

1 Case Number: OBC17-0526



FILED

JUN 07 2018

STATE BAR OF NEVADA

BY: *[Signature]*
OFFICE OF BAR COUNSEL

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STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA,)
)
Complainant,)
vs.)
)
KENNETH J. MCKENNA, ESQ.)
STATE BAR NO. 1676)
)
Respondent.)

LETTER OF REPRIMAND

TO: KENNETH J. MCKENNA, ESQ.
544 W. First Street
Reno, Nevada 89503

On or about November 23, 2015, you agreed to represent Melissa Eras ("Eras") in connection with "WCSD" and negotiating Eras's employment/termination status. Eras agreed to pay you a "flat fee" of \$3,000, plus costs for the representation. The Retainer and Fee Agreement stated that

- (i) "No hourly fees will be charged and no hourly records will be kept."
- (ii) "Should Client fail to supply sufficient funds for the proper investigation of this case so as to jeopardize Attorney's ability to represent Client, Attorney may, at his discretion withdraw from representation in the case and in that event none of the fees . . . shall be refundable." and

1 (iii) "ATTORNEY FEE NON-REFUNDABLE: The Fee Arrangement set
2 out above if the Attorney's Fee for complete representation of Client.
3 Client understands and agrees that the Fee in Non-refundable, and is
4 earned in full by the Attorney upon acceptance of the representation
5 and is to be retained by the Attorney regardless of the disposition of
6 the case or termination of the Attorney/ Client relationship."

5 On or about December 18, 2015, Eras paid you \$1,800 towards the \$3,000 flat fee.

6 For the representation, you assisted Eras in meeting with the Washoe County
7 School District ("WCSD"). Eras's objectives were not obtained, therefore, Eras retained
8 you a second time. The second retention was "in connection with state employment
9 WCSD." On or about February 11, 2016, you and Eras executed the second Retainer and
10 Fee Agreement. Eras agreed to pay you a "non-refundable" retainer of \$20,000 and "35%
11 of any and all amounts recovered by compromise, settlement, judgment, verdict, and award
12 or pursuant to a judgment plus costs" for the second representation. The second Retainer
13 and Fee Agreement also stated:

14 (i) The \$20,000 payment "represents a non-refundable retainer and is
15 earned in full at the inception of this agreement between Client and Attorney
16 upon Attorney's agreement to represent Client with respect to the above
17 referenced case. This fee is not based on hours worked. No hourly fees will
18 be charged and no hourly records will be kept."

17 (ii) "Should Client or Attorney terminate Attorney's representation of
18 Client in this matter, Attorney shall be entitled to the non-refundable retainer
19 and shall have the right to lien the case additionally for the value of services
20 rendered in regard to the 35% contingent fee agreed to."

20 (iii) "FEE NON-REFUNDABLE: The fee arrangement set out above is
21 Attorney's fee for representation of Client as Described above. Client
22 understand and agrees that the fee is non-refundable and is to be retained
23 by the Attorney regardless of disposition of the case."

22 On or about February 11, 2016, Eras paid \$10,000 toward the retainer amount identified in
23 the second Retainer and Fee Agreement. Thereafter, Eras was to pay \$200 per month
24 towards the balance of the retainer. Eras did not make any of the \$200 payments.

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1 In or about May, 2016, Eras personally submitted a Final Appeal letter to the
2 Department of Education, Training and Rehabilitation ("DETR") which included additional
3 documentation and statement that she had collected. Your office did not participate in the
4 submission.

5 In September, 2016, your office represented to Eras that a draft of the lawsuit should
6 be ready for Eras's review soon. Then, in or about October, 2016, your office told Eras that
7 the representation would be terminated if payments were not made towards the retainer.
8 In response to the notice, Eras emailed Respondent's office and requested they reconsider
9 the requirement that payment be received before moving forward with litigation on her
10 behalf.

11 On or about January 23, 2017, your office declined to "alter the terms of the contract"
12 to allow non-payment of the rest of the retainer and reiterated the termination of the
13 representation. The email from your assistant also simply asserted that all paid fees had
14 been earned.

15 You did not file a Complaint on behalf of Eras or provide Eras with a copy of any
16 prepared Complaint when the representation was terminated.

17 Violation of the Rules of Professional Conduct

18 You had a duty to take steps to the extent reasonably practicable to protect your
19 client's interests when terminating representation pursuant to RPC 1.16 (Declining or
20 Terminating Representation). You knowingly violated RPC 1.16 (Declining or Terminating
21 Representation) when, after you terminated the representation, you failed to provide Eras
22 with papers and property and/or refund the advance payment of fees that had not been
23 earned or incurred.

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1 Your aforementioned conduct also was prejudicial to the administration of justice for
2 Eras, thus being a knowing violation of RPC 8.4(d) (Misconduct- prejudicial to the
3 administration of justice).

4 Your client could have been injured by your misconduct had she not availed herself
5 of appropriate agency redress and sought other counsel.

6 In arriving at the appropriate level of discipline for your misconduct, the Panel has
7 considered the aggravating factors of your prior discipline (SCR 102.5(1)(a)) and your
8 substantial experience in the law SCR 102.5(1)(i)). The Panel has also considered the
9 mitigating factors of your cooperative attitude toward the discipline proceeding (SCR
10 102.5(2)(e)), the mitigation of any injury to the client by your return of \$5,900 of the retainer
11 funds, and the remoteness of prior offenses (SCR 102.5(2)(n)).

12 Although this foregoing violation could warrant a suspension of your license to
13 practice law, the nature of the injury to the client and the mitigating factors warrant a
14 downward deviation from the presumptive sanction.

15 In light of the foregoing, you violated Rule of Professional Conduct ("RPC") 1.16
16 (Declining or Terminating Representation) and RPC 8.4(d) (Misconduct-prejudicial to the
17 administration of justice) and are hereby REPRIMANDED and ordered to pay \$1,500, plus
18 all hard costs of the disciplinary proceeding within 30 days of the filing of the Findings of
19 Fact, Conclusions of Law and Order.

20 You are also cautioned that no fee is *per se* "non-refundable." All fees, whether
21 billed hourly or as a "flat fee" must be measured by the reasonableness of that fee, as set
22 forth in RPC 1.5(a). If the fee is not reasonable, then it must be refunded. The Panel also

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1 cautions you that, having now received three disciplinary reprimands, any further violation
2 of any Rule of Professional Conduct will be weighed with this history in mind.

3 DATED this 6th day of June, 2018.

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5 By: G. Robertson
6 G. DAVID ROBERTSON, ESQ.
7 Formal Hearing Panel Chair
8 Northern Nevada Disciplinary Board
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