SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-457

IN THE MATTER OF

STEVEN M. OLITSKY

AN ATTORNEY AT LAW

Decision

Argued: February 5, 1998

Decided: May 11, 1998

George Mazin appeared on behalf of the District VB Ethics Committee.

Ernest G. Ianetti appeared on behalf of respondent.

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 VB Ethics Committee (DEC). The two formal complaints alleged unethical conduct in connection with five cases.[1]

Respondent was admitted to the New Jersey bar in 1976. On November 22, 1993 he was privately reprimanded for failure to communicate with a client and to prepare a written

[1] Although count VI of one of the formal complaints in this record alleges misconduct in connection with a client named Leslie Hunter (District Docket No. VB-96-10E), the DEC did not hold a hearing in that matter, which is still pending below.

retainer agreement. On November 27, 1996 he received an admonition for failure to prepare and execute a fee retainer agreement and to inform his client that his law firm would not initiate the matter unless full payment of the fee was made. Lastly, in June 1997 respondent was suspended for three months for recordkeeping deficiencies, which included the commingling of personal and client funds in his trust account in order to avoid an IRS levy on his personal funds. After his three-month suspension expired (August 16, 1997), respondent applied for reinstatement to the practice of law. The Court denied his reinstatement until the resolution of all ethics grievances and complaints pending against him.

I. THE THOMAS GEORGE MATTER
District Docket No. VB-93-16E

In July 1982 a judgment in the amount of approximately $7,000 was entered against Thomas George, the grievant in this matter. The judgment-creditor was James Opdyke, the owner of a vehicle struck by George, an auto mechanic, who was test-driving a car entrusted to him for repairs. When George was unable to satisfy the judgment, his driver's license was suspended. George lost his job and was unable to obtain other employment as an auto mechanic because he did not have a driver's license.

In 1990 George paid respondent $600 or $800 to file a bankruptcy petition. George's intent was to have the Opdyke debt discharged so that he could recover his driver's license.

Respondent did not prepare a written fee agreement.

On October 30, 1990 respondent filed a bankruptcy petition in George's behalf, erroneously listing the Division of Motor Vehicles (DMV) as the judgment-creditor. On November 9, 1992 the bankruptcy court entered a final decree releasing George from all dischargeable debts. George was unable, however, to recover his license because the schedule of creditors named the wrong judgment-creditor. According to George, when this fact came to his attention, he promptly notified respondent and asked him to rectify the mistake. George testified that thereafter he called respondent's office every day for four months, always unable to reach respondent. George complained that, five years later, respondent still had not taken action to amend the schedule of creditors. As a result, George stated, he never got back his license.

Respondent offered a different version of the events, both as to George's cooperation and as to the steps taken to file an amended schedule of creditors. According to respondent, because George had never given him a copy of the Opdyke judgment, respondent had been forced to list DMV as the judgment-creditor. In the spring of 1991, he had obtained a copy of the judgment listing Opdyke's name and address. He had then filed an amended schedule of creditors with Opdyke's name on May 20, 1991. Inexplicably, another document, titled "Amended Schedule F -Creditors Holding Unsecured Nonpriority Claims" — filed on July 14, 1992, more than one year after the purported filing date of the schedule with Opdyke's name — still listed DMV as the judgment-creditor.

With respect to George's alleged attempts to contact respondent daily for four months, respondent countered that, if George had, in fact, been so persistent, respondent "would have done something about it." According to respondent, he was not aware, until the filing of the grievance, that George's license had not been returned to him.

At the conclusion of the ethics hearing, the DEC found that respondent violated RPC 1.4(a), when he failed to keep George reasonably informed about the progress of the matter for a period of at least four months, and RPC 1.5(b), when he failed to set forth the basis of the fee arrangement in writing. The DEC made no mention of the allegations that respondent's conduct constituted lack of diligence and gross neglect, in violation of RPC 1.3 and RPC 1.1(a), respectively. Presumably, the DEC found that those charges had not been sustained.

II. THE VANESSA COUSER MATTER
District Docket No. VB-96-05E

Vanessa Couser retained respondent in 1991 to file a bankruptcy petition. At their initial meeting she gave him a complete list of creditors. Respondent quoted a $600 fee, which Couser agreed to pay in weekly installments. Respondent did not prepare a written retainer agreement. Respondent told Couser that he would file the petition upon full payment of the fee.

According to Couser, she paid the $600 fee over a period of six months. Thereafter she never saw respondent again; she called respondent's office "quite a few times," but respondent was never there. Couser assumed, however, that the matter was proceeding apace and that respondent had filed the petition. Periodically, Couser would be contacted by her creditors and would refer them to respondent.

Four years later, in 1995, Couser received a notice of motion for a wage execution, filed by Sears, Roebuck & Company. Couser testified about her surprise reaction, as she believed that respondent was taking care of the bankruptcy matter. She called respondent after receiving that notice. She was able to reach only his secretary, who assured her that respondent would contact her. He did not, however. Unable to discuss the case with respondent, Couser filed a grievance with the DEC.

Couser testified that, after she received the notice of motion for a wage execution, she personally made arrangements with her creditors to pay her debts in installments. To that end, she was forced to obtain a second job. As of the date of the DEC hearing, Couser had satisfied nearly all of her financial obligations.

For his part, respondent denied any wrongdoing. He conceded that he had never filed a bankruptcy petition in Couser's behalf. He claimed, however, that Couser had taken approximately two years to pay the $600 fee and that she had never paid the required $120 filing fee. In fact, respondent added, he had drafted the petition and was awaiting only the payment of the $120 to file it. The unsigned original petition was made part of this record.

In his defense, respondent contended that Couser never gave him the Sears complaint that ultimately led to the wage execution. Indeed, Couser did not remember being served with the complaint and testified that, if she was served with a complaint, she most likely called the attorney for Sears and gave the attorney respondent's name and telephone number. As to this, respondent testified to his office procedure, which required that, if a bankruptcy petition had not been filed yet, his secretary would inform the inquirer that the petition was pending, but not yet filed. Respondent stated that those phone calls would never "get to him."

Respondent was asked by the DEC if it was his practice to send a letter to his clients informing them that their petition had not yet been filed because his fee had not been fully paid. Respondent replied that, although this is his practice now, it was not then the case.

After Couser filed the grievance against respondent, he made several appointments with her to sign the petition. She never appeared at his office. Couser explained that it made no sense to sign a petition at that time because she was already the subject of a wage execution.

The DEC found that respondent's conduct constituted gross negligence, lack of diligence, failure to communicate with a client and failure to prepare a written retainer agreement, in violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 1.5(b), respectively. Although the DEC did not spell out the basis for its findings, it is clear that the DEC believed Couser, instead of respondent. The DEC must have found credible Couser's testimony that

respondent had asked for $600 only, instead of $720. Accordingly, the DEC concluded that respondent's failure to file the petition amounted to lack of diligence and gross neglect.

III. THE EDWIN HAMLET MATTER
District Docket No. VB-95-012E

This count of the complaint charged that respondent violated RPC 1.1(a), RPC 1.1(b) and RPC 1.3 when, in the course of a bankruptcy proceeding, he failed to include the client's settlement from a personal injury suit as an allowable exemption from distribution to creditors or to amend the petition to include the settlement as an allowable exemption.

In or about 1990 Edwin Hamlet retained respondent to file a bankruptcy petition in his behalf. Hamlet paid the $500 fee in a "couple of weeks." Hamlet understood that respondent would be unable to complete the work until the fee was fully paid. He could not recall whether respondent had prepared a written retainer agreement.

The bankruptcy petition was filed three years later, in 1993. Although there is testimony in the record about this delay, the complaint did not charge respondent with lack of diligence or gross neglect in this connection.

There is no dispute that respondent found out about Hamlet's personal injury suit and its settlement only at what is commonly known as a 341(a) hearing, which took place in December 1993, after the petition had been filed. There is also no dispute that, when the existence of the settlement came to light at that hearing, Hamlet asked respondent to amend

the petition to list the proceeds as an allowable exemption. Hamlet testified that, when respondent asked him for an additional $500 to file the amendment, respondent allowed him to pay that sum at the conclusion of the bankruptcy proceeding. Respondent, in turn, vigorously denied agreeing to be paid at the end of the case. According to respondent, he had requested the money in advance. Respondent testified that, under the bankruptcy code, he was entitled to a fee to file the amendment, particularly because the amendment had nothing to do with a mistake on his part. Respondent added that his initial fee of $500 had been more than reasonable: he was only retained to file a bankruptcy petition for one individual with a $20,000 debt, but ultimately had to file a petition for both Hamlet and for his new wife, with a total debt of $44,000. Accordingly, respondent reasoned, to request an additional fee for the amendment was not unreasonable. Respondent went on to testify that, because Hamlet never paid him the additional $500, he never filed the amendment.

On November 22, 1994, at Hamlet's request, respondent sent copies of the file to Hamlet's new attorney to whom, incidentally, Hamlet paid $900 to file the amendment.

Ultimately, there was no economic harm to Hamlet, who received $15,000 out of the $18,500 settlement proceeds.

The DEC found that respondent refused to amend the petition unless Hamlet paid him an additional $500 fee. The DEC concluded that respondent was under a duty to complete the matter through final discharge and that his conduct in not filing the amendment constituted lack of diligence, in violation of RPC 1.3. For some unexplained reason, the

DEC also found that respondent failed to communicate with his client, in violation of RPC 1.4(a), and that he failed to prepare a written retainer agreement, in violation of RPC 1.5(b). As noted above, however, the only allegation in the complaint is that respondent failed to file the amended petition.

IV. ANTHONY HOWARD MATTER
District Docket No. VB-95-074E

Anthony Howard retained respondent in 1992, at which time he paid him a $400 fee. Respondent did not prepare a written retainer agreement. Howard had been paying child support for Damon Harrison for twelve years, when he found out that he was not the child's biological father. Howard hired respondent to terminate child support payments, which were being made through the probation department.

Howard testified that, for a period of approximately two years, he stopped by respondent's office at least once a month to find out the status of the matter. Invariably respondent was not there. Frustrated by respondent's inaction, Howard filed an ethics grievance against him. After the filing of the grievance, he met with respondent to attempt a resolution of the matter. At that time, respondent refunded $300 of the $400 fee.

At the DEC hearing there was much testimony about the scope of respondent's representation. Howard testified that he hired respondent to take care of the Harrison matter only. Respondent, in turn, testified that Howard had also engaged him to resolve a second

child support matter involving another of Howard's sons, Anthony Campbell.

Regardless of whether respondent was retained to handle one or two matters, it is unquestionable that he did not complete the Harrison child support matter. Although respondent contended that he had personally met with Howard on numerous occasions, he admitted that he did not file a motion to terminate the child support payments. Respondent's explanation was that he was attempting first to resolve the matter directly with the probation department, in order to avoid the expense of filing a motion. Respondent testified that his goal was to obtain a rehearing with the probation department, as he had done in other matters; to that end, he had sent a letter to the probation department on June 12, 1993, asking for a rehearing. Thereafter, he had followed up with telephone calls, which had proved fruitless. According to respondent, even though he had been told several times that a caseworker would get in touch with him, he had never been contacted. Respondent added that, when he finally determined that it was time to file a motion, Howard terminated his representation.

The DEC found that, for two years, respondent failed to take any action in Howard's behalf, with the exception of making a few phone calls to the probation department. Accordingly, the DEC concluded that respondent was guilty of lack of diligence, in violation of RPC 1.3, and gross neglect, in violation of RPC 1.1(a). The DEC also determined that respondent failed to keep Howard reasonably informed about the status of the matter, in violation of RPC 1.4(a), and failed to set forth the basis of the fee arrangement in writing, in

violation of RPC 1.5(b).

Lastly, the DEC found that respondent's conduct in all four matters constituted a pattern of neglect, in violation of RPC 1.1(b).

* * *

Following a de novo review of the record, the Board was satisfied that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence.

In the George matter, the DEC found that respondent did not comply with George's requests for information made over a period of four months, in violation of RPC 1.4(a). In so finding, the DEC had to conclude that George's testimony was more credible than respondent's. Accordingly, the Board deferred to the DEC's finding, as the DEC had the opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Board also agreed with the DEC's finding that respondent violated RPC 1.5(b) when he failed to prepare and execute a written retainer agreement with George.

The DEC did not resolve the question of whether respondent ever filed an amended schedule of creditors reflecting the Opdyke judgment. George testified that, early in the representation, he had complied with respondent's request for the name and address of the judgment-creditor, Opdyke. Respondent, in turn, claimed that he had listed the DMV as the

judgment-creditor because George had not given him any information about Opdyke. As noted earlier, all bankruptcy documents that are part of the record show the DMV as the judgment-creditor, instead of Opdyke. At the DEC hearing, however, respondent produced an amended schedule registering Opdyke as a judgment-creditor. That document, "Schedule A-3 Creditors Having Unsecured Claims Without Priority," has a bankruptcy court stamp date of May 20, 1991. In light of this circumstance, there is not sufficient evidence in the record to support the conclusion that respondent never filed an amended schedule of creditors. It is possible to raise an inference that the bankruptcy court mistakenly continued to list DMV as the judgment-creditor. Accordingly, the Board determined to dismiss the allegations that respondent exhibited gross neglect and lack of diligence in this matter. RPC 1.1(a), RPC 1.3.

The Board found, however, clear and convincing evidence that respondent failed to communicate with George, in violation of RPC 1.4(a). George testified that he unsuccessfully attempted to reach respondent daily for four months to determine if respondent had filed an amended schedule. Respondent, for his part, was able to offer only that, if George had contacted him so frequently, he would have returned George's calls. In view of the foregoing, the Board agreed with the DEC that the evidence fully supported a finding that respondent failed to keep George informed about the progress of his case, in violation of RPC 1.4(a). The Board also found that respondent did not prepare a written retainer agreement, in violation of RPC 1.5(b).

In the Couser matter, the evidence is not crystal clear that respondent quoted only a $600 legal fee to Couser and that, having received full payment, he was grossly negligent in not filing the bankruptcy petition. While Couser did not dispute being told that the petition would be filed only after she paid the fee in full, she denied that respondent had asked her for the payment of a $120 filing fee as well. Respondent, in turn, maintained that he had made it very clear to Couser that she had to pay $720, instead of $600. Since there is no other evidence corroborating either Couser's or respondent's testimony, credibility becomes paramount. The DEC believed Couser and found respondent guilty of gross neglect. The documents introduced into evidence, however, convey the impression that respondent was not totally indifferent to or neglectful of Couser's interests. For instance, he did prepare a petition in 1993 or 1994, which allegedly would have been filed after full payment of the fee. There is nothing improper about telling a client that the fee must be paid in full before any work is performed, particularly in bankruptcy cases. If respondent's testimony can be believed, after Couser paid the $600 fee, he prepared the petition and was only awaiting the receipt of the $120 filing fee to file the petition with the court; Couser, however, never gave him the $120. In light of conflicting testimony on this issue, the Board was unable to find that respondent had quoted only the $600 legal fee and that he neglected to file the petition. Accordingly, the Board dismissed the charges of violations of RPC 1.1(a) and RPC 1.3.

The evidence is sufficient, however, to conclude that respondent did not keep Couser apprised of the status of her case, namely, that a petition had not been filed because the $120

filing fee had not been paid. Respondent's conduct in this context violated RPC 1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation). Respondent also violated RPC 1.5(b) when he did not prepare a written retainer agreement for Couser's signature.

In Hamlet, the sole issue is whether respondent was obligated to file the amendment at no extra charge. Nothing in the record establishes that respondent had such a duty. In fact, it appears unfair to burden respondent with filing an amended petition without charge, when it was undisputed that the circumstances necessitating the amendment were unknown to respondent until the 341(a) hearing. The Board, thus, found no violation of RPC 1.3.

Lastly, in Howard, the proofs are clear and convincing that respondent did very little to advance Howard's interests. Although respondent wrote a letter to the probation department asking for a rehearing, for a period of two years he did little else, relying on the probation department's assurance that a caseworker would get in touch with him. Instead, respondent should have filed a motion to terminate child support payments, knowing that, for a period of twelve years, his client had been paying child support for a child who apparently was not his. The Board agreed with the DEC's finding that respondent lacked diligence [RPC 1.3], exhibited gross neglect [RPC 1.1(a)], failed to communicate with his client [RPC 1.4(a)], and failed to prepare a written retainer agreement [RPC 1.5(b)] in Howard.

* * *

In mitigation, respondent advanced that, because he services a less affluent clientele who would otherwise go without representation and because he charges his clients lower fees, he is financially unable to implement a good office system to keep track of the cases. He also maintained that, because he concentrates in the areas of criminal and bankruptcy laws, he is constantly in court and hence not always available to his clients during the day. Respondent added that, routinely, on his return to the office in the late afternoon, he receives approximately twenty to thirty telephone messages and that he tries to take care of the most pressing matters. Respondent recognized that, inevitably, such practice generates a message backlog that cannot be addressed on a daily basis.

Respondent testified that, with the help of a psychiatrist with whom he has been consulting for three years, he has set up a program to handle things properly. He stated that he obtained a car phone and a beeper so that his secretary and his clients will have prompt access to him.

It is undeniable that respondent's office practices were sloppy. He acknowledged that, in the past, he essentially relied on contact from his clients to spur some action on his part. Supposedly, respondent has improved his office system to provide better representation and accessibility to his clients. Nevertheless, his conduct in these matters was unethical and, in some cases, caused financial injury to his clients.

In George, respondent failed to communicate with his client and to prepare a written retainer agreement; in Couser, respondent did not send his client a letter informing her that he still had not filed the bankruptcy petition and did not have a written fee agreement with the client; and in Howard, respondent exhibited lack of diligence, gross neglect and failure to communicate with his client; he also did not set forth the basis of his fee in writing.

Cases dealing with the sort of unethical conduct displayed by respondent have resulted in a three-month suspension when the attorney, as this respondent, had a prior ethics record. See, e.g., In re Brantley, 139 N.J. 465 (1995) (lack of diligence in two matters, failure to communicate in one of those matters, failure to cooperate with the DEC in three matters and pattern of neglect when all matters were considered; prior one-year suspension and three private reprimands); In re Martin, 122 N.J. 198 (1991) (misconduct in four matters, including failure to pursue an appeal, failure to communicate with clients in three matters and failure to cooperate with the DEC investigation; prior six-month suspension); In re Albert, 120 N.J. 698 (1990) (lack of diligence and failure to communicate in two matters; in one matter, the attorney also withdrew fees from an escrow account without the client's permission; failure to cooperate with DEC considered an aggravating factor; prior private reprimand).

Here, too, the Board unanimously concluded that a consecutive three-month suspension was appropriate. The Board, therefore, voted to make the three-month suspension retroactive to the date of the expiration of respondent's prior three-month suspension, August 16, 1997.

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

Dated: 5/11/98

LEE M. HYMERLING
Chair
Disciplinary Review Board