SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-073

IN THE MATTER OF	:
HUBERT U. BARBOUR, JR.	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 15, 1996

Decided: November 17, 1996

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Respondent failed to appear despite proper notice of the hearing.

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

This matter was before the Board based on a recommendation for discipline filed by the District I Ethics Committee ("DEC"). Respondent was charged with violations of RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 1.15(b)(failure to safeguard client's funds and to promptly deliver

funds); RPC 1.5 (fee overreaching) and RPC 1.4(a) (failure to communicate); (count one); and R. 1:21-6(b) and RPC 1.15(d) (recordkeeping violations) (count two).

Respondent was admitted to the New Jersey bar in 1973. He is a sole practitioner in Atlantic City, New Jersey. Respondent received a private reprimand in 1988 for failure to communicate with clients and failure to return their documents upon request.

Respondent was associated with the law firm of Carl J. Valore, Esq. until April 1992. In December 1990, while with the firm, respondent agreed to represent Alberta Watkins in connection with an employment matter against Atlantic City. Watkins was a certified tax collector and tax search official for the city. Watkins had been disciplined and her wages docked, without the benefit of a hearing.

Watkins' difficulties resulted from tax search certificates that she had signed, but that had been prepared by someone else. When a problem came to light, Watkins was docked three days' pay and was reprimanded. The matter was publicized in a local radio broadcast and local newspaper and became public knowledge in her workplace. Humiliated by the adverse publicity, Watkins resigned from her position as the tax search official.

A friend of Watkins, Marvin Beatty, Jr., the city's Fire Department director, had worked with respondent in the past. He, therefore, contacted respondent in Watkins' behalf and explained her circumstances to him. Thereafter, Watkins personally met with respondent. According to Watkins, respondent requested a $1,500

retainer, which she paid in two installments. It is not clear what services respondent agreed to provide for the fee. Respondent never discussed his hourly rate or informed Watkins about his total fee or the manner of its calculation. There was no written fee agreement. It was Watkins' understanding that, if she prevailed in her case, the city would be responsible for her counsel fees.

Respondent represented Watkins in connection with an order to show cause filed by the city and returnable within seven to ten days of respondent and Watkins' initial meeting. The subject matter of the hearing apparently concerned Watkins' position. According to respondent, the matter was ultimately dismissed.

Thereafter, respondent represented Watkins in connection with her disciplinary matter. He succeeded in having her reprimand expunged and secured the return of her lost wages amounting to approximately $587. The monies were forwarded directly to Watkins.

On December 5, 1991, respondent submitted a bill to the city solicitor for legal services rendered to Watkins in the amount of approximately $5,000 (Exhibit G-14). Respondent explained that a local city ordinance permitted a wronged employee to recover legal fees from the city. Respondent also forwarded a copy of the letter to Watkins. She, therefore, believed that her $1,500 retainer would be returned once respondent collected his fee from the city.

For reasons not clear in the record, the city did not pay respondent his fees. Thereafter, in September 1992, before the statute of limitations ran, respondent filed a complaint in Watkins' behalf against the city and various officials, alleging,

among other things, violations of the law against discrimination, violations of Watkins' constitutional and civil rights, tortious interference with contractual rights and a loss of consortium claim in Beatty's behalf. Beatty was Watkins' companion. Again, there was no written fee agreement entered at this point or discussion about respondent's hourly fee of $150.

Respondent contended that he only filed the suit to obtain reimbursement for legal fees he was owed by the city from his earlier representation of Watkins. Notwithstanding respondent's stated reasons for the suit, however, Watkins believed that she had a viable claim against the city and its officials. After filing the complaint, respondent (1) made a discovery demand with which the defendants failed to comply; (2) filed motions to compel discovery; (3) filed a motion to suppress the defendants' answer; and (4) obtained the entry of a judgment by default. As a result of respondent's actions, the city began settlement negotiations with him. Respondent claimed that Watkins had advised him that she would not testify in any proceeding, a contention that Watkins strenuously denied.

The city made several settlement offers, beginning at $5,000, which respondent discussed with his client. The offers grew higher until Watkins accepted $17,500 in February 1994.

Respondent submitted itemized bills to Watkins on at least four occasions, specifically noting his intention to keep his legal fees separate from a settlement obtained in Watkins' behalf. Exhibit G-15.

On February 24, 1994, Watkins signed a general release prepared by the city, providing that, in consideration for a payment to her of $17,500, she would "not seek anything further . . . including any other payment or other consideration. . . . " Exhibit G-1.[1] The city issued two checks payable to both Watkins and respondent in the amounts of $10,000 (Exhibit G-2) and $7,500 (Exhibit G-3). At all times, Watkins believed that she was entitled to the full settlement amount and that the city would pay for respondent's legal fees.

Watkins endorsed the settlement checks on March 3, 1994. Respondent deposited them in his trust account on March 7, 1994. On March 11, 1994, respondent paid himself a fee of $2,500 from his trust account (Exhibit G-5); on May 3, 1994, he issued to his order a check for $1,500 (Exhibit G-6), all without Watkins' knowledge or authorization.

In April 1994, Watkins began to call respondent to inquire about the status of her settlement. When respondent informed her that the checks had cleared, she assumed that she would receive the settlement funds shortly. In mid-May 1994, Watkins again called respondent about the funds and even discussed with him what she intended to do with the proceeds. Respondent never informed her that he had already taken a portion of the proceeds as his fee or that she would not receive any sums because the entire settlement

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[1] Respondent admitted retyping the release, claiming there were many errors in the draft prepared by the city. It is not known whether he made any substantive changes to the release that would bear directly on the issue of counsel fees.

proceeds were earmarked to cover his fee. During one conversation, respondent brushed off Watkins' requests for the funds by telling her that he was working on figuring out his bill for legal services. According to Watkins, she started calling respondent every other week to find out what was holding up the receipt of her funds. Each time, respondent came up with a different excuse, such as that he was sick or that there was something wrong with a friend.

Eventually, respondent told Watkins that he had already taken $3,000 as his fee. According to Watkins, respondent told her, "You know I have to live too." T78.[2]

At a meeting in August 1994, respondent finally showed Watkins a preliminary bill for legal services. She was surprised at its contents and told him it did not make sense to her. Watkins told respondent, "I didn't need you for me to go through all this aggravation for nothing." According to Watkins, respondent replied, "Well, oops, I guess I made a mistake." T80. Respondent told Watkins that he would try to submit a claim to the city to get his fee. Beatty, who was also at the meeting, claimed that respondent "put his hand up to his mouth" and admitted that he had forgotten to sue the city for his fee. T48. When respondent told them that he would have to put his bill together and reopen the case, Beatty replied, "If you think they're going to open that case for this, I've got more chance of being the next Pope than getting this case open again." According to both Watkins and Beatty,

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[2] T denotes the transcript of the December 4, 1994 DEC hearing.

respondent indicated that he would file the claim nevertheless. Beatty testified that respondent "stonewalled" as to whether Watkins would get paid.

For his part, respondent testified that, even before the case was settled for $17,500, Watkins knew that his legal fees were at least $20,000. Respondent added that, although he had not told Watkins in so many words that she would not get any of the $17,500, he had discussed numbers with her on several occasions and she was aware that his fee exceeded $17,500. Respondent was satisfied that, when he explained the general release to Watkins, she knew that she would not be receiving any portion of the $17,500. T124-25. According to respondent, he was shocked to hear from Watkins, in April 1994, that she expected to receive the entire $17,500. T138-39. Respondent allowed, however, that his negotiations with the city included a settlement figure less legal fees. T134-39.

In any event, on September 13, 1994, respondent personally delivered his bill to Watkins for fees and costs in the amount of $28,480.33. The fees he had already taken from the settlement proceeds were not credited on the bill. Respondent admitted that the majority of the fees had been generated after he had filed the complaint.

After receiving that bill, Watkins had no further contact with respondent. She explained at the DEC hearing that she "did not have anything else to say to [respondent] once he delivered that bill." T181.

On December 10, 1994, respondent withdrew an additional $13,000 from his attorney trust account against Watkins' settlement for a down payment on a new house. His check register reflected the payment as a "gift of fees for down payment . . . ." Exhibit G-8. The check was made payable to respondent's wife. When respondent was asked at the DEC hearing why he had twice continued to withdraw his fees from the $17,500, despite his knowledge that Watkins expected to collect the entire $17,500, he gave an unsatisfactory explanation:

> Well at that point in time I had indicated to her in December, you know, what the amount might be. I provided her with a bill that basically told her what the total amount was. I concluded that, you know, somehow or other I was going to have to get paid out of that money, so --
> [T141]

Watkins filed for fee arbitration on February 28, 1995. On May 16, 1995, the District I Fee Arbitration Committee entered a determination directing respondent to refund $19,000 to Watkins, equalling the settlement proceeds and the amount of the initial retainer. Exhibit G-9. The fee committee referred the matter for an ethics investigation. As stated in the fee arbitration determination, the fee committee found that Watkins had not been responsible for the fee, as respondent had assured her that he would collect it from the city. The fee committee forwarded the matter to the ethics committee because it was disturbed that respondent had disbursed to himself several thousand dollars from the $17,500 held in trust, without Watkins' authorization. See Exhibit I to Complaint. Although the Statement of Reasons

Supporting Determination makes no express mention of overreaching, the fee arbitration committee checked the "yes" box next to a form asking if there was overreaching.

As of the date of the Board hearing, the funds had not been returned to Watkins.

* * *

At the DEC hearing, the Office of Attorney Ethics' ("OAE") investigator testified that respondent failed to maintain the following records: 1) a trust account receipts and disbursements journal, 2) a separate trust account ledger book containing separate pages for each client, 3) a current balance for respondent's trust account and 4) quarterly reconciliations of trust funds. The investigator also testified that respondent did not have an individual client ledger card for the Watkins matter. Respondent claimed that he kept such information in the individual client file.

* * *

The DEC concluded that respondent deceived Watkins about recovering his fee from the city, thereby violating RPC 8.4(c); failed to communicate in writing to Watkins, a new client, the basis or rate of his fee, in violation of RPC 1.5(b); failed to segregate Watkins' settlement funds, to which both he and Watkins claimed an interest, until the distribution issue was resolved, in violation of RPC 1.15(c); and committed recordkeeping violations,

in contravention of RPC 1.15(a) and (d) and R. 1:21-6(b). The DEC report is silent about fee overreaching, as charged in the complaint and as urged by the OAE. The DEC recommended the imposition of a three-month suspension for respondent's unethical conduct.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is supported by clear and convincing evidence. The more credible proofs are that Watkins paid respondent a $1,500 retainer believing that, if she prevailed against the city, her counsel fees would be paid separately by the city and that she would recover her retainer. Indeed, the records show — and respondent so testified — that the negotiations with the city always included a settlement figure plus attorney's fees. Watkins did ultimately prevail against the city. For whatever reason, however, whether by oversight on respondent's part or reluctance on the city's part, respondent was unable to collect his fees from the city.

The more credible evidence also supports the conclusion that, until some point after Watkins signed the release, she believed that she would receive the entire $17,500 settlement and that respondent's fees would be paid separately. Indeed, Watkins made repeated telephone calls to respondent inquiring when she would

receive her money. Respondent did nothing to clarify the situation. It was not until August 1994 that respondent showed Watkins a preliminary bill for his services, which bill, if paid, would have depleted the entire settlement. It was also at that time that respondent admitted to Watkins that he had made a mistake in failing to recover his fee from the city. Even then, respondent continued to mislead Watkins that he would try to submit a claim to the city solicitor for his legal fees.

As recited above, in early March 1994, respondent deposited the settlement proceeds into his trust account. On March 11, 1994, May 3, 1994 and in December 1994, respondent withdrew $2,500, $1,500 and $13,000, respectively, as fees from the Watkins settlement. The withdrawals were made without Watkins' knowledge or consent. Respondent attempted to justify his actions in this regard by claiming with respect to the two separate settlement checks, payable to both Watkins and him:

> [A]s I look at it and in terms of what had been provided to me by one of the solicitors, that one aspect of that at one point was considered to be legal and one point was considered to be monies that might go to her. [T139-140]

More simply stated, respondent claimed that, because he did not know why the city had issued two checks instead of one, he though that part of the settlement could be used for his fee. Nevertheless, he took the entire settlement, not just a portion of it.

As noted earlier, it is obvious that respondent's true reason for filing a discrimination suit against the city was to enable him

to recover attorney fees incurred in the first case, dealing with Watkins' disciplinary action. He never, however, disclosed this reason to Watkins, who understood that any settlement monies would go to her and that respondent's fees and costs would be paid by the city. Respondent then amassed significant additional fees in his pursuit of Watkins' claim and thereafter improperly withheld her settlement from her for his own benefit. Respondent's failure to advise Watkins of the amount or basis for his fee and to have her sign a retainer agreement violated RPC 1.5. His failure to inform Watkins about the progress of the case or that she would not realize any benefits from the settlement violated RPC 1.4. Similarly, his misrepresentations to Watkins that he would seek the payment of his fees from the city violated RPC 8.4(c). Respondent was also guilty of recordkeeping violations, contrary to RPC 1.15 (d) and R. 1:21-6. Lastly, and more egregiously, respondent's unauthorized taking of fees from the settlement funds without Watkins' knowledge or consent violated RPC 1.15 (b) and (c). Respondent's most serious misconduct occurred when, on notice that his client opposed his use of the settlement funds as compensation for his counsel fees, he continued to avail himself of the funds until they were depleted. Under the circumstances, respondent had an obligation to keep the funds segregated until the resolution of the fee dispute. His conduct did not amount to knowing misappropriation only because of his colorable claim of entitlement to the funds as counsel fees.

As to the charge of fee overreaching, in violation of RPC 1.5, the Board found that the evidence did not satisfy the clear and convincing standard of proof. Respondent submitted a bill for $28,000, of which he received $19,000 from Watkins. The evidence is insufficient to conclude that (1) he would attempt to recover the $9,000 difference from Watkins and (2) the fee was so "unconscionable,""so exorbitant and wholly disproportionate to the services performed as to shock the conscience." In re Quinn, 25 N.J. 284, 289 (1957). Furthermore, the DEC made no specific finding of fee overreaching. For these reasons, the Board was unable to make any findings of impropriety in this regard.

Respondent's overall conduct, however, was sufficiently egregious to merit a period of suspension. Respondent came perilously close to knowing misappropriation when he continued to avail himself of the trust funds after he was put on clear notice that Watkins considered them her property. See In re Rogers, 126 N.J. 345(1991) (two-year suspension for incorrect, but good faith belief that escrow funds had been converted to attorney's own funds; attorney was found guilty of other extremely serious conduct, which caused grave consequences to a number of parties).

After consideration of the relevant circumstances, which also included respondent's failure to appear at the Board hearing or to waive oral argument, the Board unanimously voted to suspend him for one year. The Board also voted to condition respondent's reinstatement on the full restitution of the $19,000 sum to Watkins. Two members did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 10/17/96

LEE M. HYMERLING
Chair
Disciplinary Review Board