

IP

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-435

IN THE MATTER OF :
:
JAY G. HELT :
:
AN ATTORNEY AT LAW :
:

Decision

Argued: April 13, 2000

Decided: August 15, 2000

William G. Brigiani appeared on behalf of the District VIII 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 based on a recommendation for an admonition filed by the District VIII Ethics Committee ("DEC,") which we determined to bring on for a hearing. The one-count complaint charged respondent with violations of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (d) (conduct

prejudicial to the administration of justice) and RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) for failing to provide new counsel with the client's file, in violation of an Appellate Division order; RPC 3.2 (failure to expedite litigation) for preventing the new attorney from preparing adequate pleadings by withholding the file; RPC 3.4(a) (unlawfully obstructing another party's access to evidence having potential evidentiary value); RPC 1.4(a) (failure to comply with reasonable requests for information) by failing to adequately reply to requests for the original file; RPC 1.15(b) (failure to promptly deliver to a client or a third person property that they are entitled to receive); RPC 1.15(c) (when in the course of representation a lawyer is in possession of property in which both the attorney and another person claim interest, the property shall be kept separate by the lawyer) for failing to keep separately documents requested by his former client; RPC 1.15(d) (failure to comply with the provisions of R.1:21-6 [recordkeeping]); and RPC 1.16(d) (upon termination of representation, failure to surrender papers and property to which the client is entitled).

Respondent was admitted to the New Jersey bar in 1983. He maintains a law practice in Holmdel, New Jersey. Respondent was reprimanded in 1997, in a default matter, for violations of RPC 1.16(d) (failure to turn over files) and RPC 8.1(b) (failure to cooperate with disciplinary authorities). In re Helt, 147 N.J. 273 (1997). In 1986 respondent was privately reprimanded for unethical conduct in a matrimonial matter, which included failure to communicate with his client and failure to communicate his fees in writing. In the Matter of Jay G. Helt, Docket No. DRB 85-416 (December 23, 1986).

Deborah Hering retained respondent in February 1995 to represent her in connection with a claim against her former employer, AT&T Employee's Federal Credit Union (now Affinity Federal Credit Union) and her former supervisor. Based on the testimony of respondent and his associate, Hering was a difficult client.

On May 1, 1998, a summary judgment motion was decided in favor of the defendants. After an outburst from Hering at the courthouse, she terminated respondent's services. Both respondent and Hering had grown discontent with their attorney/client relationship.

While representing Hering, respondent had accumulated three "bankers' boxes" of documents comprising her file. Hering demanded that respondent turn over her file and, in fact, went to his office on May 1, 1998 to retrieve it. Hering grabbed only one box before she was stopped and the office was locked. She tried to force her way back into the office to retrieve the remaining boxes, but was prevented by the police. Another attorney, Keith Arcomano, who happened to be at respondent's office during the confrontation, convinced Hering to return the box by assuring her that he would hold that box in his possession until she and respondent had resolved their problems. Respondent kept the other two boxes.

On or about May 8, 1998, Hering retained another attorney, Michael Hrycak, who filed a substitution of attorney with the court and, on May 11, 1998, a motion for reconsideration. Subsequently, Hrycak learned that he was missing vital information from Hering's file. As a result, on Thursday, May 21, 1998, Hrycak called Arcomano first, then respondent, asking for the release of Hering's file. Respondent informed Hrycak that he

would not release the boxes without first making copies of the documents for his own records, at Hering's expense. The attorneys agreed that Hrycak could drive to respondent's office on Saturday of the Memorial Day weekend, May 23, 1998, to review the file and determine which items he needed.

Late in the afternoon of Friday, May 22, 1998, Hrycak received the defendant's brief in opposition to Hering's motion for reconsideration. Afterwards Hrycak called respondent's office to set a time to review the file, but the office was already closed for the holiday. Hrycak called respondent's answering service explaining that he had to contact respondent to set a time for a Saturday meeting with respondent. Respondent never returned Hrycak's call. He claimed that he never received a message about the call. Hrycak was unable to review the documents prior to the return date of the motion.

On May 29, 1998 Hering's motion for reconsideration was denied. According to Hrycak, the court based its decision on evidence that was not in his possession. Thereafter, Hering retained Hrycak to pursue an appeal. Hrycak filed a notice of appeal and case information statement with the Appellate Division.

On June 10, 1998, in an attempt to obtain Hering's file, Hrycak wrote to respondent and Arcomano to inform them that a "stalemate" had occurred and to suggest that respondent's failure to turn over the file may have been designed to obstruct access to evidence or documents, in violation of RPC 3.2 and RPC 3.4. Hrycak also enclosed a copy of ACPE Opinion No. 554, 115 N.J.L.J. 565 (May 16, 1985), dealing with the return of

clients' file. Hrycak requested that both respondent and Arcomano arrange to have Hrycak or his client's father pick up the three boxes of documents. Hrycak offered to make copies of any documents necessary for respondent's files.

By letter dated June 16, 1998, respondent denied that he was trying to prevent Hrycak's access to the file. Respondent pointed out that Hrycak had failed to contact him to make alternate arrangements for the transfer of file during the week that preceded the return date of the motion for reconsideration. Respondent accused Hrycak of failing to make timely arrangements for the transfer of the file and asked for detailed instructions as to how Hrycak intended to retrieve Hering's file. The following day, June 17, 1998, respondent wrote to Hrycak to inform him that he had contacted "Staples" about reproducing Hering's file. Respondent believed that there were 2,000 to 3,000 pages and that "Staples" charged "approximately" \$.10 per copy. Respondent requested a check for \$300 from Hering prior to having the file reproduced and offered to refund any excess monies.

According to Hrycak, after he received respondent's letter, he called respondent two days in a row, but respondent was unavailable. Hrycak, therefore, told respondent's secretary that he wanted to borrow the original file for the appeal proceeding, assuring her that he would not disturb it and that he would return it in due course. Hrycak also wrote to respondent on June 17, 1998, stating that there must have been "some misunderstanding regarding our prior arrangement to meet on May 23, 1998." Hrycak further wrote, "as you had previously agreed, I would like to arrange to have my client's father . . . pick up the files

on whatever date is convenient for you." The letter also confirmed respondent's consent to allow Arcomano to release the box in his possession. Exhibit C-3.

By letter dated June 23, 1998, respondent told Hrycak that he would not release the file, but would send it out to be copied upon receipt of a deposit from Hering for the copying charges. Respondent requested Hrycak to contact him to confirm this agreement. Apparently nothing further transpired until June 25, 1998, when Hrycak contacted the Appellate Division to notify it that he was experiencing problems obtaining the file from respondent and that he might have to file a motion to compel its release.

Respondent again wrote to Hrycak, on July 14, 1998, reminding Hrycak that he had not received a reply to his June 23, 1998 letter. Respondent asked Hrycak to let him know when he would be forwarding the check for copying charges, since it would take approximately two to three days to have the file reproduced. Hrycak replied by letter dated July 16, 1998, indicating that the matter was currently under the jurisdiction of the Appellate Division and that he was applying for relief from the courts because respondent had failed to comply with the Rules of Professional Conduct and the relevant ACPE opinion. On July 21, 1998, respondent wrote the following to Hrycak:

Our initial conversation was that you and your wife would possibly meet me on Saturday, May 23, 1998 in order to review the file. That arrangement not having worked out, in conversation with my secretary you requested I turn my file over to you in its entirety until the appeal was concluded. I made it clear that I did not feel it was my obligation to release the entire file. As an accommodation and in the interest of submitting the necessary information in a timely manner, I agree to have the entire file copied

and sent directly to you. Obviously, in light of your recent correspondence, this is unacceptable and I therefore suggest that you appear at my office any day between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, in order to determine which documents you need and same will be copied and forwarded to you. I would suggest you give at least a few days notice so we can arrange to meet Mr. Arcomano to review the contents of the file in his possession.

[Exhibit R-5]

Thereafter, on or about July 22, 1998, Hrycak filed a motion with the Appellate Division to compel respondent to turn over to him Hering's entire file. Respondent opposed the motion by letter-brief and certification dated July 31, 1998. On August 31, 1998 the Appellate Division granted Hering's motion. The order stated as follows:

Motion by appellant to compel and to stay appellant proceedings is granted. Plaintiff's file shall be delivered to plaintiff's present counsel within 10 days of this order. Terminated counsel may retain photocopies of plaintiff's file at his expense. Appellate proceedings shall be stayed 20 days from the date of this order.

[Exhibit C-1]

Hrycak sent a copy of the Appellate Division order to respondent on September 4, 1998. In the cover letter Hrycak noted that the order did not provide for the return of the file held by Arcomano, but indicated only that the original files be released. Hrycak requested that Arcomano make copies of the file to preserve the integrity of the documents. On September 10, 1998, respondent turned over what was apparently a condensed version of the file. The documents were originals, not copies. In his cover letter to Hrycak, he stated that the file held by Arcomano had to be reviewed and copied either by respondent's secretary

or respondent by Friday and would be forwarded upon completion. Respondent requested that Hrycak return the original files to him upon completion of the appeal.

When the file held by Arcomano was not sent, Hrycak wrote to respondent and to Arcomano on September 20, 1998, complaining that he had not yet received that file, suggesting that it was an oversight and stating his belief that it would be delivered as soon as possible, as required by the Appellate Division's order. Exhibit C-6. The record is silent on whether respondent or Arcomano was to be blamed for the failure to return that file.

Hering's appellate brief was due on October 28, 1998. When the additional documents were not turned over to him, Hrycak filed another motion to, among other things, enforce the original order, request an extension of time to file the appellate brief and impose sanctions. On December 16, 1998, the Appellate Division granted the extension, but denied the request for imposition of sanctions. Shortly thereafter, Arcomano turned over the remainder of Hering's file to Hrycak.

At the DEC hearing, Hrycak explained that he had not sent respondent \$300 to copy the file because he had never been told that he would get the entire file.

For his part, respondent testified that he did not want to turn over the original file because he was afraid that he might expose himself to some type of liability later on. He stated that he had given Hrycak the opportunity to review the file and had even offered him the use of his photocopy machine. Respondent added that he never had the file copied because Hrycak had never complied with his request for a deposit.

* * *

Although Hering claimed that respondent had canceled some appointments with her and that her inquiries about the status of her case were not adequately answered, the DEC found that there was no evidence in the record that respondent had failed to properly communicate with her about the progress of the case. The DEC found, however, that respondent failed to turn over Hering's file in a timely manner, causing her significant inconvenience and additional legal fees. The DEC found that Hering was entitled to the return of her file and that there was sufficient protection that respondent would be reimbursed the duplicating fees. The DEC determined that respondent should have reviewed the file and should have authorized its duplication, either in his office or at a commercial photocopying office. Based on the foregoing, the DEC concluded that respondent's conduct was a violation of RPC 1.16(d) and recommended the imposition of an admonition.

* * *

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

Respondent's attempts to cooperate with the release of Hering's file were only half-hearted. The first such offer was made prior to the Memorial Day weekend, when respondent agreed to have Hrycak come to his office on a Saturday morning. However, when Hrycak attempted to contact him to arrange a meeting time, respondent's office was already closed for the holiday and he could not be reached through his answering service. Hrycak only learned that he was missing a crucial piece of information afterwards, when his motion for reconsideration was denied. Thereafter, while Hrycak was preparing the appeal, the several telephone calls and letters between the two attorneys did not result in the turnover of files by respondent.

ACPE Opinion 554, 115 N.J.L.J. 565 (May 16, 1985) establishes the obligation of the former attorney to turn over his client's file to the new attorney. The opinion unequivocally states that a client or his new attorney is entitled to receive the file with everything that is or was essential for the completion of litigation. As to responsibility for the payment of copies, the opinion states as follows:

It seems to us that when a client changes attorneys, the burden should rest with the client and his new attorney. Payment of the charges may have to await the outcome of the litigation, but the obligation to pay is created when the copies of the records are made available to the client or his new attorney. The original attorney has a genuine interest in retaining the records and documents for his protection against possible malpractice suits, or an ethical or tax inquiry.

Hrycak's June 10, 1998 letter, which referred to the rights and obligations under Opinion 554, acknowledged his client's duty to pay for copying costs. When no agreement

was reached between the attorneys, Hrycak filed a motion with the appellate division to compel respondent to turn over Hering's file. Contrary to Opinion 554, the Appellate Division ordered that "terminated counsel may retain photocopies of plaintiff's file at his expense." (Emphasis added). Despite this order, respondent only turned over the documents in his possession and made no arrangements for the release of the documents in Arcomano's possession. It was not until Hrycak filed a second motion to enforce the August 31, 1998 order that Arcomano turned over the remainder of the file to Hrycak.

Of the allegations made in the complaint, the only applicable charge is of a violation of RPC 1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practical to protect a client's interests, such as . . . surrendering papers and property to which a client is entitled). We unanimously find a violation of RPC 1.16(d) because of the stalemate that respondent created in turning over Hering's file.

Generally, admonitions have been imposed in cases where attorneys have failed to turn over their clients' files. See, e.g. In the Matter of John J. Dudas, Jr., Docket No. DRB 95-383 (November 29, 1995) (admonition for violations of RPC 1.4(a), RPC 1.16(d) and RPC 8.1(b)); and In the Matter of Howard M. Dorian, Docket No. DRB 95-216 (August 1, 1995) (admonition for violations of RPC 1.1(a), RPC 1.4, RPC 1.16 and RPC 8.1(b)). However, respondent has an ethics history. He was reprimanded in 1997 for violations of RPC 1.16(d) (failure to return a file) and RPC 8.1(b) in a default matter. In re Helt, 147 N.J.

273 (1997). He also received a private reprimand in 1986 for violations of RPC 1.4 and RPC 1.5 in a matrimonial matter.

Respondent's delay in turning over Hering's file resulted in the loss of information necessary for her motion for reconsideration. Moreover, respondent's conduct added to Hering's litigation expenses. Clearly, respondent did not learn from his earlier discipline, which we have considered as an aggravating factor in assessing discipline. We unanimously determined to impose a reprimand. One member did not participate.

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

Dated: 8/15/00

By: 

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

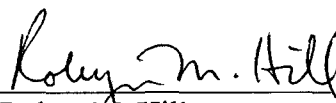
**In the Matter of Jay G. Helt
Docket No. DRB 99-435**

Argued: April 13, 2000

Decided: August 15, 2000

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling			X				
Peterson			X				
Boylan							X
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy			X				
Schwartz			X				
Wissinger			X				
Total:			8				1


Robyn M. Hill
Chief Counsel