SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-177
District Docket No. IV-2013-0009E

IN THE MATTER OF	:
ERIC ANDREW FELDHAKE	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 18, 2014

Decided: December 15, 2014

Daniel Q. Harrington appeared on behalf of the District III Ethics Committee.

David H. Dugan, III appeared on behalf of respondent.

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

This matter was before us on a recommendation for a reprimand filed by the District IV Ethics Committee (DEC). The six-count complaint charged respondent with two counts of having violated RPC 1.4(d) (failure to advise client that the assistance the client seeks is prohibited by the Rules of Professional Conduct), one count of RPC 4.4(a) (conduct that has no substantial purpose other than to embarrass, delay, or burden a third person or the use of methods to obtain evidence that violates the legal rights of such a person),

and three counts of RPC 8.4(d) (conduct prejudicial to the administration of justice). For the reasons detailed below, we determine that a censure is the appropriate discipline in this matter.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1999. He maintains a law office in Haddonfield, New Jersey. He has no history of discipline.

According to a stipulation of facts, respondent represented Francis Felcon in connection with guardianship proceedings for both of Francis' parents, Joseph and Bernice Felcon, estate litigation for both of his parents' estates, and claims against his brother, Thomas, for misappropriating his parents'/estate funds, through the use of undue influence and wrongful acts.

Francis retained respondent in September 2010.[1] At the time, Francis and some of his seven siblings believed that both parents were mentally incapacitated (Alzheimer's or dementia) and had cognitive impairments that prevented them from carrying out their daily functions, as well as making medical and financial decisions. Respondent had them evaluated by medical professionals and filed papers to have guardians appointed for them. Although a return date had been set for a hearing, Joseph passed away beforehand, in 2010, causing the matter to be adjourned for several months. The

[1] Francis has since passed away.

application later went forward on behalf of Bernice, who was declared incapacitated. Francis and his sister Colleen were appointed the guardians of the property and of the person, respectively. Bernice passed away in the fall of 2012.

Thomas had moved in with his parents in 2008. Sometime thereafter, he had Joseph sign various real estate, estate, and power-of-attorney documents that conflicted with his siblings' authority over their parents. According to respondent, Joseph's estate "was in flux" until 2013, when a judgment determined which estate planning documents were valid and how the estate was to be distributed.

Attorney David Khawam, the grievant in this matter, represented Thomas in estate matters brought by Francis, as well as in criminal complaints filed against Thomas. Respondent was not involved in the filing of the criminal complaints.

At Francis' direction, on January 5, 2011, respondent sent a letter to Khawam stating, in part:

> Francis Felcon will attempt to withdraw the pending charges against your client and he believes that his siblings will support withdrawals of charges against Thomas Felcon if the following occurs. . . .
>
> [Ex.C4;J1¶8;T22.][2]

[2] "J" refers to the stipulation of facts between the parties; "T" refers to the March 12, 2014 DEC hearing transcript.

Nineteen following paragraphs required Thomas, among other things, to relinquish his rights and responsibilities under each estate document signed by Joseph and/or Bernice Felcon. More specifically, it required him to renounce his right to act as fiduciary for his parents and to admit to various improper acts. Those included influencing his father to transfer assets in a way that Thomas would have control over them, stealing prescription pain medication from his brothers, and terrorizing his family members and threatening violence against them. According to respondent, the purpose of the letter was to further Francis' desire to either minimize or end the protracted litigation. Respondent advised Francis that some of the conditions in the letter were unenforceable, such as requiring Thomas to leave the state.

At some point before July 6, 2011, Francis, as a fiduciary, filed a motion with the Superior Court, Burlington County. The record does not provide the details of the motion. However, as a result of the motion, on July 6, 2011, the court determined that, after several doctors had found Joseph to be mentally incapacitated, Thomas had exerted undue influence over Joseph, causing him to execute certain estate planning and financial documents. The court ordered that the funds that Thomas had improperly obtained from Joseph ($180,000 out of $217,735.17) be disgorged and that respondent's firm hold them in escrow. The

court denied Francis' request to have Khawam return funds that Khawam had received from Thomas. Thomas was ordered, within thirty days of the order, to account for the $217,735.17 that was in dispute.

Some of the disputed funds had been passed on to Khawam as counsel fees (four checks, totaling $35,000). Three of the checks that Khawam had received were cashier's checks from Falcon Trucking, LLC (also spelled Felcon Trucking in the transcript), which was not a party to the litigation. Falcon Trucking had been created by Thomas, who had taken his father's funds and deposited them into the Falcon Trucking account.

Thomas filed a motion for reconsideration of the portion of the July 6, 2011 order that required him to disgorge the funds. Francis filed a cross-motion for reconsideration of the portion of the order that did not require Khawam to return the amount of fees and costs that he had received from Thomas.

On August 11, 2011, the Honorable Michael J. Hogan, P.J.Ch., denied both motions. The judge's opinion shed some light on the dispute over the funds. After doctors had determined that Joseph was incapacitated, Thomas had opened an account with his father at PNC Bank and obtained a $217,735.17 cashier's check from his father's funds. The check listed Joseph as the payee. Thomas' sister, Colleen, found the check and turned it over to respondent, who then put it into the firm's

vault for safekeeping. When Thomas discovered that the check was missing, he informed PNC Bank that it had been stolen. After Thomas signed an indemnification agreement, the bank issued another check, payable to Joseph Felcon. Thomas obtained access to those funds by having his father deposit them into a jointly held account. Respondent claimed that, approximately one week later, Thomas "conceal[ed] a portion of those funds" by transferring them to Falcon Trucking. Thomas used approximately $75,000 of the funds for personal purposes and to pay Khawam's legal fees.

In their motions, Francis argued that the money that Thomas had used was money that would have passed through the father's estate; Khawam disagreed, asserting that it was money from a joint account. Eventually, a portion of the disputed funds was deposited into respondent's escrow account.

Thereafter, in a September 29, 2011 email to Khawam, respondent stated the following:

> Just to be clear my client is going to pursue every available remedy to get the $35,000 his brother paid you back into his father's estate. This includes motions, appeals, and any available ethics charge. He feels strongly that both morally and legally after May 4 2011 hearing [sic][3] you had a duty NOT to bill against the disputed funds.

[3] Presumably, May 4, 2011 was either the date Francis filed the motion or the return date of the motion that was decided on July

(Footnote cont'd on next page)

> I may be able to recommend he waive claims against you if you return all fees billed to Thomas Felcon and Falcon Trucking after May 4, 2011.
>
> [Ex.C7.]

Khawam responded:

> [Y]ou stated "This includes motions, appeals, and any available ethics charge" and so to me that means you are litigating against me and unethically threatening ethics charges against me to embezzle money from me. You can't be any clearer. Obviously you have your mind set. Before I started taking this to another level I just thought you would see reason. Do what you have to do.
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> [Ex.C7.]

Respondent then replied "My client will do all the law affords him to protect his parents' estates."

According to Khawam, respondent threatened that ethics charges are "very nasty" and "you don't want them to happen against you, so if I was you, I would return the money right away and then no ethics charges."

Respondent, in turn, explained that his email offered to waive civil charges relating to Thomas' actions, not ethics charges, because such violations are a "public right, a public

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(Footnote cont'd)

6, 2011, which would have put Khawam on notice that there was a dispute over the funds.

harm." He conceded, however, that, when he wrote the email, he was not aware of A.C.P.E. Opinion 721, 204 N.J.L.J. 928 (June 27, 2011) (T128)[4]. In addition, respondent denied, both at the hearing and in his answer to the ethics complaint, that he had orally threatened Khawam with ethics charges. He claimed that, at that stage of the civil proceedings, he did not know whether a grievance was feasible, because he had not yet seen any discovery to ascertain whether Khawam had done anything improper. In addition, it was his understanding that any ethics grievance filed at that point would be stayed until the conclusion of the civil litigation.

Respondent contended that, when he had sent the email, there had already been a request that Khawam return the funds that Thomas had given him, that RPC 1.15(c) (funds over which there is a dispute between the lawyer and the client must be kept separately until the dispute is resolved) had been cited, and that, even though Khawam had been informed that the funds were in dispute, he had used them, instead of setting them aside

[4] That opinion states that "[a]ttorney discipline is not a private cause of action or private remedy for misconduct that can be negotiated between an attorney and the aggrieved party." The opinion further states that an attorney may not seek or agree, as a condition of settlement of an underlying dispute, that the client refrain from filing an ethics grievance with regard to conduct of the attorney in the matter or withdraw an already filed grievance. Such agreements are prejudicial to the administration of justice, a violation of RPC 8.4(d).

in an escrow account. Respondent added that, although he harbored a suspicion that Khawam might have improperly used the funds, without having received any discovery, he could not be certain that Khawam had violated any ethics rules.

In October 2011, respondent subpoenaed Khawam's billing records, so that the estate could determine "the timing" of Khawam's billing and whether Khawam had been obligated to escrow any portion of the amounts that he had received from Thomas. Respondent believed that the billing records were critical to deciding whether Khawam had violated any ethics rules. According to respondent, the judge ruled that he could subpoena Khawam's records relating to his billing for matters concerning Joseph and Joseph's estate.

Respondent's October 5, 2011 subpoena ordered Khawam to appear at a deposition and to produce billing records relating to Joseph, Joseph's estate, Thomas, and Falcon Trucking, LLC. Respondent testified that his purpose was to determine whether Khawam had violated RPC 1.15 and that the scope of the subpoena was limited to Khawam's billing records, not other client matters. He denied that his intent was to embarrass or burden Khawam.

In moving to quash the subpoena, Khawam argued that the subpoena power did not apply to him because he was not a party to the case, that he was bound by the attorney-client privilege

and that, therefore, he could not testify, even though by that time, Thomas had disappeared[5]. At oral argument, on December 9, 2012, the judge stated the following:

> This is a situation where an attorney at law, through - - as I hear your argument, has participated with - - a client to effectively continue a fraud of [sic] the Estate. And that's serious stuff because the ultimate - - the bottom line is to the attorney, is that it could affect his license. It could even affect his freedom.
>
> . . . .
>
> [H]e should be a party to the case before we start delving into his records.
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> [Ex.C12-23.]

On December 12, 2011, the court granted Khawam's motion to quash the subpoena, without prejudice, but permitted Francis to add Khawam as a party to the complaint. The judge did so to give Khawam his "full litigation rights . . . [so that he would] not just [be] sitting on the sidelines . . .". The judge also granted respondent's oral motion to add Khawam as a defendant and Khawam's motion to withdraw from Thomas' representation.

On December 20, 2011, respondent filed a proposed order to amend Francis' complaint to add Khawam as a party. Because Judge Hogan had retired, the case was reassigned to the Honorable Karen L. Suter, P.J. Ch., who required respondent to file a

[5] Khawam believed that Thomas had moved to Florida.

formal motion to amend the complaint. The judge ruled that merely submitting a proposed order was insufficient. Francis, however, instructed respondent not to file the motion because, according to respondent, Francis wanted to change his focus from Khawam to PNC Bank. Respondent testified that Francis had made a "tactical decision" not to pursue Khawam because of Khawam's poor finances and because to pursue a motion to add him as a party would have been too expensive. According to respondent, they then decided to subpoena Khawam's Wells Fargo bank records to trace the path of the PNC funds. Their purpose was to find out where the assets from Joseph's estate had been deposited.

On January 17, 2012, respondent served the subpoena on Wells Fargo Bank, demanding the production of "[a]ll written or electronic records relating to checks made payable" to Khawam or his law office on behalf of Joseph Felcon, his estate, or on behalf of Thomas Felcon and Falcon Trucking, that were "cashed, deposited, or otherwise converted" at a Wells Fargo location or ATM, including, "without limitation," the three checks attached. The three checks, made out to Khawam, came from either Thomas or Falcon Trucking. The subpoena also requested the monthly statements for the account into which the checks had been deposited.

At that point, Khawam was out of the case. Respondent testified that the subpoenaed information was limited to the

information relating directly to the $217,000 check that Thomas had improperly obtained. He claimed that, even though the subpoena had been "inartfully drafted," he was only looking for monthly statements for April and May 2011. He denied any intent to harm or harass Khawam.

In response to the subpoena and two subsequent requests from respondent, Wells Fargo sent him documents that included Khawam's personal and professional banking information and information relating to another one of Khawam's clients. Respondent asserted that he had tried to protect Khawam's privacy interests by providing the information to Francis only. He had not, however, redacted any account numbers or other identifiers, before he had sent the information to Francis.

Respondent did not restrict Francis' use of the bank records pertaining to Khawam. When Francis filed a grievance against Khawam, he attached those bank records to it.

Khawam testified that he became aware that respondent had subpoenaed his Wells Fargo bank records only after he received copies of several identical ethics grievances that Thomas' siblings had filed against him. The grievances attached copies of the subpoena and of Khawam's subpoenaed bank records. Khawam

pointed out that the grievances against him had all been dismissed.[6]

Khawam testified that the subpoenaed records included his and his wife's joint account information. Khawam complained that respondent had received his personal banking information, which included his spending habits. It greatly upset his family and "embarrassed and humiliated" him. Khawam told the hearing panel that, because some of the information that respondent obtained related to Khawam's clients, he was concerned that, if his clients' information became public, he would be subject to lawsuits.

On July 15, 2013, the Honorable Charles A. Little, J.S.C., Ch.D., entered a final judgment in the estate litigation, finding, among other things, that Thomas had exercised undue influence on Joseph, during Joseph's execution of all estate documents after August 7, 2009. The judge (1) invalidated the deeds and revocable trust entered on January 21, 2010 and re-titled them to Bernice's estate; (2) ordered the funds held in respondent's firm's escrow account to be transferred to

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[6] According to the OAE records, Francis' grievance against Khawam was dismissed. Although disciplinary matters are confidential before the filing of a formal ethics complaint, R. 1:20-9(a), it is assumed that Khawam waived confidentiality, R. 1:20-9(a)(1), inasmuch as he testified about the Francis grievance at the hearing in this matter.

Bernice's estate; and (3) determined that, after an offset of funds held by respondent's firm, Thomas owed the estate $75,552. In addition, the judge determined that Thomas owed attorneys' fees totaling $121,557.01. At the time of the judgment, Thomas was represented by William Vaugh, who had been recommended to him by Khawam and who shared office space with Khawam.

Although the DEC found no evidence that respondent had participated in filing criminal charges against Thomas, it determined that he had attempted to use the charges as a bargaining chip in the civil action. Nevertheless, the DEC concluded that the evidence did not clearly and convincingly establish a violation of RPC 8.4(d) on this score and, therefore, RPC 1.4(d) (counts one and two, respectively).

The DEC found, however, that, on at least one occasion, respondent orally threatened to pursue ethics charges against Khawam, unless Khawam returned the disputed fees, and that he did so to gain an unfair advantage in the civil matter, a violation of RPC 8.4(d).

The DEC also found that, in light of Judge Hogan's (1) denying respondent's motions to order Khawam to disgorge funds that he had received from Thomas; (2) quashing respondent's subpoena to have Khawam testify at a deposition and to produce certain billing records; and (3) on December 9, 2011, granting Khawam's motion to withdraw as Thomas' attorney, respondent

violated RPC 4.4(a). The DEC concluded that the subpoena had no substantial purpose other than to embarrass and burden Khawam.

The DEC further concluded that service of the subpoena and follow-up inquiries to Wells Fargo were deliberate attempts to circumvent the clear intent of the court's order to have respondent add Khawam as a party to the litigation. The DEC reasoned that, by making Khawam a party-defendant, Khawam would have been offered full litigation rights, before respondent could pursue discovery relating to Khawam's personal and professional financial affairs.

Finally, the DEC found that respondent violated RPC 1.4(d) by failing to inform Francis that serving the subpoena on Wells Fargo, at Francis' direction, was not permitted by the Rules of Professional Conduct.

The DEC considered, as mitigation, that respondent has no ethics history. The DEC would have recommended an admonition, instead of a reprimand, but for (1) respondent's threats, on more than one occasion, of filing a grievance against Khawam for the purpose of intimidating him; (2) the letter offering to withdraw Thomas' criminal charges, which displayed respondent's attempt to intimidate, as a course of conduct throughout the litigation; and (3) the fact that the Wells Fargo subpoena was part of the same ongoing conduct.

In his letter-brief to the DEC, the presenter argued the following.

As to count one, relating to respondent's January 5, 2011 letter to Khawam, setting forth nineteen conditions for resolving the litigation, the presenter acknowledged that RPC 3.4(g) (threatening criminal charges to gain an unfair advantage in a civil matter) does not address the "unusual situation that occurred here," in that respondent did not initiate the criminal charges. The presenter argued, however, that, because respondent's conduct ran afoul of the identical policies that underlie that rule, respondent violated RPC 8.4(d).

The presenter pointed to correspondence from Francis to respondent and to respondent's replies to Francis, as proof that Francis was a smart, demanding, and challenging client. The presenter called RPC 1.4(d) (advising a client of limitations on a lawyer's conduct) the "just say no" rule and suggested that it was tailor-made for Francis. Yet, according to the presenter, there was no evidence that respondent had ever attempted to confront Francis about the "significant ethical deficiency in respondent's [January 5, 2011 letter]" to Khawam, which respondent had sent at Francis' direction.

The presenter further argued that count three (RPC 8.4(d)), relating to respondent's September 29, 2011 email to Khawam, could not be read as anything other than a threat to pursue

ethics charges, if Khawam did not comply with Francis' requests to return the legal fees paid by Thomas.

As to the subpoena served on Wells Fargo for Khawam's bank records, the presenter pointed out that there were four court rulings that were important: two that denied respondent's requests for the return of the fees that Thomas had paid Khawam, one quashing respondent's subpoena for Khawam's billing records, and one granting Khawam's motion to be relieved as Thomas' counsel. The presenter noted that, once Khawam was relieved as counsel, he would no longer be served with notice of further proceedings in the matter. The presenter underscored Judge Hogan's objections to the subpoena for Khawam's billing records, as it did not afford Khawam an opportunity to defend himself and had the potential to uncover evidence that might subject Khawam to a host of charges. The judge, thus, ordered respondent to file a motion to join Khawam as a party, if respondent intended to pursue information regarding Khawam's billing/bank records.

Before the issuance of the Wells Fargo subpoena, however, Francis had determined not to add Khawam as a defendant and, instead, to focus on PNC Bank. The presenter pointed out that serving a third-party subpoena on Wells Fargo was contrary to the intent of Judge Hogan's ruling, when he quashed the subpoena for Khawam's billing records. In fact, the presenter remarked, the first subpoena was far less intrusive than the subpoena

served on Wells Fargo. The presenter argued that respondent had flouted the intent of Judge Hogan's ruling, in a manner that had left Khawam without the ability to challenge the subpoena; in essence, he was left without his litigation rights. Moreover, the presenter noted, when respondent forwarded the unredacted bank records to Francis, without imposing any restrictions on the documents' use or dissemination, respondent prevented Khawam from protecting his own interests.

The presenter argued that respondent had "no non-frivolous reason" to subpoena the Wells Fargo records and that, if it were true that respondent intended to pursue the bank, rather than Khawam, the subpoena that he had issued to the bank was so much broader than necessary that it was obvious that its purpose was to embarrass and burden Khawam, a violation of RPC 4.4(a). The presenter added that respondent's circumvention of Judge Hogan's ruling to make Khawam a party to the litigation also violated RPC 8.4(d) (counts four and five). Finally, the presenter argued that respondent's failure to inform his client that he was not permitted to serve the subpoena violated RPC 1.4(d).

The presenter did not recommend to the DEC any degree of discipline for respondent's violations.

On August 18, 2014, respondent's counsel filed a brief with us, essentially reiterating some of the arguments made to the DEC.

Counsel argued that respondent's offer to withdraw pending criminal charges against Thomas, as his client had directed, was not a violation of RPC 8.4(d), given the lack of notice that doing so is unethical. Therefore, he asserted, RPC 1.4(d) is inapplicable here.

Counsel further argued that respondent did not actually threaten to file an ethics grievance against Khawam, but merely informed him about the remedies that his client intended to pursue. Specifically, the statement regarding "any available ethics charge" was simply a statement of fact as to what Francis intended to do. Also, the reference to claims that respondent might be able to recommend that his client waive pertained to financial claims to the recovery of the $35,000, not to grievances. Moreover, respondent testified about his understanding that ethics charges are usually dismissed without prejudice, if they relate to pending court proceedings. Thus, counsel noted, an ethics grievance filed at that juncture would have had little or no impact.

As to Khawam's testimony that respondent had orally threatened him with a grievance, counsel pointed out that, without corroboration, there was no clear and convincing evidence that it had occurred.

Counsel argued further (1) that the Wells Fargo subpoena was a proper discovery tool to search for funds taken from the

estate; (2) that, although the subpoena "spoke broadly about the 'documents to be produced' [it] clearly intended to require a response only as to the three attached checks;" (3) that, as such, the subpoena had a substantial, legitimate purpose; (4) that it was not seeking information that respondent was unable to obtain from Khawam, that is, his billing records; (5) that respondent's purpose in serving the subpoena was "simply to trace and identify funds which Thomas had acquired from his father and, [sic] to have those funds secured and returned to the decedent's estate;" and (6) that the subpoena was necessary to adequately complete discovery. Accordingly, counsel argued, respondent did not violate RPC 4.4(a).

As to count five, counsel asserted that the Wells Fargo subpoena had nothing to do with Khawam's time records; that it simply sought bank records to document the source of funds that Khawam had received from Thomas; that it was necessary to fulfill respondent's duty to represent his client with diligence, under RPC 1.3; and that, because respondent did not violate RPC 8.4(d) in this regard, RPC 1.4(d) was also inapplicable.

Counsel asserted that there are no aggravating factors and that, conversely, mitigating factors are present: (1) respondent has no ethics history; (2) he fully cooperated with ethics authorities; (3) only one client matter was involved; (4) his

conduct was solely for the benefit of his client, without personal gain; (5) he is a Major in the Judge Advocate Corps (twenty-six years); he received multiple medals and good conduct awards; (6) he was unaware of ACPE Opinion 721, when he wrote the email to Khawam (acknowledging that ignorance is no excuse, but asserting that it decreases the level of wrongdoing, if any); and (7) he acted diligently and represented his client in good faith.

Although counsel urged us to dismiss all of the charges against respondent, he added that, if we conclude otherwise, we should impose discipline no greater than an admonition. Counsel cited no cases for this proposition.

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

Counts two and six charged respondent with having violated RPC 1.4(d) (when a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct). RPCs 1.2(d) (a lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent . . . or expressly prohibited by law) and RPC 1.4(d) "permit a lawyer to refuse to follow a

client's instructions if they would involve the lawyer in illegal, criminal, or fraudulent activity." Michels, New Jersey Attorney Ethics (GANN 2014) §14:3-3 – 293. Michels noted that the Debevoise Committee recommended a change to RPC 1.4(d), which was previously RPC 1.2(e), to clarify "that the lawyer has the obligation to be very precise in explaining to the client what the lawyer may and may not do on the client's behalf." Ibid.

Two cases in which attorneys were found guilty of having violated RPC 1.4(d) are In the Matter of David G. Polazzi, DRB 13-252 (January 28, 2014) (admonition) and In re Rosen, 209 N.J. 157 (2012) (reprimand).

In Polazzi, the attorney's supervisor had him prepare, as the attorney for the buyer, provisions for the use of lender funds that were not disclosed to the lender and that resulted in adjustments and credits that did not appear on the HUD-1 closing statement. The attorney was found guilty of assisting in conduct that he knew was fraudulent (RPC 1.2(d)), without advising the client about the limitations on his conduct (RPC 1.4(d)).

In Rosen, the Court found the attorney guilty of RPC 1.4(d) and RPC 1.2(d) for handling real estate closings in which he had prepared written instruments that contained terms that he knew were expressly prohibited by law (shifting the payment of realty transfer fees from the seller to the buyer). The Court accepted

the district ethics committee's factual findings that the attorney had failed to inform his client of the limitations on his conduct, knowing that his client expected assistance not permitted by the RPCs.

Here, the first charge of a violation of RPC 1.4(d) is contained in count two, which alleged that respondent violated RPC 8.4(d) for attempting to settle the litigation by having his client withdraw criminal charges that the client himself had filed against his brother.

To be sure, respondent had not participated in the filing of criminal charges against Thomas. However, his January 5, 2001 letter, offering to "attempt to withdraw the charges" against Thomas, if Thomas agreed to nineteen civil demands, was an improper bargaining tool. We find that such conduct is the flip side of RPC 3.4(g), which prohibits an attorney from presenting, participating in presenting, or threatening to present criminal charges to obtain an improper advantage in a civil matter. Here, some of the nineteen conditions are unrelated to the civil litigation.[7] We find, however, that respondent's letter had no other purpose than to gain an advantage in the litigation, a

[7] For example, the conditions that Thomas leave the state within ten days and not return until after 2014 and that he admit that he convinced his father to rent out his condominium to an unemployed woman.

violation of RPC 8.4(d). We find no violation of RPC 1.4(d) because respondent had advised Francis that some of the conditions in the letter were unenforceable.

Count three alleged that respondent threatened ethics charges in an attempt to "gain concessions in a civil dispute," a charged violation of RPC 8.4(d). The DEC found that, on at least one occasion, respondent orally threatened Khawam with the filing of ethics charges. Although the DEC did not make any credibility findings with regard to the testimony on this issue, it clearly found Khawam's testimony on this topic more believable than respondent's. In any event, respondent's email to Khawam could only be interpreted as such a threat. Moreover, when Khawam replied to respondent's email and stated that he had interpreted it as threatening the filing of ethics charges against him, respondent replied simply, "My client will do all the law affords him to protect his parents' estate." Despite respondent's arguments to the contrary, the only reasonable interpretation of his email is that it was a threat made to gain an advantage in the civil litigation, conduct which is prohibited by ACPE Opinion 721. We, therefore, find clear and convincing evidence that respondent violated that opinion and RPC 8.4(d).

Counts four and five relate to the subpoena that respondent served on Wells Fargo (RPC 4.4(a) and RPC 8.4(d), respectively).

Despite respondent's arguments to the contrary, the only logical conclusion is that, after Judge Suter refused to permit him to amend the complaint without a proper motion, he and his client abandoned the idea of subpoenaing Khawam's billing records and, instead, circumvented Judge Hogan's ruling by subpoenaing records directly from Wells Fargo Bank. Respondent, a seasoned attorney, claimed that the subpoena had been "inartfully drafted." His competing claims were that the subpoena's intent was to obtain information on whether Khawam had violated RPC 1.15, not to obtain private or other client information, and that his client wanted to change his focus to PNC Bank, since Khawam was no longer involved in the case and he was not a party to it. Respondent claimed that the purpose of the subpoena was to uncover the path of the PNC Bank funds that had been deposited in Khawam's Wells Fargo account.

Respondent's assertions are simply not worthy of belief. It was not his role to investigate whether Khawam had violated the ethics rules. He had only a duty to report his suspicions, if reasonable, to the ethics authorities (RPC 8.3(a)) and leave the investigation to them. The subpoena stripped Khawam of the protections that Judge Hogan sought to give him. Once Khawam withdrew from Thomas' representation, he no longer received copies of the documents or pleadings relating to the case. He was, therefore, unable to protect himself, contrary to the judge's intent. He became aware of the subpoena only after the damage had been done.

We find that respondent's issuance of the subpoena violated RPC 8.4(d) because it circumvented the judge's order – by failing to make Khawam a party to the proceedings. We also find that respondent violated RPC 4.4(a) because the subpoena had no substantial purpose other than to embarrass, delay or burden Khawam and that the methods that respondent used to obtain evidence violated Khawam's legal rights.

Compounding his improprieties, once respondent obtained the subpoenaed information, he failed to safeguard it. He provided the information to his client, without redacting sensitive information and without cautioning him not to disseminate the information. The information was shared with, at a minimum, Francis' other siblings, who, according to Khawam, had attached the subpoena and records to their grievances against him. We find this to be a significant factor aggravating respondent's conduct.

Finally, we find a violation of RPC 1.4(d) as it relates to the Wells Fargo subpoena, under Rosen and Polazzi, even though it is subsumed in the RPC 8.4(d) violation.

The only issue left for determination is the proper quantum of discipline for respondent's conduct.

In In re Ziegler, 199 N.J. 123 (2009), the attorney was reprimanded for threatening to file ethics charges against his adversary to affect the course of the litigation. The attorney also told the wife of his client in a domestic relations matter that she

should be "cut up into little pieces . . . put in a box and sent back to India." He was found guilty of violating RPC 8.4(d) and RPC 3.2.

Attorneys who violate court orders have also generally received reprimands, even if that infraction is accompanied by other, non-serious violations. See, e.g., In re Mason, 197 N.J. 1 (2008) (attorney engaged in conduct prejudicial to the administration of justice; with information gathered during the representation of Marx Toys, the attorney switched sides to represent a competing entity; the attorney was found guilty of having violated a court order entered after the switch, directing him "not [to] perform any legal work which involves Marx Toys and [not make] any disclosures regarding Marx;" conflict of interest also found); In re Gourvitz, 185 N.J. 243 (2005) (attorney engaged in conduct prejudicial to the administration of justice by repeatedly disregarding several court orders requiring him to satisfy financial obligations to his former secretary, an elderly cancer survivor who sued him successfully for employment discrimination); In re Carlin, 176 N.J. 266 (2003) (attorney failed to comply with two court orders; he also failed to comply with mandatory trust and business recordkeeping requirements and was found guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to deliver funds to a third person); and In re Malfara, 157 N.J. 635 (1999) (attorney failed to honor a bankruptcy judge's order to reimburse the client

$500 for the retainer given in a case where he failed to appear at two court hearings, forcing the client to represent himself; the attorney was also found guilty of gross neglect and failure to cooperate with ethics authorities during the investigation of the matter).

Attorneys guilty of failing to counsel their clients that the assistance they seek is impermissible have received either an admonition or a reprimand, respectively, In the Matter of David G. Polazzi, supra, DRB 13-252 and In re Rosen, supra, 209 N.J. 157.

Based on the above precedent and the serious aggravating factor here -- respondent's failure to protect Khawam's personal information by disseminating it to his client without restriction -- we determine that, notwithstanding respondent's clean disciplinary record, a censure, rather than a reprimand, is warranted.

Vice-Chair Baugh, Member Clark, and Member Singer voted to impose a reprimand, finding respondent guilty of violating only RPC 8.4(d), for threatening to file ethics charges to gain concessions in the civil dispute. These members found that, although it is unethical to present or threaten criminal charges to obtain an improper advantage in a civil matter (RPC 3.4(g)), it is not an ethics violation to bargain to withdraw criminal charges that have already been filed. In their view, there is neither a rule nor precedent holding that it is improper to attempt to or to agree to withdraw pending charges, in order to motivate an opposing party to

settle a civil matter. These members, thus, did not find a violation of RPC 8.4(d) or 1.4(d) in this regard. They, likewise, found no violation of RPC 4.4(a) or RPC 8.4(d) in connection with the subpoena. They found that the subpoena was appropriate and necessary to ascertain the path of the funds that Thomas had improperly obtained from his father.

Members Yamner and Rivera 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
Bonnie C. Frost, Chair

By: _____
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Eric A. Feldhake
Docket No. DRB 14-177

Argued: September 18, 2014

Decided: December 12, 2014

Disposition: Censure

Members	Disbar	Suspension	Censure	Reprimand	Did not participate
Frost			X		
Baugh				X	
Clark				X	
Gallipoli			X		
Hoberman			X		
Rivera					X
Singer				X	
Yamner					X
Zmirich			X		
Total:			4	3	2

Ellen A. Brodsky
Chief Counsel