

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-242
District Docket Nos. IX-00-036E

IN THE MATTER OF
EUGENE M. LaVERGNE
AN ATTORNEY AT LAW

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Decision

Argued: November 17, 2005

Decided: December 28, 2005

David Epstein appeared on behalf of the District IX Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline (reprimand) filed by the District IX Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1990. On July 16, 2001, he received a six-month suspension for gross neglect, lack of diligence, failure to communicate with client, failure to return the client's file upon termination of the

representation, failure to safekeep property, and misrepresentation. In re LaVerqne, 168 N.J. 410 (2001). On June 19, 2001, respondent received a reprimand after a criminal conviction for theft by failure to make required disposition of property (respondent failed to pay \$700 for a car purchase and resold the vehicle, claiming that payment had been contingent on the sale of another vehicle). In re LaVerqne, 168 N.J. 409 (2001).

A three-count complaint charged respondent with violations of RPC 1.16(d) (failure to return file to client upon termination of representation), RPC 1.15(d) and R. 1:21-6(a)(2) (attorneys are required to deposit into a business account all funds received for professional services), and RPC 8.1(b) (failure to cooperate with ethics authorities). The third count, alleging failure to cooperate with ethics authorities, was dismissed at the conclusion of the DEC hearing.

These charges stemmed from respondent's representation of Walter Biernacki, who, in July 1999, retained respondent to file a lawsuit against the Eatontown Fire Company, a volunteer organization of which Biernacki was president. In July 1999, Biernacki was ousted from his position by a faction within the fire company, because he had discussed firehouse matters with a town councilman.

Biernacki had been escorted out of the firehouse by police, at the request of Joseph Miller, another volunteer fireman and sergeant in the Eatontown police department.

On September 27, 1999, respondent filed a verified complaint against the fire company, Miller, and another fire company member, Dane Richards. The suit alleged that Biernacki's ouster was in retaliation for questions that he had raised about the fire company's disposition of fire company property. The complaint also alleged that the fire company failed to give Biernacki notice of the motion to oust him, which motion had been heard in his absence, and that the fire company then used state action (the police) to improperly prevent him from presiding over the fire company's August 3, 1999 meeting.

Biernacki testified, at the DEC hearing, that he had retained respondent to sue the fire company. He recalled that respondent filed a lawsuit on his behalf, and that shortly thereafter the township attorney stepped in to have him restored to his position.

According to Biernacki, the suit survived his reinstatement, in order to redress the damage to his name.

Biernacki testified that respondent failed to communicate events in the case to him, and that he learned about the status of his matter "through the information given to the company at a

company meeting." In the same manner, Biernacki stated, he found out that his suit had been dismissed.

On cross-examination, respondent sought to question Biernacki about respondent's extensive involvement in the case, various settlement offers, and the adequacy of the representation. However, the panel chair limited the scope of the inquiry to the circumstances of the termination of the representation. Under respondent's cross-examination, Biernacki explained that he never requested his file directly from respondent, but through his new counsel, John Gillespie.

Gillespie also testified at the DEC hearing. According to Gillespie, Biernacki had first consulted with him in January 2001. On January 18, 2001, he sent a letter to respondent at his 601 Grand Avenue office address, announcing his retention, requesting Biernacki's file, and enclosing a substitution of attorney form for respondent's signature. That letter, however, was returned by the post office as undeliverable.

In February 2001, Gillespie sent another letter to respondent, but heard nothing from him.

Ultimately, Gillespie obtained respondent's telephone number from local ethics authorities, and spoke to respondent on March 31, 2001, at which time he personally requested the turn over of the file. At that time, Gillespie recalled, respondent

promised to deliver to his office the file and substitution of attorney, on April 2, 2001. Despite respondent's assurances, Gillespie did not receive the file.

In May 2001, Gillespie filed a motion for an order directing respondent to execute the substitution of attorney or ordering, sua sponte, the substitution. There being no response, on June 22, 2001, the court entered an order substituting Gillespie as attorney of record.

As detailed below, respondent maintained that Gillespie was to blame for not retrieving the file from his office.

Respondent was unaware of Biernacki's December 13, 2000 grievance until December 2001, because he had moved his office location that month and was out of the office for several weeks in December 2000. However, respondent introduced no evidence of problems with the receipt of his mail.

Respondent denied receiving Gillespie's January 18, 2001, and February 23, 2001 letters requesting the file, addressed to "Room 601". Respondent noted that his room number was "307."

However, respondent recalled receiving Gillespie's March 19, 2001 letter and speaking to Gillespie shortly thereafter about transferring Biernacki's file. Respondent's recollection differed from Gillespie's, in that he thought Gillespie would pick up the file:

My recollection was not I was going to drop it off at his office because in fact I had agreed to give him my original files so that he could get started if he wanted rather than go through the argument about him paying me because under the rules as you are aware I'm entitled to keep the original file and charge them for photocopying. I didn't want anything to do with that because at this point I was fed up because I had done thousands and thousands of work [sic] and the client rejected an offer

[T73-9 to 19.]¹

A short time later, respondent again reflected on the file transfer:

I say my agreement is that [Gillespie] would pick it up in my office. And it sat on the ledge for months, and then in I guess it was May or the beginning of June I got some paperwork faxed to me from Judge D'Amico's law clerk that was never served on me that he wanted a — wanted an order forcing substitution of attorney. I said do whatever you want.

[T78-4 to 11.]

When asked if he had ever inquired of Gillespie as to the file's retrieval over those months, respondent admitted that he had not.

In February 2002, respondent delivered Biernacki's file to the ethics authorities.

¹ "T" refers to the transcript of the June 10, 2003 ethics hearing.

Biernacki made three payments to respondent for legal services: July 20, 1999 (\$150), August 10, 1999 (\$1,000), and August 16, 1999 (\$1,000). Respondent did not deposit those checks to his business account, as required by the rules. Rather, respondent admitted that he cashed the July 20 and August 10, 1999 checks. He endorsed Biernacki's August 16, 1999 check, made payable to him, and gave it to his secretary to cash, presumably for her own purposes. Respondent explained his treatment of the checks as follows:

I would cash checks so I could deposit them as cash into my business account because of the bank clearance problems so I wouldn't have to wait. I don't do that any more, but I might have done that in this case.

[T85-22 to T86-1.]

The DEC found that respondent failed to release Biernacki's file to subsequent counsel, a violation of RPC 1.16(d), and that respondent violated the recordkeeping rules by failing to deposit the checks into his business account, a violation of R. 1:21-6(a)(2) and RPC 1.15(d).

The DEC recommended a reprimand.

Upon a de novo review of the record, we are satisfied that the evidence clearly and convincingly establishes that respondent was guilty of unethical conduct.

We find that respondent's explanation for his failure to turn over Biernacki's file was not reasonable. Gillespie attempted to obtain the file from respondent for months with no success. Even if respondent had not received Gillespie's initial requests for the file, he admitted receiving Gillespie's March 19, 2001 letter, but did not reply to it or call Gillespie.

Gillespie, on the other hand, obtained respondent's new telephone number from ethics authorities and spoke to him on March 31, 2001. Gillespie recalled that respondent had assured him that he would deliver the file to his office on April 2, 2001. Gillespie memorialized that understanding in a letter to his client.

Respondent, in turn, presented no evidence to corroborate his claim that Gillespie was to retrieve the file from his office. In fact, respondent admitted that the file sat "on the ledge for months" thereafter, with no effort on his part to find out why it had not been picked up.

In the two instances, during his testimony, that respondent addressed his failure to deliver the file, he referred to Biernacki's outstanding fees, thereby creating an inference that he may have withheld the file, in some small measure, as retaliation for not having been paid.

We often defer to the DEC on matters of credibility. On the file issue, the DEC sided with Gillespie. We, too, find that respondent agreed to deliver the file, but failed to do so. We conclude, thus, that respondent violated RPC 1.16(d).

With respect to the R. 1:21-6(a)(2) and RPC 1.15(d) violations, respondent admitted his ethics infractions. He cashed checks for legal services, instead of depositing them to his business account, as required by the rules. Also, respondent endorsed a check for legal services and gave it to his secretary for her own purposes. That check, too, should have been deposited into the business account.

An admonition is the appropriate sanction for attorneys who run afoul of the recordkeeping requirements of R. 1:21-6 and RPC 1.15(d). See, e.g., In the Matter of Marc D'Arienzo, DRB 00-101 (June 28, 2001) (admonition for failure to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards); In the Matter of Arthur G. D'Allessandro, DRB 01-247 (June 17, 2001) (admonition for attorney who was found guilty of numerous recordkeeping deficiencies); In the Matter of Christopher J. O'Rourke, DRB 00-069 (December 7, 2000) (admonition for attorney who did not keep receipts and disbursements journals or a separate ledger book for all trust account transactions); In the Matter of Arthur N.

Field, DRB 99-142 (July 19, 1999) (admonition for failure to maintain attorney trust and business accounts); and In the Matter of Russell G. Cheek, DRB 96-100 (May 22, 1996) (admonition for attorney who failed to maintain proper attorney trust and business account records required by R. 1:21-6).

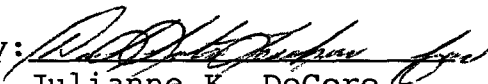
So, too, a single violation of RPC 1.16(d) has resulted in an admonition. See, e.g., In the Matter of Harry E. Franks, Jr., Docket No. DRB 01-286 (November 1, 2001) (admonition for attorney who withdrew from the representation without taking reasonable steps to protect the client's interests or filing a motion to be relieved as counsel); In the Matter of Anthony F. Caraccino, DRB 99-340 (December 28, 1999) (admonition for failure to properly withdraw from representation); In the Matter of Ayshia Y. Armorer, DRB 97-462 (admonition for failure, upon termination of representation, to return client-file contents including documents and tape-recordings).

In aggravation, respondent has a disciplinary record, including a six-month suspension and a reprimand. Although the suspension matter included a failure to return client files upon termination of the representation, the suspension post-dated the within misconduct. Therefore, it was not an instance of an attorney's failure to learn from a past mistake.

We determine, thus, that a reprimand sufficiently addresses the within ethics infractions. Chair Maudsley and Vice-Chair O'Shaughnessy did not participate.

We also require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Disciplinary Review Board
Louis Pashman, Esq.

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of Eugene M. LaVergne
Docket No. DRB 05-242

Argued: November 17, 2005

Decided: December 28, 2005

Disposition: Reprimand

Members	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley					X
O'Shaughnessy					X
Boylan		X			
Holmes		X			
Lolla		X			
Neuwirth		X			
Pashman		X			
Stanton		X			
Wissinger		X			
Total:		7			2


Julianne K. DeCore
Chief Counsel