

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-327
District Docket No. IV-2008-0001E

IN THE MATTER OF
EUGENE M. LaVERGNE
AN ATTORNEY AT LAW

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Decision

Argued: January 20, 2010

Decided: March 10, 2011

Anne T. Picker appeared on behalf of the District IV Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline (six-month suspension) filed by the District IV Ethics Committee (DEC). The complaint charged respondent with violations of RPC 1.15(b) failure to promptly turn over property to a third party), RPC 1.16(d) (failure to promptly turn over

file upon termination of representation) and RPC 8.1(b) (failure to cooperate with an ethics investigation). We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1990. On June 19, 2001, he received a reprimand as a result of his criminal conviction for theft by failure to make required disposition of property. Specifically, he failed to pay \$700 for a car purchase and resold the vehicle, claiming that payment had been contingent on the sale of another vehicle. In re LaVergne, 168 N.J. 409 (2001). On July 16, 2001, he received a six-month suspension for gross neglect, lack of diligence, failure to communicate with client, failure to return the client's file upon termination of the representation, failure to safekeep property, and misrepresentation to the client. In re LaVergne, 168 N.J. 410 (2001). On February 21, 2006, he received a reprimand for failing to turn over a file to his client, after the legal representation was terminated, and for improperly cashing checks for legal services, instead of depositing them to his business account, as required by the court rules. In re LaVergne, 186 N.J. 74 (2006).

Recently, on the eve of oral argument on this matter, respondent filed with Office Board Counsel a letter-brief that we

treated as a request for an adjournment and a motion for other relief. We considered respondent's submissions and the presenter's reply, but determined to deny respondent's request for an adjournment; reject his argument that the DEC did not have jurisdiction to hear the matter below (R. 1:20-(3)); and deny his motion to remand and transfer this matter to the District X Ethics Committee.

As to respondent's request that we limit our findings to "sufficient credible admissible evidence in the record," we will address the adequacy of the proofs below.

The relevant facts are contained in the August 26, 2010 hearing panel report and the complaint. The grievant, Christopher Greenfield, could not be located for the ethics hearing. Respondent also failed to appear on the scheduled date, despite having knowledge of the hearing date and time, as detailed below. Therefore, the only testimony was that of the DEC investigator, Leah McGarry Morris, regarding her efforts to locate Greenfield and to obtain information from respondent about the grievance.

At the outset of the DEC hearing, the panel chair set forth the procedural posture of this disciplinary matter:

I was assigned this matter in the fall of 2009. As a result of that assignment I had scheduled a conference call to be handled on November 10, 2009 at 11 a.m. and provided some call-in numbers to my office for that conference call. Persons on that call were Mr. Gunther, who is here as the Presenter in this matter, and Mr. Eugene LaVergne, the respondent.

That conference call did take place and during that conference call Mr. LaVergne indicated a desire to file motions. I sent out the confirmation of the occurrence of the conference call on October 8, 2009 and of course, as I have indicated, Mr. LaVergne did call in on that day.

When we had the hearing by phone, I established a timetable for which to make applications to the panel, and in the letter dated December 1, 2009, it was sent to all members of the panel, which include Ms. Leslie Clark and Mr. Andrew Karcich, Miss Clark being the community member, lay member.

I advised that on November 10th I had scheduled that all motions to be submitted were to be submitted by November 19. The specific motion that Mr. LaVergne talked about on November 10 was a change of venue motion that he said was appropriate because the initial grievance in this matter at the time the matter evolved was at Riverfront Prison in Camden. That prison of course is closed, but the grievant, Christopher Greenfield, had been removed from that prison, had been discharged, and was not available to the panel as I was led to believe, and had absconded supervision following his incarceration.

For a period he had been in and out of the Ocean County Jail, according to people's beliefs, without verification. He said, therefore, that the hearing could be held further north since his offices were up in Monmouth County at the time. I never received any papers from Mr. LaVergne, nor a communication requesting an extension of time.

As a result of his failure to act in that situation, I then scheduled the matter, this hearing, for February 24, 2010 at one p.m. in my office here in Moorestown, New Jersey. Mr. LaVergne at the last moment, I believe it was the day before, called me and said he didn't have notice of the hearing and requested the opportunity to be present.

The record should reflect that he had not called me between the due date of motions which was November 19th of 2009 until the call requesting extension of time for the hearing. I had Faxed to Mr. LaVergne at his last Faxed address the hearing date for February 24, 2010, which FAX number he verified was his, but claimed to be having difficulties with the provider and therefore, did not receive the notification.

I have verification of that transmission having gone through the week of February 22nd. Like I have indicated, the 23rd was the day that Mr. LaVergne called me. Later that week we spoke on the phone again and established the date of March 31st, today's date, as the hearing date for his matter.

I sent out notices for the hearing date to all members of the panel and Mr. LaVergne on March 1, 2010. In that correspondence of course I put my return address at this office and telephone number. Because I

established the address for Mr. LaVergne of 84 Broad Street, Eatontown, New Jersey, 07724, by telephone conversation on or about the 25th of February I requested that Mr. LaVergne send me a FAX transmission of his address, phone number and other contact information so I could continue to be in contact with him. He never responded. While agreeing to do so, he never sent me the FAX transmission.

He has also received from me my cell phone number so that he could call me directly if he wished to do so. On March 1, since he had not responded regarding the FAX transmission to confirm address and phone number, I sent him a separate letter concerning the hearing date, also dated March 1, where I requested that he -- strike that, where I indicated that he had not further provided confirmation of his address, phone number and contact information, assured him that this matter was not going to be continued and I closed by saying I want you to have the opportunity to present your defense, please cooperate. He did not respond to that communication.

The letters dated October 8, 2009, December 1, 2009, February 2, 2009 -- strike that, January 8, 2010, February 2, 2010, March 1, 2010 to Mr. LaVergne individually, and March 1, 2010 to members of the panel and Mr. LaVergne combined will be attached to the report to be issued as Panel Exhibit 1.

This hearing did not convene until approximately ten minutes to 11, 50 minutes after its scheduled time. During that 50-minute period myself and Mr. Karcich of the panel attempted to have other means of

locating Mr. LaVergne to see if there was any explanation for his failing to be here. The phone numbers that he had provided me, 732-728-2500, when called, referred me to a second number that he had also provided me, 732-796-5650. However, the mailbox on that telephone was full. We attempted to go on the internet to locate him and while other information was discerned from that communication, no additional phone numbers were made available to us. Those that we tried to call indicated they did not know Mr. LaVergne and the number associated with him in the internet contact was apparently inaccurate.

Accordingly, Mr. LaVergne is not present. It is the decision of the panel to proceed with this matter in his absence.

[T3-6 to T7-17.]¹

Greenfield's grievance alleged that, in addition to several criminal matters, respondent represented him with regard to two tort actions. Greenfield, described in the record as a career criminal, underwent a gall bladder operation in the early 1990s, while incarcerated in a New Jersey prison. During surgery, a temporary bile duct stent was placed in his abdomen, but was never removed. Years later, on July 6, 2006, Greenfield was a

¹ "T" refers to the transcript of the March 31, 2010 DEC hearing.

passenger in an automobile driven by his brother, Glenn. When the car crashed, Greenfield suffered injuries that resulted in the amputation of his arm.

According to the grievance, in the spring of 2007, Greenfield sought to terminate respondent's representation and, thereafter, requested the return of his files. Respondent's actions upon the termination of the representation, not the substance of the representation, form the basis for this ethics matter.

In an August 31, 2007 letter to respondent, Greenfield terminated the representation and demanded that he immediately send his files to him at the Riverfront State Prison, where he was incarcerated at the time. He advised respondent, in the alternative, to send them to his brother, Glenn, or their mother. When respondent did not comply with his request by September 18, 2007, Greenfield filed the ethics grievance.

DEC investigator Morris testified, at the hearing below, that she sent Greenfield a packet of information about the matter that required his reply by April 8, 2008. Over a year later, on September 15, 2009, Greenfield replied from prison, in a handwritten letter, explaining that her packet of information had originally been delivered, in June 2009, to a former address

and then forwarded to him in prison, a year later. Greenfield stated, "[l]astly, I very much wish to pursue this complaint and I strongly negate [respondent's] assertions of no wrongdoing and I dismiss his rambling and slanderous accusations, as well as his factual account of events."

In a February 1, 2008 memorandum to Morris, respondent set forth a lengthy explanation for his failure to return Greenfield's files. He portrayed Greenfield as a drug addict and convicted sex offender who sought to dodge Megan's Law notification requirements of his whereabouts. Respondent recalled that Greenfield had a medical malpractice claim regarding the gall bladder operation and a personal injury claim related to the amputation of his arm. Greenfield's brother had crashed an uninsured automobile into a house, while trying to elude police at night, with the auto's lights off, and while intoxicated. Respondent had refused to turn over the files to Glenn, as Greenfield had suggested in his letter from prison, because Glenn was a defendant in the personal injury case. Likewise, respondent refused to turn them over to the mother, claiming that she wanted nothing to do with Greenfield. Finally, respondent maintained that he had offered to turn the files over to Greenfield or to an attorney of his choosing, but only if Greenfield signed a substitution of attorney form.

Morris and the presenter, Bruce Gunther, were unable to locate Greenfield for the ethics hearing. Although, by that time, Greenfield had been released from prison, the prison authorities would not disclose his new address to ethics authorities.² Morris and Gunther then contacted Lerner, Piermont and Riverol, P.A., the law firm that Greenfield identified, in a September 15, 2009 letter to ethics authorities, as his new counsel. According to Morris, that firm declined to represent Greenfield after it, too, could not locate him.

Respondent also failed to turn over Greenfield's files to ethics authorities. Morris testified that, in her initial contact with respondent, he told her that the files were voluminous, and that it would be burdensome to copy and send them to her. When Morris concluded that the only means of securing the files was through respondent, on July 18, 2008, she sent him a letter requesting his files in both matters. Because respondent did not comply with that request, she sent an August 22, 2008 email to respondent. In it, she referred to a telephone

² Greenfield, a convicted sex offender, was required to register his address with police.

conversation with his secretary, on that day, about the files. Morris had called to schedule a time to review the files at respondent's office, but the secretary offered to copy them instead, because the documents "were very few in number." Based on this information, that is, that the files were not voluminous as respondent had stated, Morris requested respondent to either bring the files to her office for copying, or provide her with copies of the files forthwith. She gave respondent until September 5, 2008 to complete that task. Respondent, however, never contacted her or sent her the files.

In September 2008, Morris sent subsequent requests for the file and gave respondent a final deadline of September 26, 2008 to comply. Once again, respondent did not contact her or send her the files.

Thereafter, on January 5, 2009, respondent was served with a copy of the complaint. He filed an answer on June 19, 2009. On November 10, 2009, during a three-way pre-hearing conference call with the presenter and the panel chair, respondent stated his wish to file a motion for a change of venue. The panel chair directed him to do so before November 19, 2009, but respondent filed nothing.

The matter was then scheduled for a February 24, 2010 hearing. By letters dated February 2 and 19, 2010, the DEC

notified respondent of the hearing date. On the eve of the hearing date, respondent called the panel chair, complaining that he had just received notice of the hearing, and advising him of a new address, 84 Broad Street, Eatontown, New Jersey 07724. He requested that all future correspondence be sent to the new address. According to the hearing panel report, during that conversation, respondent confirmed his availability for a March 31, 2010 hearing at 10:00 a.m. and agreed to send a written confirmation of his new address.

On March 1, 2010, the DEC sent a letter to respondent at the new address, confirming the March 31, 2010 hearing date. The letter requested the previously required address confirmation, as the DEC had received nothing from respondent, and advised him that the March 31, 2010 hearing date was peremptory.

Respondent did not send the written address confirmation or contact the DEC, before failing to appear at the March 31, 2010 hearing. On the hearing date, the panel chair attempted to contact respondent at all of the telephone numbers known to be used by him, but was unsuccessful in his attempts to reach him. Therefore, as previously stated, the hearing took place without respondent.

The DEC concluded that respondent violated RPC 1.15(b) and RPC 1.16(d) by his failure to turn over Greenfield's files directly to Greenfield in prison, as Greenfield had requested. The DEC also found respondent guilty of having violated RPC 8.1(b) for his failure to cooperate with the investigators' requests for information about the case and, in particular, Greenfield's files.

The DEC recommended a six-month suspension, without citing any case law.

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

Greenfield's files included information about a medical malpractice claim and a personal injury claim that respondent had been hired to handle. In 2007, Greenfield terminated respondent's representation and requested that respondent either return the files to him in prison or release them to his mother or brother.

Respondent explained that he did not turn over the files to Greenfield's family because the brother was a defendant in one of the matters and the mother had indicated an unwillingness to accept the file. Nothing, however, prevented respondent from

turning them over directly to Greenfield. Even assuming that respondent was correct in not returning them to the relatives, RPC 1.16(d), which governs the return of client papers upon termination of the representation, obligated him to relinquish the file to Greenfield.

Respondent's excuse that he required a substitution of attorney from his client, is of no moment. It is well-settled that, upon termination of the representation, an attorney must promptly deliver the file to the client. The attorney is entitled to keep a copy of the file to guard against possible malpractice suits, or ethics or tax inquiries, but cannot refuse to release it. It is the client's responsibility to pay for the reproduction costs. If litigation is pending, there can be an agreement for payment out of the proceeds of the litigation. N.J. Advisory Committee on Professional Ethics Opinion 554, 115 N.J.L.J. 565 (1985). Therefore, respondent's failure to turn over the files to Greenfield violated RPC 1.16(d).³

³ RPC 1.15(b), as charged in the complaint, addresses an attorney's obligation to promptly return funds or other property of value to the client or third persons. The applicable rule

(footnote cont'd on next page)

Respondent also ignored the DEC investigator's repeated attempts to obtain Greenfield's files for the investigation of the grievance. Moreover, respondent failed to appear at the DEC hearing, despite having assented to its scheduled date and time. R. 1:20-6(c)(2)(D) makes it mandatory for a respondent to appear at all hearings. We reject, as not credible, respondent's argument that he was unaware of the hearing date and time, an argument that he brought to us, literally, on the eve of oral argument. Unquestionably, thus, respondent violated RPC 8.1(b).

Generally, admonitions have been imposed on attorneys who have failed to turn over files to their clients or to disciplinary authorities, even if, at times, additional violations are present, provided that the attorney does not have a disciplinary record. See, e.g., In the Matter of Brian J. Muhlbaier, DRB 08-165 (October 1, 2008) (upon termination of the representation, attorney refused to turn over the files to subsequent counsel for a period of months, despite requests for their return, in violation of RPC

(footnote cont'd)

when the file is not promptly returned to the client is RPC 1.16(d).

1.16(d)); the attorney's refusal was an attempt to compel payment of outstanding legal fees); In the Matter of Vinaya Saijwani, DRB 07-211 (November 13, 2007) (attorney received five separate letters from subsequent counsel requesting the turnover of client files; because the attorney did not read the letters carefully, she presumed it unnecessary to send the limited materials maintained in his files, thereby violating RPC 1.16(d)); In the Matter of Vera Carpenter, DRB 97-303 (November 1, 1997) (admonition for attorney who failed to act diligently, failed to communicate with a client, and failed to turn over the client's file to new counsel); In the Matter of Andrew T. Brasno, DRB 99-091 (June 25, 1997) (admonition for failure to turn over client's file after termination of representation and failure to comply with a lawful demand for information from a disciplinary authority); In the Matter of John J. Dudas, Jr., DRB 95-383 (November 29, 1995) (admonition for failure to turn over client's file to new counsel for nearly one year after termination of the representation, failure to communicate with a client, and failure to reply to a lawful demand for information from a disciplinary authority or to comply with the district ethics committee's direction to forward the client's file to new counsel); and In the Matter of Howard M. Dorian, DRB 95-216 (August 1, 1995) (admonition for failure to turn

over client's file to new counsel, gross neglect of client's file for fifteen months, failure to communicate with a client, and failure to comply with a lawful demand for information from a disciplinary authority).

Where prior discipline is a factor, reprimands have been imposed. See, e.g., In re Garbin, 182 N.J. 432 (2005) (attorney failed to send client a copy of a motion to enforce litigant's rights filed in a divorce action and failed to inform the client of the filing of the motion, which proceeded unopposed; the court then found the client in violation of the final judgment of divorce; the attorney also failed to return the file to either her client or new counsel; violations of RPC 1.1(a), RPC 1.4(a), and RPC 1.16(d) found; the attorney had a prior admonition) and In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with the clients in two matters; in one of the matters, the attorney also failed to return the file to the client; prior reprimand).

Were this respondent's first brush with the disciplinary system, an admonition might have sufficed for his failure to turn over a client file and to cooperate with ethics authorities. Respondent, however, has significant prior discipline: a June 19, 2001 reprimand after a criminal

conviction for theft by failing to make required disposition of property; a July 2001 six-month suspension for misconduct in eight matters, including gross neglect, lack of diligence, misrepresentation and failure to return client files in three of the matters; and a February 21, 2006 reprimand for failing to return a client file and for improperly cashing legal fee checks, instead of depositing them to his business account, as required by the rules. Alone, the presence of this prior discipline would warrant the imposition of enhanced discipline – at least a reprimand.

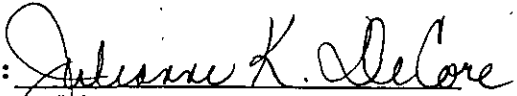
Respondent's ethics record demonstrates that he has not learned from prior similar mistakes. Two of his three prior discipline matters included failing to return client files upon termination of the representation. Apparently, respondent still insists that he can hold client files hostage after the representation has concluded. Either he has not learned from prior similar mistakes or he refuses to accept the mandates of RPC 1.16(d).

One other significant factor is troubling to us. Respondent's noncooperation with ethics authorities in this instance was egregious. In the investigation stage, he found unjustifiable reasons not to turn over Greenfield's files to the investigator, including a misrepresentation that the file was voluminous.

Thereafter, he failed to attend a mandatory DEC hearing. Combined, these factors constitute a flagrant affront to the disciplinary system. We, therefore, determine that nothing short of a censure is justified in this case.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

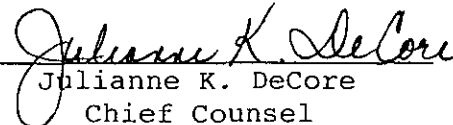
In the Matter of Eugene M. LaVergne
Docket No. DRB 10-327

Argued: January 20, 2011

Decided: March 10, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			


Julianne K. DeCore
Chief Counsel