

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 94-307

IN THE MATTER OF :
ADELE M. STALCUP, :
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: February 1, 1995

Decided: March 31, 1995

Helen Fite Petrin appeared on behalf of the District I Ethics Committee.

Respondent appeared pro se.

This matter was before the Board pursuant to the provisions of R.1:20-4(f)(1). The amended complaint charged respondent with a violation of RPC 1.1(a) (gross neglect), RPC 1.4(a) and (b), (failure to communicate), RPC 1.15(a)(b)(c) and (d) (failure to safeguard client property), RPC 1.16(d) (failure to withdraw), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and R.1:21-6 (improper recordkeeping).

Respondent was admitted to the New Jersey bar in 1980. She maintains an office in Penns Grove, Salem County. She has no history of discipline.

Respondent represented Shun Milburn in a trial arising from a criminal accusation. She continued the representation in post-trial motions and sentencing. On the day Shun Milburn was sentenced, September 14, 1990, he and his parents, Solomon and Mary Milburn, consulted with respondent regarding an appeal. Respondent

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agreed to undertake the representation. The parties do not dispute that, at the time that respondent was retained to file the appeal, the Milburns owed respondent \$1,500 for her representation during the trial. There is great difference in the recollection of respondent and of the Milburns as to what ensued.

According to respondent, after she had been retained, she had several conversations with Solomon Milburn, during which she explained that she had until October 29, 1990, forty-five days after sentencing, to file the appeal. She explained that, prior to filing an appeal, she required a payment of a \$1,500 retainer, together with \$300 to cover the filing fee (respondent mistakenly thought that the filing fee applied to criminal matters), \$450 to pay for the trial transcript, as well as the \$1,500 owed from the underlying trial. According to respondent, she agreed to represent Shun based upon the assurance that she would be paid in full.

On October 22, 1990, respondent received a check for \$1,650 from Mr. Milburn. Respondent viewed that sum as designed to pay off the balance due from the trial and an additional \$150 toward the appeal. She contended that Mr. Milburn still owed her the balance of the money for the appeal. According to respondent, during several telephone conversations with Mr. Milburn, she explained to him that she was not willing to commence the appeal unless she received the balance of her fee and costs. She further explained that they were running out of time to file the appeal. Mr. Milburn agreed to forward at least enough money to cover the filing fee and the transcript, via overnight mail. According to

respondent, she "backed down" and agreed to accept that sum (3T47).

On or about November 2, 1990, respondent filed a motion to file the appeal nunc pro tunc, based on Mr. Milburn's representation that the remainder of the money was forthcoming. She also forwarded a request for the transcript, along with her trust account check for \$450. Mr. Milburn, however, did not forward the promised payment. Respondent's motion to appeal nunc pro tunc was granted. Respondent's trust check, however, was returned for insufficient funds. (There is no allegation in the record of misappropriation.)

Sometime thereafter, the court reporter notified respondent via telephone of the difficulty with the check. He further informed her that he had underestimated the costs for the transcript. On or about November 16, 1990, respondent received written notice from the court that the check had been returned. Respondent did not forward a second check for the transcript. According to respondent, she informed Mr. Milburn that she would need additional money for the transcript. She contended that she had been unaware that she had a limited period of time to forward the check to avoid the dismissal of the appeal. Interestingly, respondent forwarded \$300 to the Appellate Division for costs on November 29, 1990. By her own calculation, \$150 of that sum would have been respondent's own funds. Also of interest in that regard is respondent's letter to Mr. Milburn dated November 8, 1990, discussed below, in which she stated that these costs had already been forwarded to the court.

Respondent testified that, in February 1991, she had several conversations with Mr. Milburn, during which he stated that he no longer had sufficient funds to pursue the appeal if it was going to cost any more than respondent's initial estimate. According to respondent, she explained to Mr. Milburn that she could not guarantee that her fee would not be higher if additional work was required. She added that the transcript was already going to cost more than the initial estimate. Accordingly, Mr. Milburn instructed her to stop pursuing the appeal.

The appeal was dismissed shortly thereafter, on February 26, 1991, based upon respondent's failure to forward a second check for the transcript. Respondent did not recall how or when she had learned of the dismissal, but recalled that Mr. Milburn had already instructed her to stop work on the appeal. Respondent never informed the Milburns of the dismissal. She stated "[s]o what I probably did when I did get notice it was dismissed, it didn't matter because he already told me he didn't want to pursue it" (3T82).¹

Despite the fact that Mr. Milburn had, according to respondent, instructed her to stop pursuing the appeal, he continued to forward payments to her. Respondent contended that those payments were for funds that were already owed to her:

He continued to pay after that because in February I said to Mr. Milburn -- besides being concerned about

¹ 1T refers to the transcript of the hearing before the DEC on January 26, 1994. 2T refers to the transcript of the hearing before the DEC on March 30, 1994. 3T refers to the transcript of the hearing before the DEC on April 11, 1994. 4T refers to the transcript of the hearing before the DEC on May 11, 1994.

the fact that he understood that that was going to cause the appeal not to go forward but I said what about the fact that I've already incurred fees and costs and, you know, all of these things are already in the works. He agreed with me at that point to pay. In fact, he said to me -- I didn't -- it wasn't my insistence. He said to me I will pay whatever is -- we agreed and was charged to this point but I don't want you to do anything to incur any extra costs. He said to me, If you'll proceed, in other words, if you go on with the appeal, it is going to cost me any more than what we've already talked about. And I said to him I couldn't guarantee that it wouldn't cost him -- it would cost him nothing more than what we've already talked about because what I charged him was for a retainer for my fee for one thing. I also pointed out to him that the transcript could well cost more -- would cost more, in fact, than the deposit I had charged him for on the bill. So it was my concern that he understand that just by saying, fine, I don't want to go on anymore, that there was still already these expenses that were involved and had to be paid for.

[4T16-17]

Respondent testified that she made no attempt to have the appeal reinstated, because she had never been so instructed by Mr. Milburn. She further did not return any of Mr. Milburn's funds to him. When asked why she failed to return any of the retainer that had been paid, respondent contended that she had earned it. The check for the \$300 filing fee was never cashed by the Appellate Division. As of June 8, 1994, the date of the DEC's report, the check was still being held by the court.

Respondent did not dispute that the \$450 paid for transcripts was not hers. Noting, however, that the transcript had eventually been prepared, respondent was uncertain whether the money should have been forwarded to the public defender who ultimately handled the appeal, the court reporter or Mr. Milburn. (It appears from a voucher in the record that the final cost of the transcript was \$502. 3T95-97.)

According to Solomon Milburn, he agreed to pay respondent's retainer fee and costs in connection with the appeal. He stated that, during a telephone conversation with respondent shortly after she was retained, respondent instructed him to forward \$1,650. Mr. Milburn forwarded the money shortly thereafter. He believed that that would be the full cost of the appeal. Mr. Milburn testified that he was aware of, but did not intend to pay, the balance owed to respondent from the criminal trial. Respondent testified that she was unaware of how Mr. Milburn had arrived at the \$1,650 total. [The number makes sense if Mr. Milburn was relying on respondent's retainer at the trial level (\$1,000), the filing fee (\$300) and the initial transcript cost she had conveyed to him (\$350)].

Exhibit P-1 is a bill dated December 20, 1990 from respondent to Mr. Milburn after she had received the \$1,650 payment. It reflects a balance due of \$2,100, including \$1,500 from the trial. After subsequent discussions, Mr. Milburn agreed to pay the full amount due. Despite respondent's testimony that she never agreed to accept a payment plan, the record shows that Mr. Milburn made a series of payments to respondent, as follows:

October 22, 1990.....	\$1,650
March 5, 1991.....	\$800
April 4, 1991.....	\$425
May 7, 1991.....	\$425
July 18, 1991.....	\$450

Mr. Milburn believed that all of the money he sent to respondent as related to the appeal.

Part of the confusion regarding the amount due might have resulted from respondent's letter to Mr. Milburn, dated November 8, 1990 (Exhibit R-3). That letter states, in pertinent part:

As you can see, the statement includes the prior balance due for representation in the case below in the amount of \$1,500 which is the total for two days of time and the preparation for and appearance at the post-trial motions. Also I told you that the deposit for the transcript would probably be \$350.00. I spoke to the Court Reporter and he advised that he wanted \$450.00 as the deposit. This was paid, as was the \$300.00 filing fee to the Appellate Division. You sent me a check in the amount of \$1,650.00. Therefore, \$750.00 of this has been applied to costs and the remaining \$900.00 has been applied to the \$1,500 retainer charged for the Appeal leaving a balance of \$600.00 for the retainer. Also as you know, there is an outstanding balance remaining on the legal fee for this trial and post-trial motions in the amount of \$1,500. This brings the total outstanding fee due at this time to \$2,100.00, as you can see from the attached statement.

[Exhibit R-3]

Respondent blamed the confusion on secretarial error and understood how the letter could have confused Mr. Milburn. In a subsequent letter of February 20, 1991, respondent referred back to the November 8, 1990 letter, which might have reinforced Mr. Milburn's confusion. Respondent testified, however, that she had had several conversations with Mr. Milburn in February, in which the various fees and costs were discussed.

Mr. Milburn contended that he believed that his son's appeal was pending all the while he was making payments to respondent. He testified that respondent had, in fact, informed him in 1992 that the appeal was still pending because the court reporter could not be located and the transcripts had not yet been obtained. He learned of the dismissal at an undisclosed time from Mrs. Milburn.

(The record does not reveal how Mrs. Milburn learned of the dismissal.) It was Mr. Milburn's understanding that the matter had been dismissed because the court reporter had not been paid for the transcripts.

Shun Milburn testified before the DEC. According to Shun, he believed that respondent had been pursuing an appeal from the day following his sentencing. When he was asked, however, what information about his case he had received from respondent during the appeal, he replied, "nothing, nothing, nothing" (2T26). According to Shun, his father had advised him that it had been difficult to communicate with respondent and that, when he did speak with her, she had no clear-cut information to give them. Because it was Shun's understanding that his father was paying for the costs of the appeal, he did not question the fact that he never received a bill from respondent.

The record contains a letter from Shun, dated June 10, 1992, to Mr. and Mrs. Milburn, authorizing them to handle his legal affairs for him. In that letter, he contended that his previous attorney, respondent, did not assist him to the best of her ability. On August 21, 1992, Shun contacted the Office of the Public Defender and was ultimately represented by that office on appeal.

Mary Milburn, Shun's mother and the grievant in this matter, also testified before the DEC. (Mrs. Milburn is estranged from Mr. Milburn.) Of particular interest was her testimony about a letter she sent to respondent dated March 6, 1992, over one year after the

appeal was dismissed, requesting information on Shun's case. The letter refers to a conversation between Mr. Milburn and respondent approximately two weeks earlier, wherein respondent advised Mr. Milburn that there was some difficulty locating the court reporter, who was no longer employed by the court, that all of the transcripts had not been provided and that the transcript was going to cost more than initially expected. Respondent never replied to Mrs. Milburn's letter. When asked why, respondent stated that she received the letter from Mrs. Milburn after she received Mr. Milburn's instructions not to add to the expenses of the case. She was, therefore, unable to respond to Mrs. Milburn's letter unless the latter was willing to pay for the response herself, which she was not willing to do. Therefore, respondent ignored Mrs. Milburn's request for information, despite the fact that Mrs. Milburn was obviously unaware that the appeal had been dismissed over a year earlier.

As noted above, respondent testified about a number of telephone calls and a series of letters she had sent to Mr. Milburn. Mr. Milburn testified that, contrary to respondent's testimony, he received no written communication from respondent other than monthly bills. The record contains a green certified mail card that bears Mr. Milburn's signature and a post mark of February 28, 1991. Although he admitted that the card bore his signature, Mr. Milburn claimed that he never received a letter and that the card could have been attached to one of the monthly bills.

Mr. Milburn further testified about his difficulties contacting respondent by telephone.

The DEC determined that respondent was guilty of a violation of RPC 1.1(a), RPC 1.4(a) and (b), RPC 1.16(d), RPC 8.4(c), RPC 1.15 and R.1:21-6.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The Board disagrees, however, with the DEC's finding that respondent was guilty of a violation of RPC 1.15 and R.1:21-6, for failing to place the funds received from Mr. Milburn into her trust account or utilize them for their intended purpose. Retainer fees or money advanced for costs are not required to be placed in the trust account. In re Stern, 92 N.J. 611 (1983). Further, the record does not clearly explain what respondent did with the money received for the transcript. Accordingly, the Board dismisses these two charges.

Respondent neglected to pursue an appeal on her client's behalf. As noted above, her justification for her inaction was an alleged instruction from her client's father, who was responsible for the expenses of the case, not to pursue the appeal because he did not want to expend any more funds. Even assuming that respondent's testimony in that regard was truthful, when she received that instruction, she should have: contacted Shun Milburn,

her client, and advised him of the instruction she had received from his father; confirmed Mr. Milburn's instructions in writing, and withdrawn as counsel of record in the case. Respondent did none of these things.

In addition to her failure to pursue the appeal, respondent also failed to communicate with her client. Although Mr. Milburn had been paying the bills and Shun had delegated his father to act for him, Shun was still her client. According to his testimony, Shun received no information from respondent about the status of his appeal. In her answer to that allegation, respondent stated: "Respondent never talked to Shun Milburn at all since Shun Milburn never advised Respondent as to which correctional facility he was assigned" (Answer, paragraph 10). Respondent could have simply picked up the telephone and called the court, the Department of Corrections, or Mr. or Mrs. Milburn to find out where Shun was. Obviously, she did not deem it necessary to speak with her client. Similarly, as noted above, she did not deem it necessary to tell her client that she was no longer pursuing an appeal on his behalf.

The Board need not pass on the issue of whether respondent received from Mr. Milburn the alleged instruction to stop pursuing the appeal. Whether that is true or not, her subsequent conduct was unquestionably improper. Respondent was guilty of a violation of RPC 1.1(a) and RPC 1.4(a) and (b), for failure to perfect an appeal and failure to so inform her client. She was further guilty of a violation of RPC 1.16(d), for failure to withdraw from the representation.

In addition to the issue of her failure to pursue the appeal, several questions arose regarding the funds that respondent received from Mr. Milburn. Respondent testified that she failed to return the \$450 advanced by Mr. Milburn for the transcript because she was not sure who was entitled to the funds: Mr. Milburn, the court reporter or the office of the Public Defender. Although that would have been a simple task, respondent took absolutely no steps to resolve that issue. (With regard to the \$300 that respondent mistakenly forwarded to the Appellate Division for costs, as of the DEC's report, the funds had not been returned to her.)

Respondent testified that the \$1,500 fee she was paid for the appeal had been earned. There was very little testimony before the DEC on that issue and it is not apparent exactly what respondent did to entitle her to keep those funds. She wrote a few letters to Mr. Milburn, researched the issues that would form the basis for the appeal and filed the motion to appeal nunc pro tunc. It is hard to see how respondent could have written any part of the appellate brief without having the trial transcript. Although it is, thus, unlikely that respondent earned \$1,500, the record is nevertheless insufficient for the Board to make a finding of overreaching.

The Board, by a five-member majority, has determined that respondent should receive a public reprimand. See In re Russell, 110 N.J. 329 (1988) (public reprimand for failure to file an appellate brief in a civil matter resulting in the dismissal of the matter and improperly withdrawing from the representation of his


client); In re Gaffney, 133 N.J. 64 (1993) (public reprimand for failure to file an appellate brief in a criminal matter and failure to respond to various orders of an Appellate Division judge, resulting in a finding that the attorney was in contempt of court). Four members dissented, believing that respondent should be suspended for a period of three months.

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

Dated:

3/31/95

By:



Raymond R. Trombadore
Chair
Disciplinary Review Board