

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-081

IN THE MATTER OF
THOMAS JOHN FORKIN
AN ATTORNEY AT LAW

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Decision

Argued: May 11, 2000

Decided: October 30, 2000

Sharon A. Ferrucci appeared on behalf of the District IV Ethics Committee.

Francis J. Hartman 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 based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1995 and maintains an office for the practice of law in Northfield, New Jersey.

The complaint alleges violations of RPC 1.15(a) (negligent misappropriation and failure to safeguard the funds of a client or third person); RPC 1.15(b) (failure to promptly notify a client or third person of the receipt of funds and promptly deliver the funds to the person entitled to receive them); RPC 1.15(c) (failure to separate property in which both the lawyer and another person claim interests); RPC 1.15(d) (recordkeeping violations); RPC 8.1(a) (false statement of material fact in connection with a disciplinary matter) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Recently, we determined to suspend respondent for one year for violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 1.5 (failure to return an unearned fee), RPC 1.16 (improper termination of representation), RPC 3.3(a)(1) (false statement of material fact or law to a tribunal), RPC 5.5(a) (practicing while ineligible), RPC 7.5(a)(1) (false or misleading letterhead), RPC 8.1(a) (false statement of fact or law to a disciplinary authority) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) in eight matters. We also required that, prior to reinstatement, respondent provide proof of fitness to practice law and that, after reinstatement, he practice under the supervision of a proctor for two years. In the Matter of Thomas J. Forkin, Docket Nos. DRB 99-293 and 99-335 (2000).

* * *

On February 17, 1997, Robin Bertucci retained respondent to represent her on a post-

judgment matrimonial motion filed by her former husband, seeking custody of their two children. Bertucci gave respondent a \$500 retainer. Although Bertucci and respondent were not close friends, they had known each other since high school. On February 21, 1997, respondent appeared in court on the motion and entered into a consent order that resolved the custody issue.

In February 1997, respondent also represented a friend of Bertucci, Shane Zane, who had been arrested on a criminal charge. Bertucci had posted \$1,000 bail for Zane. Zane then moved into an apartment in respondent's basement, where he lived for approximately six months.

On February 26, 1997, the grand jury returned a "no bill" on the charges against Zane. As a result, Bertucci was entitled to the return of the \$1,000 she had posted as bail. Bertucci asked respondent to pick up the \$1,000 for her because she was in a full-time training program in Skillman, New Jersey and could not return to Bridgeton before the municipal offices closed.

On March 17, 1997, respondent submitted an "assignment of bail" to the Bridgeton municipal court, whereby Bertucci assigned the \$1,000 to respondent. The assignment had purportedly been executed by Bertucci and notarized by respondent's paralegal, Tonia Board, on March 14, 1997. However, it is undisputed that Bertucci did not sign the assignment and Board did not notarize Bertucci's signature.

After the Bridgeton municipal court issued a \$1,000 check to respondent, he endorsed

the check, which was cashed by the bank on March 17, 1997. It is undisputed that respondent did not deposit the check in either his attorney business account or his trust account. Respondent's business account was consistently overdrawn during the months of February, March and April 1997. Respondent's trust account showed no activity in March or April 1997.

On April 25, 1997, respondent issued a \$1,000 check to Bertucci from his business account, post-dating the check for April 28, 1997. On the check, respondent wrote the notation "Return of Bail \$1,000.00 to be transferred from Atty Trust." After Bertucci deposited the check in her bank account, it was returned for insufficient funds.

By letter dated May 21, 1997, respondent sent Bertucci a bill for \$1,300, allegedly for outstanding legal fees in Bertucci's matrimonial case.

On May 29, 1997, Bertucci filed a criminal complaint against respondent with the Bridgeton police department, alleging that he had forged her signature on the assignment and issued a check knowing it would not be honored.

By letter dated June 10, 1997, B & G Collections, Inc. advised Bertucci that respondent had referred Bertucci's unpaid legal bill to B & G for collection.

On August 5, 1997, respondent paid Bertucci \$1,000 in cash from funds taken from his attorney business account. Respondent and Bertucci signed a mutual release with respect to the \$1,000, the criminal complaint and the legal fees.

In his August 20, 1998 certification in reply to the grievance, respondent made the

following statements:

- during the month of May 1997, I paid Ms. Bertucci the \$1,000 in cash;
- when I had no response to the letter [enclosing his legal bill] or payment of the statement, I referred the matter to a collection agency;
- I believe that I am somewhat a victim of Ms. Bertucci who was so eager not to pay me a just bill that she contacted the police as a diversion.

According to the Office of Attorney Ethics ("OAE") investigator, respondent told her that, when he received the \$1,000 check on March 17, 1997, he "held onto" it for "a little while," then deposited it in his attorney business account. As to respondent's statement in his certification that he had repaid Bertucci in May 1997, respondent told the investigator that he must have been mistaken about the date.

With regard to the bill to Bertucci, respondent stated to the investigator that he had not intended to collect on the bill, that he had sent the bill because Bertucci was "giving him a hard time" about the \$1,000, that he had wanted to show Bertucci "what he had done for her" and that the bill had been sent to the collection agency in error.

The OAE investigator further testified that, when she spoke with Board, the alleged notary on the assignment, Board denied having notarized the document and did not know who had signed her name. Board also told the investigator that, when she was employed by respondent in 1997, she kept her notary seal in her desk at respondent's home office.

Respondent testified that he had prepared the assignment and given it to Zane, who

was then living in respondent's home.¹ According to respondent, Zane was unable to pay rent and, therefore, would serve summonses or perform other services for respondent. Respondent testified that he told Zane "when you see [Bertucci] have her sign this and have it notarized by whoever . . . and bring it back to me so I can go get this thing straightened out for her." Respondent stated that, the next time he saw the document, it was in a blank file folder on his desk and had been signed by Bertucci and Board. Respondent testified that, although Zane was living in his house in March 1997, he did not speak with Zane about the assignment after finding it on his desk.

Respondent denied having signed Bertucci's or Zane's name on the assignment. In fact, respondent testified, he was not aware of Board's denial that she had notarized the document until the OAE investigator so testified at the hearing.

According to respondent, he did not have a "direct recollection" of what he had done with the \$1,000 check. Although he did not deny having told Bertucci that he had deposited it in his trust account, he contended that, because of his drinking problem, he did not "know what [he] was saying back then."

As to his statement to the OAE investigator that he had deposited the Bridgeton check in his business account, respondent testified that he had not reviewed his records prior to the interview and believed, at the time, that his statement was truthful.

Respondent testified that his statement that he had repaid Bertucci in May had been

¹ Zane did not testify at the hearing. The OAE investigator testified that, although she attempted to locate Zane through Bertucci, Bertucci did not reply to her letter.

made in reply to "a rapid-fire question" from the investigator. However, respondent made that statement in his August 20, 1998 reply to the grievance, not during the investigative interview.

Both respondent and Bertucci testified that respondent was not acting as Bertucci's attorney but as her friend, when he picked up the \$1,000 check.

According to Bertucci, she did not remember when she learned that respondent had obtained the funds. She recalled, however, that respondent had told her that "he had to write me a check because he had deposited it in a trust fund, an attorney trust fund."

Bertucci testified that she did not recall whether respondent had discussed with her the need for her to execute an assignment so that he could obtain the funds. However, she was certain that she had not executed the assignment and that she had not authorized anyone to sign the document on her behalf. According to Bertucci, the first time that she saw the assignment was in April 1997, when she went to Bridgeton city hall.

After respondent's check bounced, Bertucci testified, she left several messages for him, but he did not return her calls. Instead, she received respondent's legal bill. According to Bertucci, respondent had previously told her that the \$500 retainer she had paid was sufficient.

Bertucci testified that, after she received the bill, she was able to speak with respondent, who asked for "a couple weeks" to "get everything settled." When she still did not receive the \$1,000, Bertucci testified, she filed a complaint with the Bridgeton police

department.

* * *

During the investigation of the grievance in this matter, it became apparent – and respondent did not dispute – that he did not maintain his attorney trust and business account records in accordance with the requirements of R.1:21-6 and in violation of RPC 1.15(d).

* * *

In mitigation, respondent testified that he began drinking heavily after his father died in September 1996 and that his alcohol problem intensified, until he was confronted by a judge, in May 1997. He thereafter became involved in Alcoholics Anonymous groups and in Lawyers Concerned for Lawyers. Although respondent testified that he has been a “recovering alcoholic” since June 1998, in his answer he stated that he has been sober since August 1997.

Respondent also submitted two reports, from his treating psychiatrist, Gary Glass, dated August 10, 1998 and December 14, 1999. The 1998 report was apparently prepared in connection with a charge that respondent drove while his license was suspended. Glass did not state when he began treating respondent. However, respondent testified on February 7, 2000 that he had been seeing Glass for “almost two years.” In his 1999 report, Glass stated that, during the time period relevant to this matter, respondent was “under the

influence of his alcohol addiction and severe depression” and was taking Prozac. Glass added that “[t]here is no doubt that [respondent’s] judgment was impaired by his multiple problems.”

* * *

The DEC dismissed the charged violations of RPC 1.15(a), (b) and (c) because “all involve an attorney-client relationship, which did not exist in this matter at the time in question.” However, the DEC found that respondent cashed the refund check and converted the funds to his own use, in violation of RPC 8.4(c).

With respect to respondent’s misrepresentations to the OAE investigator, the DEC rejected respondent’s defense that he had not reviewed his file prior to the interview, finding that respondent knew or should have known that his statements were false. The DEC, thus, found violations of RPC 8.1(a) and RPC 8.4(c). Finally, the DEC found that respondent did not comply with the recordkeeping requirements of R.1:21-6, in violation of RPC 1.15(d).

As to respondent’s claimed mitigation, the DEC determined that his “mental and emotional status, and/or his overuse of alcohol” did not impair his “ability to know right from wrong.”

The DEC recommended a six-month suspension, to be served concurrently with the prior suspension recommended by the DEC in the two matters under Docket Nos. DRB 99-293 and 99-335.

* * *

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

Instead of remitting Bertucci's funds to her, respondent used the funds, in violation of RPC 1.5(b). Although the DEC dismissed that charge on the basis that there was no attorney-client relationship between respondent and Bertucci, the rule also applies when the funds belong to a third person, not only a client. We find, therefore, that respondent's failure to promptly deliver Bertucci's funds to her violated RPC 1.15(b).²

Respondent then misrepresented to Bertucci that he had deposited the funds in his trust account and falsely noted on his business account check to Bertucci that the funds had been transferred from his trust account. Furthermore, in respondent's certification in reply to the grievance, he misrepresented that he had repaid Bertucci in May 1997 and that Bertucci had filed a police report in order to avoid paying his "just bill." Respondent also misrepresented to the OAE investigator that he had held the \$1,000 check for "a little while," then deposited it in his business account. All of these false statements violated RPC 8.4(c). In addition, respondent's misrepresentations in his certification and to the OAE investigator

² We do not find knowing misappropriation for two reasons: respondent was not charged with knowing misappropriation and, more importantly, it has never been found that, when an attorney improperly uses a friend's funds – absent an attorney-client or a fiduciary relationship created by statute, agreement or other legal source – the conduct is characterized as knowing misappropriation, requiring disbarment.

violated RPC 8.1(a). The latter are particularly troubling because they occurred after respondent was already involved in the investigations of the prior ethics matters and after he had allegedly stopped drinking.

With respect to the charged violations of RPC 1.15(a) and (c), we agree with the DEC that they should be dismissed, although not for the reasons cited. The DEC premised its dismissal on the absence of an attorney-client relationship between respondent and Bertucci. Like RPC 1.15(b), however, RPC 1.15(a) and (c) also apply where the funds belong to a third person. Unlike RPC 1.15(b), though, RPC 1.15(a) and (c) require that the funds be obtained “in connection with a representation,” or “in the course of a representation,” respectively. Here, both respondent and Bertucci testified that respondent agreed to obtain Bertucci’s funds as a friend and that the conduct did not occur in connection with his prior representation of Bertucci or Zane. For these reasons, we agree with the DEC that those charges should be dismissed.

Finally, respondent admitted – and the DEC found – that he did not comply with the attorney recordkeeping requirements, in violation of RPC 1.15(d).

In fashioning an appropriate discipline for respondent’s misconduct, we are mindful that we recently determined to suspend respondent for one year for his misconduct in eight matters. As here, the prior matters involved dishonesty and misrepresentations, among acts of other misconduct. And, although the ethics offenses in those matters occurred between June 1996 and December 1997, that is, contemporaneously with much of respondent’s

improprieties in this matter, respondent's misrepresentations in his reply certification and in his interview with the investigator occurred after he was already involved in the investigations of the prior ethics matters. We are, therefore, troubled by respondent's continuous dishonest conduct, despite his being involved in the disciplinary process at the time. Furthermore, the misrepresentations occurred after respondent had allegedly stopped using alcohol. Therefore, he cannot deflect responsibility for them to his drinking problem.

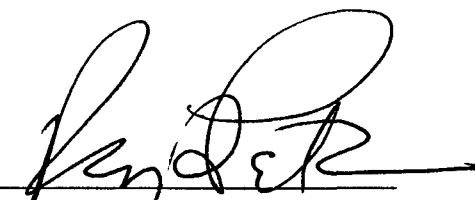
In light of the foregoing, we unanimously determined to impose a three-month suspension, to be served after the one-year suspension imposed in the matters under Docket Nos. DRB 99-293 and 99-335. See, e.g., In re Rinaldo, 155 N.J. 541 (1998) (three-month suspension where, among other things, the attorney failed to promptly notify a third party of the receipt of funds in which the party had an interest and failed to keep the funds separate) and In re Chasan, 154 N.J. 8 (1998) (three-month suspension where the attorney failed to retain a disputed fee in a separate account, made misrepresentations to the other attorney involved in the dispute, failed to advise two judges that he had already disbursed the fee to himself and violated the recordkeeping rules).

We also reiterate our decision to require that, prior to reinstatement, respondent provide proof of fitness to practice law, certified by a mental health professional approved by the OAE, and that, upon reinstatement, he practice for two years under the supervision of a proctor, also approved by the OAE.

Two members recused themselves. One member did not participate.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 10/30/2011

By: 
ROCKY L. PETERSON
Vice Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Thomas J. Forkin
Docket No. DRB 00-081**

Argued: May 11, 2000

Decided: October 30, 2000

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling						X	
Peterson		X					
Boylan		X					
Brody		X					
Lolla		X					
Maudsley						X	
O'Shaughnessy		X					
Schwartz							X
Wissinger		X					
Total:		6				2	1

By *Isabel Frank* 3/27/01
Robyn M. Hill
Chief Counsel