SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-110

IN THE MATTER OF :
:
WILLIAM P. MIKITA, JR. :
:
AN ATTORNEY AT LAW :

Decision

Argued: May 15, 2003

Decided: July 15, 2003

Brian D. Gillet appeared on behalf of the Office of Attorney Ethics.

James P. Nolan appeared on behalf of respondent.

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

This matter was before us based on a disciplinary stipulation between the Office of Attorney Ethics ("OAE") and respondent. Respondent admitted violations of RPC 1.5(c) (upon conclusion of a contingent fee matter, the attorney shall provide the client with a written statement setting forth the outcome), RPC 5.3(b) (responsibilities regarding non-lawyer assistants), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1994. He is an associate at the firm of Gill & Chamas, L.L.C., located in Woodbridge, Middlesex County. He has no history of discipline.

The procedural history of this case has relevance to our ultimate action here. The District VIII Ethics Committee ("DEC") filed a formal ethics complaint on August 28, 2001. Respondent's counsel filed a verified answer on October 2, 2001. On November 29, 2001, the DEC submitted for our review a motion for discipline by consent, pursuant to R.1:20-10(b). We then remanded the matter to the OAE for additional investigation into the grievant's allegation that respondent had schemed with a medical provider to deprive him of funds. The OAE attempted to contact the grievant by letters dated May 22 and June 24, 2002 and a telephone call on December 23, 2002. On March 21, 2003, the OAE advised us that the grievant had not replied to its inquiries. The OAE's investigation revealed no support for the grievant's contentions. We, therefore, considered this disciplinary stipulation, which is, in essence, the same stipulation that previously accompanied the motion for discipline by consent.

The stipulated facts are as follows:

Respondent represented Olabamidele Olanubi in a personal injury matter that was settled in July 2000. Respondent agreed to pay medical bills that Olanubi had incurred with certain medical providers as a result of his injury, as follows: University Goldenrod Chiropractic Center (also known as Health and Wellness Chiropractic Center), Damadian MRI, and Allcare Medical and Rehabilitation ("Allcare").

On March 26, 1999, respondent filed a complaint on Olanubi's behalf. By letter of May 25, 2000, respondent advised Olanubi that the defendant had offered $15,000 to settle the case. Respondent's letter stated, "Pursuant to our conversation, you would have no objection to getting nothing so long as the doctors we have on file have been paid." Respondent told Olanubi that his file had medical bills in the following amounts: $12,735 from Allcare, $1,050 from Damadian MRI and $3,649 from Health and Wellness Chiropractic Center. Respondent also told Olanubi that "Health and Wellness will take $1,300.00 and Damadian MRI will take $550.00 in settlement of this claim. As we discussed, I am currently negotiating with Allcare. Right now, they want $9,000.00 in settlement of your case." Apparently, thus, respondent had compromised two of the medical liens on Olanubi's file and was attempting to compromise the Allcare lien. Eventually, respondent compromised all three liens.

By letter of July 15, 2000, respondent advised Olanubi that the defendant "will not budge over $15,000.00." He also told Olanubi that "Allcare has agreed to take the remainder of your settlement money, which will be approximately $7,726.63, in full settlement of their bill." Respondent further advised Olanubi that he was paying Health and Wellness Center $1,300 and Damadian MRI $550, "as we agreed." Respondent added that "[u]nfortunately, although your bills will have been paid, you will get nothing out of this settlement."

The case was settled in July 2000 for $15,000. On July 18, and July 20, 2000, respondent forwarded releases to Olanubi in Florida, instructing him to sign and return them.

On August 21, 2000, respondent sent Olanubi a power-of-attorney "to deposit your settlement check into trust." Respondent's letter noted that "[o]nce I receive the check and this signed power of attorney, I will deposit same in the trust account to clear and will then forward your money onto you." The power-of-attorney forwarded to Olanubi had a typed date of December 3, 1999. It authorized respondent to sign the settlement check and "to sign and review the settlement disbursement sheet that the Law Offices of Gill & Chamas will prepare upon receipt of the settlement funds."

In August 2000, Olanubi signed the power-of-attorney and mailed it back to respondent's office. The power-of-attorney was witnessed by Rose DeSimon, respondent's secretary, and notarized by Marla Deptula, a non-lawyer employee in respondent's office, who certified that, on December 3, 1999, Olanubi had personally come before her and signed the document.

In late July or early August 2000[1], respondent notarized two separate releases, both dated July 31, 2000, previously signed by Olanubi in Florida. The releases indicated that Olanubi had personally come before respondent in July 2000. DeSimon witnessed Olanubi's signature on both of the releases. On August 2, 2000, respondent sent the releases and stipulations of dismissal to defense counsel. On September 7, 2000, respondent received two checks totaling $15,000, which were deposited in his firm's attorney trust account. The funds were disbursed as follows:

[1] The stipulation mistakenly states the year as 2002.

Check No.	Date	Payee	Amount
8213	9/15/00	Gill & Chamas	$ 5,423.37
8214	9/15/00	Health and Wellness Chiropractic	$ 1,300.00
8215	9/15/00	Damadian MRI	$ 550.00
8216	9/15/00	Allcare Medical Center	$ 7,726.63

On October 13, 2000, payments for the compromised liens were forwarded to Damadian MRI, Health and Wellness Chiropractic and Allcare Medical Center.

Respondent did not provide Olanubi with a written closing statement until November 2000. It was this failure that led Olanubi to file a grievance alleging violation of RPC 1.5(c). Respondent admitted that this delay was due to an oversight on his part, but claimed that Olanubi was previously aware of the amounts reflected in the statement. Respondent acknowledged that his failure to provide a written settlement statement violated RPC 1.5(c) and that his improper notarization of the two releases violated RPC 8.4(c) and RPC 8.4(d). In addition, respondent admitted that his August 21, 2000 letter led Olanubi to believe that he was entitled to receive funds after the case was settled, even though he had previously advised Olanubi that there would be no funds left from the settlement, once his medical bills were paid. Respondent explained that he had used a standard closing letter stating that, once the settlement checks were deposited and cleared the banking process, the client's portion of the funds would be remitted.

Respondent further admitted that he violated RPC 5.3(b), RPC 8.4(c) and RPC 8.4(d) by failing to reasonably ensure that his secretary's conduct was compatible with his obligations as an attorney. Indeed, DeSimon witnessed Olanubi's signature on the power-of-attorney and the releases, even though the documents had not been signed in her presence. As to Deptula's notarization of the power-of-attorney, also signed outside of her presence, respondent's position was that DeSimon had given it to Deptula to notarize. Respondent did not stipulate a violation of the rules with regard to Deptula's conduct, although, clearly, the method of notarization was also improper.

By way of mitigation, the stipulation noted that respondent (1) eventually provided the settlement statement to Olanubi; (2) successfully negotiated a reduction of the medical bills; (3) had no prior experience handling a settlement with a power-of-attorney and (4) has not been previously disciplined.

The OAE urged us to impose a reprimand, citing the following cases in support of that proposition: In re Bullock, 166 N.J. 5 (2001) (reprimand for, among other improprieties, misrepresentation and failure to provide a written fee agreement and a settlement statement); In re Lessack, 148 N.J 394 (1997) (reprimand for attorney who was grossly negligent in connection with the improper taking of a jurat on two occasions); In re Weiner, 140 N.J 621 (1995) (reprimand for excessive delegation of authority to non-lawyer staff and for condoning his staff's signing of clients' names on documents); In re Bonanno, 135 N.J. 464 (1994) (public reprimand for lack of supervision of a non-attorney employee and the management of his law practice); and In re Coughlin, 91 N.J 374 (1982) (public reprimand where the attorney improperly

executed the jurat on an affidavit of consideration and acknowledged the signature on a deed outside the grantor's presence).

* * *

Following a de novo review of the record, we found that the stipulated facts support a finding that respondent's conduct was unethical.

Respondent violated RPC 1.5(c), RPC 5.3(b), RPC 8.4(c) and RPC 8.4(d). The stipulated misconduct relates to three separate acts: the power-of-attorney, the settlement statement and the witnessing and notarization of Olanubi's signature.

The Power-of-Attorney

Respondent erred twice in obtaining the power-of-attorney: when he was granted the right to review and sign a settlement statement on behalf of his client and when he was authorized to sign the settlement check before the client had approved the settlement statement.

In In re Conroy, 56 N.J. 279 (1970), the Court found "highly improper" the use of a retainer agreement that contained a power-of-attorney to endorse the client's name on a settlement check, deposit it and make appropriate disbursements. Thereafter, the Advisory Committee on Professional Ethics cited the Conroy decision, when faced with a similar inquiry. In N.J. Advisory Comm. On Professional Ethics Opinion 635, 124 N.J.L.J. 1480 (1989) ("Opinion 635"), a law firm proposed to have clients execute an "authorization to endorse form" when they executed a release and disbursement statement, incidental to the settlement of litigation, to permit the attorney to endorse the

settlement draft and to deposit the funds in the attorney's trust account, after full disclosure to the clients. The form sought to avoid inconvenience to the clients in having to return to the firm's office to endorse the settlement draft and to avoid the time lag involved in mailing the instruments. The opinion found no impropriety in this arrangement. It found Conroy distinguishable from the situation posed by the inquiring law firm, which proposed to use the power-of-attorney at the request and with the consent of the client to facilitate disbursement of the proceeds. The power-of-attorney was to be executed after the settlement had been consummated and after the clients had signed the closing statement required by R.1:21-7 and RPC 1.5(c). The opinion concluded as follows:

> The requirements with respect to fee agreements and closing or written statements showing the remittance to the client and the method of its determination make the client aware of the amount of the recovery which the client is entitled to receive. If after that has been done, the client for his own convenience executes a written authorization permitting his attorney to endorse the settlement draft or check received in settlement of the matter or in satisfaction of a judgment and to deposit same in the attorney's trust account for the sole purpose of disbursing the funds in accordance with the closing statements, we see nothing improper in such a procedure.

Both the New Jersey Lawyers' Fund for Client Protection and the Office of Attorney Ethics sought the Court's review of that opinion. In the Matter of Advisory Committee on Professional Ethics Opinion 635, 125 N.J. 181 (1991). The Court disapproved the use of a form extending the power-of-attorney to endorse the client's name on a settlement draft, except in "extraordinary circumstances:"

> In severely limiting the circumstances under which the procedure sanctioned by Opinion 635 may be acceptable, we hasten to reaffirm our

> confidence in the integrity of the bar in general. Only a very small number of lawyers would be tempted to take advantage of the opportunity for fraud that the procedure envisioned by the use of the form creates. Small as that number may be, we conclude that as a matter of policy, in the discharge of our obligation to superintend the practice of law in this state, we should discourage that opportunity. We do not perceive the advantage gained in client convenience as sufficient to outweigh the increased risk for the unscrupulous lawyer to victimize his or her clients.
>
> We should make clear exactly what it is that we are disapproving: the routine use of a form that extends power of attorney to the lawyer in endorsing the client's name to a settlement draft. We will not permit the form to become a part of the package of a lawyer's ordinary closing papers. We acknowledge that there may be extraordinary circumstances – the client on the eve of departure for an extended stay in a foreign land, a client about to undergo surgery, with a doubtful prognosis and an extended hospital stay to follow – that might justify use of such a power of attorney. These, however, are not the situations contemplated by the inquiry nor does Opinion 635 purport to be so limited.
>
> [In the Matter of Advisory Committee on Professional Ethics Opinion 635,supra, 125 N.J. at 187]

We need not reach the question of whether the circumstances surrounding respondent's use of the power-of-attorney met the Court's requirements for extraordinary circumstances because he failed to meet the initial requirements set out in Opinion 635. Specifically, respondent failed to have Olanubi review the settlement disbursement sheet, prior to obtaining the power-of-attorney. In addition, the power-of-attorney authorized respondent to review and sign the settlement disbursement sheet, a power that, under the Court's decision and Opinion 635, cannot be delegated to the attorney. Thus, respondent's use of the power-of-attorney was improper and in violation of RPC 8.4(d).

The Disbursement Statement

By sending the disbursement statement to Olanubi after the distribution of the funds, respondent violated RPC 1.5(c). Pursuant to R.1:21-7(g), the statement must be sent to the client when the matter is concluded by settlement or verdict. Obviously, for the rule to make any sense, the client's review must take place before the distribution of the funds. Here, although allegedly Olanubi was aware of the distribution of the proceeds to the medical providers through respondent's letters and had agreed to the distribution, RPC 1.5(c) was nevertheless technically violated.

Notarizing and Witnessing the Signatures

Respondent's notarization of Olanubi's signature on the releases was improper because Olanubi did not sign the releases in his presence. Also, respondent violated RPC 5.3(b) when he allowed DeSimon to witness Olanubi's signature on the power-of-attorney, even though she had not witnessed its signing. Through DeSimon's conduct, respondent also violated RPC 8.4(c), by misrepresenting to the world that the witnessing of the document had been properly done, and RPC 8.4(d), by prejudicing the administration of justice.

As to Deptula, the stipulation was vague. Respondent admitted misconduct in failing to supervise his secretary, who, he claimed, "gave the Power of Attorney to Ms. Deptula to notarize." At first blush, it appeared that respondent was contending that he did not know, at the time, about Deptula's notarization. Indeed, during argument before us, it appeared that the parties had agreed that the misconduct in connection with Deptula,

related back only to respondent's failure to supervise DeSimon. We, therefore, made no independent findings with regard to Deptula.

* * *

Discipline in cases dealing with the improper execution of jurats, without more, is ordinarily an admonition or a reprimand. When the attorney witnesses and notarizes a document that has not been signed in the attorney's presence, but is signed by the legitimate party, the discipline is usually an admonition. See In the Matter of Stephen H. Rosen, Docket No. DRB 96-070 (1996) (admonition where the attorney witnessed and notarized the signature of an individual on closing documents signed outside of his presence; in addition, he failed to cooperate with disciplinary authorities). In 1990, we imposed a private reprimand – now admonition – where the attorney witnessed and notarized a client's signature on a deed signed outside his presence. In a 1989 case, a private reprimand – now admonition – was imposed where the attorney executed a jurat on an affidavit not signed in his presence, after he read the contents of the affidavit to the affiant and inquired whether he had signed the document in the presence of a third party.

If there are aggravating factors, such as the attorney's personal stake in the transaction, or the direction that a secretary sign the party's name on a document that the attorney then notarizes, or a pattern of practice, then the appropriate discipline is a reprimand. See, e.g., In re Spagnoli, 89 N.J. 128 (1982) (public reprimand where the attorney signed his client's name on three affidavits, which he then conformed and filed with the court); and In re Conti, 75 N.J. 114 (1977) (public reprimand where the attorney's clients told his secretary that it was impossible for them to come to the

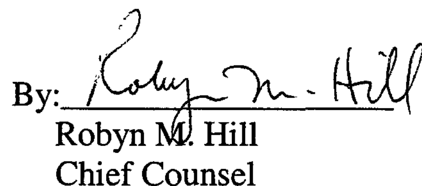
attorney's office to sign a deed and instructed her to do "whatever had to be done" to record the deed; the attorney had the secretary sign the clients' names on the deed and then witnessed the signatures and took the acknowledgment).

Respondent's misconduct encompassed more than the improper execution of jurats. In all, he utilized an improper power-of-attorney, failed to timely send a settlement disbursement sheet to his client, improperly notarized his client's signature and failed to ensure that his secretary's conduct was compatible with his professional obligations.

There are mitigating factors. Respondent was relatively young and inexperienced at the time of his misconduct, has no history of discipline and cooperated fully with the disciplinary system by entering into a stipulation. In light of the foregoing, a reprimand is sufficient discipline in this case.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: 
Robyn M. Hill
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

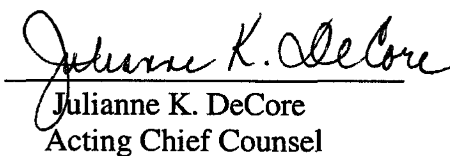
In the Matter of William P. Mikita, Jr.
Docket No. DRB 03-110

Argued: May 15, 2003

Decided: July 15, 2003

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley			X				
O'Shaughnessy			X				
Boylan			X				
Holmes			X				
Lolla			X				
Pashman			X				
Schwartz			X				
Stanton			X				
Wissinger			X				
Total:			9				



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