SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-041
District Docket No. VB-2006-017E

IN THE MATTER OF	
STEPHEN H. SKOLLER	
AN ATTORNEY AT LAW	

Decision

Argued: April 21, 2011

Decided: July 28, 2011

Denice Gilchrist appeared on behalf of the District VB Ethics Committee.

Respondent waived appearance for oral argument.

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 censure filed by the District VB Ethics Committee (DEC). We agree with the DEC's recommendations that a censure is the appropriate form of discipline for respondent's misconduct.

This case arose out of respondent's failure to account for a $25,000 retainer given to him by his former client at the start of their attorney-client relationship. Respondent was charged with having violated RPC 1.4(b) as a result of his failure to reply to his client's many requests, after the termination of the representation, for an itemized bill for services rendered during the representation. Respondent also was charged with having violated RPC 1.5(a) (charging an unreasonable fee) as a result of his failure to reply to his client's request for an itemized bill and to refund any unused portion of the client's $25,000 retainer. Further, he was charged with failure to refund an unearned retainer, a violation of RPC 1.16(d). Finally, respondent was charged with having committed recordkeeping violations (RPC 1.15(d)), based on his failure to produce and maintain the client files and time records required by R. 1:21-6.

Respondent was admitted to the New Jersey bar in 1983. At the relevant times, he maintained an office for the practice of law in Maplewood.

In 2006, respondent received a two-year suspension for violations of RPC 1.15(b) (failure to deliver client funds promptly), RPC 3.1 (assertion of frivolous claims), RPC 8.4(c)

(conduct involving dishonesty, fraud, deceit and misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice). In re Skoller, 186 N.J. 261 (2006). In that matter, during the course of representing his mother in the sale of her South Orange home, respondent misrepresented to the buyers' counsel that a Florida judgment, which had been domesticated against that home, had been vacated. Respondent also presented an affidavit of title, signed by his mother, in which she stated that the judgment had been vacated. When the parties learned that the judgment had not been vacated, respondent refused to consent to the release of escrow monies that had been set aside, pending confirmation that the Florida judgment had been vacated.

Respondent has not sought reinstatement. He claims to have been retired from the practice of law since 2005.

The hearing in this matter took place on December 2, 2010, at which time the DEC received the testimony of respondent and his former client, Carlos Rodriguez.

Rodriguez testified that he and forty others were arrested, on December 1, 2004, for alleged mob-related drug and gambling activities. He was charged with second degree racketeering,

third degree gambling, third degree promotion of gambling, and possession of cocaine.

Rodriguez sought legal representation from respondent, who, he stated, was "highly recommended" by the family business's lawyer, Robert E. Martini. After Rodriguez's arraignment, on December 2, 2004, when respondent appeared on his behalf, Rodriguez and respondent met at a diner, where they agreed upon the terms of the representation. When respondent undertook the representation, he told Rodriguez that the case would probably not go to court for a year because "it was so large."

Rodriguez identified a December 2, 2004 letter to him from respondent, which, in essence, was the retainer agreement between them. The letter stated, in pertinent part:

> As we discussed, I will require payment of a $25,000 retainer at the commencement of my representation in this case. This retainer is not an estimate of the fees that might be incurred in my representation of you in this matter but is merely a deposit against the fees that will be incurred at the outset of the matter. I will bill against this retainer for any fees incurred and will send you monthly advice of the balance of the retainer. I ask that all bills beyond the retainer amount be paid within thirty days of receipt.

Consistent with the letter, Rodriguez understood that respondent "was holding this 25,000 and it would be deducted as the case went along for whatever work he had done for me." There was no discussion about the retainer fee's being non-refundable.

Despite Rodriguez's understanding that respondent would provide him with monthly or "somewhat regular" billings, he never received a single billing statement. Rodriguez estimated that, between the date of respondent's retention, in December 2004, and mid-summer 2005, he spoke to respondent seven to ten times. When Rodriguez learned that others were "going to court," he tried to "reach out" to respondent, but his office phone was disconnected. Rodriguez also was unsuccessful in reaching respondent at his home until, finally, respondent's wife told him that respondent was in Italy. At that point, Rodriguez determined to get a different lawyer.[1]

Rodriguez replaced respondent with attorney Paul B. Brickfield. On October 3, 2005, Brickfield wrote to respondent,

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[1] These facts raise the specter of client abandonment. However, as seen below, Rodriguez was able to talk to respondent in September.

informed him that Rodriguez had retained him, and enclosed a letter from Rodriguez terminating respondent's representation. Rodriguez's letter also requested "an itemized bill for services rendered to date as well" and the return of "the unused balance of the $25,000 retainer." Respondent did not send a bill to Rodriguez.

On October 31, 2005, respondent wrote to Brickfield, stating that he would "immediately forward the itemized bill for [his] services in this matter." Respondent also updated Brickfield on the status of the case against Rodriguez. At the ethics hearing, respondent conceded that he did not send a bill to Rodriguez.

On December 15, 2005, Martini, the Rodriguez family business's lawyer who had recommended respondent to Rodriguez, wrote to respondent and requested that he comply with Rodriguez's and Brickfield's requests for a final, itemized bill and that he refund the unused retainer.

By letter dated February 13, 2006, respondent told Brickfield that he would like to talk to him "right away" about the dispute over respondent's charges, during the time that he represented Rodriguez. Respondent asked Brickfield to call him

"so that [they could] resolve any misunderstanding." Respondent testified that Brickfield never complied with his request.

On the next day, February 14, 2006, Brickfield wrote to respondent and requested that he provide a statement of services and return the retainer balance "immediately." Respondent testified that he did not comply with the request and never spoke to Brickfield. Instead, he had "several conversations" with Rodriguez, who "expressed no question . . . at least about the time that [respondent] had put in representing him."

On March 22, 2006, upon the advice of Martini, Rodriguez filed a $25,000 claim with the New Jersey Lawyers' Fund for Client Protection (CPF), as respondent still had not provided a bill or refunded any unused portion of the retainer. On November 17, 2006, the CPF paid Rodriguez $21,500. As of March 4, 2011, respondent had not made restitution to the CPF.

As of the date of Rodgriguez's testimony below, he still had not received an itemized bill or letter from respondent.

On cross-examination, Rodriguez testified about the services that respondent had provided to him during the representation. Specifically, respondent represented Rodriguez at his arraignment, on December 2, 2004, when Rodriguez appeared with the forty others and their attorneys. At that time,

respondent also talked to the prosecuting attorneys and the investigators and learned details about the investigation, which he shared with Rodriguez. The arraignment lasted no more than three hours, according to Rodriguez. Afterward, respondent and Rodriguez met in the diner across the street from the courthouse and discussed the matter.

Thereafter, Rodriguez and respondent discussed what had transpired during his conversations and meetings with the prosecuting attorneys and their investigators. Rodriguez acknowledged that his goal was to be extracted from the case "in a positive way," so that he could move on with his life and pursue a career in law enforcement.

Rodriguez and respondent met with the prosecutor's office once, where they were offered a deal about Rodriguez's becoming a cooperating witness in an unrelated drug investigation, in order to attain some leniency in his own gambling and narcotics matter. During that meeting, Rodriguez accepted the offer and even made a phone call for the prosecutor.

Later, Rodriguez told respondent that he no longer wanted to cooperate, but, rather, go to trial. Thereafter, they had conversations about respondent's work in reviewing transcripts

of recorded telephone conversations and other discovery regarding the investigation, including surveillance.

Rodgriguez agreed that he and respondent had conversations on a number of topics. Rodriguez estimated that his conversations and meetings with respondent totaled no more than eight-to-ten hours. Indeed, between February and September 2005, Rodriguez did not have a single telephone conversation with respondent, which was of great concern to him, as the defendants' cases were moving forward, either to trial or dismissal. It was not until the end of September that Rodriguez was able to track down respondent and talk to him.

At the pre-indictment conference, in December 2005, when Brickfield appeared on Rodriguez's behalf, he was granted permission to enter the Pre-Trial Intervention Program.

Rodriguez never received time billings from respondent as to the amount of time spent with Rodriguez. He did not receive copies of any letters or documents prepared by respondent on his behalf. During the summer of 2005, respondent's office number was disconnected and letters that he had sent certified mail to respondent were returned. The post office told Rodriguez that the addressee was no longer at that location.

Respondent, who proceeded pro se at the ethics hearing, conceded that he did not send "time bill sheets" or billings to Rodriguez. In fact, he did not even have time billing records for the Rodriguez matter. Nevertheless, he was able to provide details about the work that he had undertaken on Rodriguez's behalf, during the course of their attorney-client relationship.

Respondent testified that, on the evening of December 1, 2004, Rodriguez's parents had contacted him about representing their son, who had just been arrested and was in jail. For the remainder of the evening and the next day, respondent did the following on Rodriguez's behalf:

- Telephone conversation with Rodriguez's parents to gather background information;
- Telephone conversation with the Bergen County "lock up" to arrange for a bail hearing;
- An hours-long telephone conversation with Rodriguez's parents about what he had learned, including that Rodriguez had been bailed out sometime after midnight and that arraignment would be in the morning;
- Four-hour appearance at the courthouse for arraignment, where he met Rodriguez and his parents;
- Conversation with the chief prosecuting attorney, who told respondent that the prosecutor's office had tape-recorded conversations of Rodriguez engaged in illegal gambling activities;
- Conversation with Rodriguez — during and after the arraignment — about the State's case against him;

- Another conversation with Rodriguez's parents about the specifics of the case against him and the $25,000 retainer; and

- Initial legal research on the matter.

Respondent estimated that he had spent twenty hours on these matters.

On the following Monday, respondent met with an individual named "Ralph" at the prosecutor's office. He then traveled "way out to Bergen County" to meet with several investigators involved with the case. He detailed his many other activities in the Rodriguez matter up until the end of the representation, including continuing conversations with representatives from the prosecutor's office and Rodriguez about Rodriguez's ability and willingness to assist in the investigation, reviewing surveillance materials and other discovery, negotiating a limited immunity agreement for his client, participating in Rodriguez's interviews with the prosecutor's office, dealing with the fall-out, after Rodriguez, out of fear of reprisal, no longer wanted to cooperate, and preparing for trial.

After Rodriguez terminated respondent's representation, they had several conversations about the insufficiency of the retainer to cover the time that he had spent on the matter.

Respondent conceded that the retainer agreement did not state that the $25,000 was non-refundable. He also conceded that the agreement provided for monthly statements. He explained, however, that they would not be produced if a minimal amount of services were performed in a given month.

As to a file for the Rodriguez matter, respondent testified:

> Whatever pieces of my file that I had relevant to the investigative work I had forwarded to Mr. Brickfield when he took over the case so he can continue the representation. I could not find my own separate copies of – for example, when we negotiated and Carlos – when we negotiated the limited immunity agreement and Carlos became a cooperating witness, that results in a court document, document of limited immunity. I cannot find my copy of the limited immunity agreement but we know that took place because Carlos even explained that he was a cooperating witness, he got involved as a cooperating witness and then pulled the plug when he became nervous and the trigger for all of that was the negotiation and conclusion of limited immunity with him. I don't have it or the copies of the correspondence back and forth. The correspondence, for example, that I had got [sic] was getting [sic] from the prosecutor's office advising me of the schedule for preindictment conference which triggered my letters to Mr. Brickfield at the end of October of '05 was [sic] no doubt notices from the court and/or letters from Mr. Lilore or his assistant saying here's a schedule for the preindictment conference,

> please appear. Again, I forwarded the originals, I don't have copies of any of those documents any longer.
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> [T77-21 to T78-24.][2]

According to respondent, his practice was to provide Rodriguez with copies of correspondence. However, because he had closed his practice and was now working in the financial services industry, he did not know where the file copies of pleadings and correspondence in the Rodriguez matter were located. He no longer had his Lawyers Diary and Manual.[3]

Respondent testified that, although he did not send Rodriguez time billings reports, he did keep him advised of what was happening in his case, via telephone conversations and meetings. From December 2004 through April 2005, according to respondent, he and Rodriguez met "more than several times a month." Early in the representation, he and Rodriguez met several times a week to craft their strategy. In addition, he

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[2] "T" refers to the December 2, 2010 transcript of the DEC hearing.

[3] Respondent has been on the inactive list of attorneys in New Jersey since 2006, when he closed his office.

heard from Rodriguez "nearly every day." When Rodriguez was contemplating being a cooperating witness, they met with representatives from the prosecutor's office "several times a week."

After Rodriguez told respondent that he no longer wanted to be a cooperating witness, respondent told him that they needed to have a conversation about the costs going forward, if Rodriguez intended to go to trial. Respondent recalled that, after three months of representation (in February 2005), he informed Rodriguez that they "had come very close to exhausting the retainer . . . given the initial heavy activity . . . [a]nd that he needed to consider that before he decided so cavalierly to go forward with a defense." Respondent did not recall there being much detail in the conversation. He did not remember specifically telling Rodriguez "here's the numbers, here's where we're at, here's what's left just simply the generic conversation we're nearly through the retainer." He did remember sending Rodriguez a copy of a large photocopying bill for documents that were copied from the prosecutor's files.

Respondent claimed that everything in his possession was given to Brickfield.

Based on notes of his re-created time, respondent estimated that he had spent more than seventy-five billable hours, between December 2004 and October 2005, on the Rodriguez matter. Thus, he claimed, excluding expenses, the total billable hours (at $350 per hour) would have resulted in a $26,250 fee. He based this assertion on the documents that had been admitted into evidence. When asked why he had never generated a billing statement, respondent answered:

> I wish there was a good answer for that because I could have avoided all of this but the answer is no. I was wrapping up my practice at the time, moving in to another business and just did not pay proper attention to getting him that information so he would understand in writing what had been going on. So the answer to your question is no, there was no reason.
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> [T96-5 to 13.]

When pressed, he continued:

> First of all, the ethics complaint was served on me at the end of '08. I don't know when it was filed but it was served on me at the end of '08 but having said that at the time I met with him we were knee deep in what was going on, it wasn't guess work or speculation, we were doing it together, going through it at the time so the conversation that I had with him was just reviewing what had been in front of both of us for several months and looking at my notes regarding my recreation and going back to the testimony I just gave about my

> initial representation of Carlos in December of 2004 from the time of first contact, first appearance, first meetings with the prosecutors and investigators, first meeting to start to set up his cooperation agreement, I spent an excess of 40 billable hours in December of 2004 the beginning of my representation yet in connection with those matters. Going forward in January, February and March when we were in the cooperation agreement now and he was cooperating in the undercover drug investigation and we had the other matters going on, in those three months I spent 25 billable hours in representing Carlos and then following that as things teetered off and he withdrew from the cooperation agreement and I was just doing some document reviews and occasionally checking in, in April, May, June, July, August and September so one, two, three, four, five, six months in 2005 I had ten billable hours in those months so that's where the time comes from. The initial time was spent when we first got started and then it started to peter off through the summer of 2005 but at the time that I spoke to him in January and February of '05 when we were trying to figure out what to do, how to do it and when to do it we were just doing it, it was right there in front of us, it wasn't do you remember last year when we did this, do you remember two years it was here's what we've been doing.
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> [T97-16 to T99-7.]

The DEC found that during the time that respondent represented Rodriguez, from December 2004 until October 3, 2005, respondent never prepared or provided to Rodriguez any document reflecting the amount of time or expenses incurred in the

representation, notwithstanding Rodriguez's multiple requests for them. The DEC concluded, however, that there was insufficient evidence to find that respondent had violated RPC 1.5(a) (unreasonable fee) because (1) the estimates given by Rodriguez (ten hours) and respondent (seventy-five hours) conflicted and (2) no document existed that would "shed light on the amount of work, or lack thereof." The DEC noted, however, that, given the severity of the crimes with which Rodriguez had been charged and the scope of the criminal matter (which involved forty defendants), it would not have been out of the ordinary for an attorney to have spent in excess of seventy-five hours in carrying out his duties in such a matter. Moreover, the DEC noted, Rodriguez's estimate did not take into account activities undertaken by respondent that would not have required the client's participation. Thus, the DEC "could not find by clear and convincing evidence that a fee of $25,000 would have been unreasonable."

For the same reason, the DEC found insufficient evidence to sustain a finding that, upon Rodriguez's termination of the representation, respondent had failed to refund any advance payment of a fee that had not been earned or incurred (RPC 1.16(d)).

The DEC did find, however, that the clear and convincing evidence established respondent's violations of RPC 1.4(b) (failure to communicate with the client) and RPC 1.15(d) (recordkeeping violations). Respondent, after all, admitted that he had never prepared or provided Rodriguez with billing or time records, despite his numerous requests. Moreover, he admitted that he did not prepare or maintain any records of statements or disbursements of funds and that he did not retain a copy of the Rodriquez file.

For respondent's violations of RPC 1.4(b) and RPC 1.15(d), and his ethics history, the DEC recommended that he be censured.

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

We do not find, however, that respondent violated RPC 1.5(a) (unreasonable fee). That rule sets forth specific factors that may be considered in determining the reasonableness of a fee. The lack of billing statements or the failure to refund any unearned portion of the fee are not among the factors identified by the rule. Moreover, there is simply no relevance between these two factors and the reasonableness of a fee. For the lack of clear and convincing evidence that respondent's fee

was unreasonable, we determine to dismiss the charged violation of RPC 1.5(a).

We also found insufficient evidence to support a finding that, upon termination of his services, respondent failed to refund any advance payment of the fee that had not been earned or incurred. When respondent's hourly rate of $350 is considered along with the nature of the representation, it is not inconceivable that the $25,000 retainer would have been exhausted quickly. Although respondent should not benefit from his failure to keep records substantiating the depletion of the retainer, at the same time, there is no clear and convincing evidence that any funds were left when Rodriguez discharged respondent, in late 2005.

On the other hand, the clear and convincing evidence demonstrates that respondent failed to adequately communicate with Rodriguez and failed to comply with the recordkeeping rules set forth in R. 1:21-6.

RPC 1.4(b) requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Respondent violated this rule when he continually failed to reply to his client's many requests for information pertaining to the time spent on his

case and the fees incurred during the course of the representation.

RPC 1.15(d) requires an attorney to comply with R. 1:21-6, which imposes certain recordkeeping obligations on members of the bar. For example, an attorney "shall maintain in a current status and retain for a period of seven years after the event that they record" . . . "copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto." R. 1:21-6(c)(1)(I). The reference to "copies" in the rule presumes the obligation to create and maintain such records in the first place. Respondent made it clear that the $25,000 retainer was not a flat fee. Yet, he did not have time billing records for the Rodriguez matter. Thus, respondent had no document that provided "a complete understanding of the financial transactions" in the Rodriguez matter, that is, a record of the services provided, which, he claimed, had exhausted the monies advanced to him by his client.

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Alan Zark, DRB 04-443 (February 18, 2005) (attorney violated RPC 1.4 (a) and (b); the attorney did not reply to the clients'

requests for information about their matter; in addition, the attorney caused his clients unnecessary concern over the disposition of some checks to be transmitted to a court-appointed fiscal agent when the attorney turned over the checks to the agent six months later, without first notifying the clients); In the Matter of William H. Oliver, DRB 04-211 (July 16, 2004) (attorney failed to keep client apprised of developments in her matter, including a sheriff's sale of her house); In the Matter of Paul A. Dykstra, DRB 00-182 (September 27, 2000) (attorney failed to inform his clients that an arbitration award that the clients declined to accept had never been appealed but had been dismissed a year earlier); In the Matter of Beverly G. Giscombe, DRB 96-197 (July 24, 1996) (attorney failed to communicate the status of the matter to a client in a personal injury case); and In the Matter of Anthony F. Carracino, DRB 95-381 (November 30, 1995) (attorney failed to keep his client reasonably informed of the status of her personal injury matter).

Similarly, the failure to maintain for seven years those portions of a client's file, as required by R. 1:21-6, ordinarily warrants an admonition. See, e.g., In the Matter of Carolyn J. Fleming-Sawyyer, DRB 04-017 (March 23, 2004) (in one

of two client matters, attorney did not keep complete records of receipts and expenditures and did not preserve them for a period of seven years; the attorney also collected a real estate commission when she sold the client's house; in the other client matter, the attorney delayed in recording a deed and ignored her client's requests for information about the matter), and In the Matter of Stephen R. Mills, DRB 94-391 (December 28, 1994) (attorney failed to prepare a retainer agreement or to otherwise communicate to his client, in writing, the basis or rate for the fee, failed to communicate with her concerning the scope of the representation, and failed to maintain the client's file for a period of seven years).

In this case, an admonition would be the minimum measure of discipline to be imposed on respondent for his failure to communicate with Rodgriguez and for the recordkeeping violations. However, in aggravation, we considered the following points. First, respondent was suspended for two years in 2006. Second, at the time that respondent was engaging in unethical conduct in this matter, he was well aware that his conduct, in general, was under scrutiny, as the hearing panel report in the suspension matter was issued on April 29, 2005. Third, respondent's wrongdoing in this matter required Rodriguez

to file a claim with the CPF, which still has not received restitution for the $21,500 paid to Rodriguez. Thus, for the totality of the circumstances, we agree with the DEC that a censure is the appropriate measure of discipline to be imposed on respondent for his misconduct in this matter.

Member Baugh did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Stephen H. Skoller
Docket No. DRB 11-041

Argued: April 21, 2011

Decided: July 28, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh						X
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Julianne K. DeCore
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Chief Counsel