SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-007

IN THE MATTER OF :
STEVEN M. KRAMER, :
AN ATTORNEY AT LAW :

Decision

Argued: April 17, 1996

Decided: October 1, 1996

John M. Kearney, III appeared on behalf of the District IIIB Ethics Committee.

James B. Ventantonio appeared on behalf of the respondent.

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 the District IIIB Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.2(a)(a lawyer shall abide by a client's decision about the objectives of the representation, shall consult about the means by which they are to be pursued and shall abide by a client's decision whether to

cept an offer of settlement); and RPC 1.8(j)(proprietary interest in the cause of action or subject matter of litigation).

Respondent was admitted to the New Jersey bar in 1983. He is also admitted in New York. His primary office is in New York City. At the time the formal complaint was filed, respondent's New Jersey office was located in Berlin, New Jersey.

Respondent received a public reprimand in 1993, for violations of RPC 1.1(a) (gross neglect); RPC 1.3 (failure to act with reasonable diligence in opposing a motion and to take other action in a timely manner); RPC 1.16(a)(3)(failure to withdraw as counsel when discharged); RPC 1.16(d)(failure to protect a client's interests after termination of representation); and RPC 8.1(b)(failure to cooperate with ethics authorities). In re Kramer, 130 N.J. 536(1993).

* * *

The grievance in this matter arose when respondent sued his former client, Jon DeLuca, for breach of contract (the retainer agreement), among other things. Ruling against respondent on August 31, 1990, the court also found a violation of RPC 1.2(a) and a possible violation of RPC 1.8(j). As a result of that proceeding, the court referred the matter to the disciplinary authorities.

* * *

DeLuca and Edward Pastucha had been fifty percent shareholders in a company known as Koala Blue (USA) Ltd. They were in the business of opening retail stores and selling franchises. For a time their business did well. At some point, DeLuca began to have financial problems. He claimed that Pastucha refused to finance his interest in their business. A rift developed between the two. DeLuca alleged that, thereafter, Pastucha improperly sold his interest in the company.

DeLuca consulted with respondent, who believed that DeLuca had a good case against Pastucha. DeLuca, thus, retained respondent in August 1986 to sue Pastucha, Koala Blue, Inc. (a company different om Koala Blue (USA) Ltd.), Patricia Farrar and Olivia Newton-John for violations of the California Franchise Investment Act. On August 12, 1986, DeLuca entered into a retainer agreement (Exhibit P-1) with respondent. The agreement referred to the case as "DeLuca v. Pastucha" and "DeLuca v. Newton-John et al." The retainer agreement did not indicate that respondent was representing the corporation, Koala Blue (USA) Ltd., or that DeLuca was suing in his capacity as officer of the corporation. The agreement established that respondent was to receive a forty percent contingent fee of all sums recovered from a settlement or trial. Also, an $8,500 retainer payable by November 1, 1986 was to be applied toward the forty percent contingency fee.

Respondent filed a complaint in DeLuca's behalf in the United

tates District Court for the central district of California. Apparently, respondent also filed an amended complaint (Exhibit P-2). The record does not reveal the filing date of either document. By March 1988, DeLuca had become disenchanted with respondent's representation. In a letter dated March 13, 1988, DeLuca informed respondent that he would be retaining new counsel and instructed respondent to forward his files to his new attorney. It is not known whether respondent forwarded the files at that time.

At some unspecified point, but apparently prior to DeLuca's March 13, 1988 letter, the defendants had filed a motion for summary judgment, which was granted. Afterwards, on April 22, 1988, an order for counsel fees in the amount of $110,842 was entered against DeLuca.

DeLuca explained that, after the summary judgment motion, he felt that respondent was inept and was not paying attention to his case. DeLuca claimed:

> So we moved from having a lawsuit against Olivia Newton-John and Ed Pastucha [for half of the value of the business] to defending your backside because these guys got a judgment against me for attorney's fees. So when you look at it it's silly but it's what happened.
> [1T23-24, 27]

DeLuca believed that he lost the summary judgment motion because respondent failed to appear in court when required and failed to file proper documents with the court. DeLuca felt that the court was angry because of respondent's "sloppiness." Moreover, DeLuca testified that it was often difficult to contact respondent because he was so busy.

The defendants' attorney, James MacNaughton, obtained a

dgment against DeLuca in New Jersey. Thereafter, MacNaughton began contacting DeLuca personally. The record does not clarify whether MacNaughton unsuccessfully attempted to deal with respondent or whether he just chose to deal directly with DeLuca. Respondent implied that he instructed MacNaughton that he was not to negotiate directly with DeLuca (2T386)[1] and also testified that "Mr. MacNaughton told me to go f_ _ _ myself and he was going to talk directly to DeLuca." 3T443.[2]

DeLuca explained that he was forced to attend depositions at MacNaughton's office without the benefit of respondent's representation:

> I said hey, this is a whole new ballgame for the two of us, we need you there to defend us when we have these meetings. Don't worry, don't worry, he said. I'm close to the phone, call me, whatever, I'm really busy, blah, blah, blah. So we just dangled out there not knowing what our rights were or not. That was a mess. [1T28[3]].

The record is unclear about the dates and number of contacts between MacNaughton and DeLuca. During various conversations between MacNaughton and Deluca, settlement possibilities were discussed. Thereafter, on a number of occasions, DeLuca informed respondent that he wanted to settle the matter and requested that respondent contact the defendants to that end. Instead, respondent convinced DeLuca that he had a good case and to continue to pursue

---

1 2T denotes the transcript of the July 20, 1995 DEC hearing.

2 3T denotes the transcript of the September 27, 1995 DEC hearing.

3 1T denotes the transcript of the July 13, 1995 DEC hearing.

he matter. DeLuca, however, was in ill health, had suffered a heart attack and his finances were poor. He, therefore, wanted to settle the matter even though he believed that he had a good case, because he felt that all he was doing was defending himself against the New Jersey judgment.

DeLuca again agreed to continue his suit. He and respondent orally changed the terms of the retainer agreement. As confirmed by DeLuca's letter dated May 1, 1989 (Exhibit P-7), DeLuca agreed to proceed with the California action and respondent agreed to pay all outstanding costs and expenses in connection with both the underlying claim and an appeal on the summary judgment order. Respondent also agreed to defend DeLuca in connection with the judgment for attorney's fees and to pay all the costs, expenses and ees necessary for DeLuca to file a Chapter 11 bankruptcy petition (respondent had convinced DeLuca to file for bankruptcy to stay the execution of the judgment). The above terms represented DeLuca's understanding of respondent's representation.

MacNaughton continued to contact DeLuca in an attempt to settle all outstanding actions. DeLuca wanted respondent to participate in settlement negotiations because he did not feel that he was capable of representing himself. Although DeLuca informed respondent of at least one meeting, respondent indicated that he was too busy to attend, but could be reached by phone if a problem developed. DeLuca testified that initially MacNaughton offered him a $50,000 settlement and a discharge of the judgment for counsel fees. 1T52. Again, in a letter dated May 11, 1989 (Exhibit P-8),

Luca notified respondent that he was dissatisfied with the direction his case had taken and, therefore, wanted to settle it.

DeLuca wrote and telephoned respondent on several more occasions expressing his dissatisfaction with respondent's services. Respondent again and again succeeded in persuading DeLuca to proceed with the litigation and to file for bankruptcy to stop the defendants' collection efforts on the judgment. By letter dated May 18, 1989, respondent forwarded a letter to DeLuca summarizing an amended retainer agreement. The letter indicated:

> Our original retainer agreement shall be modified in the following manner. I will be responsible for expenses to pursue this litigation. Those amounts will be deducted from any recovery, as will be your payments for expenses to this date. Also to be deducted from the gross recovery will be the retainer paid to my firm. After those three deductions (your expenses for the suit, my outlay of expenses and the retainer), this split shall be 40% to Steven M. Kramer and 60% to John DeLuca.
>
> * * *
>
> It is understood that no settlement negotiations shall take place without my concurrence.

[Exhibit P-11]

A notation at the bottom of the page indicated that DeLuca could not be involved in negotiations for "less than $100,000" without respondent's "concurrence." According to DeLuca, respondent would be able to recover at least his expenses if DeLuca were to settle for $100,000. The letter also enclosed a copy of a check respondent had forwarded to attorney Jeffrey E. Jenkins, whom respondent had retained to file a bankruptcy petition in DeLuca's behalf.

After conferring with respondent and consulting with DeLuca,

Jenkins filed a Chapter 11 petition. Respondent had led both DeLuca and Jenkins to believe that the petition was only a "stop-gap" measure to stay collection proceedings on the judgment for attorneys fees and to buy time for respondent to pursue DeLuca's appeals in the federal court.

After the Chapter 11 petition was filed, the defendants filed a motion to dismiss. Jenkins advised DeLuca that the defendants had a good chance of winning the motion, whereupon they could seize DeLuca's assets to satisfy the New Jersey judgment. The motion was scheduled to be heard on July 31, 1989.

In a July 27, 1989 letter to respondent, DeLuca stated that he had agreed to file for bankruptcy only because respondent had assured him that the federal court would promptly decide his appeal and that he had a good chance of prevailing. DeLuca understood that respondent was to advance all monies necessary to further the bankruptcy case and to continue the case in the federal court. As of July 27, 1989, however, DeLuca believed that he would not be represented at the bankruptcy hearing because respondent had not paid Jenkins' fee and respondent would not appear on his behalf. Exhibit P-12. DeLuca, therefore, told respondent that he felt it was in his best interests to settle the matter. He instructed respondent to contact MacNaughton to discuss a settlement. DeLuca wanted respondent to insure that the judgment against him would be vacated and that his assets would no longer be frozen. Respondent never contacted MacNaughton, as requested by DeLuca. DeLuca had lost all confidence that respondent had any intention of protecting

is interests and, finally, in a letter dated September 20, 1989, notified respondent of the following:

> By this letter I am hereby releasing you as my attorney in any and all capacities (including, but not limited to, the Bankruptcy filing in Trenton, New Jersey and any litigations now pending in any and all courts).
>
> [Exhibit P-13]

The letter instructed respondent not to take any further actions in any case in which DeLuca was involved. DeLuca did not feel that he needed to give a lengthy explanation of the reasons for his decision.

Notwithstanding this letter, DeLuca believed that respondent continued to take action in his behalf. DeLuca explained that, even though respondent had returned most of his files as requested, respondent had continued to litigate the matter. DeLuca testified that he was surprised to learn that respondent had continued the California action and was acting in behalf of Kaola Blue (USA) Ltd. Respondent had not been retained to represent the corporation. Respondent, however, filed a "response to notice of stay," dated November 7, 1989, indicating that the notice of stay only applied to plaintiff-appellant DeLuca and that, because the plaintiff-appellant Koala Blue (USA) Ltd. had not filed for bankruptcy, the appeal should proceed as to that appellant. Respondent intended to represent the corporation right through the appeal.

Upon learning of respondent's actions, Jenkins wrote to respondent on November 8, 1989:

> It is my understanding that my client, Jon DeLuca

has fired you as his attorney in any and all capacities (enclosed please find a copy of the letter that Mr. DeLuca informs me he sent to you by regular and certified mail, surely you have received same). This termination of representation would certainly include your representation of Koala Blue USA, Ltd.

I am puzzled why some six (6) weeks after you have been relieved of your representation of Mr. DeLuca you are still filing pleadings allegedly on his behalf with not only the Third Circuit Court of Appeals but also the Ninth Circuit Court of Appeals. I would suggest that you stop this unauthorized and unethical representation and interference with Mr. DeLuca's affairs immediately.

[Exhibit P-15]

In response, respondent wrote:

a. I have a fiduciary duty to Koala Blue USA Ltd., independent of my representation of Mr. DeLuca. Mr. DeLuca is but one shareholder of that corporation. Hence, I fully intend to represent that corporation's rights through the appeal.

b. The Ninth Circuit has scheduled oral argument on the appeal for December 5. As I anticipate that the summary judgment will possibly be reversed, it is my position that your stipulation to attempt to stay that action is ill-advised. Is the trustee aware of the pendency of the oral argument and the likelihood of success? Is the Bankruptcy Judge?

[Exhibit P-16]

Later that day, respondent sent Jenkins another "fax" indicating that he should advise DeLuca that, without a substitution of counsel, DeLuca's letter of termination was ineffective under the local rules in the Ninth Circuit Court of Appeals and that DeLuca should advise respondent of the name of his new attorney so that respondent could prepare a substitution of counsel form. Exhibit P-18.

Pastucha had also learned that respondent was taking action on

behalf of Koala Blue (USA) Ltd. From respondent's own file, it may be inferred that Pastucha questioned respondent about his authority to represent the company. This inference is drawn from a letter from respondent to Pastucha, in which respondent informed Pastucha that he was continuing as attorney for Koala Blue (USA) Ltd. because no substitution of counsel had been completed. Exhibit P-19. According to Jenkins, Pastucha had informed him that the company had never retained respondent.

On November 13, 1989, respondent sent a letter to DeLuca (Exhibit P-20) threatening to sue him for breach of the retainer agreement and to file a claim for attorney fees with the bankruptcy court. Nevertheless, DeLuca continued to negotiate with the defendants and eventually agreed to dismiss his bankruptcy petition in exchange for $10,000 and the abandonment of the judgment against him for counsel fees.

When respondent learned of the impending settlement, he sent a "fax" on November 14, 1989 (Exhibit P-21) to the bankruptcy trustee, Thomas Orr, indicating that he had recently learned of the parties' tentative settlement, that he had been litigating the cases in DeLuca's behalf for three and one-half years, that the cases were valuable, that the defendants in the cases knew it and that that was why they were eager to have DeLuca settle on the terms offered. Respondent also indicated that the value of the case could increase if DeLuca prevailed on the first of the appeals, which was scheduled in California for December 5, 1989. Respondent wrote:

> I am at a complete loss as to how Mr. Jenkins can advise that this settlement is in the best interest of the estate. As I was to be co-counsel in this bankruptcy proceeding, according to my agreement with Mr. DeLuca and Mr. Jenkins, I must go on record as strenuously objecting to such settlement as completely against the interest of the estate.
>
> [Exhibit P-21]

Finally, respondent also informed Orr that he wanted to be heard at the hearing in the matter.

Because respondent refused to withdraw from the case until a substitution of attorney was signed, DeLuca prepared a substitution of attorney naming himself as the party pro se. (The document was erroneously dated January 20, 1989, instead of 1990). Exhibit P-23. Thereafter, DeLuca agreed to stay all litigation between himself and the defendants and consented to the issuance of a stay of the bankruptcy proceedings in New Jersey.

The settlement included, among other terms, that general releases were to be exchanged between the parties; that Koala Blue was to pay DeLuca the sum of $10,000; and that DeLuca and Koala Blue (USA) Ltd. would assign to Koala Blue twenty percent of the proceeds, if any, that would arise out of a malpractice claim against either respondent or other attorneys involved and/or their respective firms.

DeLuca testified that he believed that respondent had filed a motion to set aside the stay. He noted that that action was without his consent and had occurred after he had specifically terminated respondent's representation. After the above settlement was entered, respondent actually filed a complaint against DeLuca

in e District Court of New Jersey. He also threatened to sue Jenkins and Jenkins' firm and went so far as to prepare a complaint, which he never filed.

* * *

In attempting to explain why he continued to litigate the matters after being discharged, respondent asserted that, once DeLuca filed a petition for bankruptcy, he was no longer solely representing DeLuca's interest. He claimed that he had an obligation to represent the bankruptcy estate as its special counsel. DeLuca, however, testified that he had agreed to file a bankruptcy petition at respondent's urging, so that respondent could buy time to pursue the California litigation. It was DeLuca's understanding, up until November 13, 1989, that respondent was epresenting him only, not Koala Blue or the bankruptcy estate. At no time did DeLuca understand that the bankruptcy action would shift control of the litigation to respondent. At the DEC hearing, DeLuca stated: "I never knew there was a difference between me and the estate." 1T31. He further claimed: "[Respondent] never advised me that I was no longer the client and there was an estate . . . until today . . . .I'm upset because this is the first time I've heard from [respondent] that there was any change in the case and he was not doing something else." 1T66. Moreover, DeLuca could not understand how Koala Blue (USA) Ltd. had become a plaintiff in the underlying matter. Initially, he was unaware that Koala Blue (USA) was a plaintiff. The company had never entered into a retainer agreement with respondent. At the DEC hearing,

DeLuca stated to respondent, "how you mixed that up, I'll never know. Koala Blue was a company I owned so was I suing myself?" 1T145. DeLuca also expressed confusion about how he could have had authority to retain respondent to represent a company in which he was only a fifty percent shareholder. DeLuca contended that he had hired respondent to engage in litigation to benefit him. At some point, however, he felt that respondent's conduct was no longer to his benefit, a concern he expressed to respondent a number of times.

DeLuca felt that respondent had interfered with his attempt to settle the matter by trying to convince him on a regular basis to "hang in," in order to collect his fee. He claimed that respondent must have contacted him twenty or twenty-five times to persuade him to continue with the matter; respondent kept telling him to "hang in it's a big case." DeLuca stated at the DEC hearing, "I don't blame you, you were trying to collect your winnings." T160.

* * *

Respondent first raised the special counsel argument in replying to the DEC investigation. In an October 29, 1990 letter to the DEC, respondent claimed that, based on his prior experience, he believed that, once a bankruptcy petition was filed, his fiduciary duty was no longer solely to the debtor, but to the bankruptcy estate. It was for that reason that he had modified the retainer agreement with DeLuca, with Jenkins' knowledge. Respondent maintained that, in the past, he was required to obtain

court approval of such a fee agreement and believed approval would be sought in this case. (Respondent did not suggest by whom). However, respondent added, before court approval could be sought, DeLuca settled his case and the bankruptcy proceedings were dismissed. Exhibit P-27.

* * *

Jeffrey Jenkins was retained to represent DeLuca in 1989. He testified that respondent asked him to file a Chapter 11 petition in DeLuca's behalf to avoid a post-judgment execution on DeLuca's assets and to "buy more time" for his client. According to respondent's representations, Jenkins never imagined that the bankruptcy would continue for more than a month or two or that the Chapter 11 proceeding would be converted to a Chapter 7 proceeding.

Jenkins confirmed that, since DeLuca could not afford to pay his fee, respondent had agreed to subsidize the bankruptcy proceedings by paying Jenkins $1,000 to file the bankruptcy petition ($500 for filing fees and $500 for Jenkins' fee). The fee agreement between respondent and Jenkins was memorialized in a May 18, 1989 letter from respondent to DeLuca (Exhibit P-11), indicating that respondent's and DeLuca's initial retainer agreement would be modified.

According to Jenkins, the bankruptcy petition had to be filed quickly to stay the defendant's collection proceedings. It was filed on May 19, 1989. Jenkins explained that, in June or July 1989, MacNaughton had moved to dismiss the Chapter 11 petition,

claiming that it had been filed in bad faith. A hearing on the motion was scheduled for the end of July. According to Jenkins, the only way to defend the motion would have been to file a Chapter 11 reorganization plan. However, a reorganization plan was impossible because, at that time, DeLuca had no money coming in. DeLuca could pay his debts only if he prevailed in the federal court claim. Jenkins appeared at the bankruptcy hearing to dismiss the original petition and also to have the matter converted to a Chapter 7 proceeding.

Apparently, at one point, respondent and Jenkins had discussed acting as co-counsel in the bankruptcy proceedings. Although a "co-counsel" agreement was drafted and signed by Jenkins, there was no formal agreement between the two, since respondent never executed the document. According to Jenkins, respondent refused to act as co-counsel in the matter.

Testifying as an expert witness, Jenkins explained that, in a Chapter 11 proceeding, the debtor is in possession of the assets and controls their distribution. In a Chapter 7 proceeding, however, a trustee is appointed and the trustee collects and distributes the estate assets. Jenkins filed a motion to have the Chapter 11 proceeding converted to a Chapter 7 proceeding because the California matters were dragging on. In July 1989, DeLuca informed Jenkins that he felt uncomfortable with the litigation and was interested in settling because MacNaughton continued to make him offers.

Jenkins refuted respondent's assertion that respondent was

special counsel to the bankruptcy estate by stressing it was not supported by any documentation or appointment orders. Moreover, Jenkins explained, once the matter was converted to a Chapter 7 bankruptcy, the trustee would have determined whether it was in the estate's best interest to appoint respondent as special counsel to the estate to pursue any special cause of action. Respondent never requested that the trustee make such a determination. Moreover, Jenkins and respondent never discussed the possibility that respondent be declared special counsel, according to Jenkins, given the purpose of the bankruptcy action.

Jenkins explained that, in the event that respondent had filed an application for appointment as special counsel, he needed to file an affidavit as to his qualifications, disinterest in the proceedings and absence of any interest adverse to the debtor or the estate. The debtor, DeLuca, needed to file a separate form supporting the special counsel request. Jenkins opined that respondent's interest in the California litigation, adverse as it was to the interest of the estate, as well as the franchise claim and the modified retainer agreement, could have resulted in the denial of any special counsel application by respondent. Under certain circumstances though, the appointment of special counsel would have been appropriate to pursue the litigation or prosecute the appeals, because the suit would have been an asset of the estate and counsel fees an obligation of the estate. However, the bankruptcy matter never ripened to the point where special counsel was required.

Jenkins further explained that, in a Chapter 7 proceeding, when there is a proposed settlement, all interested parties must be given notice and an opportunity to be heard as to its terms and the settlement must be approved by the court. Jenkins testified that, in late November 1989, the bankruptcy was dismissed on notice to all parties and creditors.

DeLuca's principal debt was the judgment for counsel fees, held by MacNaughton, the principal creditor of the estate. Since DeLuca was trying to settle the franchise case with the principal creditor of the estate, Jenkins did not perceive that there was any collusion or improper dealings between DeLuca as debtor and defendants' counsel as the primary creditor. Accordingly, Jenkins filed a motion to have the bankruptcy dismissed. Prior to the dismissal of the bankruptcy, the court was fully aware of the proposed settlement.

Jenkins also disagreed with respondent's assertion that an attorney's obligation shifts from the debtor to the debtor's estate once a bankruptcy petition is filed. He testified that an attorney representing a debtor in a bankruptcy action does not have a duty to all "parties" to the estate. In that vein, Jenkins noted that, after the Chapter 11 petition was filed, respondent still represented DeLuca's interest because DeLuca was the debtor in possession. Once the matter was converted to a Chapter 7 proceeding and a trustee was appointed, if respondent had still been involved in the proceeding, his obligation would have been to the trustee. Thus, the responsibility of the debtor's attorney is

rimarily to the client as well as to creditors, but only to the extent that they be put on notice of settlements and the like.

According to Jenkins, the protection provisions of the bankruptcy code state that a creditor cannot collect money owed, cannot talk to or write to the debtor during the pendency of the bankruptcy and cannot sue the debtor. Contrary to these provisions, respondent threatened to sue and actually did sue DeLuca claiming that he had become DeLuca's creditor (for attorney's fees) once he was fired.

* * *

Frank Lobosco, Esq. testified as respondent's bankruptcy expert. Lobosco explained that an attorney appointed as special counsel in a bankruptcy proceeding is not considered the debtor's attorney. Rather, the attorney is appointed to act as a fiduciary for a specific purpose. Lobosco explained that to be appointed special counsel an attorney must submit to the bankruptcy court "retention papers." 3T397. He noted that it was not unusual for attorneys to perform services prior to their appointment.

Lobosco admitted though that, upon reviewing respondent's file, he did not see any retention papers or any submission to the court to have respondent appointed as special counsel. Lobosco had been left with the distinct impression that, despite the fact that respondent had not been appointed, he was serving as special counsel. Lobosco was, therefore, surprised to discover that no retention papers had been submitted to the court. He stated "in all due respect, frankly, as a debtor's lawyer, I think that . . .

ne of the first obligations that a debtor's attorney should do is get the papers submitted to the court." 3T404.

Lobosco noted that the attorney-client history between DeLuca and respondent, in considering a request for appointment as special counsel, would have been a matter of concern to the court. The judge would have had to consider whether it would have been in the estate's best interest to appoint someone that had such a conflict with the debtor. 3T414.

* * *

Respondent admitted that, as early as the spring of 1989, DeLuca had expressed to him a desire to settle the matter. However, he urged DeLuca not to settle. When asked if the corporation had hired respondent to represent it, respondent replied affirmatively, but admitted that to his knowledge there was never a written resolution retaining him as counsel. Both Patuscha and DeLuca denied hiring respondent; both had wanted respondent to stop the ninth circuit actions. According to respondent, he advised DeLuca that he would be happy to do so as long as they would substitute somebody in. Respondent maintained throughout that DeLuca was his client only until the bankruptcy petition was filed, whereupon the bankruptcy estate became his client.

* * *

When respondent was unable to prevent the dismissal of DeLuca's bankruptcy petition and DeLuca's settlement, he filed suit

gainst DeLuca. Respondent's complaint charged DeLuca with breach of the retainer agreement and also alleged that DeLuca owed him money for services rendered, based on a quantum meruit theory.

The matter was resolved upon a motion for summary judgment. Judge Lifland's order, filed August 31, 1990, rejected respondent's claim that DeLuca breached the fee agreement by terminating respondent without cause, refusing to communicate with respondent and dismissing the appeals. The judge found instead that respondent, not the client, was the one controlling the objectives of the representation, contrary to public policy and RPC 1.2(a). The judge found that DeLuca had a right to settle the litigation at any time, the necessary consequence of which was to discontinue respondent's representation. The judge concluded that, since respondent could not charge DeLuca with a breach of a portion of a contract that was void, his breach of contract claim had no merit.

As to respondent's quantum meruit claim, the judge found that respondent's representation of DeLuca resulted in an order of summary judgment against DeLuca in the district court of California and in an award of $110,000 in attorney's fees and costs against DeLuca. The judge noted that "[n]ot surprisingly, [DeLuca] then went on to discharge [respondent] and settle the case himself. [Respondent's] services resulted in no net benefit to [DeLuca]." The judge concluded that quantum meruit was not a remedy available to the respondent. Moreover, the judge found, since the quantum meruit claim was based on litigation costs advanced by respondent, it was defeated by the retainer agreement. The agreement provided

hat respondent "will be responsible for expenses to pursue this litigation. Those amounts will be deducted from any recovery, as will be your payment for expenses to this date." The judge, therefore, concluded that the entire quantum meruit claim "suffered" from the fact that respondent had received all that the agreement may have required; even if he could have argued that he secured a $10,000 benefit for DeLuca, the $8,500 retainer far exceeded the contingent fee ($4,000) set forth in the agreement.

The judge also found that the modification to the retainer agreement suggested that respondent was to acquire an interest in the litigation by securing a right to veto the settlement, in violation of RPC 1.8(j). Exhibit P-26. Because the judge believed that serious ethics violations had been committed, he filed a grievance against respondent. Respondent did not appeal the judge's decision.

* * *

The DEC found that, notwithstanding the modified retainer agreement, during the fall of 1989 DeLuca repeatedly requested respondent to settle the litigation and expressed his dissatisfaction with respondent's representation. Nevertheless, respondent failed to take the action requested by his client. DeLuca ultimately discharged respondent, filed a pro se substitution of attorney and settled the pending litigation with the defendant.

Despite respondent's discharge by his client, which was reiterated in Jenkins' letter of November 7, 1989, respondent notified the Ninth Circuit Court of Appeals that the appeal would proceed as to Koala Blue (USA) Ltd. Thereafter, respondent wrote to the bankruptcy trustee advising against the settlement and against the abandonment of the appeal.

According to the DEC, these actions were taken by respondent after he had been discharged and "had no client interested in [the] positions." Nevertheless, respondent attempted to justify his actions, claiming that, once the bankruptcy petition was filed, the estate, not DeLuca, was his client, for which he was acting as special counsel. The DEC discounted respondent's claim in this regard because he had never been appointed or confirmed as special counsel. The DEC found that respondent's self-proclamation was merely "a smoke screen produced to camouflage his actions."

The DEC further found that it was clear that the bankruptcy petition was filed to hold off the execution of the judgment against DeLuca. It was a "dilatory tactic as the pressure to collect same was exercised on [DeLuca]. He became exceedingly upset physically and prone to settle." The DEC added that the bankruptcy petition had been undertaken to reduce the pressure on DeLuca and to provide respondent with more time to pursue the ninth circuit appeals. Also, respondent hoped that DeLuca would not settle his suit. However, when argument in the ninth circuit did not occur when anticipated and DeLuca's bankruptcy moved closer to completion, the pressure was again on DeLuca. He, therefore,

informed respondent that he wanted to settle and several months later terminated respondent's services.

The DEC found DeLuca's and Jenkins' testimony about the strategy and desired results in the case more credible than respondent's.

As to the retainer agreement, the DEC found that, by amending the original retainer, respondent acquired a proprietary interest in the litigation that he was conducting in his client's behalf. In the DEC's view, the amendment "effectively franchised the respondent with a veto power over settlement offers."

The DEC cited an Arizona case, Skarecky v Hornstein, et al., 825 P.2d 949 (Ariz. App. 1991), which held that a law firm's acceptance of a client's assignment of a beneficial interest in a trust deed, intended to secure payment of attorney's fees in a lawsuit concerning that deed, did not violate the ethics rules. The assignment acted only as a security device for payment of legal fees. The court noted that, while the firm acquired an interest in the result of the action, it did not acquire an ownership interest in the lawsuit. The court was persuaded that there was no proprietary interest because the client could still settle or release the claims without the consent of the firm or even against its advice. Moreover, the client could render the assignment ineffective by deciding to pay the firm's bill, rather than rely on the proceeds from the litigation. The court explained that the purpose of the ethics rule was to prohibit an attorney from acquiring an interest in the outcome of a suit, in addition to

f s, and from placing the attorney's own interests in a recovery ahead of the client's.

As noted by the DEC, the amended retainer agreement gave respondent an interest in DeLuca's claim. Therefore, respondent had a direct interest in proceeding with the appeal. "By acquiring a veto power over any settlement agreement, nay any settlement conference, [respondent] established a direct propriety interest in the action, above and beyond his contingency fee."

The DEC unanimously found violations of RPC 1.2(a) and RPC 1.8(j) and recommended the imposition of a period of suspension.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is clearly and convincingly supported by the evidence. Respondent filed suit in DeLuca's behalf; and his subsequent legal tactics permitted the matter to be dismissed on a motion for summary judgment. Respondent admitted that the case was a good case. In fact, he tried to persuade the bankruptcy trustee to block a settlement in the matter because the case was potentially worth quite a bit. Yet he still lost the case for his client.

After the matter was dismissed, and to add insult to injury, an order for counsel fees was entered against DeLuca because respondent failed to take timely measures to prevent the entry of the order. Respondent thereafter filed an appeal in the ninth

circuit in an attempt to remedy the problems in the matter. In the interim, the defendants' attorney obtained a judgment in New Jersey for counsel fees against DeLuca and took action to collect on the judgment. The attorney scheduled asset depositions, at which respondent failed to appear, leaving his client to fend for himself.

As DeLuca aptly relayed, the entire character of the lawsuit changed from DeLuca's attempts to recover fifty percent of his business to DeLuca's defense of the New Jersey judgment.

Thereafter, respondent persuaded a bankruptcy attorney to file a bankruptcy petition in DeLuca's behalf to stave off the defendants' attempt to seize DeLuca's assets and to buy more time to reopen DeLuca's original case. Respondent, however, misjudged the scheduling of oral argument on the appeals and DeLuca's bankruptcy matter quickly approached fruition. No one had anticipated such a result.

Thereafter, the defendants sought to have the bankruptcy dismissed as filed in bad faith. Jenkins advised DeLuca that the defendants had a good chance of prevailing on the motion. However, by this point DeLuca was in ill health and had no money. Respondent had already modified the retainer agreement and had agreed to finance all of DeLuca's litigation expenses. DeLuca was left with two alternatives: go into liquidation or settle with the defendants.

DeLuca had desired settling the matters for a long time, but was repeatedly persuaded by respondent to keep going because the

case was good. Eventually, after repeatedly requesting respondent to settle on his behalf, to no avail, DeLuca discharged respondent and settled the matter himself.

Still unwilling to abandon the case, respondent declared himself special counsel to the estate and attempted to forge ahead on behalf of his former client and, more surprisingly, on behalf of a corporation that had never retained him. When respondent's attempts to block DeLuca's settlement failed, he had the audacity to sue his former client.

Respondent's actions throughout this case were fraught with improprieties. The record supports by clear and convincing evidence violations of RPC 1.2(a) and RPC 1.8(j). Respondent's conduct in this matter is reminiscent of his earlier ethics matter, in which he not only violated RPC 1.2(a) and RPC 1.8(j), but also RPC 1.1(a), RPC 1.3, RPC 1.16(a)(3) and (d) and RPC 8.1(b). Respondent was disciplined in 1993 in that matter. Here, respondent's conduct began in or about 1986 and continued through 1990. The misconduct in both matters, therefore, transpired around the same time period. While it cannot be concluded that respondent did not learn from his earlier mistakes, his conduct was nevertheless outrageous.

In In re Brady, 110 N.J. 217(1988), an attorney received a three-month suspension for very similar conduct. The attorney continued to represent clients after he was discharged, took actions contrary to the wishes of his clients and made an ex parte application to a judge for a consent order without notice to the

parties. In a more egregious form of controlling the financial outcome of a matter, where an attorney in essence purchased a claim from his client, the Court found that disbarment was the appropriate remedy. See In re Shaw, 88 N.J. 433(1982).

After considering respondent's outrageous conduct in this matter, as well as his prior ethics history for similar conduct, eight members of the Board determined to impose a six-month suspension. One member voted for a reprimand.

The Board also required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 10/1/96

LEE M. HYMERLING
Chair
Disciplinary Review Board