SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-049

IN THE MATTER OF

JOHN F. FOX

AN ATTORNEY AT LAW

Decision

Argued: April 17, 1997

Decided: June 30, 1997

Irene U. Mecky appeared on behalf of the District XI Ethics Committee.

Anthony C. Sartori appeared on behalf of the 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 XI Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1970. He received a public reprimand in 1990 for making an unsecured loan of $30,000 in trust assets, while acting as trustee of a testamentary trust, to a roofing company/client, without disclosing the loan to the beneficiary of the trust or to the Surrogate's Court and without obtaining consent to the loan on behalf of the trust.

The complaint alleged violations arising out of two matters: Fay and Vollrath. The

Fay matter was dismissed prior to hearing. Vollrath is discussed below.

The Vollrath count of the complaint alleged violations of RPC 1.1(a)(gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(a)(failure to communicate); RPC 1.5(b)(fees); and RPC 8.1(b)(failure to cooperate with the disciplinary authorities).

In July 1989, Gloria Rider and Dolores Mulvaney ("grievants") retained respondent to represent the estate of Marie M. Vollrath, of which they were co-executrixes.

At their initial meeting, respondent reviewed the decedent's will and the assets of the estate, valued at approximately $750,000. The estate consisted of four bank accounts, various stocks, bonds and a condominium in Jersey City, New Jersey.

Rider testified at the DEC hearing that respondent started working on the estate shortly after their initial meeting. Settlement of the estate entailed liquidation of the decedent's stock holdings, the finalization of a specific bequest to a church and the distribution of the residuary estate to two charities: one named in the will and the other to be selected by the co-executrixes. Respondent also handled the sale of the condominium for grievants, who inherited it under the will. Rider and Mulvaney paid the legal fee for that transaction directly to respondent (T5/29/96 at 27-37). On November 30, 1989 respondent wrote to grievants quoting a legal fee of $35,000 to settle the estate. The fee, respondent added, was commensurate with their fees as co-executrixes of $15,000 each. Respondent also suggested that for estate tax purposes he be paid $15,000 of his fee immediately and that each grievant take $7,500 as commissions, prior to the end of 1989 (Exhibit C-2).

Both grievants testified that they had not intended to take commissions at that time,

but did so at respondent's suggestion. The estate also paid respondent $15,000 at that time.

The matter progressed apace through 1989 and most of 1990. During that time, respondent helped grievants in the selection process of the second charity and was involved with the stock transfers and the sale of the condominium.

On January 28, 1991 grievants and respondent met again. Respondent was paid the remainder of his $35,000 fee. The next meeting took place on August 2, 1991. According to Rider, respondent assured her on that day that all remaining work would be completed in approximately two weeks and that no further information was required from grievants to settle the estate. By December 1991 grievants were angered that respondent had not settled the estate. They had made representations to the two charities that disbursements were forthcoming and were fearful of disbursing funds to the charities without respondent's advice and counsel. On December 11, 1991 Rider wrote to respondent and conveyed her and Mulvaney's displeasure with the lack of progress in the case:

> Over two weeks ago you assured us that the final accounting for the Estate had been completed and was being mailed to us. To date neither one of us has received our copy.
>
> * * *
>
> Both Dolores and I are getting extremely annoyed with your lack of candor regarding the final accounting and the ultimate distribution of the funds to the two parties. The hospitals and we were assured by you that the Estate would be wound up in August or September.
>
> [Exhibit C-15]

The letter went on to suggest that the charities had budgeted for the distributions and

that respondent should have told grievants two years earlier that he could not timely settle the estate, if that was the case. Finally, Rider requested that respondent call "before the end of the day."

Hearing nothing from respondent, on December 16, 1991 Rider wrote yet another letter to respondent. She enclosed her December 11, 1991 letter, pleaded with respondent for the final accounting and notified him that she and Mulvaney would be sending disbursements to the charities on December 20, 1991. Respondent never responded to Rider.

After disbursing the funds on or about December 20, 1991, Rider was finally able to reach respondent by telephone. According to Rider, their conversation was brief:

> And then I called Fox and I told him that,' We had sent the checks out. Now what?' and he said, 'you did what you wanted to do.' He did not say anything more. He said he had nothing more to say. And that was the last time I spoke with Mr. Fox.

[T5/29/96 at 74]

In early 1992 grievants consulted with another attorney, Steven DeRicco, Esq., in an effort to move the case along. According to grievants, DeRicco was not retained at that time to represent the estate. DeRicco would later testify that he could not substitute into the case because respondent had already been paid in full for the work in settling the estate. Compounding the problem was a statutory requirement that the estate file certain documents with the New Jersey State Attorney General's Office, because the residuary beneficiaries were charities protected by statute. DeRicco did not want the estate to incur further legal fees or to incur the scrutiny of the Attorney General's Office over excessive fees. He thought

it prudent to nudge respondent toward the completion of the estate, instead of substituting in as attorney for the estate.

In March 1992, DeRicco communicated with respondent by telephone and letter. He testified that respondent represented to him that work on the file was now moving apace and that a filed federal estate tax return and final accounting would be sent out to grievants by the end of April 1992.

From April 1992 to December 1993 the case remained stagnant. DeRicco asserted his belief that respondent had virtually completed the work necessary to settle the estate and that he, DeRicco, was simply awaiting the conclusion of the case and copies of the tax returns.

Not hearing from respondent, grievants filed the grievance on July 19, 1993.

In December 1993 Rider learned that respondent had not prepared the final accounting. Grievants then retained DeRicco for the limited purpose of preparing the final accounting. On December 6, 1993 DeRicco sent a letter to respondent demanding the estate file in order to complete "any work necessary" to settle the estate.

On or about December 22, 1993 respondent forwarded a letter to DeRicco and the documents necessary to complete the final accounting. Respondent expressed reluctance in sending the entire file because of the pending ethics complaint (Exhibit C-28). Instead, respondent retained the file.

DeRicco then prepared a final accounting using the information supplied by respondent, but without the benefit of the entire file. The charities refused to sign off on the

accounting, as DeRicco was generating fees for work for which respondent had already been paid.

In January 1995, DeRicco arranged a conference call with respondent and Gerald Tobin, Esq., the attorney for one of the charities. Both DeRicco and Tobin testified that, at a January 19,1995 conference call, respondent asserted that he had completed and filed the federal estate tax return.

Satisfied with respondent's representation, but wanting to confirm the filing of the tax return, DeRicco sent a letter to respondent on April 4, 1995:

> With respect to the general estate administration, including preparation and filing of any documents concerning the federal government, New Jersey Inheritance Tax Bureau or other government entity or Office (including, without limitations the Federal Estate Tax Return, New Jersey Inheritance Tax Return and other income tax returns or Office or Agency reports) as you have been paid and retained your full legal fee you remain entirely responsible and liable for those estate requirements. If there remain any unfiled estate returns, reports or other documents concerning the general estate administration we recommend and urge you to file such reports, or, if you are unable to correspond with us concerning any open issues. We advise you that you review the estate file which to this date remains in your possession and resolve any necessary filings and or open issues for the estate. Any assistance required of us will be in addition to the limited service we have already provided and would require return of the compensation the estate provided to you for services which we presumed to have been completed.
>
> [Exhibit C-27]

At about this time the charities signed off on DeRicco's accounting. Respondent never gave DeRicco a copy of the filed tax return.

Respondent finally turned over the estate file to the disciplinary authorities in October 1995. It was then discovered that the federal estate tax return had never been filed. DeRicco's firm was promptly retained to complete whatever was required to settle the estate, including the federal estate tax return. Each of the two charities was required to return $15,000 to the estate to render it solvent pending settlement. The record is not clear about any losses incurred by the charities, other than DeRicco's additional fee to complete the work. In fact, it is not clear how much DeRicco charged for his participation in the matter.

For his own part, respondent testified about all of the work that he had performed in behalf of the estate, including the transfer of stocks held by the estate, problems with a specific bequest to a church, problems surrounding the New Jersey State valuation of the decedent's condominium and the reissuing of certain dividend checks that were apparently misplaced by the decedent. Respondent conceded, however, that the estate was neither contested nor complex. He maintained that his fee of $35,000 was reasonable, had he completed the work necessary to settle the estate. Respondent admitted receiving from grievants a separate fee for the sale of the condominium. Respondent also admitted that there were calls from Rider in late 1991 that he did not return, but contended that he did not complete the accounting in part due to Rider's failure to supply necessary bank statements.

Respondent acknowledged receiving and not replying to Rider's January 3, 1992 letter requesting him to complete all work by January 10, 1992. Similarly, he admitted receiving Rider's January 15, 1992 telephone message, but believed that his representation had been terminated by grievants. Respondent was not permitted (on hearsay grounds) to testify about

the telephone message and why it led him to believe that he no longer represented the estate. Respondent did not communicate with grievants to confirm that his assessment in this regard was correct. Respondent asserted that instead, his "termination" was confirmed by a February 18, 1992 letter from DeRicco stating, "We understand that prior to this time you acted as counsel for the estate . . ." (Exhibit C-23). Respondent did not seek confirmation from DeRicco that his representation had been terminated or that DeRicco had replaced him in the representation.

In October 1995, some two and one-half years after the grievance was filed, respondent contacted DeRicco to ascertain what DeRicco had done in the case and to request from DeRicco any documents necessary to settle the estate. Not unexpectedly, DeRicco did not respond. With regard to the unreasonable notion that he might have been asked to settle the estate at this juncture, respondent testified as follows:

> Question: Do you remain prepared to do whatever necessary [sic] to finalize this estate?
>
> Answer: Yes, but I suspect that we are long past that particular point where the executrixes desire that I do that. So although I do say I am able to do it, I don't think that I am going to be asked to do it.
>
> [T6/19/96 at 110]

Finally, respondent alleged that as of the date of the DEC hearing, only twenty hours of legal work remained to settle the estate. That included the completion of the final accounting, the federal estate tax return, the filings required by the Attorney General's Office

and all other aspects of the estate's administration.

Lastly, respondent apologized to grievants for his mishandling of the case:

> I didn't do right on this matter in terms of getting the job done for you. I feel particularly bad for Ms. Mulvaney because we had mutual friends who we will both continue to see. And for Gloria who [sic] I did not know, I really do apologize. I am sorry I didn't finish it and that caused grief and problems as a consequence, and I accept responsibilities for that.
>
> I am sorry and the apology gets doubled because I owe the committee an apology, my attorney and your attorney.
>
> I am not happy with what happened, but there were so many things going on I just couldn't handle.
>
> [T6/19/96 at 112-113]

By way of mitigation, respondent stated:

> Well, I think - I'm a very private person. I know that I have to say this. I testified as to the composition of my family as we began in the proceeding today. I had a daughter die in 1988. She had three open-heart surgeries and just never recovered.
>
> At the same time, the youngest child was born and she had open-heart surgery in the Fall of 1988 - I hope I have my years straight at this point.
>
> My father-in-law, who I mentioned before, died in 1989. I lost my house, a foreclosure in 1991, February of 1991.[1] At that point, I had, I guess, eight of my [ten] children living at home. Seven were living at home. One was married in 1991. One got married in 1992. She had her own apartment, but there were seven of them living at home, all of them in school having to move from one town that we lived in for twenty-five years to another.

[1] Apparently, the foreclosure was a result of a failed legal partnership with an attorney who was later disbarred.

> It created all sorts of relationship problems, at the least of which was personal and involved everybody in the family. We did relocate. We did transfer schools. We had to give up certain activities that we were in in the town that we moved from.
>
> My wife, in particular, had a program that she was running for senior citizens that she had to give up because we were now too far away. It was a disaster.
>
> [T6/19/96 at 100-101]

Respondent also offered the testimony of Sister Victoria Coyle, who vouched for Respondent's good character and gratis legal services to her Order, the Little Sisters of the Poor, over the prior ten years.

* * *

The DEC found a violation of RPC 1.3 due to respondent's failure to adequately move the estate toward settlement from August 1991 to December 1993. The DEC also found a violation of RPC 1.4(a), as respondent failed to communicate with grievants as early as 1990 and was completely unresponsive by December 1991. The DEC concluded that respondent's failure to file the federal estate tax return or to advise DeRicco of the need to do so was a violation of RPC 1.1 (a) (gross neglect). The DEC also found a violation of RPC 8.4(c) for respondent's misrepresentation of the status of the estate to grievants and of the status of the federal estate tax return to both DeRicco and Tobin. The DEC dismissed the charge of a

violation of RPC 1.5, finding that the original fee charged was reasonable. Lastly, the DEC found a violation of RPC 8.1(b) for respondent's failure to comply with the investigator's initial request for information, dated December 31, 1992, and to release the file to the DEC until just prior to the original hearing date in November 1995.

* * *

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

There is little question that respondent mishandled the Vollrath estate. He admitted as much at the DEC hearing. Specifically, with regard to the alleged violation of RPC 1.3 (lack of diligence) and RPC 1.1(a) (gross neglect), Rider's testimony was compelling. As co-executrix of the estate, Rider acted both in an organized and thorough manner. She expected as much of respondent, but he simply did come through. Although the case moved apace from the initial meeting in July 1989 through most of 1990, Rider began to experience difficulty communicating with respondent in late 1990. The record shows that by August 1991 the situation had deteriorated significantly. Respondent had been paid his entire fee for the case and had promised to have the estate ready for settlement in a matter of weeks. From that time to December 1991, Rider repeatedly attempted to spur respondent on. However, instead of completing the work, respondent stopped communicating with her altogether.

From March 1992 through December 1993, DeRicco made numerous attempts to urge

respondent to complete the administration of the estate. The Board found that respondent largely ignored DeRicco and did no work on the estate during this time, thereby violating RPC 1.3. The grievance in this matter was filed on July 19, 1993. Respondent did not release the file to DeRicco or the DEC until more than two years later, in October 1995. Despite respondent's retention of the file for this final twenty-two month period of time, he did not file the federal tax returns, did not prepare the final accounting and did not file documents with the Attorney General's Office. Indeed, until he finally turned over the file to the DEC, no one but respondent knew the true extent by which respondent had not completed the estate. The Board found that respondent's failure to complete the estate during those twenty-two months and to give DeRicco the information necessary to do so constituted gross neglect, in violation of RPC 1.1(a).

Respondent admitted that certain of Rider's telephone calls went unanswered. In fact, Rider also wrote letters imploring respondent to "finish the job." Respondent ignored those letters and left grievants in the dark at critical times, such as at the end of 1991, when disbursements were made to the two charities and from December 1993 to October 1995, when DeRicco sought information in grievants' behalf. Respondent displayed an almost cavalier attitude toward Rider after the disbursements were made by saying, "you did what you wanted to do," instead of offering the sound legal advice that she had been seeking for months. In fact, respondent never communicated with grievants after that conversation with Rider. Respondent's lack of communication with grievants was in violation of RPC 1.4(a), and the Board so found.

The most serious allegation was that respondent misrepresented the status of the case to DeRicco and Tobin in the conference call of January 19, 1995, almost two years after the filing of the grievance. Both DeRicco and Tobin testified about their conversation with respondent. Both were led to believe that respondent had prepared and filed the estate's federal tax return. Both were so convinced of that fact that they moved ahead with the charities' sign-off on DeRicco's final accounting. For his part, respondent denied misrepresenting the status of the case to DeRicco or Tobin. His denial strains credulity, however. After all, respondent had not been forthcoming with information about the estate for some time. DeRicco had been trying since March 1992 to ascertain the true status of the matter. Respondent had every opportunity to make clear to DeRicco and Tobin what was still required to settle the estate. It is simply not believable that DeRicco and Tobin, both seasoned trust and estate attorneys, were mistaken about respondent's statements. On that basis, the Board found a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Although the DEC found a violation of RPC 8.1(b) (failure to cooperate with the disciplinary authorities), respondent finally turned over the Vollrath file, testified at the DEC hearing and appeared at the Board hearing. For this ultimate cooperation, the Board dismissed the charge.

Lastly, respondent presented evidence in mitigation of his actions. Undoubtedly, with the loss of one of his children after three open-heart surgeries, and the birth of another child requiring similar heart surgery, respondent had his hands full. The foreclosure on his house

with seven school-aged children at home, the failure of his law practice and a strained marriage rounded out what respondent aptly described as "a disaster."

In aggravation, at about the time that respondent began his drift away from the Vollrath estate, he received a public reprimand (1990) in another matter.

Ordinarily, intentionally misrepresenting the status of cases warrants a reprimand. In re Kasdan 115 N.J. 472, 488 (1989). While respondent's prior public reprimand could have provided reason to increase the discipline in this case to a short term of suspension, the Board did not find that respondent simply did not care to conform his behavior to the rules. Rather, respondent appeared to have "stuck his head in the sand" when overwhelmed by personal and professional problems.

Given the terrible misfortune occasioned by the loss of one child to heart disease and the birth of another child with similar maladies, the fact that seven children remain at home and in need of respondent's income, and noting that a public reprimand is in keeping with the line of cases cited in Kasdan, the Board unanimously determined to impose a reprimand.

Finally, the issue of respondent's $35,000 fee was left open by the DEC. All involved acknowledged that the fee was not unreasonable, had the work been completed. It is known that the estate paid an additional $5,000 in fees to DeRicco to settle the estate. From the limited information available, the Board concluded that neither the estate nor the charities suffered beyond that amount. The Board determined to require respondent to reimburse the estate the sum of $5,000 no later than April 17, 1998, with proof of payment to be provided to the Office of Attorney Ethics ("OAE"). In the event that respondent fails to comply, the

OAE may take appropriate action.

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

Dated: 6/30/97

LEE M. HYMERLING
Chair
Disciplinary Review Board