SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 97-216, 97-217, 97-235

IN THE MATTER OF

DONALD W. RINALDO,

AN ATTORNEY AT LAW

Decision

Argued: November 20, 1997

Decided: April 13, 1998

Joan VanPelt appeared on behalf of the District XII Ethics Committee.

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Raymond Grimes appeared on behalf of respondent in the matters under Docket Nos. DRB 97-216 and 97-235.
Robert Michael Vreeland appeared on behalf of respondent in the matter under Docket No. DRB 97-217.

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

These matters were before the Board based on a recommendation for discipline filed by the District XII Ethics Committee ("DEC"). Each of the three matters will be addressed individually below.

Respondent was admitted to the New Jersey bar in 1965. He maintains a law office in Union, New Jersey. Respondent received a public reprimand in 1981 for filing with the court two certifications that were signed and notarized by his secretaries. In re Rinaldo, 86 N.J. 640 (1981). In 1991 respondent was privately reprimanded for failure to advise two clients to seek independent counsel in their business dealings with him.

The Fiederowicz Matter

Docket No. DRB 97-216

A three-count complaint charged respondent with violations of RPC 1.1 (gross neglect) and RPC 1.3 (lack of diligence) (count one); RPC 1.4 (failure to communicate) (count two) and RPC 8.1 (knowingly making false statements of material facts in a disciplinary matter) (count three). At the DEC hearing the presenter decided not to proceed with counts two and three because respondent admitted the allegations of count one. Moreover, the presenter indicated that she was pursuing only the charge of a violation of RPC 1.1 (a) (gross neglect) in count one.

There was no testimony as to the acts of misconduct alleged in the complaint, only as to mitigation. The facts set forth in the complaint are as follows:

The grievant in this matter, Charlene Fiederowicz, met with respondent in July 1993 about an automobile accident in which she had been involved. Fiederowicz was a former client of respondent. During their meeting, Fiederowicz informed respondent of her March

1993 accident and of her retention of Herbert Winokur, Esq. to represent her in a lawsuit arising from the accident. According to the complaint, after consulting with Fiederowicz respondent wrote to Winokur on that same date, representing that he had been consulted by Fiederowicz about the matter and requesting that Winokur turn over the file to him. In reply to respondent's letter, on July 19, 1993 Winokur forwarded to respondent the contents of his file. On September 29, 1993, Winokur forwarded additional materials to respondent.

Between July 1993 and March 1995 Fiederowicz consulted with respondent on several occasions about the accident and, on two occasions, gave him copies of bills relating to her medical expenses from the injury.

The complaint alleged that, in the presence of Mr. and Mrs. Fiederowicz, respondent directed his secretary to prepare and file a complaint. Respondent denied this allegation, claiming in his answer that he would not have directed his secretary to take such action because all complaints were to be signed by him; therefore, she could not have filed the complaint unless he had signed it. In fact, respondent failed to file a complaint, thereby allowing the action to become barred by the statute of limitations.

In March 1995 respondent informed Fiederowicz that he had misplaced her file. In October 1995, Robert Hicks, Esq. informed respondent that he had assumed Fiederowicz's representation. Hicks requested the return of Fiederowicz's file. Respondent did not comply with that request. Neither Hicks nor Fiederowicz received a copy of the documents relating to Fiederowicz's accident.

The complaint charged that respondent's failure to safely maintain the materials received from Fiederowicz and Winokur and his failure to proceed with an action in her behalf showed a lack of reasonable diligence and promptness in representing Fiederowicz, as well as gross negligence.

For unexplained reasons, the presenter did not pursue count two of the complaint, charging respondent with failure to reply to numerous inquiries about the case by both Fiederowicz and her attorney. Count three was also dismissed. That count charged respondent with knowingly making false statements of material facts in a disciplinary matter. The record does not detail the presenter's reasons for withdrawing counts two and three.

After the complaint was served, respondent claimed that he did not know any of the details of Fiederowicz's accident, that he never agreed to represent her and that he never received any papers relating to the accident. Respondent stated that Fiederowicz had filed a separate malpractice action against him, as a result of which he had been required to pay damages to her.

Respondent admitted that he had been grossly negligent by allowing the statute of limitations to expire on Fiederowicz's case. Respondent was at a loss to explain the reason for that oversight. Respondent added that he has since taken appropriate action to avoid similar problems.

The DEC found that respondent did not properly represent Fiederowicz, by failing to either file suit in a timely manner or to advise her of her other options. The DEC, thus,

found a violation of RPC 1.1 and recommended the imposition of a reprimand.

* * *

The Perun/Buontempo Matter

Docket No. DRB 97-217

Although the complaint in this matter named both respondent and Mark H. Jaffe in a consolidated action, it was bifurcated for hearing. Counts one, two and three of the complaint relate to respondent. The remaining counts, four through seven, apply to Jaffe.

Count one of the complaint charged respondent with violations of RPC 1.1, presumably (a) (gross neglect), RPC 1.7 (conflict of interest) and RPC 1.16, presumably (a) (1) (prohibiting a lawyer from representing a client when the representation will result in a violation of the Rules of Professional Conduct). Count two charged respondent with a violation of RPC 1.4 (failure to communicate with his client) and count three with RPC 8.1(b) (failure to cooperate with the disciplinary authorities).

Some background is required for a better understanding of this matter. The grievance in this matter arose from a contract action filed in the Superior Court, Law Division, Union County, in the matter of Benjamin Buontempo v. Angela L. Perun. Buontempo, a contractor, sued Perun for unpaid bills in connection with renovations made to Perun's house. When the case was called to trial, Buontempo's attorney of record was Mark Jaffe. Perun's attorney

was Catherine White. At trial, Jaffe advised the court that he was unprepared for trial because he was unfamiliar with the file even though, as the attorney of record, he had signed certain pleadings. Jaffe explained to the court that he had been working on a per diem basis for respondent and that respondent had actually prepared the documents that Jaffe had signed. Jaffe did not have custody of the file, which was in respondent's office. Based on Jaffe's explanation, the court referred the matter to the DEC for investigation.

Because Jaffe was unprepared to proceed with the trial, the court dismissed Buontempo's complaint and conducted a proof hearing only on Perun's counterclaim. During the proof hearing, Perun testified that respondent had drafted the agreement for the renovations on her house. Perun also expressed shock at Jaffe's statement on the record that respondent had actually prepared the pleadings filed in behalf of Buontempo against her. The reason for Perun's surprise was her belief that, at the time that respondent drafted the agreement, he was acting as her attorney.

At the conclusion of the proceeding, the court entered a judgment in favor of Perun.

At the DEC hearing, Perun, also an attorney, testified that she had known respondent for approximately ten years. Sometime in the late 1980s, Perun had asked respondent for the name of a contractor to do renovations to her house. Respondent had recommended Buontempo. Perun explained that, at that time, she was not aware of any special relationship between respondent and Buontempo. After Perun obtained an estimate from Buontempo, she asked respondent to draft a contract for the renovations. According to Perun, even though

she repeatedly offered to pay for respondent's services, he would not accept any payment. Respondent told her that he had drafted the contract as a friend.

Buontempo started the renovations to Perun's home sometime in 1989. Apparently, after the job was completed or as it was nearing completion, Perun became dissatisfied with some of the work. She and Buontempo had a number of disagreements about how the repairs should have been made. As a result, she called respondent on many occasions, believing that he was acting as her attorney. Moreover, Perun exchanged correspondence with respondent and sent him copies of letters that she sent directly to Buontempo. Ten such letters are part of the record (Exhibits P-2, P-3, P-5/P-12).

In one of the letters to respondent, Perun recounted the following events:

> At my behest you drafted a contract for work to be done on my premises. At that time I asked you to bill me. You declined, saying you were doing it as a friend. I felt you acted in my interests, as my attorney; I, as your client. I knew at some point, after all matters were closed that I would discuss it with you, again.
>
> Your protestations of friendship were ongoing. And I, however, tried not to impose upon your kindness. Remember for a long time you were the one who put me off about pursuing my remedies because of your insistence on some sort of conciliatory meeting with Buontempo; this, in spite of my reports to you of his harassing, obscene and abusive calls and threats.

According to Perun, she believed that respondent was both her friend and her attorney because he had drafted the contract at no cost to her, had listened to her complaints and had made recommendations on how she should handle the matter with Buontempo. However, once Perun was served with the complaint, she began to feel that respondent had stopped

helping her. Perun answered the complaint pro se. At some point in 1991 Perun retained Catherine White. Perun expressed surprise at learning that respondent, the attorney who had drafted the contract in her behalf, had also engaged other attorneys who did per diem work for him, first Theresa Roskowski Kennedy (hereinafter "Roskowski") and then Jaffe, to sue her.

Roskowski testified that in 1991 she had worked for respondent on a per diem basis. She stated that respondent had requested her to handle the Buontempo matter. Respondent explained to Roskowski that he did not want to handle the case because of his friendship with Perun. Roskowski was not aware of respondent's professional relationship with Buontempo, although on occasion she had seen Buontempo in respondent's office. Roskowski testified that she agreed to take the case, although not on a per diem basis. She did not, however, prepare any documents in the matter. She believed that the summons and the complaint had been prepared by either respondent or someone else in his office. Although Roskowski signed the pleadings, she did not plan to file them until after she met with Buontempo. She did not authorize respondent to file the complaint. She claimed that, sometime after she withdrew from the case, she learned that respondent's office had filed the documents. Someone had drafted a cover letter to the clerk and signed Roskowski's name on the June 18, 1991 cover letter. The letter enclosed the summons and complaint and a check for the filing fees. Roskowski denied any arrangements with respondent allowing him to act in her name. Roskowski testified that she did not have her own attorney account and that,

therefore, respondent had paid the filing fees in the matter.

Roskowski also testified that, after the complaint was filed, she received a number of irate telephone calls from Perun. Also, at about that time, Roskowski had decided to stop practicing law to pursue a different profession. She, therefore, withdrew from the Buontempo case, returned the file to respondent and notified him that she no longer wanted to handle the case. Someone from respondent's office prepared a substitution of attorney that, although executed in the summer of 1991, was not filed with the court until 1992. Roskowski turned over the Buontempo file to respondent's secretary. Respondent informed Roskowski that he would find another attorney to take over the matter. Roskowski never discussed the case with her successor attorney in the matter, Mark Jaffe. Although Roskowski withdrew from the Buontempo matter, she continued to perform occasional per diem work for respondent.

Before the DEC hearing, Ben Buontempo passed away. His widow testified at the hearing. She explained that she and her husband had been "good friends" with respondent. They also regarded Perun as a friend. When problems arose over the deficiencies in Buontempo's work, and Perun began withholding further payments, Buontempo asked respondent to represent him. According to Mrs. Buontempo, respondent advised Buontempo that he could not handle the case because he knew both Buontempo and Perun. He recommended that another attorney handle the matter.

Catherine White, Perun's attorney, also testified at the DEC hearing. White explained that on October 4, 1993 she wrote a letter to Jaffe inquiring whether he was still representing Buontempo, informing him of the trial notice for November 1, 1993 and requesting an adjournment of the trial until January 1994. According to White, Jaffe must have responded, because the matter was adjourned to January 10, 1994.

Mark Jaffe, in turn, testified that in 1992 he had worked for respondent on a per diem basis. Prior to that time he had worked for the Union County Prosecutor's Office; his experience was, therefore, limited to criminal matters. Jaffe simultaneously did per diem work for three or four other attorneys, in addition to respondent. Jaffe primarily attended calendar calls or handled municipal court appearances.

Jaffe's version of the events was as follows. In February 1992 respondent asked him to sign some papers. Jaffe did not have the opportunity to review the papers. He saw only the portions that he signed. He was informed by respondent that they would discuss the matter at a later time. Jaffe believed that he would be working with respondent on the matter; respondent was to do the work and to review it with Jaffe. Jaffe later learned that the documents he had signed related to the Buontempo v. Perun matter. One was the substitution of attorney dated February 18, 1992, previously executed by Roskowski. Jaffe also signed several other documents including an answer to the counterclaim and a notice of motion to file the answer out of time. Jaffe recalled that he had signed all of the documents on February 18, 1992, even though the notice of motion was dated February 21, 1992.

Unbeknownst to Jaffe, the notice of motion was filed under his cover letter dated February 21, 1992; the answer to the counterclaim was filed on March 23, 1992. Although the cover letters showed Jaffe's signature, he denied signing them.

According to Jaffe, respondent never gave him copies of the documents he had signed and never reviewed the case with him, as respondent had promised. Jaffe recalled that, after he signed the pleadings, respondent took them to his office. At that time, Jaffe did not realize that the documents related to Buontempo v. Perun and did not make the connection until the eve of trial, when Catherine White informed him that Roskowski had previously represented Buontempo.

Like Roskowski, Jaffe never met Buontempo. He testified that he never discussed the case with Buontempo or sent him any information about the matter.

After the case went to trial and Buontempo's complaint was dismissed, an ethics investigation ensued. By letter dated March 23, 1994 respondent wrote to Jaffe about the Buontempo matter. Respondent advised Jaffe that he should settle the case by making a motion pursuant to R. 4:50-1. Respondent further advised Jaffe that the motion should seek to vacate the default and any judgment entered on the counterclaim, as well as to reinstate the case to the active list for trial. Respondent added that, if any costs were involved, Jaffe would have to pay them. Respondent offered to prepare the necessary motion, certification and brief.

According to Jaffe, he stopped doing per diem work for respondent in May 1992. Thereafter he often called respondent about his unpaid services. Respondent did not reply to his calls.

Jaffe testified that, when the Buontempo matter was first listed for trial, White telephoned him seeking an adjournment. Jaffe told White that he had no objection to the adjournment. Notwithstanding Jaffe's belief that his name was mistakenly listed as the attorney of record, he failed to make any inquiries about why his name appeared on the case.

For his part, respondent denied that he ever represented Perun. He claimed that he knew her from seeing her in the courthouse. Respondent recalled that, when Perun asked him for names of contractors, he gave her a few names, including that of Buontempo. Respondent denied that he drafted the contract between Perun and Buontempo, claiming that he uses form contracts. He stated that he became involved in the matter only because he tried to "save the parties from themselves" and that he repeatedly attempted to settle their differences. Respondent asserted that, when Buontempo asked him to file suit against Perun, he declined to do so. Respondent claimed that he advised Buontempo to utilize Roskowski's services. Respondent believed that he had told Roskowski to contact Buontempo. Although respondent denied representing any of the parties, he maintained that it would not have been unethical to act as either Buontempo's or Perun's attorney. He claimed that his efforts at conciliation were merely an attempt to help the individuals solve their dispute without charging them a fee. Respondent recalled telling Roskowski about the basic facts of the case,

as well as advising her to charge Buontempo as she saw fit.

Respondent testified that, when Roskowski called him to complain about Perun's harassing telephone calls and to convey the desire to terminate her representation, respondent offered to call Jaffe, as a courtesy to Roskowski, to find out if Jaffe was interested in representing Perun. Respondent's testimony in this regard was confusing. Although he claimed that he advised Roskowski to call Jaffe, he also indicated that he called Jaffe and that both he and Roskowski may have spoken to Jaffe about the matter. Nevertheless, both Roskowski and Jaffe denied having spoken to one another.

Respondent denied any involvement in the Buontempo matter. However, when questioned by the presenter about his involvement, respondent admitted that he had assisted Roskowski to some extent:

> Q: Your only involvement initially with Ms. Roskowski was to put her in contact with Mr. Buontempo when you called her or you had Mr. Buontempo call her; is that correct?
>
> A: No. She was at my office. I believe I told her about the case. She wanted the case. And I think we prepared the forms for her and typed them. And I think we gave her the money. She had no money or she had no account. I'm not sure. She had no money. I just helped her to that degree. I let her use my office, I believe. And then she went with the file to her own home office.

Respondent admitted that he paid the filing fee in the matter.

Respondent denied that he had covered up the Buontempo documents for Jaffe's signature. He acknowledged that, after the Buontempo complaint was dismissed, he wrote to Jaffe to help him vacate the judgment and restore the complaint. In direct contradiction

to Jaffe's testimony that he was not familiar with the file, respondent claimed that, when Jaffe obtained the file from Roskowski, Jaffe reviewed the file and made a derogatory comment because Roskowski had failed to answer the counterclaim.

Throughout the hearing, respondent denied that either Buontempo or Perun was his client. At some point respondent indicated that they were his acquaintances, not friends, but later stated that he was trying to help friends. Respondent was unable to perceive a conflict of interest in this matter. He continuously maintained that it would have been permissible for him to represent either one against the other if he had chosen to do so.

The DEC investigator testified that, when she attempted to contact respondent in June 1995, she was informed by his secretary that "he was in Trenton" and that she was not authorized to permit the presenter to review the file. The secretary told the presenter that respondent would call him. When respondent did not communicate with the presenter, on June 30, 1995 she wrote to respondent asking to review the file. She did not receive a reply to that request. The presenter was unable to see the file until the pre-trial conference, on April 25, 1996. When the presenter was cross-examined about the notes of her conversation with Buontempo, she indicated that Buontempo had informed her that he did not view respondent as his attorney, that respondent had not filed suit in his behalf because respondent knew it would create a conflict of interest and that he was aware that Perun was a friend of respondent.

As to his delay in replying to the DEC's requests for information, respondent denied any intent to avoid the DEC's investigative efforts. Respondent claimed that he had had problems in obtaining an attorney and that he had suffered two minor strokes, which presumably had interfered with his ability to respond timely to the DEC's requests.

The DEC found clear and convincing evidence that respondent was in a conflict situation in the Buontempo v. Perun matter. The DEC found that it was evident that respondent had performed legal services in Perun's behalf, even though he had not entered into a retainer agreement with Perun or sought any compensation from her. The DEC considered that the correspondence between Perun and respondent reflected the existence of an attorney/client relationship and that respondent had never denied, in writing, his role as Perun's attorney. The DEC considered Perun's testimony that she believed that respondent was acting as her attorney. Also, the DEC believed Roskowski's and Jaffe's testimony that respondent had drafted the complaint in behalf of Buontempo. The DEC noted that respondent had drafted the complaint and that, although Roskowski did not authorize him to mail the complaint before meeting with the client, respondent nevertheless filed the complaint and paid the filing fees, all without Roskowski's knowledge. The DEC also pointed to the fact that neither Roskowski nor Jaffe ever met with Buontempo in connection with the case and that all filing fees were paid from respondent's business account. The DEC concluded that respondent had recognized the conflict and had tried to circumvent it by arranging to have the complaint filed by attorneys who were not "formally" affiliated with

his office. The DEC found that respondent "orchestrated the filing of the complaint against Ms. Perun even though he had rendered legal services to her in this matter. . . ." The DEC also found that respondent's letter to Jaffe of March 23, 1994 showed that respondent "was engaging in a subterfuge by seeking to pursue this litigation against this client on behalf of Ben Buontempo through the name of another attorney who was not affiliated with his firm." The DEC stated as follows:

> [Respondent] recommended lawyers to handle the matter and actually performed legal work in the background. The conduct of [respondent] in soliciting counsel to commence suit against Angela Perun, drafting the suit, paying the court costs for this suit, obtaining another attorney to substitute into this suit and ultimately writing to [Jaffe], in order to offer to draft papers to vacate the judgment obtained by [Perun] against [Buontempo] constitutes a violation of RPC 1.7 and RPC 1.16.

Because respondent was not the attorney of record, the DEC did not find that respondent had violated RPC 1.1 or RPC 1.4. The DEC also found that from June 1995 until the pre-trial conference of April 1996 respondent did not supply the DEC investigator with the information requested, in violation of RPC 8.1(b). Based on the foregoing, the DEC recommended the imposition of a reprimand.

The Koutoudis Matter

Docket No. DRB No. 97-235

The complaint in this matter charged respondent with violations of RPC 1.15 (negligent misappropriation of trust funds), RPC 1.15 (commingling of trust and personal

funds), RPC 3.2 (failure to expedite litigation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was retained by Arietta Koutoudis for injuries she sustained at the Kessler Institute for Rehabilitation in September 1987, while she was being treated for injuries stemming from a 1985 automobile accident. Samuel Lachs was representing Koutoudis in the matter involving the automobile accident. Later, however, respondent replaced Lachs as Koutoudis' attorney in that matter as well. At some unknown point, another attorney, John D. Arsenault, succeeded respondent as Koutoudis' attorney.

According to respondent, because of Lachs' delay in returning the file, he was forced to duplicate some of the work already performed by Lachs; the complaint in the car accident case had to be filed because the statute of limitations was about to expire. Eventually Lachs turned over the file to respondent and also asserted an attorney's lien for fees.

On November 13, 1987 Lachs obtained a court order directing respondent to hold in his trust account legal fees received from any settlement or judgment, until there was either an order disbursing the fees or a written agreement about the distribution of their respective shares.

When Lachs became suspicious that the Koutoudis matter had settled, he tried to obtain information about the case from respondent, to no avail. On September 22, 1995 Lachs filed a motion to compel respondent to turn over a copy of the file and to submit proof that he was holding the fee in his trust account, as required by the court order. Lachs'

certification in support of the motion stated that, on many occasions, someone on respondent's staff had informed him that the case was still pending.

In his reply certification of October 16, 1995, respondent admitted that he had received a $12,290.60 check from Arsenault. In the certification, respondent also complained that the $12,290.60 was a "minimal fee" to himself and suggested that, if Lachs wished to be compensated, he had to sue Koutoudis.

At the DEC hearing, respondent explained that he had failed to notify Lachs of the settlement because he was not aware that his office had received the $12,290.60 check from Arsenault in May 1994. He added that it was his employees' responsibility to deposit the checks, not his. Respondent testified that ordinarily the checks received by his office were stamped with a rubber stamp and then credited and deposited into the proper account.

Contrary to the November 1987 court order, however, the Koutoudis fee check had been deposited in respondent's business account, rather than his trust account. The check, which was payable to respondent, had been stamped "for deposit only." The check had a notation reading "KOUTOUDIS ATTY. FEE & EXP." and broke down the amount as $10,832.20 for fees and $1,458.40 for expenses. Subsequently respondent used the fees to pay for office expenses. Respondent did not notify Lachs that he had received a fee from Arsenault or make any application to the court for the allocation of the fees, as required by the court order.

After Lachs filed a motion for the apportioning of fees, respondent admitted that he had not complied with the court order. He claimed that he had forgotten about the order. Ultimately, the court held respondent responsible for the actions of his staff and also faulted Lachs for the delay in turning over the file to respondent. The court awarded Lachs $5,000 as a fee and ordered respondent to pay Lachs a $2,000 penalty for violation of the order. The court also noted that, during the period between the entry of the order and the motion, Lachs had written to respondent approximately six times and had made several telephone calls to ascertain the status of the litigation. The court remarked that respondent had not replied in writing to Lachs' inquiries or personally returned Lachs' telephone calls; the only responses from respondent's office had been from his secretary, informing Lachs that the case was still pending.

For his part, respondent conceded that the funds had been mistakenly deposited in his business account. He admitted that he had not complied with the court order, but denied any intent to steal the funds. In mitigation, respondent asserted that, ultimately, he gave Lachs the ordered amount. In disavowing any improper motives, respondent pointed to the passage of six years between the date of the court order and the receipt of the check from Arsenault. Lastly, respondent maintained that he was entitled to contest the amount of the fee owed to Lachs. In fact, respondent added, he had been successful in obtaining a one-half reduction of the fee award to Lachs.

The DEC found that respondent had violated the November 13, 1987 order requiring him to hold the Koutoudis fee in his trust account, pending the resolution of the allocation of the fees. The DEC noted respondent's admission that he received the check in May 1994 and deposited it in his business account, contrary to the order. The DEC concluded that respondent had negligently misappropriated trust funds and had also commingled trust funds — the Koutoudis fee — and his own funds, in violation of RPC 1.15. The DEC did not find clear and convincing evidence of violations of RPC 3.2 and RPC 8.4(d). The DEC dismissed those charges.

The DEC recommended the imposition of a reprimand, noting that respondent had received a public reprimand in 1981 and a private reprimand in 1991.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's finding that respondent's conduct was unethical was supported by clear and convincing evidence.

Respondent admitted that his conduct in Fiederowicz was a violation of RPC 1.1(a) (gross negligence).

As to the Perun/Buontempo matter, despite respondent's protestations that he did not represent either Buontempo or Perun, the record establishes otherwise. Notwithstanding

respondent's denials that he drafted the contract, the more credible evidence is that he did so. Moreover, it is clear that respondent drafted the complaint against Perun in behalf of Buontempo and had unsuspecting and novice attorneys execute the pleadings. Roskowski and Jaffe testified that they never met Buontempo. It appears, at least as to Jaffe, that he was unfamiliar with the facts of the matter. Therefore, the DEC correctly found that respondent created a subterfuge in order to create the appearance that he was not involved in the matter.

Respondent's conduct in this matter violated RPC 1.7 (conflict of interest) and RPC 8.1 (b) (failure to respond to a lawful demand for information from a disciplinary authority). The Board, however, did not find a violation of RPC 1.16 (a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in a violation of the Rules of Professional Conduct or other law) because respondent was never officially the attorney of record for either party.

In the Koutoudis matter, respondent claimed that his conduct was unintentional. Indeed, the six-year period between the date of the order and Arsenault's remittance of the check to respondent is a significant length of time. It is possible that respondent was unaware of the receipt of the check.[1] While this does not justify respondent's improper

[1] Exhibit R-7 is a reconstruction of respondent's time records in the Koutoudis matter. One of the entries in that document reads: "4/29/94 - receipt of cover letter with check for attorneys fees ¼ hr." At first glance, that would suggest that respondent was aware of the receipt of the fee check on April 29, 1994 and, consequently, of the requirement to deposit the fee in trust, as directed by the court order dated November 13, 1987. The record does not establish, however, that respondent himself prepared the time records; someone else in his office may have made that entry. Even if respondent was the preparer of the time records and, therefore, was aware of the receipt of the fee, he might have forgotten about the court order entered seven years earlier.

conduct, it serves to explain it to some extent. It is undeniable, though, that respondent's conduct, albeit possibly inadvertent, was improper and violative of the 1987 court order. In fact, respondent admitted that he acted contrary to the order. Respondent's alleged ignorance of the receipt of the fee check, if true, does not relieve him of responsibility, as an attorney's recordkeeping obligations cannot be delegated. In re Barker, 115 N.J. 30 (1989) (attorneys cannot avoid accounting responsibilities by claiming reliance on staff). Respondent's conduct in this regard violated RPC 8.4(d) (conduct prejudicial to the administration of justice) and RPC 1.15(b) and (c). RPC 1.15(b) requires that an attorney, upon receiving funds or other property in which a client or third person has an interest, notify promptly the client or the third person. Here, respondent did not promptly notify Lachs of the receipt of the fee, even after Lachs' repeated efforts to ascertain the status of the funds. Even if respondent was unaware of the receipt of the check, he should still be responsible for the conduct of his employees who, allegedly, did not bring to his attention that Arsenault had sent him a check or the fee.

RPC 1.15(c) provides that, when in the course of the representation, a lawyer is in possession of property in which both the lawyer and another person claim an interest, the property shall be kept separate by the lawyer until there is an accounting allocating their interests. Here, respondent or his employees deposited the check in respondent's business account, instead of his trust account. That, the DEC found, constituted commingling of personal and trust funds (Lachs' fee) and negligent misappropriation of trust funds. For the

reasons explained below, the latter finding was inappropriate.

Prohibited commingling results where the attorney's personal funds are mixed with clients' funds in the trust account. The commingling of non-client funds and client trust funds violates the requirement that client funds be kept separate in the trust account. All attorney fees, for example, must be transferred from the trust account to the business account prior to any further disbursement. Hence, an attorney who leaves earned legal fees in the trust account is guilty of commingling. If, however, an attorney deposits client trust funds in the business account, either inadvertently or deliberately, that conduct constitutes negligent or knowing misappropriation, respectively, not commingling. The DEC's finding of commingling, under the circumstances of this case, was thus erroneous.

The question here is whether respondent's deposit of the fee check in his business account amounted to negligent misappropriation, as found by the DEC. The Court has not addressed the issue of whether attorneys are required to segregate fees over which there is a dispute. A six-month suspension was imposed in In re Shapiro, 138 N.J. 87 (1994), which involved, among other things, an attorney's failure to promptly disburse shared fees in two matters. In the first matter, one of Shapiro's associates had brought a wrongful death matter into the firm. Shapiro had an agreement with all of the firm's attorneys that the originator of a particular file was entitled to one-third of the legal fees generated by the file. The associate left the firm but remained on good terms with Shapiro. After the case was settled, the associate contacted Shapiro to inquire whether the firm had received its fee. On two

occasions, Shapiro falsely told the associate that it had not. When the associate learned that the firm had in fact, received the fee, he eventually agreed to reduce his share. Shapiro was charged with violations of RPC 8.4(c) for knowing misappropriation, failure to promptly notify the associate of the receipt of the fee, failure to promptly deliver the associate's portion of the fee and failure to keep the disputed fee separate and intact until their respective interests were severed. The Court agreed with the Board's determination that such conduct did not amount to knowing misappropriation and found a violation of RPC 8.4(c) only for respondent's misrepresentation to the associate that the fee had not yet been received.

In a separate matter, Shapiro was also charged with knowing misappropriation. There, Shapiro had been substituted in as counsel. A court order had created an attorney's lien in favor of another attorney. Shapiro failed to notify that attorney of the settlement within the required ten days and to satisfy the attorney's lien before depositing the one-third fee into his business account, contrary to the court order. Shapiro contended that the violation had been an oversight, as he had always intended to pay the court-ordered amount. After the attorney wrote to Shapiro reminding him that the entire fee should have been maintained in Shapiro's trust account, Shapiro transferred the fee to his trust account and disbursed the attorney's share of the fee by way of a trust account check. In analyzing Shapiro's alleged violations, the Board did not find that RPC 1.15 (safekeeping property) was intended to govern the division of fees among attorneys. The Board stated that

> although the better practice would be to separate the amount in dispute until resolution of the controversy, the Board does not consider itself the appropriate forum to determine the applicability of the segregation requirement of RPC 1.15 to fee disputes among attorneys.

The Board found a violation of RPC 8.4(d) only, for Shapiro's failure to notify the attorney of the receipt of the fee. The Court adopted the Board's recommendation without comment on whether RPC 1.15 also governed attorney fee disputes.

It has not been yet determined, thus, that the failure to keep a disputed legal fee intact in a trust account constitutes either negligent or knowing misappropriation of trust funds. Accordingly, the Board found only that respondent violated RPC 1.15(c), when he failed to insure that the disputed fee remained inviolate until the resolution of the disagreement between the attorneys.

In sum, in the Fiederowicz matter, respondent exhibited gross neglect when he failed to file suit in a timely manner or to advise Fiederowicz of her options. In the Perun/Buontempo matter, respondent was involved in a conflict of interest situation by improperly representing both parties to a lawsuit through an elaborate subterfuge; respondent also failed to reply to a lawful demand for information from a disciplinary authority. Finally, in the Koutoudis matter, respondent violated RPC 1.15(c) by failing to keep the fee separate until the dispute over the fee was resolved.

There remains the issue of discipline. This matter involves a combination of violations that requires the consideration of several different cases. In In re Grossman, 145 N.J. 570 (1996), the attorney entered into a stipulation of discipline by consent and was

reprimanded for failure to notify prior counsel that the matter had been settled and that settlement proceeds had been received, as well as failure to remit to prior counsel, once available for distribution, disbursements to which prior counsel was entitled. A closer look at Grossman shows similarities with respondent's conduct in the Koutoudis matter. There, when Grossman took over a personal injury case from another attorney, he wrote to the attorney that he would be "happy to work out an acceptable fee agreement" with him. At the time that the attorney forwarded the file to Grossman, he asked Grossman to contact him at the conclusion of the case to resolve the issue of the distribution of the fee. In a subsequent letter to Grossman, the attorney confirmed his understanding on the disbursement of legal fees and asked that Grossman send him a check for $514 for his firm's disbursements.

In February 1994 Grossman settled the case for $30,000. He deposited the settlement check in his trust account in March 1994. On March 17, 1994 the settlement proceeds, including the legal fees, were disbursed in their entirety. Grossman took the entire fee amount (the maximum legal fee allowable in the case, $9,741.79) and deposited it into his business account. He did not forward any disbursements to prior counsel or discuss with him the allocation of legal fees. According to the DEC investigator's report, which was attached to the stipulation of discipline, there was nothing in Grossman's file to suggest that the first attorney had been informed of the settlement. Apparently, a law partner of the first attorney had inadvertently learned from a source other than Grossman that the matter had been settled. After prior counsel's several attempts to contact Grossman were unavailing, he made an

application to the court for an attorney's lien, which was granted in August 1995.

The difference between Grossman and this matter is that allegedly respondent was unaware that his firm had received the fee check six years after the entry of the order requiring him to hold the monies in trust. Nothing in the record supports a finding to a clear and convincing standard that respondent intended to mislead Lachs about the status of the Koutoudis matter or to misrepresent the status of the fee. Indeed, the evidence allows the inference that the misdeposit of the check in respondent's business account was a bookkeeping error by his staff, for which, nevertheless, respondent must be held accountable. In view of insufficient proof that respondent acted with malevolence, a reprimand would have been adequate discipline, had this been respondent's only ethics transgression. However, in the Perun/Buontempo case, respondent also engaged in a conflict of interest situation and failed to cooperate with the disciplinary authorities. Accordingly, the measure of discipline must be enhanced.

Generally, in cases involving conflicts of interest, absent egregious circumstances or serious economic injury to clients, a reprimand has been deemed appropriate discipline. In re Berkowitz, 136 N.J. 134 (1994). Here, however, even though there has been no showing of economic injury to the parties, respondent's conduct was so egregious that sterner discipline is required. Indeed, respondent acted surreptitiously to create the appearance that he was not involved in the matter. In the process, he dragged two other attorneys into this imbroglio. In one case, the attorney faced disciplinary charges as a result of his unsolicited

involvement in the case. More glaring, however, were respondent's shoddy practices in representing clients, his deliberate subversion of the rules governing the profession and his inability — or refusal — to acknowledge the wrongfulness of his conduct.

After considering respondent's experience as an attorney, his prior encounters with the disciplinary system and the totality of his conduct in these three matters, a five-member majority of the Board determined that a three-month suspension is the appropriate quantum of discipline. Three members dissented, finding that a six-month suspension was warranted. One of the dissenting members was of the view that, based on entries in respondent's time records, including a reference on February 15, 1994 to a review of the file, a reference on April 20, 1994 to the receipt and review of a letter from an attorney in Arsenault's office about the settlement of attorneys fees, and the acknowledgment of the receipt of the fee check on April 29, 1994, the conclusion is inescapable that respondent knew that his office had received the check and that he, therefore, intentionally violated the court's direction to hold the fee in trust until the resolution of the fee dispute. One member did not participate.

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

Dated: 4/13/98

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Donald W. Rinaldo
Docket Nos. DRB 97-216, DRB 97-217 & DRB 97-235

Argued: November 20, 1997

Decided: April 13, 1998

Disposition: Three-Month Suspension

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Six-Month Suspension	Disqualified	Did not Participate
Hymerling		x					
Zazzali		x					
Brody					x		
Cole		x					
Lolla					x		
Maudsley		x					
Peterson							x
Schwartz					x		
Thompson		x					
Total:		5			3		1

Robyn M. Hill 4/15/98
Robyn M. Hill
Chief Counsel