SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-040

IN THE MATTER OF

HOWARD S. DIAMOND

AN ATTORNEY AT LAW

Decision

Argued: April 18, 2002

Decided: June 20, 2002

Stuart M. Lederman appeared on behalf of the District X Ethics Committee.

Albert Jeffers appeared on behalf of respondent.

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 X Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), mistakenly cited in the complaint as RPC 1:9, and RPC 1.5(b) (failure to communicate basis of the fee in writing).

Respondent was admitted to the New Jersey bar in 1985. He maintains a law office in Randolph, New Jersey. In 2002, he received an admonition for failure to communicate with

the executrix of an estate, in violation of RPC 1.4(a). In the Matter of Howard S. Diamond, Docket No. DRB 01-420 (February 8, 2002).

Andrew Governale and Frank Solimando, Jr. were partners in a number of businesses, including G & S Trucking Enterprises, Inc., DC Bulk Transport, Inc. and RFAR, Inc., d/b/a Chubby's. Renee Orrico, Governale's daughter, was a paralegal in respondent's law firm and worked primarily for him. In the past, respondent had provided free legal services to Orrico and members of her family.

In October 1999, Governale and Solimando met with respondent in connection with a lawsuit filed against them by Wells Fargo Equipment Finance, Inc. ("Wells Fargo"). Governale and Solimando had borrowed funds from Wells Fargo to purchase equipment in connection with a tire recycling business. They were guarantors on the note and later defaulted on it. Specifically, they were unable to generate income from the business as a direct result of certain misrepresentations made by the individual from whom they leased the property for the business.

According to Governale, he and Solimando initially made payments on the note. When they were no longer able to do so, Governale communicated directly with Wells Fargo's attorneys in an attempt to find investors for the business. Eventually, however, Wells Fargo sued Governale, Solimando and the company.

Respondent agreed to represent Governale and Solimando in connection with the Wells Fargo litigation. Although he had not represented either one of them or any of their businesses before, he did not provide them with a retainer agreement. Because of respondent's relationship with Orricio and in anticipation of her help in the case, he told Governale and Solimando that they would be charged a reduced fee.

After their initial meeting with respondent, neither Governale nor Solimando had further contact with respondent. Any information that Governale received about the matter came from his daughter. There was never any dispute that they owed Wells Fargo money. They, however, hoped to obtain investors in the business or to sell it and pay off the loan.

Respondent claimed that Governale and Solimando had been "sitting" on the complaint. Therefore, by the time they met with him, it was necessary to obtain a stipulation to extend the time to answer, even though, on that date, the time had not yet expired.

Respondent had Hope Tuber, his associate, speak with Wells Fargo's attorney, who agreed to an extension, on the condition that the defendants waive any jurisdictional issues, which they did. Thereafter, Tuber prepared the stipulation. It is not clear from the record, however, whether a signed stipulation was ever returned. In any event, respondent did not file an answer.

Tuber testified that she was the individual who took the calls from Wells Fargo's attorneys, either inquiring about the status of the matter or attempting to settle it. According to Tuber, she told the attorneys that she was not handling the case and that she would relay their messages to respondent. When respondent did not return Wells Fargo's attorneys' telephone calls, they threatened to take action to protect their client. Eventually, Wells Fargo obtained default judgments against the defendants and levied on their personal and business accounts, including Orrico's personal bank account. Apparently, the motion to enter a default was never served on the defendants, who became aware of the default only after the levies.

Respondent's firm then filed a motion to vacate the default, the default judgments and the bank levies. Although the court vacated the default judgment, it did not lift the levies on the accounts, with the exception of Orrico's personal account.

Christopher Deninger, one of Wells Fargo's attorneys, testified that, after the default was entered, he tried unsuccessfully to settle the matter with respondent's firm. Eventually, another firm took over the representation from respondent, filed an answer and settled the matter. Deninger never spoke to respondent.

According to respondent, Governale and Solimando were either trying to find investors for their enterprise or sell it. Therefore, they were trying to "buy time" with the bank. Respondent stated that they did not want him to file an answer in the case because of the costs involved; they just wanted him to delay the matter as long as possible.

Contrary to Tuber's and Deninger's testimony, respondent claimed that he spoke to Wells Fargo's attorneys about three times between October 1999 and May 2000. Respondent testified that, after the new attorney took over the case, the matter settled for less than was sought. He speculated that, therefore, Governale and Solimando's "strategy did, in fact, pay off." They got "their feet back on the ground" and were able to "pay off the bank" in a lump sum.

Respondent asserted that, because of his prior relationship with Orrico's family, he believed that a written fee agreement was unnecessary.

During the course of the Wells Fargo matter, Governale and Solimando also met with respondent in connection with another case, the Pappas matter. Although respondent received a $1,500 retainer in that case, he did not provide his clients with a written retainer agreement.

* * *

The DEC determined that respondent's failure to ensure that the stipulation extending time to answer the complaint was filed and his failure to file an answer —causing a default judgment and subsequent levies — amounted to gross negligence, in violation of RPC 1.1(a). The DEC also found that respondent's failure to communicate his fee, in writing, in both the Wells Fargo and the Pappas matters, was a violation of RPC 1.5(b). The DEC recommended a reprimand.

* * *

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

It is undisputed that respondent did not provide his clients with retainer agreements in either the Wells Fargo or the Pappas matter. RPC 1.5(b) states that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation." Respondent's claim that a written retainer was unnecessary because of his prior relationship with Orrico is meritless. Respondent never represented Governale, Solimando or any of their businesses for a fee, prior to the Wells Fargo matter. Any legal work previously performed for Orrico's family was free of charge. Therefore, Governale and Solimando could not have known the basis or rate of respondent's fee. Respondent's failure to provide them with a written retainer agreement violated RPC 1.5(b).

This case underscores the need for retainer agreements — not only to set out the amount of the fee, but also to memorialize the scope of the representation. Respondent claimed that his clients did not want to incur legal fees and that their strategy was "to put things off" to allow them to either find investors or sell the business. Respondent stated that the strategy worked because the case settled for less than what was sought by Wells Fargo. Respondent's assertions would have been more credible if his clients had not retained new counsel, thereby exhibiting their dissatisfaction with his services. Even if the clients had not wanted to spend money to file an answer, they clearly could not have anticipated, or wanted, a default judgment against them or a levy not only on their personal and business accounts, but also on Orrico's account. Respondent's inaction, coupled with his failure to correspond with Wells Fargo's attorneys, rose to the level of gross negligence.

In similar situations, admonitions have been imposed. See, e.g., In the Matter of Larry J. McClure, Docket No. DRB 98-430 (February 22, 1999) (the attorney's conduct included gross negligence, lack of diligence, failure to communicate with client and failure to prepare a written fee agreement in one matter; in a second case, the attorney exhibited lack of diligence, failure to communicate with client and failure to cooperate with disciplinary authorities); In the Matter of Peter F. Vogel, Docket No. DRB 98-190 (September 24, 1998) (gross neglect, lack of diligence, failure to communicate with client and failure to prepare a written fee agreement; attorney did not submit a final accounting in the New York conservatorship action for more than three and one-half years); and In the Matter of Diane K. Murray, Docket No. DRB 97-225 (October 6, 1997) (lack of diligence, failure to communicate with client and failure to provide written fee agreement).

An admonition might have been proper here, had it not been for respondent's prior encounter with the disciplinary system. We, therefore, unanimously determined to impose a reprimand. One member recused himself.

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

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Howard S. Diamond
Docket No. DRB 02-040

Argued: April 18, 2002

Decided: June 20, 2002

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson			X				
Maudsley			X				
Boylan			X				
Brody			X				
Lolla			X				
O'Shaughnessy			X				
Pashman			X				
Schwartz			X				
Wissinger						X	
Total:			8			1	

Robyn M. Hill 6/28/02
Robyn M. Hill
Chief Counsel