SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 96-448 and DRB 97-012

IN THE MATTER OF	:
ROBERT S. ELLENPORT	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 23, 1997 (DRB 96-448) and March 20, 1997 (DRB 97-012)

Decided: June 30,1997

Seamus Boyle appeared on behalf of the District XII Ethics Committee.

Edward J. Kologi appeared on behalf of respondent.

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

These disciplinary matters arose from one case (DRB 96-448) argued on January 23, 1997 and another case (DRB 97-012) argued on March 20, 1997. The Board's decision in DRB 96-448 was held pending oral argument on DRB 97-012. The matters are discussed below separately.

In DRB 96-448, the complaint charged respondent with violations of RPC 1.8(j) (prohibited business transactions with clients) and RPC 1.7(b)(conflict of interest). In DRB 97-012, the complaint charged respondent with violations of RPC 1.1 (gross neglect), RPC 1.2(a) (failure to abide by client's decision regarding settlement issues), RPC 1.3 (lack of diligence) and RPC 1.6(a) (disclosure of information relating to representation of client).

* * *

Respondent was admitted to the New Jersey bar in 1975. He received an admonition on January 6, 1997 for charging a fee in excess of the maximum allowed by the rules.

I. Docket No. DRB 96-448

In or about November 1990, respondent undertook the representation of Roselyn Weprin, also known as Roselyn Weisstuch and Roselyn Weprin Beckoff ("Weprin"), for a post-judgment matrimonial matter and a civil rights suit. Weprin and respondent met frequently at respondent's office to discuss her matters. On most of those occasions, Lucy Schonbach ("Grievant"), Weprin's mother, accompanied her. Both grievant and Weprin testified at the District XII Ethics Committee ("DEC") hearing.

In or about April 1991, Weprin was experiencing difficulty paying respondent and her other matrimonial attorneys, Wendy Elovich and Susan Kunstler. Elovich and Kunstler were

respondent's co-counsel in the matrimonial case. Sensing Weprin's precarious financial condition after speaking with her other matrimonial attorneys, respondent sought assurances from Weprin that his and their fees would be paid. At about this time, grievant told respondent about a pending personal injury case in which she was the plaintiff. The action arose out of an auto accident in which she was a passenger. Her daughter, Weprin, was the driver and the defendant in that suit. Grievant's then attorney, Terry Shapiro, had obtained a settlement offer for about $50,000. An arbitration panel had set grievant's award at $125,000. In order to provide assurance that her daughter's fees would be paid, grievant agreed to have the settlement proceeds of that case forwarded to respondent's trust account. On this issue, grievant testified that, because respondent wanted control of her case, he first pressured her to make this arrangement and later to allow him to take over her representation in that case. Weprin testified that it was respondent's idea to become her mother's attorney and that her mother was reluctant to discharge Shapiro as her lawyer. Respondent testified, in turn, that he knew nothing of grievant's case until grievant offered its proceeds as collateral for Weprin's legal fees.

In April 1991, grievant wrote to Shapiro and to respondent authorizing respondent to use a portion of her settlement proceeds to pay for Weprin's legal fees. According to both grievant and Weprin, the fees owed to Kunstler were only about $2,000 at that point. Respondent and Elovich had not yet generated a bill. Over the next two years, however, all of the attorneys, each billing on an hourly basis, worked extensively and billed prodigiously

on Weprin's matrimonial matter. Respondent alone billed in excess of $110,000 for his work.

In September 1991, grievant dismissed Shapiro in favor of respondent, who took over the representation of the personal injury case in which grievant was the plaintiff and her daughter, Weprin, the defendant. On October 3, 1991, respondent sent the following letter to grievant:

> This will confirm that there has been full and complete disclosure to you of the implications of representing you in the above-captioned law suit against your daughter Roselyn Weprin, when this office also represents your daughter's interests in her matrimonial matters. Despite this common representation, you have voluntarily retained this law firm to represent you in the above-captioned personal injury.
>
> Please indicate your acceptance and approval of the terms of this letter by signing the original and returning it to this office in the envelope provided.
>
> [Exhibit C-4]

Grievant testified that, because respondent wanted control of the personal injury case, he insisted that it be brought to him, lest he cease representing Weprin in her matrimonial matter. Grievant denied that respondent explained the conflict of interest referenced in the October 3, 1991 letter. She admitted that she had signed the letter, however. Grievant also denied having read the letter prior to signing it in respondent's office. Weprin, in turn, testified that she was present at the signing and that, although her mother had indeed read the letter, her mother was uncomfortable signing it. Nonetheless, both testified that respondent was authorized to use the proceeds of the personal injury case to pay only the $2,000 fee to

Kunstler and respondent's fees in Weprin's civil rights case, not his present and future fees in the matrimonial matter. Neither grievant nor Weprin could explain why this had not been spelled out in either of grievant's April 1990 letters to Shapiro and respondent, giving them an attorney's lien, or the October 3, 1991 "disclosure" letter from respondent to grievant.

Also, Weprin testified that respondent did not send her a disclosure letter of any kind, despite her awareness that respondent was simultaneously representing her in the matrimonial matter and her mother in the personal injury matter where she was the defendant.

For his part, respondent testified as follows:

> I was aware that Ros [Weprin] had significant financial problems and a few years earlier had filed bankruptcy. She didn't have a full-time job; she was on commissions in her job. She was behind in her payments to me even though my bills were not substantial at the time.
>
> I knew from conversations with Wendie Elovich that she was behind in her bills and Wendie Elovich and I knew that she was behind in her bills to her New York attorney Carol Eisenberg because Carol Eisenberg who had represented her in New York had been making telephone calls to me and advising me that she was owed I think it was about $17,000 or $19,000. [T92-93][1]
>
> * * *
>
> I discussed with Ros and Lucy [grievant] who was present at almost all the conversations that she now had three attorneys in two litigations both of which would require considerable amount of time in the next month or two months,

[1] T refers to the transcript of the DEC hearing of June 25, 1996.

if not longer, that she still owed an attorney in New York, and that we — everybody was being retained on an hourly basis and we needed some assurances of payment and what could she do.

She basically - not basically. She told me she didn't have the wherewithal to pay the attorneys and I advised her that she had in large measure two options. One was to go to the Women's Law Center, to Rutgers Clinic, or some organization of that nature and seek to— if they would take on the case on a reduced fee basis or no fee basis, or the other was for her to borrow money or attempt to raise money from another source and be able to pay the attorney and have the attorneys pursue that suit.

She told me that she did not want to go to a clinic, that she preferred to be able to control her case and her attorney which she felt she wouldn't get in a clinic situation, and that she didn't know who she could go to [to] borrow money.

At that time, Lucy told me that she had received an offer of settlement in her personal injury action and that if the attorneys would accept it she would transfer to the attorneys her proceeds, anything she could do to get money for Ros and save her grandson. Lucy made that offer.

I then spoke with Wendie Elovich, I spoke with Susan Kunstler. Both of those attorneys expressed reservations about money coming in from Lucy based on a personal injury case.

I then spoke to Terry Shapiro who confirmed that he had received a settlement offer I think it was at that time about $50,000. I then conveyed that to the two attorneys and they asked me for additional assurances of payment. And I suggested to Ros and Lucy that if Lucy was signing over the money, that perhaps the attorneys, to feel that there was an additional assurance of payment, if the money was transferred into my attorney's trust account and thereby they would know that it was protected in that regard. Attorney's trust account is sacrosanct and that they would then be able to proceed and bill against that.

[T93-95]

Respondent testified that, in late summer 1991, grievant expressed dissatisfaction with Shapiro's services in the personal injury action. According to respondent,

> [w]e — there was a settlement offer made sometime in September. Terry Shapiro was still representing Lucy. Lucy and Ros conveyed, I don't remember who it was, one or the other or both, conveyed that settlement offer to me and felt that — and raised the question to me whether or not if Lucy accepted it what would she walk away with.
>
> Lucy at the time was concerned she wanted work done on her teeth and she wanted to make sure that after the attorneys' bills were paid, that she would have money for work on her teeth.
>
> I then corresponded to Susan Kunstler and Wendy Elovich and asked them in early September whether or not they would be prepared to discount their bills, and if so, I would try to coordinate a discount of the attorneys' bill and then Lucy would then consult with Terry Shapiro as to whether or not she wanted to take the lesser amount of money.
>
> Susan Kunstler agreed to discount her bill. I believe it was about twenty percent for payment in full.
>
> Wendy Elovich, her bill was $11,000, refused to discount her bill. She wanted payment in full.
>
> I advised Lucy of that and told Lucy that basically with the outstanding bills and even with the discount and even with the discount on my bills, that after the one-third contingency was taken by Terry Shapiro, she would most likely not have any money for her operation on her mouth and if she paid all the money to the attorneys. Lucy then said to me that she was upset and could I file a fee arbitration with Terry Shapiro and that he was getting too much and perhaps we could lower the amount that he would take and that would free up some of the money. In fact, I did call Terry Shapiro who basically in polite words rejected that.

Ros then suggested that perhaps I could do better negotiating than Terry could and would I consider taking on Lucy's case which I said I would look into it [sic].
[T97-99]

Respondent next claimed that grievant was adamant that her personal injury case not go to trial because she did not want to testify against her daughter. Respondent added that, it was at this time, just prior to the October 1991 disclosure letter, that he discussed the potential conflict of interest in great detail with both grievant and Weprin. He further stated that he was not present when grievant signed the disclosure letter; his associate had handled that matter.

Also at issue was the likelihood that respondent would have to pursue Weprin on an "excess demand," the settlement amount over and above Weprin's insurance coverage of $100,000. Respondent testified that he was aware, when he took grievant's case, that Weprin was only insured for $100,000, and that the arbitration award was $125,000. Respondent insisted that grievant had agreed not to pursue Weprin for the excess demand. When questioned on this issue, respondent stated as follows:

Q. She had another attorney for the excess demand?
A. Right.
Q. Is that correct?
A. That's correct.
Q. So you were looking to her personal assets for he additional monies if you could get them for Ms. Schonbach. Is that correct?
A. I was making a demand both for the full amount of the policy and the excess against any personal assets that she might have had.
Q. So at the time that you are making this demand against her personal assets, you are also representing her?
A. In the divorce — in the matrimonial, correct.
[T115]

In an effort to persuade the DEC that he had properly disclosed the conflict of interest to Weprin, respondent recounted a discussion he had with her about that issue. According to respondent, Weprin contended that grievant would not let the case go to trial because neither Weprin nor grievant wished to take the witness stand. Respondent testified that, during the discussion, he recommended that Weprin consult another attorney regarding the conflict of interest. Respondent, however, had no recollection of sending Weprin a disclosure letter to substantiate his contentions. No letter was produced for the record at the DEC hearing.

* * *

The DEC found that there was no clear and convincing evidence of a violation of RPC 1.8(j) (prohibited business transactions with clients), but found violations of RPC 1.7(b) and RPC 1.7(c)(2) (conflict of interest). The DEC did not state the specific reasons for its findings.

II. Docket No. DRB 97-012

The grievant in this matter is Roselyn Weprin ("grievant"), the daughter of Lucy Schonbach, the grievant in DRB 96-448. Grievant gave the following account of the circumstances of respondent's representation:

The Civil Rights Matter

In November 1990, grievant was referred to respondent to discuss possible representation in a civil rights matter. Grievant had been involved in custody and other post-judgment matrimonial proceedings in the State of New York for six years. Her former husband's father, Saul Weprin, was a member of the New York Assembly and at various times served as Chair of the Judiciary Committee, Chair of the Ways and Means Committee and Speaker of the Assembly. According to grievant, Saul Weprin also had very close ties to Mario Cuomo, the governor of New York at that time. Because grievant received multiple court orders that she considered peculiar, she believed that the judges in New York were giving preferential treatment to her former husband, David Weprin ("Weprin"), based on his father's political position. Grievant testified that the New York legislature sets judicial salaries. As Chair of the Judiciary Committee, Weprin's father would have played a critical role in many judiciary issues, including judicial appointments and salaries.

Grievant related various orders that were entered by the New York courts during six years of litigation. In an unusual order, Weprin was granted legal custody of the parties' son[2], but grievant had "visitation" with the child all week from Sunday evening through Sunday morning. In other words, although Weprin had legal custody, his physical custody consisted of seeing his son one day per week. Thus, grievant was not the legal custodian, but was responsible for the child's day-to-day care. However, without legal custody, she was

[2] Apparently, the parties could not even agree on their son's name. Grievant referred to him by his Hebrew name, Shlomo, while Weprin preferred to call him Steven.

precluded from exercising certain responsibilities such as, for example, signing consent forms for school trips or taking her son to a doctor.

Another court order that grievant found questionable granted occupancy of the marital apartment to Weprin. According to grievant, she had no place to live immediately after giving birth to her son. Moreover, although the judge would not rule on her motion for child support, he ruled on Weprin's motion for visitation. At the time that the child was seven weeks old, an order was entered granting Weprin three hours of visitation three nights per week plus Sundays. When the child was three months old, this visitation was increased to four nights per week for four hours each night plus four hours on Sundays. Grievant testified that the visitation arrangement interfered with her son's breast-feeding and sleep schedules, so that at the age of ten months he was treated at Boston Children's Hospital for severe sleep disorders, including night terrors. Grievant contended that a subsequent order was entered granting custody to Weprin because of her purported lack of compliance with visitation orders, despite the fact that the child's pediatrician testified that, during the missed visitation, the child was ill. Grievant eventually was awarded child support in the amount of only $75 per week, even though she was unemployed and Weprin was earning $65,000 per year as Deputy Superintendent of Banking for the State of New York, a politically appointed position.

In support of her civil rights case, grievant alleged that Weprin had told her that, at a political fund-raiser, he had spoken with the judge assigned to their case. Weprin added that the judge had asked him if there were any problems with visitation and whether he had

received the judge's recent ruling on support. Grievant recorded this conversation with Weprin. At a subsequent court appearance, grievant's New York counsel requested that the judge recuse himself. Weprin, his attorney and the judge denied that the conversation had taken place. When grievant's attorney requested a hearing to interrogate Weprin on this issue, the judge denied the request for a hearing, although he did recuse himself. Grievant remarked that the judge had been appointed to the bench. The custody case was then transferred to an elected judge, who entered an order limiting Weprin's contact with the son to three hours of visitation per week, supervised by grievant. When the matter was transferred to another appointed judge, the visitation schedule was modified without a hearing.

According to grievant, respondent represented to her that he would file a civil rights action in federal court. Grievant testified about respondent's statement that he would "tear Saul Weprin apart" on the witness stand, that he was not concerned about the politics involving the case, and that he would call Governor Mario Cuomo as a witness, if necessary. Grievant produced a letter from respondent dated January 16, 1991, prompted by her request that he outline the civil rights action for her. In the letter, respondent initially recited that he was "contemplating" filing a lawsuit in the Federal District Court for the Southern District of New York, but later referred to "the lawsuit which we will be filing on your behalf" (Exhibit C-3). Grievant asserted that she maintained frequent contact with respondent during the next two and one-half years and that, almost every time they talked, the civil rights litigation was discussed.

In May 1991, jurisdiction of the custody and visitation issues was transferred from New York to New Jersey. In June 1991, grievant retained respondent to represent her in the custody and family law issues that had been litigated in New York. She felt that respondent and her New York counsel were not working well together and thought it would be beneficial for respondent to represent her on all matters. Because respondent assumed representation of grievant in the family law matters, they had occasion to talk often. When they discussed the civil rights matter, respondent continually told grievant that the time was not right to file the complaint, that it should be put on the "back burner", that a press conference and media coverage should first be arranged, and so forth. Respondent continually assured her, however, that he would file the lawsuit. Grievant talked with respondent at least once a week from June 1991 to April 1993. Despite his repeated assurances to grievant, respondent never filed the civil rights lawsuit.

Settlement of the Matrimonial Matters

As stated above, respondent took over the representation of grievant in the custody and visitation matters. Grievant's prior attorney had obtained an emergent order from Judge Napolitano in New Jersey permitting grievant to take her son for therapy, as recommended by officials from the child's school. Weprin, however, had refused to take the child for therapy and, without legal custody, grievant was powerless. In response to grievant's motion for therapy, Weprin filed a motion in New York for full custody, that is, both legal and physical custody. Grievant testified that respondent filed a motion for custody in New

Jersey, which was assigned to Judge Lawrence Smith. On January 10, 1992, Judge Smith conducted a conference with respondent and Weprin's attorney, Carol Kronman. At the conference, Judge Smith requested that the attorneys attempt to settle the issues and report to him on their progress. He offered to be available by telephone conference on forty-eight hours' notice to his chambers (Exhibit C-11 at 57).

Grievant testified that she had spent close to $15,000 on settlement efforts in New York. She therefore specifically instructed respondent not to engage in settlement discussions:

> And I said, I know my ex-husband. I do not want to enter into more settlement negotiations that are just going to up my fee and get me nowhere. And I said, Now the case is in New Jersey. Let's go to trial and try and get some justice and satisfaction here. Maybe we have a better chance. And he said, Well, if the judge says you got to settle, you got to make an effort. Fine, make an effort, but don't go back and forth. And if he says he's available within 24, 48 hours, just call him and say this is the situation.
>
> Three and a half months later, when there was [sic] no settlement negotiations, Mr. Ellenport refiled the papers. I don't know why he withdrew the papers, but he had to redo the entire thing again, file the papers again. And lo and behold, Judge Smith is no longer on the matrimonial bench, and now we're before Judge Escala, and he says why can't we settle this thing.
>
> [1T42-43][3]

Respondent drafted a proposed settlement agreement on custody and other issues and sent it to Weprin's attorney on June 22, 1992. However, the next day grievant telefaxed a letter to respondent, rejecting the terms of the agreement and asking respondent to inform the judge, at a court date scheduled for June 24, 1992, that there was no agreement.

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[3] 1T refers to the transcript of the DEC hearing on June 5, 1996.

Grievant told respondent that, through six years of custody litigation, she learned that it is much more difficult to overturn a settlement agreement than a court order. Accordingly, she was willing to go to trial, even if she obtained an unfavorable result, rather than agree to something she was not comfortable with, because the order could be appealed or modified. In this regard, grievant testified as follows:

> You can always appeal a court order. It's much, much more difficult to overturn an agreement. And that's what I explained to Mr. Ellenport, that if we did go to trial, if there was a problem, we would deal with that. But I'd sooner go to court and have a judge do what he's going to do once he listens to the testimony than agree to a little more visitation, then have to go back to court and say, Your Honor, I meant well, but it's not working out. Because it just doesn't work that way.
>
> [1T62]

In response to grievant's letter and telephone messages in which she withdrew her consent to the proposed settlement, respondent sent a letter dated June 23, 1992, strongly urging grievant to accept the terms of the agreement. The letter states as follows, in its entirety:

> When I called from the hospital on a few occasions today I was given some very disturbing messages from both my secretaries. Rather than go into detail I want to give you a general response. The Settlement Agreement that was shown to you yesterday did not only reflect correspondence over the past month which was discussed with you before it was written, but reflected meetings and telephone conversations that we had. Each item in the Settlement Agreement was at one time or another authorized and approved by you. Furthermore, I have told you repeatedly over the past year and a half that a Court judgment following trial is not final in all sense of the word. Unlike most other litigations, matrimonial orders are always subject to attack based on either changed circumstances or the best interest of the child. Indeed, that is how I was able to have New Jersey assert jurisdiction following a series of New York State judgments and orders. The reason for my suggestion of accepting a settlement agreement rather than trial is based upon my belief that

what we will achieve by the settlement agreement is the same if not better than what we will receive a [sic] trial and that by settling now you will have immediate legal custody. Even if you go to trial and win on all points, that would not prevent David from either taking an appeal or filing a motion to attack what you have won.

I know that you are looking for the opportunity to tell your story to the Court. However, there are risks involved by going to trial such as, as I told you yesterday, increased visitation to David. While the Settlement Agreement I have proposed is not a total victory, it achieves more than what you wanted than when you first hired me to be your lawyer. It does so without subjecting Shlomo to the anxiety of testifying against his father.

I have still received no response from Carol Kronman. In any event, I will call you directly Wednesday afternoon, (assuming all is well with my son) to discuss going forward.

[Exhibit C-10]

By telephone, grievant confirmed her position to respondent, who agreed to inform the judge that there was no settlement. After the court appearance on July 9, 1992[4], respondent notified grievant that Kronman had sent a copy of the "agreement" to the judge. The "agreement" was a letter dated May 13, 1992 from respondent to Kronman proposing settlement. The letter contained strikeouts, handwritten notes and other modifications and bore the following handwritten language: "Consented and agreed to five pages. Court to draw order. July 9, 1992" (Exhibit C-7, at 3). It was signed by respondent and Kronman for their respective clients. Grievant was extremely upset and asked respondent what he would do next. Respondent replied that he would contact the court and request that Judge Escala not open the letter from Kronman and not read the proposal. According to grievant,

[4] Apparently, the June 24, 1992 court date was carried until July 9, 1992.

Judge Escala did review the settlement proposal and incorporated it into an order. Although respondent told grievant that he would file an ethics complaint against Kronman, grievant contended that he never did. Grievant asked respondent to request Judge Escala to recuse himself because he had improperly received the settlement proposal. Respondent answered that he could not make such an application.

Grievant testified that the judge used the May 13, 1992 letter, marked up and annotated during settlement discussions, as a basis for preparing and entering an order dated August 5, 1992. She had not seen the letter until June 1993 when she retained new counsel, who filed an order to show cause; in response, Weprin's attorney supplied a copy of the May 13, 1992 "agreement." Respondent had not notified grievant of the court date of July 9, 1992, when the settlement agreement was apparently signed by respondent and Kronman. Thus, grievant became bound by the "settlement agreement" that she had rejected and that Judge Escala apparently used as a basis for his order of August 5, 1992.

Respondent's Certification on Behalf of Grievant's Second Husband

On September 1, 1992, grievant married Norman Beckoff. The marriage was short-lived. On June 18, 1993, Beckoff was arrested for domestic violence. Apparently, a significant issue in the divorce litigation between grievant and Beckoff concerned telephone communications between grievant and respondent during grievant and Beckoff's honeymoon. On September 13, 1993, one year after the wedding -- which respondent attended --

respondent submitted a certification on behalf of Beckoff in the divorce litigation. The certification read as follows:

> 1. I am an attorney licensed to practice law in the State of New Jersey and formerly represented the defendant, Roselyn Beckoff, in connection with her litigation against her former husband, David Weprin.
>
> 2. I respectfully advise the Court that my timesheets indicate that, in fact, I did have a conversation with Roselyn Beckoff in St. Martin on September 2, 1992, the first day of her honeymoon. (As I attended the wedding on the evening of September 1, 1992, I am aware that the honeymoon commenced the next day.) I also had a conversation with her mother on that date, as well as on September 3 and 4. Further, I had conversations with both Roselyn and her mother on September 5, on September 6, and on September 7, 1992. [Original emphasis].
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> [Exhibit C-9]

Prior to submitting the certification, respondent neither contacted grievant nor obtained her consent to his signing it. Respondent ceased representing grievant in April 1993.

* * *

For his part, respondent agreed that he began representing grievant in November 1991, but denied telling her that he would definitely file a civil rights lawsuit on her behalf. He explained that he merely committed to grievant that he would review the documents she gave him, investigate the matter and research the issues. Respondent also told grievant that they could not file the complaint until the appeal filed by her New York attorney was concluded. His position was that, because the issue was the subject of an appeal, he could not bring a

separate lawsuit. Respondent explained that later, however, he learned that the order denying recusal was not one of the issues on appeal.

Respondent recalled that, after reviewing the materials supplied by grievant, he advised her that, if she prevailed in a civil rights matter, the remedy would not be a different outcome in her divorce trial, but merely a new trial before a different judge.

Respondent contended that, once jurisdiction of the custody issue was transferred to New Jersey, grievant's civil rights claim was no longer viable. He denied having assured grievant for two years that he would be filing a civil rights lawsuit. According to respondent, once jurisdiction vested in New Jersey in May 1991, grievant was satisfied and never discussed the civil rights action again.

On the topic of his letter of January 16, 1991 about the civil rights matter, respondent explained that he made a "poor choice of words" when he stated that he would be filing such a lawsuit; he meant to say that the lawsuit was being "contemplated," as recited earlier in the letter.

Respondent was asked why his retainer agreement dated June 11, 1991 referred to the civil rights litigation, when he had determined in May that the matter was no longer viable. He offered that, although he was retained by grievant in November 1990, he could not find a copy of the retainer agreement. Therefore, in June 1991 he sent another retainer agreement that, according to respondent, simply repeated the language of the earlier version. Respondent admitted that he neither notified grievant in writing of his decision not to file a

civil rights lawsuit, nor informed her when the statute of limitations for filing the complaint would expire.

On the issue of settlement negotiations, respondent testified that, very soon after he began to represent grievant, he perceived settlement to be a difficult prospect, primarily due to Weprin's approach to the issues. Respondent did not dispute that grievant told him not to attend settlement conferences because they would not be productive; he replied to her, however, that, if a judge ordered him to participate in settlement conferences, he had to do so. Grievant then requested respondent to attend, but simply give the appearance of good faith. Respondent answered that he could not do that; if he was ordered to attend a settlement conference, he would go in good faith and attempt to reach a resolution.

According to respondent, both grievant and Weprin made some progress in settlement efforts. He sent a letter dated May 13, 1992 to Kronman and received a favorable response. Respondent proceeded to draft a settlement agreement. He testified that grievant and her mother reviewed and approved all documents before they were sent. On June 22, 1992, respondent sent a settlement proposal to Kronman, with grievant's approval. On June 23, 1992, respondent was at a hospital where his son was receiving medical treatment. When he called his office, he was informed that grievant had called and withdrawn the settlement proposal that he had sent to Kronman the prior day. Respondent testified that he called grievant and "screamed" at her for repudiating the agreement. He persuaded her to continue negotiating toward settlement.

Respondent went on to say that he discussed settlement issues with grievant during the latter part of June 1992. His bills to grievant for that month reveal that settlement discussions took place on June 24, June 26, June 29 and June 30, 1992. Respondent's July bill shows settlement activity on July 7 and July 8, a court appearance on July 9, telephone conferences with grievant on July 9 and July 10, a conference with grievant on July 16, a conference with grievant on July 23 regarding a proposed court order and a letter to grievant regarding a draft order. The bills contradict grievant's testimony that she was not aware of the settlement or order until 1993. By both telephone and telefax, respondent sent to Judge Escala an objection to Kronman's submission of the settlement agreement. Respondent did not know whether Judge Escala reviewed the agreement. In any event, Judge Escala scheduled a status conference for July 9, 1992. Respondent testified that the conference was not for settlement purposes, but in the nature of a pre-hearing meeting on all pending motions.

According to respondent, he and Kronman notified the judge that, while the parties had not reached a total settlement, there had been substantial movement on some issues. Judge Escala then ordered the attorneys to prepare a list for him, explaining the parties' position on each issue:

> What [Judge Escala] wanted us to do was to assist him and to let him know what movement the parties had made in the year's time. And we asked him what he meant and he said, Well, they started out with a position a year ago. You've now said that they've made movement off that position to date. He said he'd like to know where the parties moved since that time. And we said, All right, we'll prepare a list. So he said fine.

He opened up a courtroom and he told us to sit down and start drafting a list of the various issues before him which dealt with custody, visitation, everything else as to where the parties had moved in their discussions over one year's time . . . .

So we sat down and we started, took out a pad and started going through it. And Carol Kronman said, Wait, I got a better idea. Let's take this May 13 letter that you had sent me and we'll use that as a checklist.

[2T82-83][5]

Respondent testified that, after he and Kronman completed the list of issues, they submitted it to Judge Escala:

We submitted it to Judge Escala. So ordered. We said to Judge Escala, both of us, that this was not a consent order, that neither of us had authority on behalf of our clients to settle and we were not settling.

Q. Let me ask you this. On the third page it says 'Consented and agreed to, five pages. Court to draw order July 9, 1992.' Carol Kronman's signature for David Weprin.

A. I think my signature is cut off.

Q. Might have been cut off on the bottom. What does that language mean?

A. We did not consent and agree to the terms. We were not asked to consent and agree to the terms. This is not a settlement agreement. We were asked -- we were ordered, not asked, we were ordered to tell the judge where the parties had moved in one year of discussion, negotiation and litigation. We initially did this, and you can see that it initially said 'Consented and agreed to, three pages,' which we submitted to the judge. We then submitted it . . . .

This was not a settlement agreement. This was not a representation of our parties' agreement to settle and resolve the case. That's why it says the court is to draw the order, because the court still had before it the motions. The court could have taken these positions, accepted them, modified them or rejected them. And my recollection is that the court did precisely that.

[2T84-86]

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[5] 2T refers to the transcript of the DEC hearing on June 6, 1996.

When asked about the statement "Consented and agreed to" in the letter, which was signed by respondent and Kronman, respondent asserted that he was consenting merely to giving Judge Escala the document. He explained that to signify a consent he ordinarily used the phrase "terms and conditions are agreed to." Because that phrase did not appear on the document, respondent contended that it was not a consent agreement.

Respondent testified that Judge Escala then prepared a draft order, which was submitted to the attorneys for review. Respondent and grievant reviewed the draft and wrote to the judge objecting to portions of the proposed order. Although he did not have a copy of this letter, he had a copy of Kronman's letter to the judge containing her objections to the draft order. Respondent added that grievant wrote comments on Kronman's letter, a fact that further contradicts grievant's testimony that she was not aware of the settlement proposal or the court order of August 5, 1992.

On the issue of the certification given to grievant's former husband, Beckoff, respondent testified that Beckoff had agreed to be responsible for grievant's attorneys' fees incurred after their marriage. Respondent sent out two monthly bills: one to grievant only, showing the past due amount, and one to grievant and Beckoff jointly, with billing beginning on September 1, 1992. In the spring of 1993, Beckoff informed respondent that grievant had filed a domestic violence complaint against him. At that time, Beckoff notified respondent that he would no longer be responsible for grievant's attorneys' fees. By this time, not only was respondent no longer grievant's counsel, but she had filed a request for fee arbitration

and threatened a malpractice lawsuit against him. At the fee arbitration hearing, Beckoff testified on respondent's behalf.

Subsequently, Beckoff's attorney, Margaret Goodzeit, asked respondent if he had time records supporting the bills sent to grievant in September, October and November 1992. Goodzeit indicated that there might be an issue about the time records in grievant and Beckoff's divorce matter, as grievant had challenged Beckoff's contention that she had called respondent during their honeymoon. During the conversation with respondent, Goodzeit mentioned Beckoff's recollection that the bills respondent had sent to him and grievant would reflect these telephone calls. Goodzeit told respondent that, rather than getting the hotel telephone bills, she would simply subpoena respondent to testify at trial. Respondent inquired as to the need for his appearance at the trial, which was to take place in Bergen County. Goodzeit replied that she needed confirmation that the telephone conversations had occurred on the dates shown on the bills. She then asked respondent whether he would submit a certification if she did not issue a subpoena. Respondent answered affirmatively to avoid traveling to Bergen County for the trial.

At the ethics hearing, respondent was asked whether he could have discussed the certification with grievant:

> Q. And there was no way you could communicate to her that you had been asked to give a certification in her divorce?
>
> A. Oh, I imagine I could of [sic] if I felt that I was being asked to divulge privileged information or confidential information or information that hadn't already been made public to Norman.
>
> Q. Without knowing the importance of the information or the relevance in that particular litigation, how could you know if you were divulging or not divulging something?

A. That's why I asked Margaret Goodzeit when she told me I was going to be subpoenaed. I said for what purpose. I wanted to make my decision.

Q. And you were comfortable relying on Mr. Beckoff's attorney's representation?

A. Her representation to me was she only needed to find, get confirmation of my time records, telephone calls that were made in September. And I had already sent a bill to that effect to Norman and Roselyn Beckoff.

Q. Didn't that make you ask her why is it important that they were made at that particular time?

A. I didn't want to know . . . .

[2T152]

Respondent testified that, because he had contemporaneously mailed the bills to Beckoff while Beckoff was married to grievant and because respondent was not revealing the substance of the telephone conversations, but only their existence, he felt that he had not breached his duty of confidentiality to grievant.

* * *

The DEC found clear and convincing evidence that respondent had violated RPC 1.1, RPC 1.2, RPC 1.2(a), RPC 1.4 and RPC 1.6(a). On the civil rights claim, the DEC found that respondent's failure to either file the lawsuit or advise grievant that he would not do so was contrary to RPC 1.1, RPC 1.2 and RPC 1.4. In all likelihood, the reference to RPC 1.2 (scope of representation) was in error; RPC 1.3 (diligence) should be substituted therefor.

The complaint did contain an allegation that respondent's failure to file the civil rights complaint constituted a lack of diligence, contrary to RPC 1.3. Respondent was not charged with a violation of RPC 1.2 in connection with the civil rights matter and the DEC gave no explanation for its finding of this violation.

The DEC also found that respondent executed a settlement agreement in behalf of grievant without her knowledge or consent and contrary to her specific instructions. According to the DEC, the execution of this agreement deprived grievant of a plenary hearing, which had been her goal. The DEC found that respondent engaged in unauthorized settlement negotiations, failed to consult with grievant as to settlement and failed to abide by her decision about settlement. Thus, the DEC found that respondent violated RPC 1.2(a).

Finally, on the issue of the execution of the certification in behalf of grievant's former husband, the DEC found a violation of RPC 1.6(a). The DEC remarked that the certification was executed for the benefit of grievant's former husband, without her knowledge or consent. The DEC also found that the certification was issued after grievant had requested fee arbitration and had threatened to file a malpractice complaint against respondent. The DEC recommended a reprimand.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct is clearly and convincingly supported by the evidence.

In DRB 96-448 (the personal injury matter), respondent's conduct was fraught with improprieties from the beginning, even before he took on the representation of Lucy Schonbach's (the grievant) case. First, respondent had to convince Schonbach's daughter's (Weprin) reluctant matrimonial attorneys, Kunstler and Elovich, to accept the assurance provided by Schonbach's personal injury action. In so doing, respondent acted as the attorneys' fiduciary, creating an obligation to safekeep their fees in his trust account. Furthermore, the potential existed for respondent to favor the attorneys' best interests over Weprin's, having persuaded the attorneys to accept the offer to guarantee payment of their fee out of the personal injury settlement proceeds. Second, even before respondent took over Schonbach's representation in the personal injury case, he, by his own admission, advised Schonbach on issues ranging from the adequacy of the pending settlement offer of $50,000 to the issue of Shapiro's fee. Indeed, respondent had already begun negotiating Shapiro's fee. Schonbach clearly relied on respondent's advice and reluctantly agreed to respondent's superseding Shapiro as her attorney. Respondent might not have had Schonbach's best interest at heart, even before taking her case. Respondent had a duty to Weprin at this point in time, a fiduciary duty to the other matrimonial attorneys for their fees, and an overriding interest in protecting and obtaining his own fees in Weprin's matter, all in conflict with Schonbach's best interests.

RPC 1.7(a) states as follows:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:

> (1) the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after a full disclosure of the circumstances and consultation with the client . . . .

Here, respondent represented both the plaintiff (Schonbach) in a personal injury suit naming as defendant another of his clients (Weprin) in a matrimonial matter. Their respective legal positions in the personal injury suit were obviously diametrically opposed: Schonbach sought to recover damages from Weprin for injuries she sustained while a passenger in a car driven by Weprin. It is of no consequence that respondent did not represent both Schonbach and Weprin in the personal injury action. It is sufficient for a conflict to exist that the interests of one client in one case are directly adverse to the interests of another client in a different case. It is a question of divided loyalty, of a breach of the duty of fidelity owed to each of the clients.

The disclosure issue was a cornerstone of respondent's testimony before the DEC. He recounted a very detailed disclosure to Schonbach that was in sharp contrast to Schonbach and Weprin's testimony. Respondent pointed to the October 3, 1991 letter to Schonbach as proof-positive of full disclosure and consent. However, while RPC 1.7 does not require a writing for disclosure to be effective, where, as here, competing versions of the scope of the disclosure vie for credibility, the letter is useful for proof purposes. Indeed, the letter should have detailed the conflict, should have explained how it could affect

respondent's representation of Schonbach and should have urged Schonbach to discuss her options with independent counsel. Instead, the letter had a self-serving few paragraphs designed to indicate that respondent had discharged his duty under the conflict of interest rule. The letter, in its true light and alongside Schonbach and Weprin's testimony that the disclosure was not as respondent claimed, allows the logical conclusion that respondent merely went through the formalities of disclosure and consent, without fully explaining in detail the circumstances of the representation to allow Schonbach to make an informed decision as to whether she still wanted respondent to represent her or whether she wished to engage independent counsel. It stands to reason that, had respondent in fact discussed with Schonbach, in detail, the conflict of interest situation, he would have repeated the full discussion in the letter—since he went through the trouble of attempting to confirm the conversation in writing — instead of merely mentioning their discussion. The bare letter corroborates Schonbach and Weprin's testimony that respondent virtually insisted that he take control of Schonbach's proceeds and later the case. An inference may be raised that the letter was intended to protect respondent, rather than to serve the client. And even if respondent had made full disclosure to Schonbach, the fact remains that respondent did not document his purported disclosure to Weprin and did not obtain her consent to his representation of her mother or to the continuation of his representation in the matrimonial matter. Respondent clearly violated RPC 1.7(a).

RPC 1.7(b) states, in relevant part:

> A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after a full disclosure of the circumstances and consultation with the client . . . .

It is clear that a major reason for taking over the representation of Schonbach's personal injury action was respondent's desire to be paid his fees in Weprin's matter. That self-interest was in conflict with the interests of both clients. First, respondent had an interest in being paid his Weprin fees quickly. Despite his protests to the contrary, respondent was in a position to compromise Schonbach's settlement in order to expedite his payment of the fees in the Weprin case. Respondent was also in a position to recommend to Schonbach to settle for less than $100,000, so he would not be forced to sue Weprin on an excess demand. In addition, respondent's allegiance to Weprin was compromised by his expressed intention to sue her on an excess demand, if need be. Indeed, respondent was "playing both ends against the middle," to the detriment of both clients. Not having obtained Schonbach's informed consent to the representation — in light of the deficient disclosure mentioned above —respondent violated RPC 1.7(b) as well.

Lastly, respondent violated RPC 1.7(c) for having created an appearance of impropriety when he represented both Schonbach and Weprin.

Like the DEC, the Board was unable to conclude that respondent violated RPC 1.8(j). The Board could not find that respondent's conduct rose to the level of taking a proprietary interest in the client's cause of action, as alleged in the complaint.

In DRB 97-012 (the Weprin matters), on the issue of the civil rights complaint the Board was unable to conclude that respondent violated the Rules of Professional Conduct. The evidence shows that, once jurisdiction of the family law issues was transferred to New Jersey, respondent advised Weprin that there were no benefits to be gained by filing the civil rights complaint and that she concurred. Although it would have been prudent for respondent to communicate this information to Weprin in writing, his failure to do so was not unethical.

Similarly, the Board concluded that respondent's execution of the certification for Beckoff did not rise to the level of an ethics violation. Respondent did not reveal the substance of his conversations with Weprin, only the fact that he had had such conversations. Weprin's husband, Beckoff, already possessed this information. The Board found, however, that respondent violated RPC 1.4 by failing to communicate with Weprin prior to executing the certification.

As to the unauthorized settlement, the Board found that respondent violated RPC 1.2(a) by failing to follow Weprin's express instructions not to enter into settlement negotiations. Indeed, respondent went far beyond entering into settlement negotiations. Without Weprin's knowledge or authority, respondent executed a document that settled a large number of the issues. That document contains the language: "Consented and agreed

to." His explanation that the judge ordered counsel to sit at the courthouse and sign a list of how their clients had shifted in their respective settlement positions, while possible, strains credulity. In signing the agreement, respondent violated RPC 1.2(a).

* * *

Generally, in cases involving conflict of interest, without more, and absent egregious circumstances or serious economic injury to clients, a reprimand constitutes appropriate discipline. In re Berkowitz, 136 N.J. 134 (1994). In Berkowitz, the Court observed that

> the lawyer must have in mind not only the avoidance of a relationship which will obviously and presently involve the duty to contend for one client what his duty to the other presently requires him to oppose, but also the probability or possibility that such a situation will develop. [Citations omitted].
>
> [Id. At 143]

Respondent violated RPC 1.7(a), (b) and (c). In so doing, he did a great disservice to both of his clients. Fortunately, no lasting harm befell either client.

Respondent also violated RPC 1.2(a) in entering into a settlement without his client's authorization. In prior cases involving similar misconduct, admonitions or reprimands have been imposed. In a matter in which the attorney received a private reprimand,[6] the attorney settled civil litigation without the client's consent. In that case, at a trial call, the judge

[6] The matter was heard by the Board and the Court when the Rules required such discipline to remain private.

conferenced the matter and the attorney agreed to a settlement. Due to several mitigating circumstances, including the death of the attorney's mother-in-law and the pregnancy-related complications suffered by the attorney's wife, the Court, on March 26, 1991, issued only a private reprimand. Similarly, in In re Fitzpatrick, N.J. (1997), the attorney's associate called the attorney from the courthouse as the trial was about to commence to convey a settlement offer. The attorney authorized the associate to accept the offer. It could not be determined from the record whether the attorney further instructed the associate to notify the court that the settlement was subject to the client's approval. The attorney, however, failed to notify the client of the settlement. The Board determined that the attorney had violated RPC 1.4(a) (failure to communicate) and imposed a reprimand.

The Board unanimously determined to impose a reprimand for respondent's ethics violations. In Schonbach (DRB 96-448), a six-member majority found that respondent engaged in a conflict of interest; three members would have dismissed the matter. In Weprin (DRB 97-012), the Board was unanimous in its determination that respondent acted unethically. Two members did not participate in the Weprin deliberations.

The Board also required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/22/97

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert S. Ellenport
Docket No. 96-448 (Schonbach)

Hearing Held: January 23, 1997

Decided: June 30, 1997

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Zazzali					x		
Huot					x		
Cole			x				
Lolla			x				
Maudsley			x				
Peterson			x				
Schwartz					x		
Thompson			x				
Total:			6		3		

By Robyn M. Hill 7/9/97
Robyn M. Hill
Chief Counsel

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert S. Ellenport
Docket No. 97-012 (Weprin)

Hearing Held: March 20, 1997

Decided: June 30, 1997

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Zazzali			x				
Huot							x
Cole			x				
Lolla							x
Maudsley			x				
Peterson			x				
Schwartz			x				
Thompson			x				
Total:			7				2

By Robyn M. Hill 7/9/97
Robyn M. Hill
Chief Counsel