SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-253

IN THE MATTER OF

SCOTT D. FINCKENAUER

AN ATTORNEY AT LAW

Decision

Argued: October 18, 2001

Decided: February 6, 2002

Yvonne Smith Segars appeared on behalf of the District IIA 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 based on a recommendation for discipline filed by the District IIA Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1991 and maintains an office for the practice of law in Fairview, New Jersey. He has no disciplinary history.

The complaint alleged violations of RPC 1.5(b) (failure to provide, in writing, the

basis or rate of his fee); RPC 1.15(d) (failure to comply with the provisions of R.1:21-6); RPC 5.4(a) (sharing legal fees with a non-lawyer); RPC 7.2(c) (giving something of value to a person for recommending the lawyer's services); RPC 7.3(d) (compensating a person to recommend or secure the lawyer's employment by a client or as a reward for having made a recommendation resulting in the lawyer's employment by a client); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

* * *

In March 1997, the Office of the Public Defender ("Public Defender") assigned respondent to represent Thomas Holmes on a charge of possession of illegal drugs with intent to distribute. Thereafter, Holmes retained respondent to represent him in connection with a murder charge stemming from an unrelated case. According to respondent, Holmes' aunt paid a $4,000 retainer in two installments, in April and August 1997.

The ethics complaint charged three counts of misconduct related to respondent's representation of Holmes: (1) failure to provide, in writing, the basis or rate of his fee for representing Holmes on the murder charge; (2) improper billing to the Public Defender for work not done on the drug charge; and (3) providing free legal services to Holmes in exchange for client referrals.

The Failure to Provide, in Writing, the Basis or Rate of the Fee

Respondent admitted that he did not provide to Holmes a written retainer agreement or any other writing concerning his fee for the murder charge. Respondent testified that he had been under the misconception that written retainer agreements were not necessary for criminal cases because he charged a flat fee for such cases.

The Improper Billing to the Public Defender

On December 18, 1997, Holmes pleaded guilty to the drug charge and to conspiracy to commit aggravated assault in the murder case. On February 20, 1998, Holmes was sentenced, in both cases, to eight years' imprisonment. Apparently, there was a re-sentencing proceeding on March 13, 1998. The record does not explain the reason for that proceeding. Respondent closed his file on Holmes' drug charge on March 21, 1998.

Thereafter, respondent submitted a payment voucher to the Public Defender for $1,399.17 (approximately sixteen hours of in-court time and sixty-one hours of out-of-court time) for representing Holmes on the drug charge. On the voucher, respondent certified that the billing was "correct in all its particulars" and that the "described goods or services have been furnished or rendered." Respondent billed 1.5 out-of-court hours for preparation of a probable cause motion, as well as 2.0 in-court hours and 1.5 out-of-court hours for argument and conferences on the motion. Respondent admitted that the probable cause motion related to the murder charge and that he should not have billed the Public Defender for that time.

Respondent also billed the Public Defender for fifteen "jail visits" to Holmes. The jail records showed, however, that respondent was at the jail on only four occasions. The records also showed that respondent met with Holmes on two days not listed on his bill, but within two days of a listed date. Apparently, the jail records for one of the listed dates was not available. Therefore, the records established that respondent improperly billed the Public Defender for eight of the fifteen "jail visits."

Respondent admitted that he "apparently made an error in preparation and submission of [his] bill." He attributed his "errors" to his lack of a computerized billing system at the time. However, respondent also contended that some of his "jail visits" occurred during the weekend and that, in 1997 and 1998, the sign-in procedure for professional visits was not followed on weekends.[1] Respondent provided no corroboration for this contention. In fact, the evidence was to the contrary.

At the ethics hearing, a county employee testified about the procedures followed when an attorney visits his or her client in the jail. The employee testified that an attorney may not see an inmate without an entry in the professional visitors' log book. The presenter did not specifically ask the employee whether that was the case in 1997 and 1998. However, the employee's testimony did not indicate otherwise.

The employee also produced the original log books for the period March 1997 through March 1998. However, only copies of certain pages of the books were in evidence.

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[1] Three of the eight disputed "jail visits" purportedly occurred on a weekend.

In general, those pages contained the dates of the "jail visits" shown on respondent's voucher, as well as the dates immediately preceding and following those visits. Of the thirty-one days of log pages in evidence, the sign-in procedure for professional visitors was followed on two Saturdays and two Sundays. Therefore, the evidence does not support respondent's contention that weekend meetings with Holmes were not recorded in the log books.

The Client Referrals

In March 1999, Holmes retained respondent to file a motion for change of sentence to a drug treatment facility. Holmes' wife, Lynn, paid $1,500 to respondent for the representation. The motion was denied in July 1999. In April and December 1999, respondent remitted $750 and $250, respectively, to Lynn.

It is undisputed that, between March 1997 and March 1999, Holmes referred other inmates to respondent, six of whom retained respondent to represent them.[2] Respondent denied that he paid Holmes for those referrals. However, he admitted that he agreed to reduce to $500 his usual $1,500 fee for the motion for change of sentence, because of the referrals. Neither Holmes nor Lynn testified at the ethics hearing. The following excerpts from respondent's letters to Holmes addressed the issue of payments for the referrals:

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[2] In fact, the jail log books showed that, when respondent visited Holmes in 1997 and 1998, he also met with one or more of the clients referred by Holmes.

August 21, 1999:

I am in receipt of your letters and once again I am very unhappy with their tone. If you feel that I am not providing adequate services or remuneration then you are free to terminate our relationship and retain other counsel.

I will not engage in a relationship where you think I have to account to you for my actions and the level of remuneration you receive.

That being said, I will detail for you where I perceive our balance sheet for services and costs stands the next time you call the office.

October 29, 1999:

[Y]ou were told that the additional $250.00 was paid towards the cost of the multitude of collect calls that you place to my office for both business and personal matters. I never said that I would return that money, but I did say that you would soon be entitled to other money which I would forward before the holidays.

At this point in time I am terminating my relationship with you. You should refer all your work and any new clients to somebody else. I will, as previously indicated to you, forward a check to Lynn for $250.00.

January 8, 2000:

As I told you before, my agreement with you was that if other clients came and paid their bills, I would give you a credit against your legal fees, costs and expenses. Although you seem to think that the $250.00 for the phone calls is somehow 'separate' it is not. Out of the $1,500.00 that Lynn sent to me for the last motion, $500.00 was my fee, $750.00 was already sent back to Lynn and as I told you at the time, $250.00 was being applied to your costs due mostly to the high phone bill for collect calls that you were making daily to my office.

It doesn't matter what you call it, however, because my intention always was, and still is, that you should be able to receive free services based on you sending me clients. What you are entitled to, however, cannot and will not exceed the amount of your fees and costs.

The total amount of time I have expended on your behalf since your original sentence was 22.6 hours. Based on an hourly fee of $75.00, which

> is already reduced from my usual hourly fee of $125.00, this amounts to a total fee of $1,695.00. I have further estimated your costs, including mostly collect calls, as $250.00 This makes you [sic] total bill $1,945.00.
>
> Again, I am not asking you to pay this amount. This amount is what is set off by the clients you referred to me. Out of this amount, all money paid on your behalf has been refunded to you except for $500.00. I still expect that that amount will also be refunded based on anticipated fees from Jorge Reveron and Thomas Figueroa.

Respondent testified that, after Holmes was sentenced, he continued to accept Holmes' collect calls from prison. Those calls involved requests by Holmes to deliver messages to his wife, for respondent to send him stamps, greeting cards, paper and pens and for assistance with Holmes' "administrative problems" with the corrections system. According to respondent, he complied with those requests, although he refused Holmes' request for a television.

Respondent further testified that, when Holmes retained him to file the motion for change of sentence, he told Holmes that he would reduce his usual $1,500 fee to $500 because of the client referrals, because he liked Holmes and his wife and because he "felt sorry" for Holmes. He also told Holmes that he would refund the remaining $500 after he was paid by the clients referred by Holmes. According to respondent, Lynn sent him $1,500, instead of the agreed-upon fee of $500. Respondent stated that Holmes had not told his wife about the reduced fee because Holmes wanted respondent to send the $1,000 to him, which respondent refused to do. According to respondent, he only returned $750 to Lynn because he determined to keep $250 for the costs of Holmes' collect telephone calls. After Holmes

objected to his retaining the $250, respondent remitted that amount to Lynn. Respondent contended that he later sent $50 to Holmes to buy birthday gifts for his children and that he intended to refund the remaining $450, once the referred clients paid their bills.

With respect to his use of the word "remuneration" in his August 21, 1999 letter to Holmes, respondent stated that it referred to the $500 he agreed to remit to Holmes, after the referred clients paid their bills, and to the cards, stamps and other items he sent to Holmes.

As to his January 8, 2000 letter to Holmes, in which he computed a "total bill" based on an hourly rate of $75, respondent denied that he ever billed Holmes for his time. Rather, according to respondent, he kept track of the time spent talking with or doing favors for Holmes "so I could print out a list of how much time I expended on his behalf, even unrelated to a criminal case," but "it wasn't being billed that, but I was, I was saying to him look, here is how much time I spent on you...when he's calling to complain to me about my refusal to pay him money for the clients that he sent to me, I made it clear to him, what you are getting from me is not money, you're getting my time and my time is money."

* * *

The DEC found respondent guilty of all of the charges contained in the complaint.[3] The DEC was "convinced that the conduct of respondent was based in large measure on an apparent lack of any real understanding of the conduct required of lawyers."

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[3] The public member of the hearing panel was unable to attend the hearing. The alternate attorney member attended. Therefore, there were three attorneys on the hearing panel. However, the public member read the transcript of the hearing and it was the public member, not the alternate attorney member, who participated in the determination.

The DEC recommended that respondent be suspended for three months and be required to reimburse the Public Defender "to the extent of one-half of the total amount he received."

* * *

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

Respondent admitted that he failed to provide Holmes with a writing setting forth the basis or rate of his fee, in violation of RPC 1.5(b). It is not a defense that respondent did not know such a writing was required. "Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct." In re Berkowitz, 136 N.J. 134, 147 (1994). However, the DEC was incorrect in concluding that respondent 's failure to provide the required writing also violated RPC 1.15(d) (failure to comply with the provisions of R.1:21-6). R.1:21-6(b)(3) requires an attorney to keep copies of retainer agreements for seven years. Here, the misconduct was the failure to provide the writing in the first instance.

The DEC also concluded, correctly, that respondent violated RPC 8.4(c) when he billed the Public Defender for work that was done for the murder, not the drug case and for non-existent "jail visits". Respondent admitted that the probable cause motion was for the murder case. Furthermore, respondent's testimony that his weekend meetings with Holmes

were not recorded in the professional visitors' log book was not credible for several reasons: (1) respondent produced no evidence to support his testimony; (2) respondent did not examine the jail personnel on the issue; (3) the jail personnel testified that an attorney could not see an inmate without an entry in the log book; and (4) the pages of the log book that were in evidence contained weekend entries. Therefore, there is clear and convincing evidence that respondent made misrepresentations on his payment voucher.

The DEC recommended that respondent be required to reimburse the Public Defender for one-half of the amount he received. However, we do not generally require attorneys to return fees to aggrieved clients or otherwise permit the disciplinary process to be employed as a collection agency or as an alternative to recourse to the courts or to the fee arbitration system. Furthermore, the amount of the DEC's recommended return was not based on an accounting or other analysis of the actual overcharges. Therefore, we declined to require respondent to reimburse the Public Defender for the overcharges. Instead, we will send a copy of our decision to the Public Defender's office for its determination as to whether to pursue the excessive fees.

With respect to the client referrals, respondent admitted that they were part of the explanation for his reduction of his usual $1,500 fee to $500 for the motion for change of sentence. He also admitted that he agreed to remit the remaining $500 after the referred clients had paid their bills. Finally, respondent admitted that he did various "favors" for Holmes, such as accepting collect calls from him, relaying messages to his wife and sending

him stationery supplies. Respondent denied that he otherwise paid Holmes for the referrals. In his letters to Holmes, respondent spoke of providing "remuneration" to Holmes and stated that their agreement was for Holmes to "receive free services based on you [sic] sending me clients."

RPC 7.3(d) states that a "lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client," except in certain limited circumstances, not applicable here. Although this is not the typical runner case in which an attorney pays a nonlawyer to solicit business for the attorney, in return for a portion of the legal fee, respondent's services to Holmes amounted to something "of value" given in exchange for soliciting clients for respondent. Hence, respondent's actions violated RPC 7.3(d).

The DEC found that respondent's actions with respect to the client referrals also violated RPC 5.4(a) and RPC 7.2(c). RPC 5.4(a) prohibits an attorney from sharing legal fees with a nonlawyer. However, there is no evidence that respondent agreed to give Holmes a percentage of the fees generated by the referred clients. Arguably, respondent's agreement to remit to Holmes his $500 fee after he was paid by the referred clients may be encompassed by the rule. But respondent never remitted those funds, except perhaps for $50 for Holmes to buy birthday gifts for his children. In light of the fact that RPC 7.3(d) deals directly with respondent's actions, we declined to find a violation of RPC 5.4(a). For the

same reason, we declined to find a violation of RPC 7.2(c). Like RPC 7.3(d), RPC 7.2(c) prohibits an attorney from giving something of value to a person for recommending the lawyer's services. However, RPC 7.2(c) is part of the rule dealing with attorney advertising. Since there is a rule – RPC 7.3(d) – that deals directly with respondent's actions with respect to the client referrals, we dismissed the charges of violations of RPC 5.4(a) and RPC 7.2(c) as cumulative. We also dismissed, as cumulative, the charge that respondent's conduct violated RPC 8.4(a).

In summary, we find that respondent violated RPC 1.5(b), RPC 7.3(d) and RPC 8.4(c).

With respect to the appropriate sanction, discipline for the improper solicitation of clients has ranged from a reprimand to disbarment. See In re Meaden, 155 N.J. 357 (1998) (reprimand where the attorney, after hearing about a gas line explosion at an apartment complex, went to the hotel where many of the victims were temporarily residing and initiated contact with several prospective clients, including one who was visibly upset; the attorney handed out business cards and later sent letters to sixteen prospective clients whose names he had obtained at the hotel); In re Pease, 167 N.J. 597 (2001) (three-month suspension where the attorney paid a runner for referring fifteen prospective clients to him and loaned funds to one of those clients; the attorney's misconduct was limited to a four-month period more than ten years prior to the ethics proceeding, when the attorney was a relatively young, newly admitted attorney; the attorney had no other disciplinary history and had performed

a significant amount of community service); In re Bregg, 61 N.J. 476 (1972) (three-month suspension where the attorney paid part of his fees to a runner from whom he accepted referrals); In re Introcaso, 26 N.J. 353 (1958) (three-year suspension where the attorney used a runner with a "long criminal record" to solicit criminal cases. The attorney continued to deny having used the runner, despite the contradictory testimony of three clients and the runner; the Court stated that its "immediate impulse" was to disbar Introcaso; instead, it imposed a three-year suspension because Introcaso had a previously unblemished reputation and his actions had occurred prior to In re Frankel, 20 N.J. 588 (1956), the first decision dealing with the use of runners by attorneys); In re Pajerowski, 156 N.J. 509 (1998) (disbarment where the attorney used a runner to solicit clients, condoned the fact that the runner instructed prospective clients to obtain treatment from specific medical providers, despite the clients' protestations that they had not been injured, assisted in the unauthorized practice of law, engaged in a conflict of interest and advanced funds to clients).

As to respondent's false billing on the voucher, "the Court has imposed a range of discipline, taking into consideration the severity of the misconduct and the existence of aggravating and mitigating factors." In re LaVigne. 146 N.J. 590, 609 (1996). See In re Goore, 140 N.J. 072 (1995) (reprimand where the attorney filed inaccurate and false fee certifications with a bankruptcy court and failed to maintain proper attorney records); In re Mazeau, 122 N.J. 236 (1990) (reprimand where the attorney failed to disclose to a court his representation of a client in a prior lawsuit, where that representation would have been a

factor in the court's ruling on the attorney's motion to file a late notice of tort claim); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension where the attorney made multiple misrepresentations to a judge regarding the reasons for his tardiness for court appearances and failure to appear); In re Kernan, 118 N.J. 366 (1990) (three-month suspension where the attorney lied in a certification to the court and fraudulently conveyed property to his own mother in order to avoid child support obligations; attorney had a prior private reprimand).

Although the false voucher was not sent to a client, cases dealing with the charging of excessive fees are instructive. See In re Mezzacca, 120 N.J. 162 (1990) (reprimand where the attorney had taken contingent fees based on gross recoveries, failed to provide his clients with written contingent fee agreements and delayed the return of his client's funds until after his appearance before the ethics committee; the attorney's candor and admission of wrongdoing were considered as mitigating factors, while his failure to correct deficiencies found in an earlier audit and his prior reprimand were considered aggravating factors); In re Thompson, 135 N.J. 125 (1994) (three-month suspension where the attorney charged her client $2,250 for filing two identical motions necessitated by the attorney's own neglect in failing to appear at scheduled conferences, and charged for the filing of a pre-trial motion that, in fact, had never been prepared or filed; the attorney's misrepresentations and poor attitude toward the Court were considered as aggravating factors; her illness during the relevant time period was considered a mitigating circumstance); In re Hecker, 109 N.J. 539 (1988) (six-month suspension where a municipal attorney billed for services not rendered,

concealed personal assets to avoid a civil judgment, instituted harassing litigation and engaged in conflicts of interest).

Based on the foregoing, a five-member majority determined to suspend respondent for three months. Two members voted to suspend him for six months. Two members did not participate.

We also unanimously determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Scott D. Finckenauer
Docket No. DRB 01-253

Argued: October 18, 2001

Decided: February 6, 2002

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Reprimand*	*Six-month Suspension*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson		X					
Maudsley		X					
Boylan				X			
Brody		X					
Lolla				X			
O'Shaughnessy		X					
Pashman							X
Schwartz							X
Wissinger		X					
Total:		5		2			2

Robyn M. Hill 2/28/02
Robyn M. Hill
Chief Counsel