IF

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-136

IN THE MATTER OF

FREDERIC L. MARCUS

AN ATTORNEY AT LAW

Decision

Argued: July 8, 1999

Decided: August 15, 2000

Mark Falk appeared on behalf of the District VA Ethics Committee.

Cynthia M. Craig 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 recommendation for an admonition filed by the District VA Ethics Committee ("DEC"), which the Board determined to bring on for a hearing. The one-count complaint charged respondent with violations of RPC 1.4(a) (failure to communicate with clients), RPC 1.7(a) (conflict of interest - a lawyer shall not represent a client if the representation of that client will be directly adverse to another client), RPC

1.7(b) (conflict of interest - a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client), RPC 1.7(c) (conflict of interest - appearance of impropriety), RPC 1.16(d) (upon termination of representation, failure to protect a client's interests) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1974. He maintains a law office in Newark, New Jersey. Respondent has no history of discipline.

Sheree Cummings, the grievant, and her sister, Sharon Andrews, were involved in a motor vehicle accident on July 13, 1993. Cummings was the driver of the car owned by another sister, Zenobia Cummings, and Andrews was a passenger. The car was rear-ended by a vehicle operated by Harold Wood, an uninsured motorist. Both Cummings and Andrews retained respondent to represent them in connection with personal injury claims arising from the accident. They each executed a general retainer agreement with respondent shortly after the accident.

It was not until July 13, 1995, two years later, that respondent filed complaints on behalf of Cummings and Andrews. According to respondent, he was unable to file the complaints earlier because Cummings was not forthright about her address. Respondent explained that, because the case involved an uninsured motorist claim, it was crucial to determine Cummings' place of residence in order to establish which insurer would cover the accident — Zenobia's insurer or the insurer for the person with whom Cummings resided.

According to respondent, it was also possible that a recovery would be pro-rated between the insurers.

The defendants named in Sheree Cummings' complaint were Wood, an insurance company, an adjustment company and fictitious defendants. The defendants named in Sharon Andrews' complaint were Sheree Cummings (also respondent's client), Zenobia Cummings, Wood, an insurance company, an adjustment company and fictitious defendants. Paragraph three of the Andrews complaint stated that

> [d]efendants, Sheree T. Cummings, Zenobia Cummings, Harold Wood, John Doe and/or Richard Roe were negligent in the ownership, operation and control of their vehicles and were otherwise inattentive and careless, which negligence caused the vehicles to collide.
>
> [Exhibit P-5]

The Andrews complaint listed Andrys S. Gomez, Esq., formerly associated with respondent, as the attorney for plaintiff. Gomez signed the complaint.

On April 9, 1996, Sheree Cummings filed a grievance against respondent stating as follows:

> The reason I'm complaining I never spoke to my original attorney and how can the secretary, Norma Perez, switch me over to another attorney. I just do not believe none of it. There are too many stories to this case.
>
> [Exhibit P-1]

The Office of Attorney Ethics ("OAE") investigated this matter. The investigator was unable to contact Sheree Cummings during the course of her investigation. Moreover, Cummings did not testify at the DEC hearing. The investigator did, however, interview

Sharon Andrews, Andrys Gomez and respondent. Neither Andrews nor Gomez testified at the DEC hearing.

The DEC complaint charged that respondent prepared the Andrews complaint and arranged for attorney Gomez to sign it as the attorney for Andrews, in order to avoid a conflict of interest situation arising from respondent's simultaneous representation of Sheree Cummings as plaintiff and of Sharon Andrews as plaintiff in a complaint against Cummings. According to the investigator, Gomez had told her that she was not involved in the Andrews case; she merely signed the complaint, which had been faxed to her by respondent, to avoid a conflict of interest situation for respondent. Respondent, however, stated in his answer that, if it became necessary for the parties to have separate representation, Gomez stood ready to represent Sharon Andrews and that

> [t]he cooperation between the office of respondent and the office of Andrys Gomez . . . was not a subterfuge designed to 'avoid the appearance of a conflict of interest,' but was a real vehicle for coping with a conflict of interest situation, should a conflict situation arise.

According to the investigator, Andrews did not know Andrys Gomez and was unaware that she had signed a complaint in her behalf; in fact, Andrews did not even know that a complaint had been filed.

Respondent admitted that neither Cummings nor Andrews expressly waived the conflict by signing a "writing." In fact, the record does not clearly establish if respondent even advised them of the circumstances surrounding the conflict. Only the testimony of one

of respondent's expert witnesses indicated that respondent discussed the conflict with his clients. The expert stated "[w]ell, he told them about the potential conflict . . . and about the way [the case] was likely to unfold . . . ."

Ultimately, respondent was unable to settle the matter for either Cummings or Andrews. He stated that, although the majority of his practice involved personal injury work, he did not litigate cases or participate in arbitration matters. If he was unable to settle a case, he added, his practice was to transfer a case to another attorney. According to respondent, it was his custom to orally notify his clients about the limitations on his practice.

In October 1995, respondent transferred both the Cummings and Andrews files to Alan Berliner, Esq. Although respondent claimed that his clients knew that their cases were being transferred to another attorney, there is no evidence that either Cummings or Andrews was given prior notice of the transfer or contributed to this decision.

According to the investigator, respondent admitted to her that he did not obtain his clients' prior consent to transfer the cases to Berliner. The only such documentary notice to Cummings and Andrews is a letter from Berliner to them, dated October 28, 1995. The letter states as follows:

> I work with the office of Fred Marcus. I must speak to you about the July 13 accident.
>
> [Exhibit P-6]

A reasonable interpretation of this letter is that the two attorneys worked together in the same office, which was not the case. The letter did not make it clear that the cases had

been transferred to another office. Respondent claimed, however, that Cummings and Andrews were aware that Berliner was taking over their representation.

Neither sister appeared at the DEC hearing to rebut this testimony. As noted above, the investigator was unable to obtain Cummings' cooperation with the investigation. She did, however, interview Sharon Andrews, who denied having consented to the transfer of her file to another attorney.

Eventually, Berliner settled the Andrews case for $2,175 and the Cummings case for $2,000. Respondent received one-third of Berliner's fees. Andrews stated that, although initially she had had some problems with respondent's representation, she was ultimately satisfied with the outcome of the case.

Respondent testified that he was aware from the outset that Wood was an uninsured motorist and entirely at fault for the accident. Therefore, respondent stated, he did not believe that there would be a conflict of interest representing both driver and passenger. Respondent claimed both at the DEC hearing and in his answer that it was unnecessary for him to file a complaint in the matters because the uninsured motorist claim against the insurance carrier was a contract claim between the insured and the insurance company. Nevertheless, he stated, he filed the complaints to protect his clients' interests and to prevent the carriers' attempts to avoid liability by claiming that their subrogation rights had been waived. Respondent maintained that the filing of the complaints was a "red herring" because

the case involved an uninsured motorist who was one hundred percent at fault for the accident.

Respondent stated that, because uninsured motorist claims can be complicated and Andrews' and Cummings' injuries were minor, they would have experienced difficulty in obtaining other attorneys to represent them, particularly in light of the fact that the two-year statute of limitations was about to expire. As noted earlier, respondent blamed the delay in filing the complaints on Cummings' failure to provide him with an accurate address.

Respondent did not recall discussing with Andrews the issue of suing her sister. He claimed, however, that it was his practice to mention such information to his clients. Respondent did not recall giving his clients copies of the complaint.

Respondent's testimony about who filed the Andrews complaint was vague. Respondent initially claimed that he did not file it, implying that it had been filed by Gomez. Later, however, respondent admitted that it was "very possible and probable" that someone from his office had filed both of the complaints.

At the DEC hearing, respondent presented the testimony of two expert witnesses, one of whom was the former chair of the DEC. The experts concluded that respondent's conduct in filing the complaints showed that he exercised greater care than most practitioners. One of the experts opined that, if any ethics violations were committed by respondent, they were merely technical in nature and the result of the difficult situation in which respondent found himself.

The DEC found that respondent's representation of both the driver and passenger without making full disclosure to them of the conflict and without obtaining their consent to the representation, was a violation of RPC 1.7(a) and (b). The DEC concluded that, because an actual conflict of interest existed, it was unnecessary to consider whether respondent's conduct gave rise to an appearance of impropriety. The DEC, therefore, dismissed the charge of an RPC 1.7(c) violation.

The DEC found insufficient evidence that respondent had violated RPC 1.4(a). Also, the DEC found that there were no specific allegations raised in the complaint or facts adduced at the hearing to support a violation of RPC 8.4(c).

Noting respondent's inability to recall whether he had informed his clients of the transfer of their file to another attorney or obtained their consent to the transfer, the DEC found a violation of RPC 1.16(d).

The DEC recommended the imposition of an admonition.

* * *

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical is supported by clear and convincing evidence. We are unable to agree, however, with some of the DEC's findings of misconduct.

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RPC 1.7(a) or (b).

RPC 1.7 states as follows:

> (a) A lawyer shall not represent a client
> client will be directly adverse to another client ur

As to the charge that respondent's conduct violated RPC 8.4(c), it is undisputed that respondent was retained to represent both Andrews and Cummings. This was borne out by respondent's own testimony and the retainer agreements signed by both Andrews and Cummings. It is also undisputed that Gomez was not retained to represent Andrews. According to the OAE investigator, Andrews had never heard of Gomez and was not even aware that a complaint had been filed in her behalf. The evidence established that Gomez signed the Andrews complaint only as a favor to respondent to avoid a possible conflict of interest. Because respondent represented both driver and passenger, Gomez's name and signature on the Andrews complaint was a sham. Respondent's conduct in obtaining Gomez's signature and his contradictory statements regarding same are violations of RPC 8.4(c).

The DEC found that respondent's representation of both driver and passenger was a conflict of interest. Respondent, however, relied on DeBolt v. Parker, 234 N.J. Super 471, 479 (Law Div. 1988), for the proposition that an attorney may represent both driver and passenger in automobile accident cases, where it is clear that the driver was not responsible for the accident and the attorney complied with the disclosure and consent requirements of RPC 1.7(a) or (b).

RPC 1.7 states as follows:

> (a) A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:

(1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and

(2) each client consents after a full disclosure of the circumstances and consultation with the client . . . .

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after a full disclosure of the circumstances and consultation with the client . . . .

There is no evidence in the record that respondent failed to comply with the requirements of these rules. Neither client appeared at the DEC hearing to testify. Moreover, testimony about respondent's compliance with these sections was never fully developed below. While respondent admitted that his clients never signed a writing expressly waiving the conflict, neither section (a) nor (b) imposes the requirement of a writing. Also, respondent claimed that it was his practice to discuss such information with his clients. Without more, the evidence in the record does not meet the clear and convincing standard necessary for a finding that respondent violated either RPC 1.7(a) or (b).

Notwithstanding the insufficiency of evidence relating to this charge, the law governing conflicts of interest as it applies to the dual representation of driver and passenger, particularly in an uninsured motorist case is anything but clear. A brief overview of similar cases is provided in Kevin H. Michels, New Jersey Attorney Ethics § 19:2-1e.(3) (1998):

> One attorney may represent both the driver and a passenger as plaintiffs in an automobile accident case, as long as it is clear that the other driver was completely responsible for the accident and the attorney complies with the

disclosure and consent requirements of RPC 1.7. See DeBolt v. Parker, 234 N.J. Super, 471, 479 (Law Div. 1988). On the other hand, if there is some question about the plaintiff driver's liability, or if the defendant driver's insurance coverage is insufficient or inadequate to cover the damages of both plaintiffs, separate representation may be required. See N.J. Advisory Comm. on Professional Ethics Comm.[sic] Op. 248 (Jan. 25, 1973). A lawyer who misjudges the potential adversity between the interests of a passenger and a driver runs the risk of being forced to withdraw from the representation of both parties if, for example, the defendant driver counterclaims, asserting the negligence of the plaintiff driver. See, e.g., DeBolt, supra, at 484; Advisory Comm. Op. 613 (May 19, 1988).

The origins of the rules in this area can be traced to a Supreme Court Notice to the Bar, issued in 1968, which provided as follows:

> The Supreme Court is of the view, because of the conflict of interest inherent in the situation that an attorney should not represent both the driver of a car and his passenger in an action against the driver of another car, unless there is a legal bar to the passenger suing his own driver, as, for example, where they are husband and wife, unemancipated child and parent, or employees of the same employer and the accident occurred in the course of their employment. Where an attorney does represent both a driver and his passenger and no such legal bar exists, if a cross-claim or counter-claim is made by the other driver, a conflict of interest arises and the Supreme Court has advised the Assignment Judges that the attorney should not be permitted to continue to represent either the driver or his passenger.

Notice to the Bar, 91 N.J.L.J. 81 (Feb. 8. 1968). The Advisory Committee interpreted this Notice as prohibiting one lawyer's representation of a driver and his sister, or a driver and a family friend, in an action arising out of an auto accident, even when it appeared that the defendant driver was solely responsible for the collision. See Advisory Comm. Op 156 (July 24, 1969). The Committee reasoned that the attorney who sought to engage in the multiple representation should not be allowed to judge whether his client bore any responsibility for the accident or whether any counterclaim by the defendant would be frivolous. In contrast, the Committee permitted the lawyer in Opinion 156 to represent both the plaintiff driver and his minor daughter, who was also injured in the same collision, because parent-child immunity barred the daughter from making a cross-claim against her father.

The Supreme Court subsequently eliminated the doctrines of spousal and parent-child tort immunity in automobile accident cases. See Immer v. Risko, 56 N.J. 482 (1970); France v. A.P.A. Transport Corp., 56 N.J. 500 (1970). The Court then issued the following notice:

> Until further order of the Supreme Court, the policy statement with reference to the representation of driver and passenger will not apply with respect to husband and wife or parent and child. The problem of common representation in such situations will depend upon the circumstances of each case.

Notice to the Bar, 93 N.J.L.J. 712 (Oct. 8, 1970). The effect of this Notice was to apply the same rules to all driver-passenger situations, regardless of whether the plaintiffs were members of the same nuclear family.

Shortly thereafter, the Advisory Committee issued Advisory Comm. Op. 188 (Nov. 12, 1970), laying the groundwork for the present state of the law in this area. In Opinion 188, the Committee disapproved of a lawyer's representation of both a plaintiff driver and a plaintiff passenger, who was also the owner of the vehicle, against the defendant driver of another vehicle, even though both the passenger/owner and the driver of the first vehicle had agreed not to assert any claims against each other and had indicated their willingness to sign appropriate waivers and consents to the conflict. The Committee ruled that 'consent and waiver do not permit an attorney to represent two or more parties who may have potential claims against one another arising out of the same transaction.'

In Advisory Comm. Op 248, supra, the Committee took this language one step further, indicating for the first time that the key element in determining whether one lawyer could represent both the driver and his or her passenger in a lawsuit arising out of a motor vehicle accident was the degree of culpability of the defendant driver. The Committee held that one attorney may represent both a husband and wife or both a parent and child in such an action only if the liability of the defendant driver is obvious and undisputed. In dicta, the Committee suggested that the same rule would apply even if the driver and passenger were unrelated. The Committee also stated that there would be a potential conflict necessitating separate representation if the defendant driver's insurance coverage appeared to be insufficient to permit full payment to both plaintiffs. See id.

As the presenter candidly acknowledged before us, "the law in this area is less than clear." The presenter also opined that the law requires clarification. The confusion in this

area is underscored by respondent's argument that uninsured motorist claims "are a special breed" of cases that create technical, not true conflicts of interests, because insurers require that claimants' attorneys file a complaint in order to protect the insurers' subrogation rights against anyone who may potentially be deemed negligent. This case involved the filing of a complaint by one of respondent's clients against the other. Based on the lack of evidence in the record and the lack of clarity in the law we do not, at this time, find a violation of RPC 1.7(a), (b) or (c).

Respondent maintained throughout the proceedings that he filed the complaints only to prevent the insurers from claiming that their subrogation rights had been waived and that it was not anticipated that any litigation would ensue. Respondent also asserted that, because Cummings had been less than forthright about her place of residence, he had been unable to file the complaints for his clients until the statute of limitations was about to expire. He allegedly believed that, because of the timing and small value of the claims, no other attorney would take the cases. He claimed, thus, that he was only trying to protect his clients' interests by filing the complaints. Nevertheless, respondent's conduct in improperly obtaining another attorney's signature on the complaint was improper and cannot be countenanced. In light of respondent's otherwise unblemished record of twenty-five years and the fact that there was no injury to his clients, five members voted to impose an admonition. See In the Matter of Robert Simons, Docket No. DRB 98-189 (July 28, 1998) (admonition for violation of RPC 8.4(c) for signing another's name on an affidavit,

notarizing the signature and attaching affidavit to a complaint filed in federal court). Three members voted to impose a reprimand. One member did not participate.

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

Dated: 8/15/00

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Frederic L. Marcus
Docket No. DRB 99-136

Argued: July 8, 1999

Decided: August 15, 2000

Disposition: Admonition

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling				X			
Cole			X				
Boylan				X			
Brody			X				
Lolla				X			
Maudsley				X			
Peterson			X				
Schwartz							X
Wissinger				X			
Total:			3	5			1

By Robyn M. Hill 10/5/00
Robyn M. Hill
Chief Counsel