DISCIPLINARY REVIEW BOARD

OF THE

SUPREME COURT OF NEW JERSEY

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May 23, 2016

VIA CERTIFIED MAIL, R.R.R. & REGULAR MAIL

Mark B. Frost, Esq.
c/o Mark S. Kancher, Esq.
The Kancher Law Firm, L.L.C.
Grove Professional Center
100 Grove Street
Haddonfield, New Jersey 08033

Re: In the Matter of Mark B. Frost
Docket No. DRB 16-017
District Docket No. XIV-2012-0624E
LETTER OF ADMONITION

Dear Mr. Frost:

The Disciplinary Review Board has reviewed your conduct in the above matter and has concluded that it was improper. Following a review of the record, the Board determined to impose an admonition. Member Hoberman recused himself.

Specifically, you and Greg L. Zeff were partners in the law firm of Frost & Zeff, P.C. (the firm). You were granted leave to appear, pro hac vice, in a discrimination action instituted by the firm on behalf of three employees of the City of Paterson Fire Department, captioned Andrew Selby, et al. v. City of Paterson, et al., Superior Court of New Jersey, Passaic County, Law Division, Docket No. L-2146-06 (the Selby case). Although you are not licensed to practice law in New Jersey, once you were granted leave to appear pro hac vice in the Selby case, you

became obligated to abide by all New Jersey disciplinary rules. R. 1:21-1(c)(1).

The Selby case resulted in a conditional settlement, in July 2008. The firm was to receive a $260,000 attorney fee. The individual plaintiffs were granted equitable relief. Employee Marilyn Watkins was to be transferred to the dispatch unit of the police department. Employee General McFadden, who was serving an employment-related suspension, was to be reinstated but also was required to resign his position with the fire department on June 30, 2009. Employee Andrew Selby, who also was serving an employment-related suspension, was to apply for an accidental disability retirement pension.

The conditional aspect of the settlement turned on the outcome of Selby's pension application. Under the terms of the agreement, if Selby's application for an accidental disability retirement pension was denied, the entire settlement would be "void," and the Selby case would revert to its status at the time the settlement agreement had been reached. Thus, Watkins would be returned to her position in the fire department, and McFadden and Selby would return to serving their suspensions. In addition, the firm would be obligated to return the $260,000 in attorney fees, which the City of Paterson (the City) had agreed to pay.

Despite the conditional nature of the settlement, the City agreed to pay the firm its $260,000 fee and required the funds to be held in escrow only until Selby had filed the pension application, which occurred in late October 2008, after which time the firm was free to disburse the monies as it saw fit. The City did so, however, only upon your (and Zeff's) agreement to: (1) repay the $260,000, in full, if Selby's pension application were denied; (2) execute a promissory note and personal guarantees; and (3) permit the City to withhold, as security, the payment of attorney fees due to the firm in other unrelated matters then pending against the City.

In a separate agreement between the firm and the plaintiffs, which was reached at the time the Selby case was settled, you and Zeff agreed to "gift" a total of $45,000 of the $260,000 attorney fee to the plaintiffs, in varying amounts. Each of the plaintiffs understood that, if Selby's pension application were denied, thereby requiring the full $260,000 to be returned to the City, they would have to return the $45,000 to the firm.

After Selby had filed the pension application, $10,000 was disbursed to Watkins and to McFadden. Thereafter, $5,000 was disbursed to Selby. Later, an additional $2,000 was paid to McFadden. The remaining $18,000 was never paid, but rather was used by the firm for other purposes. Thus, the Office of Attorney Ethics (OAE) charged you with knowing misappropriation of client funds.

Agreeing with the special master, the Board found that the record lacked clear and convincing evidence that the $18,000 represented client funds and, therefore, determined to dismiss the knowing misappropriation charge. In the Board's view, at all times, the entire $260,000 paid by the City to the firm represented attorney fees and remained attorney fees. The partners' agreement to "gift" $45,000 to the plaintiffs did not change the nature of the monies because the gift was conditioned on the success of Selby's pension application. Because Selby was granted an ordinary pension, rather than the pension for which he had applied, the condition was never fulfilled and, thus, the monies remained attorney fees.

The Board also dismissed the RPC 1.15(a) (failure to safeguard funds) and RPC 1.15(b) (failure to deliver promptly funds belonging to the client) charges because the $18,000 represented attorney fees.

Further, the Board dismissed the RPC 8.1(b) (failure to cooperate with disciplinary authorities) charge because (1) the period at issue comprised about two months, at which time the OAE appears to have abandoned its request for whatever documents remained outstanding; (2) the record lacked clear and convincing evidence that the OAE had failed to obtain all the information it had requested; and (3) the requests were directed to your counsel, and, therefore, the record lacked clear and convincing evidence that you had knowingly failed to cooperate in the investigation.

However, the Board also found that you violated RPC 1.7(a)(1) and (a)(2), which applies to concurrent conflicts of interest. In the Board's view, you created a conflict under both subsections of the rule by negotiating a settlement that conditioned two of your clients' remedies on the successful outcome of the lead plaintiff's accidental disability retirement pension application. Further, if the

application were denied, those two plaintiffs would be returned to their employment status prior to the settlement. For example, Watkins faced being forced from the police department back to the fire department, where she had allegedly suffered discrimination in the first place. McFadden would be returned to his status as a suspended employee.

You permissibly could have continued representing Watkins and McFadden in the settlement negotiations if both clients had given "informed consent, confirmed in writing, after full disclosure and consultation." RPC 1.7(b)(1). Although the record establishes that the clients fully understood the terms of the settlement, including the risk that they might have to return to their former status if Selby was unsuccessful, and elected to proceed with you as counsel anyway, you violated the Rule by failing to procure their consent in writing.

Finally, RPC 1.15(d) requires attorneys to "comply with the provisions of R. 1:21-6," which governs an attorney's recordkeeping duties. R. 1:21-6(a)(2) requires attorneys to deposit legal fees into a business account. Because the $260,000 settlement check, representing the payment of attorney fees, was deposited in the firm's Pennsylvania trust account, rather than its New Jersey business account, you violated RPC 1.15(d).

In imposing only an admonition, the Board took into consideration that (1) despite the absence of a writing, your clients had received full disclosure and understood and agreed to the terms of the settlement on the record in the Selby case, and (2) at the time of the incident, you had practiced law in Pennsylvania for nearly thirty-five years, without incident.

Your conduct has adversely reflected not only upon you as an attorney but also upon all members of the bar. Accordingly, the Board has directed the issuance of this admonition to you. R. 1:20-15(f)(4).

A permanent record of this occurrence has been filed with the Clerk of the Supreme Court and the Board's office. Should you become the subject of any further discipline, it will be taken into consideration.

The Board has also directed that the costs of the disciplinary proceedings be assessed against you. An invoice of costs will be forwarded under separate cover.

Very truly yours,

Ellen A. Brodsky
Chief Counsel

EAB/sl

c: Chief Justice Stuart Rabner
Associate Justices
Bonnie C. Frost, Chair
Disciplinary Review Board
Mark Neary, Clerk
Supreme Court of New Jersey
Gail G. Haney, Deputy Clerk (w/ethics history)
Supreme Court of New Jersey
Charles Centinaro, Director
Office of Attorney Ethics
Christina Blunda Kennedy, Deputy Ethics Counsel
Office of Attorney Ethics