SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-326
District Docket Nos. XII-05-47E,
XII-05-48E, and XIV-06-121E

IN THE MATTER OF	:
ELLIOT GOURVITZ	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 19, 2009

Decided: May 12, 2009

Robert J. Logan appeared on behalf of the District XII Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter came before us on a recommendation for a reprimand filed by Special Master Donald A. DiGioia, based on respondent's misconduct in three client matters. For the reasons expressed below, we accept the special master's

recommendation and impose a reprimand on respondent for his unethical behavior.

Respondent was admitted to the New Jersey bar in 1969. At the relevant times, he maintained an office for the practice of law in Short Hills. In 2005, respondent was reprimanded for engaging in conduct prejudicial to the administration of justice after he had repeatedly disregarded several orders requiring him to satisfy his financial obligations under the terms of a settlement agreement between him and his former secretary, who had sued him for employment discrimination. In re Gourvitz, 185 N.J. 243 (2005).

For one day in September 1993, respondent was on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

The three clients at issue in this matter are Regina Sarti (XII-05-48E), Annette Fischer (XII-05-47E), and Shirley Peterson (XIV-06-121E). In all three matters, respondent was alleged to have charged an unreasonable fee. In the Peterson matter, he also was charged with having failed to safeguard the client's funds and, upon the client's termination of this representation, to refund the retainer that had not been earned.

Respondent's defense to the charges in the Sarti and Fischer matters – matrimonial actions involving fee agreements that required the payment of non-refundable retainers, contrary to R. 5:3-5(b) – is that the violation of this court rule does not constitute a per se violation of RPC 1.5(a), which prohibits attorneys from charging unreasonable fees. Moreover, he claims that the provision at issue called for payment of a "minimal fee," not a non-refundable fee. Finally, respondent contends that, because this is the first time that a violation of this type has come before us, precedent requires that he not be found guilty. Instead, he believes that the determination that such provisions constitute a violation of RPC 1.5(a) should be applied prospectively.

Further, in the Sarti and Peterson matters, respondent points out that his clients' retainers have been fully refunded and that it was never his intent to deprive them of their funds. Respondent attributes the delay in the return of Peterson's retainer to the inaction on the part of a court-appointed receiver. In the Fischer matter, respondent notes that he has complied with an Appellate Division decision requiring him to refund one hundred percent of her retainer.

Prior to the hearing, the parties stipulated that (1) respondent never intended to deprive these three clients of their retainers; (2) the retainer agreements signed by Sarti and Fischer were not used to deny them the return of their money; (3) respondent never alleged that he had done any work that entitled him to keep Peterson's and Sarti's money; (4) Peterson's retainer was repaid in full; and (5) the return of Sarti's retainer was subject to the United States bankruptcy laws and would be returned to her through the bankruptcy court.

The stipulation was essentially silent with respect to Fischer, respondent's now former client. In the divorce action between the Fischers, respondent had been granted leave to withdraw as Fischer's lawyer but, at the same time, was directed by the court to return her $10,000 retainer. Respondent appealed the decision, which was upheld by the Appellate Division. Fischer v. Fischer, 375 N.J. Super. 278 (App. Div.), certif. denied, 183 N.J. 590 (2005).

In this disciplinary matter, the special master presided over a three-day hearing, which took place during the fall of 2007. The following witnesses testified: respondent's associate, Richard Outhwaite; his client, Regina Sarti; and his law firm's court-appointed receiver, attorney Jay Benenson.

Benenson testified that, on January 26, 2004, Superior Court Judge James S. Rothschild, Jr., J.S.C., appointed him the fiscal agent of both respondent and his law firm. At the time, respondent's former secretary, Helen Rokos, and her attorney were having difficulty collecting a $750,000 judgment that had been entered against respondent in an employment discrimination case that Rokos had instituted against him.[1] Benenson testified that, as fiscal agent, his role was to gather facts, ensure that there was no dissipation of assets, and propose a monthly payment from respondent to Rokos that would not adversely impact the operation of respondent's law firm.

Benenson was not provided with the facts he required. Therefore, on August 18, 2004, Judge Rothschild entered an order appointing him receiver of respondent's law firm. Benenson's duties now included receiving funds and assets, deciding how to locate funds, and "keeping the company alive while making sure that just obligations are met," including the satisfaction of

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[1] As indicated above, respondent's post-settlement conduct in the discrimination action is what led to his 2005 reprimand.

the Rokos judgment. Thus, Benenson needed to know what revenue was coming into the firm.

The initial procedures that Benenson intended to employ were communicated to respondent in a letter dated September 30, 2004. Among other things, respondent was to send Benenson copies of all checks received by his firm for legal services, which respondent intended to deposit for the benefit of either respondent or his firm. Yet, Benenson did not receive copies of these checks, and he was never provided with evidence of the firm's revenue. Thus, on November 1, 2004, the court ordered respondent's law firm to directly turn over to Benenson "all monies" received by the firm. As of the end of the year, Benenson testified, respondent did not do so.

The Regina Sarti Matter (XII-05-48E)

In this matter, the formal ethics complaint alleged that, in October 2004, Regina Sarti retained respondent to represent her in a matrimonial action. She signed a retainer agreement that contained a clause requiring the payment of a $5000 retainer and stating that the fee was "non-refundable." The complaint alleged that the retainer agreement violated R. 5:3-5(b), which prohibits non-refundable retainers in matrimonial

matters. Based on these facts, respondent was charged with having violated RPC 1.5(a) and RPC 8.4(a).

Regina Sarti testified that, on October 5, 2004, she had an appointment with respondent to discuss a possible matrimonial action against her husband. She met with his associate, Richard Outhwaite, instead.[2]

Sarti stated that Outhwaite had informed her that the retainer would be $10,000. However, Sarti paid only $5000, for which she was given a receipt.

Sarti did not believe that she and Outhwaite had discussed what would happen if she chose not to pursue the matter. She was not told whether she would or would not be entitled to a refund of the $5000 "under any circumstances." Outhwaite mentioned nothing about the firm's being in receivership.

Sarti testified that she had read the retainer agreement before signing it. The provision at issue in this disciplinary matter provided as follows:

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[2] Sarti testified that she never met respondent.

RETAINER:

> We hereby acknowledge pre-payment as a retainer, the sum of $[10,000]. This fee shall be placed in our regular operating account, and will be applied to our fees as earned. This retainer need not be replenished, but outstanding bills must be paid as submitted. Because each case is unique, we cannot estimate the amount of time we will spend on your case and the amount of expenses. Consequently, we cannot predict the amount of our fee.
>
> In the event that the amount of time we spend on your case (and the resulting fee generated) is less than the amount of money you have paid us, the unused money shall be promptly returned to you, except for a minimal fee of $5000. <u>This non-refundable fee may exceed the attorney's ordinary hourly time charge.</u>

[Ex.P-1 (emphasis added).]

Sarti testified that, early in the week following execution of the agreement, she called respondent's office and informed a secretary that she did not wish to pursue the matter because she had reconciled with her husband. Between that date and April 2005, Sarti called the office "a good twelve times," in order to obtain a refund of the retainer. On at least three occasions, she spoke to Outhwaite, who informed her that the firm did not control its finances but that he would try to arrange the return of her retainer.

Finally, in 2007, Sarti retained counsel and received $1275. She did not remember whether she had received the funds as the result of a bankruptcy proceeding. She testified that she has received no additional money.

Outhwaite testified that, when Sarti retained the firm, in October 2004, he knew that Benenson was the receiver. Outhwaite did not see to it that Sarti's retainer was given to Benenson, as he, Outhwaite, had nothing to do with the running of the office. Outhwaite testified: "All the money went to, to Mr. Gourvitz." Outhwaite's non-involvement in the business of the law firm was a recurrent theme throughout his testimony. He testified that, for this reason, he had not taken any steps to see that Sarti's retainer was returned to her.

Outhwaite did not dispute that, after Sarti had executed the retainer agreement, she called him and stated that she did not intend to pursue the matrimonial action. According to Outhwaite, at that point, she was entitled to the return of her retainer, as "the retainer agreement was never, ever used to hold people's money, because, quite frequently [there were] reconciliations and the money was given back." Rather, the agreement was simply "meant to deter [clients] from attorney

shopping" and creating a conflict of interest vis-à-vis their spouses.

Outhwaite never thought of the provision at issue as a non-refundable retainer, but only as a "minimal fee." Although Outhwaite claimed that there is a difference between a minimum fee and a non-refundable fee, he could not explain it.

With respect to the pre-printed retainer agreement that Sarti had signed, Outhwaite testified that, on the third page, he had written by hand that the total retainer would be $10,000, with $5000 payable on October 5, 2004, and another $5000 payable within seven days. He explained:

> That's a number we put in on the old retainer agreements that we used to have, we would put half of the amount as a deterent [sic] for somebody to just hire us for a day and – it sounds a little bit conceited, hire Mr. Gourvitz for a day, and then the next day call and say I don't want you to represent me so that would knock us out of the case.
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> That was something that was – they told me years ago that we would do, just to make sure that that didn't happen, which was occurring, as I understand it, with well known matrimonial attorneys such as Mr. Cutler – I'm not saying they used the same paragraph, Mr. Cutler, Mr. Skoloff, there was talk going around that matrimonial community that certain high profile clients would just sign a retainer agreement and then the next day, say, I don't want you to

> represent me, thereby knocking out that person's representation.
>
> So what we had in our old retainer agreement would be automatically we would put half would be non-refundable. It was never utilized, but that was – that was why it was in there, as I recall.
>
> [1T9-19 to 1T10-18.][3]

Outhwaite testified at length – and sometimes inconsistently – with respect to the provision of the firm's retainer agreement that called for the payment of a "non-refundable fee." Although he claimed that, at some point, this non-refundable" language was changed, he did not recall the date.

On the one hand, Outhwaite testified that he had retrieved the pre-printed agreement form signed by Sarti from a folder marked "retainer agreements" and that there were not "two different retainer agreements." On the other hand, he stated that it was possible that he could have taken the wrong agreement. When questioned about this inconsistency, Outhwaite testified:

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[3] "1T" refers to the transcript of proceedings, dated September 18, 2007.

I don't recall if there was more than one available.

. . . .

We never — there was always one retainer agreement.

If we used a new one and there were still some old ones left over, that can be the case, but it wasn't as if we would use one agreement for one person, another agreement for another person, it was the same agreement used all the time.

[1T14-1 to 11.]

Outhwaite lectured at "boot camps" on the law and court rules. He testified, on the one hand, that he was familiar with R. 5:3-5, which prohibits non-refundable fees in matrimonial cases. Yet, on the other hand, he claimed that he was not aware that this rule had been amended in 2000 to prohibit the use of a non-refundable retainer agreement in matrimonial actions. Outhwaite also claimed, however, that because he reviews the rules each year, he would have become aware of the rule change when it took place in 2000. Outhwaite recalled that, at some unknown point, he learned of the amendment from respondent.

Outhwaite, who had worked for respondent for thirteen years, left respondent's employ in May 2005. He stated that, during his thirteen years with respondent's firm, no client was

refused the return of a retainer, notwithstanding the "nominal fee" language.

With respect to the August 2004 order appointing Benenson receiver, Outhwaite testified that the firm had not sent monies to him for deposit into a receiver's account. Although he had many conversations and dealings with Benenson, Outhwaite never learned whether Benenson had ever set up such an account.

Outhwaite was very critical of Benenson's performance as receiver. He testified that "there's a lot of things [Benenson] didn't do." For example, over a two-and-a-half-month period, Benenson did not grant authorization for firm employees to be paid, including Outhwaite. At Benenson's request, the firm's books were produced, but he did not examine them.

At the hearing, several letters were the subject of testimony. Outhwaite testified that, on November 5, 2004 and at respondent's direction, he wrote a letter to Benenson, which enclosed certain invoices that needed to be paid. Outhwaite did not verify the accuracy of the information in the letter. The letter did not request the return of Sarti's retainer. Three days later, respondent wrote to Benenson, but, again, he did not request the return of Sarti's money.

On November 22, 2004, Outhwaite signed another letter to Benenson, which requested the payment of several bills. On the second page, Outhwaite sought authority to return the "left over retainers" to three clients, including Peterson. Outhwaite did not know why Sarti's retainer had not been included, even though the letter was written more than a month after she had signed the agreement and terminated the legal representation.

On December 15, 2004, Outhwaite signed a letter to Benenson, complaining about his actions in carrying out his duties as receiver. Outhwaite's testimony was inconsistent with respect to his role in writing the letter. Initially, he denied that he had signed the letter and claimed that he did not know who had. Outhwaite did not believe that he had directed someone to sign the letter on his behalf, as the letter would have stated "dictated not read." He also could not recall whether he had anything to do with the preparation of the letter.

Later, Outhwaite testified that it would be a "fair assumption" that he had dictated the letter because it contained the initials "RAO/kg." The facts in the letter would have been given to him by respondent. However, according to Outhwaite, some of the letter's contents were his style while others were

not. Outhwaite believed that respondent did not sign the letter because he may have been out of town or in court.

Outhwaite claimed that, in addition to these letters, he had communicated to Benenson his concern that the firm was encountering "ethics problems" because retainers were not being returned to clients. Although he could not remember what Benenson had said, Outhwaite never received authorization from him to return the retainers.

Benenson testified that he had never heard the name Regina Sarti. In any event, he stated, he would not have authorized the return of anyone's retainer until he had "understood what was coming into the company." He testified that, hypothetically, if he had learned that Sarti had given the firm a $5000 retainer on October 5, 2004, that no work had been done on her behalf, and that, within a few days, she had requested the return of the retainer, he would have authorized repayment but "[o]nly after [he had] presented it to the DEC, Judge Rothschild and probably sought a Court Order for protection of all the parties recognizing the gravity of the situation."

The Annette Fischer Matter (XII-05-47E)

According to the formal ethics complaint, in September 2003, Annette Fischer retained respondent to represent her in a matrimonial action. She signed a retainer agreement that contained the same "non-refundable fee" clause as that of the agreement signed by Sarti. As in Sarti, the complaint alleged that the retainer agreement violated R. 5:3-5(b), which prohibits non-refundable retainers in matrimonial matters. Moreover, the complaint asserted that the retainer agreement was not a "minimum fee agreement, since there was no agreement to achieve a specified result within a specified time." Based on these facts, respondent was charged with having violated RPC 1.5(a) and RPC 8.4(a).

The retainer agreement signed by Fischer was not admitted into evidence. Moreover, neither Fischer nor anyone else testified about the retainer agreement that she had signed. Nevertheless, in his answer to the complaint, respondent admitted that Fischer had signed the agreement, which contained the non-refundable retainer provision.

The Shirley Peterson Matter (XIV-06-121E)

The complaint alleged that, on September 7, 2004, Shirley Peterson consulted with respondent regarding a real property dispute in Maryland. Peterson paid respondent a $350 consultation fee on that day, plus an additional $5000 retainer.

The complaint also alleged that, within a few days of signing the retainer agreement, and before respondent had performed any legal services for Peterson, she determined that a Maryland lawyer would serve her interests better. She requested the return of the retainer. Despite several requests on her part, Peterson received only a $2500 partial refund, on November 30, 2004. The balance was not paid until February 2005.

At some point, the complaint alleged, respondent had incorrectly informed Peterson that Benenson was the only person who could make the refund to her. Peterson wrote to Benenson on December 15, 2004, informed him that she had called respondent's office several times, and requested the refund of her retainer. As of the date of Peterson's letter, Benenson had received no funds from respondent's practice.

Based on these facts, the complaint alleged that respondent had violated RPC 1.5(a), RPC 1.15, RPC 1.16(d), and RPC 8.4(a).

Peterson did not testify at the disciplinary hearing. Outhwaite testified that he had had no interaction with Peterson regarding the return of her $5000 retainer. He could not recall ever having advised her to call Benenson about the return of her retainer. He did state, however, that he had specifically asked for permission to return Peterson's retainer, but that, as of May 2005, when he left the firm, Benenson had not permitted the firm to do so.

Benenson testified that, when he received Outhwaite's November 22, 2004 letter requesting his approval of the payment of certain bills, Benenson possessed no information regarding the firm's revenue since his appointment as receiver, in August 2004. With respect to the claim that Peterson was owed a $5000 "left over" retainer, Benenson stated that there was no basis on which he could determine whether Peterson had given any money to the firm or whether the firm had any money to pay her. He had no letter in his files relating to Peterson.

Benenson testified that he had never heard of Peterson until December 6, 2004. He explained in a letter to respondent of that same date:

> I have this day received a telephone call from Shirley Peterson, who advised me as follows:

> In the beginning of September 2004, Ms. Peterson provided you with a $5,000 retainer to handle a real estate matter in Maryland, and after a day or two, changed her mind and telephoned you and requested the return of her retainer. You said her retainer would be returned. No check was forthcoming and Ms. Peterson telephoned your office and was informed by your staff that you only write checks at the end of the month. Again no check was forthcoming and she continued to telephone your law office through the months of October and November and was advised each time that "only Mr. Gourvitz can write you a check." On December 6, 2004 she spoke with Kelly from your office who suggested that she should speak with me, indicating that I was, in some way, responsible for your failure to return her $5,000 retainer.
>
> As you are well aware, I have never received a dime from you or your law office since my appointment as Receiver on August 18, 2004, in spite of frequent demands that I receive all fees. I believe the Court, which has received a copy of this letter, is entitled to an explanation of the foregoing, as is Ms. Peterson. Before today, I never heard of Shirley Peterson, nor the fact that she has been demanding the return of her full retainer since September 2004.
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> [Ex.P-9.]

The letter was copied to Judge Rothschild.

Benenson testified that, on December 15, 2004, Peterson wrote him a letter, informing him that one of respondent's employees had told her that Benenson was "in charge of releasing

funds." Yet, Benenson testified, at the time, he had no funds from which to make a disbursement to Peterson. Judge Rothschild eventually entered an order, releasing $26,000 in respondent's escrow monies to Benenson. Benenson paid $2500 to Peterson; the balance went to Rokos. As stated previously, the parties stipulated that Peterson's retainer has been refunded in full.

Respondent attempted to establish Benenson's bias and, therefore, his lack of credibility. Moreover, he attempted to establish that Benenson's derelictions as receiver were the cause of the delays in his clients' refunds of their retainers. Respondent alleged that, first, as of the date of Benenson's testimony, Benenson had made a claim of approximately $21,000 against him in his bankruptcy proceeding, which was the subject of an ongoing dispute between Benenson and him in that matter. Second, although Benenson had insisted that communications between respondent's firm and him not be ex parte, Benenson had ex parte communications with the law firm that had represented Rokos in the discrimination action against respondent. For example, he had sought from that firm authorization for respondent to make a $12,000 payment on some kind of a lease. Yet, Benenson stated, he did not need that firm's permission to

make the payment; he merely sought the firm's comment on the propriety of the proposed payments.

Third, Benenson testified that Rokos had loaned him money from the $350,000 that she had received in the discrimination action against respondent. According to Benenson, "no money was set aside for administration," presumably of the receivership. Rokos made the loan to him because, as she stated in front of Judge Rothschild, she "felt bad I didn't get paid." Nevertheless, the $29,000 check, which was the money loaned to Benenson, was written on the trust account of the law firm that had represented Rokos. There was no court order authorizing the loan, but the loan had been discussed in the presence of Judge Rothschild. At his deposition in another matter, Benenson stated that the judge had approved the loan, although not in writing. Benenson has since repaid more than $23,000.

Benenson denied that he had never reviewed the books and records that respondent's law firm had produced for him during the course of the receivership. In fact, when he reviewed the papers produced, "some of them were incomprehensible."

Fourth, Benenson conceded that the arrangement for the payment of bills differed from that set forth in the order. Nevertheless, Benenson testified that he controlled "the money

depositing and informing [respondent]." The arrangement, however "never was working." For example, although Outhwaite would send letters identifying the total income received by the firm per month, Benenson was never shown the income. Moreover, Benenson "never learned what came out." He conceded, however, that at least two letters mentioning the receipt of retainers and the fact that they had to be returned were indications that Benenson was, in fact, informed of income that the firm had received, including Shirley Peterson's $5000 retainer.

Benenson agreed that he had received periodic letters from respondent's firm requesting the payment of certain obligations. Yet, he did not receive the information that he required before he could authorize payment. Between October 6 and December 6, 2004, Benenson did not authorize the payment of any bills by respondent.

The special master found that the matrimonial retainer agreements signed by Fischer and Sarti violated R. 5:3-5(b), in that each of the agreements provided for the payment of a $5000 non-refundable fee.

The special master accepted Sarti's testimony that, within a few days of signing the retainer agreement, she had contacted respondent's firm in order to cancel the representation.

Thereafter, she contacted the firm at least twelve times but could never reach respondent.

With respect to Outhwaite's testimony, the special master accepted his claim that he had nothing to do with the operation of the law firm. Thus, he found, the letters written to the receiver under Outhwaite's signature contained information given to Outhwaite by respondent. In fact, the special master ruled that all letters to the receiver, which were admitted into evidence, were respondent's work product, irrespective of which attorney had signed the letter.

The special master rejected Outhwaite's suggestion that the firm may have had more than one matrimonial retainer agreement and, that, therefore, he might have taken the wrong agreement out of the filing cabinet. The special master explained:

> The undersigned is satisfied, by clear and convincing evidence that the respondent's firm had only one form of matrimonial retainer agreement in 2003 and 2004, which was the type of retainer signed by Annette Fischer and Regina Sarti. In coming to this conclusion, it is significant to note that respondent argued throughout the proceeding that the clause in question is not a non-refundable agreement prohibited by R. 5:3-5(b), but rather a minimum fee. If respondent truly believed in this position, it stands to reason that respondent would not have deleted this clause from retainers after the July 5,

> 2000, rule amendment which took effect on September 5, 2000.
>
> [SMR21.][4]

The special master concluded that the Sarti retainer agreement was the typical matrimonial agreement utilized by respondent in 2003-2004 and that the agreements signed by Fischer and Sarti were not outdated forms mistakenly taken from the filing cabinet. Rather, the agreements were "representative of the type of matrimonial retainer agreements which were used by Respondent's firm during those years."

The special master also found that, based on Outhwaite's testimony, the reason for the non-refundable fee clause was "to deter clients from conferring with Respondent once, thereby creating a conflict of interest situation which would preclude the Respondent from possibly being retained thereafter by the other spouse." Thus, it created "a chilling effect, improperly influencing the client to refrain from discontinuing the representation." The special master concluded that the clause at issue in the Fischer and Sarti agreements contained non-

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[4] "SMR" refers to the special master's report, dated June 27, 2008.

refundable fee language that was strictly prohibited by R. 5:3-5(b) in the year 2000. He considered it "of no moment" that the clause was not triggered in either case.

The special master found that, because the non-refundable-fee clause violated R. 5:3-5(b), it also violated RPC 1.5(a), which requires a fee to be reasonable. He specifically noted that, under the terms of the agreement, the lawyer was entitled to $5000 even if the sum exceeded the attorney's hourly rate. He analogized it to a contingency fee agreement that violates R. 1:21-7, which, in turn, violates RPC 1.5(c).

Moreover, the special master reasoned, this was not the same as a violation of a procedural rule (such as those governing page limitations in a brief), which does not constitute an ethics violation (SMR25). Rather, R. 5:3-5(b) "goes to the heart of the attorney-client relationship."

The special master also found that respondent had violated RPC 8.4(d) by having matrimonial clients sign non-refundable retainer agreements, which he considered deceitful.[5]

The special master also found that Benenson had not received any funds from respondent's firm from the date he was appointed receiver, in August 2004, until the end of that year. Moreover, during this same time, respondent's firm had issued checks to payees other than Peterson and Sarti. As an aside, the special master found that the loan from Rokos's lawyer to Benenson was ill-advised, although discussed before Judge Rothschild.

With respect to the Peterson matter, the special master noted that she did not testify at the hearing. Inasmuch as no evidence was presented on the issue of whether or not respondent had charged her an unreasonable fee, the special master concluded that there was no clear and convincing evidence that respondent had violated RPC 1.5(a).

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[5] The special master mistakenly cited RPC 8.4(d), when he clearly meant 8.4(c). RPC 8.4(c) was not charged by the complaint.

The special master also found in favor of respondent with respect to the RPC 1.15 charge, noting that a retainer fee is not required to be placed into an attorney trust account. Moreover, he concluded, there was no "explicit understanding" between respondent and Peterson that required him to place her retainer in the trust account.

Finally, the special master concluded that respondent had violated RPC 1.16(d) when he failed to return Peterson's unearned retainer to her until several months after she had terminated the representation. According to the special master, respondent was not "proactive in taking all steps necessary" to have the retainer returned to Peterson. He waited a month before notifying the receiver. He failed to keep the client informed, forcing her to repeatedly call the firm without success. If, as respondent contended, he could not write a check to Peterson (although he wrote checks for other purposes); he should have filed a motion with the court for approval to return the funds. Finally, respondent spent Peterson's funds, as was evidenced by his November 8, 2004 letter to the receiver, stating that the firm's business account was overdrawn.

The special master rejected respondent's claim that Benenson was responsible for his "inability to properly deal

with" Peterson. Peterson was respondent's client; his ethical responsibility was to her, irrespective of the receiver's competence or incompetence. Respondent was required to abide by RPC 1.16(d), which he did not do.

The special master determined that respondent's handling of Sarti's funds was more egregious than his handling of Peterson's funds. Unlike respondent's minimal attempt to seek Peterson's funds from the receiver, he made no attempt with respect to Sarti's funds. Sarti paid the retainer in cash, promptly canceled the representation, and made continuous requests for the return of her retainer, to no avail. The special master found that respondent's conduct in this regard violated RPC 1.16(d).[6]

The special master found that respondent violated RPC 1.4(b) when he failed to return Sarti's and Peterson's telephone calls and that, by virtue of the above violations, respondent also violated RPC 8.4(a).

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[6] The complaint did not charge a violation of RPC 1.16(d) in the Sarti matter.

Although the special master concluded that respondent had violated RPCs not charged, for the purpose of the recommended discipline, he considered only respondent's violations of RPC 1.5(a) and RPC 8.4(a) in the Sarti and Fisher matters and his violations of RPC 1.16(d) and RPC 8.4(a) in the Peterson matter. For these infractions, the special master recommended the imposition of a reprimand.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The special master correctly determined that respondent had violated RPC 1.5(a) when he required Sarti and Fischer to sign non-refundable fee agreements in their matrimonial matters and collected the non-refundable fees from them. R. 5:3-5(b) expressly prohibits the inclusion of "a provision for non-refundable retainer" in civil family actions. The unethical nature of such a provision was addressed by the Appellate Division in its decision in Fischer.

In that matrimonial action between respondent's client, Fischer, and her spouse, the trial court granted respondent's motion to withdraw as Fischer's counsel, which he filed after she had claimed that he deceived her with respect to the terms

of the retainer agreement, but it also required him to return her $10,000 retainer. Fischer, supra, 375 N.J. Super. 278 at 282. We focus solely on that aspect of the opinion pertaining to the trial judge's decision requiring respondent to return Fischer's $10,000 retainer to her, including the $5000 "non-refundable" portion. Id. at 282-83.

In the Appellate Division's decision, the panel noted (albeit in dicta) that the trial judge "quite correctly" determined that the "non-refundable fee provision violated R. 5:3-5(b) and was unethical." Id. at 288 (emphasis supplied). Moreover, amicus curiae, the New Jersey State Bar Association, which had joined respondent in seeking the reversal of the order in other aspects, "acknowledged that Gourvitz's inclusion of a non-refundable retainer provision in the agreement 'was ripe for referral to the Ethics Committee.'" Id. at 289.

Respondent takes the position that, even if the fee required by the agreement were interpreted to mean what it says, that is, it is non-refundable, the violation of R. 5:3-5(b) is nothing more than a violation of a Court Rule. He analogizes it to a violation of R. 2:6-7, which governs the page limit of appellate briefs, and which would not be considered a per se

violation of an RPC. We find that respondent's argument misses the mark.

Page limit rules are administrative in nature. Along with rules imposing filing and service deadlines, they are meant to assist the courts and the parties in the management of litigation. Court rules, which are created in order to protect clients, such as R. 5:3-5(b), are a different matter.

Outhwaite testified that the purpose of the non-refundable fee provision was to prevent a client from "attorney shopping." He also claimed, however, that the fee would be refunded if the client reconciled with his or her spouse. The fundamental fact remains, however, that the net effect of a non-refundable fee provision, particularly in the amount of $5000, is to punish the client for terminating the representation or to force the client to remain in the attorney-client relationship even if the client is unhappy with the lawyer's services. This is per se unreasonable. Moreover, Outhwaite was silent with respect to whether retainers were or would be refunded to clients who terminated respondent's services for reasons other than reconciliation with their spouses.

One could argue that the fee is not unreasonable if it is returned to the client, but this is irrelevant. Whether the fee

is returned bears no relationship to whether it was a reasonable fee in the first place, which is charged and collected from the client. Here, respondent charged a non-refundable fee to his new matrimonial clients, in violation of R. 5:3-5(b). He collected the non-refundable fee. The fee was not returned unless the client had reconciled with the spouse. We find that the non-refundable retainer fee provision in respondent's matrimonial fee agreements, which violates R. 5:3-5(b), is a violation of RPC 1.5(a). Respondent violated this rule in the Sarti and Fischer matters. See, e.g., In re Weston-Rivera, 194 N.J. 511 (2008) (the attorney was admonished for charging an unreasonable fee based on her taking a contingent fee greater than that to which she was entitled pursuant to court rule, as a result of her failure to calculate the fee in compliance with R. 1:21-7(d); because the attorney had violated the court rule, she was deemed to have violated RPC 1.5(a)).

We need not abide by respondent's plea that, because this is a case of first impression, no discipline should be rendered here, but, instead, only a warning for the future should be issued. R. 5:3-5(b) has been around for years; respondent is an experienced matrimonial lawyer; he knew that non-refundable retainer fees were prohibited in matrimonial actions; and he

tried to get around that by inserting "minimum" in the same sentence as "non-refundable." Our determination that the clause violates RPC 1.5(a) and the imposition of discipline upon respondent for this violation will serve as notice to the rest of the bar that indeed this is unethical conduct that will warrant discipline.

From respondent's violation of RPC 1.5(a) in the Sarti and Fischer matters, it follows that he violated RPC 8.4(a). That rule provides that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct."

In the Peterson matter, which was not a matrimonial action, the special master correctly determined that there was no clear and convincing evidence to conclude that respondent had violated RPC 1.5(a). There was no evidence with respect to whether the $350 consultation fee charged to Peterson was or was not unreasonable; there was no evidence that a $5000 retainer was unreasonable for the type of work that respondent had been retained to perform; therefore, there was no clear and convincing evidence that respondent had violated this rule.

The special master determined that the presenter had failed to sustain the RPC 1.15 (presumably (a) (failure to safeguard

trust funds)) charge because a retainer is not required to be kept in an attorney trust account. See e.g., In re Stern, 92 N.J. 611, 619 (1983) (general retainers may be deposited into a lawyer's business account, unless the client requires that it be separately maintained).

On the other hand, the special master was correct in his determination that respondent had violated RPC 1.16(d) when he failed to fully refund Peterson's September 2004 retainer, which was not returned to her until well after the representation had been terminated. Peterson retained respondent in early September 2004 and paid him a $5000 retainer. She terminated the representation a few days later. She received a partial refund on November 30, 2004 and the remainder in February 2005.

RPC 1.16(d) provides, in pertinent part, that, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practical to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned or incurred." The proofs on this issue are sufficient to establish, by clear and convincing evidence, that RPC 1.16(d) was violated.

Outhwaite testified that he had no interaction with Peterson regarding the return of her retainer, although he

authored letters about this issue. On October 4, 2004, Outhwaite informed Benenson that Peterson and others had asked for the return of their retainers. On November 22, 2004, Outhwaite demanded Benenson's approval of the return of a $5000 retainer to Peterson. Benenson testified, however, that he had no basis for determining whether Peterson had given any money to the firm, as he had received no information from respondent regarding the firm's revenue since his appointment as receiver in June 2004. Indeed, Benenson did not learn of Peterson's existence or her claim to a refund of the retainer until she wrote a letter to him in mid-December 2004.

Whatever the difficulties between respondent and Benenson, it is clear that respondent did not provide him with sufficient information to permit him to authorize a prompt refund of Peterson's retainer. Outhwaite did not identify her in the letters. Rather, she and other clients were identified only by their initials. In Peterson's case, it was S.P. Outhwaite did not provide Benenson with any records that demonstrated the firm's receipt of the $5000 in the first place. Finally, respondent made no "proactive" efforts (as the special master noted) to compel Benenson to approve payment of the refund. As

the special master noted, Peterson was respondent's client; the RPC 1.16(d) obligation was his, not Benenson's.

In the absence of a tarnished disciplinary record, an attorney who fails to return the client's unearned retainer, after the termination of the representation, generally will receive an admonition. See, e.g., In the Matter of Larissa A. Pelc, DRB 05-165 (July 28, 2005) (one-year delay) and In the Matter of Stephen D. Landfield, DRB 03-137 (July 3, 2003) (four-month delay).

An admonition or a reprimand is typically imposed on attorneys who charge an unreasonable fee, if the infraction is limited to one incident. See, e.g., In re Weston-Rivera, supra, 194 N.J. 511 (2008) (admonition for attorney who took a contingent fee greater than that to which she was entitled; the excess fee occurred as a result of her failure to calculate the fee in compliance with R. 1:21-7(d); the attorney also violated RPC 1.15(a) and RPC 1.15(d)); In the Matter of Angelo Bisceglie, Jr., DRB 98-129 (September 24, 1998) (admonition for attorney who billed a board of education for work not authorized by the board, although it was authorized by its president; the fee charged was unreasonable, but did not reach the level of overreaching); In the Matter of Robert S. Ellenport, DRB 96-386

(June 11, 1997) (admonition for attorney who received $500 in excess of the contingent fee permitted by the rules); In re Read, 170 N.J. 319 (2001) (reprimand for attorney who, in one matter, collected almost $100,000 in fees, when $15,000 would have been reasonable, and, in another matter, overcharged the estate by $85,000; in an effort to legitimize his exorbitant fee, the attorney presented inflated time records to the estate; compelling mitigating factors were considered); In re Cipolla, 141 N.J. 408 (1996) (reprimand for attorney who charged an unreasonable fee for services rendered, filed with the court an affidavit signed in blank by his client, did not give the client a copy of the retainer agreement or a bill for services, and engaged in a conflict of interest by representing husband and wife in a matter and then representing another client against the husband and the wife in an action arising from substantially similar circumstances); and In re Hinnant, 121 N.J. 395 (1990) (public reprimand for attorney who overreached his client by attempting to collect $21,000 in fees for his representation in a $91,000 real estate transaction; the attorney was also found guilty of conflict of interest, by acting in multiple and incompatible capacities as attorney, consultant, negotiator, and real estate broker).

In this case, respondent's failure to refund Peterson's retainer in a timely fashion would result in an admonition. In addition, however, he charged two clients (Sarti and Fischer) an unreasonable fee, based on the $5000 non-refundable retainer. An admonition would be in order for this misconduct as well. Coupled with respondent's ethics history, however, the above infractions justify the imposition of a reprimand.

Vice Chair Frost recused herself. Members Boylan and Lolla 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
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 Elliot H. Gourvitz
Docket No. DRB 08-326

Argued: February 19, 2009

Decided: May 12, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost					X	
Baugh			X			
Boylan						X
Clark			X			
Doremus			X			
Lolla						X
Stanton			X			
Wissinger			X			
Total:			6		1	2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel