Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-037

IN THE MATTER OF :
ALLEN C. MARRA, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 21, 1993

Decided: May 17, 1993

Andrew W. Kleppe appeared on behalf of the District VC Ethics.

Michael Critchley appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This disciplinary matter was before the Board based upon a recommendation for public discipline filed by the District VC Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.4(a) (failure to communicate), RPC 1.5(b) (safekeeping property), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and R.1:20-3(f) (failure to cooperate with the DEC's preliminary investigation).

Respondent was admitted to the New Jersey bar in 1967. He maintains a law office in Montclair, Essex County, New Jersey.

In March 1989, respondent was retained by David McGraw to represent him in connection with injuries sustained in a fall at a supermarket. Respondent and McGraw had known each other for over twenty years and, at least in respondent's estimation, were close

friends until September 1990, when they had a falling-out. Respondent had also represented McGraw in two other prior matters, including a complex criminal case in 1985, for which there was an outstanding legal fee of $72,000.

Respondent did not prepare a retainer agreement in connection with the slip-and-fall case and did not discuss with McGraw the basis of the fee. Respondent explained that he viewed that formality as unnecessary because he and McGraw were "very good friends at that time." T5/21/1992 34.

The gravamen of McGraw's grievance concerns respondent's conduct in the settlement of the slip-and-fall case and the subsequent disposition of the settlement funds. It is undisputed that respondent signed a release on behalf of McGraw and his wife and also endorsed a $3,000 settlement check made out to McGraw, his wife, and respondent. Respondent not only affixed his signature on the back of the check, but also signed the names of McGraw and his wife. There is no question that respondent did not have a power of attorney to do so. The issue is whether he had the oral consent of both McGraw and his wife.

According to respondent, McGraw had authorized him to settle the suit for $3,000, which he did. Sometime thereafter, the chiropractor who had treated McGraw in connection with the injuries sustained in the accident happened to be in respondent's office on an unrelated matter. At that time, respondent asked the chiropractor if he would agree to reduce his outstanding $1,800 bill to $1,000, because of the small amount of the settlement. The

chiropractor agreed. Respondent then immediately telephoned McGraw, while the chiropractor was still in respondent's office, to obtain McGraw's authorization to pay $1,000 to the chiropractor. Still according to respondent, McGraw replied, ". . . I'm not looking for any money. That's all we can get. You just keep the rest. Pay the doctor and forget about it from what I owe you." T5/21/1992 35. When respondent informed McGraw that he would have to sign the check, McGraw indicated "I'm not coming up there to sign it. . . you do what you have to do with it." T5/21/1992 35. Respondent then deposited the check, not in his trust account, as required, but in his business account. He disbursed $1,000 to the chiropractor and kept the balance.

Similarly, when respondent asked McGraw to sign the release, McGraw allegedly replied, "I'm not going to come up there. . . you sign it." T5/21/1992 34. Respondent then signed McGraw's and McGraw's wife's name on the release and had someone from his office notarize the "signatures."

At the DEC hearing, respondent testified that he had not attempted to obtain McGraw's wife's consent or authorization to sign her name either on the release or on the check. At the Board hearing, however, respondent's counsel submitted an affidavit by Mrs. McGraw, stating that she had been informed by her husband of the $3,000 settlement; that she had given respondent permission to retain the settlement proceeds in partial satisfaction of the owed legal fees; and that she had authorized respondent to sign her name on the check and on the release.

The chiropractor corroborated respondent's testimony that he had obtained McGraw's authorization to pay the chiropractor $1,000 and to keep the balance of the settlement proceeds. According to the chiropractor, he was in respondent's office when respondent utilized the speakerphone to talk to McGraw; McGraw's reply had been, "give the doctor whatever he wants and just hold on to the rest." T5/21/1992 21.

McGraw's testimony, however, was to the contrary. According to McGraw, sometime in 1989, respondent advised him that he might be able to settle the case for $3,000. Subsequently, however, respondent informed McGraw that there was no possibility of recovery because McGraw was unemployed at the time of the fall. Thereafter, in August or September 1990, McGraw received a telephone call from the chiropractor indicating that respondent had sent him $500 toward his $1,800 bill and asking for the remainder. When McGraw telephoned respondent to inquire about the settlement, respondent replied, "I don't know about it . . . I can't be bothered with you." T5/21/1992 10. Because thereafter McGraw was unable to reach respondent, he wrote a letter to respondent, on September 18, 1990, stating, in part, that he had recently learned that the case had been settled and that respondent had retained the balance of the settlement funds after paying the chiropractor's bill. The letter demanded an explanation from respondent as to why he had kept the settlement monies. The letter also advised respondent that, if he did not forward the monies to McGraw by October 5, 1990, he would file a complaint with the ethics

authorities (Exhibit P-1). Respondent did not reply to that letter. Accordingly, on October 26, 1990, McGraw wrote directly to Risk Services, Inc., the agency in charge of handling the slip-and-fall case on behalf of the supermarket (Exhibit P-2). In that letter, McGraw requested a copy of the settlement check, which was forwarded to him (Exhibits P-5 and P-6). The check had been endorsed by respondent. McGraw denied vehemently that either he or his wife had given respondent permission to endorse the check. McGraw never received any portion of the settlement proceeds.

The ethics complaint also charged respondent with failure to reply to the investigator's written request for information about the grievance. The presenter conceded, however, that he had orally conferred with respondent about this matter. Respondent did file an answer to the complaint, albeit on the eve of the DEC hearing.

* * *

At the conclusion of the ethics hearing, the DEC concluded that respondent violated RPC 1.4, when he failed to communicate with his client; RPC 1.5, when he failed to prepare a contingent fee agreement and to provide McGraw with a written statement showing the remittance to the client and the method of its determination; RPC 1.15(b), when respondent failed to notify McGraw of the receipt of the settlement funds; "probably" RPC 1.15(c), when respondent failed to keep those funds separate until there was an accounting and severance of his interest; RPC 8.4(c), when respondent signed the settlement check and the release on behalf of

Mrs. McGraw without her authorization and had someone in his office notarize the "signatures" on the release and on the check, and, finally, R. 1:20-3(f), when respondent failed to reply, in writing, to the DEC investigator's two requests for information about the grievance.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. The Board is unable to agree, however, with the DEC's specific findings of violations of RPC 1.5 and RPC 1.15(a) and (b).

It is undeniable that respondent violated RPC 1.4(a), as demonstrated by his failure to reply to McGraw's letter of September 18, 1990. Also, although the record did not clearly and convincingly establish that respondent signed the check and the release without the McGraws' acquiescence, by merely signing those documents (even in the face of a verbal authorization,) respondent violated the ruling contained in Matter of Advisory Committee on Professional Ethics Opinion 635, 125 N.J. 181 (1991) (power of attorney authorizing lawyers to endorse client's name on settlement draft justified only in extraordinary circumstances). Moreover, respondent violated RPC 8.4(c) when he directed someone in his office to notarize the false signatures on the release and on the check. By signing their names on those two documents and arranging

for an employee to notarize the "signatures" on the release, respondent led the world to believe that McGraw and his wife themselves had signed them in the presence of the notary.

As to a violation of 8.1(b), although it is true that respondent did not reply to the investigator's two requests for information, he did confer orally with the investigator about the matter and filed an answer to the complaint, although untimely; he also appeared at the DEC hearing and was cooperative. In light of the foregoing, the Board finds that respondent technically violated RPC 8.1(b), a circumstance that should not operate to raise the degree of discipline required for his other ethics infractions.

The Board is not convinced, however, that respondent violated RPC 1.5 and RPC 1.15 (b) and (c), as found by the DEC. The DEC based its finding of a violation of RPC 1.5 on respondent's failure to prepare a written retainer agreement in a contingent fee matter, as required by that rule. But the record is not clear that the fee was contingent. Respondent testified, and McGraw agreed, that there was no discussion whatsoever about the fee. Under those circumstances, the DEC's finding that it was a contingent fee is unsupported by the record. Similarly, respondent's failure to communicate the basis or the rate of the fee (even if not contingent) to McGraw did not rise to the level of a violation of RPC 1.5, inasmuch as respondent had represented McGraw before and also shared a close and long-standing personal relationship with him. RPC 1.5(b).

It is also not clear that respondent violated RPC 1.15(b) and

(c) for failing to notify McGraw of the receipt of the $3,000 settlement check and to maintain those funds separate. Because the parties' testimony was contradictory, it cannot be concluded by clear and convincing evidence that respondent did not notify McGraw of the receipt of the $3,000 settlement check or that respondent had the obligation to keep those funds separate until an accounting and severance of his interest. Nevertheless, respondent's failure to deposit the settlement check in his trust account violated RPC 1.15.

As to the appropriate level of discipline, the Board was persuaded that a public reprimand is sufficient for respondent's misdeeds. See, e.g., In re Conti, 75 N.J. 114 (1977), and In re Rinaldo, 86 N.J. 640 (1981). Although the Board is aware that respondent received a private reprimand in 1992 for lack of diligence and failure to communicate in one case, the unethical conduct that was the subject matter of that disciplinary proceeding is unrelated to the within ethics transgressions.

The Board unanimously recommends that respondent receive a public reprimand.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 5/17/93

By: Raymond R. Trombadore
Chair
Disciplinary Review Board