Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-247

IN THE MATTER OF

A. KENNETH WEINER,

AN ATTORNEY AT LAW

Decision
of the
Disciplinary Review Board

Argued: December 21, 1994

Decided: May 23, 1995

Stanton Levy appeared on behalf of the District VIII Ethics Committee.

Ronald J. Busch appeared on behalf of respondent.

This matter was before the Board based on a recommendation for public discipline filed by the District VIII Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 5.3 (liability for non-lawyer staff misconduct) and RPC 8.4 (no subsection specified).

Respondent was admitted to the New Jersey bar in 1970. He was privately reprimanded on May 5, 1988 for failure to properly identify and safeguard a client's funds and to return the balance at the end of the representation.

Dawn Kapalski retained respondent initially for a criminal matter on April 2, 1988. On June 20, 1988, she and her mother conferred with either respondent or one of his staff members. At that time, Kapalski retained respondent to represent her in a

personal injury matter arising from a June 12, 1988 accident in which Kapalski's aunt was the driver of the automobile.

On the same day, Kapalski also met with respondent's paralegal, Brenda Finley. Finley gave Kapalski blank medical authorizations, releases and a power-of-attorney "to sign any and all documentation, [papers], authorizations or checks . . .and to negotiate checks for deposit . . .and to sign any and all documentation . . .[in this matter]." At this point, Finley's and Kapalski's versions of the events differed. Kapalski testified that she signed several forms, but that she refused to sign the power-of-attorney. 2T5.[1] Finley testified that Kapalski signed all of the forms. 3T13, Exhibit P-12. Although respondent was present at Kapalski's meeting with the paralegal, he claimed he did not know which forms were signed at that time.

Both cases appear to have proceeded routinely for about a year. The criminal matter resulted in a three-day jury trial, in May 1989, with sentencing scheduled for June 16, 1989. Respondent's office billed Kapalski $4,700 on May 30, 1989. Between June and October 1989, Kapalski made five payments toward the $4,700 fee, totalling $900.

The personal injury matter resulted in a settlement of $15,000, the policy limit. In November 1989, respondent's office received the settlement check. Barbara Leftow, a secretary in

---

[1] 1T refers to the transcript of the DEC hearing on September 2, 1993.
2T refers to the transcript of the DEC hearing on December 2, 1993.
3T refers to the transcript of the DEC hearing on February 3, 1994.
4T refers to the transcript of the DEC hearing on March 30, 1994.

respondent's office for twelve years, had worked on the criminal matter, including its billing. She was unaware of the personal injury matter until the $15,000 check was received. She testified that, when "a settlement check come in, it's generally spoken of in the office, and I, therefore, was made aware at that time that the settlement check had come in and so I asked the bookkeeper to deduct the balance of the criminal fees owed from the settlement check." 2T65-68. The secretary did so without respondent's knowledge or Kapalski's consent to apply a portion of the insurance proceeds to the fee balance in the criminal matter. When the secretary was asked whether this type of unauthorized deduction was standard procedure in the office, she replied: "It didn't happen very often that additional criminal fees were taken out of negligence cases. Certainly since that time we don't do that without the express consent of the client. I can't really answer because I don't remember how many cases we had in the office at that time or what was done." The secretary was aware that it was standard operating procedure to obtain clients' signatures on releases and power-of-attorney forms in personal injury matters, but she did not know whether those forms had been executed in this specific case.

Meanwhile, the paralegal endorsed or stamped the insurance proceeds check payable to respondent and to Kapalski, allegedly pursuant to a power-of-attorney form signed by Kapalski and not witnessed. Exhibit P-12, 3T13. The check, which was not introduced into evidence at the DEC hearing, was presumably

deposited in respondent's trust account. A handwriting expert, Gregory A. McNally, reviewed numerous checks and documents previously signed by Kapalski as well as the two releases and the power-of-attorney in question. He concluded that the signatures on the releases and on the power-of-attorney were not Kapalski's. Exhibits P-7 through P-9. The expert made no conclusions as to whose handwriting it was. Respondent's counsel stipulated that the expert's report and letter could be "treated by the panel as testimony" and that the power-of-attorney and releases had not been signed by Kapalski. 2T59-60.

Thus, the record reveals two separate improper acts: the secretary's unauthorized deduction of the balance of the fee in the criminal matter from the insurance proceeds in the personal injury matter and the paralegal's signing of the client's name to the settlement documents.

Following these two events, on December 14, 1989 respondent's office mailed to Kapalski a cover letter, a net trust account check of $5,952 (after the deduction of costs of $372 and fees of $4,876 and $3,800) and a settlement statement to be signed by Kapalski. Exhibits 2 and 2A. Kapalski protested the deductions by calls to respondent's staff on unspecified dates and by a letter to respondent, dated February 9, 1990. On February 13, 1990, respondent wrote to Kapalski, explaining that he was unaware of her objections until he received her letter. He asserted that Kapalski did not show up for three scheduled appointments, presumably to

discuss the secretary's prior deduction of the fee from the settlement proceeds.

* * *

The DEC found clear and convincing evidence that respondent violated RPC 5.3(a) (adopting and maintaining reasonable efforts to ensure that non-lawyer conduct will be compatible with lawyer's obligations), RPC 5.3(b) (supervision of non-lawyer conduct) and RPC 5.3(c) (responsibility for non-lawyer misconduct if ordered or ratified, or if known, or if not reasonably investigated to disclose former misconduct).

The DEC did not find any violations of RPC 8.4.

* * *

Following a de novo review of the record, the Board finds that respondent violated RPC 5.3 through his excessive delegation of authority to his non-lawyer staff and through at least condoning the signing of client's names by his staff.

The deduction of the fee in the criminal matter from the proceeds of the negligence matter was improperly authorized by a secretary in respondent's office. Although the record shows no malevolence on the secretary's part, the correct procedure would have been to obtain the client's signature before the deduction of the fee. Accordingly, while there is no clear and convincing evidence that respondent directed the secretary's actions or even had knowledge of the improper deduction of the fee, the Board concludes that respondent violated RPC 5.3 for his inadequate supervision of the secretary and of his attorney records.

Respondent should have been aware of all trust account transactions, including the transfer of legal fees from his trust account to his business account. This responsibility cannot be delegated.

As to the signing of the power-of-attorney and releases, respondent stipulated that the signature on those documents was not Kapalski's. Therefore, as the DEC concluded, someone in respondent's office must have signed the documents. RPC 5.3 imposes vicarious, not strict, liability on attorneys for misconduct by non-lawyer employees. The rule requires either knowledge by the attorney, or failure to make reasonable efforts to insure compliance by non-lawyer employees with the professional obligations of the attorney, or failure to make reasonable investigation of circumstances that would disclose past instances of misconduct by the non-lawyer, evidencing propensity for such misconduct. Here, there is no clear and convincing evidence that respondent had knowledge of the forgery of Kapalski's signature on the documents by one of his non-lawyer employees. Similarly, the record does not support a conclusion that respondent failed to make reasonable efforts to insure that the conduct of his non-lawyer employees complied with the rules, or that he had reason to know of past instances of misconduct by those employees. The suspicion is that respondent's office procedures and practices were somewhat loose to the extent that he improperly delegated too much responsibility for his files to his non-lawyer staff or at least to his paralegal. Nevertheless, the evidence in this regard is

insufficient to satisfy a clear and convincing standard of proof. Accordingly, the charge of a violation of RPC 5.3 on this score should be dismissed.

Indeed, even if Kapalski had properly signed the power-of-attorney, that practice would still have been improper under Opinion No. 635, 124 N.J.L.J. 1420 (December 7, 1989), modified at 125 N.J. 181 (1991) (where the Court rejected routine use of power-of-attorney to endorse check and restricted such use to extraordinary circumstances).

After consideration of the relevant circumstances, which included respondent's prior private reprimand, the Board has unanimously determined to impose a reprimand for respondent's misconduct. Two members did not participate.

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

Dated: 5/23/95

By: Raymond R. Trombadore
Chair
Disciplinary Review Board