

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket Nos. DRB 96-207 96-305 and 96-306

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IN THE MATTER OF  
WALTER S. SWIRSKY  
AN ATTORNEY AT LAW

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Decision

Argued: October 17, 1996

Decided: January 6, 1997

Walton W. Kingsbery, III appeared on behalf of the District VA Ethics Committee.

Alan Silber appeared on behalf of respondent.

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

These matters were before the Board based on a recommendation for discipline filed by the District VA Ethics Committee ("DEC").

The first matter, Docket No. 96-207, was originally reviewed on the papers by the Board at the July 1996 meeting. That matter was submitted to the Board pursuant to R. 1:20-6(c)(1), which provides that, unless the pleadings raise genuine disputes of material fact, or the answer requests an opportunity to be heard in mitigation, or the presenter requests to be heard in aggravation, the matter shall be filed directly with the Board, without a hearing below, for the determination of the

appropriate sanction. In the interim, two other matters were filed. All three matters were then consolidated to allow a review by the Board based on the totality of respondent's conduct.

Prior to the Board hearing, respondent made a motion to expand the record to include three certifications and various exhibits. The Board granted the motion.

Respondent was admitted to the New Jersey bar in 1957. He received a private reprimand in 1988 for twice ignoring, over a period of six months, notice of a disciplinary proceeding and failing to answer the complaint in a timely fashion. In addition, two days prior to the DEC hearing, respondent was granted an adjournment to obtain counsel, only to appear at the rescheduled hearing without legal representation and to request a further adjournment, notwithstanding the fact that the DEC had brought a witness from Arizona to testify.

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I. THE RECORDKEEPING MATTER:  
DRB 96-207 [District Docket No. XIV-94-126E]

This matter came before the Board as a stipulation between the Office of Attorney Ethics ("OAE") and respondent. Respondent admitted to deficiencies in the accounting system due to an arcane accounting system set in place many years ago. Those deficiencies were compounded by inattention resulting from health problems encountered by both respondent and the firm's accountant. Respondent further admitted that neither the bookkeeper (respondent's wife) nor the accountant kept proper records or reconciled the trust accounts. He recognized, however, that the ultimate responsibility for compliance rested with him. As a result, respondent admitted to four instances of

negligent misappropriation of client funds between January and March 1992, in violation of RPC 1.15(a); commingling of fees and trust funds between May and December 1992, in violation of RPC 1.15(c); failure to promptly deliver settlement funds to clients between June 1990 and May 1991, in violation of RPC 1.15(b); and various recordkeeping violations between April 1991 and November 1991, in violation of RPC 1.15(d) and R. 1:21-6.

II. THE KUILAN MATTER:  
DRB 96-305 [District Docket No. VA-93-044E]

The complaint alleged violations of RPC 1.4(b) (failure to explain the matter to the client to extent reasonably necessary to permit the client to make informed decisions regarding the representation) and RPC 1.16(d) (failure to return property or papers upon termination of the representation).

Janet Kuilan ("Grievant") retained respondent on or about January 7, 1991 to represent her in a personal injury claim arising out of an automobile accident. Respondent filed suit on behalf of grievant on or about December 29, 1992. Because, however, he was unable to accomplish service of the complaint on the defendant, he filed certified statements with the trial court to avoid the dismissal of the matter, pursuant to R. 1:13-7.

Grievant testified that she did not understand the status of her matter as handled by respondent and was not satisfied with respondent's communication with her about the case. She claimed that she made three or four attempts, both by telephone and by personal appearance at respondent's office, to obtain such information from respondent, to no avail. According to grievant,

respondent met her inquiries with anger and failed to give her information necessary to evaluate the status of her case. Respondent's behavior was confirmed by the testimony of grievant's husband, Michael Kuilan, who accompanied her to a meeting with respondent in or about January 1993. Mr. Kuilan testified that respondent was both hostile and non-communicative regarding the status of the matter. In fact, both grievant and Mr. Kuilan complained that they had been forced to leave respondent's office as a result of his behavior. Therefore, they obtained the names of several individuals who witnessed that behavior, which names were given to the DEC. For unknown reasons, those persons were not called as witnesses. The DEC found the testimony of both grievant and Mr. Kuilan credible.

Respondent, for his part, testified that it was the Kuilans who were hostile and that he did, in fact, explain at length what he had done to protect grievant's interests. Respondent could not produce any writings to evidence his recommendations to the Kuilans or updates on the case, but insisted that they were properly informed about the case.

Shortly after the January 1993 meeting with respondent, the Kuilans contacted the law firm of Linares & Coviello and arranged for the firm to take over their representation in the matter. In a January 28, 1993 letter to respondent, the Kuilans directed him to discontinue all work on the file and to forward the entire contents of the file to Linares & Coviello. Respondent did not forward the file, claiming that the Kuilans wished him to continue the representation. Respondent testified that he had telephone conversations with Linares & Coviello and that the firm declined to represent Mrs. Kuilan in the lawsuit. The expanded record includes an October 10, 1996 certification of Anthony L. Coviello, Esq., of Linares & Coviello, which shed new light on the Kuilans' testimony:

On March 15, 1993 Mr. Michael Kuilan called me once again to inquire as to the status of the file. I again explained to Mr. Kuilan that I had again requested the file from Mr. Swirsky and had not yet received the file.

At this point Mr. Kuilan became angry to the point of almost being irrational. He accused me of being in conspiracy with Mr. Swirsky. He indicated that he was going to file an Ethics Complaint not only against Mr. Swirsky but also against the undersigned and in general he flew into an expletive filled tirade against me and Mr. Swirsky.

It was at this point that I made clear to Mr. Kuilan that I wanted no part of his case given what I thought was the man's complete inability to control himself and given his threats. I told Mr. Kuilan that I would not be taking over his wife's claim and that I would be advising Mr. Swirsky immediately that he should not send me the file.

On March 15, 1993 following my discussion with Michael Kuilan I sent him a letter by Certified Mail Return Receipt Request with a copy to Walter Swirsky, also by certified return receipt requested, confirming that I wanted nothing to do with this claim and that Mr. Swirsky should communicate with the Kuilans.

Grievant testified that she understood that Linares & Coviello had turned down the representation only because respondent refused to accept less than one-half of any fee award to be given in the case. (Linares & Coviello had offered respondent one-third of the award). Respondent denied that he refused a one-third fee and maintained that he never discussed the issue of fees with Linares & Coviello.

\* \* \*

The DEC found, by clear and convincing evidence, that respondent's conduct was in violation of RPC 1.4(b), by his failure to explain the matter to his client to the extent reasonably necessary to permit her to make a decision regarding the representation. The DEC also found a violation of RPC

1.16(d), by respondent's failure to turn over the file or take other steps to protect grievant's interest after she attempted to terminate the representation. Lastly, the DEC found a violation of RPC 1.1(b), citing respondent's pattern of failure to communicate with his client about the case. The DEC noted that respondent, despite several appearances, did not manifest an understanding of his failure to communicate with his client.

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Shortly before the Board hearing, respondent sought the advice of counsel, having appeared pro se at the DEC hearing. The Kuilan matter took on a different complexion based on new information in the expanded record, including respondent's own certification. In his certification, respondent explained why he did not turn over the file:

I believed discussing the matter with Mr. Coviello before I forwarded the file would result in a greater protection for the Kuilans because I did not believe that he would ultimately file a substitution in the case and represent Mrs. Kuilan once he learned of all of the problems in the case. Circumstances were such that I did not get a chance to talk with Mr. Coviello, and before I could, he had already rejected the case. Thus, I have continued to represent Mrs. Kuilan.

In addition, respondent's notes to the Kuilan file indicate Linares & Coviello's refusal to take on the representation.

III. THE MANNING MATTER:

DRB 96-306; [District Docket No. VA-94-055E]

This matter was before the Board based on a recommendation for an admonition filed by the District VA Ethics Committee ("DEC"). The complaint alleged violations of RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate).

Annette Manning ("Grievant") retained respondent to represent her in a personal injury claim arising out of an October 1989 slip-and-fall incident. On or about November 2, 1993, respondent settled the matter in grievant's favor for \$5,000. Grievant, however, did not receive the settlement proceeds until one year later, on November 5, 1994.

Grievant testified that she had spoken to respondent one to two months after the initial settlement and had three or four subsequent exchanges with his office, by telephone, inquiring each time about the status of the settlement proceeds. According to grievant, respondent informed her that he would call her when he received the proceeds, but failed to do so for more than one year.

On November 5, 1994, grievant executed a document indicating that she did not wish to proceed further with the ethics grievance she had filed against respondent. The document stated that she had received her full portion of the settlement proceeds and was satisfied with the manner in which respondent had handled the case. The document bears the same date, November 5, 1994, as the date grievant finally received her proceeds from respondent.

Respondent testified that he often saw counsel for the defendant in the underlying case at the courthouse, at which time he would urge him to send the settlement proceeds. Respondent, however, did not produce any letters or documentation about his efforts to obtain the settlement proceeds from counsel for the defendant, relying exclusively on the November 5, 1994 document for exoneration.

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The DEC found a violation of RPC 1.3 (lack of diligence), based on grievant's testimony and respondent's lack of any documentation showing his diligence in obtaining the proceeds of settlement.

The DEC also found a violation of RPC 1.4(a) (failure to communicate) due to respondent's failure to comply with grievant's repeated requests for information regarding the status of her case.

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Following a de novo review of the entire record, including supplementary information provided in the Kuilan matter, in accordance with the Board's order, the Board determined to dismiss Kuilan, finding that the evidence did not clearly and convincingly establish any unethical conduct on respondent's part. In light of Linares & Coviello's refusal to assume the representation of Mrs. Kuilan, respondent's continued involvement in the case was appropriate in order to protect his client's interests in a responsible fashion. Under these circumstances, the Board could not find a violation of RPC 1.16. Similarly, the Board was unable to conclude that respondent violated RPC 1.4(a), inasmuch as the evidence in this regard was in equipoise. The Kuilans testified that respondent had not kept them informed of the progress of the case, alluding to respondent's display of hostility when pressed for information. Respondent, in turn denied any wrongdoing, contending that he had given detailed explanations to the Kuilans about the status of the matter and accusing the Kuilans of hostile behavior. On the face of this record and taking into consideration Anthony Coviello's account of



Mr. Kuilan's irrational demeanor directed at him, there is not clear and convincing evidence that respondent's deportment toward the Kuilans was unprofessional or unethical or that he did not keep them informed of any developments in the case. Accordingly, the Board unanimously voted to dismiss the Kuilan matter.

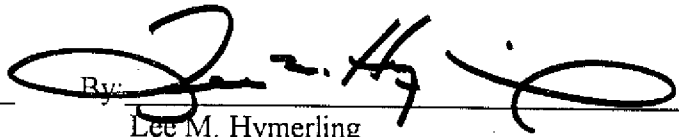
As to the Manning matter, the Board was presented with new evidence that, between November 1993 and November 1994, respondent made efforts to obtain the settlement proceeds for grievant. Indeed, respondent wrote to his adversary and prepared a motion to compel payment. Before he filed the motion, however, he received the settlement proceeds from his adversary. The records, as supplemented, contain a certification from respondent's adversary, recounting respondent's diligent efforts to obtain the proceeds. Under these circumstances, the Board could not find a violation of RPC 1.3 (lack of diligence).

With respect to RPC 1.4(a) (failure to communicate), grievant repeatedly tried to obtain information from respondent about the progress of her case. She alleged that no information was forthcoming other than respondent's assurance that, as soon as he received the proceeds, he would call her. Respondent agreed that each time he would tell grievant to call him back in a month or so. He could not produce any documentation, telephone notes, status updates or other information indicating any efforts to apprise grievant of the developments in her case. Here, the record clearly and convincingly supports a violation of RPC 1.4(a).

As to the matter under Docket No. DRB 96-207 (recordkeeping violations), respondent admitted that he negligently misappropriated client funds in four cases; commingled fees and trust funds and failed to promptly deliver funds to clients in six cases; and committed various recordkeeping violations, all in violation of RPC 1.15 and R. 1:21-6.

In short, respondent committed recordkeeping violations in the first matter, including commingling of trust and personal funds and negligent misappropriation of trust funds. In the Manning matter, respondent failed to communicate with his client about the progress of the case. Respondent's ethics transgressions, combined, warrant a reprimand. The Board unanimously determined to reprimand respondent. See In re Mitchell, 139 N.J. 608 (1995); In re Zavodnick, 139 N.J. 607(1995); and In re Pressler, 132 N.J. 155 (1993).

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

Dated: 1/6/97 \_\_\_\_\_ By:   
Lee M. Hymerling  
Chair  
Disciplinary Review Board