SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-205
District Docket No. XII-2011-0051E

IN THE MATTER OF	:
MARC D'ARIENZO	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 21, 2013

Decided: December 16, 2013

Robert J. Logan appeared on behalf of the District XII Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a reprimand filed by the District XII Ethics Committee (DEC). The four-count complaint charged respondent with having violated RPC 1.3 (lack of diligence), RPC 1.16(b)(1) and (d) (failure to protect a client's interests by either declining to represent a client or upon terminating the representation), RPC 5.5(a)(1) (practicing law while ineligible), and RPC 8.4, presumably (d)

(conduct prejudicial to the administration of justice). For the reasons expressed below, we determine to impose a censure on respondent.

Respondent was admitted to the New Jersey bar in 1993. He maintains a law practice in Summit, New Jersey.

In 1999, respondent was suspended for three months for making false statements to a tribunal (RPC 3.3(a)(1)) and for displaying conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)). In re D'Arienzo, 157 N.J. 32 (1999). Specifically, respondent twice misrepresented to a municipal court judge his reasons for failing to appear in a criminal matter. At the ethics hearing in that matter, the municipal court judge testified that respondent "had a history of either failing to appear on matters before her or of being late in those instances when he did appear." We found that, while ordinarily a reprimand would have been the appropriate degree of discipline, a suspension was in order because "respondent was brazen enough to lie to the same judge who had recently given him a very stern warning that his misconduct would not be tolerated. Respondent's misconduct was not a single, isolated event. Rather, his lies were almost seamless in their transition." Respondent was reinstated to the practice of law on June 14, 1999. In re D'Arienzo, 158 N.J. 448 (1999).

In 2001, respondent was admonished for recordkeeping violations (RPC 1.15(d) and R. 1:21-6). There, he did not use a trust account in connection with his practice and did not maintain any of the required receipts and disbursements journals or client ledger cards. In the Matter of Marc D'Arienzo, DRB 00-101 (June 28, 2001).

In 2004, respondent received another admonition for violating RPC 8.4(b) (committing a criminal act that reflects adversely on an attorney's honesty, trustworthiness, or fitness as a lawyer). Specifically, in December 2003, he was charged with possession of less than fifty grams of marijuana (N.J.S.A. 2C:35-10(a)(4)) and possession of drug paraphernalia, a water bong (N.J.S.A. 2C:36-2). He received a conditional discharge. In addition to other mitigation, we considered that respondent's conduct, unlike his prior two infractions, was not related to the practice of law. In the Matter of Marc D'Arienzo, DRB 04-151 (December 10, 2004).

In 2011, respondent received a censure for violating RPC 8.4(d) (conduct prejudicial to the administration of justice) by failing to provide a court with notice of his conflicting calendar. As a result, he failed to appear at a criminal trial and also at an order to show cause stemming from his failure to appear at the trial. In re D'Arienzo, 207 N.J. 31 (2011).

In 2013, on a motion for discipline by consent, respondent was reprimanded for practicing law while ineligible. He failed to file the IOLTA registration statement for 2011 and was placed on the list of ineligible attorneys from October 21, 2011 until March 27, 2012. Two days earlier, he had entered his appearance in a Newark municipal court. We noted that respondent's actions were inadvertent, that he was unaware of his ineligibility, and that, once he became aware of his dereliction, he filed the IOLTA registration statement. We determined that respondent's ethics history warranted increasing the typical discipline for an inadvertent violation of RPC 5.5(a)(1) from an admonition to a reprimand. In re D'Arienzo, 214 N.J. 623 (2013).

The New Jersey Lawyers' Fund for Client Protection (the Fund) report shows that respondent had several periods of ineligibility for failure to pay his annual attorney assessment from December 12, 1994 to January 3, 1995 (three weeks); September 25, 1995 to October 12, 1995 (approximately two and one-half weeks); September 30, 1996 to November 1, 1996 (one month); September 30, 2002 to October 15, 2002 (approximately two weeks); and September 26, 2011 to October 13, 2011 (two and one-half weeks).

We now turn to the facts of this matter.

On September 19, 2011, criminal defendant Shahirie Mims appeared before the Honorable Patrick Roma, J.S.C., Bergen County, Criminal Division, at 9 a.m., for an arraignment. According to Mims, respondent had represented him, in "a lot of cases," since 2007, and continued to represent him, after that Bergen County matter. When the judge asked Mims if he had an attorney, Mims replied that respondent was representing him. Respondent was not present in court at the time. As a courtesy to both Mims and respondent, the judge carried the matter to September 26, 2011. According to the judge, on that date, in a telephone conversation with the judge's secretary, respondent stated that he had a scheduling conflict, namely, another court appearance in an immigration matter. Respondent asked if he could appear at 1:30 p.m. instead. The judge testified that, even though he had ordered respondent to appear at the scheduled time, respondent told the judge's secretary that, if he had to appear before 1:30 p.m., "I guess I don't represent Mr. Mims."

On September 26, 2011, when Mims appeared before Judge Roma and the judge inquired about respondent's whereabouts, Mims replied that he had no knowledge of it. He gave the judge "some story" that respondent was "busy in court" somewhere else. According to Mims, the judge became angry, but adjourned the case for another week, with the warning that, on the new date,

the case would go forward with or without the presence of an attorney.

Mims testified that he finally contacted respondent between his second and third court appearances, at which time "someone" told him that respondent could not be his lawyer. Respondent gave him the name and telephone number of another lawyer, Michael DeAlessandro.

Mim's case was re-listed for October 3, 2011. On that date, Mims appeared with DeAlessandro, who informed the judge that he was appearing in respondent's place. The judge understood that DeAlessandro was only standing in for respondent. However, DeAlessandro continued to appear on Mims' behalf up until the date of Mims' sentencing, when DeAlessandro arranged to have another attorney represent Mims.

Notwithstanding DeAlessandro's appearance on Mims' behalf, everytime the judge asked Mims who was representing him, Mims replied that it was respondent. Mims told the hearing panel that he had lied to the judge in that regard and had only informed the judge that respondent was his attorney because he always retained respondent and he was trying "to buy time" to get money together to hire respondent.[1]

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[1] Mims had not yet paid respondent's fee.

At the DEC hearing, respondent testified that he had made one phone call to the court, in which he had stated something to the effect that he "may be getting retained upon arrival today" and had made it "crystal clear" that, unless the judge marked the case for 1:30 p.m., he would not be representing Mims. Respondent claimed that he so advised Mims. Nevertheless, respondent added, he had received a call from the judge that he had to be in court at 1:30 p.m. "to answer an order to show cause." The record does not specify when this phone call occurred, but respondent's answer to the ethics complaint states that he had declined to represent Mims and that he had called the court "before 9 and asked the Judge if I could go forward at 1:30 with the case." When the judge said no, respondent said he would not take the case.

During cross-examination, Mims acknowledged to the hearing panel that he had informed the presenter that he had had a "cell phone" conversation with respondent, in which respondent had told him that he would appear in court on his behalf on September 26, 2011, but only if he were paid his fee. Mims testified that he was unable to come up with respondent's fee.

At the ethics hearing, against respondent's objection of double hearsay, Judge Roma read an October 11, 2011 letter to respondent into the record, which had been drafted "reasonably

contemporaneous[ly] with events." According to the judge, the letter stated:

> The Court carried the matter until September 26th, 2011. On that date, [respondent] stated to my secretary on the phone . . . [t]hat you were unable to appear for Mims' status because of another court obligation and asked to come in at 1:30. This was the first time the Court was made aware of any scheduling conflict. Additionally, you stated to my secretary that if you had to . . . [a]ppear prior to 1:30 then, quote, I guess I don't represent Mr. Mims. The Court ordered you to appear and you did not appear on that date.
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> On October 3rd, 2011, Mr. Mims appeared with Mr. DeAlessandro, reiterated to the Court that you were his attorney. Mr. DeAlessandro stated that he was appearing in your place to resolve the matter. The Court ordered you to appear at 1:30 p.m. You refused to appear due to other scheduled court appearances, including an appearance in immigration court. And the court issued an Order directing that you pay a thousand dollar fine. The Court has since learned that you were declared in eligible [sic] to practice law.
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> [T17-7 to T20-3.][2]

According to respondent, Mims did not initially have the funds to pay DeAlessandro and may have mentioned to the judge that respondent would still be representing him. Respondent testified:

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[2] T refers to the transcript of the ethics hearing, dated April 19, 2013.

> That's why Judge Roma's testimony was honest, I think Mr. DeAlessandro said something about Mr. D'Arienzo still may be representing him and me covering for him, it was a little murky. That's the reason. Mike wasn't paid. So as a lawyer who wasn't paid, he wasn't going to go up there and say I'm the guy. He . . . bought some more time. [Mims] went and paid him and then that cleaned everything up.
>
> . . . .
>
> I didn't put the court in a position where they had to keep adjourning cases because I wouldn't show up or because I was flippant about my responsibility. I was never representing the guy. . . . [H]e never paid me anything.
>
> . . . .
>
> I never represented the guy, I never made an appearance in court, I never sent a letter to the court. I was not formally retained as his attorney.
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> [T107-17 to T108-16.]

The judge conceded that he never received a telephone call in which respondent had stated that he was representing Mims or a letter entering an appearance on behalf of Mims. However, it was clear to the judge, from his conversations with his secretary, that Mims had retained respondent to represent him. The judge noted that respondent never seemed to be available at nine o'clock -- he was always someplace else.

Respondent testified that he has a "toxic relationship with Judge Roma," mostly due to his own fault. He explained that,

because his primary practice is in Union County, he tries to schedule his Bergen County cases for the afternoon and that, although some Bergen County judges accepted his time limitations, Judge Roma did not. He characterized the situation as the "perfect storm of bad circumstances." He underscored that Mims had lied to the judge that respondent was his lawyer, thereby creating "that toxic element."

As to respondent's ineligibility, Judge Roma stated that, by letter dated October 3, 2011, he had received notice from the Fund that, on September 26, 2011, respondent had been declared ineligible to practice law for failure to pay his annual attorney assessment.

On that issue, respondent's cousin, Lauren Smith, testified that respondent's failure to timely pay the annual assessment was her fault. She stated that, for a short period, starting in August 2011, she had worked as respondent's part-time secretary because she needed extra money. Her responsibilities included answering the phone, taking messages, paying bills, sending mail, and typing.

She recalled a problem with the bill from the Fund because it was a source of "semi-hostility" between her and respondent. Sometime in September 2011, respondent asked her if she had paid the bill. She was sure that she had mailed the payment and told

respondent that she had done so, without verifying that she actually had mailed it.

According to Smith, around October 2011, respondent told her that he had heard from "somebody that [he] was ineligible and there was a problem with a bill." Smith told respondent that she thought that she had sent the payment. She added that it was a very chaotic time in her life, however, as she was going through a divorce and was working on her divorce matter, during her lunch hour. She speculated that the Fund's bill may have gotten mixed in with her personal papers. She told the hearing panel that, when respondent discovered that he had been declared ineligible, he became angry.

At some point, Smith left respondent's employment due to that incident. According to Smith, the envelope to the Fund, purportedly containing the payment, never resurfaced.

For his part, respondent recalled that he had given Smith the form to mail to the Fund. He trusted that she had done so. He stated that, "after the October 3rd debacle" with Judge Roma, he called the "Administrative Office of the Courts" and found out that he was on the ineligible list and that they had sent him "something . . . [on] the 6th or 7th." He asked Smith, who was still working for him at the time, if she had re-sent it and she assured him that she had done so. A day or two later, however,

he called the Fund and discovered that it still had not received the payment.

According to respondent, after he learned of his ineligibility, he obtained another form and sent it via overnight mail. He conceded that he was "administratively ineligible for [a] certain short stretch," but blamed it primarily on Smith and only partially on himself, maintaining that his ineligibility had not been intentional.

The presenter acknowledged that respondent's eighteen-day ineligibility was administrative, not purposeful, and the result of Smith's mistake.[3]

By letter dated May 6, 2013, addressed to the hearing panel chair, the presenter noted the absence of mitigating factors in this matter and, as an aggravating factor, respondent's disciplinary history. The presenter pointed out that respondent's 1999 three-month suspension and his 2011 censure stemmed from conduct similar to the one exhibited in this matter.

The DEC found that Mims lied to Judge Roma that respondent was representing him, in order to "buy time" to come up with

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[3] The presenter mistakenly characterized respondent's ineligibility as a suspension.

funds for respondent's fee. Mims did so because he knew that the judge would adjourn his case. The DEC pointed out that, although the judge had adjourned the matter for one week, Mims had not contacted respondent. Finding no evidence that respondent had ever agreed to represent Mims, the DEC was unable to conclude that respondent had failed to appear in court on behalf of a client that he was representing, as charged in the complaint.

The DEC also found no clear and convincing evidence that "respondent failed to arrange adequate representation for a client when terminating his representation" or that he caused various court matters to be adjourned at the last minute. The DEC, thus, dismissed the charged violations of RPC 1.3, RPC 1.16(b)(1) and (d), and RPC 8.4.[4]

The DEC found, however, that respondent had practiced law while ineligible. Although the DEC labeled Smith's testimony as less than credible, it concluded that respondent did not know that he was ineligible until he was so advised by the Fund.

Because respondent had an extensive ethics history, the DEC

[4] Parenthetically, although the hearing panel report also listed District Docket No. XII-2012-0010E in the caption, the panel dismissed that matter, finding no proof of the charged violation of RPC 7.3(b)(5) (unsolicited direct contact with a prospective client).

determined that a reprimand was the appropriate discipline for his practicing law while ineligible for a brief period.

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

The central question in this matter is whether respondent was retained to represent Mims in the case before Judge Roma. Mims told the judge that respondent was his attorney. Nevertheless, at the DEC hearing, Mims testified that he had lied to the judge because he was trying to "buy time" to come up with the money for respondent's legal fee. Indeed, the judge acknowledged that respondent had not formally informed him, either by way of a phone call or a letter, that he would be acting as Mims' lawyer. The only indication that respondent might be representing Mims was respondent's statement to the judge, on the morning of September 26, 2011, that he might "be getting retained upon arrival," but only if the judge rescheduled the arraignment for 1:30 p.m. Respondent told the judge's secretary that, otherwise, "I guess I don't represent Mr. Mims."

Between the several adjournments on the case, which the judge granted based on Mims' statement that respondent was his lawyer and was "busy in court" somewhere else, Mims contacted

respondent and was told by "someone" that respondent could not take on the case. He was given the name and telephone number of DeAlessandro, who did appear in court, on October 3, 2011, and also subsequently, until sentencing, when DeAlessandro arranged for another lawyer to appear with Mims. Despite DeAlessandro's appearances, whenever the judge asked Mims who his lawyer was, Mims replied that it was respondent. Mims told the hearing panel, however, that he had lied to the judge. He also told the panel that respondent had said that he would appear in court on September 26, 2011, if Mims paid his fee, which Mims conceded he never did.

Under the circumstances, it cannot be found that respondent had agreed to represent Mims and failed to appear in court on behalf of a client. We, therefore, dismiss the charged violations of RPC 1.3, RPC 1.16, and RPC 8.4.

Respondent did violate RPC 5.5(a), however, when he practiced law while ineligible. Smith testified that she had been responsible for the non-payment to the Fund and that respondent was unaware that the payment had not been made. Although that might be true, the fact remains that, when respondent discovered that Smith had not paid the annual assessment to the Fund, he should have taken appropriate steps to ensure that the payment would be made forthwith, instead of

merely asking Smith if she had re-sent it. As it turned out, she had not. Inasmuch as respondent had been previously ineligible on four occasions for failure to pay the assessment to the Fund and once for not filing his IOLTA registration statement -- he was disciplined for practicing law during the ineligibility period stemming from the IOLTA violation -- he should have been more vigilant about his Fund obligations.

Practicing law while ineligible, without more, is generally met with an admonition if the attorney is either unaware of the ineligibility or advances compelling mitigating factors. See, e.g., In the Matter of Robert B. Blackman, DRB 10-137 (June 18, 2010) (attorney practiced law while ineligible for failure to file the IOLTA registration statement for three years; the attorney did not know that he was ineligible); In the Matter of Matthew George Connolly, DRB 08-419 (March 31, 2009) (attorney, who was ineligible to practice law, rendered legal services; the attorney's conduct was unintentional); and In the Matter of William C. Brummell, DRB 06-031 (March 21, 2006) (attorney practiced law during a four-month period of ineligibility; the attorney was unaware of his ineligible status).

A reprimand is usually imposed for practicing law while ineligible if the attorney has an ethics history, has been disciplined for conduct of the same sort, has also committed

other ethics improprieties, or is aware of the ineligibility and practices law nevertheless. See, e.g., In re Jay, 210 N.J. 214 (2012) (attorney was aware of his ineligibility and practiced law nevertheless; prior three-month suspension for possession of cocaine and marijuana); In re (Queen) Payton, 207 N.J. 31 (2011) (attorney who practiced law while ineligible was aware of her ineligibility and had received an admonition for the same violation); In re Goodwin, 203 N.J. 583 (2010) (attorney practiced law while ineligible, commingled personal and trust funds by depositing the proceeds from the refinance of his residence into his trust account, and was guilty of recordkeeping violations; although there was no evidence that the attorney was aware of his ineligibility, a balancing of the aggravating factors against the mitigating factors required a reprimand); In re Austin, 198 N.J. 599 (2009) (during a one-year period of ineligibility the attorney made three court appearances on behalf of an attorney-friend who was not admitted in New Jersey, receiving a $500 fee for each of the three matters; the attorney knew that he was ineligible; also, the attorney did not keep a trust and a business account in New Jersey and misrepresented, on his annual registration form, that he did so; several mitigating factors considered, including the attorney's unblemished disciplinary record); In re Davis, 194

N.J. 555 (2007) (motion for reciprocal discipline; attorney suspended for one year and a day in Pennsylvania for representing a client while on ineligible status in that jurisdiction as a non-resident active attorney and later as an inactive attorney; the attorney also misrepresented his status to the court, to his adversary, and to disciplinary authorities; extensive mitigation considered); and In re Ellis, 164 N.J. 493 (2000) (one month after being reinstated from an earlier period of ineligibility, the attorney was notified of his 1999 annual assessment obligation, failed to make timely payment, was again declared ineligible to practice law, and continued to perform legal work for two clients; he had received a prior reprimand for unrelated violations).

Respondent's recklessness in not ensuring that either he or Smith had re-sent the payment to the Fund is akin to knowledge on his part. Therefore, at a minimum, a reprimand would be appropriate here, if that conduct were viewed in isolation. But in light of respondent's disciplinary history, which includes, among others, a 2013 reprimand for practicing while ineligible, a reprimand is insufficient discipline in this instance. We determine that a censure is more appropriate. Respondent is hereby cautioned that any future ethics transgressions on his part may result in more severe discipline.

Member Gallipoli did not participate. Members Singer and Hoberman abstained.

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: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Marc D'Arienzo
Docket No. DRB 13-205

Argued: November 21, 2013

Decided: December 16, 2013

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Abstained	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Gallipoli						X
Hoberman					X	
Singer					X	
Yamner			X			
Zmirich			X			
Total:			6		2	1

Isabel Frank
Acting Chief Counsel