SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-186

IN THE MATTER OF	:
RAYMOND A. BROWN, JR.,	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 17, 1996

Decided: October 1, 1996

Paul Jackson appeared on behalf of the District VC Ethics Committee.

Ernest G. Ianetti appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District VC Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.8(a) (entering into a prohibited business transaction with a client); RPC 5.4(b)(forming a law partnership with a non-lawyer); RPC 1.8(e) (providing financial assistance to a client in connection with pending or contemplated litigation); RPC 7.2(c) and RPC 7.3(d) (payment for recommending lawyer's services); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 8.4(d) (conduct prejudicial to the administration of justice) and RPC 8.1(b) (failure to cooperate with a disciplinary

investigation). At the hearing before the DEC, the presenter withdrew the charge of failure to cooperate as not clearly and convincingly supported by the record.

Respondent was admitted to the New Jersey bar in 1986. He was admonished on April 30, 1996 for failure to perform quarterly reconciliations of his trust account records and for use of a facsimile rubber stamp to sign trust account checks. That misconduct postdated the present charges by over one year.

In or about July 1989, respondent was retained by Wilbert C. Farrell, Jr. ("grievant") to represent him, his fiancée and his two minor children for injuries sustained as a result of an automobile accident. Mr. Farrell's fiancée and children had been passengers in his automobile when he collided with an uninsured (or phantom) vehicle, that had made a left turn in his path. Farrell was referred to respondent by an individual at the auto body shop that was making repairs to Farrell's vehicle. Farrell and his family met with respondent the day following the accident. Respondent agreed to represent all four individuals. (Although respondent's representation of all four individuals presented a conflict of interest issue, respondent was never charged with such a violation. Moreover, while the presenter elicited some facts regarding the accident itself and Farrell's potential liability, those facts were insufficient to determine whether an actual conflict existed, as opposed to an appearance of impropriety).

Over the next several months, Farrell referred several clients to respondent for representation. Farrell testified that he

received no compensation from respondent for those referrals. Rather, he referred people to respondent for representation simply because respondent was his attorney.

In September 1990, one year after Farrell first met respondent, he referred his sister, his niece and his nephew to respondent, all of whom had been involved in an automobile accident. Farrell testified that, to his surprise, after his sister left respondent's office, respondent paid him $100 in cash for each of those referrals. Subsequent to that payment, Farrell "would go out riding the city streets and highways lookig [sic] for accidents." In all, Farrell testified, he referred respondent approximately thirty clients, for which he received cash payments of $100 each. Although Farrell (and the presenter) indicated that they had a list of those referrals, the list was not produced at the DEC hearing.

For his part, respondent admitted that Farrell referred several clients to him. He denied, however, that he had ever paid Farrell for those referrals.

According to Farrell, beginning shortly after his accident, he frequently visited respondent's office to check on the status of his case. Respondent testified that Farrell had come to his office on a frequent basis, offering to run errands for respondent to earn some money. Because Farrell had been out of work since his automobile accident and because respondent wanted to help him, respondent frequently paid Farrell to run errands for him. He suggested that Farrell may have confused payments for those errands

as payment for referral of clients. Respondent produced no receipts for those cash payments or any evidence that he charged those payments back to a particular client matter as a legitimate expense.

Farrell testified that, during some of his visits, he had told respondent about an upcoming auction of tax delinquent properties and had expressed interest in attending the auction so that he might purchase a house. The two never discussed the possibility of a loan from respondent to Farrell during any of those conversations. Farrell attended that auction on September 26, 1990 and, in fact, bid on certain property. However, he did not have sufficient money to cover the ten percent deposit on the bid. Therefore, because Farrell "thought [his] case [was] supposed to be coming through from what [respondent told] him," he telephoned respondent from the auction to ask him to lend him $4,200, which he promised to repay upon settlement of his case. Respondent told Farrell that he did not have that amount of money in the office, but invited Farrell to pick him up from his office and take him to his home, where he had access to a large amount of cash. (Respondent's housemate apparently ran a cash business and kept large sums at the house). In fact, that is exactly what Farrell did. Respondent did not deny that he had agreed to lend Farrell the money. He testified, however, that, at the time he agreed to do so, he had essentially already settled Farrell's case. Respondent added that he wanted to help Farrell,

whom he considered to be a good and industrious man. The loan was interest-free and respondent derived no direct financial benefit.

On or about October 16, 1990, approximately three weeks after respondent lent Farrell the $4,200, Farrell visited respondent's office in order to sign releases and closing statements on his own settlement, as well as on his children's settlements (as their guardian ad litem). The closing statement on the children's matters contained an acknowledgment, signed by Farrell, indicating that those settlement proceeds attributable to each child were to be used solely for the welfare and benefit of that child. Although Farrell denied that he had read that acknowledgment prior to signing the closing statement, he admitted that he knew that it was his children's money that he was receiving and not his own.

That notwithstanding, the procedures used by respondent did not comport with the requirements set forth in the Rules of Court for settlements on behalf of minors. Specifically, the rules (R. 4:48A and R. 4:44-3) required that court approval be secured in all cases involving settlements for minors. Respondent testified that he misinterpreted the rules to require court approval only where the net proceeds of the settlement exceeded $5,000. He, therefore, always followed a procedure of releasing minors' funds (less than $5,000) directly to their guardians, after requiring the guardians to sign the above-described acknowledgment.

Approximately two weeks after Farrell signed all the closing papers, he and his fiancée again went to respondent's office to pick up all of their settlement checks. At that point, respondent

accompanied them to his bank, not only to facilitate cashing of the checks (Farrell apparently did not maintain a checking or bank account in his own name) but also to do some of his own banking. After respondent introduced Farrell to the appropriate bank personnel, he went to a different part of the bank to transact his own business. Farrell testified that, during that period, he and his fiancée cashed all the checks except his own, which he wanted to save and to deposit into his mother's checking account. When respondent concluded his business and rejoined Farrell and his fiancée, Farrell handed respondent $4,200 in cash to repay the earlier loan.

It was respondent's release of the minors' money to Farrell without court approval, coupled with Farrell's use of his children's money to repay his debt to respondent, that resulted in the charges of violations of RPC 8.4(c) and (d). It is clear by all accounts, however, that respondent had no knowledge that Farrell was using his children's money to repay him.

Thereafter, in or about November 1990, respondent offered Farrell a job with Royal Investigation Services ("Royal"), a company owned by respondent's "claims manager," a Mr. Ross. Farrell continued to work for Royal through July 1991, when he and respondent had an argument, as seen below. During the time that Farrell worked for Royal, he continued to refer new clients to respondent.

Farrell testified that, in early February 1991, while he and respondent were sitting in Ross' office (in the same suite as

respondent's offices) respondent proposed to enter into a business transaction with him. Respondent's and Farrell's versions of this conversation were divergent. Farrell maintained that respondent told him that he wanted to run a transportation business through him to drive clients back and forth to their medical appointments. Farrell would be reimbursed for his services through the various PIP carriers and would not be prohibited from transporting clients for other attorneys. Respondent was to get no financial benefit from the transaction, other than the indirect benefit he would presumably receive from larger settlements for his clients (and hence respondent's share of the settlement) as a result of his client's ability to keep their medical appointments. When Farrell expressed concern to respondent that he might not be able to handle the financial burden of waiting for payment from the various carriers, he proposed that respondent pay him for his services, if the insurance carriers did not do so within sixty days, and that respondent be reimbursed upon receipt of the carriers' payments. At that point, respondent allegedly told Farrell "let me get back to you." Farrell testified that he perceived respondent to be proposing a silent partnership between them. Therefore, after their conversation, and without any further discussion with respondent, Farrell, "on [his] own," purchased a multiple passenger van so that he would be ready in the event respondent decided to "do business." Farrell admitted that respondent was unaware that he was purchasing a van. In fact, it was not until after-the-fact that Farrell told respondent that he had, indeed, purchased a van.

At that point, or possibly weeks later, respondent asked Farrell if he was "ready to roll" with the business. When Farrell answered affirmatively, respondent asked him to pick up one of his clients from the hospital. Thereafter, respondent referred numerous clients to Farrell for transportation. At all times since the initiation of this conversation, respondent continued to represent Farrell on two other pending matters. Thus, the charge of a violation of RPC 1.8.

Respondent's version of the events leading to Farrell's purchase of the van was significantly different. Respondent testified that, after Farrell received his settlement check, he continually asked respondent what he should do with his money. (The purchase of the house on which Farrell had bid ultimately failed to materialize). Respondent attempted to suggest several investment options to Farrell. He viewed Farrell as a young, enterprising "kid", who "hustled" for business. Therefore, one of the investment options respondent suggested to Farrell was that he start his own business. As an example of the type of business Farrell might start, respondent pointed to the various medical transportation services respondent used to drive his personal injury clients to their medical appointments. The next thing he knew, and to his surprise, Farrell informed him that he had purchased a van to start such a business. Since Farrell had already purchased the van, respondent, in an attempt to help, promised to refer him some clients. Respondent continued to use other services to transport his clients, in addition to Farrell's

service. He testified that the only advantage he gained by using Farrell's service was that he was available on very short notice.

The mechanism for payment to Farrell for his transportation services is unclear. There is no evidence to suggest, however, that respondent paid Farrell directly when the carriers did not do so within the sixty-day timeframe Farrell had initially set.

Regardless of the version of the events leading up to Farrell's formation of a transportation business, suffice it to say that relations between respondent and Farrell began to deteriorate in or about late June 1991. By that point, Farrell had been operating his transportation business for approximately four months. He had been experiencing cash flow problems because, as predicted, the PIP carriers had not made prompt payment for Farrell's services. Moreover, Farrell had learned that several of respondent's client's had received settlement funds in cases in which Farrell had rendered (but not received payment for) transportation services. Out of frustration, and in an attempt to record what he perceived to be his partnership with respondent in the transportation business, Farrell telephoned respondent on June 27, 1991. Without respondent's knowledge, Farrell taped that conversation. A transcript of the recording was made by the presenter's staff and admitted into evidence. Exhibit P-3. Despite Farrell's specific purpose for recording the conversation, the transcript is replete with unsuccessful attempts on Farrell's part to induce respondent to admit that he had agreed to enter into a partnership with him. During a somewhat heated conversation,

respondent consistently denied any such agreement on his part and continued to insist that he had offered to help Farrell only by showing him the procedures to be used in dealing with insurance carriers. See, e.g., Exhibit P-3 at 2-4, 7-8, 9-10, 13-17, 20. The transcript further reinforces both Farrell's and respondent's testimony that Farrell had independently and prematurely purchased the van in anticipation of going into business with respondent. During that conversation, Farrell never challenged any of respondent's denials that he had ever agreed to be his partner. In fact, by the end of the conversation, Farrell admitted that perhaps he had misunderstood respondent's offer to help him in the business. P-3 at 16-17. At that point, respondent offered to have someone on his staff call one of the carriers in Farrell's behalf to learn whether there was a particular problem that was delaying Farrell's payments.

At some point during their (recorded) conversation, respondent and Farrell began to discuss two particular client matters (James and Cross). Although they had been discussing payment for Farrell's transportation services immediately before discussing these two particular clients, the ensuing conversation became somewhat obscure. For the sake of accuracy, the transcript should be quoted:

> Farrell: And, what's it? This Johnny James, you took his case?
>
> Respondent: Johnny James.
>
> Farrell: Johnny James.
>
> Respondent: The guy that got burned. Oh, he

didn't get burned. He -- no, no, I didn't take the case. I sent him a letter telling him (indiscernible). Because he had no real injuries.

Farrell: So you ain't take it?

Respondent: No, I didn't take it. But I gave you something for that, though.

Farrell: No, you didn't never give me anything on Johnny James. You said something about you had to check it out or something.

Respondent: Oh, yeah. Well, I sent him a letter telling him we wouldn't even take the case.

Farrell: Well, Cassandra Cross, she had a bus accident. Her daughter had one in the beginning. Her daughter was in a accident.

Respondent: Right.

Farrell: And then she was in a bus accident.

Respondent: Right.

Farrell: Okay. And I was talking to her about, I said, go ahead down and talk to Ray. She said, well, I'm going to call her first to see something. She never did get back in touch with her. And then I checked it out and then she's - - you know, she's on the screen with you.

Respondent: Her brother brought her down here.

Farrell: So?

Respondent: Her brother brought her. Her husband is a client of mine. He brought her down here.

Farrell: Oh, man.

Respondent: Her husband is a client. I got the whole family. They were just here in the office when you was [sic] here.

Farrell: Man.

Respondent: Her husband is David Johnson, her brother-in-law is Michael Johnson. They were just here in the office this morning.

Farrell: I didn't pay them no attention.

Respondent: They all was [sic] here.

[Exhibit P-3 at 10-12]

When the presenter asked respondent, on cross-examination, to explain his conversation with Farrell regarding James, respondent testified that he had paid Farrell for running errands relative to that matter. He offered no evidence, such as receipts, to support that claim. He was unable to offer an explanation for his conversation about Cross. He steadfastly denied, however, that he had ever paid Farrell or any other individual for referring clients to him for representation. That was so, he testified, in spite of the fact that he had been solicited to do so on numerous occasions since he began solo practice in 1987. He continued to insist that any money he gave Farrell was payment for errands, before his employment with Royal.

The relationship between respondent and Farrell completely broke down in July 1991, shortly after their recorded telephone conversation. According to respondent, Farrell had continued to telephone his office staff over payment of his transportation bills. During one of those telephone calls, Farrell allegedly told respondent's secretary that he was coming down to his office to "shoot them all up." Farrell then appeared in respondent's office one-half hour later in an agitated state. Respondent testified that Farrell barged past his secretary and into his office with his

hand in his pocket. Believing that Farrell was about to pull a gun from his pocket, respondent pulled a gun from his desk drawer, pointed it at Farrell and instructed him to leave the office.

Farrell's version of the events was substantially different. Specifically, Farrell testified that he went to respondent's office to again discuss payment of his transportation bills. He visited only after talking to respondent's secretary, who had assured him that respondent could meet with him later in the day. When Farrell appeared in respondent's office, respondent instructed him to enter and to close the door behind him. Farrell stepped into respondent's office and asked whether respondent intended to give him his money. At that point, respondent drew his gun, pointed it at Farrell and demanded that Farrell leave the office.

Farrell then went to the police station where he apparently filed a complaint against respondent. Ultimately, both respondent and Farrell were arrested and charged with various offenses. Respondent was eventually found not guilty of all charges. Apparently, the charges against Farrell were dismissed on a technicality.

After the disposition of the criminal matters, Farrell filed an ethics grievance against respondent, alleging, among other things, that respondent had improperly influenced the law enforcement officials, resulting in respondent's acquittal and Farrell's arrest. The presenter raised no charges as a result of this incident between respondent and Farrell. In fact, it was respondent's attorney who, in order to impeach Farrell's

credibility, elicited detailed testimony regarding the incident to demonstrate Farrell's hostility towards respondent.

* * *

The DEC found respondent guilty of unethical conduct. Specifically, the DEC found respondent guilty of a violation of RPC 1.8(e) for his loan to Farrell against the proceeds of his anticipated settlement. The DEC rejected respondent's argument that, because the case was virtually settled at the time he agreed to make the loan, the rule was not violated. In doing so, the DEC noted that the closing papers were not signed until three weeks after the loan and, that RPC 1.8(e) did not "provide for a 'virtually settled' exception." The DEC further found that respondent had paid Farrell for recommending his services and for securing his employment, in violation of RPC 7.2(c) and RPC 7.3(d). In the face of respondent's own testimony, the DEC rejected as incredible respondent's denial of payment to Farrell. The DEC remarked:

> Respondent asks the Panel to believe that Grievant, who he perceived as a young street wise kid, continued to refer numerous clients to Respondent over a six to nine month period without compensation in an environment where, according to Respondent, he could easily be compensated for such an activity elsewhere. He asks the Panel to believe that in this environment where cash payments could be misconstrued, he simply ignored the appropriateness to document with receipts Grievant's small jobs, particularly if he intended to be reimbursed.
>
> [Hearing panel report at 13-14]

The DEC found "most telling" respondent's recorded conversation with Farrell regarding the James and Cross matters. It concluded that the conversation addressed the payment of money to Farrell in exchange for referrals.

The DEC declined to find respondent guilty of a violation of the remainder of the charges, as not clearly and convincingly supported by the record. Specifically, the DEC found that the record did not clearly and convincingly support the conclusion, as urged by the presenter, that respondent had intentionally avoided the proper procedure to secure court approval of the minors' settlements. Rather, the DEC accepted respondent's explanation that he had simply misinterpreted the rule. The DEC, therefore, determined to dismiss the alleged violations of RPC 8.4(c) and 8.4(d). The DEC further found that the record did not clearly and convincingly establish that respondent had entered into a prohibited business transaction with Farrell by agreeing to form a partnership with him in a medical transportation business.

The DEC made particular note that it did not find Farrell's testimony incredible. Instead, the DEC remarked that, in his enthusiasm, Farrell had misinterpreted his conversation with respondent. Finally, the DEC declined to find respondent guilty of a violation of RPC 5.4(b) by his involvement with Royal, as not clearly and convincingly supported by the record.

The DEC recommended that respondent receive a three-month suspension for his violations of RPC 1.8(e), RPC 7.2(c) and RPC 7.3(d).

* * *

Upon a de novo review, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is clearly and convincingly supported by the record. Respondent advanced a substantial amount of money to Farrell in anticipation of reimbursement from Farrell's settlement proceeds. However, because respondent harbored the subjective belief that Farrell's case had been settled at the time of the loan, the Board cannot conclude that the record clearly and convincingly supports a finding that respondent advanced sums to this client in connection with pending or contemplated litigation, in violation of RPC 1.8(e). Respondent's transaction with Farrell is more appropriately characterized as a loan of personal funds, that is, a business transaction with a client that triggers the safeguards of RPC 1.8(a). Because respondent complied with none of those requirements, his conduct violated RPC 1.8(a).

The Board is unable to agree with the DEC's finding that the record clearly and convincingly established that respondent paid Farrell cash for referring potential clients to him. The DEC based its decision on respondent's admissions during the recorded telephone conversation, on his failure to produce any documentation to support his claim that his cash payments to Farrell represented payment for errands he had run or work he had performed for the client cases in question and, finally, on respondent's testimony that he had long been aware that such a practice was pervasive among the personal injury bar. However, as noted earlier,

respondent's admissions during the recorded telephone conversation were obscure, at best. The Board could not interpret respondent's statements as admissions of wrongdoing on his part. Moreover, although Farrell claimed that he had kept a list of referred clients for which respondent had paid him cash, he produced no such list. While it is true that respondent also submitted no documentary evidence to support his claim that he had paid Farrell only for legitimate expenses or services, that failure does not provide a basis for a finding that respondent paid Farrell for referrals. Rather, it provides only a basis for a finding that respondent did not comply with the recordkeeping requirements of R. 1:21-6, in violation of RPC 1.15(d). Specifically, R.1:21-6(b)(6) requires attorneys to keep, for seven years after the event, "copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed." Although respondent's failure in this regard might seem at first blush to be a mere technical violation of the rule, the Board is nevertheless troubled by that failure, particularly in an environment, such as that described by respondent, where cash payments can be so easily misconstrued. The result is that the public is left to speculate on the reasons for the cash payments and to draw potentially negative inferences from those payments, visiting disrepute on the profession as a whole. The Board takes this opportunity, therefore, to remind the general bar that the recordkeeeping rules serve many purposes – not the least of which is to preserve the integrity of the profession.

Strict adherence to those rules is essential to serve that purpose.

All this notwithstanding, respondent's misconduct was serious. Not only did he fail to keep essential records, but he also engaged in a prohibited loan transaction with his client, which placed respondent's interests in conflict with those of Farrell.

Cases where attorneys have entangled their personal affairs with their professional obligations has resulted in varying levels of discipline. However, the Court has held that, "in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline." In re Berkowitz, 136 N.J. 134, 147 (1994) (citations omitted).

In this case, there was no injury to the client. Indeed, Farrell benefitted from respondent's conduct. Moreover, and in further mitigation, respondent's actions were motivated by a desire to help Farrell. Based on the totality of the circumstances, a five-member majority of the Board determined to reprimand respondent for his violations of RPC 1.8(a) and RPC 1.15(d).

One more word of caution to the bar is in order. Had the record clearly and covincingly supported a finding that respondent had paid Farrell for referral of clients, a suspension would have been imposed. See, e.g., In re Frankel, 20 N.J. 588 (1956) (two-year suspension); In re Introcaso, 26 N.J. 353 (1958) (three-year suspension) and In re Bregg, 61 N.J. 476 (1972) (three-month suspension).

A three-member minority of the Board voted to impose a three-month suspension. Those members believed that the record clearly and convincingly established that respondent had paid Farrell for referring him clients, in violation of RPC 7.2(c) and RPC 7.3(d). One member did not participate.

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

Dated: 10/1/96 By: _____

Lee M. Hymerling
Chair
Disciplinary Review Board