SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-254

IN THE MATTER OF

HOWARD M. DORIAN

AN ATTORNEY AT LAW

Decision

Argued: October 17, 2002

Decided: February 20, 2003

James F. Keegan appeared on behalf of the District VB Ethics Committee.

Anthony P. Ambrosio waived appearance 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 discipline filed by the District VB Ethics Committee ("DEC"). The complaint charged respondent with

violations of *RPC* 1.15(b) (failure to promptly deliver funds to a third person) and *RPC* 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority).

This matter was originally before us as a default in February 2002. At that time, we determined to grant respondent's motion to vacate the default, to deem respondent's certification in support of the motion an answer to the complaint and to remand the matter to the DEC for a hearing.

Respondent was admitted to the New Jersey bar in 1978. In 1995 he was admonished for gross neglect, failure to communicate with the client, failure to withdraw as counsel, failure to promptly turn over his client's file to a new attorney and failure to reply to requests for information from a disciplinary authority, in violation of *RPC* 1.1(a), *RPC* 1.4, *RPC* 1.16 and *RPC* 8.1(b). *In the Matter of Howard M. Dorian*, Docket No. DRB 95-216 (August 1, 1995). In 2001 respondent was reprimanded for gross neglect, lack of diligence and failure to communicate with a client, in violation of *RPC* 1.1(a), *RPC* 1.3 and *RPC* 1.4(a). *In re Dorian*, 166 *N.J.* 558 (2001). On June 4, 2002, we dismissed charges alleging that, in a personal injury matter, respondent lacked diligence, failed to communicate with the client and failed to reply to requests for information from a disciplinary authority.

* * *

The facts in this matter are generally not in dispute. In October 1996 respondent was retained by Herman Holder, who had been injured in an automobile accident on September 28, 1996. Based on his client's representations to him, respondent believed that Holder did not own a motor vehicle and would be covered as an uninsured motorist by the insurance policy of the owner of the automobile that he was driving at the time of the accident. Approximately two years later, respondent learned that, contrary to his client's assertion, Holder owned an uninsured automobile and, thus, could not file a claim for personal injury protection.

On October 22, 1996 respondent asked Dr. Mark Smith, Holder's treating chiropractor and the grievant in this matter, to submit a report and a bill when Holder was released from his care. More than one year later, on February 25, 1998, Dr. Smith notified respondent that Holder's treatment was completed and offered to submit his report and bill upon receipt of $125. On March 3, 1998 Dr. Smith "faxed" to respondent a document that Holder had signed, granting Dr. Smith a $6,763 lien against any recovery obtained by respondent in Holder's behalf. Respondent signed the acknowledgement of lien and "faxed" it to Dr. Smith the next day. Dr. Smith subsequently sent his report and bill to respondent.

In late 1999 respondent settled Holder's personal injury action for $5,000. On December 22, 1999 respondent disbursed $1,800 to himself as costs and legal fees and

$1,950 to Holder. Respondent escrowed $1,250 for medical liens. According to respondent, Holder had indicated that he would continue to pursue a personal injury protection claim from other insurance sources. Respondent, thus, withheld the standard $250 deductible plus $1,000 (twenty percent of the first $5,000) for any medical liens that might arise.

In June 2000, about six months later, Holder informed Dr. Smith about the settlement. After leaving several messages for respondent and not receiving a return telephone call, Dr. Smith finally discussed the matter with respondent in July 2000. Respondent told Dr. Smith that, unless respondent's signature were on the document, Dr. Smith should request payment directly from Holder. Although Dr. Smith "faxed" to respondent a copy of the acknowledgement of lien bearing respondent's signature, respondent did not reply further to Dr. Smith, who filed the ethics grievance on September 2, 2000.

In January 2001 Dr. Smith retained an attorney, who sent a February 1, 2001 letter to respondent about his noncompliance with the acknowledgement of lien. The attorney indicated that suit would be filed if respondent did not contact him. On June 11, 2001 respondent issued to Dr. Smith a $1,250 trust account check, representing the funds that had been escrowed for medical liens. On July 6, 2001 respondent issued a business account check to Dr. Smith in the amount of $1,950, a sum equal to Holder's portion of

the settlement proceeds. Respondent, thus, sent a total of $3,200 to Dr. Smith, reasoning that, if he had honored the lien authorization prior to any disbursements, that was the amount that Dr. Smith would have received, after the deduction of respondent's fees and costs.

On December 28, 2000 the DEC investigator sent a copy of Dr. Smith's grievance to respondent, requesting a reply within ten days. Having received no reply, on April 4, 2001 the investigator sent a second letter to respondent, asking for information about the grievance and including eleven specific questions for respondent to answer. The next day, the investigator sent a letter to the attorney who represented respondent in the disciplinary matter that we dismissed in June 2002. The investigator stated that, although he did not know whether the attorney was representing respondent in this matter, he was providing him with a copy of his April 4, 2001 letter to respondent. After failing to receive a reply from either respondent or the attorney, on June 18, 2001 the investigator sent to respondent a copy of the April 4, 2001 letter and renewed his request for a reply. Again, respondent failed to reply. Consequently, a formal ethics complaint was filed on August 17, 2001.

For his part, respondent claimed that, although he was aware, when he settled the *Holder* matter, that Holder had outstanding bills for Dr. Smith's treatment, he was unaware that Holder had given Dr. Smith a lien against the proceeds. According to respondent, his file did not contain a copy of the lien. He speculated that, when his

secretary sent it to Dr. Smith, she failed to retain a copy for the file. Respondent testified that he would not have disbursed any funds to his client if he had known about the lien.

Respondent acknowledged that, even after Dr. Smith sent him a copy of the lien authorization that respondent had signed, he failed to release the escrow funds to Dr. Smith. Respondent claimed that, after Dr. Smith had contacted him, he had tried to obtain Holder's consent to the release of the escrow funds to Dr. Smith, but had been unable to locate his client. He maintained that, without Holder's authorization, he could not release the funds. Respondent testified that, after the grievance was filed, he believed that he had the authority to release the funds to Dr. Smith. As the presenter pointed out, however, respondent did not release the funds soon after the grievance was filed. He waited until June 2001, four months after he was contacted by Dr. Smith's attorney. Respondent contended that he was acting upon advice of counsel at this time. According to respondent, he contacted his attorney in April 2001 about this matter

Similarly, with respect to respondent's failure to reply to the investigator's numerous requests for information, he claimed that he was represented by counsel, whom he believed would resolve the matter.

* * *

The DEC found that respondent violated *RPC* 1.15(b) when he "simply disregarded the lien that was in his file." Apparently, the DEC rejected respondent's contention that his file did not contain a copy of the lien authorization, although it did not make an explicit finding in that regard. The DEC also found that respondent violated *RPC* 8.1(b) by failing to reply to the investigator's repeated requests for information about the grievance.

The DEC recommended a reprimand.

* * *

Following a *de novo* review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is supported by clear and convincing evidence. As noted above, after respondent settled Holder's personal injury action, he disbursed the settlement proceeds to himself and his client, and retained $1,250 in escrow for potential medical liens. According to respondent, his file did not contain a copy of the lien authorization and he was not aware of it when he made the settlement distribution. There was no evidence to rebut his testimony in this context. Respondent conceded that, although he had acknowledged the lien, he did not honor it.

Unless an attorney signs a guarantee assuming responsibility for a client's medical expenses, that attorney has no personal liability for the debt. There is no suggestion here that respondent personally guaranteed payment of Holder's medical expenses. It is unquestionable, however, that respondent should have disbursed the balance of the settlement proceeds to Dr. Smith, after deducting his own fees and costs. Respondent claimed that inadvertently a copy of the lien had not been retained in the file and that he had simply forgotten about it. Had respondent remedied his error by immediately forwarding the funds to which Dr. Smith was entitled, we might have accepted his contention and found merely a technical violation of *RPC* 1.15(b). Because, however, respondent did not remit the funds to Dr. Smith until many months after he was reminded of the lien, his claim that his conduct at the time of the disbursement was the product of inadvertence becomes tenuous. In our view, upon being reminded of the lien, respondent should have taken swift action to honor it. Yet, he did not dispute that, after he received a copy of the lien, not only did he fail to pay Dr. Smith, but he also did not get in touch with him. Even the filing of the grievance did not prompt respondent to contact Dr. Smith. It was only after he was contacted by Dr. Smith's attorney that he finally sent the funds to Dr. Smith. Respondent's actions, thus, were inconsistent with his claim of forgetfulness.

Respondent contended that he did not deliver the escrow funds to Dr. Smith forthwith because he did not have Holder's authority. According to respondent, only after the grievance was filed was he able to release the funds with impunity. There are several flaws in respondent's claim. First, he did not release the funds immediately after the grievance was filed. The grievance was filed on September 2, 2000 and served on respondent on December 28, 2000. He released the $1,250 escrow to Dr. Smith on June 11, 2001, more than five months after he was served with the grievance. Second, the filing of the grievance was not related to the validity of Dr. Smith's lien. Respondent should have acknowledged its validity as soon as Dr. Smith "faxed" a copy of the lien document to him.

Respondent also contended that he had not disbursed the funds to Dr. Smith sooner because he was acting upon the advice of his attorney. As noted above, respondent claimed that he discussed this matter with his attorney in April 2001. Nevertheless, Dr. Smith contacted respondent in July 2000. Even if we were to accept respondent's claim, he still waited a minimum of nine months from Dr. Smith's telephone call to him and three months from the service of the grievance to call his attorney. His failure to take any action in this matter, at least from July 2000 until April 2001, cannot be attributed to his attorney. Respondent's failure to promptly deliver the funds to Dr. Smith, thus, violated *RPC* 1.15(b).

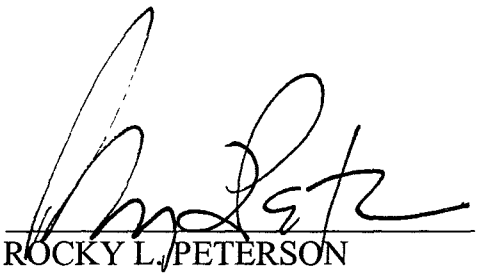
As to the charge that respondent violated *RPC* 8.1(b), he again attributed his failure to take any action to his belief that his attorney was resolving the matter. He also contended that he had not replied to the investigator's letters because he believed that the grievance had been withdrawn. Both of these beliefs were unreasonable. The investigator sent the grievance to respondent on December 28, 2000. He sent a follow-up letter on April 4, 2001, asking respondent to reply to the grievance. After respondent told the investigator that he would ask his attorney to contact him, the investigator forwarded to the attorney a copy of his April 4, 2001 letter, indicating that he did not know whether the attorney was representing respondent in this matter. The investigator sent yet another letter to respondent on June 18, 2001, again requesting a reply to the grievance. At this point, respondent should have realized that, for whatever reason, his attorney was not communicating with the investigator. Respondent, therefore, should have contacted either the investigator or his attorney.

Moreover, respondent issued checks to Dr. Smith in June and July 2001. According to respondent, he believed that Dr. Smith's withdrawal of the grievance would conclude the matter. After he was served with the formal ethics complaint in August 2001, respondent knew, or should have known, that the grievance had not been withdrawn. His belief that his payments in June and July resolved the matter was unreasonable, in light of his receipt of the complaint in August.

In sum, respondent failed to promptly deliver funds to a third person and failed to cooperate with a disciplinary authority. Attorneys who have committed similar transgressions have received reprimands or short-term suspensions. *See, e.g., In re Tutt,* 163 *N.J.* 562 (2000) (reprimand in a default case where the attorney failed to distribute funds to beneficiaries of an estate, failed to cooperate with disciplinary authorities, exhibited a lack of diligence and failed to communicate with clients); *In re Breig*, 157 *N.J.* 630 (1999) (reprimand where attorney failed to promptly remit funds received on behalf of a client and failed to comply with recordkeeping rules); *In re Gilbert*, 159 *N.J.* 505 (1999) (three-month suspension where attorney failed to promptly return funds to his client's former spouse in an effort to obtain payment of his fee from his client and failed to respect the rights of third persons); *In re Lesser*, 139 *N.J.* 233 (1995) (three-month suspension where attorney failed to promptly notify client of receipt of funds and to promptly deliver those funds, failed to comply with recordkeeping requirements and failed to communicate with his client).

Here, respondent's infractions were not as serious as those of Gilbert or Lesser, who received suspensions. In our view, his conduct was more similar to that of the attorneys in *Tutt* and *Breig*. We, thus, were not convinced that a suspension is warranted in this matter and unanimously voted to impose a reprimand.

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

By: 

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Howard M. Dorian
Docket No. DRB 02-254

Argued: October 17, 2002

Decided: February 20, 2003

Disposition: Reprimand

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

Robyn M. Hill 2/24/03
Robyn M. Hill
Chief Counsel