SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-217

IN THE MATTER OF

ROBERT M. SILVERMAN

AN ATTORNEY AT LAW

Decision

Argued: September 11, 2003

Decided: October 30, 2003

Theresa C. Grabowski appeared on behalf of the District IV Ethics Committee.

David H. Dugan, III appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"). The amended complaint charged respondent with violations of *RPC* 1.2(a) (failure to abide by a client's decision concerning the objectives of representation and concerning whether to accept an offer of settlement), *RPC* 1.4(a) (failure to comply with a client's reasonable requests for information), *RPC* 1.5(b) (failure to communicate in writing the basis or rate of the fee), *RPC* 1.5(c) (failure to prepare a written fee agreement in a contingent fee matter), *RPC* 1.7(b) (representation of a client materially limited by the lawyer's own interests), *RPC* 1.8(f)(1) (accepting compensation for representing a client from one other than the client), *RPC* 3.1 (filing a frivolous lawsuit), and *RPC* 8.4(a) (assist or induce another to violate the *Rules of Professional Conduct*), as well as violations of *R.*1:20A-6 (failure to issue pre-action notice before suing a client for a fee) and *R.*1:21-7 (charging an excessive contingent fee).

Respondent was admitted to the New Jersey bar in 1989. In 2002, he admitted that he failed to maintain a *bona fide* office, in violation of *RPC* 5.5(a) and *R.*1:21-1. The matter was diverted pursuant to *R.*1:20-3(i)(2)(B)(i) and completed on May 8, 2002. Respondent is a partner with Kimmel & Silverman ("K&S"), which has offices in Haddonfield, New Jersey and Ambler, Pennsylvania.

This matter stems from respondent's representation in a "lemon law" case, which he settled for a lump sum, inclusive of his legal fees. Respondent allocated one-half of

the settlement for his client's damages and one-half for his legal fees. Although the client had initially accepted the settlement offer, she later objected to the fee allocation and rejected the settlement. After she filed a grievance, respondent sued the client for his legal fees.

Specifically, on March 1, 2001, Linda Wagoner retained K&S to represent her in an action against Chrysler Corporation. Although Wagoner's original warranty had expired, she had purchased an extended warranty. Wagoner had bought the vehicle, a 1998 Dodge Neon, from a dealership in Wayne, New Jersey. The car began to leak oil and the dealership replaced the head gasket. After the car began to leak oil again, the dealership refused to repair it. Wagoner contacted K&S after viewing its internet website, which stated that, upon a successful claim, the manufacturer is required to pay attorneys' fees and that the law firm bears "all costs of litigation and preparation."

On March 1, 2001, respondent sent to Wagoner a letter confirming the representation. That letter provided that there would be "no cost or fee . . . for our legal representation." According to the letter, if the claim were to succeed, respondent's fees would be paid by the manufacturer, while if there were no recovery, no fee would be paid. The letter did not disclose the basis or rate of the legal fees. K&S never sent Wagoner a bill.

On May 18, 2001, respondent's associate, Robert Rapkin, informed Wagoner that Chrysler had offered $4,000 to settle the matter and that $2,000 of the settlement funds would be apportioned for her damages and the remaining $2,000 for the firm's legal fees. He also told Wagoner that, although K&S' fees were about $2,600, the firm was willing to accept $2,000. Wagoner accepted the settlement offer. On May 21, 2001, Rapkin sent to Wagoner the following letter:

> This letter will confirm I have done as you have instructed me and accepted the gross amount of ($4,000.00) to settle the above matter. As we had agreed on May 18, 2001 this settlement represents ($2,000.00) in damages for you and ($2,000.00) for attorney fees and costs of bringing the lawsuit. Once the release comes in, I will send it to you to sign, and send back to me, so I can give you your money as soon as possible.

On May 22, 2001, Rapkin sent to Wagoner a release prepared by counsel for Chrysler. The release indicated that for consideration of $4,000, Wagoner released Chrysler from "claims, damages, costs, fees, loss of services, personal injuries and property damage." Wagoner refused to sign the release. She testified that, after reviewing her documents referring to "free representation," she reconsidered the settlement. In a May 29, 2001 letter "faxed" to respondent, Wagoner protested signing a release for $4,000, when the settlement contemplated a payment of only $2,000 to her. She added that:

> I will wait for written verification indicating that the settlement from Chrysler will be the $2,000.00 indicated in the Release form and I am not responsible for any legal fees for representation from your firm. Then I will

> sign the Release form and return it back to you. It has never been my concern how or where Kimmel & Silverman obtains their fees and should not be the factor that blocks this settlement from happening. It is clearly stated in your letter of representation that the fees are not part of the settlement and are obtained from the manufacturer – even if that means going to court.

Respondent replied via a "fax" dated May 29, 2001, in which he asserted that because Wagoner's maximum recovery was approximately $600, the cost of replacing the head gasket, the $2,000 recovery exceeded her actual damages.

Following a telephone conversation the next day, May 30, 2001, respondent "faxed" a letter to Wagoner confirming her position that the $2,000 settlement offer was fair; that because her vehicle could be repaired at another dealership at little or no cost, she had no damages; and that she believed that she did not receive free legal representation. In another "fax" also sent to Wagoner on May 30, 2001, respondent attached a revised release prepared by counsel for Chrysler. The release provided that the $4,000 was "inclusive of attorney fees and costs." In a reply "fax" sent on the same day, Wagoner stated that:

> I simply can not sign a Release that states that I am receiving $4,000.00 for DAMAGES, when in fact as per Mr. Rapkin's letter I am receiving $2,000.00 towards DAMAGES. I have nothing to even justify $2,000.00 towards legal fees. I feel $2,000.00 towards legal fees that I have no idea how much work was done on this is a bit excessive and am open to negotiations of such.

> Pennsylvania Attorney General and now your office.[1] Perhaps Ms. Wagoner feels if she simply wastes enough of our time, I will economically decide to simply pay her part of our attorney fee and cost settlement. However, this is a matter of principle for me and I will never agree to do so. (emphasis added)

In addition, OAE investigators testified that, during an interview on November 16, 2001, respondent stated that he had an agreement whereby Chrysler paid K&S $2,000 for each case settled at the same stage as Wagoner's case.

During the investigation of the grievance, the OAE requested a random sample of settlement amounts and fees between K&S and Chrysler. Respondent produced a list of every New Jersey case handled by K&S against Chrysler from January 1, 2000 to April 15, 2002. Of the approximately 200 cases on the list, K&S' fee was $1,500 in about one-half of them. At the ethics hearing, respondent stipulated that his fee was $2,000 in fifteen percent of the cases on the list.

For his part, respondent testified that K&S specializes in cases brought pursuant to the "lemon law" statute or the Magnuson-Moss Warranty Act. Both statutes contain a fee-shifting provision requiring the defendant to pay the plaintiff's attorneys' fees and costs, if the plaintiff is the prevailing party. Because K&S usually receives its fee from the manufacturer, the firm does not require retainers from its clients. The amount of the

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1 As mentioned above, the grievance predated the lawsuit that respondent filed against Wagoner.

fee is not related to the amount of the recovery, but is based on the number of attorney hours spent on the case and the amount of costs.

Respondent stated that the settlement offer from Chrysler had been presented as a lump sum of $4,000, with no allocation between Wagoner's damages and the firm's fees. Respondent asserted that after the release was revised pursuant to Wagoner's objections, she continued to refuse to sign it. According to respondent, Wagoner stated that she would sign the release if she received more money from the settlement. Respondent refused to reduce his fee. Respondent contended that $2,000 was an excellent recovery for Wagoner because the car had been repaired without expense.

Respondent asserted that he was "less than articulate" in his letter of August 1, 2001 to the DEC, which stated that K&S always receives "the very same $2,000.00 to settle our bill in every case at this stage in the legal process" and that the $2,000 is a "separately negotiated attorney fee and cost settlement with Chrysler." He denied that he had an agreement with Chrysler to receive a fee of $2,000 in every case settled at the same juncture as Wagoner's. Respondent testified that, after ten or eleven years, Chrysler had developed an understanding of how much attorney time had been spent on a case at a particular phase in the proceedings. According to respondent, Chrysler would know, without being shown any part of the file, that K&S had earned almost $3,000 in fees and, therefore, Chrysler would include $2,000 for fees in a settlement offer, thereby receiving

a discounted fee. Respondent stated that the fees were not separately negotiated and that the offer was a lump sum payment of $4,000, inclusive of attorneys' fees and costs.

Stephen Goodrich, counsel for Chrysler, submitted an affidavit dated March 19, 2002, denying the existence of an agreement between him and respondent or his firm concerning attorneys' fees. He added that he usually included attorneys' fees, without apportioning the amounts, when making settlement offers.

Respondent testified that he sued Wagoner in Pennsylvania because he believed that she had sufficient contact, such as "faxes" and letters, with his office to bring the lawsuit there. In a letter dated August 30, 2001 to the DEC, respondent discussed the reason that K&S brought the lawsuit in Pennsylvania:

> As to the venue, we chose Pennsylvania because it is far more convenient to the lawyers involved in the underlying case, who will be witnesses. Both Mr. Rapkin and I reside in Pennsylvania. Since the representation/this dispute involved work performed in both New Jersey and Pennsylvania and the settlement was reached with a Michigan Corporation, our choice of Venue was at all times appropriate. With all due respect to Ms. Wagoner, when choosing a venue for filing suit, I was not going to choose her convenience over the convenience of my attorneys.

With respect to the basis of the lawsuit, respondent contended that once Wagoner agreed to accept the settlement offer, K&S was entitled to have its fees paid and that Wagoner breached an agreement by not signing the release. He also claimed that K&S' initial letter to Wagoner required her to participate in her case, which would include

following through on a settlement.[2] Respondent asserted that because Wagoner had breached a contract by not participating in her case, his firm would be entitled to its fees and costs as damages. He stated that Rapkin chose the $6,000 amount listed in the complaint against Wagoner based on the amount of attorneys' fees the firm should have received pursuant to the settlement, plus the anticipated additional cost of collecting the fee.

Rapkin admitted that he had not told Wagoner the firm's hourly rate or that the firm could sue her for its fees, plus collection costs. The following exchange took place between Rapkin and a panel member:

> Panel: Now, your firm advertises that you take these Lemon Law cases and that your clients never have to pay any fees, right?
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> The Witness: That's true, and they don't.
>
> Panel: Then how can you sue your client for fees?
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> The Witness: The client – well, I don't know how to answer that other than to say that there was a deal. The client agreed that we were entitled to those fees and we wanted to collect our fees.
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> Panel: But how does the client make an intelligent decision as to what you're entitled to as far as fees are concerned?
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> The Witness: Well, I think they're able to do that when I tell them what my bill is and that I'm reducing it down and that she's always entitled to a copy of it. . . .

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2 The letter does not require Wagoner's participation.

Panel: She wasn't provided with a copy of the bill?

The Witness: No. I would have been happy to give her one.

The DEC found that respondent violated *RPC* 1.2(a) by suing Wagoner in Pennsylvania in an attempt to coerce her to accept the settlement offer; *RPC* 1.5(b) by failing to disclose the basis for the firm's legal fees; *RPC* 1.7(b) by setting his legal fees, thereby reducing the amount of Wagoner's recovery, such that his and his client's interests were adverse; *RPC* 3.1 by filing a frivolous complaint against Wagoner in a court that did not have jurisdiction over her; and *RPC* 8.4(a) by assisting or inducing Rapkin to violate the *Rules of Professional Conduct*. The DEC found that respondent "probably" had an agreement with Chrysler to receive $2,000 to settle "lemon law" cases. The DEC found no violation of the remaining charges.

The DEC recommended a sixty-day suspension, noting that had respondent not sued Wagoner, its findings may have been different.

Following a *de novo* review of the record, we are satisfied that the DEC's finding that respondent filed frivolous litigation is supported by clear and convincing evidence. We determined to dismiss the remaining violations.

Respondent agreed to represent Wagoner with the understanding that she would not be required to pay his fee. K&S' website and letters made it clear that, under statutory fee-shifting provisions, the manufacturer is responsible for payment of legal fees and that

the legal services were "free" to the client. Based on that understanding, Wagoner retained respondent to represent her in a "lemon law" case against Chrysler. Respondent never informed Wagoner that she could be responsible for his legal fees. His letter dated March 1, 2001, stated that if they were successful, the fees would be paid "through the Court" and if they were unsuccessful, the firm would not be paid.

After Wagoner rejected the settlement that she had previously accepted, respondent authorized Rapkin to sue her for legal fees. The lawsuit against Wagoner was frivolous, in violation of *RPC* 3.1. Respondent contended that Wagoner's acceptance of the settlement offer created a contract that she later breached. After accepting the settlement offer, Wagoner reviewed her documents from respondent, reflected on them, and determined that, despite the representations to the contrary, the agreement required her to pay respondent's legal fees from her portion of the settlement. Wagoner was permitted to revoke her acceptance of the settlement offer. Instead of suing his client, respondent should have taken steps to protect her interests. He could have continued to negotiate with counsel for Chrysler to obtain a higher settlement that would increase Wagoner's recovery and still compensate his firm. He could have further reduced his fee. He could have counseled Wagoner to reject the settlement and filed suit against Chrysler. He could have withdrawn from the representation. Because Wagoner had no obligation to pay respondent's fee, his lawsuit against her was without merit.

Furthermore, the amount of damages claimed and the location of the lawsuit were patently inappropriate. The amount of damages sought, $6,000, was more than twice the amount of fees that respondent claimed to have earned and three times the amount that he had agreed to accept. In addition, respondent, an attorney admitted in New Jersey, was retained by a New Jersey resident who had purchased an allegedly defective automobile from a Chrysler dealership located in New Jersey. Respondent admitted that he chose to file suit in Pennsylvania because it was more convenient than suing Wagoner in New Jersey.

We, thus, determined that respondent's lawsuit against Wagoner was frivolous and violated *RPC* 3.1.

As mentioned above, we found no clear and convincing evidence to support the remaining charges. The complaint charged respondent with two violations of *RPC* 1.2(a): one for failure to abide by the client's decisions concerning the objectives of representation, and the other for filing "suit against the client in a tribunal that did not have jurisdiction over the client in an effort to force acceptance of settlement by the client." There is no evidence that respondent failed to abide by Wagoner's decisions in any respect, including whether to accept the settlement. Respondent neither accepted nor declined a settlement offer contrary to his client's direction. In addition, the record does not support the finding that the lawsuit against Wagoner was filed to coerce her to accept

the settlement from Chrysler. When respondent filed the lawsuit, he had been discharged and the grievance against him had been filed. The complaint itself does not seek to enforce the settlement but to collect legal fees. Although we found that respondent's lawsuit was frivolous, in violation of *RPC* 3.1, we did not find a violation of *RPC* 1.2(a).

The charge that respondent violated *RPC* 1.4(a) was based on his failure to turn over his file to Wagoner after he was discharged. Respondent produced a letter indicating that Wagoner's new counsel agreed that she did not need a copy of the file. That evidence was not rebutted. Although a more appropriate charge would have been a violation of *RPC* 1.16(d) (failure to protect client's interests upon termination of representation), we determined that respondent was willing to produce his file and did not fail either to communicate with his client or to protect her interests upon termination of representation.

As mentioned above, respondent expected to receive his fee from Chrysler. Because respondent had no intent to charge Wagoner a legal fee, his failure to set forth the basis or rate of his fee did not violate *RPC* 1.5(b). Moreover, respondent did not charge Wagoner a contingent fee, in violation of *RPC* 1.5(c) (failure to provide a written contingent fee agreement) and *R*.1:21-7 (excessive contingent fee). Although respondent's fee was contingent on a successful result, the fee would have been paid by the defendant, not the client. In addition, *R*:1:21-7, which mandates maximum percentage limits of fees

in contingent fee matters, applies only to tort cases. Wagoner's claim was based on breach of a warranty, not a tort.

We also determined that respondent did not engage in a conflict of interest, in violation of *RPC* 1.7(b). Although the amount of respondent's fee was dependent on the amount of his client's settlement, it is not unusual for attorneys to have an interest in their client's recovery. For example, in the typical contingent fee case, the higher the client's recovery, the higher the attorney's fee will be. This situation, however, does not constitute a conflict of interest. Indeed, *RPC* 1.8(j), which prohibits attorneys from acquiring a proprietary interest in the client's cause of action, expressly permits attorneys to contract with clients to receive a reasonable contingent fee in civil actions.

RPC 1.8(f)(1) prohibits an attorney from accepting compensation from someone other than the client unless (1) the client consents, (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship, and (3) client confidentiality is preserved. Because the exceptions to the rule apply in this case, the rule was not violated. Wagoner consented to Chrysler's payment of respondent's fee pursuant to the statutory fee-shifting provision. There was no interference with respondent's independence of professional judgment. Respondent did not disclose confidential client information. We, thus, found that respondent did not violate *RPC* 1.8(f)(1).

The DEC found that respondent violated *RPC* 8.4(a) by assisting or inducing Rapkin to violate the *Rules of Professional Conduct.* Although Rapkin filed the frivolous lawsuit against Wagoner, because he acted at respondent's direction, we did not find that Rapkin violated the *Rules of Professional Conduct.* Because Rapkin did not violate the *Rules of Professional Conduct*, we did not find that respondent assisted or induced Rapkin to do so.

With respect to *R.*1:20A-6, respondent admitted that he had not provided Wagoner with the required pre-action notice before he sued her for his fee. The rule serves as a procedural mechanism to prevent attorneys from litigating fee issues unless the client is notified of the right to request fee arbitration. The failure to comply with the rule, however, does not necessarily amount to a violation of the *Rules of Professional Conduct.*

We did not find clear and convincing evidence that respondent had an improper fee agreement with Chrysler. In his letter to the DEC dated August 1, 2001, and during his interview with the OAE investigators on November 16, 2001, respondent stated that he had an agreement whereby Chrysler paid him legal fees of $2,000 in every case settled during the same stage as the *Wagoner* case. At the hearing, respondent denied that he had such an agreement with Chrysler, stating that his letter had been "less than articulate."

This matter is distinguishable from *In the Matter of Karel L. Zaruba*, Docket No. DRB 03-098 (2003), in which we voted to suspend an attorney for one year.[3] In that case, corporate counsel paid plaintiffs' attorneys so that they would not represent plaintiffs in lawsuits against the corporation by whom counsel was employed. The plaintiffs' attorneys in that case essentially received a bribe in exchange for their agreement to abstain from filing lawsuits against the corporation. They were disciplined in another jurisdiction for their numerous violations of the *Rules of Professional Conduct*. Here, respondent clearly had no agreement to abstain from suing Chrysler. We did not find clear and convincing evidence that respondent had an agreement with Chrysler that he would receive $2,000 in every case. At most, the record supports the conclusion that Chrysler paid respondent approximately the same fee when the case settled at the same stage of the proceedings.

There remains the issue of the quantum of discipline. In *In re McDermott*, 142 *N.J.* 634 (1995), the attorney received a reprimand for filing a criminal complaint against his client and her parents who had stopped payment on a fee check, despite the client's assurances that she intended to pay for services rendered and believed they could reach an amicable solution. In *In the Matter of Alan Wasserman*, DRB Docket No. 94-228 (1994), the attorney received an admonition for instituting a frivolous lawsuit against his

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3 That matter is pending with the Court.

former clients for his legal fees and then, after that litigation was dismissed, filing another frivolous lawsuit for the same fees against the former clients' insurance carrier, without notice to the former clients.

We considered as aggravating factors the location of respondent's lawsuit against Wagoner, the amount of damages he sought in that complaint, and his prior diverted ethics matter. We unanimously voted to impose a reprimand. One member did not participate.

We further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert M. Silverman
Docket No. DRB 03-217

Argued: September 11, 2003

Decided: October 30, 2003

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley			X				
O'Shaughnessy			X				
Boylan							X
Holmes			X				
Lolla			X				
Pashman			X				
Schwartz			X				
Stanton			X				
Wissinger			X				
Total:			8				1

Julianne K. DeCore
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Acting Chief Counsel