SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-388

IN THE MATTER OF

MARTIN C. LATINSKY

AN ATTORNEY AT LAW

Decision

Argued: March 15, 2001

Decided: August 6, 2001

Lois M. Myers appeared on behalf of the District IIA Ethics Committee.

William L. Gold appeared for respondent, who was also present.

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

This matter was before us based on a recommendation for discipline filed by the District II-A Ethics Committee (DEC). Respondent was admitted to the New Jersey bar in 1983. At the time of the alleged misconduct, he maintained an office for the practice of law in Haworth, Bergen County.

The complaints allege that respondent engaged in a pattern of neglect in two matters.

On November 29, 1999 respondent received an admonition for misconduct that included failure to properly terminate the representation of a client and failure to communicate with the client in the first of three client matters. In the second matter, respondent failed to keep the client reasonably informed about the status of the case and, in the third matter, exhibited lack of diligence and failed to communicate with the client. In the Matter of Martin C. Latinsky, Docket No. DRB 99-291 (November 29, 1999.)

On July 10, 2001 the Supreme Court remanded two default matters to us, in order to give respondent an opportunity to file a motion to vacate the defaults. Respondent filed a motion on August 14, 2001. Those matters are awaiting our review. One matter alleges gross neglect, lack of diligence, failure to communicate with the client, failure to return an unearned retainer and failure to utilize a retainer agreement. The other matter alleges failure to communicate with the client. In the Matters of Martin C. Latinsky, Docket Nos. DRB 01-277 and DRB 01-278 (formerly DRB 00-180 and 00-181).

I. The Semmler Matter - District Docket No. IIA 99-018E

The complaint alleged violations of RPC 1.1(a) (gross neglect) and (b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (a) (failure to communicate with client), RPC 1.5 (unreasonable fee), RPC 3.2 (failure to expedite litigation), RPC 5.5 (unauthorized practice of law, by taking a fee in violation of the bankruptcy court rules), RPC 8.4(a) (attempt to violate the Rules of Professional Conduct), RPC 8.4(c) (conduct involving

dishonesty, fraud, deceit or misrepresentation – withdrawing legal fees without his client's consent), RPC 1.15(b) and (c) (failure to safeguard client's property – taking fees without the client's authorization) and RPC 8.1(b) (failure to cooperate with ethics authorities).

On July 1, 1996 the grievant, Henry Semmler, retained respondent to handle a Chapter 11 bankruptcy matter for his company, Henry's Body & Frame Repair. Toward that end, respondent and Semmler executed a retainer agreement that stated, as follows, in part:

> The client agrees to pay the attorney upon signing of this contract a retainer of $5,860.00 for services performed or to be performed under this contract... Thereafter, the attorney shall bill the client on or about the final day of each month for services performed and expenses incurred under this contract during that month, except that if a bankruptcy case if [sic] filed, such bills shall not be paid unless allowed by the bankruptcy court.

Semmler had chosen respondent to handle the matter because his fee was more reasonable than that quoted by another law firm.

On or about July 1, 1996 Semmler paid respondent $5,860 ($5,000 for respondent's retainer, $800 for the Chapter 11 filing fee and $60 for the filing fee in a "preference" action.) The fee agreement listed an hourly rate of $100 per hour.

On July 2, 1996 respondent filed the bankruptcy petition, as well as a motion to be appointed as attorney for the debtor. Included with the motion was a certification by respondent, required under the bankruptcy rules, in which he disclosed that he had been paid a $5,000 retainer.[1] The motion was granted on July 9, 1996.

---

[1]The DEC mistakenly construed the order. Although the order only approved respondent's retention as the attorney for the debtor, the DEC interpreted it to also approve

Thereafter, respondent fashioned a plan of reorganization, which was confirmed by the bankruptcy court on July 22, 1997. The plan was a "single payment" plan, under which all of the creditors were to receive a lump-sum payment in full satisfaction of their claims. With that in mind, in early August 1997 Semmler gave respondent sufficient funds ($13,500) to pay the creditors and close the case. However, respondent did not prepare the order of confirmation until October 1997 and did not pay the creditors until March 1998. Respondent had no explanation for this lengthy delay.

Semmler testified at the DEC hearing that he personally contributed funds to the plan so that respondent could pay the creditors swiftly and close the case. He took this approach to minimize the imposition of quarterly fees by the U. S. Trustee in the amount of $1,500, to be paid each quarter of the year that the case remained open. Semmler further testified that the only impediment to closing the bankruptcy case after the creditors were paid in March 1998 was the filing of a preference action, as detailed below.

Between October 1997 and June 1999 Semmler wrote to respondent on numerous occasions, sending him copies of the U. S. Trustee's quarterly statements and pleading for respondent's resolution of the case. According to Semmler, he desperately wanted to "light a fire under" respondent, even offering respondent a portion of the proceeds of an outstanding preference action in order to get him moving. According to Semmler, he was frustrated with respondent's failure to wrap up the case and concerned with the U. S.

---

an initial fee of $5,000 for respondent.

Trustee fees, which had swelled to $10,500 by June 1999. Semmler stated that the preference action sought the return of monies that were improperly paid to one creditor, to the detriment of other creditors to the case. Semmler was distressed that respondent had waited until January 6, 1999 to file the preference action. Respondent later admitted that the preference action was actually filed after the two-year statute of limitations had expired. Fortuitously, the attorney for the creditor did not raise that defense. Respondent was able to settle the preference action in Semmler's favor, on May 26, 1999, for $6,500. The bankruptcy case as a whole was then administratively closed on the same date.

Thereafter, respondent placed the settlement funds in his trust account and, without the bankruptcy court's approval, disbursed to himself fees in the amount of $5,065, representing his time for work in excess of the retainer amount, plus $65 for expenses. On July 7, 1999 respondent forwarded the remainder of the settlement funds ($1,435) to Semmler, along with an itemized bill detailing all of his work in the matter.

On July 15, 1999 the U. S. Trustee filed a motion to reopen the bankruptcy case in order to compel the payment of the accumulated U. S. Trustee fees. According to respondent, he had repeatedly advised Semmler, during the pendency of the bankruptcy, not to pay the quarterly fees because, in his view, the U. S. Trustee would not be successful in enforcing those fees. Respondent admitted that he had misinterpreted the state of the law

regarding the legitimacy of those fees, having relied on old case law that had been overturned early in the pendency of Semmler's matter.[2]

Respondent's adversary in the U. S. Trustee's office, Gail B. Cooperman, Esq., also testified at the DEC hearing. She testified that there had been some uncertainty in bankruptcy circles about the propriety of the U. S. Trustee's practice of charging quarterly fees in cases that were open, albeit not active. Cooperman explained that the Third Circuit Court of Appeals finally settled the issue in the U. S. Trustee's favor, allowing quarterly fees in those cases. Thereafter, the U. S. Trustee moved to reopen approximately one hundred-fifty bankruptcy cases in which quarterly fees were assessed, but had not been paid, including Semmler's.

At the hearing on the U. S. Trustee's motion, respondent accepted responsibility for the quarterly fees in Semmler's matter ($10,500). Respondent reasoned that, because he had given unsound advice to his client, he should be personally responsible for the fees. Respondent entered into a consent order with the U. S. Trustee, making respondent personally liable for the repayment of all quarterly fees in the case.[3]

On October 21, 1999 respondent made an application to the bankruptcy court for the approval of his fees over and above the retainer. Respondent did not disclose that he had

---

[2] Semmler's name is used interchangeably with that of his business, the debtor in bankruptcy, even though it is recognized that Semmler was only the principal of the debtor.

[3]Respondent defaulted on his obligation, after paying approximately $4,500. In July 2000 the U. S. Trustee obtained a judgment against respondent for the outstanding balance.

already disbursed those fees ($5,065) to himself in May 1999. In total, thus, respondent had already received at least $10,000 (the $5,000 retainer plus $5,065). The application stated as follows:

> 1. The following disbursements have been made as actual and necessary costs and expenses incurred in the course of the proceedings: the chapter 11 filing fee of $800.
> 2. A previous allowance of $5,860 was made by the applicant at the time of the initial chapter 11 filing. No additional funds have been charged to the applicant aside from this initial retainer amount.
> 3. The rate of compensation agreed to by the debtor were [sic] detailed in the debtor's application for approval of applicant's employment, and were approved by the court. In conformity with those rates, the reasonable value of the services rendered by the applicant as attorney for said debtor in possession in this case under chapter 11 is $10,125.00, on account of which the applicant has been allowed and has received $5,860. The $5,860 amount includes $800 for the filing fee. Detailed time records are attached.

Contrary to respondent's statement in the application, his initial fee had not been approved by the bankruptcy court, as required by the bankruptcy rules. As noted earlier, the court's original order merely approved his retention as the debtor's attorney. That form of order, prepared for the court by respondent and dated July 11, 1996, made no reference to the approval of fees. Respondent was obviously aware of that fact before the inception of the case, when he drafted a June 13, 1996 letter to Semmler, in which he stated, in part, as follows:

> As you may know, all fees, and even my being retained, are subject to the approval of the bankruptcy court. (An order approving my retention is submitted with the petition).

Respondent testified that the majority of his law practice at the time was bankruptcy law and that he had handled "500 or so" bankruptcy cases prior to Semmler's.

On November 16, 1999, the bankruptcy court allowed respondent a fee in the amount of $5,860. The court mistakenly permitted respondent to apply $860 to his fees as well, instead of directing the payment of filing fees. The court did not allow the extra $5,065 in fees that respondent had already taken from the preference action settlement, unbeknownst to the court. Respondent did not appeal the court's ruling or file a motion for reconsideration.

Initially, respondent argued that court approval for the $5065 fee was not required because, since the preference action had been filed after the confirmation of the plan of reorganization, the settlement proceeds were no longer a part of the bankruptcy estate and, therefore, belonged to Semmler. Ultimately, however, respondent conceded that the settlement proceeds were, in fact, property of the estate. There is no charge or evidence that respondent's fees were unreasonable.

II. The Romano Matter - District Docket No. IIA 99-008E

The Romano complaint alleged violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (a) (failure to communicate with client), RPC 1.16 (d) (failure to return file upon termination of the representation) and RPC 8.1 (b) (failure to cooperate with ethics authorities). Because, however, the grievant did not

appear at the DEC hearing, the DEC dismissed all of the allegations, except the charge of a violation of RPC 8.1 (b).

Respondent did not contest his failure to reply to a series of letters from the DEC investigator, requesting information about the grievance. Moreover, although the answer to the formal ethics complaint was due on or about November 25, 1999, respondent did not file an answer until January 6, 2000.

* * *

In the Semmler matter, the DEC dismissed the alleged violations of RPC 1.1(a) and (b), RPC 1.3 [mistakenly cited as RPC 3.2] and RPC 3.2, explaining that respondent had not neglected Semmler's matter. The DEC reasoned as follows:

> Although the Respondent did not close the bankruptcy case promptly, did not institute the preference action within the two-year statutory period and told the grievant not to pay the trustee, these acts or omissions did not constitute lack of due care or lack of diligence in handling the Grievant's matter. In fact, the Grievant received more than what he should have received out of the bankruptcy and preference matters in a number of respects due to the efforts of the Respondent. The Respondent did not act quickly in all matters. However, his failure to act expeditiously was within the realm of his discretion in gaining a tactical advantage for the Grievant by waiting to file the preference action until after the bankruptcy action was finalized. Likewise, his delay in proceeding was not inconsistent with his client's interests since his client wanted to receive money from the preference action and probably would not have if it was filed two years prior.

* * *

> If the Respondent had filed the preference matter within the two-year statutory period, the preference monies would have in all likelihood fallen into the bankruptcy estate leaving the Grievant with no proceeds at all from that action.

The DEC also dismissed the charges of a violation of RPC 1.5, finding that respondent's fee was not unreasonable, as well as RPC 5.5(a), which the DEC found inapplicable to this case. Also, the DEC dismissed the charge of a violation of RPC 8.4(c), finding instead that respondent violated RPC 1.15 (c):

> The Hearing Panel believed very strongly that the Respondent earned the additional counsel fee and was entitled to it.... Based upon this reasoning, the Hearing Panel did not believe that his conduct was conduct involving 'dishonesty, fraud, deceit or misrepresentation.' However, the Hearing Panel is clearly convinced that the way in which he took the fee was clearly inappropriate in a number of respects. The respondent was not authorized under the retainer agreement to take an additional fee without first billing the Grievant. He failed to do this and instead paid himself his fee out of trust monies without first notifying his client and obtaining a severance of their interests. Furthermore, and most important, he failed to obtain prior approval of the Bankruptcy Court before taking his fee.

* * *

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

With respect to the allegation of gross neglect, the DEC did not find that respondent's misconduct amounted to a violation of the rule because he eventually filed the preference

action and obtained a very good result for his client. The DEC conceded that respondent was slow to react to events in the case, but was not alarmed at the timing of respondent's actions in the case. We agree. For example, while it took respondent a full year to file the plan of reorganization after the Chapter 11 filing, there is no evidence that one year was an unreasonable period of time under the circumstances of the case.

The most significant lapse of time in this case was the seemingly excessive delay in filing the preference action. In fact, respondent did not file it until after the statute of limitations had expired. In his defense, respondent argued that the delay was to Semmler's benefit. The DEC agreed. Another view, however, is that the delay was respondent's deliberate attempt to keep the preference action out of the estate. In any event, missing the statute of limitations, without more, does not rise to gross neglect, particularly when there is no harm to the client. Although, here, the prejudice to Semmler was the accrual of considerable U.S. Trustee fees, respondent assumed personal liability for their payment. Therefore, we could not find that respondent's conduct in missing the statute of limitation amounted to gross neglect. Similarly, we did not find that respondent's delay in wrapping up the case constituted lack of diligence, inasmuch as there is some merit to respondent's argument that he purposely slowed down the resolution of the matter to benefit his client. Indeed, as found by the DEC, Semmler did benefit from respondent's delay.

We also agree with the DEC's finding that there is no clear and convincing evidence that respondent's fee was unreasonable, in violation of RPC 1.5, and that there are no facts to support a finding of a violation of RPC 5.5(a) (unauthorized practice of law).

With respect to the charge of a violation of RPC 1.15 (c), the DEC believed that, by taking fees from the preference settlement, respondent failed to safeguard Semmler's property. The DEC believed so for two reasons. First, the retainer agreement provided that respondent would bill Semmler for any fees in excess of the amount of the retainer. Second, and more importantly, respondent took his fee without the prior approval of the bankruptcy court. District of New Jersey, Local Bankruptcy Rule 2016-1.

In this regard, respondent argued that the requirement of prior approval of fees was a "ministerial" function of the court. However, the requirement that the fees be approved by the court is intended to prevent, in respondent's own words, "overreaching" by attorneys. This is hardly a ministerial function. It is unquestionable, and we so found that, although respondent was entitled to the fees, he took them without his client or the court's prior approval, in violation of RPC 1.15 (c).

With regard to the allegation of a violation of RPC 1.4 (a), there is ample evidence that respondent failed to keep Semmler informed about events in the case. Semmler testified that, for months at a time, he wrote to respondent, pleading for information about the case and for a resolution to the matter. Although at the DEC hearing respondent generally asserted that he always kept Semmler informed about the case, he offered no evidence in this

regard. Moreover, the DEC found Semmler to be a credible witness. Therefore, we found a violation of RPC 1.4 (a).

Respondent did not contest that he had failed to cooperate with the DEC in the investigation of these matters, in violation of RPC 8.1 (b). He only offered, in mitigation, that his father was diagnosed with stomach cancer in the Spring of 1999, at a time when respondent was working fifty to sixty hours per week. According to respondent, he spent all of his spare time with his father, at the hospital, or with his mother, at her home, until his father passed away in February 2000. We considered the foregoing by way of mitigation. However, respondent's disciplinary record is an aggravating factor that must also be taken into account. He received an admonition in November 1999 and we recently voted to impose three-month suspension in two default matters.

One more point needs to be mentioned. The complaint did not charge respondent with a violation of RPC 8.4 (c) for his failure to disclose to the court that he had already disbursed to himself his full $10,000 fee by the time that he made his fee application. Although under In re Logan, 70 N.J. 222, 232 (1976), the complaint be deemed amended to conform to the proofs where appropriate, here, the issue was not litigated below. Under these circumstances, due process considerations precluded a finding that respondent made a misrepresentation to the court.

With regard to discipline, where failure to safeguard client funds is found alongside other misconduct, such as failure to communicate and lack of diligence, generally either an admonition or a reprimand is appropriate. See, e.g., In the Matter of William F. Aranguren, (June 30, 1997) (admonition imposed where the attorney failed to act diligently and to communicate with a client in a litigated matter and who, in a separate case, failed to promptly pay funds that were due to a client) and In re Holland, 164 N.J. 246 (2000) (reprimand imposed where the attorney violated a judge's order by improperly withdrawing attorney's fees from her trust account when the order directed the attorney to "hold the remaining attorney's fees...in (the attorney's) trust account pending either agreement between (the attorney and her adversary) or further order of this court,"; the attorney also failed to maintain proper trust and business account records as required by R. 1:21-6).

We unanimously determined to impose a reprimand based on respondent's prior disciplinary history and his failure to cooperate with ethics authorities in these matters.

We also determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Dated: 8/06/01

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Martin C. Latinsky
Docket No. DRB 00-388

Argued: March 15, 2001

Decided: August 6, 2001

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson			X				
Boylan			X				
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy			X				
Schwartz			X				
Wissinger			X				
Total:			9				

Robyn M. Hill 10/10/01
Robyn M. Hill
Chief Counsel