SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 94-431

IN THE MATTER OF

CHARLES W. CIPOLLA

AN ATTORNEY AT LAW

Decision
of the
Disciplinary Review Board

Argued: March 15, 1995

Decided: August 11, 1995

John D. Birchby appeared on behalf of the District IIA Ethics Committee.

Respondent appeared pro se.

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 Special Master John E. Selser.

In a four-count ethics complaint, respondent was charged with violations of RPC 1.9 (representing a client in a matter in which the client's interests are materially adverse to the interests of a former client) and RPC 1.7 (appearance of impropriety). These charges resulted from respondent's representation of grievant and his wife as defendants in an earlier matter and respondent's subsequent representation of another client as plaintiff against grievant and his wife in an action arising from substantially similar circumstances. Count two charged respondent with a violation of RPC 1.5(d) (failure to provide a client with a written

retainer agreement). In the third count respondent was charged with violations of RPC 1.2(d) (counselling or assisting a client in conduct the lawyer knows is illegal, criminal or fraudulent); RPC 8.4(a) (conduct violating the Rules of Professional Conduct); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice); those charges arose from respondent's request that his clients sign blank affidavits. Finally, count four charged respondent with a violation of RPC 1.5(a) (rendering an unreasonable bill for services rendered).

This matter was originally before the District IIA Ethics Committee. After the first hearing date, it was transferred to Special Master Selser, who reviewed the transcript from the hearing on November 30, 1992 and the documents submitted at that time. Respondent and the presenter agreed that the Special Master could rely on the November 30, 1992 transcript without having to recall witnesses to testify. 2T4-5[1]

Respondent filed a brief and two motions with the Board: one to expand the record, the other to remand the matter. No documents or affidavits in support of the motions were submitted. The motions were denied.

* * *

[1] 2T denotes the transcript of the September 29, 1993 DEC hearing before the Special Master.

Respondent was admitted to the New Jersey bar in 1967. At the time of the conduct in question, he maintained two offices, one in New York and another in Englewood Cliffs, New Jersey. In 1985, respondent received a private reprimand for failure to maintain a bona fide office.

The grievant in this matter, William T. Johnston, and his wife, Margaret F. Johnston, owned and operated Endicott-Sherwood, Inc., an insurance broker/producer licensed to do business in New Jersey under the state's insurance laws.

Johnston met respondent in the early to mid-1980s. Respondent frequently called Johnston to confer with him on insurance matters of interest or he would send the Johnstons information on industry-related matters. In the mid-1980s, Johnston was involved in a lawsuit against Interpool Ltd., an insurance company. Johnston was represented in that matter by an attorney other than respondent. Johnston was aware of respondent's expertise in insurance-related matters and recommended to his then attorney that respondent be used as an expert in the Interpool matter. As a result, respondent was retained to provide certain "non-legal" services and was apparently paid for those services the following year.

Subsequently, Johnston filed a malpractice action against his former attorney. The attorney had entered into a settlement on Johnston's behalf with a bankrupt company. Johnston learned of the bankruptcy from respondent. It appears that the attorney representing Johnston in the malpractice action conferred with

respondent as a potential expert in the matter, at Johnston's suggestion. However, after meeting with respondent, the attorney chose not to use respondent's services.

There were other matters in which respondent performed legal services for Johnston. For example, in 1985, respondent was involved with negotiations on the Johnstons' behalf for the purchase of the Homestead Insurance Company (Homestead). Respondent apparently made a series of telephone calls in connection with the venture, wrote at least one letter (Exhibit D-8), drafted a preliminary handwritten agreement that was signed by the parties (Exhibit D-7) and attended at least one meeting where the preliminary agreement was executed. Johnston stated that respondent also provided him with the language to include in a letter in connection with the purchase. The transaction between Johnston and Homestead, however, was never consummated.

Respondent was also involved in negotiations with CIGNA Insurance Company (CIGNA) to obtain the return of certain premiums to the Johnstons. Respondent accompanied the Johnstons at a meeting with CIGNA representatives in Philadelphia, Pennsylvania. Following the close of oral testimony in this matter, respondent provided the Special Master with two letters he had drafted on behalf of the Johnstons' to CIGNA, one dated December 9, 1988, (referred to as "D-28 in evidence" by the Special Master), the other dated March 8, 1989. Neither letter indicates that a copy had been given to the Johnstons. According to Johnston, respondent never followed through with the matter and allowed it to "drop."

Another letter, dated January 1990, was submitted to the Special Master following the close of oral testimony. That letter from respondent to the National Community Bank of New Jersey summarized the substance of a meeting that occurred on "January 11," attended by Mr. Johnston, respondent and several bank representatives. The Johnstons did not receive a copy of that letter.

Respondent indicated that he provided the Johnstons with legal services in the above matters and implied that his telephone contacts with the Johnstons regarding mutual topics of interest in the insurance industry and sending them insurance-related information also fell under the rubric of "legal services." Respondent, however, never billed the Johnstons for any of these services (except for his expert services in the Interpool matter) — and never provided them with a retainer agreement. Likewise, respondent failed to introduce any competent evidence that would establish the amount of time he spent on any of those matters.

In February 1989, the Johnstons and Endicott-Sherwood, Inc. were sued in federal court in the matter of New York Marine and General Insurance Company v. William T. Johnston, Margaret F. Johnston and Endicott-Sherwood, Inc. Initially, the Johnstons were represented in this matter by a law firm. The firm, however, either believed that its continued representation of all the defendants presented a conflict of interest or possibly that Mrs. Johnston's prior dealings with the firm presented a conflict. The firm, therefore, terminated its representation of the Johnstons.

Thereafter, each of the Johnstons retained independent counsel. In or about May 1990, respondent was substituted as counsel for Mr. and Mrs. Johnston and their company. See Exhibit D-11 (Exhibit D-10 purports to be a substitution of attorney form to respondent. Respondent's signature, however, is missing from the form, which is undated except for a penciled-in date. The form also lists a wrong docket number, which was corrected in red pencil).

The complaint in the New York Marine matter alleged the following, in relevant part

> 16. From on or about September 23, 1988, until at least January 3, 1989, defendants received and collected surplus lines insurance premiums from various restaurants and their insurance agents. These premiums were intended to purchase surplus lines insurance issued by the plaintiff.
>
> 17. Despite defendant's receipt and collection of such premiums, defendants have failed and refused to remit such premiums or any part thereof to [American Host Insurance, the general agent for New York Marine] or plaintiff.
>
> * * *
>
> 19. [Endicott-Sherwood, Inc.'s] failure to remit premiums constitutes a breach of trust. (Emphasis supplied).

Respondent never gave the Johnstons a retainer agreement. Johnston claimed that he never received a bill from respondent and that respondent never explained how he would be billed. Nevertheless, on or about July 27, 1989, Johnston gave respondent a check in the amount of $3,500 as a retainer (1T144[2]). After

[2] 1T denotes the transcript of the November 30, 1992 DEC hearing.

paying the retainer, Johnston did not hear from respondent for a significant period of time, despite leaving numerous messages for him. It was not until October 1989 that Johnston learned that respondent had been in a serious automobile accident that allegedly prevented respondent from working from approximately September 1989 until March 1990. In March 1990, Johnston paid respondent an additional $3,000 for services.

New York Marine propounded discovery requests upon the Johnstons, which apparently went unanswered. Thereafter, New York Marine moved for summary judgment. A return date was set for September 17, 1990. Respondent filed a memorandum in opposition to the motion (Exhibit D-5).

Respondent met with the Johnstons at their home to prepare the responsive pleadings to New York Marine's motion. Respondent admitted that, while reviewing the Johnstons' records and books, he also became familiar with the Johnstons' accounting practices, which encompassed their collection of premiums from insureds and subsequent remittance or lack thereof to American Host. Respondent testified that he reviewed all of the Johnstons' "dailies, the records, the check books and so on," but he did not look at anything else such as mortgages, deeds or IRS returns. 4T149.[3]

The Johnstons' records included the numerical sequence of policy numbers, the date of inception of the policy, the gross and net premiums involved, a description, where applicable, of the

[3] 4T denotes the transcript of the October 20, 1994 hearing before the Special Master.

addition or diminution of premiums with any adjustments thereto, depending on the exposure involved, the name of the insured, and sub-agents. Separate records indicated the dates when the premiums were collected from the insureds. The records revealed where the collected premiums were deposited. Respondent also admitted performing an accounting of the premiums deposited into the Johnstons' accounts and back out to American Host or New York Marine. 4T162.

Based on respondent's review of the Johnstons' records, respondent was troubled by the large number of cancellations he found. He commented that, while a lot of cancellations could be legitimate (4T155), he believed that many of them were artificially induced mid-year cancellations for the purpose of getting a credit with the insurer.

The information obtained from respondent's review of the above, other than his suspicions concerning the Johnstons' practices, was incorporated into his response to the New York Marine motion. Respondent, however, failed to file supporting affidavits with his response. He also failed to appear for oral argument on the scheduled argument date, claiming that he mistakenly appeared for the argument in Newark, rather than Trenton. Johnston claimed that, as a result of respondent's errors, a judgment was entered against him in the amount of $800,000. 1T147. Exhibit D-3, the order, shows a judgment against the defendants in the amounts of $273,811.68 plus prejudgment interest, $821,435.04 plus prejudgment interest, and an award of

attorney's fees of $167,539.13. Johnston further testified that he did not learn of this judgment until some time in October 1990. 1T149.

Prior to the Johnstons' awareness of this adverse judgment, respondent drafted affidavits to be executed by Mr. and Mrs. Johnston, to be filed in support of their response to the summary judgment motion. As noted above, the affidavits were not filed at that time. It is undisputed that the affidavits were not in final form as of August 25, 1990, when Johnston attempted to pick them up from respondent's Englewood Cliffs office. Because the Johnstons were leaving on a vacation the next day, respondent asked Johnston to have the last pages of the affidavits executed by him and Mrs. Johnston and then to have the signatures notarized.

Respondent admitted that the body of the affidavits was not typed when Johnston came to pick them up. He argued, in his defense, that Johnston had given him the information to be contained in the affidavits and that the affidavits were read to the Johnstons prior to their signing the blank pages. Respondent claimed that he believed it was necessary for the Johnstons to have the affidavits executed at that time because they were leaving for a trip the following day for two to three weeks and would not be able to sign the finalized documents during that time. Although Mrs. Johnston was reluctant to sign a blank page, after talking to respondent on the phone and with her husband, she was convinced it would be alright. The Johnstons signed the blank pages, had them

notarized at their bank and then mailed them back to respondent prior to leaving on their trip.

Later, when the Johnstons learned that an adverse judgment had been entered against them in the New York Marine matter, they retained new counsel. It was only when the new attorney obtained respondent's files that the Johnstons learned of the true language contained in their affidavits. The Johnstons testified that the affidavits contained substantially different language from the language they had discussed with respondent. They also felt that the affidavits were not truthful. When pressed to identify which paragraphs were untrue, however, the Johnstons admitted that the paragraph in which respondent indicated that he was withdrawing as their counsel was the only information they had not discussed with respondent.

Respondent filed a motion for reargument of the summary judgment order on October 9, 1990. Exhibit C-5. In support thereof, respondent included his own affidavit explaining his failure to appear in Trenton for oral argument and also included the Johnstons' affidavits.

On or about October 22, 1990, respondent's files were transferred to the Johnstons' new attorney. It was while going through respondent's files on the New York Marine matter that the Johnstons' new attorney discovered unopened and, therefore, unanswered discovery requests propounded on the Johnstons, as well as the above-mentioned affidavits.

At some point after respondent withdrew from the New York Marine case, he attempted to collect his fee from the Johnstons. Respondent sought a total of $31,247.60 for fees, costs and disbursements. The Johnstons, thereafter, filed for fee arbitration. The Johnstons complained that respondent had failed to enter an appearance on their behalf, failed to pursue discovery that was vital to their case, even though he continually promised to do so, failed to advise them of the status of their case and lied to them about their affidavits. In sum, the Johnstons claimed, respondent had done nothing on their behalf for the $6,500 he had been paid. Following a fee arbitration hearing, the panel determined that respondent was not entitled to any additional amounts over and above the $6,500 that had already been paid by the Johnstons. Respondent did not appeal the fee arbitration determination.

The fee arbitration file (Exhibit F to the ethics complaint) does not contain any of respondent's time sheets or records of time spent on behalf of the Johnstons, other than what appears to be one illegible diary entry from September 2, 1989. Respondent admitted that he did not supply the Johnstons with a written retainer agreement. He claimed that they had a "handshake" agreement on the fee. 4T175. Respondent intended to bill the Johnstons at, he believed, an hourly rate of $150 per hour. See Exhibit F to the ethics complaint, fee arbitration determination at 2 (stating that respondent's fee agreement with Johnston was $160 per hour with out-of-pocket expenses; respondent also claimed that he had not

rendered a bill to the Johnstons at the time he was relieved as counsel because he believed Mr. Johnston wanted him to wait until he recovered a judgment in another lawsuit).

Respondent admitted that there was no retainer agreement in the National Community Bank matter; he thought that the Johnstons may have agreed to either "$150, $130 or $140" per hour. 4T180. **Respondent relied on Johnston's promise that he would "take care of** him." Respondent claimed that he "asked" Johnston if he could bill him and Johnston replied "No. I can't pay you. I am financially pressed." 4T181.

* * *

On or about October 28, 1991, respondent, as attorney for Homestead Insurance Company, filed a complaint (Exhibit D to the ethics complaint) against the Johnstons and Endicott-Sherwood, Inc., in the matter of Homestead Insurance Company v. William T. Johnston, Margaret F. Johnston and Endicott-Sherwood, Inc. The complaint alleged, in relevant part:

> 7. During 1987 and the early part of 1988, the defendants within the course and scope of the agency agreement (Exhibit A) collected and received for and in behalf of the plaintiff from policyholders premiums due on such policies and the total net amount of premium funds due to the plaintiff has never been paid, despite numerous promises to do so made by defendant William T. Johnston and defendant Margaret F. Johnston.
>
> 8. The defendant William T. Johnston in his individual capacity did agree to pay in early 1988 the total net balance due to the plaintiff together with interest and this was

never done despite the numerous requests made by the plaintiff.

9. On December 30, 1988 defendant Margaret F. Johnston acknowledged and admitted in writing that the current balance due from the defendants to the plaintiff was $48,666.71; but this amount has never been paid.

10. Since this date, the plaintiff has at various other times prior to the commencement of this action, demanded that the defendants make payment of the premium funds due, but defendants William T. Johnston and Margaret F. Johnston still refuse to pay over the net balance of the amount collected during their agency representation in the name of Endicott-Sherwood, Inc.

11. This conduct of the defendant William T. Johnston and the defendant Margaret F. Johnston in refusing to make payment to the plaintiff, has been wilful in the sense of intentional, accompanied by malice and in a spirit of criminal indifference toward the obligations owed to others in their role as state licensed insurance producers.

12. The owners and executive offices of corporate defendant Endicott-Sherwood, Inc., defendant William T. Johnston and defendant Margaret F. Johnston have illegally misappropriated and converted to their own private use moneys received in the conduct of their insurance business and belonging to the plaintiff.

13. The defendants, as insurance agents for the plaintiff have accordingly committed fraud against their principal, the plaintiff, and have forfeited all rights to a commission so that the gross premium of $60,833.39 is due the plaintiff. (Emphasis supplied).

Based on the foregoing complaint, the District IIA Fee Arbitration Committee referred the matter to the District II Ethics Committee for investigation of a possible ethics violation by respondent for "representing another client in a matter

substantially related to the matter in which he represented the Johnstons and that said representation [was] adverse to the interest of Mr. and Mrs. Johnston."

Respondent stressed the following differences between the New York Marine case and the Homestead case: 1) only one of the insurers was admitted to do business in New Jersey, the other insurer was an approved surplus lines insurer; 2) Homestead was suing the Johnstons based on a promissory note that they signed to Homestead for moneys they collected but had failed to remit; 3) in New York Marine, the Johnstons dealt through a managing general agent, rather than the home office; 4) the Johnstons asserted different defenses in each case; 5) different insurers were involved in each matter; and 6) the "products" were marketed differently. Respondent did not, therefore, see any conflict involved in first representing the Johnstons and then representing Homestead against the Johnstons in a substantially related matter. 4T167. He claimed that he did not learn anything from the New York Marine case, "except for trying to assess, if I can, the honesty or precision of the Johnstons, but there was nothing that I learned or discovered or picked up with regard to one company when I was working for the other company." Respondent admitted though that, during a meeting with Johnston on "August 22", Johnston stated "I got problems with the Homestead. I owe them money." According to respondent, however, Johnston had immediately retracted the statement, explaining that he was "working off the thing with the

Homestead." Respondent also admitted that he was "suspicious" of the Johnstons' accounting practices. 4T170.

* * *

The Special Master found a conflict of interest, in count one, based on respondent's representation of the Johnstons in the New York Marine case followed by his representation of Homestead Insurance. The Special Master noted that the alleged theft of premiums from New York Marine occurred during virtually the same timeframe as the alleged theft of premiums from Homestead. The Special Master rejected respondent's defenses that the cases were substantially different because the Homestead suit was an action to collect based on a promissory note and because, in New York Marine, the Johnstons had acted as sub-producers while in Homestead they acted as direct agents.

The Special Master discounted the testimony provided by the Johnstons' new attorney, who claimed that, while reviewing respondent's files in the New York Marine matter, he found information relating to Homestead Insurance. Because no tangible evidence was submitted to substantiate this claim, the Special Master did not give the attorney's statement any weight. Nevertheless, the Special Master concluded that, while representing the Johnstons in New York Marine, respondent became familiar with the Johnstons' business practices, such as, the way they billed, collected premiums, maintained their trust and business accounts

for premiums and remitted premiums. He found that the differences between the two lawsuits were, therefore, inconsequential. Respondent had obtained information about the Johnstons' practices in New York Marine that would be useful in the prosecution of the Homestead suit. The Special Master found clear and convincing evidence of violations of RPC 1.7(c)(2) and RPC 1.9(a)(1).

In count two, the Special Master found that respondent had not regularly represented the Johnstons before the New York Marine case and that, prior thereto, most of their contacts were based on their friendship and mutual interest in the insurance industry. The Special Master concluded that respondent failed to communicate, in writing, the basis or amount of his fee and that, from the record, it did not appear that he had ever rendered a bill for any legal services provided prior to New York Marine. The Special Master found, therefore, that respondent had violated RPC 1.5(b).

In count three, the Special Master found clear and convincing evidence that respondent improperly had the Johnstons sign affidavits on signature lines and then had them have the signatures notarized when, in fact, the affidavits had not yet been prepared. The Special Master concluded that this conduct violated RPC 1.2(d) and RPC 8.4(a), (c) and (d).

Finally, in count four, the Special Master found that respondent failed to present sufficient proof to satisfy the mandates of RPC 1.5(a), which states:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the

> **reasonableness of a fee include the** following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged **in the locality for similar legal** services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent.

The Special Master concluded that respondent's fee violated RPC 1.5(a).

* * *

Following a de novo review of the record, the Board is satisfied that, in count one, the Special Master's findings are fully supported by clear and convincing evidence. The differences raised by respondent in the New York Marine and the Homestead lawsuits were of no consequence. In essence, both complaints emanated from the Johnstons' failure to remit collected premiums. Respondent's familiarity with the Johnstons' business practices, records and books, while preparing for the New York Marine matter,

made him "suspicious" of the Johnstons' accounting practices and led him to try to assess the "honesty or precision of the Johnstons." Respondent also knew of the Johnstons' problems with Homestead prior to the time he sued the Johnstons on Homestead's behalf. Respondent's knowledge of the Johnstons' practices, therefore, put his former clients at a disadvantage. Respondent's conduct, thus, violated RPC 1.7(c)(2) and RPC 1.9(a)(1) and (2).

As to count two, the evidence is clear and convincing that respondent violated RPC 1.5(b) because respondent never provided a retainer agreement to the Johnstons, never gave them a bill for legal services rendered and failed to establish that he "regularly represented" the Johnstons in legal matters. Indeed, the Special Master noted that the only litigated matter in which respondent provided representation to the Johnstons was the New York Marine matter. The other matters in which respondent was involved merely required his attendance at a few meetings, telephone calls and the drafting of letters. As remarked by the Special Master, respondent's participation in such matters was infrequent.

The Special Master found that respondent violated RPC 1.2(d) and RPC 8.4(a), (c) and (d) in connection with his preparation of affidavits to be executed by the Johnstons (count three). The record, however, supports only a violation of RPC 8.4(c) and (d). It is true that respondent improperly convinced the Johnstons to sign blank pieces of paper that were later affixed to the body of the affidavits he had prepared. When the Johnstons were questioned about which paragraphs in the affidavits were untrue,

however, they were only able to say that, at the time they executed the blank pages to be attached to their individual affidavits, they were not aware of the fact that respondent was planning to withdraw as their counsel. There is no evidence that any of the other statements contained in the affidavits were untrue, that respondent counselled or assisted them in illegal, criminal or fraudulent conduct or that the Johnstons were unaware of the other information set forth in the affidavits. Respondent's impropriety was to file with the court affidavits that had been signed in blank by his clients.

As to count four, respondent did not provide any tangible evidence of the time actually spent representing the Johnstons, such as bills for his services, diary entries or any other records of the time spent for legal services. Respondent, therefore, failed to substantiate the fee charged. Moreover, respondent himself presented conflicting evidence of the hourly rate he intended to charge the Johnstons. See Exhibit F to the ethics complaint and 4T180. It is, therefore, not clear from the record that respondent had ever established the value of his services. Also, respondent failed to appeal the fee arbitration determination, concluding that he was not entitled to additional fees above the $6,500 that he had already been paid. Respondent, thus, violated RPC 1.5(c), by charging his clients an unreasonable fee for services rendered. It cannot be concluded, however, that respondent's conduct rose to the level of overreaching.

In In re Guidone, _____ N.J. _____ (1994), the Court ruled that, generally, "in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to clients involved, a public reprimand constitutes appropriate discipline." Id., Slip op. at 7. (citations omitted). Here, there was no showing of economic injury to the Johnstons and no egregious circumstances were presented. Respondent, however, also failed to prepare a fee agreement and filed with the court affidavits that had been signed in blank. Nevertheless, despite these added misdeeds, the Board was not convinced that harsher discipline is warranted. See In re Pamm, 118 N.J. 556 (1990) (public reprimand for, among other things, filing a document with the court that had been signed in blank and practicing law in a jurisdiction in which the attorney was not licensed). The sense developed by the record is that respondent's transgressions were more the product of ignorance than venality.

The Board's decision to impose a reprimand was unanimous. The Board also required respondent to practice under the supervision of a proctor until further order of the Court. Three members did not participate.

Respondent shall reimburse the Disciplinary Oversight Committee for disciplinary costs.

Dated: 5/11/95

By: Raymond R. Trombadore
Chair
Disciplinary Review Board