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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-222

IN THE MATTER OF :
:
NEIL I. STERNSTEIN, :
:
AN ATTORNEY AT LAW :
:

Decision of the
Disciplinary Review Board

Argued: October 19, 1994

Decided: March 31, 1995

Peter J. Boyer appeared on behalf of the District IV Ethics Committee.

Carl D. Poplar appeared on behalf of respondent.

This matter was before the Board pursuant to the provisions of R.1:20-4(f)(1). Respondent was charged with misconduct in four matters. Specifically, respondent was charged with violation of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate), RPC 1.5(b) (failure to provide a written explanation of his fee), RPC 1.15 (a), (b), (c) and (d) (failure to safeguard and to promptly deliver client property), RPC 8.1(b) (failure to cooperate with the DEC), R.1:21-6 (recordkeeping) and R.1:21-7A (failure to have a written retainer agreement in a family action).

Respondent did not file an answer in any of the four matters.

Respondent was admitted to the New Jersey bar in 1975. At the time of the alleged violations, respondent was engaged in private practice in Woodbury, Gloucester County. He has no history of discipline.

The Malandro Matter (District Docket No. IV-92-21E)

Anthony Malandro retained respondent in September 1988 in connection with a civil matter. Mr. Malandro, who owned a charter fishing boat company, sought a recovery from Viking Yacht Co. ("Viking") for an allegedly defective yacht. Respondent pursued a lawsuit on Mr. Malandro's behalf. After a trial in March 1990, the court awarded Mr. Malandro \$27,000 in damages. On June 15, 1990, after a post-judgment motion by Viking was denied, Viking's attorney wire-transferred to respondent's trust account \$27,549, representing the amount of the award plus interest from the date of the award. Respondent did not learn until July that the funds had been transferred. He did not turn these funds over to Mr. Malandro until November 12, 1990. According to respondent, he had requested information from Mr. Malandro with regard to costs to enable him to make the distribution, which the latter failed to provide. (Contrarily, Mr. Malandro testified that he telephoned respondent repeatedly about the expenses and respondent did not return his calls.) Nevertheless, respondent admitted that he was not diligent with regard to distributing the funds and did not realize how much time had elapsed until he received a letter from Mr. Malandro, dated November 9, 1990, about the disbursement of the money. Upon receipt of that letter, respondent took the necessary steps and distributed the funds.

There was a great deal of controversy in this matter concerning the expenses incurred in connection with the litigation

against Viking. The record contains two letters to respondent from Mr. Malandro's new attorney and a reply from respondent, inquiring as to the expenses. The letters are dated after respondent made the distribution of the proceeds to Mr. Malandro. As of the DEC hearing, the issue seemingly had still not been resolved.

There was further dispute in this matter regarding the amount of respondent's fee. Originally, respondent represented Mr. Malandro on an hourly basis, as reflected in an unsigned retainer agreement dated September 24, 1986. After a dispute arose from Mr. Malandro's failure to pay respondent's bills on time, the parties agreed to change the fee arrangement by means of a second agreement, dated December 2, 1988. The hearing panel described the agreement as a "hybrid retainer agreement," whereby Mr. Malandro would compensate respondent on a contingency basis, with a provision in the agreement reflecting that money advanced up to the point of the new agreement would be considered costs in the event of a recovery. That agreement stated as follows:

9. Reimbursement of Costs Paid. The Client has agreed to pay the sum of \$6,068.07 for fees and costs pursuant to a General Fee Agreement, for services rendered through May 11, 1988. The firm has agreed to accept the client on a Contingency Fee basis subsequent to that date. In the event of a recovery in this matter, the amount stated above shall be reimbursed to the Client as a cost of suit.

[Exhibit C-13]

Mr. Malandro did not understand the nature of the compensation set forth in the December 2, 1988 retainer agreement. He believed

that the agreement provided for a straight contingent agreement. He understood that the fees paid through May 11, 1988 would be reimbursed to him (1T22, 41).¹ In this regard, the following exchange took place at the DEC hearing:

[Panel Chair]: If he was getting a third of your 24,000 and his fee was 8,000, he was going to deduct whatever you had advanced to him from that 8,000, so that if you had advanced seven, he would only get 1,000 from the contingency fee?

Mr. Malandro: That's exactly right and that's -- that's why I say he's not walked away with nothing, he had his guarantee. That's why he went either which way. He had it both ways in a sense, if we lost the case he was paid. If he won the case it went against a third of the winnings. That's just the way it was supposed to be.

[1T50-51]

It is difficult to determine from the record exactly what respondent had previously received in fees and what he had expended as a cost of the litigation during the time that he was compensated on an hourly basis. It appears that, as of May 1988, when respondent stopped billing on an hourly basis, he had incurred expenses of \$1,656.07 and legal fees of \$5,430 (1T161). The total payment that respondent had received at the time that the contingent agreement was signed was \$7,086, the sum of those two amounts.

The November 1990 disbursement to Mr. Malandro was made as follows:

¹ 1T refers to the transcript of the hearing before the DEC on June 21, 1993.

DISTRIBUTION OF RECOVERYRECOVERY: \$27,549.00 + 608607 + 100000² + + +³

COSTS:

Anthony Malandro - Prepaid Cost	\$6,086.07
Philip E. Clarkson - 7/7/89	\$ 300.00
Certified Mail - 7/19/88	\$ 3.50
Executive Delivery Service - 7/6/89	\$ 319.50
Robert Gibble, Inc. (Paid by Malandro)	\$ 350.00* ³
Executive Delivery Service - 3/14/90	\$ 285.00
Superior Court of New Jersey - 11/30/88	\$ 75.00
Sheriff James T. Plousis - 3/24/89	\$ 26.84
Sheriff Harry W. Metzger - 3/24/89	\$ 41.80
Subpoena Fee - Lawrence E. Pecan	\$ 43.50
Subpoena Fee - Joe Walker	\$ 41.25
Subpoena Fee - Sam Reale	\$ 33.38
Subpoena Fee - Robert Gibble	\$ 44.63
Philip E. Clarkson - Resurvey & Appear	\$ 350.00
TOTAL	\$8,000.47

NET RECOVERY \$19,548.53LEGAL FEES \$6,516.18BALANCE DUE CLIENT \$13,032.35RETURNED COSTS 6,436.07TOTAL DUE CLIENT \$19,468.42

² Respondent kept \$1,000 as "consideration" for signing a new fee agreement.

³ Items appearing in bold print appear to be alterations made on the original document.

Respondent was charged with violations of RPC 1.4(a) and (b), RPC 1.15(a) and (b) and RPC 8.1(b).

The hearing panel concluded that respondent violated RPC 1.15(b), based upon the five months that passed between the time he received the funds from Viking and ultimately distributed them, without any justification for the delay. The panel found no intent on respondent's part to defraud Mr. Malandro of his fair share of the money. The panel did not find clear and convincing evidence of the other alleged violations arising out of this matter.

Although the panel did not find respondent guilty of unethical conduct in connection with his compensation, it pointed to an entry on respondent's bill for 14.5 hours spent on a cruise on Mr. Malandro's boat, during which time respondent, who has an engineering background, was collecting information for the case. (Respondent testified that he was not actually planning to collect for that billing.) The panel found that, while the overall amount of respondent's billing was not unreasonable, Mr. Malandro should not have been billed for those hours.

Although respondent sent a letter, dated July 18, 1992, to the presenter in response to five letters from the presenter and the DEC secretary, he failed to file an answer to the complaint. Accordingly, the panel determined that respondent violated RPC 8.1(b).

The Stow Matter (District Docket No. IV-92-40E)

On or about July 19, 1991, Cynthia Stow retained respondent to represent her in a matrimonial action. She paid him \$850.

During the course of respondent's representation, Mr. and Mrs. Stow attempted to resolve the distribution of marital assets on their own. By letter dated November 4, 1991, Mrs. Stow forwarded a preliminary settlement agreement to respondent. She indicated that she did not feel that the agreement was adequate and asked for respondent's guidance on how to proceed. By letter dated March 16, 1992, respondent replied to her inquires and requested further financial information from her. The letter also discussed alimony and recovery of legal fees.

Thereafter, Mr. and Mrs. Stow came to an agreement as to the property settlement. By letter dated May 11, 1992, Mrs. Stow forwarded a copy of the agreement to respondent. She noted that she was satisfied with the agreement, but asked if respondent thought anything should be added. Respondent telephoned Mrs. Stow on May 20, 1992 and discussed the agreement with her. The record is not clear what alterations, if any, respondent made to the agreement.

The Matrimonial Early Settlement Panel was scheduled for May 26, 1992. On that date, the parties met and reviewed the settlement agreement. Later that day, the parties appeared before the court and a judgment of divorce was entered.

Mrs. Stow did not testify before the DEC. Her grievance filed with the DEC alleged that she received little guidance from

respondent, was unable to communicate with him and set forth occasions when she telephoned him and he failed to return her calls. Respondent testified that Mrs. Stow attended school and it was difficult to reach her during business hours. He added that she did not have an answering machine.

There were allegations raised at the DEC hearing that respondent did not obtain sufficient information about Mr. Stow's assets. Respondent explained that Mr. Stow had not provided him with information by which the assets could be evaluated and that he had so informed Mrs. Stow. (The record contains a letter from respondent to Mr. Stow's attorney, dated March 23, 1992, requesting more informative answers to interrogatories.) Respondent contended that he did not pursue additional information about Mr. Stow's finances because Mrs. Stow wanted the matter settled quickly and with as little expense as possible, regardless of the lack of information (2T51). Respondent added that Mrs. Stow was not interested in obtaining alimony or attorney fees (2T54). Further, according to respondent, Mrs. Stow was unwilling to cooperate in the discovery process, including answering interrogatories. Respondent stated that, although Mrs. Stow's answers are dated October 10, 1991, they were not forwarded to him until March 1992 (2T27-28, 43).⁴ In fact, the record contains a letter from Mr. Stow's counsel to respondent, dated February 11, 1992, requesting answers to interrogatories.

⁴ 2T refers to the transcript of the hearing before the DEC on June 29, 1993.

Mrs. Stow filed her grievance with the DEC in August 1992. Thereafter, respondent was asked to reply to her allegations. The record contains a letter from respondent to the DEC secretary dated August 21, 1992, requesting additional time to reply to the Stow and Berg grievances (infra). Respondent did not reply to Mrs. Stow's grievance, however.

The complaint charged respondent with violations of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a) and (b) RPC 1.15(b) and RPC 8.1(b). Respondent did not file an answer to the complaint.

In its report, the panel pointed out that it was at great disadvantage because Mrs. Stow did not testify; the panel was, therefore, unable to evaluate her credibility or corroborate her allegations. The panel determined that respondent was guilty of violation of RPC 1.4(a), based upon his delay in replying to Mrs. Stow's above mentioned November 1991 letter forwarding the proposed settlement agreement to respondent and RPC 8.1(b), for his failure to cooperate with the DEC. The panel did not find clear and convincing evidence of the remaining charged violations.

The Hoffner Matter (District Docket No. IV-92-42E)

This matter involved an alleged fraud perpetrated on Thomas Blisard by Donald Ballato. Although the record is not specific, Blisard and Ballato had a business relationship of some sort. Ballato was, at one time, respondent's client. (The record does not reveal the nature and time of respondent's representation of Ballato.) The grievant in this matter was Blisard's sister, Anne

J. Hoffner, who was the co-administratrix of his estate. (Blisard died on December 13, 1990.)

According to Mrs. Hoffner, Blisard was having difficulty settling his late wife's estate. Ballato told Blisard that respondent would be able to assist him. In the record, there is a \$200 check that appears to be from Blisard to Ballato for respondent.

Ballato obtained a power of attorney from Blisard and used it to purloin the latter's property. When Blisard learned of the theft, he rescinded the power of attorney. Mrs. Hoffner's attorney, Dennis P. McInerney, Esq., then asked Ballato for the return of the property and documents he had taken. Ballato informed him that respondent had the documents. Mrs. Hoffner and her sister, the co-administratrix, testified before the hearing panel that they and other family members thereafter attempted to contact respondent regarding the return of documents and that he failed to return their calls. Subsequently, McInerney and respondent corresponded and respondent turned over the documents. The documents respondent had in his possession were of little significance.

With regard to his lack of communication with Mrs. Hoffner and the other family members, respondent testified that he was of the belief that the sisters' position was adverse to his then client, Ballato, and he, therefore, would not speak with them (2T113).

Respondent testified that he never received any money from Blisard and that he never received the documents to which Blisard's

sisters were referring. Respondent explained that Ballato told him that Blisard's two sisters were stealing from him, Blisard, and that Ballato had obtained the power of attorney to assist him.

According to Ballato, Blisard gave him gifts in order to thank him for his assistance. Respondent explained that he did not feel that Ballato's acceptance of the "gifts" was proper and, when Ballato asked that respondent represent him in the event of a problem with the estate, respondent refused. (Although the record is not clear, it appears that Blisard had drafted a will leaving the estate to Ballato.) There is correspondence in the record indicating that respondent was, at times, uncertain as to whether to proceed with the representation. Respondent testified, however, that he ultimately refused to represent Ballato and that he, Ballato, threatened respondent's life. According to respondent, as of the date of the DEC hearing, there was an outstanding warrant for Ballato's arrest.

The complaint charged respondent with a violation of RPC 1.15(a) and (c) and RPC 8.1(b). Respondent did not file an answer.

The hearing panel did not find clear and convincing evidence of misconduct, with the exception of a violation of RPC 8.1(b). The panel was unable to conclude that an attorney-client relationship existed between Blisard and respondent or that an on-going attorney-client relationship had existed between respondent and Ballato. In fact, the panel was not convinced that respondent had any responsibility toward Blisard or that he had any role in Ballato's alleged fraud.

The Berg Matter (District Docket No. IV-92-39E)

Robert L. Berg retained respondent, on or about October 30, 1991, to file a motion to reduce alimony payments Mr. Berg had been making since a 1983 divorce. (Respondent had not represented Mr. Berg during the divorce.) Mr. Berg gave respondent a \$500 retainer fee on that date. Respondent forwarded a retainer agreement to Mr. Berg on November 6, 1991, which he signed on November 12, 1991.

Mr. Berg sought the reduction in alimony payments because he suffered from a debilitating illness that had necessitated his retirement from his engineering position and placed a great strain on him financially. He made a number of attempts to ascertain from respondent what the status of his matter was. Between January 30 and June 11, 1992, Mr. Berg made nine calls to respondent and left messages with a receptionist or secretary. The calls went unanswered. In fact, respondent neither telephoned Mr. Berg nor sent any correspondence after he forwarded the retainer agreement (3T20).⁵ (Contrarily, respondent contended that he had two telephone conversations with Mr. Berg. 3T32.)

Respondent took almost no action on this matter. He indicated that he prepared a notice of motion to reduce the alimony, but did not file it or prepare a certification in support of the motion. (The motion was not produced as evidence.) Respondent claimed that he did not prepare the certification because he did not have Mr. Berg's then current financial information. Respondent stated that, despite the fact that Mr. Berg gave respondent information and

⁵ 3T refers to the transcript of the hearing before the DEC on July 6, 1993.

respondent obtained Mr. Berg's previous attorney's file, that information was not sufficiently recent to be utilized. Respondent took no steps to obtain more recent information from the court. He explained that he relied on his client to provide the information to him and to see that the case proceeded (3T46). Respondent stated that he wanted Mr. Berg to set up an appointment to meet with him, but that he "didn't chase [Mr. Berg]" (3T32).

Mr. Berg is deceased. His widow, Mrs. Stella Berg, testified before the DEC. Mrs. Berg testified as to the above facts and the effect that the matter had on her late husband.

Respondent admitted that he "let the file get away from [him]" (3T32). He conceded that he did not, and does not, have a good system in his office to remind him to follow up on files (3T42). Respondent assured the DEC that he would return the \$500 retainer fee to Mrs. Berg.

The complaint charged respondent with a violation of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a) and (b), RPC 1.5(b), RPC 1.15(a) and (d) and R.1:21-6, and R.1:21-7A. Respondent did not file an answer.

The DEC determined that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 8.1(b).

* * *

The DEC was of the opinion that the misconduct in Malandro Stow and Berg warranted a private reprimand based upon respondent's lack of prior discipline and the lack of financial harm to his clients, with the possible exception of Mr. Berg. (Private

reprimands were abolished on July 14, 1994. An admonition is now the lowest form of discipline.) The DEC further concluded that respondent's violation of RPC 8.1(b) warranted public discipline.

* * *

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 DEC found that respondent had violated RPC 1.1(a) and RPC 1.3 in one matter (Berg), RPC 1.4(a) in two matters (Stow and Berg), RPC 1.15(b) in one matter (Malandro) and RPC 8.1(b) in all four matters.

The Board disagrees in part with the DEC. The Board is of the opinion that respondent violated RPC 1.1(a), RPC 1.3 and RPC 1.4 in each of the four matters. One member, however, did not find a violation of RPC 1.1(a) in the Berg matter.

With regard to respondent's violation of RPC 8.1(b), although respondent cooperated with the DEC during the hearing, he provided no explanation for his failure to reply to the investigator's requests for information or for his failure to file answers to the complaints. Given this lack of explanation and the number of cases involved, the Board concurs with the DEC's findings.

Much was made at the DEC hearing of the fact that respondent took the retainers he received from his clients and deposited them into his business accounts. Those fees, according to respondent's

retainer agreements, were minimum fees. The hearing panel correctly found no violation on respondent's part in this regard. General retainers for legal services may be deposited in the business account where no explicit understanding has been reached with clients that the fees will be separately maintained. In re Stern, 92 N.J. 611, 619 (1983).

Two Board members also took issue with the propriety of respondent's legal fee in Malandro. Respondent received a \$27,000 check from the defendant, deducted costs, including his hourly fee from the original retainer agreement, took out his one-third fee, added back the costs already paid by Mr. Malandro and gave his client a check for the total. In those two members' view, the problem, however, is that the \$6,086.07 Mr. Malandro paid to respondent when the case was still being billed on an hourly basis has not been properly credited. The total amount that is involved here is the \$27,549 settlement plus the \$6,086.07 paid to respondent by Mr. Malandro. A question arises as to what happened to that money. After signing a contingent fee agreement, respondent could not wind up with that money, too, at the end of the case. It either had to be returned to his client or deducted from his one-third fee or given to third parties to pay costs. Respondent repeatedly contended that he did not take more than his one-third fee but, instead, was compensated on the basis of two different contracts. Two Board members disagreed with respondent's contention and found that he violated RPC 1.5(b).

In light of the above violations, the Board has determined that respondent must be suspended for a period of three months. See In re Marlowe, 121 N.J. 236 (1990) (where an attorney was suspended for three months for gross neglect, lack of diligence, a pattern of neglect and failure to communicate in two cases and misrepresentation of the status of one of those matters. The attorney's lack of cooperation with the DEC and prior public reprimand were also taken into consideration). Further, upon reinstatement, respondent is to practice under the supervision of a proctor for a period of one year. Three members did not participate.

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