

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-134
District Docket No. VC-2010-0027E

IN THE MATTER OF :
STEPHEN SCHNITZER :
AN ATTORNEY AT LAW :
:

Decision

Argued: September 15, 2016

Decided: December 9, 2016

Peter J. Gallagher appeared on behalf of the District VC Ethics Committee.

Richard W. Mackiewicz, Jr. appeared on behalf of respondent.

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

This matter was before us on a recommendation for a reprimand filed by the District VC Ethics Committee (DEC). The three-count complaint charged respondent with violations of RPC 1.5(a) (charging an unreasonable fee), RPC 1.5(b) (failing to provide a client with a writing setting forth the basis or rate of the fee), and RPC 1.15(d)

(failing to comply with recordkeeping requirements).¹ For the reasons set forth below, we determine to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1968. He maintains a law office in Livingston, New Jersey.

Respondent's ethics history consists of two admonitions. In 2001, he obtained a client's signature on a second mortgage on the client's house, which he had prepared, to secure the payment of his legal fees and charges without complying with the requirements of RPC 1.8(a) (business transaction with a client). In the Matter of Stephen Schnitzer, DRB 01-392 (December 21, 2001).

In 2014, as a result of a random audit of respondent's books and records, the Office of Attorney Ethics (OAE) discovered various recordkeeping deficiencies, including commingling trust and personal funds from 1995 through 2012, violations of RPC 1.15(a) and RPC 1.15(d). In imposing only an admonition, we considered that respondent's prior discipline was for unrelated conduct and, but for that prior admonition, he had an unblemished forty-six years at the bar. In the Matter of Stephen Schnitzer, DRB 13-386 (March 26, 2014).

¹ The presenter moved to dismiss the RPC 1.5(b) charge, based on the unavailability of the grievant, Nathaniel Johnson, III, a Maryland resident. The motion was granted at the DEC hearing.

Respondent's answer to the ethics complaint alleged that he did not have his original fee arbitration file, which was misplaced by either the OAE, the ethics committee, or the fee arbitration committee and, thus, was prevented from providing more specific responses to the allegations. Based on the "non-availability or non-return" of his original file, he raised four constitutional challenges:² (1) the right to be assisted by effective legal counsel; (2) the right to procedural and substantive due process; (3) the right not to be subjected to cruel and unusual punishment; and (4) the right to effectively confront his accuser.

This matter has a tortured procedural history. On June 11, 2010, Nathaniel Johnson, III, filed a grievance against respondent. In January 2011, the DEC filed a formal ethics complaint. On March 6, 2011, respondent filed a motion to dismiss the complaint with supporting documentation. On March 10, 2011, the DEC Vice-Chair informed respondent that the motion to dismiss was improper, but that his certification would be treated as his verified answer. On March 19, 2011, respondent requested that the DEC reconsider its decision, noting that there was a pending appeal of a related fee arbitration (FA) determination. After reviewing respondent's

² R. 1:20-15(h) provides that "[c]onstitutional challenges to the proceedings raised before the trier of fact shall be preserved, without Board action, for Supreme Court consideration as a part of its review of the matter on the merits."

documentation and consulting with OAE and Office of Board Counsel staff, the DEC deferred the proceedings, pending a determination in the FA matter.

On June 13, 2011, after the conclusion of the FA matter, which was twice appealed, the DEC reinstated the ethics matter. Thereafter, it was placed on untriable status due to respondent's health issues.

On December 18, 2014, the DEC notified respondent that the matter would proceed. On February 11, 2015, respondent's counsel requested the production of the two underlying FA files, which counsel believed were relevant to respondent's defense. According to counsel, respondent had sent his file in the Johnson matter to the Algier Woodruff firm "for a lawsuit on damages."

On February 16, 2015, the DEC requested the files from the OAE and, on March 20, 2015, informed respondent that the initial April 8, 2015 hearing date was adjourned. On March 20, 2015, the DEC forwarded a copy of the file in DRB 11-106 (District Docket No. VC-2010-0008F) to respondent's counsel. Thereafter, on June 9, 2015, respondent's counsel requested an adjournment of the June 22, 2015 DEC hearing, citing witness unavailability, the continuing unavailability of one of the FA files, respondent's continuing treatment for his medical condition, and respondent's conflicting schedule in a domestic violence matter. Several e-mails were

exchanged in an attempt to reschedule the matter. For each date, respondent had an excuse for his unavailability. On June 17, 2015, the DEC Panel Chair informed the parties that the matter would not be adjourned indefinitely to accommodate one of respondent's witnesses, who was on maternity leave and who could be subpoenaed to appear.

The hearing was scheduled for July 27, 2015. By letter dated June 18, 2015, respondent raised several objections to proceeding, including the absence of one of the two FA files.

On July 13, 2015, the presenter submitted a prehearing report arguing that (1) the missing FA file was irrelevant to the ethics proceeding; (2) respondent should be estopped from litigating facts that the FA panel resolved; (3) no material issues of facts remained to be resolved at the ethics hearing; and (4) respondent should produce all receipts showing payments he received from Johnson.

On July 15, 2015, respondent argued that he was prejudiced by the receipt of 190 pages of the FA file two weeks before the hearing and argued against the application of estoppel on the FA findings. Thereafter, the panel chair requested the parties' positions on various issues; the July 27, 2015 hearing was converted to a pre-hearing conference; and the hearing was rescheduled to September 3, 2015, but then adjourned due to a scheduling conflict, and rescheduled to September 30, 2015.

At the ethics hearing, respondent's counsel made an oral application to recuse the panel members and convene a new panel, which application was denied. The basis for the application was an e-mail from the DEC Vice-Chair stating that one of the many delays preventing the matter from proceeding was respondent's "alleged health claim." Respondent's counsel argued that the comment "fouled the waters," giving the impression that respondent was not truthful in one or more of his requests for an adjournment and, thus, the panel could not fairly adjudicate the matter.

The DEC denied respondent's motion for disqualification relying, in part, on R. 1:20-6(d), which requires, where possible, that a motion for disqualification be made in advance of any prehearing conference; otherwise, the rule provides that "it shall be made in advance of the initial day of hearing."

R. 1:20-6(d) states that R. 1:12-1, which addresses disqualification of judges, applies to the trier of fact in discipline cases. Although R. 1:12-1(g) requires disqualification "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so," the hearing panel reasoned that the DEC Vice-Chair's remark had been made months before the hearing and, despite the "score of communications" among respondent, the presenter, and the panel chair, respondent had not raised the

issue of recusal prior to the hearing. The DEC added that, not only was respondent's application untimely, but also the views of the panel members were not impacted by the comment of the Vice-Chair, who was not privy to respondent's medical history.³

As noted previously, Johnson, who resides in Maryland, did not participate at the DEC hearing, which resulted in the dismissal of count one (RPC 1.5(b)). The presenter had intended to call respondent as a witness for his case-in-chief. However, respondent refused to testify. The matter, thus, proceeded through the introduction of documentary evidence. The parties agreed to rely on post-hearing submissions addressing (1) whether intent was a required element to establish violations of RPC 1.5(a) and RPC 1.15(d); (2) the applicable facts and law; and (3) the proper quantum of discipline.

³ In respondent's March 2014 matter (DRB 13-386), he recounted his history of a serious illness relating to Crohn's disease, for which he had been hospitalized approximately three dozen times, for periods ranging from a week to a month. In January 2005, he was hit by a car, which required his hospitalization for several months, followed by daily rehabilitation for years. In October 2009, his car was rear-ended, resulting in additional back injuries. In October 2011, he had three emergency surgeries in a matter of days, during which he suffered two heart attacks and received an ileostomy (an opening in the abdominal wall to form a stoma). The record does not reveal whether the hearing panel was aware of respondent's extreme health issues.

The facts are as follows. On July 2, 2002, Johnson retained respondent for representation in an administrative appeal of his denial of a position with the New Jersey Department of Corrections (DOC), based on medical reasons. The retainer agreement provides:

[Johnson] agrees to retain the offices of [respondent] in the initial retainer amount of \$1,000.00 for legal services which include but are not limited to the matter of his appeal of denial of qualification from the Department of Corrections. He will be billed at the special courtesy hourly rate of \$350.00 per hour to be billed in quarter hourly segments rounded up to the fullest quarter hour together or at discussed fixed fee charges with out-of-pocket costs and disbursements which the client is to pay.

Time slips will be kept by [respondent] on a quarter hourly basis as set forth above for billing calculation purposes and invoices will be rendered accordingly. All invoices are to be paid in a timely manner within thirty (30) days of the date thereof, or upon failure to do so [respondent] shall have the right to cease all legal work and seek to be relieved as counsel.

[Johnson] also agrees to pay any open invoices in full which exist following the conclusion of any proceedings.

[Ex.30-Ex.C.]⁴

According to the complaint, respondent first appeared on Johnson's behalf before the Medical Review Board to appeal the DOC's decision. The Medical Review Board ordered an independent medical

⁴ "C" refers to the January 2011 complaint, introduced into evidence as Exhibit 2.

evaluation of Johnson, which resulted in the same conclusion – that Johnson "was unfit for the job as a correction officer."

Respondent filed an appeal of the decision, which was denied. He then requested an additional \$5,000 to file a petition for review by the Court. Johnson declined to proceed further and terminated their attorney-client relationship.

According to respondent's counsel, respondent represented Johnson for approximately four years. Respondent issued seventeen bills during that period. Counsel asserted that, after a dispute arose over payment, respondent informed Johnson about the fee arbitration process and Johnson availed himself of that forum. Initially, respondent prevailed at fee arbitration. When Johnson appealed the determination, the matter was remanded. Respondent did not attend the remand hearing, at which Johnson prevailed.⁵ At

⁵ The fee matter was before us twice. Initially, the FA committee awarded respondent a fee in excess of \$30,000, in addition to the \$10,380 Johnson had already paid. When Johnson appealed the determination, we remanded the matter (DRB 09-318). Our letter stated that the hearing panel failed to apply the factors listed in RPC 1.5(a), particularly (4), which addresses the amount of the fee and the results obtained. The letter pointed out that respondent's invoices were confusing and were not always sent contemporaneously, and, if they had been, Johnson may have opted to terminate respondent's services. We ordered the matter assigned to a new panel. In DRB 11-106, we dismissed respondent's appeal of the new fee arbitration determination, which limited the fee to the \$10,380 that Johnson had paid.

argument before us, respondent's counsel maintained that respondent failed to appear at the remand hearing because of his health issues.

The Presenter's Position

The billing that the presenter pinpointed as problematic is as follows. On March 23, 2004, respondent billed Johnson \$750 on a fixed fee basis. The bill stated, "To professional services rendered for the comprehensive preparation and file review for the hearing in the above captioned matter scheduled for March 22, 2004 and attendance at such hearing on a fixed fee basis." On March 24, 2004, respondent billed Johnson \$1,500, again on a fixed fee basis. The bill stated;

To professional services
Rendered in the appearance
At hearing in the above
Matter on March 22, 2004
During the hours of 9:45 a.m. - 2:15 p.m. on
a fixed fee basis

[Ex.S12.]

On April 27, respondent billed Johnson for a third time for the same services on an hourly basis. The March 22, 2004 entry on respondent's invoice stated, "Meet client at office and travel to and appear at hearing with medical review board (10:15 a.m. - 5:15 p.m.)." The amount of time listed was six and a quarter hours.

Respondent had also billed Johnson on a fixed fee basis for preparing for the hearing and again for a half hour of services on March 22, 2004, with the entry "Look at file due as needed and talk to client."

Thus, the presenter argued that respondent billed Johnson three times to attend the hearing and twice to prepare for the hearing. According to the presenter, "[t]hat respondent billed [Johnson] multiple times for the same services, and apparently never noticed the multiple billing, much less corrected it, demonstrates that his record keeping was sufficiently inadequate and inefficient to establish 'intent' to violate RPC 1.5."

The presenter pointed out that respondent's multiple bills were internally inconsistent. Respondent's March 24, 2004 flat fee bill listed 4.5 hours of work he performed, while his April 27, 2004 hourly bill showed six hours of work. According to the presenter, respondent's recordkeeping practices were "grossly inadequate and inefficient" and if he had maintained reliable, contemporaneous time records, his bills would not have contained such inconsistencies.

The presenter maintained that respondent did not regularly provide Johnson with bills. For example, respondent's invoice #3602 reflected work performed on April 16, 2004, but not billed until February 17, 2005, some ten months after the services were

rendered. Moreover, the timeframes covered in respondent's bills overlapped. The December 3, 2003 invoice #3151 covered services rendered between June 18 and August 20, 2003, while the April 27, 2004 invoice #3296 covered services rendered between June 9, 2003 and April 12, 2004. According to the presenter, this practice of sending multiple bills spanning the same time periods was confusing and demonstrated the inadequacy of respondent's recordkeeping.

The presenter argued further that respondent's practice of alternating between fixed fee and hourly billing exacerbated his carelessness and inadequate recordkeeping. He further contended that alternating between billing genres confused even respondent and was further evidence of his inefficient billing and recordkeeping system.

Notwithstanding that intent is not a necessary element for finding a violation of RPC 1.5, the presenter urged a finding that respondent's bookkeeping was sufficiently inadequate such that it established "intent" to violate RPC 1.5(a).

The presenter also pointed out that respondent violated RPC 1.15(d) (recordkeeping). Rule 1:21-6(c)(1) requires attorneys to maintain appropriate receipts and disbursements journals containing a record of all trust account deposits and withdrawals. Attorneys also must identify the source and date of trust account payments and maintain a description of the payment.

Johnson paid respondent \$250 on April 27, 2004, and \$1,500 on January 25, 2005. However, neither of the payments were reflected for those dates on the Johnson ledger. The items were simply listed as "payment" with no source identified. According to the presenter, respondent's failure to maintain the required detail in his records violated RPC 1.15(d).

The presenter noted that respondent's 2014 admonition for recordkeeping violations included the failure to maintain fully descriptive ledger entries, the same violation present in this case. The presenter argued, thus, that respondent's failure to address this recurring recordkeeping issue warranted the imposition of a censure.

Respondent's Position

Respondent's counsel accused the presenter of turning the second count of the complaint (RPC 1.5(a) for double-billing) into a charge of recordkeeping violations. He also argued that, to establish a violation of RPC 1.5(a), intent to overreach had to be proved. Counsel pointed out that respondent represented Johnson for approximately four years and that the seventeen billing statements he prepared contained 262 separate time entries. Thus, counsel maintained that the existence of a billing entry error did not warrant the imposition of discipline.

Counsel cited In re Ort, 134 N.J. 146 (1993), for the proposition that intent to overreach must be proved by clear and convincing evidence, and contended that a mere billing error, as occurred here, is not sufficient to satisfy that standard.⁶

Further, counsel relied on Michels, New Jersey Ethics §33:3-4 (GANN, 2016), which states that "the existence and structure of the fee arbitration system strongly suggests that not every case in which an attorney's fee is deemed excessive will warrant discipline." Citing Michels, counsel added that fee arbitration committees are required to refer matters to the OAE only when they find evidence of "ethical misconduct that raises a substantial question of an attorney's honesty, trustworthiness or fitness as a lawyer . . . (including fee overreaching). R. 1:20A-4." Moreover, "it is probable that a finding of intentional overreaching remains a prerequisite to discipline on the basis of an excessive fee."⁷

⁶ Ort was disbarred for failure to communicate with the client, failure to state the basis or rate of the fee in writing, the unauthorized withdrawal of estate funds to pay excessive and unauthorized fees, fee overreaching, failure to abide by a client's decision concerning the objectives of the representation, conduct involving dishonesty, fraud, deceit, or misrepresentation, the fabrication of time sheets and letters and their presentation to the ethics committee as authentic, and conduct prejudicial to the administration of justice.

⁷ R. 1:20A-4 provides that it shall be the duty of the fee committee, after a hearing and determination of the fee, to refer any matter that it concludes may involve unethical conduct.

Counsel pointed out that, in this case, the FA committee did not perceive respondent's billing error to be so pernicious that it felt compelled to refer it to the ethics committee under R. 1:20A-4. He added that a single instance of double billing, over a four-year period, was not enough to prove a violation of RPC 1.5(a). Counsel asserted that there was no compelling proof of an ethics violation because respondent had prevailed at the first FA hearing. He conceded that the determination was later overturned on appeal, but pointed out that respondent had not participated in that second fee arbitration hearing.

Additionally, counsel disagreed with the presenter's claim that Johnson was billed three times for the same services, stating that Johnson was billed only twice, once for a fixed fee and once for an hourly fee. Counsel also claimed that respondent's delay in submitting bills to Johnson did not establish an intent to overreach.

As to the recordkeeping charges, counsel argued that count three, charging a violation of RPC 1.15(d) for respondent's failure to "credit" two payments made by Johnson in connection with the representation, must be dismissed because the presenter "over-defined" the requirements of R. 1:21-6(c)(1). Counsel argued that the rule does not require that ledger cards record the date payment was received and that the presenter improperly focused on ledger

cards rather than on respondent's journals. Moreover, he asserted that the copies of receipts given to Johnson for payment provided the information required by the rule.

Finally, although counsel maintained that there was insufficient proof to sustain a finding of any ethics violations, he suggested that, if a violation were found, a reprimand rather than a censure would be appropriate discipline.

In a reply letter-brief, the presenter disagreed that respondent's conduct involved only an isolated billing error. He argued that respondent double and triple-billed for the same services and that the improper billing was a product of respondent's inadequate and careless recordkeeping practices.

The presenter emphasized that RPC 1.5 does not require intent as did the prior version of the rule, which explicitly did so before a violation could be found. Moreover, the presenter challenged respondent's interpretation of Ort, pointing to the Court's language that "irresponsible time charges" could result in a violation of RPC 1.5, "[w]hether characterized as deceitful or reckless." Nevertheless, the presenter emphasized that respondent's inadequate and careless recordkeeping, as demonstrated by his failure to accurately track his time or to adequately review his bills such that he would notice the double-billing and a disparity in his bills, established his "intent" to violate RPC 1.5(a).

In this second submission, the presenter remarked that, at the very least, respondent should be admonished.

The DEC properly noted that the constitutional issues raised by respondent are preserved for the Court's consideration.

The DEC determined that intent is not a requirement for a violation of RPC 1.5(a), which requires a lawyer's fee to be reasonable. The Rule sets forth a list of objective factors surrounding the fee arrangement. Because, on at least two occasions, respondent billed Johnson twice for the same services, each time for both a flat fee and an hourly fee, the DEC found that respondent violated this Rule.

Notwithstanding the DEC's finding that intent was not a necessary element for an RPC 1.5(a) violation, it cited In re Hecker, 109 N.J. 539 (1988), for the proposition that, despite an attorney's denial of any specific intent to overreach, the circumstances of the case may establish intent. The DEC pointed out, however, that Hecker was decided under the prior disciplinary rules, which allowed instances of billing anomalies to be discerned from the lawyer's conduct. In Hecker, "the Court stated that a lawyer has an obligation to 'keep his [or her] books of account in such order as not to make a careless mistake to the detriment' of the client, and that, to the extent that an

attorney's overcharges are the result of a grossly inadequate and inefficient billing system, the attorney cannot excuse those overcharges for overbilling, double billing, or failing to credit a client's account."

Relying on Hecker, the DEC found clear and convincing evidence that respondent violated RPC 1.5(a) because (1) respondent's "unorthodox" retainer agreement imposed fixed and hourly rates without clarifying when either would be charged and, ultimately, led to overcharges; (2) he failed to issue itemized bills at regular intervals or within reasonable proximity to the services, sometimes issuing them nine months after services were rendered; (3) respondent's excessive delay in sending bills reduced the chance that a billing discrepancy would be detected and remedied; (4) the amount of time charged for preparing and attending the hearing was not consistent between the flat fee and hourly fee invoices; (5) respondent neither noticed nor credited amounts double-billed; and (6) respondent's billing journal was inadequate and the entries were not contemporaneous with services rendered. According to the DEC, these factors evidenced respondent's grossly inadequate recordkeeping practices, which led to careless mistakes and were relevant to a finding of intent.

In addition, the DEC also found clear and convincing evidence that respondent violated RPC 1.15(d). He was required to maintain "appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from" his trust account under R. 1:21-6(c)(1)(A), specifically identifying the date, source, and description of each item deposited, as well as the date, payee, and purpose of each disbursement. The DEC found that respondent's journal entries did not meet these criteria. He did not identify the source of payments in his journals, even though two receipts had been found.

The DEC found that respondent's violations were limited and involved carelessness created by the grossly inadequate and inefficient system he created. The DEC did not find, however, that respondent engaged in fraud or dishonesty.

In assessing discipline, the DEC considered respondent's ethics history, a 2001 admonition. The DEC, however, mistakenly cited respondent's 2014 admonition as a reprimand for recordkeeping violations. Because of respondent's ethics history, the DEC recommended a reprimand, rather than an admonition.

Following a de novo review of the record, we are unable to agree with the conclusions of the DEC.

The DEC granted the presenter's motion to withdraw the charged violation of RPC 1.5(b) (failure to communicate in writing the basis or rate of the fee). The terms of the agreement called for both an hourly rate and a fixed rate, without explaining how or when the rates would be imposed. Although the agreement implied that the fixed fees would be discussed with Johnson, neither he nor respondent testified on this issue. Thus, there was no clear and convincing evidence to establish whether Johnson was aware of how the fee would be assessed. The RPC 1.5(b) charge, therefore, was properly dismissed.

We also determine to dismiss count three, which charged a violation of RPC 1.15(d) for respondent's recordkeeping practices. Notwithstanding the paucity of the allegations in this count, respondent was already admonished in 2014 for his inadequate records following an OAE random audit. The discipline in that case was predicated on the OAE's review of respondent's records from 1995 through April 2012. Johnson retained respondent in 2002. Thus, the OAE's audit covered the same period that is at issue in this matter. Because respondent previously was disciplined for the same conduct that occurred during the same timeframe encompassed by this matter, we dismiss the RPC 1.15(d) charge.

The only issue left for our consideration is whether respondent violated RPC 1.5(a). That Rule provides that the factors to be considered when assessing the reasonableness of a fee include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent.

As noted by counsel, the previous version, DR 2-107, provided that "[a] lawyer should charge no more than a reasonable fee." The Rule included the same factors to be considered when determining the reasonableness of the fee listed factors in RPC 1.5(a). The prior Rule, however, at section (D), contained the provision that "[a] lawyer shall be disciplined if he shall enter into an agreement for, charge, or collect a fee so excessive as to evidence an intent to overreach his client." The Rule was subsequently amended to eliminate section (D).

Thus, the element of intent was eliminated as a prerequisite for finding a violation of RPC 1.5(a). See, e.g., In the Matter of Angelo Bisceglie, Jr., DRB 98-129 (September 24, 1998) (admonition for attorney who billed a Board of Education for work not authorized by the Board, although it was authorized by its president; the fee charged was unreasonable, but did not reach the level of overreaching) and In the Matter of Robert S. Ellenport, DRB 96-386 (June 11, 1997) (admonition for attorney who received \$500 in excess of the contingent fee permitted by the rules).

Even if intent were still a required element for a finding of RPC 1.5(a), it can be discerned from an attorney's recordkeeping practices. In Ort, the Court remarked that "[m]any of [the attorney's] time sheet entries [were] so clearly disproportionate to the service described that an inference of deceit was justifiable." In re Ort, supra, at 157. In In re Hecker, 109 N.J. 539, 551 (1988) the Court stated that an attorney cannot deliberately design, fashion, or maintain a bookkeeping system in such a way as to confound determination of whether he has intentionally misused a client's accounts or intentionally overcharged a client.

Even though it may be concluded that the overcharge was not intentional, yet the obligation of the lawyer is to keep his books of account in such order as not to

make a careless mistake to the detriment of his client. Hence, we agree that to the extent that respondent's overcharges of Dover Township were, at the very least, the result of a grossly inadequate and inefficient billing system, he cannot be excused from responsibility for overbilling, duplicating, and failing to credit items in the client's account. Id. at 551-52 (citations omitted).

Here, respondent's billing records establish that he billed Johnson for the same services on more than one occasion. Count two of the complaint specifically alleged that respondent "double billed Johnson for his preparation for, and appearance at, the hearing before the Medical Review Board to review the Department of Correction's decision" and "[s]pecifically, Respondent billed Johnson \$1,500 on a flat fee basis for this task and also billed Johnson 6.75 hours of hourly billable time for the same task." Counsel pointed out that respondent represented Johnson for approximately four years and that the seventeen billing statements he prepared contained 262 separate time entries. He argued that a single instance of double billing over that four-year period was not sufficient to prove a violation of RPC 1.5(a).

We do not find that intent or overreaching are prerequisites for a violation of RPC 1.5(b). However, we agree with respondent's counsel. Whether respondent's bills contain one instance of double billing as respondent's counsel claimed, or two or three as the presenter stated, we find that it constituted an error, a simple


mistake, not unethical conduct. We come to this conclusion because the complaint charged only one instance of double billing in the seventeen bills that were issued over a four-year period. In addition, Johnson was made whole through the fee arbitration process. We, therefore, dismiss the complaint in its entirety.

Vice-Chair Baugh and Member Rivera disagree. They found that double, nay triple-billing, of Johnson for the same task constituted a violation of RPC 1.5(a) because it amounted to an unreasonable fee. Respondent's preparation of a confusing fee agreement, his failure to issue bills within a time reasonably relating to the services provided, the inconsistencies in his bills with regard to time spent on certain services, and his inadequate recordkeeping practices led to the double-billing and, thus, an unreasonable fee.

Because this was respondent's third time before the Board, these members determined that a reprimand was warranted.

Member Gallipoli was recused. Member Clark did not participate.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Stephen Schnitzer


Docket No. DRB 16-134

Argued: September 15, 2016

Decided: December 9, 2016

Disposition: Dismiss

Members	Dismiss	Reprimand	Recused	Did not participate
Frost	X			
Baugh		X		
Boyer	X			
Clark				X
Gallipoli			X	
Hoberman	X			
Rivera		X		
Singer	X			
Zmirich	X			
Total:	5	2	1	1


Ellen A. Brodsky
Chief Counsel