SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-134
District Docket No. VII-06-16E

IN THE MATTER OF	
KEVIN J. CARLIN	
AN ATTORNEY AT LAW	

Decision

Argued: July 17, 2008

Decided: September 3, 2008

Robert Rothenberg appeared on behalf of the District VII Ethics Committee.

Robert Ramsey 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 recommendation for a six-month suspension filed by the District VII Ethics Committee (DEC), based on respondent's violations of RPC 1.1(b)(pattern of neglect), 1.5(a) (unreasonable fee), RPC 1.5(b) (when the lawyer

has not regularly represented the client, failure to communicate to the client, in writing, the basis or rate of fee), RPC 1.15(b) (failure to promptly deliver funds that the client is entitled to receive), RPC 1.16(d) (upon termination of representation, failure to refund unearned fee), and RPC 8.4(a) (violation or attempt to violate the RPCs).

For the reasons set forth below, we determine to impose a three-month suspension for respondent's violations of RPC 1.15(b), RPC 1.16(d), and RPC 8.4(a). In addition, as a condition of and prior to reinstatement, respondent shall submit proof of fitness to practice law as attested to by a mental health professional approved by the Office of Attorney Ethics (OAE). Upon reinstatement, respondent shall practice under the supervision of a proctor for a period of two years.

Respondent was admitted to the bar in 1985. At the relevant times, he maintained a law office in Hamilton Township, Mercer County.

In 2003, respondent was reprimanded for gross neglect, lack of diligence, failure to communicate with his client, failure to promptly deliver funds to a third party, failure to obey an obligation under the rules of a tribunal, false or misleading communication about the attorney, use of letterhead that

violates RPC 7.1(a), conduct prejudicial to the administration of justice, and recordkeeping violations in three client matters. In re Carlin, 176 N.J. 266 (2003). In that case, among other things, respondent wrongfully delayed turning over settlement funds to a client for four years; wrongfully delayed returning a deposit in a landlord-tenant dispute for more than two years, after the entry of a court order compelling him to do so and, then, only after the entry of another court order; and failed to pay a client's medical bill from the proceeds of a settlement.

In 2006, respondent was censured for lack of diligence, failure to communicate with the client, failure to promptly deliver funds to a third party, recordkeeping violations, and conduct involving dishonesty, fraud, deceit or misrepresentation. In re Carlin, 188 N.J. 250 (2006). In that matter, respondent mishandled his duties as the trustee of an education trust established for Jessica and Nicole Miller. Among respondent's derelictions was his failure to remit $1210 to one of the beneficiaries, after she had reached the age of twenty-one. In fact, even after our decision directed respondent to turn over those funds within sixty days, a Supreme Court Order was required, instructing respondent to release the

monies to the beneficiary. Respondent has provided proof of payment of the funds.

From September 26 to October 14, 2005, respondent was on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

On March 28, 2007, the DEC filed a six-count ethics complaint against respondent, arising out of his conduct as the attorney for the estate of Mary Irwin. The first count alleged that Patricia Butler had retained respondent to settle the estate and paid him a $10,000 retainer. Respondent did not previously represent either the estate or Butler. Respondent allegedly did not communicate to Butler, in writing, the basis or rate of his legal fee. Consequently, he was charged with having violated RPC 1.5(b).

In the second count, the DEC alleged that, although respondent had collected a $10,000 retainer, he did not complete the legal services for which he was retained. Accordingly, he was charged him with having charged an excessive fee, a violation of RPC 1.5(a).

The third count alleged that, after Butler had terminated respondent's representation, in July 2004, he did not return to

the client the unearned portion of the retainer "in a timely manner." The complaint charged respondent with having violated RPC 1.16(d).

The fourth count of the complaint, charged respondent with having violated RPC 1.16(d) and RPC 1.15(b) for having returned $3500 of the unused retainer to Janet McNamara, instead of to Butler. McNamara, however, was neither respondent's client, nor the executrix or the sole beneficiary of the estate.

The fifth count of the complaint charged respondent with having violated RPC 1.1(b) (pattern of neglect), on the ground that respondent has been disciplined on two prior occasions and that, as a whole, his conduct in those matters and in this matter demonstrates a pattern of neglect in his "handling of legal matters generally."

The sixth count of the complaint charged respondent with having violated RPC 8.4(a), (violating or attempting to violate the RPCs) based on the violations allegedly committed by him in this matter.

On January 24, 2008, a one-day hearing took place before a DEC panel. Butler testified that respondent's aunt had married Butler's uncle. Butler had a sister, Janet McNamara. Thus, respondent, Butler, and McNamara were relatives by marriage.

Butler also testified that Irwin was her maternal aunt. Irwin's will named Butler executrix of the estate.

After Irwin's death, Butler made an appointment with an attorney other than respondent, presumably to discuss his or her representation of the estate. In the meantime, respondent contacted McNamara and "requested very strongly that he be allowed to take care of the estate because he was having financial problems at the time." At McNamara's request, Butler agreed to retain him.

Butler first met with respondent in either April or the first week of May 2004, for approximately twenty to thirty minutes. He had never represented Butler either individually or as a fiduciary.

Respondent assured Butler that he "would take care of everything." Although he did not prepare a formal writing setting forth the services that he would provide to the estate, on May 14, 2004, he sent Butler an email providing "a general outline" of the duties that he would undertake.

As to his fee, Butler testified that, at their first meeting, respondent "very informally said oh, yeah, my fee is $275 an hour." According to Butler, respondent confirmed the hourly rate in an email.

Butler's relationship with respondent deteriorated quite rapidly after his retention, forcing Butler to terminate the representation on July 12, 2004. By that time, respondent had performed few services on behalf of Butler and the estate.

As to the representation itself, soon after Irwin's death, an acquaintance of Butler stated that she wanted to purchase Irwin's Red Bank condominium. She gave a $1000 "binder" check to respondent. No real estate agent was involved in the transaction. Respondent never drew up an agreement of sale.

In early May 2004, respondent met Butler at the surrogate's office in the Freehold court house, where Butler applied for letters of administration. (The letters were subsequently issued on May 13, 2004.) From there, respondent and Butler went to a stockbroker's office in Wall, where respondent obtained forms that would permit the transfer of those account funds into the estate account, which they then set up at the Hudson City Savings Bank, in Middletown. Butler testified that each of these stops took about thirty minutes. In total, she estimated that she and respondent spent three to four hours together that day.

When the estate checks were available, respondent picked them up at the bank and went to Butler's office with two checks

that he had pre-written and that were payable to him. One check was dated May 19, 2004, in the amount of $6000; the other was dated May 26, 2004, in the amount of $4000. Butler signed both of the checks, which were cashed on May 21 and June 8, 2004. No other checks were written to respondent.

At the time that Butler signed the checks, she understood that the funds would be used to cover the costs of settling the estate, including respondent's legal fee, and that any unused portion would be returned to the estate. Respondent never indicated to her that the $10,000 was a retainer.

On May 14, 2004, respondent sent Butler the following email:

> Patsy –
>
> I suppose that I have put in about 10 hours on the Estate's business to date (a formal bill and retainer agreement per our early discussion will follow soon). In addition, I anticipate that we will be involved in (among many other things) the following work:
>
> > Transmitting the Will to the beneficiaries
> >
> > Closing on the real estate (do you have the old title insurance policy in hand?) (If not, no problem)

Valuing the personal property of the Estate (appraisals)

Attending to payment of final bills

Receiving and disbursing income and assets to beneficiaries

Drafting and revision of final accounting

Drafting and revision of Inheritance Tax Return (ITR) for State of NJ

Drafting and revision of Refunding Bonds and Releases

For these reasons, I think that my final invoice would come in at about $10,000.00. Thank you for this retention.

Next up for us: supply the Will to the Beneficiaries once the Certificates are received. I will handle that by writing directly to them. Simultaneously, I will have the Hudson City, T. Rowe Price (I will forward you a form for execution and return) and Merrill Lynch (Hollingsworth) assets moved into the Hudson City Estate account.

It is a process of course, and takes some time naturally, but I anticipate that we will be done within eight months (ITR deadline) and probably sooner the way we have been working.

Kevin

Butler testified that, of these action items, the only tasks that respondent completed were the transmission of the

will to the four beneficiaries (one of whom was McNamara)[1] and the distribution of income and assets to them, as well as the receipt of refunding bonds and releases from them. The unfinished items were completed by attorney Nancy Falivena-Gennaro, whom Butler retained in July 2004.

Butler's frustration with respondent stemmed mostly from what she perceived to be his unreasonable delay in transmitting the will to the beneficiaries. Specifically, she complained that he had waited until the July 12, 2004 deadline to send the "60-day letter" to them, despite her repeated requests that he send it earlier.

At this point, Butler decided to hire a new attorney, as there was nothing in writing regarding the "payment agreement," and she was "constantly prodding him along to do, for instance, the beneficiary thing." She felt as though the case "was going nowhere" and, therefore, lost confidence in respondent.

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[1] Respondent and Butler disagreed as to McNamara's beneficiary status. According to Butler, McNamara was a direct beneficiary; their mother and aunt were the residual beneficiaries. In his answer, respondent asserted that McNamara was a residual beneficiary.

Despite the emails between Butler and respondent, she complained that "the communication was not good." Notwithstanding her many requests, respondent did not provide her with a written accounting of his services. She also was displeased by the lack of a written fee agreement setting forth the services that he would perform. Thus, by the time of respondent's discharge from the representation, Butler had grown dissatisfied with his lack of communication, his delay in performing his tasks, and the need for the estate to be represented in a more formal way.

During the third week of July 2004, Butler retained Falivena-Gennaro to represent the estate. Falivena-Gennaro stated to Butler that she needed to obtain the estate file in order to assess what was and was not done. On July 15, 2004, Butler wrote a letter to the beneficiaries, informing them that respondent's representation had ended and that Falivena-Gennaro had been retained. Butler asked respondent to forward the file to Falivena-Gennaro. Respondent agreed to do so.

The parties stipulated that, "on several occasions," Falivena-Gennaro requested that respondent forward the estate file, the $1000 down payment on the condominium, an itemized statement of his services, and the unearned portion of the

retainer. The parties also stipulated that respondent "did not promptly respond" to these requests.

According to Butler, respondent did not forward the file to Falivena-Gennaro for more than a month, after he was discharged. Moreover, it was not until sometime after September 16, 2004 that respondent turned over the $1000 down payment to her. During this time, Butler prodded respondent to complete these tasks via an exchange of emails.

After Butler's termination of respondent's services, she and Falivena-Gennaro continued to communicate with him on outstanding issues, such as the refund of the unearned portion of the $10,000 retainer and the provision of an accounting, to no avail.

In March 2005, Butler stated, in an email to respondent that, if she did not receive "some kind of response" from him, she would either go to fee arbitration or to the DEC. Finally, after repeated requests from Butler, respondent called McNamara and stated that he was going to drop off a check, which represented a partial return of the retainer. The check, in the amount of $3250, was dated December 15, 2006. On the memo line, the notation read "1/2 payment on account."

According to Butler, if she and McNamara had not been close, she would have never known about this check. Butler and McNamara decided to deposit the $3250 check into McNamara's checking account, where they agreed that it would remain until the other half of the payment was received. Eventually, they agreed to divide the $3250 between their mother and aunt.

The parties stipulated that "there is due and owing to either the grievant and/or the estate the sum of $3,250, and . . . that that would be an honored portion of the $10,000 retainer that was paid out in May 2004." At argument before us, respondent's counsel represented that respondent had paid the balance due to the estate, in May of this year.

Butler concluded her testimony by stating that she felt "terrible" that the matter had come to this point, as their families had been friends "for a long while." Nevertheless, Butler also "felt that it was a betrayal of trust because it did start out so informally because I just trusted him implicitly." Butler stated that she wanted a refund of the retainer.

Respondent, who was late for the DEC hearing, testified briefly. He stated that he had represented executors of estates "many times." His retainer for estate work ranges from $5000 to $50,000, depending on the size of the estate and the projected

amount of time required to process it. In this case, he projected $10,000 at $275 an hour.

Respondent testified that, under the "ethical decisions," his obligation was to both the executor and the beneficiaries of the estate. In this estate, Irwin had set up a trust for Butler. McNamara was named the trustee. We presume that this testimony somehow supports his decision to send the $3250 to McNamara, instead of sending it to Butler.

The DEC found that respondent had failed to reduce to writing the basis or rate of his fee, in violation of RPC 1.5(b), when he ignored Butler's written request for this information. The DEC did not find, however, that the fee charged by respondent was unreasonable and, therefore, a violation of RPC 1.5(a). According to the DEC, Butler's opinion that she believed the amount to be high did not sustain the presenter's burden of proof on the issue.

The DEC found that respondent had violated RPC 1.15(b) when, after Butler terminated his representation, in July 2004, he took two months to transfer to Falivena-Gennaro the $1000 down payment on the condo.

The DEC also found that respondent had violated RPC 1.16(d), inasmuch as it took him more than two years to return

any portion of the unearned retainer and, even then, he did not return the funds to the executrix of the estate but rather to her sister. The DEC found another violation of RPC 1.16(d) by respondent's failure to return the $3000 balance of the unearned retainer.

By virtue of respondent's violations of RPC 1.5(b), RPC 1.15(b), and RPC 1.15(d), the DEC found that he also violated RPC 8.4(a).

On the other hand, the DEC did not find that respondent had engaged in a pattern of neglect, because he was not charged with gross neglect in this case.

In light of respondent's disciplinary history and his failure to promptly return client funds in the previous matters, the DEC recommended that he be suspended for six months.

At oral argument, before us, respondent's counsel stated that respondent agreed with the DEC's determination on the RPCs that were violated. According to counsel, respondent disagreed only with the quantum of discipline recommended by the DEC.

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

The DEC correctly determined that respondent violated RPC 1.16(d) when he failed to promptly refund the unearned portion of the retainer upon termination of his representation, in July 2004. He tarried until December 2006 to refund a portion of the balance due and until May 2008 to refund the remaining balance.

Moreover, respondent violated RPC 1.15(b) and RPC 1.16(d) when he paid the $3250 partial refund to McNamara, rather than to Butler. McNamara was neither his client nor the executrix of the estate.

We find also that, by virtue of the above violations, respondent violated RPC 8.4(a).

The DEC properly found no clear and convincing evidence that respondent had charged the estate an unreasonable fee. The only evidence was the testimony of Butler. We, therefore, dismiss the charge of a violation of RPC 1.5(a).

The DEC also correctly determined that respondent did not violate RPC 1.1(b). He was not charged with gross neglect, and the record is devoid of evidence of any neglect; and he complied with the sixty-day beneficiary notification deadline. His sole vice was his procrastination.

We are unable to agree, however, with the DEC's finding that respondent violated RPC 1.15(b). Butler testified that

respondent had stated to her, in two separate emails, that his rate was $275 per hour. This satisfied the requirements of the rule, namely that the rate be reduced to writing. While a more formal writing would have been preferable, respondent nevertheless satisfied the basic requirements of the rule.

Similarly, we cannot agree with the DEC's finding that respondent violated RPC 1.15(b) and RPC 1.16(d) by his delay in transferring the $1000 down payment to Falivena-Gennaro. The complaint did not charge respondent with having violated these rules based on this conduct. Under R. 1:20-4(b), we are precluded from making a finding in this regard.

To conclude, by failing to promptly refund the unearned portion of the retainer upon the termination of his representation and by releasing it to McNamara, instead of to Butler, respondent violated RPC 1.15(b) and RPC 1.16(d). He also violated RPC 8.4(a).

In the absence of a tarnished disciplinary record, an attorney who fails to return the client's unearned retainer, after the termination of the representation, generally will receive an admonition. See, e.g., In the Matter of Larissa A. Pelc, DRB 05-165 (July 28, 2005) (one-year delay) and In the

Matter of Stephen D. Landfield, DRB 03-137 (July 3, 2003) (four-month delay).

Similarly, an attorney who fails to promptly deliver funds that the client or third party is entitled to receive will be admonished, even when that infraction is accompanied by other, non-serious infractions. See, e.g., In the Matter of David J. Percely, DRB 08-008 (June 9, 2008)(for three years attorney did not remit to client the balance of settlement funds to which the client was entitled; the attorney also lacked diligence in the client's representation, failed to cooperate with disciplinary authorities, and wrote a trust account check to "cash;" significant mitigation considered). In the Matter of Gordon Allen Washington, DRB 05-307 (January 26, 2006) (attorney tarried for seven months in disbursing escrow funds to the seller in a single real estate transaction; attorney also violated RPC 1.3; mitigating factors included the attorney's unblemished disciplinary history and the absence of harm; and In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (after attorney settled a case on behalf of a client, he took his fee but retained the balance, claiming that the funds were required to pay medical bills; nevertheless, the attorney disbursed settlement proceeds to the client in three separate

payments over a one-year period, while having paid only one bill; the attorney also failed to communicate with the client and practiced law while ineligible; mitigating factors included the attorney's depression and unblemished disciplinary history).

Here, respondent's recalcitrance in refunding monies admittedly due to the estate for a period of four years and his unexplained disbursement to the wrong recipient merit at least a reprimand. However, we must also consider respondent's troubling disciplinary history, which recipient demonstrates a failure to learn from prior mistakes.

This is not the first time that respondent has failed to turn over funds to which clients and third parties were entitled. In the 2003 disciplinary matter, respondent failed to turn over funds in three different cases. First, he failed to turn over settlement proceeds to his client until four years later. Second, he failed to return escrow funds to a third party until two years after he was ordered to do so, and then only after a second court order had been entered. Third, he failed to pay a medical bill out of the settlement proceeds obtained in another client's case. In re Carlin, supra, 176 N.J. 266. Respondent received a reprimand in that matter, which also included other infractions.

In the 2006 case, respondent failed to promptly remit the trust funds due one of the beneficiaries upon her twenty-first birthday, in December 2002. Not only did he release the funds in dribs and drabs ($21,000 in March 2003 and $3000 in July 2003), he continued to hold $1210, which he then refused to release to the beneficiary after she had filed a grievance against him. He received a censure in that matter.

These prior cases reveal a disturbing pattern of failure to turn over funds in a timely fashion, even in the face of a court order. In the first matter, respondent received the reprimand in March 2003. Yet, even after that decision, respondent was holding on to funds that belonged to one of the beneficiaries in the matter that ultimately led to his censure in June 2006. The conduct in this particular case took place in 2004 and continued through May 2008. Clearly, respondent has not learned from his past mistakes. A five-member majority determines, thus, that he should be suspended for three months, with the conditions detailed below. These are prompted by the following circumstances.

In the 2003 matter, respondent offered substantial mitigation, which included a diagnosis of adjustment disorder with mixed disturbance of emotions and conduct. In the Matter

of Kevin J. Carlin, DRB 02-305 (March 7, 2003) (slip op. at 14). According to the testimony of respondent's counselor, appointed by the New Jersey Lawyers' Assistance Program, this condition manifested itself in the form of "procrastination as a coping mechanism." Ibid. The therapist believed, however, that continued treatment would prevent a recurrence of respondent's misconduct. Id. at 15. He recommended against a suspension, which he claimed would be "counterproductive to respondent's treatment and harmful to his recovery." Ibid.

Unfortunately, respondent stopped treating with that counselor in December 2000, when the therapist relocated out of state. Ibid. As of our decision in that matter, respondent had not located a new therapist and was not being treated. Ibid. However, he and the therapist represented to us that he would be resuming treatment with one of two therapists whom he had recently contacted. Ibid.

In the 2006 matter, we observed that the testimony suggested "quite strongly" that respondent had not resumed therapy, despite his representation at the ethics hearing of April 2002. In the Matter of Kevin J. Carlin, DRB 06-096 (June 27, 2006) (slip op. at 45).

It appears that respondent continues to suffer from the adjustment disorder, that he remains untreated, and that the disorder's ill effect, that is procrastination, continues to compromise respondent's ability to function as a lawyer and, therefore, to protect the interests of his clients. At oral argument before us, his counsel was unable to tell us if respondent is currently being treated. Thus, we determine that, as a condition of, and prior to, reinstatement, respondent must submit proof of his fitness to practice law, as attested to by a mental health professional approved by the OAE. Further, upon reinstatement, respondent shall practice under the supervision of a proctor approved by the OAE for a period of two years. Finally, respondent is hereby strongly urged to seek counseling.

Members Boylan, Baugh, Doremus, and Clark voted for a censure, with the condition that respondent submit proof of immediate enrollment in a counseling program of no fewer than six months, administered by a counselor approved by the OAE. The counselor shall submit monthly reports to the OAE until respondent is discharged from treatment. The minority adopted the majority's requirement that respondent practice under the supervision of a proctor for two years.

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: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kevin J. Carlin
Docket No. DRB 08-134

Argued: July 17, 2008

Decided: September 3, 2008

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh			X			
Boylan			X			
Clark			X			
Doremus			x			
Lolla		X				
Stanton		X				
Wissinger		X				
Total:		5	4			

Julianne K. DeCore
Chief Counsel