SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-280
District Docket No. XB-2011-0021E

IN THE MATTER OF	:
MARC A. FUTTERWEIT	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 16, 2014

Decided: February 21, 2014

John C. Maloney, Jr. appeared on behalf of the District XB Ethics Committee.

Gerard E. Hanlon appeared on behalf of respondent.

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

This matter was originally before us, at our June 2013 session, as a recommendation for an admonition filed by the District XA Ethics Committee (DEC), which we determined to treat as a recommendation for greater discipline, pursuant to R. 1:20-15(f). The complaint charged respondent with having violated RPC 1.5(b) (failure to memorialize the basis or rate of the fee)

and RPC 1.8(a) (conflict of interest; business transaction with a client). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1989. He is engaged in the practice of law in Dover, Morris County. In 2009, he received an admonition for failure to comply with a client's reasonable requests for information about the client's case, a violation of RPC 1.4(b). In the Matter of Marc A. Futterweit, DRB 08-356 (March 20, 2009).

Some procedural background will be helpful to a better understanding of this disciplinary matter.

Respondent was the subject of a November 2009 ethics grievance filed by Sharon Eller, charging him with violating RPC 1.7 (conflict of interest), RPC 1.15(b) (failure to promptly turn over funds or property that the client or a third party is entitled to receive), and RPC 8.4(c) (misrepresentation) ("the Eller matter"). The charges were dismissed, following a hearing. Respondent's counsel in the instant matter argued that, because respondent's failure to provide a written retainer agreement to the client in the current matter was discussed in the Eller matter complaint and during the course of that earlier hearing, the DEC had, in effect, "waived its right" to charge him with that violation in a subsequent proceeding. Counsel's

opening argument was interpreted by the DEC hearing panel as a motion to dismiss the allegation that respondent had violated RPC 1.5(b). The hearing panel denied counsel's motion. In its report, the hearing panel set forth its rationale for denying counsel's motion:

> (1) The issues raised in the prior grievance did not constitute any part of the grievances set forth in the complaint before the Panel;(2) the grievances in the present complaint did not constitute part of the official proceedings of the prior grievance; and (3) the findings of the Panel at the conclusion of the hearing for the prior grievance did not include the allegations and alleged RPC violations before that prior panel. Thus, the decision was made to continue with the hearing regarding both counts one and two of the complaint.
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> [HPR¶9.][1]

Counsel again raised this issue, during oral argument before us. We agree with the hearing panel's conclusion that the allegation that respondent violated RPC 1.5(b) was properly before us.

We now turn to the facts of this matter.

As stated previously, respondent was charged with failing

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[1] HPR refers to the hearing panel report.

to provide a written retainer agreement to his client and with entering into a business relationship with that client, without following the safeguards of RPC 1.8. By way of defense, respondent argued, during the ethics hearing, that he never represented the individual. Respondent's answer, letters, and testimony were wholly inconsistent as to whether the individual was ever his client or whether he ever entered into a business transaction with the individual.

In 2007, Sharon Eller (the grievant in the Eller matter) and her husband, Martin Eller, entered into a business relationship with Mark Taggart, who incorporated under the name Acme Fabrication and Supply Corp. (Acme). In 2008, the Ellers introduced respondent to Taggart. Taggart and respondent discussed respondent's rendering of legal services to him, personally, in numerous matters. According to respondent, however, he never actually represented Taggart.[2] Respondent testified that, despite his offer to provide services to Taggart

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[2] Despite respondent's testimony that he never represented Taggart, during the hearing in the Eller matter, respondent testified that, at one point, Taggart said that he owed respondent $50,000 as fees.

and despite their forty to fifty conversations, they got no further in discussing the terms of respondent's legal services to him.[3] According to respondent, on occasions when Taggart had needed legal assistance, he had declined respondent's representation. Respondent testified that he had no correspondence with Taggart, never billed him for services, and never received any money from him.

Despite respondent's contention that he never represented Taggart, in his answer filed in the instant matter, he admitted the allegation that Taggart had first retained him in 2008 and that he had continued to represent Taggart until approximately September 2010. Respondent did not claim, in his answer, that he had never represented Taggart. In addition, during respondent's testimony in the Eller matter, the following exchange took place between respondent and the presenter:

Q. Do you presently represent Mr. Taggart?

A. No.

Q. When did you stop representing him?

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[3] Respondent stated that not all of these conversations were about business issues.

A. Three months ago or so.

Q. How long did you represent Mr. Taggart?

A. Well, Mr. Eller introduced me back in 2008, and we started talking, basically, we just started talking, and we just kept talking, as it turns out.

[Ex.B at 128-4 to 12.][4]

Moreover, during the hearing in the Eller matter, respondent's counsel asserted that respondent "was always the lawyer for Mark Taggart, he was never the lawyer for Acme Fabrication."[5] Also, respondent testified, in the Eller matter, that, "[b]ased on a representation from [Taggart]," Taggart owed him $600,000 in legal fees.

Contrarily, at the hearing in this matter, respondent testified that Taggart had promised to pay him $600,000 for future services, a sum that Taggart had come up with on his own. Respondent was unable to determine if the $600,000 fee was

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[4] Exhibit B is the transcript of the ethics hearing in the Eller matter.

[5] Counsel's statement that respondent was Taggart's attorney is irrelevant to our analysis because respondent himself admitted that he represented Taggart.

reasonable because, he said, he did not know what Taggart wanted him to do and an arrangement was never put in writing.

According to respondent, his repeated attempts to get Taggart "to sign" [a retainer agreement] were unsuccessful.

In a letter to the DEC investigator, respondent stated that, when he first met Taggart, Taggart offered him a couple of options: either bill him on an hourly basis or become a partner in his business, Acme, and share in the profits which, Taggart promised, would be large. Respondent did not prepare a writing for either Taggart or Acme, setting forth the rate or basis of his fee. Rather, there was an oral agreement that, in return for legal advice on numerous matters, respondent would receive a share in Acme's profits.

Respondent denied that his conduct was a violation of RPC 1.5(b), as charged in the complaint. He told the DEC investigator that he was not obligated to memorialize the fee agreement with Taggart because he was "doing work for a corporation [Acme], which I was part of so a retainer agreement would not be required as I would/could not bill myself." Contrarily, respondent testified in this matter that he was

going to be the attorney for Taggart and never had anything to do with Acme.[6]

The complaint also charged that, by entering into a business transaction with either Taggart or Acme, respondent violated RPC 1.8(b), because he did not ensure that the terms of the transaction were fair and reasonable to the client and transmitted to the client, in writing, in a manner that can be understood by the client; did not advise the client of the desirability of seeking and was given a reasonable opportunity to seek the advice of independent legal counsel; and did not obtain the client's informed consent to the essential terms of the transaction and the lawyer's role in the transaction.

Respondent testified that he never advised Taggart to consult with independent counsel, because their arrangement that he would share profits, instead of receiving fees, never went further than their "initial meetings" and he never performed services for Acme. Respondent asserted that he had "agreed in

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[6] Respondent's name is on Acme's business plan as counsel. According to respondent, Taggart told him that he "needed to put a name there to give it some legitimacy." Respondent had no role in Acme's formation.

principle" to be in business with Taggart, "but it never came to be." He admitted that it was his responsibility to put the terms of their agreement in writing, but it "kept getting put off."

There was further inconsistency in the record about respondent's relationship with Acme. In a letter to the DEC investigator, respondent stated that, "[w]ith regards to RPC 1.5(b), as I previously explained, as I had been made partner in the business endeavor, I was not going to be charging a lawyer's fee."[7] With regard to that statement, respondent testified, "I don't want to say that I misspoke or mistyped, if you will. As I would have been made a partner or as he was proposing to make me a partner in the business agreement is what I should have said."

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[7] Respondent also stated, in that letter: "I would have been [sic] shared in the profit of the company, if any. If there was no profit, noone [sic] in the company would benefit. As I was not representing Mark Taggart, I was not in violation of RPC 1.5(b)." In another letter to the investigator, respondent stated similarly that, in exchange for legal advice, he would receive a portion of Acme's profits. "In essence, [he] would have been in business with Mr. Taggart and therefore a retainer agreement would not have been required."

Respondent testified further that the owners of Acme were Sharon Eller and Mrs. Taggart. Thus, he claimed, when he had agreed to receive a share of Acme's profits, he would not have been doing business with Taggart, "because he was not part of the corporation."

In respondent's answer, he also denied the allegation that he violated RPC 1.8. In his answer's STATEMENT OF EXPLANATION AND REQUEST FOR DISMISSAL, respondent alleged that he was never the attorney for Acme and that, "while he may have represented Mr. Taggart on unrelated matters, [he] was involved with Acme or Taggart only to the extent Taggart promised Respondent a 'substantial interest' in Acme or other financial consideration 'in lieu of monetary legal fees.'" He claimed that he was never involved in a business transaction with Taggart, that Acme "had already been formed and supposedly operating," that he had never been "asked for advise [sic] either before or during the formation and operation of Acme," and that he had "no involvement with operating or giving advice to the business . . . ." He did admit, however, that he had not "discuss[ed]" or "resolve[d] any of the [RPC 1.8(a)] issues with Mr. Taggart and/or Acme."

In the DEC's view,

> [r]espondent's position was inconsistent and suspect considering Respondent's admissions to the critical allegations in the complaint, statements contained in certain exhibits (P-2,P-3,P-4), positions in [the transcript of the Eller matter], Respondent's own testimony during the course of the prior hearing (complaint, Exhibit "B"), and his testimony before the Panel.

The DEC also noted that "[r]espondent has essentially admitted to the violations via his answer as indicated above." The DEC found that it was "beyond dispute" that respondent had represented Taggart.

As to RPC 1.5(b), the DEC noted that, in the instant matter, respondent admitted the allegations in the complaint that, in 2008, Taggart had retained him to represent him, personally, in numerous legal matters and that he had represented him until September 2010. The DEC noted further that respondent had admitted, in his answer and his testimony, that Taggart owed him $600,000 in legal fees.[8] The DEC also pointed to counsel's remarks, in the Eller matter, that respondent "was

[8] Respondent's admission in his answer was that, in the Eller matter, he had said that Taggart owed him $600,000. In this matter, he said that Taggart would have owed him that sum for future services.

always the lawyer for Taggart." Based on respondent's admission that he had not given Taggart a written fee agreement, the DEC found that respondent violated RPC 1.5(b).

As to the charged violation of RPC 1.8(a), the DEC found that respondent entered into a business transaction with Taggart by acquiring a pecuniary interest in Acme, that is, by agreeing to share in Acme's profits, in lieu of legal fees. The DEC concluded that respondent was guilty of a conflict of interest by his failure to observe the requirements of RPC 1.8(a) (the terms of the transaction must be fair and reasonable to the client and fully disclosed and transmitted to the client, in writing, in a manner that can be understood by the client; the client is advised, in writing, of the desirability of consulting with counsel of his own; and the client must give informed consent, in writing, to the essential terms of the transaction and to the lawyer's role in the transaction).

In the DEC's view, respondent had agreed to receive a share of Acme's profits, had never advised Taggart to consult with independent counsel and had never put their agreement in writing, in violation of RPC 1.8(a).

Although the presenter suggested that a reprimand was appropriate discipline, the DEC recommended an admonition.

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

As seen from the record, respondent's statements about his representation of Taggart were wholly inconsistent. In one breath, he stated that he had represented Taggart from 2008 to 2010 and that Taggart owed him $600,000 for fees. By his own words, he stopped representing Taggart in 2010. With the next breath, he said that he had never represented Taggart and that the $600,000 was for future work that never came to pass. In one moment, respondent represented Acme; in the next he did not.

We note, however, that respondent testified, in the Eller matter, that he represented Taggart. We also note that, in his answer to the complaint in the present matter, he made that same assertion. It is immaterial who the client was, the individual or the business. The fact remains that respondent did not have a writing setting forth the fee either with Taggart or Acme and respondent so admitted. We find, thus, that he violated RPC 1.5(b) and RPC 1.8(a).

Conduct involving failure to prepare the written fee agreement required by RPC 1.5, even if accompanied by other, non-serious ethics offenses, typically results in an admonition. See, e.g., In the Matter of Gerald M. Saluti, DRB 11-358 (January 20, 2012) (attorney failed to communicate his fee in writing with respect to a post-conviction relief application and a potential appeal from the client's conviction); In the Matter of Myron D. Milch, DRB 11-110 (July 27, 2011) (attorney did not memorialize the basis or rate of his fee in writing; the attorney also lacked diligence in the case and failed to communicate with the client); In the Matter of Eric S. Pennington, DRB 10-116 (August 3, 2010) (attorney did not timely set forth the basis or rate of his fee in writing); and In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (attorney failed to memorialize the rate or basis of his fee and, in another client matter, failed to promptly deliver funds to a third party).

Likewise, when an attorney enters into a loan transaction with a client without observing the safeguards of RPC 1.8(a), the ordinary measure of discipline is an admonition. See, e.g., In the Matter of George W. Johnson, DRB 12-012 (March 22, 2012) (as trustee of a testamentary trust, attorney made a loan from the trust to himself without seeking court approval, as required

by Clark v. Judge, 84 N.J. Super. 35, 59 (App. Div. 1964), aff'd 44 N.J. 550 (1965); extensive mitigation considered, including the attorney's forty-four-year untarnished record); In the Matter of Damon Anthony Vespi, DRB 12-214 (October 2, 2012) (without complying with the requirements of RPC 1.8(a), attorney obtained a security interest in property that was the subject of the representation by having the client sign a promissory note to guarantee the payment of his $30,000 fee; to secure the note the attorney obtained an assignment of interests in payment under certain contracts and a personal guaranty for the benefit of his law firm); In the Matter of Frank J. Shamy, DRB 07-346 (April 15, 2008) (attorney made small, interest-free loan to three clients, without advising them to obtain separate counsel; the attorney also completed an improper jurat; significant mitigation considered); In the Matter of April Katz, DRB 06-190 (October 5, 2006) (attorney solicited and received a loan from a matrimonial client); and In the Matter of Frank J. Jess, DRB 96-068 (June 3, 1996) (attorney borrowed $30,000 from client to satisfy a gambling debt).

The question is whether an admonition for the two RPC violations is sufficient or whether more serious discipline is required. Shamy, for instance, received an admonition for

entering into a business transaction with three clients and also taking an improper jurat. Compelling mitigation, however, called for only an admonition.

Here, the record does not reveal any mitigation. To the contrary, three aggravating factors are present: (1) respondent gave the DEC inconsistent statements in both disciplinary matters; (2) he received an admonition, in 2009, for failure to communicate with a client; and (3) he never acknowledged any wrongdoing on his part. Indeed, he has shown no remorse and continuously altered his statements to try to back-pedal and undo prior statements against his interests, rather than admit that he had made a mistake. Had he done so, an admonition might have been sufficient. In light of the aggravating factors, we find that a reprimand is the appropriate measure of discipline in this case.

Member Singer does not find a violation of RPC 1.8(a), but agrees that a reprimand is the appropriate quantum of discipline. Members Gallipoli and Hoberman would impose a censure. Member Doremus did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and

actul expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Marc A. Futterweit
Docket No. DRB 13-280

Argued: January 16, 2014

Decided: February 21, 2014

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Censure	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Doremus						X
Gallipoli				X		
Hoberman				X		
Singer			X			
Yamner			X			
Zmirich			X			
Total:			6	2		1

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