees charged."

The DEC found no clear and convincing evidence that respondent had violated RPC 1.4(b), RPC 1.4(c), or RPC 1.5(a). The DEC found respondent guilty of violating only RPC 8.4(c), for misrepresenting the circumstances surrounding the preparation and alleged transmission of the final invoice to Villafuerte. The DEC did not find that respondent had misrepresented any of the entries on the invoice.

As mitigation, the DEC found that the retainer agreement did not require respondent to provide Villafuerte with an

itemized bill. The DEC recommended that respondent receive a reprimand to "deter [him] from crafting such post hoc billing statements in the future."

Following a de novo review of the record, we find that the record does not clearly and convincingly establish any of the charged violations.

As the DEC properly found, respondent adequately communicated with his client. Villafuerte's own testimony established that she had a number of communications with respondent over the course of their nine and one-half month attorney/client relationship. We agree, thus, with the DEC's dismissal of the RPC 1.4(b) and RPC 1.4(c) charges.

As to the charge of a violation of RPC 1.5(a), the DEC found that, in light of the settlement that respondent achieved for Villafuerte, his fee, which amounted to slightly less than one-third of Villafuerte's recovery, was reasonable. We agree with the DEC.

On the other hand, we are unable to agree with the DEC's finding that respondent was guilty of misrepresentation. Nothing in the complaint gave respondent notice that he might be found guilty of having misrepresented the preparation and transmission of the invoice. Had the presenter intended to charge respondent with preparation of the invoice after its alleged date, he

should have amended the complaint to give respondent an opportunity to defend himself. Instead, the DEC based its finding of misrepresentation solely on one question relating to respondent's association with his former law partner.

More simply stated, respondent testified that he had prepared the invoice on or about January 15, 2005, at the same time that he had prepared the settlement statement, dated January 15, 2005. Villafuerte acknowledged receiving the settlement statement, but not the invoice. She testified that she saw it for the first time when the investigator/presenter mailed it to her, before the DEC hearing. Because the letterheads on the two documents are different, the presenter and the DEC concluded that they had not been prepared contemporaneously. This difference in the letterheads was the sole basis for the DEC's finding that the preparation of the invoice had not been January 15, 2005, as respondent alleged. The DEC found nothing wrong with the contents of the invoice; only with its alleged preparation date.

Respondent, in turn, explained that the discrepancy must have been caused by his computer software. Very little exchange on this topic took place below. Respondent had no notice that this issue was under scrutiny and was not afforded an opportunity to prepare a proper defense prior to the hearing. Because a finding in this

context could subject respondent to a lengthy term of suspension, see, e.g., In re Katsios, 185 N.J. 424 (2006) (two-year suspension for attorney who improperly released escrow funds to his cousin, a party to the escrow agreement, and then falsified bank records and trust account reconciliations to mislead the ethics investigator that the funds had remained in escrow), we dismiss this charge on due process grounds. In any event, we found no clear and convincing evidence in this record that the discrepancy between the two letterheads constituted foul play on respondent's part.

Based on the foregoing, we determined to dismiss the complaint in its entirety.

Disciplinary Review Board
William J. O'Shaughnessy
Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Herbert J. Tan
Docket No. DRB 07-176

Argued: November 15, 2007

Decided: December 17, 2007

Disposition: Dismiss

Members	Dismiss	Reprimand	Admonition	Disqualified	Did not participate
O'Shaughnessy	X				
Pashman	X				
Baugh	X				
Boylan	X				
Frost	X				
Lolla					X
Pashman	X				
Stanton	X				
Wissinger	X				
Total:	8				1

Julianne K. DeCore
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Chief Counsel