

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-308
District Docket No. IIIIB-2010-0020E

IN THE MATTER OF
EDWARD G. WERNER
AN ATTORNEY AT LAW

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Decision

Decided: March 8, 2013

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

This matter was before us on a certification of default filed by the District IIIIB Ethics Committee (DEC), pursuant to R. 1:20-4(f). A one-count complaint charged respondent with having violated RPC 1.5(a) (unreasonable fee), more properly RPC 1.16(d)(failure to return unearned portion of a retainer) and RPC 8.1(b)(failure to cooperate with an ethics investigation). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1989. He has no prior discipline. He has been ineligible to practice law

since September 27, 2010, for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection.

Service of process was proper in this matter. According to the August 7, 2012 certification of service from the DEC, on May 31, 2012, the DEC sent a copy of the complaint to respondent's law office address, 212 West Route 38, Suite 200, Moorestown, New Jersey 09057, in accordance with the provisions of R. 1:20-4(d) and R. 1:20-7(h). Both the certified and regular mail parcels were returned marked "Not Deliverable As Addressed."

On June 18, 2012, the DEC published, in both the Burlington County Times and the New Jersey Law Journal, a notice advising respondent that a formal ethics complaint had been filed against him.

The time within which respondent could file an answer expired, but no answer was filed.

The facts are as follows:

In September 2009, Claire Keating retained respondent to represent her in a divorce proceeding. According to the complaint, respondent recognized that Keating was under a financial strain and agreed to try to complete the divorce for a total of \$4,000.

On September 14, 2009, Keating paid respondent \$2,000. On November 30, 2009, she paid the remaining \$2,000.

In early February 2010, respondent advised Keating that he could no longer represent her, as he was having a "nervous breakdown," due to \$50,000 in unpaid child support of his own. He advised Keating that he was checking himself into a hospital, that he expected to lose his law license, and that he "did not have any of her retainer monies left as he was trying to catch up on his child support payments."

Once the representation was terminated, Keating was unable to reach respondent about her matter, despite several attempts to do so. She then retained subsequent counsel to represent her.

With regard to the ethics investigation into the matter, on July 28, August 9, August 30, and October 21, 2010 and, again, on March 18, 2011, the DEC investigator sent respondent letters requesting his reply to the grievance. All of the letters were returned marked, "Return To Sender- Not Deliverable As Addressed- Unable To Forward."

According to the complaint, respondent's use of Keating's retainer "without performing legal services on her behalf" constituted a violation of RPC 1.5(a). The complaint also charged respondent with a violation of RPC 8.1(b) for his

failure to reply to the ethics investigator's repeated attempts to gather information about the grievance.

Finally, the complaint faulted respondent for having failed to alert the CPF to changes in his office address, as required by R. 1:20-1(c). Respondent was not charged with a rule violation for that inaction.

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

In September 2009, respondent was retained to represent Keating in a divorce proceeding. In early 2010, he terminated the representation, recognizing that he was ill, and incapable of proceeding on her behalf. He did not refund the unearned portion of the retainer.

RPC 1.5(a) states that a lawyer's fee shall be reasonable, and details a number of factors that are considered, when determining the reasonableness of an attorney's fee. Paragraph five of the ethics complaint states that respondent sought to limit his fee to \$4,000, due to his client's poor financial condition. It is evident then that the reasonableness of his fee was never the issue.

Rather, as the complaint clearly sets out, the issue is the propriety of respondent's retention of a fee "without performing legal services on [Keating's] behalf." In fact, the complaint contains an account of respondent's apology to Keating for having depleted her retainer, in an attempt to "catch up" on his own delinquent child-support obligations. The more applicable RPC then, is RPC 1.16(d), addressing an attorney's failure to return unearned fees to the client.

R. 1:20-4(b) requires a complaint to "set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." In this case, the complaint did not charge respondent with having violated RPC 1.16(d). However, a finding that respondent violated RPC 1.16(d) would not violate R. 1:20-4(b), because the allegations of the complaint clearly delineate respondent's use of Keating's retainer monies "without performing legal services on her behalf." No other RPC addresses this conduct. The mistaken citation to RPC 1.5(a) in the complaint is a matter of form, rather than substance, and does not amount to a due process violation. Under the circumstances presented, we determine that respondent violated RPC 1.16(d).

As to the charge that respondent violated RPC 8.1(b) for failure to cooperate with the DEC investigator, a finding of a

violation of that rule requires that the failure to reply to a lawful demand for information from a disciplinary authority be knowing. Here, the DEC investigator's letters to respondent were returned as undeliverable. It cannot be said, thus, that his failure to cooperate with the investigator was knowing.

On the other hand, respondent breached his duty to keep the disciplinary system apprised of his current addresses, as required by R. 1:20-1(a). We consider that to be an aggravating factor.

There remains the quantum of discipline to be imposed for respondent's violation of RPC 1.16(d). In a case where a lawyer with an unblemished disciplinary record delayed the return of the unearned portion of the client's retainer for four months, we imposed an admonition. In the Matter of Stephen Landfield, DRB 03-137 (July 3, 2003).

In a default matter, however, the appropriate discipline for the found ethics violations is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6).

In a case very similar to the present one, In re Kivler, 188 N.J. 586 (2006), the attorney received a reprimand for failing to return an unearned retainer to the client and

subsequently failing to cooperate with the ethics investigation. Like respondent, Kivler then allowed the matter to proceed to us as a default. We enhanced the discipline to a reprimand, citing Nemshick, supra.

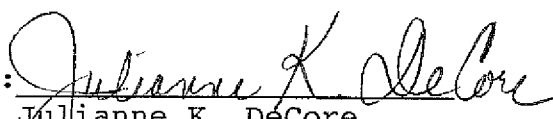
In keeping with the precedent in Kivler, we determine that a reprimand is the appropriate sanction for respondent's misconduct. We also require him, within sixty days of the date of the Court order, to return the entire fee to the client, as it was unearned.

Member Baugh did not participate.

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

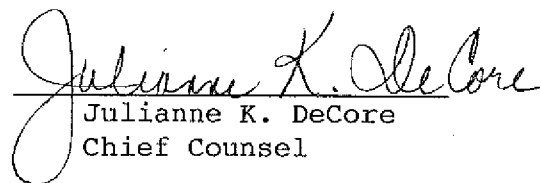
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Edward G. Werner
Docket No. DRB 12-308

Decided: March 8, 2013

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh						X
Clark			X			
Doremus			X			
Gallipoli			X			
Wissinger			X			
Yanner			X			
Zmirich			X			
Total:			8			1


Julianne K. DeCore
Chief Counsel