SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-386

IN THE MATTER OF

ROBERT S. ELLENPORT

AN ATTORNEY AT LAW

Decision

Argued: November 20, 1996

Decided: January 6, 1997

Seamus Boyle appeared on behalf of the District XII Ethics Committee.

Edward Kalogi appeared on respondent's behalf.

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 XII Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.5(a) (unreasonable fee) and RPC 1.5(c) (improper contingent fee).

Respondent was admitted to the New Jersey bar in 1975. He has no prior history of discipline. There are currently two ethics matters pending against him before the DEC. Those matters allege negligence and improper withholding of settlement funds.

* * *

On April 1, 1991, Estelle Katz was involved in an automobile accident when the motor vehicle she was operating was hit from behind by another automobile. She was a resident of Clark, New Jersey, and was acquainted with respondent, who was a councilman in Clark. Although the record is not clear, respondent was either mayor of Clark or was running for mayor, in addition to being a councilman. Katz and her daughter Sharon were involved in politics in Clark. Sharon Katz was a member of the Board of Trustees of the library. Estelle Katz had occasion to see respondent at political meetings. After some time had elapsed since the accident and Katz' injuries still had not healed, respondent suggested that Katz might need an attorney for possible legal action.

On February 19, 1992,[1] Katz and respondent entered into a retainer agreement providing that respondent would receive a contingent fee of thirty-three and one-third percent of the first $250,000 recovered, in accordance with R. 1:21-7(c). Katz informed respondent that she would like to settle the matter with the insurance carrier without the necessity of a lawsuit. On March 29, 1993, just several days prior to the expiration of the statute of limitations, respondent informed Katz that the insurance carrier had offered the sum of $60,000 in settlement of her claim. Katz authorized respondent to settle the case for that amount. Afterward, according to Katz, respondent called and asked her whether she would "split" the amount in excess of $60,000 on a fifty-fifty basis, in the event respondent were able to obtain a higher settlement. Katz agreed. On March 29, 1993, respondent sent Katz a letter confirming their arrangement to renegotiate the retainer agreement:

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[1] Although the agreement is dated February 19, 1992, it appears to have been signed by Katz on March 17, 1992.

> This will confirm that you have authorized me to settle the case pursuant to the Retainer Agreement signed on March 17, 1992 for receipt of $60,000.00. This will further confirm your agreement that notwithstanding the language of the Agreement, any amount recovered in excess of $60,000.00 will be split 50/50 between you and Robert S. Ellenport, P.A.
>
> If the above meets with your understanding of the terms of the Agreement, kindly affix your signature below.

Katz signed the letter and returned it to respondent.

Respondent obtained a settlement of $63,000. On March 30, 1993, respondent prepared a settlement statement that awarded respondent $19,784.10 (thirty-three and one-third of $60,000 less costs of $647.70) and $1,500 (fifty percent of $3,000), for a total fee of $21,284.10. The settlement statement, which both Katz and respondent signed, contained the following certification:

> We certify that this document contains an accurate record of the settlement received in this case together with the fees, costs and other disbursements.

At the DEC hearing, respondent did not deny Katz' testimony. His explanation for the increased percentage was that he also represented Katz on two other matters, in addition to the personal injury case. According to respondent, Katz discussed with him the preparation of a will and consulted him on estate planning issues, in anticipation of receiving the personal injury settlement. Respondent added that this consultation occurred when Katz visited his office, on March 29, 1993, to discuss settlement of the personal injury case. Respondent went on to say that Katz also asked him to assist her in obtaining payment of her medical bills because, at that time, it was not known whether the medical treatment was related to the automobile accident. Respondent regarded the payment of the medical bills as separate from the personal injury matter.

Respondent estimated that he had spent one and one-half to two hours on the medical bills matter and one-half hour on the estate planning matter. His customary hourly billing rate at that time was $225. Respondent did not have any billing records because a tree had fallen on his attic and destroyed the records.

Respondent explained how he came to renegotiate the retainer agreement with Katz. Toward the end of the negotiation process of the personal injury matter, the insurance carrier indicated that $60,000 was the highest sum it would pay. Respondent had requested $67,000 and then offered to "split the difference" and accept $63,500. At this point, the final amount of the settlement was not known specifically, but respondent knew it would be between $60,000 and $63,500. Respondent testified that, at this point, Katz visited his office without her daughter to discuss the settlement of the case and options about how she could invest the proceeds. Katz did not wish to pay for any will or estate planning services on an hourly or flat fee basis. Respondent claimed that it was Katz' suggestion to split the fee in excess of $60,000:

> That's my recollection is that I said, do you want to pay hourly. She said, no. She said, can you take it out of the, can you raise the contingency. And I said, no, it is limited to a third. She said, well what if we split the difference above the 60 now. And I said, we could do something like that.
> [T129][2]

Respondent attributed Katz' filing of the ethics complaint to political motivation. Although the DEC did not permit him to pursue this area, respondent presented the theory that he and Katz' daughter had a political falling out. He tried to demonstrate that Katz' motive for filing the ethics complaint was related to the political relationship between himself and Katz' daughter.

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[2] T refers to the transcript of the DEC hearing on February 15, 1996.

Maryann Quazza, respondent's secretary, testified that Katz was accompanied by her daughter whenever she came to respondent's office. It was, thus, unusual when Katz arrived alone to discuss her will. Quazza stated that Katz and respondent met to discuss what she would do with her settlement funds. According to Quazza, at the end of the meeting, respondent asked her to give Katz a will questionnaire for Katz to complete and return. However, Katz did not return the questionnaire. Quazza agreed with respondent's testimony that, in addition to representing Katz in the personal injury matter and the drafting of a will, respondent performed legal services for her in connection with the payment of medical bills unrelated to the automobile accident.

When called in rebuttal, Katz vehemently denied that she discussed other legal matters with respondent, or any method of payment for other services. She also denied having visited respondent's office on March 29, 1993. Katz stated that she never discussed a will or estate planning with respondent, that she already had a will prepared that did not have to be changed, and that she never went to respondent's office, unless accompanied by her daughter. Katz also denied that it was her suggestion to raise the percentage recovery on the contingent fee agreement as a means of paying for unrelated legal services.

Prior to the filing of the ethics complaint, Katz filed a request for fee arbitration. As a result of that filing, respondent sent Katz a check for $500.[3]

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[3] Under the terms of the original retainer agreement, respondent would have been entitled to $1,000 of the $3,000 received in excess of $60,000. Under the "renegotiated" agreement, respondent received one-half, or $1,500, of the extra $3,000. Thus, respondent received only an additional $500.

* * *

The DEC found that respondent violated RPC 1.5(a) and 1.5(c). The DEC rejected as not credible respondent's secretary's testimony about the additional legal services allegedly provided by respondent. The DEC was persuaded by the documentary evidence, that is, the settlement statement that was certified as accurate by respondent, in which no mention is made of other services, and the letter dated March 29, 1993, in which respondent renegotiated the retainer agreement.

The DEC recommended that respondent be given a reprimand.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct is clearly and convincingly supported by the evidence. There is no question that respondent charged a fee in excess of the contingent fee permitted by R. 1:21-7(c), that the client agreed to pay the additional fee, and that respondent received the extra $500. The question remaining is the purpose of the additional fee. Respondent's explanation is that he had performed legal services for Katz on two unrelated matters -- payment of medical bills and preparation of a will -- and that it was Katz who suggested paying for those services out of the personal injury settlement proceeds. Katz vigorously denied respondent's version, claiming that she never discussed other matters with respondent and that the idea of increasing the fee from the personal injury settlement was respondent's.

The documentary evidence supports Katz' testimony. The letter that respondent sent to Katz confirming their renegotiation of the retainer agreement does not refer to other legal services performed by respondent. Nor does the settlement statement, in which respondent certified the accuracy of the division of the settlement funds. Respondent testified that his billing records were destroyed when a tree fell on his attic, thereby precluding him from providing any documentation about other legal work performed for Katz.

It can be inferred from the record that respondent, not Katz, suggested renegotiating the retainer agreement. The message that this action sent to Katz and to the public was that respondent did not do his best for Katz when he was entitled to receive only one-third of the settlement. Otherwise stated, the message was that respondent needed the incentive of receiving a fee higher than that permitted by court rules to achieve a better result for his client. However, by merely agreeing to represent Katz, respondent was obligated to do his best. The appearance presented by respondent's conduct diminished the integrity of the profession in the eyes of the public and was capable of contributing to the low regard in which attorneys are held by at least some members of the public.

Although respondent's conduct was improper, this is not a case of fee overreaching. Respondent's conduct, while not to be condoned, does not rise to the level of gouging or charging an outrageously high fee. At the time that respondent suggested an equal division of the settlement in excess of $60,000, he knew the total recovery would be between $60,000 and $63,500. He was, thus, aware that the renegotiated fee would bring him only a small additional amount.

Although respondent returned the $500 to Katz, the restitution was not made until after Katz filed a request for fee arbitration. Restitution, particularly after a complaint is filed with the disciplinary authorities, does not absolve an errant attorney. Respondent also attempted to attribute an ill motive to Katz for filing the ethics grievance. However, whether laudable or not, Katz' motive is of no moment. The fact that an ethics violation resulted from respondent's conduct is the issue, not the client's motive for filing the grievance. It should also be remembered that respondent was in public office at the time he committed the ethics infraction.[4] Attorneys holding public office are held to even higher ethical standards. In re Pepe, 140 N.J. 561, 568 (1995).

After a consideration of the relevant circumstances, the Board unanimously determined to impose an admonition. One member did not participate.

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

Dated: 1/6/97

LEE M. HYMERLING
Chair
Disciplinary Review Board

[4] Although the record is not clear about whether respondent was a councilman running for mayor, or if had already been elected mayor, he clearly was serving in some public capacity.

Supreme Court of New Jersey
Disciplinary Review Board

Voting Sheet

IN THE MATTER OF ROBERT S. ELLENPORT

DOCKET NO. DRB 96-386

HEARING HELD: November 20, 1996

DECIDED: January 6, 1997

	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did Not Participate
HYMERLING			X				
COLE			X				
HUOT			X				
MAUDSLEY			X				
PETERSON							X
SCHWARTZ			X				
THOMPSON			X				
ZAZZALI			X				
LOLLA			X				

Robyn M. Hill 2/18/97
ROBYN M. HILL
CHIEF COUNSEL