SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-215
District Docket No. XII-2013-0013E

IN THE MATTER OF	
IRVING TOBIN	
AN ATTORNEY AT LAW	

Decision

Argued: November 20, 2014

Decided: January 8, 2015

Frederick B. Polak appeared on behalf of the District XII 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 on a recommendation for a reprimand filed by the District XII Ethics Committee (DEC). A one-count complaint charged respondent with having violated RPC 1.5(b) (failure to set forth in writing the rate or basis of the attorney's fee). For the reasons expressed below, we determine to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1957. In November 2001, he was reprimanded for conflict of interest, improper business transaction with a client, misrepresentation, negligent misappropriation, commingling of funds belonging to clients and investors (including respondent), and recordkeeping violations. In re Tobin, 170 N.J. 74 (2001).

On February 7, 2006, respondent was censured for drafting a client's will that left the entire residuary estate to himself, in violation of RPC 1.8(c). In re Tobin, 186 N.J. 67 (2006).

At the February 4, 2014 DEC hearing, the parties entered into a stipulation of facts (S). Although respondent admitted many of the salient facts, he denied that his actions violated the Rules of Professional Conduct. The pertinent stipulated facts are as follows:

In September 2012, Judith Feman consulted respondent regarding the sale of her Short Hills home. Respondent accepted the matter as a favor to a physician and family friend who had helped respondent and his family with medical issues over the years. Respondent was returning those favors, when he agreed to assist Feman, who, respondent stated, "clearly needed help."

From January 30 to February 28, 2013, respondent represented Feman in connection with the sale of the property.

Although respondent had not previously represented Feman, he did not prepare a writing setting forth the rate or basis of his fee. In fact, he neither discussed the amount of his fee with Feman nor issued to her an invoice or bill for his legal services.

On or about February 27, 2013, Feman asked respondent to cancel the contract, but he declined to do so, indicating that the refusal was based on his desire to protect her.

On February 28, 2013, respondent sent an e-mail to Feman resigning as her attorney.

At the DEC hearing, Feman confirmed that respondent had never provided her with a fee agreement. According to Feman, when she asked respondent the amount of his fee, he had replied, "a token," which she understood to mean that she was not being charged at all for his legal services. Feman, thus, believed that respondent was representing her without a fee, until he sent her the February 28, 2013 email resigning as her attorney and stating, in part, as follows:

> You have not paid me one cent nor have I asked you for any money despite the numerous offers I have fielded, deals I have negotiated, effort spent defending your stubbornness to other parties and the hours of time spent taking your phone calls to me and Pat several times a day. Despite all of

> this time and effort, I was planning on taking a reasonable fee from the closing proceeds. If you refuse to close with the Sharmas, I have to believe that you have no intention of selling the property.
>
> . . . .
>
> If we close with the Sharmas I estimate that you will have $75,000-$100,000 for yourself. If we do not close, there is no way for you to pay the amounts you owe or have any money for yourself. You owe significant sums to Edward Grossi, Lin Hendel, and myself.
>
> [Ex.P-1]

Feman indicated that she understood the final sentence above to mean that she did actually owe respondent fees for his legal services.

Respondent contended that he was not required to prepare a writing setting forth the rate or basis of his fee because, when he became involved in the Feman matter, he intended to take no fee. Rather, he had agreed to the representation as a favor to a friend, who knew that Feman was destitute. At that time, of the three mortgages encumbering her house, two were in foreclosure and she had never made a single payment on the third mortgage.

When respondent agreed to represent Feman, there was a pending $1.3 million contract for the sale of her house. The buyer, a builder, canceled the contract after an inspection

revealed the presence of a previously undisclosed underground oil tank.

In January 2013, Bobby and Sumona Sharma agreed to purchase the property for $1.35 million. Respondent had negotiated with them what he thought was a very good deal for Feman. The sale price was $50,000 more than the price of the prior contract; the buyer agreed to pay the realty transfer tax, which exceeded $7,000; the buyer agreed to give Feman $5,000, upon the signing of the contract that she could use immediately because she was destitute; the buyer agreed to pay Feman $10,000 for any of the household furniture that she did not wish to retain; and the closing date was arranged quickly, in accordance with Feman's request.

According to respondent, after the contract had been signed, Feman told him that she would not sell to Sharma because he was "not a nice guy" and was "a liar." She instructed respondent to cancel the contract. Taken aback, respondent told her that he could not do that, pointing out that Feman had spent the $5,000 that she had received from the Sharmas, to which Feman replied, "Let him sue me for it."

Respondent advised Feman that it was not in her best interest to cancel the contract and that, if she insisted on

doing so, he would terminate the representation. As previously mentioned, respondent terminated the representation on February 28, 2013. He turned the file over to Joseph Triarsi, an attorney whom Feman had consulted. At about the same time, on March 7, 2013, Feman filed an ethics grievance against respondent, after which, respondent asserted, he "no longer felt so charitable" toward her.

Shortly after March 7, 2013, Triarsi and Feman called respondent to discuss the case, conversing with him by speakerphone. Respondent explained to Triarsi the background of the matter and the importance of Feman's accepting the Sharma deal. Triarsi and Feman apparently wanted respondent to handle the transaction, notwithstanding the termination of the relationship. Having determined that he no longer wished to "work for her for nothing," respondent made an arrangement for his legal fee. He told Triarsi and Feman, "[I]f I go through with this deal, if she wants to come back to me and we go through with the deal and she gets more than $100,000 I would want up to $30,000." According to respondent, Feman made a counteroffer of $27,000 and they orally agreed to a $27,000 contingent fee. That new arrangement never came to fruition because Feman then cancelled the contract on her own.

The DEC concluded that respondent's statements in his February 28, 2013 email to Feman, in which he twice stated that she owed him money for the representation, indicated that he intended to charge her a fee and, thus, he was required to set forth the basis or rate of the fee in writing. In addition, the DEC considered respondent's concession that he and Feman had a reconciliation of sorts, after which Feman agreed to respondent's conditional fee of $27,000.

Finding respondent guilty of having violated RPC 1.5(b), and noting respondent's prior reprimand and censure, the DEC recommended a reprimand.

Upon a de novo review of the record, we cannot agree with the DEC's conclusion that respondent's conduct was unethical.

Respondent, who had no prior attorney-client relationship with Feman, agreed to represent her in the sale of her house. RPC 1.5(b) states that "when a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation."

Respondent admitted that he never set forth the basis or rate of his fee in writing. He argued throughout the ethics proceedings that no writing was needed because he never intended

to collect a fee – Feman's was a "charity" case, taken on as a favor to an old family friend.

At first blush, it appears that the "gratis" nature of the representation changed when respondent sent a February 28, 2013 email to Feman, listing the legal services that he had performed on her behalf. We view that email, however, not as evidence that respondent intended to bill Feman for his legal services, but as an attempt to convince her to complete the sale to the Sharmas. He did so because, in his and Triarsi's view, it was in her best interest to consummate the transaction.

Respondent, who has been practicing for fifty-seven years, represented Feman, as a favor to a mutual friend. At oral argument before us, respondent asserted that he had spent fifty to sixty hours on this pro bono matter, that he never intended to charge her a fee, that he successfully negotiated a favorable real estate contract for her, and that he sent the email to her in an attempt to persuade her not to cancel the contract. Under the circumstances, we find no clear and convincing evidence that respondent violated RPC 1.5(b) and determine to dismiss the complaint.

Vice-Chair Baugh did not participate.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Irving Tobin
Docket No. DRB 14-215

Argued: November 20, 2014

Decided: January 8, 2015

Disposition: Dismiss

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost				X		
Baugh						X
Clark				X		
Gallipoli				X		
Hoberman				X		
Rivera				X		
Singer				X		
Yamner				X		
Zmirich				X		
Total:				8		1

Ellen A. Brodsky
Chief Counsel