SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-367

IN THE MATTER OF :
MILES R. FEINSTEIN, :
AN ATTORNEY AT LAW :

Decision of the the
Disciplinary Review Board

Argued: November 15, 1995

Decided: February 26, 1996

A. Harold Kokes appeared on behalf of the District I 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 on a recommendation for discipline filed by the District I Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.3 (lack of diligence); RPC 1.4 (failure to communicate); RPC 1.5(b) (failure to reduce a fee agreement to writing) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation).

Respondent was admitted to the New Jersey bar in 1966. He was privately reprimanded on March 10, 1976 for failure to file an answer to three separate ethics complaints and for a contumacious pattern of activity. It is not clear whether that pattern was displayed towards the ethics system. A copy of the letter of private reprimand is not available for review.

* * *

In or about February 1991, D. K. ("grievant") retained respondent to represent him in an appeal of a criminal conviction for aggravated sexual assault, sexual assault and endangering the welfare of a child. Respondent had not represented grievant before. That notwithstanding, respondent admittedly did not reduce the terms of his fee requirements to writing, as required by RPC 1.5(b). That failure caused a substantial misunderstanding between the parties as to the exact amount and basis of the fee. Specifically, respondent maintained that he quoted grievant a fee of $15,000 plus costs to handle the appeal and ancillary motions, including certification to the Supreme Court, if necessary. Grievant, on the other hand, maintained that respondent had quoted him a total fee of $7,500, which had been paid shortly after he retained respondent. Although that misunderstanding played some indirect part initially in the dismissal of grievant's appeal, despite the fee confusion respondent moved promptly to reinstate the appeal, with no apparent prejudice to grievant.

There is no evidence to suggest that the fee misunderstanding otherwise caused any further delay in respondent's representation of grievant or that respondent ever intended to withdraw from his representation in the event of non-payment of his entire retainer. In fact, the initial delay in respondent's filing of the appellate brief was the result of several telephone calls from various other attorneys, who advised respondent that grievant's family had

retained them to assume grievant's representation.

At the time that grievant retained respondent, he had not yet been sentenced. Respondent appeared with grievant at his sentencing on June 20, 1991, at which time grievant received a term of imprisonment for fourteen years and a Violent Crimes Compensation Board penalty in the amount of $10,030. Grievant was apparently taken into immediate custody.

Although the complaint charged respondent with lack of diligence in handling grievant's appeal, the crux of grievant's complaint was that, between June or July 1991 and August 1992, respondent failed to reply to numerous letters requesting a status report on his appeal, an accounting of the costs expended to date and the return of several original documents given to respondent during the initial stages of representation. Grievant testified that he had also placed several telephone calls to respondent's office that went unanswered and that, at one point in time (September 30, 1991), he telephoned respondent at his office only to reach a recording indicating that the number was no longer in service. At that juncture, he enlisted the aid of his closest friend and business associate, Joseph Alberti, to locate respondent.

Despite the allegations of the complaint, grievant admitted at the DEC hearing that he was fully aware of respondent's efforts and of the status of his appeal through sources other than respondent. Specifically, grievant testified that he received information either from Alberti, who was also a friend and service provider to

respondent, or through his own efforts, consisting of telephone calls to the Appellate Division, the Attorney General's office and various court reporters (for verification of transcript costs respondent had incurred and paid in his behalf). In addition, grievant admitted that he had spoken with respondent on various occasions, either by telephone or when respondent personally went to the correctional facility to meet with him. Grievant contended that, on one of those occasions during which they discussed the appeal status, respondent informed him that the oral argument on the appeal had been adjourned at the state's request. Grievant maintained that he telephoned the Appellate Division to verify the information, which referred him to the Attorney General's office. That office apparently denied that it had made any such request.

In addition, grievant testified, on either the same or another occasion, respondent advised him that he had used the $7,500 retainer to pay transcript, photocopying and filing costs. Grievant was able to verify only the transcript costs, which did not account for the entire $7,500. Furthermore, respondent promised grievant that he would arrange for the documents he sought to be available for pick-up from his office. Those documents never became available. For all these reasons, the complaint charged respondent with misrepresentation, in violation of RPC 8.4 (c).

Grievant testified that respondent never returned to him the original documents initially given respondent for review. Grievant appeared somewhat preoccupied with the return of these documents, which, he maintained, he needed in order to pursue an ethics

complaint and/or legal malpractice action against the public defender who handled his trial and sentencing.

Finally, grievant made it clear that he was not challenging the quality and nature of respondent's representation and that he was satisfied that respondent did everything he was able to do substantively. Grievant questioned only respondent's method of communication.

Respondent admitted that he had failed to reduce to writing the terms of his fee agreement. Moreover, he testified that it was not always his practice to do so, depending upon the particular circumstances. For example, respondent generally did not enter into a written fee agreement on criminal appeal cases where he charged a flat fee. That might not be the case if he were retained on an hourly basis. In this case, grievant had been referred to respondent by Joseph Alberti, whom respondent knew socially and who had performed certain services for him (service of process). Because grievant came to respondent through Alberti, a trusted friend and associate, and because they had entered into a flat fee arrangement, respondent did not feel compelled to reduce the fee agreement to writing.

Respondent maintained that, when grievant first consulted with him, respondent made it clear, in Alberti's presence, that he devoted his practice to criminal trial work exclusively and that the demands of that practice made it impossible for him to be in the office during regular business hours. Furthermore, he had instructed his secretary — for obvious reasons — to refuse all

collect calls from inmates, unless he was in the office to speak to them. Therefore, in anticipation that grievant would be incarcerated at some point, respondent reached an agreement with Alberti to act as liaison between him and grievant. (Apparently, Alberti and grievant were in contact at least once a week). Moreover, respondent had given both grievant and Alberti his home telephone number in the event that they needed to speak with him.

Respondent testified that, predictably, he was not always able to contact grievant or to return his calls. Therefore, as agreed, he remained in contact with Alberti on a frequent basis and asked him to both relay information to grievant and to bring grievant various documents. Respondent was reluctant to send documents to grievant by mail because he was concerned that grievant's privacy might not be respected by prison inmates and other prison employees working in the mailroom. For example, respondent did not want to be responsible for disclosure of any information indicating that grievant had been convicted of a sex crime (especially one involving a minor) for fear that grievant's safety would become compromised. Indeed, grievant himself confirmed that he had not disclosed the basis of his conviction to any inmate, ostensibly for that reason.

Respondent maintained that he was confident that Alberti had conveyed his messages to grievant. Moreover, respondent testified that he had shared information regarding the status of grievant's matter with both grievant's mother and grievant's wife, in addition to speaking and meeting with grievant when that was possible.

Respondent further contended that, if there was ever any period of time during which grievant could not reach respondent by phone, it would have been during a several-day period in late 1991, when respondent was in the process of moving his office. Although respondent had arranged for call-forwarding to his new office during that period, he did experience an unanticipated interruption of service for several days. However, following that brief interruption, all clients were able to reach him simply by dialing his old telephone number, which was transferred to his new office.

Respondent maintained that he never misrepresented to grievant the reason for the delay in the oral argument on his appeal. In fact, he repeatedly advised grievant that he had no control over the Appellate Division's calendar and that he had no choice but to wait for an assigned date. At one point, respondent attempted to hasten the scheduling of the argument by telephoning the Appellate Division, but was given only an approximate date. Furthermore, respondent vigorously contended that, if any adjournments were granted, they were the result of the state's request, as it had lost certain documents vital to the defense of the appeal.

There was no documentation produced or competent testimony offered to refute or support respondent's or grievant's contention in that regard. Moreover, although respondent could not produce any records to document his expenses (all records were turned over to grievant for his post-conviction relief petition), respondent steadfastly maintained that the $7,500 retainer was used largely for transcript costs, filing fees and somewhat substantial

photocopying costs. Grievant produced no evidence to refute that contention.

Although respondent acknowledged that he had received the documents grievant so relentlessly sought, he claimed that he had returned them to grievant either through Alberti or during the return of grievant's files to him. (Grievant apparently intended to file an application for post-conviction relief on a pro se basis; thus the need for his files). Nevertheless, respondent spent several hours looking for the documents and had his secretary conduct a search as well. He speculated that, if the documents had not been returned to grievant, they could have been lost during the move to his new office or destroyed in a flood in his basement. It should be noted that respondent was not charged with a violation of RPC 1.15 or RPC 1.1 for his failure to return client property and/or gross neglect (in the event of loss of the file).

Finally, respondent asserted that, during a recent business meeting, grievant admitted to him that, although he considered withdrawing the grievance against respondent again (he had done so earlier), he believed that to do so at that point would adversely reflect upon his credibility, if he were to file an ethics grievance or malpractice action against the public defender who handled his trial below. Parenthetically, at this business meeting, Alberti and grievant discussed the possibility of employment with respondent as in-house investigators.

Joseph Alberti testified that he had agreed to relay messages to grievant from respondent and that he had done so consistently

and accurately. Indeed, grievant does not dispute this. Moreover, Alberti testified that he had attended several oral arguments ancillary to the appeal and that he had been extremely impressed with respondent's overall performance. In fact, following oral argument on the appeal itself, Alberti telephoned grievant and apprised him of the quality of respondent's performance. Grievant telephoned respondent the following day to thank him for his efforts.

Finally, Alberti testified that he had indeed delivered voluminous documents to grievant at respondent's request during one or more of his visits. Alberti was not able to say whether the documents grievant was pursuing were included among those he delivered.

* * *

The DEC found that respondent had diligently pursued all aspects of respondent's appeal, with the possible exception of filing a timely appellate brief. However, because respondent's delay was caused by his belief that respondent had retained other counsel to represent him on the appeal, because he acted promptly to reinstate the appeal following its dismissal and because grievant suffered no prejudice by the dismissal, the DEC found respondent to be "excused" for his failure in the first instance. The DEC further found that, although respondent may not always have done so personally, he had kept grievant apprised of the status of

his matters through Alberti and various family members. Finally, the DEC found that respondent had not misrepresented the status of grievant's appeal on the manner in which he exhausted the initial retainer. Therefore, the DEC dismissed all of the allegations of the complaint, with the exception of the charge that respondent violated RPC 1.5 by his failure to reduce his fee agreement to writing. The DEC found that, not only did respondent technically violate that RPC, but also that his failure in that regard caused much of the "lack of communication or miscommunication which occurred between [him] and [grievant]." (Presumably, the DEC was making reference to grievant's perception that respondent had not replied to his request for an accounting of the expenses incurred). The DEC recommended that respondent receive a reprimand for his violation of RPC 1.5(b) and that "respondent be required to maintain written fee agreements in future cases...[and that he] be required to retain copies of ledger cards that would enable him to reconstruct fees received, costs expanded and time spent on files when those files are transferred to clients or other attorneys."

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is clearly and convincingly supported by the record. Respondent admittedly failed to enter into a written fee agreement with grievant, whom he had never before represented, as required by

RPC 1.5 (b). Not only did respondent's conduct technically violate the rule, but it also created a substantial misunderstanding between respondent and grievant regarding respondent's fee and costs. Respondent's failure in this regard is especially unfortunate in light of the DEC's dismissal of the balance of the substantive charges.

The DEC's dismissal of those remaining charges was entirely proper. It is clear that respondent more than diligently pursued grievant's appeal. Indeed, even grievant himself admitted, on cross-examination, that he did not dispute the quality or timeliness of respondent's work. Grievant must have been sincere in this admission, given his willingness, to become respondent's employee as of the date of the DEC hearing. Although grievant did have a problem with respondent's manner of communicating with him, it is clear that respondent made it known to him, in Alberti's presence, that direct communication would be nearly impossible. It is equally clear that Alberti agreed to act as liaison between the two early on, given his frequent contact with grievant, his friend and business associate. Under the circumstances, respondent appears to have made the best of a communication limitation, which was difficult, at best.

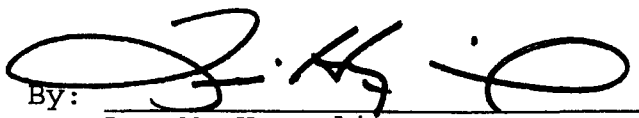
Finally, there is no clear and convincing evidence that respondent ever misrepresented to grievant either the status of his appeal or the expenditure of costs.

The issue of discipline remains. It is true that respondent's misconduct caused some confusion regarding the amount and

allocation of his fees. It is also true that respondent was the subject of discipline some twenty years ago for totally unrelated conduct. That notwithstanding, the Board was of the unanimous view that a reprimand is too severe a sanction for a violation that, if completely technical, might not have resulted in any discipline. Here, however, the violation did cause some confusion between the parties. The Board, therefore, unanimously determined to admonish respondent for his failure to reduce his fee arrangements to writing, as required by RPC 1.5.

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

Dated: 2/26/96

By: 

Lee M. Hymerling
Chair
Disciplinary Review Board

Supreme Court of New Jersey
Disciplinary Review Board

Voting Sheet

IN THE MATTER OF MILES R. FEINSTEIN

DOCKET NO. DRB 95-367

HEARING HELD: November 15, 1995

DECIDED: February 26, 1996

	Disbar	Suspension	Reprimand	Admonition	Dismiss	Dis qualified	Did Not Participate
ZYMERLING					X		
BUFF					X		
COLE					X		
HUOT					X		
MAUDSLEY					X		
PETERSON					X		
SCHWARTZ					X		
THOMPSON					X		
ZAZZALI					X		

Robyn M. Hill

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