Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-246

IN THE MATTER OF	:
DAVID C. ORT,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 16, 1992

Decided: November 5, 1992

Sheldon M. Simon appeared on behalf of the District X 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 upon a recommendation for public discipline filed by the District X Ethics Committee (DEC). The grievance, which originated as a fee arbitration matter, was referred to the Office of Attorney Ethics (OAE) and, subsequently, to the DEC.[1] A civil suit between grievant and respondent was pending at the time of the DEC hearing.

Respondent was admitted to the New Jersey bar in 1970 and has been engaged in practice in Hackettstown, Warren County. The facts of this matter are as follows:

[1]The Fee Arbitration Committee administratively dismissed the matter.

On September 21, 1989, Sophie Sawulak contacted respondent with regard to her late husband's estate. The Sawulaks had been separated for three years and Mrs. Sawulak was living in Buffalo, New York, at the time that her eighty-two year old husband died. Mr. Sawulak had remained at the couple's home in Hackettstown, New Jersey.

On or about October 1, 1989, Mrs. Sawulak traveled to New Jersey with her sister. On October 3, 1989, she met with respondent and signed a retainer agreement (Exhibit C-3), paying him $500. The retainer indicated that respondent would be paid a minimum of six percent of the gross estate, which was valued at approximately $300,000 (See respondent's summation at 2).[2] The section of the pre-printed retainer agreement outlining hourly rates was deleted by overstriking. The section of the agreement requiring respondent to submit itemized bills to the client was similarly deleted. Mrs. Sawulak testified that there was no discussion of itemized bills or of an hourly fee. Respondent, in turn, testified that, on September 27, 1989, he sent a letter to Mrs. Sawulak advising her of the hourly rate (Exhibit C-12). The letter stated: "[t]he hourly rate is between $115 and $135 depending on responsibility." Mrs. Sawulak testified that she never received the letter. A second letter bearing the same date (Exhibit C-15) was found in respondent's file. The two letters are identical, with the exception of the above quoted sentence, which

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[2]By letter dated February 20, 1990, respondent indicated that he was basing his fee on the value of the estate at the time of Mr. Sawulak's death, whether or not that value subsequently changed.

is not present in Exhibit C-15. The sentence is typed in Exhibit C-12 in an open space and slightly slanted.

According to respondent, the line containing hourly rate language was added because he had neglected to put that information in the letter when it was prepared (T3/3/92 161-162). Respondent testified that Exhibit C-15 was a file copy of a letter that was never mailed.[3] Respondent also testified that a subsequent letter was sent to Mrs. Sawulak, specifying a fee of $125 per hour. Mrs. Sawulak, however, testified that she never received that letter and respondent's file did not contain a copy of it. There was no discussion of respondent's hourly rates during any of their meetings.[4]

On October 5, 1989, Mrs. Sawulak signed a power of attorney (Exhibit C-4) at respondent's request.[5] On October 6, 1989, respondent arranged for a deputy surrogate to come to his office to execute the necessary forms for the estate to be admitted to probate. Mrs. Sawulak executed the appropriate forms to be appointed administratrix. After her appointment, Mrs. Sawulak remained in Hackettstown through the first three weeks in October and then returned to New York.

On three occasions, respondent asked Mrs. Sawulak for

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[3]The DEC found that specific testimony not credible.

[4]Respondent typed many of his own letters. The time involved in typing and secretarial tasks was charged to the estate.

[5]Mrs. Sawulak testified that she did not sign the document in the presence of the notary (T3/3/92 93-94). Respondent testified that the notary witnessed the signing of the document (T3/3/92 129).

permission to take out a loan against estate assets to pay estate bills (T3/3/92 17). Mrs. Sawulak advised him that she was against such action. Despite his awareness of her objections, in mid-December 1989, respondent used the power of attorney to obtain an equity loan for $25,000.[6] Mrs. Sawulak was not informed of respondent's action. In mid-December 1989, using the proceeds of the loan, respondent opened an estate bank account with only his name as signatory.[7] The total debts and expenses of the estate was $43,200.17. Of that total, respondent paid to himself $32,202.34 for legal fees and expenses. Estate checks were issued to Mrs. Sawulak, reimbursing her for the $500 retainer and for payments made by her on behalf of the estate.

Respondent never discussed with Mrs. Sawulak the need to have the real estate appraised. Respondent had the Hackettstown property appraised by his brother, a semi-retired real estate salesman who lived in New Jersey and Florida. Respondent's brother appraised the property for $211,580. A copy of the appraisal was sent to Mrs. Sawulak. It has been noted that the Transfer Inheritance Tax Form valued the property at $193,700. At the time of the DEC hearing, the property was under contract for sale for $114,900.

Prior to returning to New York, Mrs. Sawulak asked a neighbor

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[6]The Power of Attorney did not specifically grant respondent the authority to obtain the loan.

[7]Respondent notified Mrs. Sawulak that the account had been opened in the fall of 1989. He also notified her that a Medicare check for over $17,000 was deposited into the estate's account (T3/3/92 93).

to visit the Hackettstown house to make sure it was secure. Respondent convinced her that he should inspect the property. According to his time records, respondent visited the premises forty-one times. By letter dated January 25, 1990, Mrs. Sawulak asked for an itemized statement of fees and requested that respondent stop inspecting the property. In her letter, Mrs. Sawulak explained that she needed to keep the expenses down and that she had asked that the police patrol the area. At the DEC hearing, respondent testified that he had acted contrary to Mrs. Sawulak's wishes because he was required to inspect the house during the winter to assure its preservation.

Respondent's time records indicate a great many hours spent working on a problem with the title to the Hackettstown property.[8] According to respondent, he was ultimately forced to hire a title company to work on the difficulty (T3/3/92 175). Respondent contended that he explained to Mrs. Sawulak that the property could not be sold unless he brought an action to quiet title. His fee for that action would be $25,000, in addition to the minimum of six percent of the estate value he originally quoted and whatever additional fees were reflected by his time records. Respondent told Mrs. Sawulak that their retainer agreement required him to bring the action to quiet title and make the property marketable. Mrs. Sawulak informed him that she wanted the property sold "as is" (T3/3/92 96-97).

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[8]The property was over fourteen acres but the only deed located was for only 6.89 acres (T3/3/92 8).

Despite Mrs. Sawulak's numerous requests for itemized bills, respondent informed her that those would only be provided once he exceeded the six percent minimum ($18,000) (Exhibit C-9).[9] During his deposition in the pending civil matter, respondent stated that he made it known to Mrs. Sawulak that he would charge for the preparation of the itemized bills (T3/3/92 28). No itemized bill was ever provided to Mrs. Sawulak during the course of his representation.[10]

In mid-July 1990, another attorney was substituted in the estate matter. It was only during this attorney's representation that Mrs. Sawulak learned of the equity loan on the property. Respondent testified that a letter, dated December 11, 1989, had been sent to her informing her of the loan. Mrs. Sawulak, in turn, testified that she never received that letter. Further, in her letter to respondent dated February 28, 1990, Mrs. Sawulak questioned him about payments he made to the bank. The DEC credited Mrs. Sawulak's testimony in this regard, noting that it was clear that she had never been informed of the loan and, in fact, had instructed respondent not to encumber the premises.

Respondent testified before the DEC that this was a complicated estate because there was a question of whether Mr.

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[9]By that time respondent had paid himself over $20,000 in legal fees to administer the estate.

[10]Mrs. Sawulak only received two bills from respondent; one for $53 for a new padlock placed on the door and one for $60 for preparation of documents in connection with the sale of a truck and a beehive from the home. Both bills were paid out of Mrs. Sawulak's funds.

Sawulak had started divorce proceedings and whether a will existed; papers needed to be recovered from Mr. Sawulak's sister, who was asserting a claim against the estate; the estate had many creditors, and various doctors and hospitals were making claims to money owed to them.

Respondent produced a number of time sheets pertaining to the estate. Although respondent asserted that the sheets were correct, he admitted that some of the time sheets may have been duplicated or contained errors. As noted by the DEC:

> [a]n examination shows, for example, in Exhibit C-11, that on September 21, 1989, the defendant charged the estate with 1 1/2 hours for sending a registered letter to the sister of the deceased, and an additional 3/4 of an hour was charged to the estate for the receipt of a letter from Mrs. Sawulak. On the same date, an additional 3/4 of an hour is charged for a conference with the mortician involved in the estate. On September 27, four different charges against the estate (C-11, page 2) are charged: 1 1/2 hours on receipt of a letter from a client, 1 1/2 hours for a letter with the Agreement to the client, two separate charges 1 1/2 hours for receipt of a letter from Mrs. Sawulak and a separate 1/2 hour charge for the receipt of a letter also from Mrs. Sawulak. The Respondent indicated that there may have been a "duplication" in these charges. On October 3rd, the estate is charged with 3 1/2 hours for a conference with Mrs. Sawulak at the Hackettstown residence and the execution of the Retainer Agreement; a separate 4 1/2 hour charge is made for a telephone conference with the client and a separate 1 3/4 conference charge is made for a conference with a creditor of the estate - before it had even been admitted to probate. On October 5, 1989, two separate charges are made for conferences with the client; one of 3 3/4 hours and a separate charge for 3 1/2 hours. A separate charge against the estate on the same date is made for drafting the Power of Attorney for 3 3/4 hours. Various other charges throughout show that the Defendant charged the estate for what can only be minimally characterized as an excessive amount of time for drafting letters, telephone conferences and receipt of mail. In his time sheets (C-11), the Respondent has ten listings for the County Clerk's office or the law library, totaling 74 3/4 hours.

> The issues [respondent] indicated he was researching were; whether the 82 year old deceased had started a divorce action against his wife, (although no papers had ever been served on Mrs. Sawulak) - the Respondent indicated that because of her age he could not accept her word; the question of illegitimate children and laws of intestacy.[11] Interestingly, on some days involved the Respondent had other time record entries showing additional work. For example, on October 19, in addition to 7 1/4 hours at the County Clerk's Office and the County law library, he also charged the estate with 1 1/2 hours on receiving a letter from bank, 1 1/4 hours for preparing a letter from an insurance company, and 1 1/2 hours for receiving a letter from Mrs. Sawulak. This 11 1/2 [sic] workday is not the only example. On November 30, the Respondent charges the estate for 7 1/2 hours at the County law library and Clerk's office, 1 1/4 hours for preparing a letter to a bank, 1 1/2 hours for receiving a letter from Mrs. Sawulak and 1 1/2 hours for preparing a letter to Mrs. Sawulak. This total day then becomes 11 3/4 hours. Because of the admitted erroneous calculations in the time sheets, and the inconsistencies in evaluating the time records as a whole, it is the Panel's specific finding that these time sheets were created by the Respondent for the sole purpose of justifying fees and that they do not reflect a true character of any work that might have been involved. The statutory provisions governing intestacy are found in Title 3B; and the question of divorce or illegitimate children would seem to be remote at best and could be gleaned from Mrs. Sawulak and the deceased's contemporaries, if necessary. It is, therefore, the Panel's specific finding that the time sheets of the Respondent have no credibility and his assertions of veracity must be rejected.
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> [Hearing Panel Report at 10-12]

As a settlement offer in the pending civil action, respondent proposed to repay the $25,000 mortgage from his $33,000 fee, leaving his fee for representing Mrs. Sawulak at $8,000. As of the date of the DEC hearing respondent had not paid any of that sum to the bank. He testified that the bank would not accept payment of

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[11]Mr. Sawulak had apparently had a lengthy extra-marital affair and respondent was concerned about the existence of any children from that relationship.

the principal sum without the interest payments as well, making the amount due nearly 29,000 (T3/3/92 186-187). Although respondent admitted that repayment of the $25,000 is a settlement offer, he testified that he has a moral obligation to satisfy the $25,000 loan (T3/3/92 198).

DEC FINDINGS

The DEC determined that respondent had violated RPC 1.4(a) and (b) (failure to communicate), RPC 1.5(a) (unreasonable fee) and (b) (failure to communicate the basis or rate of the fee) and RPC 8.4(c) (conduct involving fraud, deceit or misrepresentation).[12] The DEC did not find clear and convincing evidence of a violation of RPC 1.7(b) (conflict of interest). The DEC also did not find that respondent had violated any specific RPC by hiring his own brother, but noted that "the potential for wrong-doing was strong." (Hearing Panel Report at 6). In its report the panel noted that, although not raised by respondent, the panel had reviewed the issue of whether, because of her age, Mrs. Sawulak was not capable of making informed determinations, under RPC 1.14 (client under a disability). The panel found Mrs. Sawulak "fully capable of making determination [sic] for the estate and for herself, if full and accurate information presented to her had been full and accurate." (Hearing Panel Report at 13). The panel determined that

[12]The DEC based this finding on several factors, including: the imposition of an unreasonable and unenforceable Retainer Agreement on the Estate of Peter Sawulak, the creation of time records that are so unwarrantedly large and, his representation of problems in the estate that were unwarranted or ordinary.

respondent's failure to adhere to his client's instructions violated RPC 1.2(a) (failure to abide by a client's wishes concerning the objectives of representation).[13]

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board agrees with the findings of the committee that respondent was guilty of unethical conduct by clear and convincing evidence.

Respondent received over $32,000 in legal fees for the administration of a relatively uncomplicated estate valued at $300,000. It is clear from Mrs. Sawulak's letters that, while respondent collected this fee, he was not complying with her requests for information on the status of her husband's estate. That respondent was not providing her with sufficient information to enable her to make informed judgments about the estate is also clear. Of course, when Mrs. Sawulak attempted to exercise her judgment and direct the representation, she was ignored by respondent. Respondent's actions violated RPC 1.4(a) and (b).

The Board agrees with the determination of the DEC and credits Mrs. Sawulak's testimony, finding that respondent violated RPC 1.5(b), by not communicating the basis of his fee to Mrs. Sawulak.

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[13]Although the violation of RPC 1.2 is discussed in the Hearing Panel Report, it was not charged in the complaint and is not listed in the closing paragraph of the DEC report as a violation. The Board has determined, nonetheless, to find such a violation. See In re Logan, 70 N.J. 222 (1976).

The hourly rate is clearly not in the retainer agreement and it seems unlikely that Mrs. Sawulak failed to receive two letters regarding the fee arrangement, allegedly sent by respondent.

Respondent's violation of RPC 1.5(a) is egregious. He unquestionably took advantage of an inexperienced elderly widow, who was not even present in the state to observe respondent's actions, and created legal issues and work for his own enrichment. Prior disciplinary cases show that the Court will not tolerate such behavior. In In re Wolk, 82 N.J. 326 (1980), the attorney attempted to perpetrate a fraud on a federal district court and on his clients, a paralyzed eight-year old boy and his parents, in order to obtain a fee larger than the one to which he was entitled. In addition, Wolk counseled a client to invest in a building in which he had an interest and concealed material information about the property. Wolk was disbarred.

Discipline ranging from a public reprimand to suspension has been imposed for less serious misconduct. See In re Hinnant, 121 N.J. 395 (1990), (public reprimand for overreaching and conflict of interest); In re Mezzacca, 120 N.J. 162 (1990) (public reprimand for pattern of overreaching clients in personal injury cases); In re Hurd, 69 N.J. 316 (1976) (three-month suspension for overreaching in a real estate transaction whereby property was transferred to the attorney's sister for approximately twenty percent of its value); In re Hecker, 109 N.J. 539 (1988) (six-month suspension for overreaching, filing meritless appeals and acquiring

tax sale certificates while serving as municipal attorney without filing disclosure).

Far more egregious than respondent's overreaching is his fabrication of evidence to the DEC and the Board. Many inaccuracies were found in respondent's time sheets (Exhibit C-11). Respondent stated to the DEC that these were errors. The Board does not credit respondent's statements on this point.[14] Rather, the Board agrees with the finding of the DEC that respondent's time sheets were created simply to justify his fee. Respondent is, thus, guilty of egregious violations of RPC 8.4(c) by his many misrepresentations to Mrs. Sawulak, the DEC, the Board and, by reference, the Court.

This Court has treated fabrication of public documents as one of the most serious offenses an attorney can commit. Severe discipline has consistently been imposed for such conduct. See e.g., In re Chidiac, 109 N.J. 84 (1987), (where the Court imposed an indefinite suspension on an attorney who altered an inheritance tax waiver); In re Yacavino, 100 N.J. 50 (1985), (where an attorney was suspended for three years for preparing and presenting to his client two fictitious orders of adoption in an attempt to cover up

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[14]Even if respondent was being truthful, that does not mean that respondent should not be disciplined for the inaccuracies. In In re Cohen, 114 N.J. 51 (1989), the Court found the statements of Cohen's services were so recklessly prepared as to have amounted to a knowing misappropriation. In addition Cohen was guilty of gross negligence in preparing an affidavit containing an untrue statement, representing a former client's ex-husband in an action against the client and paying for a transcript with a trust account check. Cohen, who had previously been privately reprimanded received a one-year suspension.

his neglect in failing to advance the case for a period of nineteen months); In re Meyers, 126 N.J. 409 (1991) (where the Court imposed a three year suspension on an attorney who, to placate a client in a matrimonial matter, fabricated a judgment of divorce bearing the purported signature of a Superior Court Judge. When the attorney finally confessed his misconduct to his client, he attempted to induce her lie to the Court about it to assist him in concealing his misconduct.). In both Yacavino and Meyers, the attorney's actions had not been undertaken for the purpose of self-enrichment and were deemed aberrational. See also In re LaRosee, 122 N.J. 298, 309 (1991).

That respondent's misconduct did not involve the forgery or alteration of public documents, but, rather, documents allegedly sent to his client and presented as evidence before the disciplinary authorities is of no moment. Similar "amoral arrogance" has not been tolerated in the past. See In re Brechman, 111 N.J. 655 (1988). See, also, In re Margulies, 120 N.J. 309 (1990), (where, in a reciprocal discipline case from the District of Columbia, an attorney who had been charged with neglect in a criminal matter, was publicly reprimanded for misrepresenting facts to that jurisdiction's Bar Counsel during the investigation of a disciplinary matter); In re Maurello, 121 N.J. 466 (1990), (where the Court accepted the disbarment by consent of an attorney who, inter alia, made false statements of material facts, submitted a false affidavit to a DEC investigator, and made false statements of material fact and submitted a false certification to a Superior

Court Assignment Judge.)

The Board is convinced that respondent lied to the DEC and created his time sheets to justify his outrageous fee and/or in anticipation of the disciplinary hearing. His deceitful conduct toward his client was compounded by his attempt to defraud the disciplinary system and accordingly, the Board finds a violation of RPC 8.4(d). The Board also is convinced that the letters respondent allegedly sent to Mrs. Sawulak regarding his fee, particularly the letter explaining his hourly rate, are not authentic. It would appear from the facts established in the record that, contrary to respondent's testimony, the letters were, at best, drafted and never sent or, more likely, created in anticipation of the disciplinary proceeding and/or the civil action.

Respondent admitted before the Board that he used "poor judgment" in charging the fees he did. He also conceded that he should not have placed the mortgage on the property and should have maintained better communication with his client via certified mail (BT 9).[15]

Even taking into account respondent's lack of previous discipline, clearly a lengthy term of suspension is warranted. Although he testified that he has a "moral obligation" to repay the bank loan, he offered to do so only as settlement in the underlying matter. Respondent has never admitted that he charged for

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[15]BT denotes the transcript of the Board hearing on September 16, 1992.

countless hours of unnecessary work that generated his exorbitant fee.

Accordingly, the Board recommends that respondent be suspended for a period of three-years. Two members believe that respondent should be disbarred. Three members did not participate.

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

Dated: 11/5/92

By: Raymond R. Trombadore
Chair
Disciplinary Review Board