SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-330

IN THE MATTER OF :

RICHARD J. ZEITLER :

AN ATTORNEY AT LAW :

Decision

Argued: October 15, 1998

Decided: December 8, 1998

Mitchell H. Portnoi appeared on behalf of the District VIII Ethics Committee

Douglas Kleinfeld appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District VIII Ethics Committee ("DEC"). The complaint alleged that respondent failed to escrow monies belonging to a third party, in violation of RPC 1.15. The crux of this

matter is whether respondent violated RPC 1.15(b) when he disbursed the settlement proceeds from his client's third-party personal injury claim, without satisfying a workers' compensation lien.

Respondent was admitted to the New Jersey bar in 1966 and maintains an office for the practice of law in Iselin, New Jersey. He has an extensive disciplinary history. In 1976, he was suspended from the practice of law for one year for misconduct involving dishonesty, fraud, deceit or misrepresentation in two cases. In re Zeitler, 69 N.J. 61 (1976). In 1980, respondent was suspended for two years for his gross neglect of two client matters and his failure to tell his clients that their cases had been dismissed. In re Zeitler, 85 N.J. 21 (1980). In 1995, respondent received an admonition for lack of diligence in one matter. In the Matter of Richard J. Zeitler, Docket No. DRB 95-323 (November 3, 1995).

* * *

In 1987, respondent was representing Richard Weinbrenner in a workers' compensation action against his employer, Anheuser Busch, Inc., and in a third-party personal injury claim against Koza's Tavern ("Koza"), the owner of the premises where Weinbrenner sustained a fall. The Insurance Company of North America ("INA") was the workers' compensation insurance carrier for Anheuser Busch, Inc. Warwick Insurance Company ("Warwick") was the insurance carrier for Koza.

On June 12, 1987, Crawford & Company ("Crawford"), a servicing agent of INA, sent a handwritten "speed letter" to Warwick, with a copy to respondent, regarding Weinbrenner's workers' compensation claim. The letter stated the following:

> Our compensation lien to date is as follows:
>
> 18,035.75 indemnity
> 28,603.48 medical
> 46,639.23 total
>
> Medical payments are continuing and a claim petition is still pending. Please note your records that payment of our lien is to be made payable to Crawford & Company.

Also in June 1987, respondent settled the third-party claim against Koza for $95,000. Before Koza's carrier, Warwick, would issue the settlement check, it required assurance from respondent regarding the payment of medical bills and liens. Accordingly, on June 23, 1987, respondent sent a letter to Warwick representing, among other things, that he would pay "any and all outstanding bills [or] liens with respect to the plaintiff's workmen's compensation claim...out of the proceeds of the settlement." Respondent also represented that he would indemnify and hold Warwick harmless for "any liens or money owed at the present time or at any time in the future, as a result of the workmen's compensation claim."

Notwithstanding respondent's written assurances to Warwick, on August 7, 1987, he disbursed the entire $95,000 settlement: $63,333 to Weinbrenner and $31,667 to himself for his fee. Respondent stated that he disbursed the settlement proceeds because he did not believe that INA's lien was fixed or ripe for payment because the compensation case was still in progress. Furthermore, according to respondent, it was likely that Weinbrenner would not

owe any money to INA from the third-party settlement because of the amount that respondent believed INA would be required to pay Weinbrenner in the workers' compensation case.

In fact, Weinbrenner's workers' compensation action was dismissed in 1989 and Weinbrenner received nothing. Respondent testified that the action was dismissed "on procedural grounds." There was no testimony elicited at the DEC hearing as to the reason for the dismissal. The dismissal was affirmed on appeal.

In 1992, INA filed a complaint against Weinbrenner, Warwick and respondent for reimbursement of the money paid to Weinbrenner prior to the dismissal, pursuant to its statutory lien. N.J.S.A. 34:15-40. INA alleged that respondent, too, had an obligation to reimburse INA because respondent had been given notice of its lien.

On June 15, 1994, the Honorable Mac D. Hunter, the Law Division judge, entered judgment against respondent in the INA action. According to respondent, no judgment was entered against Weinbrenner because respondent advised Judge Hunter that he was "responding for Weinbrenner," would be filing an appeal of the judgment and would be responsible for the judgment if he lost the appeal. Judge Hunter's determination was upheld on appeal. Respondent apparently resisted INA's efforts to collect its judgment and INA filed an ethics grievance against him, which led to this matter. Thereafter, respondent and INA settled the matter.

Respondent argued that RPC 1.15(b) did not apply to his actions because INA did not

have an "interest" in the third-party settlement proceeds. According to respondent, INA did not have an interest in the funds because it had not perfected its lien by complying with N.J.S.A. 34:15-40(d), which required that INA serve notice by registered mail, return receipt requested. The "speed letter" that INA's agent sent to Warwick did not indicate that it had been sent by registered mail. However, in his judgment order in the INA action, Judge Hunter specifically found that the INA lien was "deemed to be valid and perfected."

Respondent also argued that he was not a fiduciary for INA. Therefore, respondent claimed, he was not required to maintain an escrow for INA. The ethics complaint alleged that respondent owed a fiduciary duty to Warwick and Koza to satisfy INA's lien from the settlement proceeds; the complaint did not allege that he owed a duty to INA. Respondent admitted that he owed a duty to Warwick and Koza and that he was willing to indemnify Koza and Warwick, but was never required by them to do so.

* * *

The DEC found that respondent's failure to satisfy INA's lien out of the third-party settlement proceeds violated RPC 1.15(b). One panel member (attorney) dissented and would have dismissed the complaint. In his view, respondent had no obligation to pay INA or to escrow the settlement proceeds because there was no evidence that INA had perfected its lien; therefore, that member claimed, INA had no "interest" in the settlement funds.

The DEC recommended that respondent be reprimanded.

* * *

Upon a de novo review of the record, the Board was satisfied that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence. Although respondent focused on his lack of a fiduciary duty to INA, the DEC did not premise its complaint or its findings of unethical conduct on respondent's relationship to INA. Instead, the complaint alleged that respondent owed a fiduciary duty to Warwick and Koza to satisfy INA's lien from the settlement proceeds. Both the presenter and respondent relied on Selective Insurance Co. v. Ronzo, 255 N.J. Super. 415 (App. Div. 1992).

In Selective, a workers' compensation carrier filed suit against the employee who had received benefits, the attorney who represented the employee in a third-party liability action and Thomas Gattis, the defendant in the third-party action. The third-party action had been settled for $37,500 and the attorney disbursed the settlement proceeds without reimbursing Selective for the benefits it had paid to the employee. The Appellate Division held that the attorney did not owe a fiduciary duty to Selective and that "an attorney who simply knows of a client's debt has no duty to pay the creditor from the proceeds of a settlement." Id. at 418. However, the court held that the attorney had a fiduciary duty to Gattis and his

insurance carrier because the attorney knew that Selective had perfected its lien against Gattis and that his carrier could have to pay the amount of the lien twice, unless it directly paid Selective from the settlement proceeds. Ibid. Although the attorney in Selective had not made a written representation to Gattis's carrier that he would pay Selective, the court found that "[t]he inference is irresistible that defendant induced Gattis's carrier to send him the entire amount of the settlement in reliance on his assurance as an attorney that he would satisfy the lien from the proceeds." Ibid.

There remained the issue of whether Selective could recover against the attorney for violating a duty the attorney owed to Gattis and his carrier, not to Selective. The court entered judgment against the attorney in order to avoid a "circuity of action" by requiring Selective to pursue a claim against Gattis and requiring Gattis to bring a claim against the attorney for indemnification. Id. at 419.

Here, respondent owed a duty to Warwick and Koza to satisfy INA's lien out of the settlement proceeds. He made an affirmative representation that he would pay any bills and liens from the settlement proceeds. Obviously, Warwick demanded the representation because it had been given notice of INA's compensation lien. Having made such a representation, respondent had a fiduciary obligation to Warwick to address INA's lien and should not have disbursed the settlement funds until he had either paid the lien or reached an agreement with INA as to the lien.

Respondent argued that he did not have to pay INA's lien because it was not perfected. However, he represented to Warwick that he would pay all bills or liens, not just

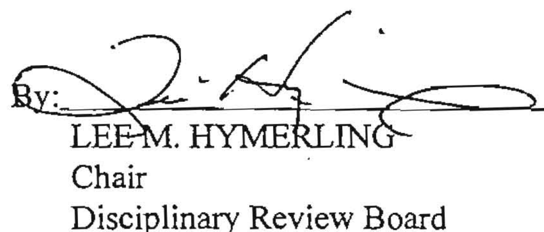
perfected liens. Furthermore, Judge Hunter, in his judgment order, found that INA's lien was valid and perfected. Finally, at the time that respondent disbursed the settlement monies, he did not inquire as to whether INA's lien was perfected and that was not the basis on which respondent disbursed the funds.

Discipline for the improper release of escrow funds has ranged from an admonition to a lengthy suspension, depending on a number of factors, including the circumstances of the release and the presence of other misconduct. See In re Spizz, 140 N.J. 38 (1995) (letter of admonition); In re Flayer, 130 N.J. 21 (1992) (reprimand); In re Susser, 152 N.J. 37 (1997) (three-year suspension).

To respondent's credit, he accepted financial responsibility for the civil judgment so that judgment would not be entered against Weinbrenner. If not for respondent's lengthy ethics history, an admonition might be sufficient discipline. However, because respondent has a significant disciplinary history, a majority of the Board determined that a reprimand is warranted. One member dissented, voting to dismiss the matter. In that member's view, this is a civil matter, not an ethics matter.

The Board also directed that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 12/8/98



By: LEE M. HYMERLING
Chair
Disciplinary Review Board