SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-153
District Docket No. IIIA-07-0031E

IN THE MATTER OF	:
JOSEPH J. DOCHNEY	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 17, 2009

Decided: November 10, 2009

Scott W. Kenneally appeared on behalf of the District III Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for discipline (reprimand) filed by the District IIIA Ethics Committee ("DEC"). The two-count complaint charged respondent with violating RPC 1.9(c)(1) (a lawyer who has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disadvantage of the former client) and RPC 8.1, presumably (a) (making a

false statement of material fact in connection with a disciplinary matter). The presenter withdrew the latter charge.

We determine that a reprimand is the appropriate discipline for respondent.

Respondent was admitted to the New Jersey bar in 1981. He maintains a law office in Toms River, New Jersey.

On September 3, 2009, we determined to reprimand respondent, in a default matter, for failure to provide a client with a writing setting forth the basis or rate of his fee in an employment termination case. Specifically, respondent did not conduct an investigation in the matter, permitted the statute of limitations to run, failed to keep his client informed about the status of the matter, did not tell him that the statute of limitations had expired, and misrepresented to the client that the matter was proceeding properly. In the Matter of Joseph J. Dochney, DRB 09-067 (September 3, 2009). The matter is pending with the Court.

This matter involves respondent's law firm's representation of the grievant, Erica Simpson, in a domestic violence incident and respondent's subsequent representation of his stepson, Robert Smith, in a custody matter in which Erica's character came into question.

Erica is Rachel Simpson's sister. Rachel and Robert Smith had a child together, Kyle Simpson. Rachel and Robert began living together when their son was approximately eight months old. Erica became acquainted with respondent as a result of her sister's relationship with respondent's stepson.

In 2005, Erica retained respondent in connection with an incident in Brick Township, for which she was charged with domestic violence, a simple assault (N.J.S.A. 2C:12-1(a)(1)), against her former boyfriend.

Respondent recalled that, on the night of Erica's arrest, Robert telephoned him for help in determining whether Erica was going to be detained and whether she would require bail. Respondent called Brick Township and learned that the police would release Erica on her own recognizance, once she calmed down.

According to Erica, she met with respondent several times before the hearing in the domestic violence matter, but, ultimately, respondent's then associate, Robert Ebbercup, represented her at the hearing. Erica testified that, during her meetings with respondent, she discussed the incident with him and "told him things that no one else knew." She also told respondent about another domestic relations incident in Lakewood

Township. She felt that respondent was like a doctor, in that she could trust him with the information.

According to Erica, respondent told her that her case was easy and that Ebbercup would be handling it. Respondent claimed, however, that he did not want to get involved in her case and, therefore, had Ebbercup handle it. Erica met with Ebbercup twice and discussed the same aspects of her case with him that she had discussed with respondent.

Ultimately, the domestic violence case against Erica was dismissed. She understood that the matter had been sealed. She considered it to be a personal, "shameful thing." No one in her family knew about the incident.

Sometime in 2007, Robert and Rachel separated. Rachel moved in with her grandparents. With respondent's assistance, Robert sued Rachel for visitation rights. In August 2007, Rachel and Robert met with a mediator, to no avail. Thereafter, the matter proceeded before the court. At that time, respondent raised the issue of preventing Erica from having unsupervised contact with Kyle.

Unbeknownst to Erica, she became the subject of Rachel and Robert's custody hearing. Erica stated that, prior thereto, she had spent a lot of time with her nephew and that no one had ever objected to her being around him. She was, therefore, surprised

that respondent was raising concerns about her character. Respondent had subpoenaed records relating to her employment, criminal incidents, drug use and hospitalizations, without her knowledge. He subpoenaed records from her employer, Outback Steakhouse, as well as Jersey Shore Medical Center, Silverton Pharmacy, Community Medical Center, CVS Pharmacy, Paul Kimbal Medical Center, Preferred Behavioral Health, St. Barnabas Behavioral Center, Walgreen's, Jersey Shore Addictive Services a/k/a Busury Methadone, Toms River Police Department, Ocean Medical Center, Seaside Police Department, Seaside Heights Police Department, Point Pleasant Police Department, Lakewood Police Department, Island Heights Police Department, Brick Township Police Department, and Pilot House Restaurant & Bar. Erica did not receive copies of the subpoenas until after the custody hearing.

Although respondent handled Robert's custody case, respondent recalled that Ebbercup may have done a couple of "things" on it, when respondent was out of the office. For the most part, the custody case was "under [respondent's] direction."

Respondent admitted that, even though Erica was not the focus of the custody case, she was a "great part of [it]." Robert had learned from his neighbors, and knew from his

personal experience, that Kyle was not properly cared for by either Erica or Rachel. Therefore, one of the focuses of the custody proceedings was the limitation of Erica's contact with Kyle. Respondent's office forwarded copies of the subpoenas to Rachel's attorney, but did not forward the relevant copies to Erica until, presumably, after one of the hearings. In addition, it appeared that the subpoenas were sent to Erica at an incorrect address. Respondent did not recall whether he had reviewed the subpoenas before they had been mailed out.

Respondent's paralegal/secretary, Tracey Forcella, testified that she had prepared the subpoenas in the Robert/Rachel custody case, at respondent's direction. She and respondent had met with Robert to prepare a list of the places or people on whom the subpoenas would be served. According to Forcella, the firm did not rely on Erica's file for the custody case, even though Erica's file was in the office and documents relating to her domestic violence matter were still on the office hard drive.

Robert testified that, because of his concerns for his son's well-being and his fears that his son was not being properly supervised by either Rachel or Erica, given both of their drug-use problems and Erica's run-ins with the police, he wanted to obtain custody of his son. To that end, and to

document his concerns, Robert provided respondent's office with information to assist in the preparation of subpoenas, including the names of Erica's medical providers, pharmacists, and the towns in which Erica had been involved in various incidents with the police.

Ultimately, Erica was denied unsupervised visits with Kyle. As a result, Erica hired an attorney to assist her to obtain visitation rights with her nephew. Her attorney filed a motion to disqualify respondent, based on his prior representation of Erica. Respondent withdrew from the custody case, whereupon Robert retained a new lawyer.

Respondent explained that Robert and Rachel were unable to work out the custody issue themselves, via mediation, because Rachel was of the view that only she was fit to take care of Kyle. Rachel would not permit Dottie, Kyle's grandmother, to take him from his house (Rachel's grandparent's house), claiming that he had been traumatized. Moreover, Rachel would not permit Robert to have unsupervised visits with Kyle. All visitation was conducted under the supervision of Rachel or her grandparents. Respondent had known Rachel for several years and found her actions to be "vengeful and spiteful."

Respondent testified that he permitted his staff to sign letters or documents on his behalf such as subpoenas, retainer

agreements, or requests for discovery. His staff had blanket authority to sign his name on forms. As to the subpoenas in the custody case, although respondent did not sign the documents, he was aware that he was subpoenaing information relating to Erica's 2005 domestic violence case. He did not think that he was doing anything wrong by issuing the subpoenas. He viewed the custody case as something that affected not only Rachel and Robert, but other family members as well. Respondent conceded that the records that he had subpoenaed were "for the purpose of developing the evidence with regard to domestic incidents, violence, drug use . . . and an incident with [Erica's] stepfather . . . to establish her unfitness with respect to being alone with Kyle."

Respondent stated that, once Erica's attorney brought to respondent's attention that she was complaining about a conflict of interest, respondent looked at the court rules and realized that his continuing representation could be a problem. He, therefore, withdrew from the case.

Respondent argued before us that he never used information relating to his prior firm's representation of Erica and that, in any event, he did not receive the subpoenaed information from the Brick Township Police Department relating to Erica's earlier matter until after the court had entered an order prohibiting

Erica's contact with Kyle. Respondent admitted subpoenaing information relating to Erica, but claimed that it was necessary to ascertain what was in the best interest of his stepson's child.

The DEC concluded that respondent used information relating to his firm's prior representation of Erica in the municipal court matter to her disadvantage and detriment, thereby preventing her from having unfettered contact with Kyle. The DEC noted that, because the type of information that respondent sought is generally sealed by the court, it is not considered as "generally known information."

The DEC found that respondent violated RPC 1.9(c)(1). It also expressed concerns about the inconsistency of respondent's testimony at the ethics hearing and the judgment that respondent exercised, given "the distinctly adversarial and hostile nature of the underlying custody matter and the information Respondent sought to and did obtain and used against his former client."

In recommending a reprimand, the DEC considered, as mitigation, that respondent had not been previously disciplined. As aggravating factors, the DEC considered that there was a disciplinary matter currently pending against respondent (the default matter cited above), and that, based on his testimony regarding the manner in which his office issued subpoenas, there

was a reasonable prospect that the DEC would file a complaint charging him with a violation of RPC 5.3 (responsibilities regarding nonlawyer assistants).

Following 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.

For the most part, the DEC's findings were proper. RPC 1.9(c)(1) provides:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use the information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known . . . .

Respondent and his firm represented Erica in the Brick Township domestic violence matter. Clearly, at that time, respondent's firm learned potentially damaging information about Erica and then later sought information via subpoena to impugn Erica's character in the subsequent custody matter. The previously known information was used to her disadvantage, even though she was not the direct object of the custody matter. In addition, the information that respondent's firm subpoenaed from

police departments, health care providers, pharmacies, and employers does not fall within the exception to the rule of information that has become generally known. Moreover, respondent admitted that, once he looked at the rules, he recognized the impropriety of his continued representation of his stepson and withdrew from the custody matter. However, his withdrawal from the case occurred only after Erica's attorney filed a motion to disqualify him from the representation. Respondent, therefore, violated RPC 1.9(c)(1).

The DEC properly considered, in mitigation, that respondent has no ethics history. However, the DEC improperly considered, as aggravating factors, the matter that was pending against respondent at that time (the default case) and the prossibility that the DEC may file additional charges against him, as a result of evidence that came to light during the course of the DEC hearing (RPC 5.3 (failure to properly supervise nonlawyer assistants)).

The only issue left for determination is the proper quantum of discipline for respondent's violation of RPC 1.9(c)(1).

Cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients, ordinarily result in a reprimand. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994). See,

e.g., In re Ford, 200 N.J. 262 (2009) (attorney filed an answer to a civil complaint against him and his client and then tried to negotiate separate settlements of the claim against him, to the client's detriment; prior admonition and reprimand); In re Mott, 186 N.J. 367 (2006) (attorney prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest in the company to the buyers, the attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a written waiver of the conflict of interest from them) and In re Poling, 184 N.J. 297 (2005) (attorney engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned – a fact that he did not disclose to the buyers, in addition to his failure to disclose that title insurance could be purchased elsewhere).

In special situations, admonitions have been imposed on attorneys who have violated the conflict of interest rules post-Berkowitz and Guidone. See, e.g., In re Bjorklund, N.J. (2009) (attorney engaged in a conflict of interest when he represented two criminal defendants in unrelated matters, with

the potential that each of the defendants could be a witness against the other; compelling mitigation considered, including the possibility that the attorney might not have been aware of the circumstances that gave rise to the conflict, the absence of a disciplinary record in his twenty-three years at the bar, the passage of thirteen years since the infraction, and his acknowledgement of the impropriety in representing criminal defendants with potentially competing interests; although the disciplinary matter proceeded as a default, the discipline was not enhanced because of lack of clear and convincing evidence that the attorney's failure to file an answer was not a mistaken understanding on his part that an answer was not required because he had indicated to the Office of Attorney Ethics' attorney assigned to his case that he did not intend to contest the charges); In the Matter of Cory J. Gilman, 184 N.J. 298 (2005) (attorney disciplined for an imputed conflict of interest (RPC 1.10(b)), among other violations, based upon his preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; in imposing only an admonition, we noted the following "compelling mitigating factors": this was the attorney's "first brush with the ethics system; he cooperated fully with the OAE's investigation, and, more importantly, he

was a new attorney at the time (three years at the bar) and only an associate"); and In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (among other things, attorney engaged in a conflict of interest (RPC 1.7(b)) when she collected a real estate commission upon her sale of a client's house; in mitigation, we considered the attorney's unblemished fifteen-year career, and her ignorance that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the client, and the passage of six years since the ethics infraction).

Recently, three attorneys who have violated RPC 1.9, albeit in another context, have discipline ranging from a reprimand to a three-month suspension. See In re Dranov, 179 N.J. 420 (2004) (reprimand for attorney who embroiled himself in several conflict of interest situations (RPC 1.9(a)(1)), thereby compromising the interests of one client to the advantage of the other and breaching his duty of fidelity to both; the attorney asserted a claim of one client against a former client, without obtaining the former client's consent after full disclosure of the circumstances and consultation with the former client); In re Mason, 197 N.J. 1 (2008) (censure imposed on attorney whose violations included, among others, violating a court order,

using information regarding one former client to the advantage of a new client; specifically, after the attorney withdrew from the representation of one corporate client against another company, he was retained by the latter to represent it "on the other side of the dispute;" during that representation, the attorney used information obtained in the course of his representation of the former client); and In re Fitchett, 184 N.J. 289 (2005) (three-month suspension for attorney who represented a public entity, the plaintiff against a defendant corporation, in connection with a landlord-tenant action; in the course of settlement negotiations, the attorney became acquainted with the lawyers for the defendant; the attorney later accepted an offer of employment by the defendant's lawyers while he continued to represent the plaintiff; only after the settlement agreement was signed did the defendant discover that the attorney had joined its lawyers' firm; we found that, when the attorney switched law firms, his client's interests were adverse to his new employer's client).

In this matter, respondent had a personal stake in the custody case: his stepson was a party and his stepgrandson's well-being was at issue. Respondent's judgment may have been clouded by these circumstances. Nevertheless, even though he claimed that he had not wanted to represent Erica from the

outset, he did not decline the representation. Instead, after conferring with Erica and discussing personal matters with her, he turned her matter over to another attorney in his firm. Both attorneys learned potentially damaging information during the firm's representation of Erica, information that was later used to Erica's detriment.

The only mitigating factor present is respondent's otherwise unblemished ethics history.[1] Respondent's conduct, which involves only a violation of RPC 1.9(a), is not as serious as the conduct in Fitchett (side-switching; three-month suspension), Guidone (undisclosed pecuniary interest; three-month suspension) or Mason (side-switching; censure). In Mason, not only did the attorney engage in a serious conflict of interest, but he also defied a court order to refrain from continuing to provide legal assistance to his new client. Here, unlike Mason, once respondent's involvement in the custody case came into question, he withdrew from the representation. We, therefore, determine that respondent's conduct, like Dranov's, deserves a reprimand.

Member Baugh did not participate.

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[1] We note that the conduct in the default matter currently with the Court occurred after the conduct in this case.

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 Joseph J. Dochney
Docket No. DRB 09-153

Argued: September 17, 2009

Decided: November 10, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh						X
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Julianne K. DeCore
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Chief Counsel