SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-196

IN THE MATTER OF :

BEVERLY G. GISCOMBE :

AN ATTORNEY AT LAW :

Decision

Argued: July 23, 1998

Decided: January 11, 1999

Michael S. Haratz appeared on behalf of the District VB Ethics Committee

Ernest G. Ianetti appeared on behalf of respondent.

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 VB Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1979 and maintains an office for the practice of law in East Orange, New Jersey. She received a private reprimand in February 1990 for engaging in a conflict-of-interest when she represented the driver and passenger in a motor

vehicle accident, lending money to one of the clients involved in the motor vehicle accident and grossly neglecting the litigation. She received an admonition in July 1996 for failure to communicate with a client.

* * *

This matter involves two separate complaints. One complaint, District Docket No. VB-95-103E, alleged violations of RPC 1.7(a) (conflict of interest), RPC 1.9(a) (conflict of interest), RPC 1.4(a) (failure to communicate) and RPC 1.16(d) (failure to turn over the client's file upon termination of representation). The second complaint, District Docket No. VB-95-105E, charged respondent with violations of RPC 1.7(a) (conflict of interest), RPC 1.4(a) (failure to communicate) and RPC 8.1(b) (failure to cooperate with the ethics authorities).

The crux of these two matters is whether respondent improperly represented adverse parties in claims arising out of motor vehicle accidents.

The Layton-Sinclair Matter, District Docket No. VB-95-103E

In January 1992, Rhoda Layton-Sinclair was involved in an accident while driving her automobile. Maria Reese and Al-Rahim Robinson were passengers in Sinclair's car at the time of the accident. The evidence indicated that respondent represented all three claimants from at least December 1992 until November 1994.

Respondent testified that the representation of the driver and her two passengers was the result of a mistake caused by the opening of two separate files by her office staff, one under the name of Layton-Sinclair and the other under the name of Layton.

Respondent's paralegal, Tracey Hinson, who was handling the file that had been mistakenly opened under the name of Layton, thought that there were no passengers in Layton-Sinclair's automobile. A former legal secretary for respondent, Jacqueline Miller, was handling a separate file on behalf of Layton-Sinclair, Reese and Robinson. According to respondent, Miller was under the impression that all three clients were passengers in the automobile. Although it was not clear from the record, it appears that no attorney met with any of the parties.

Neither Layton-Sinclair nor Miller testified at the hearing.

The police report that was in the file being handled by Miller clearly showed that Layton-Sinclair was the driver of the automobile. Furthermore, respondent's correspondence to Layton-Sinclair's insurance company, Warner Insurance Systems (Warner) showed all three claimants as clients of respondent and referred to the fact that Layton-Sinclair was the insured.

According to Hinson, she discovered the conflict during a telephone conversation with the adjuster from Warner. She then spoke with Michelle Gray, respondent's office manager, who spoke with respondent. It was decided that they would refer Layton-Sinclair to another attorney, Francis Obi. Obi, who had previously worked for respondent, had started his own practice. Although Obi no longer worked for respondent, Hinson drafted the complaint for Obi on respondent's pleading paper.

Respondent filed a complaint on behalf of Reese and Robinson against Layton-Sinclair and other defendants on November 21, 1994. The complaint that Hinson prepared for Obi to file on behalf of Layton-Sinclair was also filed on November 21, 1994.

Respondent did not dispute that she continued to represent Reese and Robinson after she discovered the conflict. Hinson and Gray testified that they met with Layton-Sinclair to explain that, because of a conflict in representing her as well as the passengers in her car, they would be referring her case to Obi. Hinson and Gray stated that Layton-Sinclair consented to the transfer. Hinson testified that they did not discuss with Layton-Sinclair the fact that respondent would continue to represent Reese and Robinson. There was no testimony elicited as to whether respondent or anyone on her staff disclosed the potential conflict to Reese and Robinson or sought their consent to the representation.

With respect to the alleged violation of RPC 1.4(a), respondent disputed that she failed to communicate with Layton-Sinclair. Gray and Hinson's testimony supported respondent's position.

Respondent also disputed the allegation that she failed to timely turn over Layton-Sinclair's file to a new attorney, Kenneth Oleckna. It was respondent's position that, at the time the file was requested, she had already transferred the case to Obi and that Obi had transmitted the file to Oleckna.

Respondent testified that she was ill from 1991 or 1992 until 1995, that she was in the office approximately one-half day a week during that time period, that her work was delegated

to attorneys who worked for her and that she managed the office primarily by telephone. Respondent did not identify any other attorney as having primary responsibility for the cases underlying these ethics matters. From the testimony and the documents, it was evident that secretaries or paralegals handled both the Layton-Sinclair and Lipford cases for respondent, using respondent's signature stamp on correspondence to insurance companies and clients. In fact, respondent testified that she did not sign her name on the November 1994 complaint that was filed on behalf of Reese and Robinson against Layton-Sinclair and did not know who signed her name on the complaint.

Respondent did not testify as to the specifics of her illness other than to state that "it was physical as well as mental, and it truly affected me and it still does." Respondent had a letter from a "counselor" that she had been seeing and offered that letter to the DEC, although she stated that she preferred not to disclose her "personal situation." The DEC determined to accept respondent's testimony that she had been ill and not to require the letter from the counselor.

The Lipford Matter, District Docket No. VB-95-105E

In January 1989, Mary Gordon was involved in an accident while driving her automobile. According to the ethics complaint, there were two minor passengers in the car at the time of the accident: the grievant (Tunisia Lipford), and Alicia Hutchins. The complaint alleged that respondent represented Gordon, the driver, as well as her passengers, Lipford and Hutchins, in violation of RPC 1.7(a).

At the hearing, respondent disputed that she represented Gordon and that there were only two passengers in the automobile. According to respondent, there were three minor passengers in the automobile; the third passenger was Gordon's minor daughter, also named Mary Gordon. Respondent's office manager's testimony supported respondent's statement in this regard. It was respondent's position that she was never retained to represent Gordon personally, only as guardian ad litem for her daughter, who was also a passenger in the car. Therefore, respondent contended, there was no conflict of interest.

Respondent's correspondence to two insurance companies and to Lipford and the complaint that she filed on behalf of Lipford and Hutchins do not shed light on whether there were two or three passengers in the Gordon automobile. Furthermore, respondent and her office manager testified that the file was lost.

The presenter testified that he had obtained the file that respondent had given to Lipford's new attorney, but that the only documents in the file were the few pieces of correspondence and the complaint that were introduced into evidence at the hearing. The file contained no accident report, no summonses and no answers. There was no testimony elicited as to whether or not respondent had files for Gordon and Hutchins.

None of the parties in the underlying case testified at the hearing.

In June 1992, respondent filed a complaint on behalf of Lipford and Hutchins and named Gordon, the mother, as a defendant. She testified that she did not include Gordon's daughter as a plaintiff because the daughter had incurred no or little medical expenses.

As noted earlier, respondent denied the existence of a conflict of interest, claiming that she represented Gordon merely as guardian ad litem for the daughter.

Another allegation was that respondent failed to communicate with Lipford, a charge that respondent denied. Lipford did not testify and the presenter withdrew that count of the complaint.

With respect to the alleged violation of failure to cooperate with the disciplinary authorities, respondent testified that she never saw the initial December 13, 1994 letter from the DEC. The DEC sent a second letter on May 23, 1995. Respondent received the letter on May 24, 1995 and called the DEC investigator that same day to request a ten-day extension of time to reply, which was granted. Respondent replied to the grievance by letter dated June 9, 1995, but did not include her file for the underlying case, as requested by the DEC. In her reply to the grievance, she stated that she had been unable to locate the file. At the hearing, respondent and her office manager testified that the file could not be located.

* * *

With respect to the Layton-Sinclair matter, the DEC found violations of RPC 1.7(a) and RPC 1.9(a), based on the fact that respondent had represented the driver and passengers of the Layton-Sinclair automobile for a substantial period of time and that respondent had filed suit on behalf of the passengers against Layton-Sinclair after respondent had transferred Layton-

Sinclair's file to Obi. The DEC concluded that respondent's simultaneous representation of the passengers and the driver gave rise to a conflict of interest that could not be waived.

The DEC dismissed the counts alleging violations of RPC 1.4(a) and RPC 1.16(d), finding no direct proof that respondent had failed to communicate with her client or to timely turn over the file to Oleckna.

In the Lipford matter, the DEC found that respondent had violated RPC 1.7(a) in representing Gordon as guardian ad litem for her daughter based on its understanding that, when there is a conflict between a child and parent, the parent cannot act as the guardian ad litem for the child with respect to that dispute. Therefore, the DEC reasoned, it was a conflict for respondent to represent the mother/driver and the daughter/passenger.

The DEC dismissed the count alleging a violation of RPC 1.4(a).[1] The DEC also dismissed the count alleging a violation of RPC 8.1(b) because the proofs indicated that the Lipford file had been inadvertently lost or destroyed by respondent's office.

The DEC recommended that respondent be reprimanded.

* * *

Following a de novo review of the record, the Board was satisfied that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence.

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[1] In any event, the presenter had already withdrawn that count.

It is a conflict of interest to represent a driver and an unrelated passenger in an automobile negligence case, even if both parties consent to the representation and sign a waiver as to any potential conflict. In re Starkman, 147 N.J. 558 (1997); New Jersey Supreme Court Advisory Committee on Professional Ethics ("ACPE") Opinion 156, 92 N.J.L.J. 481 (1969) and ACPE Opinion 188, 93 N.J.L.J. 789 (1970).

In the Layton-Sinclair matter, respondent maintained that she was unaware of the conflict because two separate files were mistakenly opened by her office staff. One of the files identified Layton-Sinclair as the driver, but did not indicate that there were any passengers in the automobile. The police report in the second file did show that Layton-Sinclair was the driver and that Reese and Robinson were injured in the accident. Yet respondent took the position that the secretary who handled the matter (who did not testify) believed that Layton-Sinclair was a passenger, not the driver; therefore, respondent contended, she could not have known that she was representing clients with adverse interests. The DEC properly rejected this position because respondent's communications with the insurance company reflected an awareness that Layton-Sinclair was the driver. Furthermore, even after respondent was made aware of the conflict and transferred the Layton-Sinclair case to Obi, respondent's paralegal simultaneously drafted a complaint on behalf of Layton-Sinclair and a complaint on behalf of Reese and Robinson against Layton-Sinclair. Under these circumstances, there is clear and convincing evidence of a violation of RPC 1.7.

It is undisputed that respondent filed a complaint on behalf of Reese and Robinson against her former client, Layton-Sinclair. Respondent argued that this was not a violation of RPC 1.9(a) because her employees, Gray and Hinson, explained the conflict to Layton-Sinclair and obtained her consent to transfer her case to Obi. However, according to Hinson, there was no discussion with Layton-Sinclair of the fact that respondent would continue to represent Reese and Robinson in a lawsuit against Layton-Sinclair. Furthermore, respondent's position ignores RPC 1.9(b), which states that the provisions of RPC 1.7(c) are also applicable to RPC 1.9. Therefore, respondent's continued representation of the passengers in a lawsuit against Layton-Sinclair was a violation of RPC 1.9(a).

In the Lipford matter, respondent was initially charged with violating RPC 1.7(a) because she represented the driver as well as two passengers involved in a motor vehicle accident. However, respondent's unrebutted position was that she did not represent the driver personally, but only in her capacity as guardian ad litem for the driver's daughter, who was a passenger in the automobile. The DEC found a conflict of interest based upon the fact that a parent cannot act as a guardian ad litem for a minor if the parent has a conflict of interest. The DEC reasoned that an attorney who represents a parent and child in such a situation violates RPC 1.7(a).

There does not appear to be any precedent for the proposition that it is unethical for an attorney to represent a child in connection with a claim against an insurance company through a parent who was the driver of the automobile in which the child was injured. It is instructive that the strict prohibition against representing a driver and a passenger does not apply in

situations where the parties are related. A Supreme Court directive, dated October 8, 1970, 93 N.J.L.J. 712, provides as follows:

> Until further order of the Supreme Court, the policy statements 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.

In Opinion 248, 96 N.J.L.J. 93 (1973), the ACPE found that it was permissible for one attorney to represent both the driver/mother and the passenger/child in a suit against the driver of the other automobile where the liability was obvious. The ACPE cautioned that, if it appeared that the other driver did not have sufficient insurance coverage to permit full payment to both plaintiffs, the attorney had to reconsider such representation since the attorney might compromise the interests of one plaintiff to the disadvantage of the other.

In light of the above, the DEC's rationale for finding that respondent violated RPC 1.7(a) is not supported by law.

The DEC did not address the presenter's argument that respondent's representation of Gordon's daughter through her mother was equivalent to representing Gordon personally, in violation of RPC 1.7(a). Apparently the argument was that, because respondent represented Gordon's daughter through Gordon, respondent violated RPC 1.7(a) when she filed a personal injury action on behalf of the other two passengers against Gordon. Because the undisputed testimony was that respondent no longer represented Gordon's daughter at the time the personal injury action was instituted, the relevant rule would be RPC 1.9, not RPC 1.7.

On initial consideration, the presenter's argument appears to have merit. Even if respondent did not engage in an actual conflict, it might appear that the multiple representation created at least an appearance of impropriety. However, any actual support for the presenter's position does not appear to exist.. Furthermore, respondent was not charged with a violation of RPC 1.9, the record in this case is sparse and there was no evidence that Gordon or her passengers were adversely affected by the multiple representation. Therefore, the Board was unable to find, to a clear and convincing standard, that respondent engaged in a conflict of interest in the Lipford matter.

The DEC properly dismissed the allegations of failure to communicate in both cases. Neither of the grievants testified at the hearing and the only evidence adduced at the hearing was that there were communications with the grievants.

The DEC also appropriately dismissed the allegation that respondent did not turn over Layton-Sinclair's file after Oleckna took over the representation and requested the file in March 1995. The evidence was that respondent had previously transferred the file to Obi and that Obi had forwarded the file to Oleckna in July 1995.

Finally, the DEC properly dismissed the allegation that respondent failed to give the DEC her file in the Lipford case. Both respondent and her secretary testified that the file had been closed, that they were unable to locate the file and that a copy of the file had previously been provided to Lipford. That testimony was supported by the fact that the DEC investigator had obtained copies of file documents from Lipford's new attorney.

In mitigation of her misconduct, respondent advanced that she was ill between 1991 or 1992 and 1995 and was in her office approximately one-half day per week. Respondent was prepared to offer a letter from a counselor, but stated that she was reluctant to discuss her personal problems. The DEC accepted her testimony that she was ill, without evidence or any specification as to the illness, other than the testimony of respondent's two employees that she had been ill. The lack of details as to respondent's illness was further complicated by her June 25, 1998 brief to the Board, in which respondent took issue with the DEC's statement that respondent suffered from physical and mental illness. Respondent contended that she never suffered from a mental illness; rather, she was affected mentally by a protracted physical illness. Yet the only evidence that respondent was prepared to submit was a letter from a counselor, not a physician. Furthermore, respondent did not dispute the DEC chair's statement, made during respondent's testimony, that respondent suffered from "psychiatric problems as well as physical problems...." Because of the lack of evidence and respondent's conflicting statements, the Board cannot find any grounds for mitigation of her misconduct.

It is clear from the record that respondent's professional and office practices were poor. The personal injury files were handled by secretaries and paralegals with virtually no oversight by respondent or any other attorney. Hinson testified that she never discussed the Layton-Sinclair case with respondent; rather, she communicated with Gray, the office manager. Letters to insurance companies would be stamped with respondent's signature, apparently without any review by respondent; in addition, someone in respondent's office signed respondent's name

to a complaint. Indeed, respondent was retained by Lipford in 1989 and filed a complaint on her behalf in 1992. Yet in 1993 she sent a letter to Lipford, in which she thanked Lipford for coming into the office for an evaluation of her claim and stated that she was not in a position to take Lipford's case.

The DEC recommended a reprimand for respondent's misconduct. The Court has generally found that "in cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline." In re Berkowitz, 136 N.J. 134, 148 (1994). There were no egregious circumstances or any evidence that respondent's clients suffered economic injury. An aggravating factor was respondent's discipline on two prior occasions, one of which was for conflict of interest. Nevertheless, the Board unanimously determined that a reprimand is sufficient discipline for respondent's ethics offenses. The Board also determined that for a period of one year respondent must be supervised by a proctor approved by the Office of Attorney Ethics.

The Board also directed that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 1/11/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board