

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-285

IN THE MATTER OF
ELLIOTT D. MOORMAN,
AN ATTORNEY AT LAW

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Decision

Argued: October 15, 1998

Decided: January 11, 1999

Judith E. Rodner appeared on behalf of the District VA Ethics Committee.

Oliver Lofton 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 VA Ethics Committee ("DEC"). A three-count amended complaint charged respondent with violations of RPC 1.3(lack of diligence); RPC 7.1(a)(1) (false or misleading communications about the lawyer's services); RPC 7.1(a)(2) (communication likely to create an unjustified expectation about results the lawyer can achieve); RPC 7.1(a)(4) (communication related to legal fees); RPC 8.4(c) (conduct involving dishonesty, fraud,

deceit or misrepresentation) (count one); RPC 1.15(d) (failure to comply with recordkeeping requirements of R.1:21-6); RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority) (count two); and RPC 1.5(b) (failure to communicate to the client the basis or rate of a fee, in writing, before or within a reasonable time after commencing legal representation) (count three). These charges stemmed from alleged representations respondent made to his client about services he would provide, following the client's criminal conviction.

Respondent was admitted to the New Jersey bar in 1977. He maintains a law office in East Orange, New Jersey. He was suspended for three months in 1994 for misconduct that occurred between 1989 through 1991, including gross neglect, failure to act with reasonable diligence and promptness, failure to keep a client reasonably informed about the status of the matter and failure to comply with reasonable requests for information. In re Moorman, 135 N.J. 1 (1994). Respondent also received a public reprimand in 1990 for misconduct that occurred from 1981 through 1991 and included failure to maintain proper time records, failure to preserve the identity of client funds and callous indifference toward the disciplinary system. In re Moorman, 118 N.J. 422 (1990).

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Respondent was retained to represent an individual known as the "Reverend" Michael Barnes on charges that he had sexually assaulted two mentally retarded patients while

employed as an aide at the Association for Retarded Citizens. After a jury trial in June 1992, Barnes was convicted of the charges.

Members of Barnes' family paid respondent to research the advisability of filing a motion for judgment notwithstanding the verdict (JNOV) or for a new trial, as well as for other services. Whether respondent was asked to provide the other services is in dispute.

Both Barnes and his sister, Willa Barnes, claimed that the monies paid to respondent were solely for the filing of a motion for JNOV. According to R. 4:40-2(b) and R. 4:49-1(b), a motion for JNOV or a new trial must be filed within ten days of the discharge of a jury or within ten days of a verdict, unless otherwise ordered by the court. Respondent did not discuss the possibility of filing a motion for JNOV with Barnes' family until after the allotted time had expired. Respondent explained the delay by claiming a mistaken belief that a motion could be made within ten days after sentencing, rather than ten days after the verdict. Respondent's time records show that, although Barnes was convicted in June 1992, respondent conducted legal research in connection with the motion for JNOV as late as August 27, 1992. Another entry in December 1992 indicated that respondent met with the Barnes family (Barnes' mother and sister) to discuss the motion for JNOV.

Contrary to the Barnes family's testimony, respondent contended that the Barneses had retained him for a range of services, including filing a post-trial motion for bail reduction, reviewing the advisability of filing a motion for JNOV and for a new trial, preparing for a sentencing presentation and filing an appeal. According to respondent, at some point — not specified in the record — he advised Barnes that, because the proof of his

guilt was overwhelming, it was not advisable to file a motion for JNOV and that Barnes' money would be better spent on a sentencing presentation. Based on this advice, Barnes asked respondent to file a motion for bail pending appeal, rather than to pursue a motion for JNOV.

Barnes, who was incarcerated at the time of the DEC hearing, testified via telephone. Barnes' testimony was confusing and contradictory. He either misunderstood the questions posed or did not comprehend fully what transpired in connection with the trial and subsequent matters. It is also possible that Barnes may have been unable to articulate what had occurred.

Even though Barnes adamantly stated that any monies paid to respondent after the trial were solely to file a motion for JNOV, he admitted that respondent took "some action" with the appellate division and also performed some services in connection with a pre-sentencing report. He admitted discussing with respondent "a collection of issues." Barnes also testified that he was "released on PTI." Clearly he was mistaken; he apparently was referring to his release on bail after his arrest. As to the appeal taken by respondent, Barnes indicated that it dealt with the competency of the witnesses at trial. Barnes admitted discussing with respondent other alternatives to a motion for JNOV. Barnes testified that respondent wanted to be paid up front. Barnes believed that respondent had been paid approximately \$10,500.

The second count of the complaint charged respondent with improper recordkeeping in connection with the Barnes matter, namely, his failure to properly record the fees collected from Barnes or his family.

Respondent testified that, following his admission to the bar, he worked with several law firms and did not become a sole practitioner until late 1988 or early 1989. Respondent claimed that when he started his private practice, he was not familiar with R.1:21-6, the rule on recordkeeping practices. Respondent admitted that it was his practice to collect fees from Barnes or his family for each service as it was provided. On occasion, Barnes or his relatives would pay respondent at his office or from other locations. If respondent was paid outside of his office, he would not have his receipts book available and would fashion a receipt on the back of a business card. Respondent failed to properly record the receipt of all fees received. Although respondent maintained a receipts and disbursements journal for his trust account, he did not maintain a comparable journal for his business account. Respondent explained that, when he would obtain fees from either Barnes or Barnes' family, he would deposit the money either into his business or his trust account. From April 1991 to the fall of 1991 respondent deposited monies received for transcripts, expert fees or fees into his trust account. Subsequently respondent began depositing his fees only into his business account.

Respondent maintained a trust ledger sheet for the Barnes matter, but no business ledger sheet. He recorded funds obtained from the Barneses either on his attorney trust account ledger sheet or in his business account check register.

During an Office of Attorney Ethics ("OAE") investigation, respondent was unable to provide the OAE with copies of receipts for funds obtained from the Barneses. The Barnes family had retained most of their receipts. A comparison of their receipts to both respondent's trust account ledger sheet and business account check register did not always

correspond. Respondent explained that this occurred because he would aggregate clients' funds for deposit, but would not always label the deposit with each client's name. Respondent added that this was his shorthand method of bookkeeping.

Respondent admitted that he did not prepare a retainer agreement for Barnes' signature.

The second count of the complaint also charged respondent with failure to comply with the OAE's requests for documentation regarding the Barnes case.

At the DEC hearing, the OAE investigator testified that respondent was dilatory in responding to its requests for information about the Barnes matter. The investigator first spoke to respondent about the matter on June 7, 1995. The investigator requested billing records, copies of bills sent to the Barnes family, copies of any old checks issued in the case, a retainer agreement and a client ledger card. A letter was sent on that date confirming the request for information. Respondent failed to comply with the request, prompting numerous subsequent letters from the OAE and the filing of a subpoena duces tecum on March 11, 1996. Thereafter, respondent provided certain documents to the OAE, but withheld a number of bank records. When additional correspondence was sent to respondent requesting compliance with the subpoena, he informed the investigator that he did not maintain or have in his possession some of the requested records. Afterwards, respondent again submitted only a portion of the requested records.

At the DEC hearing, respondent attributed his compliance problems on the fact that he had experienced difficulty in locating his records because he had moved the location of

his office. Respondent claimed that either he had lost some of the records or his landlord had disposed of the boxes containing the requested documents. Later, however, respondent was able to locate some, but not all, of the records and submitted them to the OAE. Respondent also blamed his lack of compliance on his misinterpretation of the OAE's request for documents. According to respondent, he did not understand that he was required to turn over his check registers; hence, he claimed the delay in submitting them.

* * *

On the fourth day of the DEC hearing, respondent made the following admissions: (1) he had been paid by the Barnes family to research the advisability of filing a motion for JNOV and to provide a number of other services, but never filed the motion for JNOV; (2) when he informed the Barneses that he would be filing the motion, the time to file a motion had already expired; respondent claimed that he was under the mistaken impression that the motion could be made within ten days from sentencing, instead of ten days from a verdict; (3) he failed to provide Barnes with a retainer agreement; (4) he failed to comply with the OAE's request for information in a timely manner; (5) certain payments made to him by the Barnes family did not appear on the Barnes ledger sheet or in the check registers; and (6) he did not keep appropriate receipts and disbursements journals, ledger books and other records required by the court rules.

Respondent voluntarily agreed to refund to Willa Barnes the sum of \$500 for not filing the motion for JNOV, to submit to the OAE, for one year following his reinstatement — if suspended — a quarterly certification of his attorney records, and to attend Alcoholics Anonymous meetings twice a week for one year, following the imposition of discipline.¹

* * *

Based on respondent's admissions and on the evidence presented, the DEC found, in count one, that respondent violated RPC 1.3 by failing to ascertain or attempt to ascertain the appropriate time to file a motion for JNOV and by failing to file the motion. The DEC did not find violations of RPC 7.1(a)(1), (2) and (4) or RPC 8.4(c). The DEC found credible respondent's testimony that he was preparing a motion for Barnes' release on bail pending appeal and that he informed Barnes that his proof of guilt was so overwhelming that it was unadvisable to file a motion for JNOV and also that Barnes' money would be better spent on a motion for bail pending appeal. The DEC did not find Barnes' testimony believable.

As to count two, the DEC found that respondent violated RPC 1.15(b) by failing to maintain the bookkeeping records required by R.1:21-6(d). Specifically, respondent failed to maintain appropriate receipts and disbursements journals, an appropriate ledger book, copies of all retainer or compensation agreements with clients, copies of all statements to

¹ There is no claim in the record that respondent's problems resulted from alcoholism.

clients showing the disbursement of funds to them or in their behalf and copies of all bills rendered to the clients. The DEC also found that respondent violated RPC 8.1(b) by failing to respond to the OAE's lawful demand for information.

Finally, the DEC found that respondent violated RPC 1.5(b) by failing to communicate the basis or rate of his fee, in writing, to his client before or within a reasonable time after commencing the legal representation.

In recommending a four-month suspension, the DEC considered, among other things, that there was no showing that Barnes had suffered any substantial prejudice from respondent's failure to file the motion for JNOV. The DEC considered that respondent acknowledged his alcoholism and his commitment to participate in his recovery with appropriate oversight. The DEC also recommended that respondent be required to comply with his voluntary agreement made at the hearing, that he submit, prior to reinstatement, a report verifying that he is free of drugs and alcohol and, upon reinstatement, that he practice under the supervision of a proctor approved by the OAE for a period of two years.

* * *

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

There was no clear and convincing evidence to support a finding that respondent misrepresented the services he agreed to provide to Barnes. Respondent's testimony, as well as Barnes' contradictory statements, show that respondent had persuaded Barnes to forego the filing of a motion for JNOV and instead file a motion for bail pending appeal. It also appears that respondent may have taken additional steps in connection with an appeal, which he had also discussed with his client. Thus, the DEC properly found, as to count one, that respondent's conduct violated RPC 1.3 only. The basis for this finding was respondent's failure to timely determine that a motion for JNOV was improper. As to Barnes' mother and sister, there is no clear and convincing evidence that respondent misled them about the services he intended to perform in Barnes' behalf.

Based on respondent's and the OAE investigator's testimony, as well as the exhibits, it is clear that respondent violated RPC 1.15(b) and the bookkeeping requirements recited above. Also, respondent admitted violations of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority) and RPC 1.5(b) (failure to communicate basis or rate of fee in writing).

The discipline imposed in cases involving similar violations has ranged from a reprimand to a period of suspension. See In re Marlówe, 126 N.J. 379 (1991) (fourteen-month suspension, retroactive to date of temporary suspension, for failure to maintain proper trust and business accounting records, failure to cooperate with disciplinary authorities by not correcting recordkeeping deficiencies; disciplined on three prior occasions); In re Mahoney, 140 N.J. 634 (1995) (three-month suspension for failure to maintain proper trust

and business account records, failure to communicate, lack of diligence, pattern of neglect; prior reprimand); In re Waters-Cato, 142 N.J. 472 (1995) (three-month suspension for failure to maintain proper records and failure to comply with seven OAE audits); In re Fieschko, 131 N.J. 436 (1993) (reprimand for failure to maintain trust and business accounting records and failure to cooperate with disciplinary authorities; previous reprimand); and In re Bonds, 123 N.J. 574 (1991) (reprimand for failure to maintain proper trust account records and failure to cooperate with disciplinary authorities).

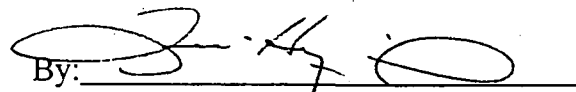
If this were respondent's first brush with the disciplinary system, a reprimand would be appropriate discipline. However, respondent's ethics record must be taken into account. Twice before he received discipline: a three-month suspension and a public reprimand. Respondent's prior ethics transgressions were of the same nature as the within charges: lack of diligence, recordkeeping improprieties and failure to cooperate with disciplinary authorities. In addition, because of respondent's shoddy records it was impossible to determine whether more serious violations had taken place. Normally these factors would require the imposition of a period of suspension. However, because of the proximity in time of these ethics infractions and those decided in 1994, the matters, if heard together, would not have resulted in any greater discipline. In fact, the events set forth in the underlying complaint predate respondent's three-month suspension in 1994. As a result, the Board unanimously determined to impose only a reprimand. Respondent is hereby put on notice, however, that any future failure to comply with requests for information from the disciplinary authorities shall result in more severe discipline.

The Board further determined to require respondent to submit to the OAE, for a period of two years, annual certifications of his attorney books and records, certified by an accountant approved by the OAE.

In addition, respondent is to comply with the terms of his voluntary agreement with the DEC.

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

Dated: 1/11/98

By: 

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Elliot D. Moorman
Docket No. 98-285

Argued: October 15, 1998

Decided: January 11, 1999

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Zazzali			x				
Brody			x				
Cole			x				
Lolla			x				
Maudsley			x				
Peterson			x				
Schwartz			x				
Thompson			x				
Total:			9				

By Robyn M. Hill 1/20/99
Robyn M. Hill
Chief Counsel