SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-064
District Docket No. I-05-002E

IN THE MATTER OF	:
SEYMOUR WASSERSTRUM	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 10, 2007

Decided: June 21, 2007

Carmine J. Taglialatella appeared on behalf of the District I Ethics Committee.

Alexander Wazeter appeared on behalf of respondent.

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

This matter came before us on a recommendation for discipline (reprimand) filed by the District I Ethics Committee (DEC). It arose out of respondent's initial representation of three clients and his subsequent transfer of the matters to

another attorney.[1] That attorney was later disbarred for, among other things, abandoning those three clients as well as others.

The complaint alleges that respondent violated RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.5(c) (failure to memorialize fee agreement), RPC 1.5(e) (improper division of fees), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The DEC dismissed all charges, finding respondent guilty only of failure to execute retainer agreements. None of the clients testified at the hearing below or presented written statements to the DEC. We determine to reprimand respondent.

Respondent was admitted to the New Jersey bar in 1973. He is a sole practitioner in Vineland, New Jersey.

In February 1998, respondent received an admonition for failure to prepare a retainer agreement in a personal injury case. He also committed a technical violation of R. 1:21-7(g) when he turned over the file to the client without keeping copies of the settlement disbursement sheets and other required records. In the Matter of Seymour M. Wasserstrum, DRB 97-046 (February 23, 1998). In July of that same year, respondent was again admonished for failure to execute retainer agreements in

[1] Although the complaint cited a fourth client, Karen Williams, the DEC found no evidence that respondent had represented that individual.

two personal injury matters involving the same client. In the Matter of Seymour Wasserstrum, DRB 98-173 (July 7, 1998).

I. The Leroy Ford, Jr. Matter

Respondent had represented the parents of Leroy Ford, Jr., a minor, for "quite a number of years," before he undertook Leroy's representation in a personal injury matter. The first letter in the record evidencing respondent's representation of Leroy is dated March 8, 1990. The next three letters span the period from September 1992 to November 1996.

By letter dated December 30, 1996, Philip L. Kantor, now a disbarred attorney, informed Leroy's father that he was "assisting Mr. Wasserstrum handle your son Leroy's case." Kantor asked Leroy's father to schedule an appointment with him to "discuss the matter in detail." Kantor was not associated with respondent's office or on respondent's payroll. Respondent described the inception of his professional relationship with Kantor:

> [In 1974] I established my own firm as a sole practitioner . . . .
>
> . . . .

As the years progressed, I got busier and busier and found myself working fourteen hour days, often working seven days a week.

. . . .

I did not feel that I had enough work to hire a full time associate, and I was hopeful I could obtain the services of an attorney to work on a per diem basis. I therefore placed an ad with Rutgers Law School in Camden.

I believe the only response I had was from Philip Kantor . . . . He indicated to me that he had a significant amount of personal injury and municipal court experience, and these were the areas in which I desired assistance . . . .

. . . .

Phil indicated to [me] that he was maintaining a solo practice in Williamstown, in Gloucester County. He said that he was just getting started on his own, and that he had been previously employed with a busy personal injury firm in Trenton. He further stated that he had significant trial experience, and that he had handled and tried some rather complex personal injury cases.

. . . .

When Phil started assisting with my clients, I would initially introduce my clients to Phil during a consultation at my office. I would normally indicate that Phil had his own practice and that because of my busy schedule, Phil was helping me on a number of

> matters. I would normally sit in during the initial meeting involving Phil and the client.
>
> I was very pleased at the way Phil was handling the matters that I referred to him for assistance. I received a lot of positive feedback from clients. Phil normally came to my office at least once a week to meet with clients, and he was getting better than just good results on many of the cases.
>
> [Ex.P-3 at 2-4.][2]

Respondent's association with Kantor began in 1993. Their fee-splitting agreement was, in respondent's words, "very flexible. It was on a case-by-case basis depending on what he did on the case, the acumen of the case, things of that nature . . . . We just sat down [at the end of the case] and talked about it and worked something out." Respondent added, however, that he did not receive a fee in the cases that are the subject matter of these disciplinary proceedings because they had not been completed before Kantor received a suspension in 2003.[3] None of the files in question contained a fee agreement between respondent and the clients. Respondent had no explanation for the lack of retainer agreements.

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[2] Ex.P-3 is respondent's reply to the grievance, dated July 28, 2005.

[3] Kantor was suspended for three months in November 2003. In re Kantor, 178 N.J. 69 (2003). He was disbarred in June 2004. In re Kantor, 180 N.J. 226 (2004).

After Kantor began assisting respondent with Leroy's representation, respondent remained involved in the case. On January 7, 2000, for instance, Kantor advised Leroy's parents to call respondent's office for directions to the office of the attorney who would be taking their depositions. Later, in July 2000, respondent discussed with Kantor a settlement offer presented by the defendant.

In late 2001 or early 2002, Kantor assumed exclusive responsibility for Leroy's case, as well as other personal injury matters. According to respondent,

> since Phil was coming to meet with clients on a regular basis in my office, I felt the best way to transfer the cases to Phil was to advise the clients when they came to meet with him in my office, and that was the general procedure [I] utilized in transferring cases to Phil.
>
> . . . .
>
> With respect to the clients that were transferred to Phil, to the best of my recollection, each client was notified during the time when they met with Phil and me in my office. I do not believe I ever sent out any specific letters formally notifying the clients of the transfer since I did not feel that was necessary under the circumstances. Generally speaking, the clients were happy to have Phil take over the cases since he had been doing the vast majority of work on their cases, and they were satisfied as to the way their cases were progressing.
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> [Ex.P-3 at 4.]

Respondent testified that none of the clients had objected to the above change in the representation. In his view, the clients would continue to be well represented by Kantor:

> Having known and worked with Phil for quite a number of years, five, six, seven, whatever it was up to that point . . . Phil had done an excellent job. He was always reliable. Cared for the clients. Hard working. And he was always dedicated and did an excellent job. In one job he had a $135,000 settlement on a case that was worth substantially less . . . . Everybody was pretty much happy with him.
>
> [T128-9 to 19.][4]

Respondent conceded that substitutions of attorney were not filed in the three matters before us.[5]

When respondent transferred full control of the files to Kantor, Kantor's disciplinary record included only a reprimand, imposed in 2000, for misrepresenting to a municipal court judge that his car was insured at the time. Respondent denied knowledge of the reprimand. Asked if he was aware that disciplinary authorities were investigating Kantor's conduct in connection with the municipal court case, respondent replied:

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[4] T denotes the transcript of the DEC hearing, on October 24, 2006.

[5] In fact, there was no need to file a substitution of attorney in Leroy's case. Kantor filed the complaint (T164;T168). He was, thus, the attorney of record.

I don't think I did. I'm not sure. I may have known it existed but I didn't know the outcome. I certainly didn't know the outcome. I definitely knew about the municipal court case because he discussed that with me on a number of occasions and, of course, about his appeals, also. I can't sit here today and tell you under oath that I definitely knew about it or didn't know about it.

[T137-8 to 15.]

According to respondent, Kantor's performance did not suffer after the municipal court incident:

Q. At this point in time when you learned about what had happened in the municipal court with him in the ethical investigation, how was his performance on the files?

A. Didn't observe anything different.

Q. No red flags were raised in your mind?

A. No.

[T138-4 to 10.]

Respondent testified that he first learned of Kantor's ethics problems when he received a call from a judge, in the summer of 2002, expressing concern for Kantor's failure to appear in court. Because no substitutions of attorney had been filed in the cases transferred to Kantor, respondent had remained the attorney of record.

After respondent was contacted by the judge, he called Kantor many times and went to his residence on numerous occasions. By that time, Kantor had moved his office from Williamstown to his house. Respondent was unable to reach Kantor. Eventually, Kantor communicated with respondent, who scheduled an appointment to retrieve the files. Respondent testified about the location and condition of the files:

> [Kantor] took us to the barn and garage and showed us cabinets and boxes where the files were, and just let us go through there and attempt to locate the files.
>
> . . . .
>
> Quite a number of them were in disarray. There was no order that I noticed they were in. We spent a considerable time rummaging through there looking for them.
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> [T135-14 to 23.]

Respondent took the files to his office, whereupon they were turned over to Tom Farnoly, a court-appointed trustee. By that time, Kantor was in the throes of his ethics troubles. Indeed, in September 2002, he was served with the complaint in the case that led to his three-month suspension. His failure to answer the complaint caused the matter to proceed on a default basis. In the Matter of Philip Kantor, DRB 03-188 (September 15, 2003) (slip op. at 1-3). In June 2004, Kantor was disbarred for,

among other reasons, abandonment of clients, including those referred by respondent. In re Kantor, supra, 180 N.J. 226 (2004); In the Matter of Philip Kantor, DRB 03-294 (December 18, 2003) (slip op. at 3-5).

II. The Frank Rush Matter

In April 2001, respondent filed a workers' compensation claim on behalf of Frank Rush, who sustained injuries in an automobile accident. Respondent also represented Rush in a third-party action against the owner and operator of the other car.

The first evidence of Kantor's involvement in the case is a letter from him to Garden State Disability, dated June 6, 2001. As noted earlier, Kantor was assisting respondent in the handling of some cases, including this one.

In late 2001 or early 2001, Kantor assumed full control and responsibility for the workers' compensation claim and the third-party action. No substitution of attorney was filed. As of March 25, 2002, the date the workers' compensation matter was listed for trial, respondent remained the attorney of record.

As to the third-party action, Kantor allowed the statute of limitations to expire. In the Matter of Philip Kantor, supra, DRB 03-294 (December 18, 2003) (slip op. at 4). After Farnoly took over Kantor's files, he was able to negotiate a settlement

on Rush's behalf.

Respondent could not recall if he had received a fee in connection with the workers' compensation case. Although fees in workers' compensation cases are set by statute and, therefore, no fee agreement is necessary, the third-party action required a retainer agreement. Yet, respondent was unable to produce such a document or to explain its absence from the file.

III. The Juan and Juana Rodriguez Matters

In 1997, Juan and Juana Rodriguez, husband and wife, retained respondent to represent them in a personal injury case arising out of an automobile accident. In April 1998, respondent filed a complaint against Allstate, the driver of the other car, and its owner. The Rodriguez case involved two claims: the payment of medical bills (a PIP claim) and an uninsured motorist (UM) claim.

In a December 1998 letter to Mark Leonetti, Allstate's attorney, respondent told Leonetti, among other things, that Kantor was assisting him in representing the Rodriguezes. Admittedly, respondent and Kantor were handling the cases together. According to respondent, however, he was no longer involved in the case when it was arbitrated, in September 2000. The last item of correspondence in the record is a letter from one of the arbitrators to Kantor, dated April 25, 2001.

As with the other cases that respondent transferred to Kantor, there was no substitution of attorney or a fee agreement.

The DEC found no clear and convincing evidence of gross neglect, pattern of neglect, lack of diligence, improper division of fees, and misrepresentation. The sole violation found was the absence of retainer agreements.

As to the dismissed charges, the DEC concluded that the testimony and exhibits clearly established that Kantor had possession of and control over the files at issue and that, therefore, their disarray was solely attributable to him. Although the Rodriguez file was offered to the DEC to demonstrate the disorganization of all the files, the Rush and Ford files were not presented to the DEC. Accordingly, the DEC declined to infer from the state of the Rodriguez file that the other files were in equal state of disarray and, moreover, that respondent was responsible therefor.

As to the allegation that respondent knew of Kantor's ethics problems when he transferred the files to him, the DEC accepted respondent's testimony that, at the time, he had no specific knowledge of any ethics infractions committed by Kantor.

Similarly, the DEC found no evidence (1) that respondent failed to act with reasonable diligence or grossly neglected the

cases before they were transferred to Kantor; (2) that the clients had not agreed to Kantor's replacement as their attorney; (3) that respondent and Kantor shared fees in any of the cases; and (4) that respondent "misrepresented who was representing the clients."

The DEC concluded, however, that the charge of failure to prepare retainer agreements had been sustained:

> Respondent acknowledged that the fee agreements were warranted and should have been prepared, however he was unable to explain why they were not contained within the files. Because respondent could not produce any evidence that written fee agreements had ever been prepared, we find by clear and convincing evidence that respondent violated R.P.C. 1.5(c) by failing to execute proper fee agreements with regard to Leroy Ford and Juan and Juana Rodriguez.
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> [HPR9.][6]

The DEC recommended a reprimand.

Following a de novo review of the record, we are satisfied that the DEC 's finding that respondent conduct was unethical is fully supported by clear and convincing evidence. We agree, as well, with the DEC's dismissal of the charged violations of RPC 1.3, RPC 1.1(a), RPC 1.1(b), RPC 1.5(e), and RPC 8.4(c).

As to the charged violations of RPC 1.3, RPC 1.1(a), and RPC 1.1(b), there is no evidence that, until late 2001 or early

[6] HPR refers to the hearing panel report.

2002, when Kantor assumed full responsibility for the files, the clients had not been diligently and competently represented. The problems arose months later, in the summer of 2002, when respondent was no longer involved in the clients' representation. In fact, the only evidence purporting to show neglect was the submission of a sample file (the Rodriguez file), presumably offered to suggest that its state of disarray should be deemed representative of the condition of the other two files. As the DEC correctly pointed out, however, the file had changed hands on a number of occasions after respondent had ceased to represent the clients. We, therefore, agree with the DEC's dismissal of those RPCs.

Similarly, there is no clear and convincing evidence that Kantor was not properly representing the clients during the time that he was helping respondent with the cases (in fact, respondent testified that he had received positive feedback from the clients); that respondent did not ask and obtain the clients' consent to the permanent transfer of the files to Kantor; that respondent made "repeated misrepresentation[s] with regard to who is representing these clients" (RPC 8.4(c)); that he improperly shared fees with Kantor (RPC 1.5(e)) (respondent did not receive a fee in any of the present cases); and that he knew or should have known of Kantor's serious encounters with

the disciplinary system.[7]

In two instances, however, respondent's conduct was unethical: when he did not memorialize the fee arrangement in the Rush third-party action, as well as in the Ford and Rodriguez matters, and when, before he transferred to Kantor full responsibility for the cases, he failed to obtain the clients' consent to limiting the scope of his own representation, violations of RPC 1.5(c) and RPC 1.2(c), respectively.

RPC 1.5(c) provides that "[a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined . . . ." Yet, the three files contained no such agreements, an omission that respondent was unable to explain or justify. One would expect that, having been twice disciplined for failure to execute retainer agreements, respondent would have paid special attention to that formality required by the RPCs.

Also, under RPC 1.2(c) (scope of representation and allocation of authority between client and lawyer), respondent was obligated to explain to his clients, in detail, that his

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[7] As noted above, by late 2001 or early 2002, Kantor's ethics record included only a reprimand, which did not involve his representation of clients but, rather, his conduct as an individual. He misrepresented to a municipal court judge that his car had been insured at the time of an accident.

representation of their interests would be of a limited scope after Kantor's initial involvement. The clients retained respondent's services, not Kantor's. To explain, as respondent claimed he did, that Kantor would be assisting him in handling the matters was insufficient; the clients had the right to know the extent of each attorney's responsibility over the work performed and give their informed consent. For instance, did respondent maintain responsibility for supervising Kantor's work? Would Kantor be in charge of discovery or other pre-trial legal work and would respondent conduct the trial, if one took place? Who would decide whether a settlement offer was suitable? To merely communicate to the clients that Kantor would be helping in the handling of their matters, as respondent did, does not equate to full disclosure of the circumstances and to the "adequate information and explanation" requirements of an informed consent. RPC 1.0(e).[8] We find, thus, that respondent violated RPC 1.2(c), at least at the time that he recruited Kantor's assistance and before Kantor became solely responsible for the clients' representation.

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[8] That rule defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Moreover, when a lawyer and client agree to some form of limitation on the nature of the work to be performed by the lawyer, that agreement should be in the writing. "Consent to limit the scope of representation under RPC 1.2 (c) should be included in a single, specifically tailored form of retainer agreement." Lerner v. Laufer, 359 N.J. Super. 201, 218-222 (App.Div.). Respondent did not do so.

Although the complaint did not specifically charge respondent with violating RPC 1.2(c), that issue was fully litigated below. The record developed at the DEC hearing contains clear and convincing evidence of that violation. We, therefore, deem the complaint amended to conform to the proofs. In re Logan, 70 N.J. 222, 232 (1976).

Failure to memorialize fee agreements ordinarily results in an admonition. See, e.g., In the Matter of Louis W. Childress, Jr., DRB 02-395 (January 6, 2003); In the Matter of William J. Brennan, DRB 03-101 (May 23, 2003); In the Matter of David Lustbader, DRB 96-470 (June 6, 1997); and In the Matter of Miles R. Feinstein, DRB 95-367 (June 3, 1996). Even when that conduct is accompanied by other, non-serious ethics offenses, an admonition may be imposed. See, e.g., In the Matter of Martin G. Margolis, DRB 02-166 (July 22, 2002) (admonition for failure to prepare a written fee agreement, a violation of RPC 1.5(c), and taking an improper jurat, a violation of RPC 8.4(c)) and In

the Matter of Alan D. Krauss, DRB 02-041 (May 23, 2002) (admonition for attorney who failed to prepare a written retainer agreement, grossly neglected a matter, lacked diligence in the representation of the client's interests, and failed to communicate with the client; violations of RPC 1.5(c), RPC 1.1(a), RPC 1.3, and RPC 1.4(a), respectively).

For respondent's two ethics transgressions an admonition would have been sufficient, were it not for his ethics history (two admonitions for failure to execute retainer agreements) and his obvious aversion to documenting or reducing to writing important developments in his clients' cases. Not only did he not memorialize fee agreements in several instances (in the past and in the present matter), but he did not obtain his clients' written, informed consent to transferring their matters to Kantor, and did not notify courts and adversaries of the change in the representation. Although Kantor might have been the individual responsible for filing substitutions of attorney, when respondent became aware of Kantor's inaction, he should have ensured their filing.

In light of the foregoing, we determine that a reprimand more appropriately addresses respondent's conduct, viewed in the context of his two prior admonitions for the same violations and the above aggravating factors.

Members Lolla and Wissinger would impose a censure. Member Baugh 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
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Seymour Wasserstrum
Docket No. DRB 07-064

Argued: May 10, 2007

Decided: June 21, 2007

Disposition: Reprimand

Members	Suspension	Reprimand	Censure	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh					X
Boylan		X			
Frost		X			
Lolla			X		
Neuwirth		X			
Stanton		X			
Wissinger			X		
Total:		6	2		1

Julianne K. DeCore
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Chief Counsel