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SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 99-167

IN THE MATTER OF

ROBERT B. FEUCHTBAUM,

AN ATTORNEY AT LAW

Decision

Argued: July 8, 1999

Decided: February 22, 2000

Harry D. Norton, Jr. appeared on behalf of the District XI 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 XI Ethics Committee ("DEC"). The complaint charged respondent with a violation of the Rules of Professional Conduct in two matters. Specifically, in the Wilkerson matter respondent was charged with a violation of RPC 1.1(a) (gross neglect), RPC 1.4(a) (failure to communicate), RPC 1.16(d) (failure to turn over a client's file) and RPC 1.16(a)(3) and RPC 1.2(a) (failure to cease representation upon termination thereof by the client). The presenter withdrew the charges of violations of RPC 1.1(a) and RPC 1.4(a), which were

based on respondent's alleged failure to communicate with his client. In the Cigna matter, respondent was charged with a violation of RPC 1.15 (failure to safeguard the property of a third party).

Respondent was admitted to the New Jersey bar in 1974. He maintains an office for the practice of law in North Haledon, Passaic County. Respondent has no history of discipline.

The facts in this matter are as follows:

The Wilkerson Matter (District Docket No XI-97-001)

As noted above, the presenter withdrew the allegations of gross neglect and failure to communicate in this matter. The remaining charges stem from respondent's conduct after his representation of his client was discontinued. Specifically, by letter dated March 19, 1996 Grace Wilkerson terminated respondent's representation in connection with her workers' compensation claim. Respondent stipulated that he received that letter. At some point thereafter, Wilkerson received a telephone call from respondent's office notifying her of a scheduled April 29, 1996 hearing in the case. Apparently, Wilkerson, who had already retained another attorney, understood the communication to mean that respondent was continuing to act as her attorney. Respondent's office, however, advised both Wilkerson and her new attorney of the upcoming hearing. As the DEC pointed out,

> [i]t is not unusual for a discharged lawyer to continue to receive correspondence after the time that he or she is discharged from a case. It is also not unusual, nor is it improper, for a discharged lawyer to notify his former client of the fact that a hearing has been scheduled by the Court. In fact, a discharged lawyer has a continuing obligation in order to act in a manner which is not detrimental to his former client's interest. In the instant case, there is no evidence that the Respondent intended to continue to render services, or to appear in the workers compensation matter, on Ms. Wilkerson's behalf.
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> [Hearing panel report at 4]

The crux of this matter, therefore, is respondent's conduct in connection with the turning over of Wilkerson's file to new counsel. The sequence of events, as found by the hearing panel, was essentially as follows:

Respondent's services were terminated by Wilkerson on or about March 19, 1996. By letter dated April 26, 1996, Wilkerson confirmed that respondent's services were terminated and advised him of her plan to pursue a civil action against him for unethical conduct, including his failure to turn over her file. Thereafter, by letter dated May 6, 1996 Wilkerson's new attorney, Douglas Amster, requested that respondent make arrangements to have Wilkerson's file turned over to his office. Amster stated his opinion that the original file belonged to Wilkerson and, therefore, respondent should bear the copying costs. Amster further advised respondent that in his attorney lien letter he should include the money expended for copying the file. By letter dated July 16, 1996, Amster again requested that respondent turn over the file, which, according to Amster, respondent had been instructed to do by the court during a telephone conference. Amster further advised respondent that, if the

file were not turned over, he would file a motion with the court. Amster also stated that Wilkerson would be filing an ethics grievance against respondent. By letter dated August 3, 1996 Wilkerson again requested the immediate release of her file.[1]

By order dated September 25, 1996 the court directed respondent to turn over the original file to Amster's firm by no later than September 30, 1996. Thereafter, by letter dated October 1, 1996 Amster advised the court that respondent had not turned over the file.[2] On or about October 28, 1996 Amster filed a notice of motion in aid of litigant's rights, in which he asked the court to hold respondent in contempt for failure to turn over the file. Subsequently, by letter dated November 26, 1996 Amster again advised the court that the file had not been supplied to him and suggested that the court require respondent to appear on the return date, scheduled for November 27, 1996, with the original file. On December 6, 1996, respondent delivered a copy of the workers' compensation file (1,395 pages) to the judge's chambers.

* * *

A copy of the file was, in fact, prepared by the end of August 1996. As noted above, the file was not delivered, however, until December of that year. The testimony offered during the hearing reveals that a substantial part of the delay stemmed from respondent's

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[1]Wilkerson also testified about at least four verbal requests for her file.

[2]The DEC pointed out that, while it is unclear if respondent had a copy of the September 25, 1996 order prior to October 1, 1996, it is clear, that respondent knew of and had a copy of the order by that date.

belief that Amster should have been responsible for the costs of copying the file and from Amster's views to the contrary. Respondent testified that he contacted the "Ethics Committee" and was advised that, although he had a duty to turn over the file, new counsel should bear the copying costs. Respondent so advised Amster, who continued to refuse to pay. Amster told respondent that he was charging too much money for the copying (thirty-five cents per page) and that respondent should turn the file over to Amster, who would have it copied for substantially less (ten cents per page). Amster's testimony, however, indicates that he had no intention of paying for the copying, even at the more favorable rate. Rather, it was Amster's position that respondent should pay for the copying, file a lien on the workers' compensation matter and let the court resolve the issue at the end of the case. In addition, in Amster's July 16, 1996 letter to respondent, he stated his position that, since the original file belonged to Wilkerson, any copying costs should be borne by respondent.

As noted above, respondent ultimately supplied a copy of the file, approximately two months after he was to deliver the original, according to the terms of the court's order.

The DEC determined that respondent had violated RPC 1.16(d), RPC 3.4(c) (failure to obey an obligation under the rules of a tribunal) and RPC 8.4(a).

The Cigna Matter (District Docket No. XI-97- 003)

Respondent represented Livingston Bailey. Bailey, who was employed by Le Febure Corp., was injured and received workers' compensation benefits from Cigna. Recovery

Services International, Inc. (RSI), Cigna's agent, served as the recovery agent for Le Febure Corp. and asserted a workers' compensation lien on any proceeds Bailey might receive from a third party settlement. Respondent stipulated the following facts:

(a) Cigna filed a proper lien with respondent and Bailey.

(b) As of April 10, 1996, the workers' compensation lien, as claimed by RSI (Cigna's recovery agent) totaled $11,708.36.

(c) Respondent, on behalf of Bailey, reached an agreement with RSI on April 19, 1996, which was confirmed in a letter from RSI to respondent, dated April 22, 1996, whereby RSI would be paid $5,000 in settlement of the lien.

(d) On November 15, 1996, RSI first learned from respondent that, although he had the $5,000 in his account, he would not be turning over the funds to Cigna. Rather, the money would be used to pay Bailey's past rent.

(e) Respondent admitted that at some point he had the $5,000 that was to be paid to Cigna in his trust account, but that he distributed $2,900 to Bailey's landlord.

(f) As of the DEC hearing, respondent had the remainder of the funds due Cigna ($2,100) in his trust account.

Respondent's explanation for his misconduct was that Bailey, his client, was about to be evicted from his apartment. According to respondent, if Bailey were evicted, he would have disappeared and, without Bailey's presence in court, respondent would have been unable to prove the workers' compensation claim. Respondent admitted that he had no

authority to disburse any part of the $5,000, but argued that he had a duty to protect his client's rights. Respondent openly admitted that he "risked a lot" based on his belief that, due to the permanency of Bailey's injuries, there would be sufficient funds to pay Cigna the full amount of the lien.

The DEC found that

> [t]he evidence is uncontroverted that the Respondent had the sum of $5,000 in his trust account, which was owed to Cigna as part of an agreement to discharge Cigna's workers compensation lien. There was no question but that there was an agreement to pay $5,000 to RSI, on behalf of Cigna, and that the Respondent had an obligation under the applicable workers compensation statute to pay said sum. It is also uncontroverted that the Respondent made the unilateral decision to use part of the money due Cigna to pay his client's landlord. The record also reflects that the Respondent failed to promptly advise RSI of the fact that he had the $5,000 in his trust account. It was only at the time that Respondent either used or intended to use part of the money to pay his client's landlord, that RSI first learned that the $5,000 was in Respondent's trust account.
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> [Hearing panel report at 10]

The DEC determined that respondent's failure to honor Cigna's lien, failure to keep the funds due Cigna in his possession until there was a severance of Cigna's interest and failure to promptly advise Cigna or RSI that he was holding funds due Cigna in his trust account constituted a violation of RPC 1.15(b) and (c) and RPC 8.4(a) (professional misconduct).

The DEC recommended that respondent be reprimanded and be required to pay to Cigna, not only the $2,100 purportedly remaining in his trust account, but also the $2,900 that was paid to the third party.

* * *

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 fully supported by clear and convincing evidence.

In Wilkerson, there is no dispute that respondent failed to turn over Wilkerson's file by September 30, 1996, as required by the court's order. That he is guilty of misconduct in this regard is clear. The question, however, is whether that misconduct falls under RPC 3.4(c), as found by the DEC. That rule is captioned "Fairness to Opposing Party and Counsel." It is not so clear to us that respondent and Amster and Wilkerson would be considered adverse parties in this situation. The DEC found that the relationship between respondent and Amster, particularly with respect to the various applications made to the court, may be fairly characterized as a relationship between opposing counsel. We disagree. In this type of situation, we would generally find a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice). Although a violation of that rule was not charged, the complaint alleges that respondent was ordered by the court to turn over Wilkerson's original file to new counsel and that he failed to do so. In addition, respondent was charged with a violation of RPC 1.16(a)(3) and (d) in connection with his dereliction. Clearly, respondent was on notice that his conduct in this regard was under scrutiny. Thus, we deemed the complaint amended to conform to the proofs and find a violation of RPC 8.4(d) for respondent's failure to timely comply with the court's order. Indeed, because

respondent turned over only a copy of the file and not the original, as ordered by the court, he has never fully complied with the court's directive.

That respondent is guilty of misconduct in failing to turn over the file, after ordered to do so by the court, is clear. It is equally clear that he improperly refused to turn the file over to Amster, after his request for it. We recognize that respondent and Amster had a legitimate dispute over who was to bear the costs of copying the file. Moreover, respondent's belief that Amster should be responsible for the costs was correct. Although the DEC disregarded respondent's claims as without merit, Opinion No. 554 of the Advisory Committee on Professional Ethics, 115 N.J.L.J. 565 (May 16, 1985), shows otherwise. That opinion states, in relevant part:

> We believe that the client or his new attorney is entitled to receive the file with everything which is or was essential for the completion of the litigation.
>
> But who is to pay for the copying of the material?
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> If the new lawyer asks to review the file and indicates the particular material he needs, it could be promptly copied. This would tend to reduce the cost to him, since he may already have copies of many documents which the original attorney had sent to the client. A demand to take away the file is not fruitful and can be very expensive when the reasonable costs are charged to the new attorney.
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> We can find no precedent deciding who pays for the copy work. It seems to us that when a client changes attorneys, the burden should rest with the client and his new attorney. Payment of the charges may have to await the outcome of the litigation, but the obligation to pay is created when the copies of the records are made available to the client or his new attorney. The original attorney has a genuine interest in retaining the records and documents for his protection against possible malpractice suits, or an ethical or tax inquiry.

Notwithstanding Amster's or Wilkerson's obligation to pay for the reproduction of the file, the proper course of action would have been for respondent to copy the file and work out the payment later. Amster was unable to say that the lack of Wilkerson's file impeded his representation, only that it "slowed him down." Furthermore, there is no reason to dispute respondent's contentions that Wilkerson already had copies of all the documents. Nevertheless, respondent should not have disregarded his client's request for the prompt return of the file. Unquestionably, thus, respondent violated RPC 1.16(d).

In Cigna, despite his good intentions, it was improper for respondent to make a unilateral decision to pay Bailey's rent with funds that rightfully were due to Cigna. In doing so, respondent failed to safeguard property in which a third party had an interest, in violation of RPC 1.15(b).

Improper distribution of escrow funds, without more, has generally resulted in discipline ranging from a private reprimand (now an admonition) to a reprimand. In August 1991, an attorney in a real estate matter was privately reprimanded for releasing the balance of escrow funds to his client, when he was unable to obtain bills from two of his clients' creditors. He released the funds with the understanding that his client would be responsible for paying those bills directly. The attorney, however, failed to obtain the consent for the release of the monies from the other party to the escrow agreement. In June 1988, in another real estate matter, the attorney also improperly disbursed escrow funds without authorization, consent or approval from the seller or his attorney. In imposing only a private reprimand,

we considered that the attorney honestly believed that his client was entitled to the monies and that the attorney had taken appropriate steps to insure that the grievant had been made whole.

More serious discipline was imposed in In re Flayer 130 N.J. 21 (1992) where an attorney was disciplined for making unauthorized disbursements against escrow funds. In that case, the attorney represented himself in the purchase of real estate. Because certain repairs needed to be made to the property, the attorney and the builder agreed that the attorney would escrow funds to cover those repairs. When the repairs were not completed after a substantial time had elapsed, the attorney became extremely frustrated. He, therefore, wrote to the builder and its counsel on several occasions, demanding that the repairs be competed within a particular time frame and, further, warning that, if they were not so made, he would himself arrange to have them undertaken at the builder's expense. When the attorney received no response to his letters and the repairs remained uncompleted, he used the escrow funds to make some repairs himself and to hire workers to make others. Acknowledging the clear impropriety of the attorney's conduct, for which he received a public reprimand, the Court nevertheless recognized his frustration in dealing with an unresponsive builder and counsel.

As noted above, respondent also violated RPC 8.4(d) when he did not timely comply with a court order to turn over the file and failed to return the original file. He also violated RPC 1.16(d) for his failure to promptly turn over the file to his client or new counsel, upon

termination of the representation. Generally, failure to turn over a client's file, without more, would merit the imposition of an admonition. See In the Matter of Brasno, Docket No. DRB 97-091 (June 25, 1997) (admonition imposed where an attorney failed to turn over a client's file and failed to cooperate with disciplinary authorities). Here, respondent's conduct was more serious because of the violation of RPC 8.4(d).

In mitigation, we considered that respondent has been admitted to the bar for twenty-five years, has had no disciplinary infractions and stipulated many of the relevant facts. Under these circumstances, we unanimously determined that a reprimand sufficiently addresses the nature of respondent's ethics infractions. One member did not participate.

One additional point warrants mention. The DEC suggested that respondent be required to pay Cigna not only the $2,100 purportedly remaining in his trust account, but also the $2,900 that was paid to Bailey's landlord. We refrained from imposing such a requirement, believing that the ethics system is not the proper forum for the resolution of that issue.

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

Dated: 2/22/00

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert B. Feuchtbaum
Docket No. DRB 99-167

Argued: July 8, 1999

Decided: February 22, 2000

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Cole			x				
Boylan			x				
Brody			x				
Lolla			x				
Maudsley			x				
Peterson			x				
Schwartz							x
Wissinger			x				
Total:			8				1

Robyn M. Hill 2/28/00
Robyn M. Hill
Chief Counsel