SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-401
District Docket Nos. IV-08-015E
and IV-08-016E

IN THE MATTERS OF	:
WAYNE POWELL	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 18, 2010

Decided: June 3, 2010

Christine Cockerill appeared on behalf of the District IV Ethics Committee.

Carl D. Poplar appeared on behalf of respondent.

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

These matters, which were consolidated for hearing, were before us on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"), arising from respondent's handling of personal injury matters. The complaints in both matters charged respondent with violating RPC 1.5(b) (when the

lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation); RPC 1.5(c) (failure to provide the client with a written contingent fee agreement); RPC 1.7(a) (a lawyer shall not represent a client if the representation involves a concurrent conflict of interest); RPC 1.7(b)(1) (written informed consent to the representation when a concurrent conflict of interest exists); R. 1:21-7(c) (contingent fees); and RPC 1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests). The DEC recommended that respondent receive a reprimand. We agree with that recommendation.

Respondent was admitted to the New Jersey bar in 1985. He was reprimanded, in 1995, for improperly advancing personal funds to eight clients in personal injury matters and for negligently misappropriating client funds. In re Powell, 142 N.J. 426 (1995). He received a second reprimand, in 1997, for lack of diligence, failure to communicate with a client, and misrepresentation to disciplinary authorities. In re Powell, 148 N.J. 393 (1997).

On October 21, 2006, Louis Clybourn, the grievant in IV-08-015E, and Eric Council, the grievant in IV-08-016E, were passengers in a car driven by Quinn Hunter, when the car was involved in an accident.[1] The car belonged to Clybourn. The police report stated, in relevant part:

> Upon arriving I spoke to one of the driver's [sic] identified as Nicholas Agnes. Mr. Agnes stated he was driving on College Drive when the vehicle in front of him made a [sic] erratic turn into the entrance to Fountainview Apartments. As the vehicle made the turn, Mr. Agnes stated he couldn't stop in time and the other vehicles [sic] turn signal wasn't on causing Mr. Agnes's vehicle to strike the other vehicle. I then spoke to the driver of the other vehicle identified as Quinn Hunter. Mr. Hunter stated he was attempting to make a left hand turn into Fountainview Apartments when another vehicle struck him in the rear. . . . While asking the driver several additional questions I detected an odor of an alcoholic beverage emanating from his breath. I asked the driver he had [sic] been drinking and he replied I had one drink approximately two hours ago at a casino in Atlantic City.
>
> [Ex.C-4.]

---

[1] Hunter did not file a grievance against respondent. The DEC investigator was unable to contact Council, who did not appear at the DEC hearing.

Hunter received traffic citations for careless driving, improper left turn, driving while intoxicated ("DWI"), and driving an uninsured motor vehicle.

Clybourn testified that Hunter had stopped and was preparing to turn into a driveway, when their vehicle was struck from the rear. The police officer spoke to them at the scene and at the hospital, inquiring into their use of drugs and alcohol. Clybourn believed that the police officer was trying to find a way to blame Hunter for the accident.

On October 31, 2006, Hunter, Clybourn, and Council met with respondent. All three signed retainer agreements. Two of the three agreements were blank. One agreement bore the name and address of respondent's law firm, affixed by a stamp. Clybourn did not read the agreement before signing it, but respondent explained to them that it was a contingent fee agreement. In fact, the agreements provided for an hourly fee. Nevertheless, Clybourn's testimony made clear that he understood that the fee was to be contingent.

Although Clybourn requested a copy of the agreement on several occasions, a copy was not provided to him. Respondent, in turn, denied that Clybourn had requested a copy of the agreement.

Respondent could not explain his use of an hourly fee agreement. He testified that he has prepared packets of forms that are utilized for his personal injury clients and surmised that a secretary must have inserted the wrong form in the packet. He stated that he has never handled a case on an hourly fee basis. He claimed that he had gone over the agreement with the clients, but acknowledged that he had not read it.

Hunter did not receive the traffic citations at the accident scene, but by mail. Clybourn also was issued a citation by mail, on an undisclosed date. Clybourn did not recall if they had the citations with them, when they met with respondent. Clybourn had not yet received the police report at that time.

Respondent never discussed with Clybourn the potential conflict of interest in his representation of all three clients. Respondent explained, that in his view, there was no potential conflict. The three clients were adamant about how the accident had occurred:

> I had some concern until they indicated to me that theirs was a stopped vehicle which was rear ended. So that from the outset, it seemed to me that there was neither any reason to discuss a potential conflict with Mr. Council, Mr. Clybourn, and Mr. Hunter or to solicit any written waiver of a conflict

> because no conflict existed and quite frankly in my mind, no conflict could exist. This was a rear end collision of a stopped vehicle. There could never have been, under any circumstance, any liability assessed against Mr. Hunter as to his two respective passengers.
>
> [T134-3 to 12.][2]

Respondent stated that, when he received the police report, there was nothing in it that was inconsistent with what the clients had told him. According to a supplemental police report, Hunter was found not guilty of the DWI, but guilty of careless driving and driving an uninsured motor vehicle.[3] Clybourn and respondent testified to the contrary -- that all charges against Hunter and Clybourn were dismissed. The record is silent about this discrepancy.[4] Respondent represented Hunter in municipal court on the charges stemming from the accident.

At the DEC hearing, the following exchange took place between respondent and the presenter:

---

[2] "T" denotes the transcript of the DEC hearing on April 29, 2009.

[3] There were no alcohol or drugs in Hunter's system, at the time of the accident.

[4] At oral argument before us, respondent's counsel noted that "regrettably the record is a little bit murky as to what happened in the municipal court."

Q. But wouldn't you agree that because there's an allegation he didn't properly signal, because there's an allegation there's alcohol on his breath, because there's allegation, on its face, of a potential conflict of interest that you would absolutely need to get the waivers for?

A. No, that means nothing to me in the context of an automobile accident where the folks who come in to see me tell me that it's a rear end collision, but the police make it a criminal investigation. If you have a police officer, just because it's a police report doesn't mean it's gospel. I've seen thousands of police reports where the police fudge the facts intentionally, where police are negligent about the facts, where they talked to one party. You never really know what you have in these cases until you get much farther down the line, until you conduct your own investigation, et cetera, et cetera. So if my client comes in and says to me I didn't do anything wrong, I'm stopped, we're waiting for a few minutes and we get hit in the rear, that's good enough for me unless or until the evidence discloses to me that there's a problem. Now, had I gone to court and Mr. Hunter had changed his opinion and said listen, I really wasn't straight with you, I was sort of kind of angling my car and moving and doing other stuff at the time this happened, then of course that would have required that I do one of two things; send him to someone else, or have a discussion with he [sic] and his passenger about a conflict. But as I saw it, it just didn't exist in the case, not as to the facts that I had.

Q. So you acknowledge a police report may not be correct and police may fudge the

facts, but you will believe full face what your clients say unless you get much further down in the case?

A. Unless I have something that gives an indication it's inaccurate.

Q. But wouldn't you agree until you get down, you wasted valuable time when there should have been the initial instruction that there could possibly or potentially be a conflict of interest and get those waivers, wouldn't you agree that's a better practice to undertake?

A. Well then if that's true, it would be the better practice whenever anybody comes into your office to say there may be a potential conflict of interest, no matter what the facts are, but I don't think that, that's what the rules respecting professional conduct require. They require if we perceive that there is a potential conflict that we take some action. We're not required to be clairvoyant. We're required to be reasonable.

Q. You would agree it's not an actual conflict to give rise to your obligation, you would agree it is a potential?

A. I would agree if there is a potential conflict, you have to take steps to head off the potential, but from Mr. Clybourn there was no police report when Mr. Clybourn, Mr. Hunter and Mr. Council came into my office, and there was none because the police themselves were waiting for the results of the test. So what I had before me was not Officer Whoever's inconsistent report about the happening of the accident. I had three gentlemen who all indicated the very same facts about the happening of the accident

> and there was absolutely no reason to believe there was anything different than that.
>
> [T145-16 to T148-8.]

At some point after respondent represented Hunter in municipal court, the three clients became dissatisfied with respondent's services. By facsimiles sent on March 23 and April 17, 2007, they instructed him to stop working on their cases and to "prepare all files for pick up soon." Respondent spoke with Clybourn, after receiving the April 17, 2007 facsimile, about his procedures to release the file. On April 20, 2007, however, respondent received the following note from Clybourn: "I want to take this time to apologize for my previous requests for our files. Quinn, Eric and myself have decided to stay with you. Please continue all proceedings. Once again you have our apologize [sic]. Thanks for everything thus far."

After Clybourn's note to respondent, however, the clients again sought their files, asking that respondent turn them over to new counsel. That attorney sent respondent a number of requests for the file, to no avail. Thereafter, another attorney, Christian A. Pemberton, requested the files for both Clybourn and Council, in December 2007. Respondent did not turn

the file over to Pemberton until March 2008. By that time, the grievances had been sent to respondent.

Respondent testified that Clybourn was a difficult client, who was dissatisfied because respondent had refused to fill out further applications for monetary advances on his behalf. As to the delay in ultimately turning over Clybourn's file, respondent explained that, following each request for the file, including those from new counsel, Clybourn would re-hire him. Respondent transferred the file, after he received the grievance, because it was clear that, despite Clybourn's telling him not to transfer the file, Clybourn had gone to the DEC about the issue. Respondent admitted that he had ignored Pemberton's requests, but explained that he had done so because of Clybourn's statements that they wished to continue with the representation.

The DEC determined that respondent had violated RPC 1.5(b) and RPC 1.5(c) in both matters. Respondent conceded that an appropriate fee agreement reflecting the contingent fee agreement was not given to his clients, attributing that problem to an oversight. In the DEC's view, "oversight or not," respondent's failure to provide a fee agreement setting forth the actual terms of the representation violated the RPCs.

As to RPC 1.7(a) and RPC 1.7(b), the DEC noted that, at the time of respondent's retention by the clients, the conflict of interest may not have been apparent. It is not clear whether the police report was available at the time or whether the citations had already been issued to Hunter. Respondent was told that the vehicle had been struck from behind.

The DEC remarked that further investigation, however, including a review of the police report, raised a question of a conflict of interest in respondent's representation of Hunter and the passengers. There was an indication in the police report that Hunter was driving erratically and had failed to use a signal. This information, even without the allegation that Hunter was intoxicated, would have raised the issue of a potential conflict, which should have been disclosed to the clients. Without a waiver, respondent could not continue the representation. Thus, the DEC found that respondent violated RPC 1.7(a) and (b) in the Clybourn matter, but found no violation of RPC 1.7 in the Council matter.

With regard to RPC 1.16(d), the DEC found the evidence as to both complaints "somewhat confusing and contradictory." Several requests were made for the clients' files to be released to the client or to new counsel. The exhibits entered at the

hearing revealed requests made by Clybourn. There did not appear to have been direct requests by Council. The DEC noted that respondent received "mixed signals" from Clybourn. On at least one occasion, Clybourn requested that the file be transferred to another attorney. Then his follow-up correspondence directed respondent to disregard that request. Apparently, there were also a number of undocumented requests with dates and contents that were unclear to the DEC.

Despite remarking that Pemberton had made clear requests that the files be transferred to him, and that respondent had not complied with those requests for several months, the DEC did not find clear and convincing evidence that respondent violated RPC 1.16(d) with regard to either grievant.

In sum, the DEC found that respondent violated RPC 1.5(b) and RPC 1.5(c) in both the Clybourn and the Council matters and RPC 1.7 in the Clybourn matter.[5] The DEC recommended that respondent be reprimanded.

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

[5] The report mistakenly refers to RPC 1.15(b) and RPC 1.15(c).

Unquestionably, respondent engaged in a conflict of interest situation by representing all three clients, when their interests became adverse. From the moment that respondent became aware of the possibility that Hunter might not have used the turn signal, a conflict of interest emerged. His representation of both driver and passengers might have been permissible only if (1) the other driver was totally culpable, (2) the culpable driver's insurance coverage was sufficient to cover both claims, and (3) respondent had obtained his clients' written consent to the representation. Advisory Committee on Professional Ethics Opinion 248, 96 N.J.L.J. 93 (1973).

Here, there was some evidence that Hunter might have been culpable. When there are issues of liability and the driver and the passenger may have claims against each other, the conflict is unwaivable. See N.J. Advisory Comm. On Professional Ethics Opinion 188, 93 N.J.L.J. 789 (November 12, 1970), and Petition for Review of Opinion 552, 102 N.J. 194, 206 n.3 (1986).

Respondent was, thus, guilty of violating RPC 1.7(a) and RPC 1.7(b).[6]

As to the charged violation of RPC 1.16(d), the record shows that respondent received "mixed signals" from Clybourn. Nevertheless, when he was asked to turn over the files to a new attorney, he should have informed his clients that he was going to do so and should have done so. We find, thus, that he also violated RPC 1.16(d).

With regard to RPC 1.5 (b) and RPC 1.5(c), although it is true that the retainer agreement that respondent presented for the clients' signature provided for an hourly fee, rather than a contingent fee, there is no evidence that respondent did not communicate to the clients the rate or basis of his fee, in writing, within a reasonable time after he was retained. We, therefore, find only a violation of RPC 1.5(c).

An admonition or a reprimand usually results when attorneys engage in a conflict of interest arising out of the impermissible representation of driver and passenger. See, e.g., In the Matter of Andrys S. Gomez, DRB 03-203 (September

[6] It is unclear why the DEC found that respondent violated RPC 1.7 only in the Clybourn matter. The facts were the same in both cases, Clybourn and Council.

23, 2003) (admonition for attorney who represented three passengers and the driver of a vehicle involved in an accident; the attorney also exhibited gross neglect and lack of diligence, and failure to communicate with his clients); In the Matter of Victor J. Horowitz, DRB 01-191 (June 19, 2001) (admonition by consent for attorney who filed a complaint for personal injury damages on behalf of the driver and four passengers of a vehicle allegedly involved in an accident); In re Soto, 200 N.J. 216 (2009) (reprimand imposed; the attorney represented the driver and the passenger in a personal injury action arising out of an automobile accident; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with one of the clients, and failure to prepare a contingent fee agreement; no ethics history); In re Barone, 180 N.J. 518 (2004) (reprimand by consent for attorney who represented driver and passenger in two separate automobile cases, allowed the two complaints to be dismissed as a result of his negligence and lack of diligence, and failed to communicate with one of the clients; mitigating factors considered); In re Giscombe, 159 N.J. 517 (1999) (reprimand for attorney who represented the driver and the passenger in two separate matters; the attorney had received a private reprimand for the

same conduct); and In re Nadel, 147 N.J. 559 (1997) (reprimand for dual representation of passenger and driver).

Generally, admonitions have been imposed on attorneys who have failed to turn over their clients' files, even with additional violations. See, e.g., In the Matter of Vera Carpenter, DRB 97-303 (November 1, 1997) (attorney failed to turn over the client's file to new counsel; the attorney also lacked diligence and failed to communicate with a client; In the Matter of Andrew T. Brasno, DRB 99-091 (June 25, 1997) (attorney failed to turn over client's file after termination of representation and failed to comply with a lawful demand for information from a disciplinary authority); In the Matter of John J. Dudas, Jr., DRB 95-383 (November 29, 1995) (attorney failed to turn over client's file to new counsel for nearly one year after termination of the representation, failed to communicate with a client, and failed to reply to a lawful demand for information from a disciplinary authority or to comply with the DEC's direction to forward the client's file to new counsel); and In the Matter of Howard M. Dorian, DRB 95-216 (August 1, 1995) (attorney failed to turn over client's file to new counsel, grossly neglected the client's file for fifteen months, failed to communicate with a client, and failed to

comply with a lawful demand for information from a disciplinary authority).

Finally, conduct involving failure to prepare the fee agreement required by RPC 1.5(c), even when accompanied by other, non-serious ethics offenses, results in an admonition. See, e.g., In the Matter of Martin G. Margolis, DRB 02-166 (July 22, 2002) (attorney failed to prepare a written fee agreement, a violation of RPC 1.5(c), and took an improper jurat, a violation of RPC 8.4(c)); In the Matter of Alan D. Krauss, DRB 02-041 (May 23, 2002) (attorney failed to prepare a written retainer agreement, grossly neglected a matter, lacked diligence in the representation of the client's interests, and failed to communicate with the client; violations of RPC 1.5(c), RPC 1.1(a), RPC 1.3, and RPC 1.4(a), respectively); and In the Matter of Seymour Wasserstrum, DRB 98-173 (August 5, 1998) (attorney failed to prepare a written retainer agreement covering a contingent fee, a violation of RPC 1.5(c)).

In mitigation, respondent's use of the wrong retainer agreement was accidental. His clients clearly understood that he would be paid on a contingent basis. In addition, Clybourn's "mixed signals" to respondent about turning over the file may have explained his dereliction to a certain extent.

We are aware that respondent has been disciplined twice before, each time receiving a reprimand. On the other hand, the two reprimands occurred thirteen and fifteen years ago. We note also that they were imposed for unrelated conduct.

On balance, particularly in light of the passage of time since respondent's prior run-ins with the disciplinary system, we find that a reprimand is sufficient discipline for his misconduct.

Member Doremus voted for an admonition. Members Wissinger and Zmirich 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
Louis Pashman, Chair

By: _____
for Julianne K. DeCore
Chief Counsel