SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-410

IN THE MATTER OF :
THOMAS F. BULLOCK :
AN ATTORNEY AT LAW :

Decision

Argued: March 16, 2000

Decided: June 15, 2000

Marc L. Hurvitz appeared on behalf of the District I Ethics Committee.

William B. Scatchard, Jr. appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was originally before us on a recommendation for an admonition. Following our review of the record, we determined to bring the matter on for hearing.

The three-count complaint charged respondent with violations of RPC 1.5 and R. 1:21-7 (overcharging a client) (count one); RPC 1.1 [presumably (a) (gross neglect)], RPC 1.5(c) and R.1:21-7(g) (failure to provide client with written retainer agreement and

settlement statement) (count two); RPC 1.3 (lack of diligence), RPC 1.1 [presumably (a) (gross neglect)], and RPC 8.4 [presumably (c) (conduct involving misrepresentation)] (count three).

Respondent was admitted to the New Jersey bar in 1976. He maintains a law practice in Milmay, New Jersey. He has no history of discipline.

The following facts were gleaned from stipulated facts and testimony at the DEC hearing:

As of 1980, respondent represented Arnold J. Sikking, Jr. in various legal matters, including business, domestic relations, family, estate, personal injury and insurance matters. The disciplinary grievance stemmed from respondent's representation of Sikking in a personal injury matter, a car accident that occurred in June 1984. A retainer agreement was signed on June 12, 1984.

At the time of the accident, Sikking was in the process of obtaining a divorce. He and a passenger, with whom he had a relationship, were struck by David Biaggi. Biaggi, who was under the influence of alcohol and drugs at the time, died as a result of the accident. Sikking sustained serious injuries, resulting in his hospitalization for approximately two months. Both he and his passenger settled their claims for $25,000 each, the limit of Biaggi's insurance policy with Allstate Insurance Company ("Allstate"). After Sikking executed a release, the proceeds were distributed to him and the passenger.

Sikking received a distribution sheet, which, among other things, listed legal fees to respondent for $7,181.63. Respondent should have received $7,109. Thus, there was an overcharge of approximately $72, which came to light as a result of the DEC's investigation. Respondent denied that he had committed any violations with regard to the overcharge, claiming that it was merely a computation error. Respondent voluntarily repaid Sikking in February 1999.

In addition to reaching a settlement with Allstate, respondent instituted suit against Egery Nelson, Egery Nelson, Inc. and Selective Risks Insurance Company ("Selective"). The suit alleged that Sikking's insurance broker, Egery Nelson, Inc., failed to offer Sikking a $1,000,000 excess policy. Selective, Sikking's insurance carrier, was sued for reformation of contract, in order to increase the limits of his underinsured benefits. The matter was dismissed on a summary judgment motion in 1989. Thereafter, respondent filed an appeal, which was granted.

In early December 1990, Selective and Sikking entered into a settlement. Selective increased Sikking's underinsured benefits to $300,000. After several credits were taken by Selective, Sikking received $260,500.

The portion of the case against Egery Nelson and Egery Nelson, Inc. proceeded to trial in early December 1990. The jury trial resulted in a finding of no cause of action against the insurance agent. The jury concluded that, although the agent had been negligent in failing

to offer the plaintiffs, Sikking and Sikking Brothers, Inc.[1], a $1,000,000 excess policy, the plaintiffs would not have purchased the additional policy if it had been offered to them.

Notwithstanding the settlement with Selective in early December 1990, the proceeds could not be distributed because of a dispute between Sikking and Sikking Brothers, Inc. over the distribution. Sikking Brothers, Inc. had a separate cause of action for the loss of Sikking's services to the corporation. At the time of the accident, Sikking was the president of the corporation and apparently managed the business. The settlement monies were, thus, deposited into an interest-bearing account, until the conflict among the brothers was resolved.

Eventually, the dispute was submitted to arbitration. When the initial arbitrator never rendered a decision, respondent was required to petition the court for a new arbitrator. Respondent claimed that he bore the expense of the arbitration process, which was not passed on to Sikking. The new arbitrator determined that the entire settlement belonged to Sikking.

In September 1992, respondent distributed the settlement proceeds as directed by Sikking, but did not provide him with a written sheet explaining the disbursement of the settlement. An accounting performed by the DEC reflected that respondent distributed all of the original principal and interest in accordance with Sikking's directions. The proceeds available to Sikking amounted to $176,757.91. Respondent's fee totaled $69,628.96. The fee was shared with the attorney who represented Sikking Brothers, Inc.

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[1] Sikking was in business with his brothers. He was a one-third owner of Sikking Brothers, Inc., an agricultural business.

Respondent asserted that, after the finding of "no cause" in the suit against Egery Nelson and Egery Nelson, Inc., he made a motion for a new trial, which was denied. Thereafter, he timely filed a notice of appeal alleging that the verdict was against the weight of the evidence presented at trial. Respondent also filed a request for transcripts, paid for them, filed a case information statement with the court and attended a pre-argument conference. Respondent, however, did not file a brief within the time prescribed in the scheduling order. Therefore, the Appellate Division dismissed the appeal on September 5, 1991. Thereafter, respondent did not file a motion to extend the period of time to file a brief and did not seek relief from the order of dismissal.

After the appeal was dismissed in September 1991, respondent had several discussions with Sikking about the status of the appeal. Respondent conferred with Sikking not only about that litigation, but also about other matters involving Sikking. Although respondent and Sikking had a number of conversations from 1991 through 1993, respondent did not inform Sikking that the appeal had been dismissed. Finally, in a letter dated May 3, 1993 to Sikking, respondent wrote the following:

> I have told you in our previous telephone conversations that the appeal appears to be a dead issue. This may, in part, be due to actions or misactions [sic] that were taken by me in the discharge of this matter. It is my unfortunate, and exceedingly unpleasant, [sic] obligation to tell you that as a result of the handling of this file while it was under my responsibility, you may in fact have a claim against me. I ask that you take this letter to an attorney and have arrangements made to review the matter with separate counsel so that you can be fully advised of the appropriate status of this matter.
>
> [Exhibit D to Exhibit J-1]

Although respondent claimed that he had advised Sikking of the dismissal in 1992, he could not present any proof of such notice. In fact, Sikking stated that he learned of the dismissal through respondent's May 3, 1993 letter. The fact that respondent forwarded a letter to Sikking on December 3, 1991, after the dismissal of the appeal, informing of the status of the appeal and indicating that transcripts had been requested, bolsters Sikking's statement.

In December 1991, respondent received a letter from his adversary asking if he intended to refile the appeal. Respondent replied affirmatively, but never followed through.

For his part, respondent testified that he was a sole practitioner and that, at the time the appeal was pending, he was suffering from extreme personal and professional difficulties. Professionally, he was involved in a bankruptcy matter that monopolized his time to the exclusion of other matters. During that same time period, his marriage, which had been deteriorating, ended in divorce. Respondent sought treatment with a psychologist from April 1991 through April 1993.

At the DEC hearing, respondent showed contrition. He apologized to Sikking for what had occurred. He claimed that had enjoyed working with Sikking, even though Sikking did not always follow his advice. Respondent testified that he felt somewhat responsible for Sikking's accident. He believed that, if he had not given Sikking personal advice, Sikking would not have been in his car at the time and would not have had the accident. He also believed that his friendship with Sikking may have jaded his professional judgment in

Sikking's matter. Respondent admitted that he should have withdrawn from Sikking's personal injury case, just as he had in some of Sikking's other matters. Respondent felt that he had let Sikking down. Also, respondent admitted that he was unable to tell Sikking about the status of his appeal. He stated that "I did for a period of time get mumbly about telling him that the appeal had been dismissed." Respondent claimed that he did not ignore the matter intentionally and that there was no malice involved in his inaction. He added that it was like he "was drowning in a body of water and [he] couldn't get out."

* * *

As to count one, the DEC concluded that there was no factual basis to conclude that the $72 overcharge to Sikking was anything more than an unintentional miscalculation of the fee by respondent. The DEC considered that, when respondent became aware of the overcharge, he repaid Sikking.

In count two, respondent was charged with a violation of <u>RPC</u> 1.1, presumably (a), and <u>RPC</u> 1.5(c) for failing to provide Sikking with written documentation reflecting the distribution of the settlement received from Selective. The DEC found only a technical violation of <u>RPC</u> 1.5(c). The DEC rationalized that, once Sikking settled with Selective, a statement of settlement distributions was executed by both Sikking and the corporation in September 1991. The proceeds, however, were not distributed until the arbitration between

Sikking and Sikking Brothers, Inc. was concluded in September 1992. The DEC's reconstruction of the escrow account confirmed that the settlement proceeds, including accrued interest, were properly distributed to Sikking in accordance with the arbitration award. The DEC found that, although RPC 1.5(c) requires a lawyer to provide his client with a written statement stating the outcome of the matter, the statement of settlement distributions executed by Sikking and his corporation satisfied, at least in part, that obligation. Also, the DEC did not find that respondent's conduct in connection with the disbursement of the settlement rose to the level of gross neglect, in violation of RPC 1.1(a).

The third count related to the appeal from the judgment of the jury trial. The DEC found that, for nineteen months, respondent failed to advise Sikking that his appeal had been dismissed. The DEC concluded that respondent's failure to file a brief within the required time or to take any further action to reinstate the appeal was a violation of RPC 1.3. The DEC further determined that respondent's failure to disclose the dismissal of the appeal to Sikking for a period of nineteen months, "while providing [Sikking] with inconsistent information," was a violation of RPC 8.4(c) (misrepresentation).

The DEC considered that respondent had furnished substantial legal services to Sikking, which, in all but these instances, had been provided effectively and responsibly. The DEC also took into account respondent's personal and financial problems at the time, as well as his expressed remorse. The DEC, thus, recommended the imposition of an admonition and the requirement that respondent present proof of mental fitness to continue

working as a sole practitioner. The DEC also recommended that respondent complete a program in office management procedures for sole practitioners.

* * *

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

The DEC correctly dismissed count one. There was no evidence that respondent's overcharge to Sikking was anything more than an error in computation. Respondent provided Sikking with a fee agreement, in compliance with RPC 1.5(b) and, at the conclusion of that portion of the case, gave him a statement of settlement distribution. Under these circumstances, there is no evidence that respondent intentionally overcharged Sikking. When that is considered with respondent's restitution to Sikking, the dismissal of count one is appropriate.

Count two dealt with the Selective settlement. Both Sikking and Sikking Brothers, Inc. signed a settlement/distribution statement setting forth, among other things, the gross settlement and the net available to Sikking and Sikking Brothers, Inc. Because of the dispute between the two, however, the proceeds of the settlement were not distributed for approximately one year. The complaint charged that, at the time of the distribution,

respondent failed to provide Sikking with the documentation itemizing the amounts disbursed and the amount actually disbursed to Sikking. The complaint, thus, alleged that respondent's failure to provide Sikking with a written document reflecting and explaining the distribution of the settlement of the amount received from Selective violated RPC 1.1 and/or RPC 1.5(c) and R. 1:21-7(g). The complaint also charged that there was no separate fee agreement between Sikking and respondent for the insurance reformation suit.

RPC 1.5(c) provides as follows:

> A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of the contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

The fee agreement of June 12, 1984 provided in part that "the fee should include legal services rendered on any appeal, review proceeding or retrial, but this shall not be deemed to require the attorney to take an appeal." Thus, we find that respondent complied with the first portion of RPC 1.5(c), because the insurance reformation proceeding was part and parcel of the initial representation.

Although respondent did not provide Sikking with a written statement at the time of the distribution of the settlement proceeds, Sikking did execute the statement of settlement distribution when the case was settled with Selective. The record also reveals that the

distribution was made in accordance with Sikking's directions. Thus, we view respondent's failure to furnish Sikking with a further statement detailing the deductions made from the settlement and the method of determining the recovery as only a technical violation of RPC 1.5(c).

Count three charged respondent with violations of RPC 1.3, RPC 1.1(a) and RPC 8.4(c). Contrary to the DEC's findings, we find that respondent's conduct with regard to the second appeal gave rise to a violation of RPC 1.1(a), as well as RPC 1.3. Respondent's inaction, his failure to file a brief in connection with the appeal and his subsequent failure to seek an extension of time to file an appeal or to reopen the appeal amounted to gross neglect and lack of diligence. Finally, respondent's failure to inform Sikking, for a period of nineteen months, that the appeal had been dismissed, together with respondent's misleading letters to Sikking, violated RPC 8.4(c).

Respondent's misconduct in this matter included violations of RPC 1.1(a), RPC 1.3, RPC 1.5(c) and RPC 8.4(c). As mitigating circumstances we have considered that respondent's conduct may have been influenced by his close personal involvement with Sikking; he felt responsible for Sikking's car accident. Moreover, during the time of the violations, respondent was suffering from personal, emotional and financial difficulties. In fact, he was seeking counseling for his problems. In assessing the appropriate discipline to impose, we have considered respondent's otherwise unblemished record and the fact that he obtained a recovery for his client.

Finally, Sikking testified that, after he learned from respondent that he might have a possible malpractice claim against him, he contacted several attorneys. While initially the attorneys led him to believe that he had a good case against respondent, they all eventually refused to pursue the matter because respondent did not have malpractice insurance. None of the attorneys with whom Sikking consulted mentioned the possibility of reopening the appeal.

Reprimands have been imposed in cases involving similar misconduct. In In re Riva, 157 N.J. 34 (1999), an attorney who misled his clients that he had taken action in a suit against them by a former employee was reprimanded. When the attorney failed to file responsive pleadings, the case was dismissed and a $1.7 million default judgment was entered against the clients. Thereafter, the constable began seizing their assets. The attorney assured his clients that he would have their assets returned, but succeeded only in part. The attorney later filed a motion to vacate the default, but the court found the attorney's motion papers deficient. The attorney assured his clients that he was conducting research on the matter and consulting other attorneys in their behalf. When the file was eventually turned over to another attorney, there was little in the file. The clients settled the suit for $11,500. In determining that the attorney's conduct was a violation of RPC 1.1(a) and RPC 1.3, the Court found that while his conduct was serious, it did not demonstrate dishonesty, deceit or contempt for the law, but rather an aberrational incident. See also In re Eastman, 152 N.J. 435 (1998) (reprimand where an attorney in a medical malpractice case engaged in gross

neglect, lack of diligence and misrepresentation to his client); In re Fox, 152 N.J. 647 (1998) (reprimand for gross neglect, failure to communicate and misrepresenting the status of the case to two attorneys); and In re Wildstein 138 N.J. 48 (1994) (reprimand for failure to communicate with clients in three matters, gross neglect in two matters and lack of diligence in two of those matters).

Based on respondent's otherwise unblemished record and his demonstrated contrition, we unanimously determined to impose a reprimand. Two members recused themselves.

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

Dated: June 15 2000

By:________________________
ROCKY L. PETERSON
Vice-Chair
Disciplinary Review Board