

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-170
District Docket No. XIV-2015-0248E

IN THE MATTER OF
ARCADIO J. REYES
AN ATTORNEY AT LAW

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Decision

Argued: July 20, 2017

Decided: November 15, 2017

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear for oral argument, despite proper service.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-14(a)(4), based on respondent's disbarment in the District of Columbia (alternately referred to herein as DC) and Maryland. He was also reciprocally disbarred in Pennsylvania, based on the District of Columbia disbarment. In the District of Columbia matter, respondent failed to treat

"advanced [legal] fees as property of the client until earned," as required by District of Columbia Rules. He misappropriated the unearned fees, instead of returning them to the client. The OAE urges respondent's disbarment for knowing misappropriation. We determine to impose an admonition.

Respondent was admitted to the New Jersey bar in 1991. He also was admitted to practice law in Connecticut (1990), the District of Columbia (1991), Pennsylvania (1992), and Maryland (1994). He has no prior discipline in New Jersey.

On June 2, 2016, the Supreme Court temporarily suspended respondent on a motion filed by the OAE. In re Reyes, 225 N.J. 14 (2016). He remains suspended to date.

In addition, on September 24, 2012, the Court entered an Order declaring respondent ineligible to practice law in New Jersey for failure to pay the New Jersey Lawyers' Fund for Client Protection annual attorney assessment. He remains ineligible to date.

On April 2, 2015, respondent signed an affidavit consenting to disbarment in the District of Columbia,¹ which was accepted by

¹ This exhibit was obtained under seal. In the District of Columbia, the order disbaring an attorney on consent is a matter of public record, but affidavits of consent to disbarment are not public. Rules Governing the District of Columbia Bar, Rule XI, Section 12(c).

the DC Court of Appeals Board on Professional Responsibility (BPR) on April 20, 2015. On May 14, 2015, the DC Court of Appeals filed an order disbarring respondent by consent, effective July 16, 2015.

According to the OAE brief in support of the motion for reciprocal discipline, respondent: (1) failed to provide a writing setting forth the scope of the representation or basis of the fee; (2) failed to treat advanced fees as property of the client until earned; (3) failed to hold client funds separate, comingling client funds with attorney personal or business funds; (4) misappropriated unearned fees; (5) failed to refund advanced fees that had not yet been earned; (6) neglected client matters; (7) failed to communicate; and (8) lacked competence.

On July 9, 2015, respondent and Maryland's Attorney Grievance Commission filed a joint petition for disbarment by consent in that state. That document referred to respondent's admission, in the District of Columbia matter, that he had mishandled client funds in violation of DC Rule 1.15(a) and (e).

Respondent and the Maryland disciplinary authorities agreed that DC Rule 1.15(a) is equivalent to Maryland Rule 1.15(a), and that DC Rule 1.15(e) is equivalent to Maryland Rule 1.15(c).

DC Rule 1.15(a) states:

A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

DC Rule 1.15(e) states:

Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

In its brief, the OAE referred to respondent's disbarment in Pennsylvania as having been based on his District of Columbia disbarment. The Pennsylvania equivalent of DC Rule 1.15(e) is Pennsylvania Rule 1.15(i), which states:

A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner.

Thus, in all three jurisdictions where respondent has been disbarred, attorneys must deposit legal fees in the attorney trust account and may not withdraw those fees until earned or withdraw those expenses until incurred. In the District of Columbia, respondent failed to treat advanced fees as property of the client until earned, failed to hold the client's funds separate from his own, and comingled client funds with personal or business funds. He then misappropriated the unearned fees.

The OAE seeks respondent's disbarment on the basis that, by misusing advanced fees and costs in the District of Columbia, contrary to DC Rule 1.15(e), he is guilty of the knowing misappropriation of client funds. The OAE urged us to conclude from the sealed affidavit that "respondent admitted misappropriating unearned fees from his client," which "virtually compels his disbarment in our jurisdiction."

In support of a knowing misappropriation finding, the OAE relied on Kevin J. Michels, New Jersey Attorney Ethics, §34:3-1 at 848 (GANN 2017), who commented that the "[f]ailure to return an unearned retainer may amount to a knowing misappropriation of client funds leading to disbarment." Michels cited In re Moore, 143 N.J. 415 (1996) and In re Lowell, 178 N.J. 111 (2003).

In Moore, the attorney was disbarred for "conduct in two matters, including lack of diligence, in violation of RPC 1.3;

failure to keep his client reasonably informed and to comply promptly with reasonable requests for information, in violation of RPC 1.4(a); failure to return sizeable unearned retainers, in violation of RPC 1.16; and failure to cooperate with the disciplinary authorities, in violation of RPC 8.1(b)." Ibid. Neither we nor the Court found Moore guilty of knowing misappropriation. Rather, Moore's disbarment was premised on the fact that he had taken sizeable retainers from clients, failed to perform any work, and then "disappeared," essentially abandoning his clients. He also failed to reply to ethics investigators and to answer the complaints, thereby evidencing an "utter disdain for the ethics process." In the Matter of John A. Moore, DRB 95-163 and DRB 95-239 (December 4, 1995) (slip op. at 8.) Moreover, after defaulting, Moore failed to appear on the return date of the Court's Order to Show Cause in his disciplinary matter.

In Lowell, the attorney was suspended for three years. Although the OAE focused on Lowell's failure to return an unearned retainer, her suspension was imposed for a myriad of ethics violations: counseling or assisting a client in conduct that the lawyer knows is illegal, criminal, or fraudulent; lack of diligence; failure to return an unearned retainer upon termination of representation; false statements of material fact

to a tribunal; offering evidence the lawyer knows to be false or failure to take remedial measures after the lawyer ascertains that false evidence has been offered; knowingly disobeying an obligation under the rules of a tribunal; making a false statement of material fact or law to a third person; false or misleading communications about the lawyer or the lawyer's services; knowingly assisting or inducing another to violate the Rules of Professional Conduct; conduct involving dishonesty, fraud, deceit or misrepresentation; and conduct prejudicial to the administration of justice and N.J. Advisory Comm. on Professional Ethics Opinion 665, 131 N.J.L.J. 1074 (1992). In re Lowell, supra, 178 N.J. 111, DRB 02-213 (October 8, 2003) (slip op. at 1-2).

Citing Moore and Lowell, the OAE urged that

respondent be likewise disbarred in our jurisdiction based on the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985). Respondent's admission that he misappropriated unearned retainers removes this case from the ambit of cases dealing solely with the failure to promptly refund unearned retainers upon the termination of representation and moves it into the type of situation governed by Wilson.

[OAEb5.]²

² OAEb refers to the brief in support of the motion for reciprocal discipline, dated May 15, 2017.

* * *

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore, adopt the findings of the DC Court of Appeals.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides that

The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:

- (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
- (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;
- (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
- (D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
- (E) the unethical conduct established warrants substantially different discipline.

Subsection (E) applies because the unethical conduct warrants substantially different discipline.

Respondent's consents to disbarment in the District of Columbia, Maryland, and Pennsylvania were based on his violation of those jurisdictions' versions of RPC 1.15, all of which prohibit an attorney from treating an advanced fee (or advanced costs) as property of the attorney until the fee is earned or the cost is incurred. Here, respondent used an advanced fee before it was earned, in violation of DC Rule 1.15(e), Maryland Rule 1.15(c), and Pennsylvania Rule 1.15(i). In New Jersey, however, there is no such equivalent RPC involving the deposit or use of legal fees.

Simply put, respondent did not engage in conduct that would constitute knowing misappropriation in New Jersey.

Unlike the District of Columbia, Maryland, and Pennsylvania, in New Jersey, attorneys may place advanced fees in either the attorney trust account or the attorney business account, and there is no requirement that the fees be taken only as they are earned, unless a specific agreement between the attorney and the client requires it. See In re Youmans, 118 N.J. 622, 629, 636 (1990) and In re Stern, 92 N.J. 611, 619 (1983).

Respondent took an unearned fee in the absence of an agreement with the client requiring him to hold the fee intact

until earned. In New Jersey, such conduct would implicate only RPC 1.16(d), which requires a New Jersey attorney, upon termination of the representation, to return the unearned portion of a client's fee. Moreover, unlike knowing misappropriation, a violation of RPC 1.16(d) is a less serious offense in New Jersey, bearing consequences far less stern than disbarment.

In summary, respondent accepted an advanced fee, comingled those client funds with personal or business funds, and then appropriated the unearned fees received from his client. As noted, no New Jersey RPC required respondent to segregate the fees, as in the above disbarring jurisdictions. If respondent had been guilty of similar actions in New Jersey, the disciplinary system would characterize his misconduct as the failure to return the unused portion of a retainer, not the knowing misappropriation of client funds. Respondent, thus, did not commingle or misappropriate fees for our purposes in New Jersey. Rather, he failed to set forth the rate or basis of his fee in writing (RPC 1.5(b)), grossly neglected and lacked diligence in the matters (RPC 1.1(a) and RPC 1.3, respectively), failed to adequately communicate with the client (RPC 1.4(b)), and failed to return an unearned fee (RPC 1.16(d)).

Violations such as gross neglect, lack of diligence, failure to communicate with a client, failure to refund the unearned portion of a fee, and failure to use a written fee agreement, without more, generally have resulted in admonitions. See, e.g., In the Matter of John L. Conroy, Jr., DRB 15-248 (October 16, 2015) (admonition for attorney who lacked diligence and failed to keep the client informed about the will, living will, power of attorney, and disability claim for which he was retained, resulting in the client's filing the claim; violations of RPC 1.3 and RPC 1.4(b); the attorney also violated RPC 1.5(b) when he agreed to the representation, but failed to provide the client with a writing setting forth the basis or rate of his fee; he also practiced law while administratively ineligible, a violation of RPC 5.5(a); finally, he failed to reply to the ethics investigator's three requests for information, a violation of RPC 8.1(b); the attorney entered into a disciplinary stipulation and returned the fee; no prior discipline in forty years at the bar); In the Matter of Charles M. Damian, DRB 15-107 (May 27, 2015) (admonition for attorney who filed a defective foreclosure complaint and failed to correct the deficiencies, despite notice from the court that the complaint would be dismissed if they were not cured; after the complaint was dismissed, he took no action to vacate the

dismissal, a violation of RPC 1.3; the attorney also failed to tell the clients that he had never amended the original complaint or filed a new one, that their complaint had been dismissed, and that it had not been reinstated, a violation of RPC 1.4(b)); In the Matter of Osualdo Gonzalez, DRB 14-042 (May 21, 2014) (admonition for attorney who failed to set forth, in writing, the basis or rate of his fee, a violation of RPC 1.5(b), and failed to communicate with the client, choosing instead to communicate only with his client's prior counsel, a violation of RPC 1.4(b); in addition, the attorney caused his client's complaint to be withdrawn, based not on a request from the client, but on a statement from his prior lawyer that the client no longer wished to pursue the claim, a violation of RPC 1.2(a); the attorney had no prior discipline in twenty-seven years at the bar and produced letters from persons attesting to the attorney's good character); and In the Matter of Larissa A. Pelc, DRB 05-165 (July 28, 2005) (admonition for attorney who was retained for a divorce action and received a \$3,000 retainer; a month later, after the attorney failed to file an answer, a default judgment was entered and the client was served with a notice of equitable distribution, prompting her to retain new counsel; when subsequent counsel requested the return of the \$3,000 retainer, Pelc sent the client a bill for \$1,237.50 and

failed to release the \$1,762.50 balance for almost one year thereafter, on the ground that she had been awaiting the client's written authorization for the release of the remainder of the funds; violation of RPC 1.16(d)).


There are no aggravating factors for our consideration. In mitigation, this matter marks respondent's first brush with disciplinary authorities in New Jersey in over twenty-five years at the bar. Therefore, we determine to impose an admonition.

Members Gallipoli and Zmirich voted to impose a reprimand.

Member Hoberman did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Arcadio J. Reyes
Docket No. DRB 17-170

Decided: November 15, 2017

Disposition: Admonition

Members	Admonition	Reprimand	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman			X
Rivera	X		
Singer	X		
Zmirich		X	
Total:	6	2	1


Ellen A. Brodsky
Chief Counsel