SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-409
District Docket No. IIB-06-0018E

IN THE MATTER OF	
ELLAN A. HEIT	
AN ATTORNEY AT LAW	

Decision

Argued: March 19, 2009

Decided: June 19, 2009

Christopher Killer appeared on behalf of the District IIB Ethics Committee.

Pamela Brause appeared on behalf of respondent.

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

This matter came before us on a disciplinary stipulation between respondent and the District IIB Ethics Committee ("DEC"). Respondent stipulated to facts supporting violations of RPC 1.5, presumably (a) (unreasonable fees), RPC 1.16(d) (failure to surrender a client file), RPC 8.1(b) (failure to cooperate with disciplinary authorities - cited in the complaint as R. 1:20-3(g)(4)), and R. 5:3-5 (retainer agreements in civil family actions).

The DEC recommended a reprimand for respondent's misconduct. We agree with that recommendation.

Respondent was admitted to the New Jersey bar in 1989. At the relevant time, she maintained a law office in Hackensack, New Jersey.

Respondent received an admonition in 2004. Specifically, a New York attorney referred a case to her. However, the client believed that she had retained the New York attorney and did not realize that respondent was representing her until she read the body of the retainer agreement. Neither the retainer agreement nor the letterhead listed respondent as "of counsel" to the New York attorney's firm. Respondent's conduct violated RPC 7.1(a)(1) (making a false or misleading communication about the lawyer's services), RPC 7.5(a) (improper use of a firm name), and RPC 1.5(e) (improper sharing of fees). In the Matter of Ellan A. Heit, DRB 04-138 (May 24, 2004).

The New Jersey Lawyers' Fund for Client Protection report shows that respondent has been ineligible to practice law since September 29, 2008, for failure to pay her annual attorney assessment. At oral argument respondent's counsel stated that respondent has not practiced law for three years.

The facts of this matter are as follows:

On June 14, 2003, Sonia Gil retained respondent to oppose her ex-husband's motion to reduce child support payments. Respondent's retainer agreement called for an hourly rate of $175. Gil paid respondent a $500 retainer. In December 2004, Gil discharged respondent and hired attorney Pamela Cerruti.

Respondent submitted only one bill to Gil, in August 2005, for $4,015.02. Gil subsequently filed for fee arbitration. The fee arbitration committee determined that respondent was not entitled to any additional fees and referred the matter to the Office of Attorney Ethics ("OAE") because of possible ethics violations. The OAE forwarded the matter to the DEC.

By letter dated August 18, 2006, the DEC investigator requested respondent's complete file within ten days. On October 31, 2006, the DEC made a second request for the file. On that date, respondent delivered a portion of her file and told the investigator that she was "having a 'bad year and ran out of time'." Again, on January 26, 2007, the investigator requested respondent's entire file. Subsequently, respondent retained counsel who, on February 8, 2007, requested an extension to produce Gil's file. The DEC denied the request. Respondent did not turn over any additional documentation to the

DEC. Respondent's counsel later advised the DEC that respondent had not found any additional portions of the Gil file.

Respondent stipulated that she failed to provide Gil with an invoice every ninety days, as required by R. 5:3-5 and, therefore, violated that rule. Subsection (a) of that rule provides that retainer agreements in civil family actions shall have annexed a statement of client rights and responsibilities that shall include, among other things,

> (5) when bills are to be rendered, which shall be no less frequently than once every ninety days, provided that services have been rendered during that period . . . .

Respondent admitted violating RPC 1.5, presumably (a) (reasonableness of fees), in that she failed to keep adequate records from which an inference could be drawn that her fees were reasonable. Respondent attempted to reconstruct her billing records, but admitted that the invoice that she forwarded to Gil did not represent records contemporaneously kept, but was merely an estimated reconstruction. The August 6, 2005 invoice reflected:

1. billing entries for time spent on eighteen separate events, without supporting diary entries for fourteen of them;

2. only six (out of nineteen) entries supported by computer entries, which entries failed to disclose the amount of time devoted to the services;

3. six hours to review documentation, which time was excessive based on the documentation in respondent's file;

4. a one-half hour telephone conversation with the accountant, on October 18, 2004, and, on October 27, 2004, an additional one-hour conversation to discuss the evaluation, notwithstanding respondent's statement that she did not charge for telephone calls;

5. excessive charges – a one-hour charge for the preparation of a December 9, 2004 letter to the adversary, requesting IRS documentation and a one-hour charge for "a cover letter to the adversary with interrogatory answers;" and

6. three hours charged for services, after Gil discharged respondent.

Respondent had estimated that Gil's matter would be resolved in ten to fifteen hours, but billed Gil for twenty-five hours, without informing her that the matter would require more time than originally estimated.

Finally, respondent failed to turn over Gil's file to her new attorney, despite being requested to do so.

Following a full review of the record, we are satisfied that it contains clear and convincing evidence that respondent's conduct was unethical.

Respondent stipulated that she charged her client an unreasonable fee (RPC 1.5(a)) and failed to turn over the file to Gil's new attorney, once Gil terminated the representation (RPC 1.16(d)). Respondent also delayed in turning over her file to the DEC investigator for two months and then turned over only a portion of it, thereby violating RPC 8.1(b).

Respondent also stipulated to violating R. 5:3-5 by failing to give Gil an invoice every ninety days. Although such a violation is not an ethics rule violation, we, nevertheless, deem it subsumed in the RPC 1.5(a) charge, because Gil could not determine the reasonableness of respondent's fee without having access to statements every ninety days, during respondent's representation.

The only issue for determination is the proper quantum of discipline for respondent's misconduct. The attempt to collect an unreasonable fee is conduct that ordinarily deserves an admonition, if it is limited to one incident. 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 rise to 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).

Similarly, admonitions are ordinarily imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the DEC investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to DEC's requests for information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous communications regarding a grievance); In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance); In the Matter of Andrew T. Brasno, DRB 97-091 (June 25, 1997) (attorney failed to reply to the ethics grievance and failed to turn over a client's file); and In the Matter of Mark D. Cubberley, DRB 96-090

(April 19, 1996)(attorney failed to reply to the ethics investigator's requests for information about the grievance).

If the attorney who failed to cooperate with ethics authorities has been disciplined before, but the attorney's disciplinary record is not serious, then reprimands have still been imposed. See, e.g., In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

Admonitions are also generally imposed in cases involving the failure to turn over files, even if accompanied by other minor misconduct or an ethics history that is not viewed as serious. See, e.g., In the Matter of Vinaya Saijwani, DRB 07-211 (November 13, 2007) (attorney failed to turn over five client files as a result of failing to carefully read an attorney's letter requesting them; prior reprimand); In the Matter of Gary A. Kay, DRB 00-382 (February 15, 2001) (attorney failed to reply to his client's numerous requests for information about the

status of the matter and failed to turn over files to the new attorney after being relieved as counsel; prior private reprimand ten years earlier for unrelated misconduct (advertising)); In the Matter of Generoso Scala, DRB 99-378 (December 17, 1999) (failure to surrender files to client's new attorney); In the Matter of Andrew T. Brasno, DRB 97-091 (June 26, 1997) (after being dismissed by his client, attorney failed to comply with the client's requests to turn over the file and failed to cooperate with disciplinary authorities); In the Matter of Howard M. Dorian, DRB 95-216 (August 1, 1995) (attorney engaged in gross neglect, failure to communicate with the client, failure to withdraw as counsel, failure to promptly turn over the file to new counsel, and failure to reply to requests for information from a disciplinary authority); In the Matter of John J. Dudas, Jr., DRB 95-383 (November 30, 1995) (failure to communicate the status of the matter to the client, failure to turn over the file to new counsel and failure to cooperate with disciplinary authorities during the investigation); and In the Matter of Richard J. Carroll, DRB 95-017 (June 26, 1995) (failure to communicate with the client, to turn over the file to new counsel for an extended period of time after his services were terminated, and to cooperate with disciplinary authorities; prior private reprimand for failure to communicate with a client).

While the present infractions, standing alone, would warrant an admonition, when combined they could still warrant an admonition under Dorian (admonition for gross neglect, failure to communicate with the client, failure to promptly turn over file to new counsel, and failure to reply to requests for information from a disciplinary authority) and Carroll (failure to communicate with the client, failure to turn over file to new counsel, and failure to cooperate with disciplinary authorities; prior private reprimand). Here, however, respondent's unreasonable fee contains an element of dishonesty -- the invoice was dated almost eight months after respondent was discharged, it was reconstructed and not based on contemporaneously recorded time entries, the documentary support for the billing often did not correspond to the services rendered, and it included a charge for time spent after respondent was discharged. We, therefore, determine that a reprimand is more commensurate with respondent's ethics offenses.

Chair Pashman and Vice Chair Frost 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
Edna Y. Baugh, Acting Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Ellan Heit
Docket No. DRB 08-409

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Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman						X
Frost						X
Baugh			X			
Clark			X			
Doremus			X			
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			6			2

Julianne K. DeCore
Chief Counsel