SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-006
District Docket Nos. XIV-2011-0309
and XIV-2012-0539

IN THE MATTER OF	
CARL D. GENSIB	
AN ATTORNEY AT LAW	

Decision

Argued: April 17, 2014

Decided: July 10, 2014

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

David H. Dugan, III appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (censure) filed by the District VIII Ethics Committee (DEC). The first count of the amended complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the

administration of justice). The second count charged him with RPC 1.3 (lack of diligence), and RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter). Both counts charged respondent with violating RPC 7.1(a) (false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement).[1] At the conclusion of the ethics hearing, the Office of Attorney Ethics (OAE) presenter withdrew the charge that respondent violated RPC 8.4(d).

The OAE recommended either a reprimand or a censure. Respondent, in turn, asked for no more than a reprimand. We determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1990. He has an extensive disciplinary record. In 2005, he was reprimanded for improperly acknowledging his clients' signatures on documents related to a real estate closing, when they had not appeared before him. In addition, he knew that one client had signed the other's name. In re Gensib, 185 N.J. 345 (2005).

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[1] The alleged violation of RPC 7.1(a) is discussed at the conclusion of the recitation of facts, rather than in each of the two counts.

In 2011, respondent received a censure for failing to advise his real estate clients that he was inflating the cost of their title insurance to cover potential additional charges by the title insurance company and for failing to memorialize the basis or rate of his fee. In re Gensib, 206 N.J. 140 (2011).

In 2012, respondent was suspended for six months for falsely certifying that HUD-1 statements that he had prepared in five real estate closings were an accurate accounting of the funds deposited and disbursed in connection with each closing. In addition, he failed to communicate to his clients the basis or rate of his fee, in writing. In re Gensib, 209 N.J. 421 (2012). He was reinstated from that suspension on November 29, 2012. In re Gensib, 112 N.J. 466 (2012).[2]

On the same day that respondent was reinstated, he was again disciplined, receiving a censure for misconduct in yet another real estate transaction. Specifically, he failed to

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[2] As a condition to respondent's restoration to practice, the Court ordered him to use the services of a title company for the disbursement of all closing funds and the preparation of HUD-1 forms in all real estate transactions, until further order of the Court. The Court terminated that condition in February 2014.

explain a matter to the client to the extent necessary for the client to make informed decisions about the representation and failed to communicate to the client the basis or rate of his fee, in writing. In re Gensib, 212 N.J. 465 (2012).

On the day of the DEC hearing on this matter, respondent's counsel and the presenter entered into a stipulation of facts, identified in the record as Exhibit J-1. The stipulated facts are incorporated into the recitation of facts below.

COUNT ONE

The Webster Matter (XIV-2011-0309E)

In July 2006, Theresa K. Webster "allegedly" entered into a contract to buy property in Philadelphia, Pennsylvania, from Mary V. Williams.[3] Respondent was the settlement agent and prepared the closing documents, including a deed and a HUD-1 for the Williams-to-Webster transaction. Respondent never met with or spoke to Webster.

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[3] It is unclear how respondent became involved in the transaction.

Prior to the closing, Webster withdrew as the buyer. She was replaced by Rachel Wexler. On December 4, 2006, Wexler entered into a contract to purchase the property from Williams.

The closing was held in December 2006. The HUD-1 was changed to reflect that Wexler was the buyer. Respondent's paralegal, however, failed to amend the deed to change the grantee from Webster to Wexler. The deed was filed in the Philadelphia County Recorder of Deeds, in February 2007, reflecting Webster as grantee. A title company subsequently discovered the error.

Respondent testified that he contacted the recorder of deeds and was directed how to proceed to correct the error. On August 30, 2007, respondent had the seller, Williams, sign a corrective deed, transferring the property to Wexler. The corrective deed was recorded in July 2008.[4]

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[4] The delay in the recording of the deed was neither questioned nor explained in the record.

Thereafter, in connection with Wexler's sale of the property, a title insurance company requested that respondent have Webster execute a deed in favor of Wexler.[5]

On or about October 27, 2010, respondent's office received a voicemail message from an individual claiming to be Webster, indicating that she would be arriving to sign the deed. Later that morning, a woman appeared at respondent's office, claiming to be Webster. Respondent, who had not previously met Webster, did not ask the woman for any identification. He testified:

> I mean normally, I don't know that there are requirements of taking a notary by an attorney. If they [sic] are, I'm ignorant to [sic] them, I guess. I do real estate closing, [sic] if the lender wants identification, I photocopy identification and I provide it to the lender. But absent some reason to believe that person is not the person who I think it is, you know, I make a practice of asking for ID.
>
> [T82.][6]

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[5] The record does not reveal why Webster had to execute a deed in favor of Wexler, if she had never owned the property.

[6] T refers to the transcript of the DEC hearing.

At the OAE's request, prior to the ethics hearing, respondent provided a certification from his paralegal, in which she attested that the woman had identified herself as Webster. Respondent notarized the woman's signature as belonging to Theresa K. Webster on a corrective deed in favor of Wexler.

Thereafter, Webster denied ever agreeing to purchase the property or signing any documents to that effect, including the October 27, 2010 deed of correction, which respondent notarized. She filed a grievance against respondent, in November 2010.

COUNT TWO

The Dressner Matter (XIV-2012-0539E)

On January 5, 2010, Jon Dressner purchased property in New Brunswick, New Jersey. Respondent represented Dressner at the closing. Pursuant to an agreement between Dressner and the seller, the seller's attorney, James Gassaro, retained $4,000 in escrow, pending the resolution of a plumbing issue at the property. Gassaro testified that they never prepared a written escrow agreement. Dressner testified that he received no documentation about where the $4,000 was being held and under what circumstances.

By letter dated March 6, 2010, respondent notified Gassaro that Dressner and the plumber had reached an agreement, which respondent set out. By letter dated March 12, 2010, Gassaro replied that his understanding of the terms of the agreement was different. Subsequent letters from Gassaro and respondent left the issue unresolved.

By emails to respondent, dated April 1, May 6, May 7, and May 17, 2010, Dressner sought information about the escrow issue. By email dated May 28, 2010, Dressner acknowledged receipt of a copy of a letter from respondent to Gassaro and asked respondent to inform him if Gassaro had replied. Dressner did not recall if respondent replied to him.

In July 2010, Gassaro sent the plumber a check for $2,111. In August 2010, Gassaro sent respondent a check for $1,889, payable to his trust account, representing Dressner's share of the escrow.[7] There is no indication that respondent deposited

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[7] The payments to the plumber and Dressner, $2,111 and $1,889, respectively, had been suggested by respondent in his March 6, 2010 letter to Gassaro.

the check in his trust account or that it cleared Gassaro's trust account. Respondent denied having received the check.[8]

By email dated August 31, 2010, Dressner, unaware that Gassaro had disbursed the $4,000 in escrow funds, asked respondent if he had received a reply to his March 6, 2010 letter to Gassaro. Dressner did not recall receiving a reply from respondent.

Respondent testified that he and Gassaro spoke "quite a few times" about this matter, as did their staff. Gassaro confirmed those frequent communications, although Gassaro did not recall any correspondence from or conversations with respondent, after August 2010.

Two subsequent emails from Dressner, as well as his earlier emails, make it clear that Dressner mistakenly thought that respondent was holding the $4,000 in escrow. Despite Dressner's mistaken understanding, respondent did not reply to Dressner's email or follow up with Gassaro on Dressner's behalf.

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[8] The record is silent about why Gassaro was unaware, for over two years, that the escrow funds remained in his attorney trust account.

By letter dated February 25, 2012, over nine months after his last email, Dressner again requested that respondent release the $4,000 escrow funds, or $2,111 to the plumber and $1,889 to himself. Dressner warned that, if respondent did not reply by March 9, 2012, he would contact "the bar association" and file a "complaint" against him. Again, respondent did not reply to Dressner's letter or follow up with Gassaro on Dressner's behalf. On May 27, 2012, Dressner filed a grievance against respondent.

By letter dated July 6, 2012, the DEC investigator sent a copy of Dressner's grievance to respondent, requesting a reply within ten days. By letter dated July 13, 2012, respondent explained to the investigator that he never held the escrow funds in his attorney trust account. Respondent further explained that the funds could not have been released without the written consent of both parties and that the parties had never agreed to their distribution. Respondent also told the investigator that there had been other communications on the matter, in addition to the letters that Dressner had provided with his grievance.

After the filing of the grievance, respondent advised Dressner, by letter dated July 16, 2012, that Gassaro was

holding the escrow funds and that they could be disbursed only on the parties' agreement. Respondent further advised Dressner that the only other option was instituting "a civil lawsuit." Finally, respondent told Dressner that, because he was suspended for six months, effective April 9, 2012, Dressner would have to retain another attorney to file a civil lawsuit.

By letter dated September 10, 2012, Gassaro advised the investigator that he had held the funds, but had disbursed them over two years earlier.[9] The following day, the investigator passed that information on to Dressner. In reply, Dressner, by letter dated September 14, 2012, asked respondent to turn over Dressner's share of the funds. By letter dated October 1, 2012, respondent advised Dressner that he did not have any funds and asked that Dressner confirm with Gassaro that the checks had been cashed.

On September 26, 2012, pursuant to the OAE's instructions, Gassaro issued a check to Dressner for $1,889. By an October

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[9] After the investigator was advised that the escrow funds had been released, the matter was transferred to the OAE.

24, 2012 letter to the OAE, Dressner confirmed his receipt of the funds.

On December 31, 2012, respondent submitted a written response to the grievance, in which he asserted: "I went over and above what would be considered a normal follow-up on an escrow issue. I was not compensated for any of this work but I did it because I wanted Mr. Dressner to be happy." Respondent testified that "[t]his was a very unique issue that Mr. Dressner created," that there was a disagreement between the parties that could not be resolved, and that, after "more than a reasonable effort" to resolve the matter, at a certain point he had ignored Dressner. Respondent asked, "At what point does [the representation] end?" He acknowledged that he had never sent a letter to Dressner saying that he was no longer representing him.

The RPC 7.1(a) Violation

J. Daniela Fama, Esq., worked for respondent until September 2007, when she left for a maternity leave. She never returned. Nevertheless, as late as a December 31, 2012 letter, Fama was included on respondent's letterhead as an attorney licensed in Pennsylvania and New Jersey.

Respondent testified that it was his belief that Fama was planning to return to his office; that he was unaware that it was a violation of the RPCs to leave her name on his letterhead, in the interim; that, when he learned that he was not permitted to have Fama's name on his letterhead, he instructed his secretary to order new letterhead; and that, without his knowledge, the secretary had decided to use up the letterhead they already had, a circumstance that respondent did not notice.

The presenter filed a letter-brief with the DEC, taking the position that either a reprimand or a censure was appropriate for respondent's conduct. The presenter pointed out that the 2005 reprimand should have put respondent on notice of the proper procedure to follow in taking jurats and that respondent has a serious disciplinary record.

In his brief to us, respondent's counsel argued that respondent's acceptance of the signature of an imposter, in the Webster matter, was "an excusable mistake." As to Dressner, counsel argued that there was no clear and convincing evidence that respondent failed to represent Dressner properly "with regard to his retained assignment." Finally, as to the alleged violation of RPC 7.1(a), counsel argued that respondent's use of

the old letterhead was inadvertent and not the type of material misrepresentation contemplated by the rule.

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As to count one, the DEC determined that respondent violated RPC 1.1(a) by failing to ask for identification, before notarizing the signature on a deed of a person whom he did not know. As an officer of the court, respondent represented that it was Webster's signature on a deed transferring property. In the DEC's view, it "is apparent that respondent does not pay very close attention to the work that he does, and his cavalier attitude is simply not acceptable." However, the DEC was unable to conclude, by clear and convincing evidence, that respondent was knowingly involved in conduct that rose to the level of dishonesty, fraud, deceit or misrepresentation. Further, after reviewing unspecified case law on violations of RPC 8.4(d), the DEC concluded that the above conduct did not violate that rule.[10]

As to count two, the DEC found that respondent did not represent Dressner with reasonable diligence, that his failure to return Dressner's phone calls or to reply to his emails was

[10] As noted previously, the OAE withdrew this charge.

"entirely unacceptable," and, moreover, that his contention that Dressner was "a demanding and needy client" was inconsistent with the testimony at the DEC hearing. Rather, the DEC found Dressner to be "a very patient client." Respondent's claims that he was too busy to communicate with Dressner and his attempt to portray Dressner as demanding were "particularly offensive" to the public member of the hearing panel.

As to the charged violation of RPC 7.1(a), although the DEC had "doubts" about respondent's explanation for his failure to remove Fama's name from his letterhead for several years, the DEC did not find clear and convincing evidence of a violation of that rule.

In mitigation, the DEC considered that respondent was cooperative with the investigation. In aggravation, the DEC "was stuck [sic] by respondent's cavalier attitude and lack of remorse regarding his dealings with Jon Dressner." In addition, the DEC pointed to respondent's extensive disciplinary history, including for conduct substantially similar to the conduct exhibited here. Among other improprieties, respondent was disciplined, in 2005, for improperly acknowledging his clients' signatures in a real estate transaction and in 2012 for failing to adequately communicate with a client.

* * *

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. We are unable to agree, however, with a few of the DEC's findings.

First, we cannot agree that the presenter did not meet her burden of proof as to an RPC 7.1(a) violation. Fama left respondent's law firm in September 2007. In December 2012, five years later, her name still appeared on his letterhead. By that time, respondent had to know that Fama was not returning to his office. That his secretary chose to continue to use the old letterhead is no excuse. It was his responsibility to ensure that his secretary followed up on his direction to order new letterhead. We find, thus, that respondent violated RPC 7.1(a).

Second, we cannot agree with the DEC's conclusion that respondent's improper jurat did not violate RPC 8.4(c). The procedure surrounding the execution of jurats and the taking of acknowledgments must be met in all respects. In re Surgent, 79 N.J. 529, 532 (1979). Five steps are involved in notarizing documents:

> (1) the personal appearance by the party before the attorney;
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> (2) the identification of the party;
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> (3) the assurance by the party signing that he is aware of the contents of the documents;
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> (4) the administration of the oath or acknowledgment by the attorney; and
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> (5) execution of the jurat or certificate of acknowledgment by the attorney in presence of the party. [Jurats and Acknowledgments, Disciplinary Review Board Notice to the Bar, 112 N.J.L.J. 30 (July 14, 1983).]
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> [In re Friedman, 106 N.J. 1, 7-8 (1987).]

Respondent affixed the jurat on the deed without complying with the above requirements. His completion of the acknowledgment was a misrepresentation to the world that all of the jurat formalities had been observed. Third parties relied on respondent's representation. We find, thus, that he violated RPC 8.4(c).

The DEC was correct, however, in concluding that respondent was guilty of lack of diligence and failure to communicate with the client in the Dressner matter. Not only did he take no action to quickly resolve the issue of the escrow with Gassaro,

but he also, as he put it, deliberately "ignored" his client's multiple requests for information about the escrow funds.

In all, thus, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 7.1(a), and RPC 8.4(c).

As to the measure of discipline, respondent's counsel argued that, assuming that the DEC's conclusions are upheld, a violation of RPC 1.1(a), RPC 1.3, and RPC 1.4(b) would warrant no more than a reprimand. With regard to respondent's disciplinary history, counsel pointed out that only the 2005 reprimand had been imposed at the time of the within misconduct and that a single prior sanction does not warrant elevating the appropriate sanction here beyond a reprimand.

For the reasons expressed below, we disagree with the measure of discipline that the parties and the DEC suggested to us.

The sanction for the improper execution of jurats, without more, is ordinarily an admonition or a reprimand. When the attorney witnesses and notarizes a document that has not been signed in the attorney's presence, but the document is signed by the legitimate party or the attorney reasonably believes it has been signed by the proper party, the discipline is usually an admonition. See, e.g., In the Matter of William J. Begley, DRB

09-279 (December 1, 2009) (as a favor to an acquaintance, attorney witnessed and notarized a real estate deed and affidavit of seller's consideration that were already signed, trusting the acquaintance's statement that the signatures were those of his parents, who were too infirm to attend the closing; violation of RPC 8.4(c); the son was actually perpetrating a fraud upon his sickly parents at the time; the attorney, who received no fee, had no prior discipline in thirty-five years at the bar) and In the Matter of Richard C. Heubel, DRB 09-187 (September 24, 2009) (attorney prepared a deed for an inter-family real estate transfer and mailed it to the signatory; the deed was returned signed but not notarized; the attorney then notarized the signature outside the presence of the signatory; violation of RPC 8.4(c)).

If there are aggravating factors, such as the direction that a secretary or another person sign the party's name on a document that the attorney then notarizes, harm to the parties, the attorney's personal stake in the transaction, or discipline for prior violations, then the appropriate discipline is a reprimand. See, e.g., In re Russell, 201 N.J. 410 (2010) (motion for reprimand by consent; attorney notarized the "signature" of the wife of her partner on loan refinance documents; the wife

claimed to be unaware of the refinance; because the wife had been present at respondent's office on that day, the attorney believed that the wife had signed the loan documents; violation of RPC 8.4(c); the reprimand was based on the attorney's receipt of a prior admonition, although for unrelated conduct); In re LaRussa, Jr., 188 N.J. 253 (2006) (attorney improperly directed a wife to sign a husband's name to a release in a personal injury action and then affixed his jurat to the document; violation of RPC 8.4(c)); In re Uchendu, 177 N.J. 509 (2003) (attorney signed clients' names on documents filed with the Probate Division of the District of Columbia Superior Court and notarized some of his own signatures on the documents; violations of RPC 3.3(a), RPC 8.4(c), and RPC 8.4(d)); and In re D'Allessandro, 169 N.J. 470 (2001) (attorney witnessed and notarized an executed deed and notarized two affidavits of title purportedly signed by four individual sellers, three of whom had not signed the documents in the attorney's presence; the signatures had been forged and the three sellers were unaware that their property was being sold; violation of RPC 8.4(c)).

When the improper acknowledgment reveals a pattern of such practice, the discipline is more severe. See, e.g., In re Lolio, 162 N.J. 496 (2000) (three-month suspension for attorney

who had witnesses attest as being present during the testators' signatures of wills; in fact, the witnesses had not observed the testators' signing the wills; more than 200 wills were at stake; violations of RPC 8.4(c) and RPC 8.4(d)).

In this case, respondent could not have reasonably believed that the document had been signed by the appropriate party, albeit outside of his presence. He had never met Webster before. Prior to taking the jurat, he was required to assure himself of her true identity. This was all the more important because, in 2005, he had received a reprimand for precisely the same violation – improper acknowledgment of his clients' signatures. It is obvious that respondent did not learn his lesson. In fact, at the ethics hearing on this matter, he professed to be "ignorant" of the existence of a proper procedure for the taking of jurats.

In addition to the improper jurat, respondent grossly neglected the Dressner matter and failed to communicate with the client, conduct that, viewed in isolation, would be met with an admonition. See, e.g., In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (admonition for attorney who filed an appearance in his client's federal civil rights action and chancery foreclosure matter and was unable to demonstrate what

work he had done on his client's behalf, who had paid him $10,000; he also failed to communicate with his client and failed to reply to the disciplinary investigator's requests for information about the grievance; violations of RPC 1.1(a), RPC 1.4(b), and RPC 8.1(b)); In re Russell, 201 N.J. 409 (2009) (admonition for attorney whose failure to file answers to divorce complaints against her client caused a default judgment to be entered against him; the attorney also failed to explain to the client the consequences flowing from her failure to file answers on his behalf; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(c)); and In re Dargay, 188 N.J. 273 (2006) (admonition for attorney guilty of gross neglect and failure to communicate in a matrimonial matter and lack of diligence in connection with the preparation of testamentary documents for the same client; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(a) (now (b)); prior admonition for similar conduct).

Finally, respondent used a misleading letterhead, for which an admonition, too, usually is imposed. See, e.g., In the Matter of Raymond A. Oliver, DRB 09-368 (May 24, 2010) (admonition imposed on attorney who used letterhead that identified three lawyers as "of counsel," despite having no professional relationship with them, a violation of RPC 7.1(a)

and RPC 7.5(a); the attorney also violated RPC 8.4(d), in that two of those lawyers were sitting judges, a fact that could easily have created a perception that the attorney had improper influence with the judiciary; other improprieties noted); and In the Matter of Paul L. Abramo, DRB 08-209 (October 20, 2008) (admonition for continued use of firm letterhead that contained the name of an attorney after he was no longer associated with the firm, violations of RPC 7.5(c) and N.J. Advisory Committee on Professional Ethics Opinion 215, 94 N.J.L.J. 600 (1971)).

We are aware that, standing alone, some of respondent's ethics offenses could lead to no more than an admonition. But we cannot ignore the totality of his conduct; his serious ethics history; his obvious failure – or refusal – to learn from his prior ethics errors, some of which were similar; and his demonstrated lack of recognition of his improprieties. We, therefore, determine that nothing less than a three-month suspension is appropriate in this case.

Vice-Chair Baugh and member Singer would impose a reprimand and have filed a separate dissent. Member Clark would impose a censure.

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 Carl D. Gensib
Docket No. DRB 14-006

Argued: April 17, 2014

Decided: July 10, 2014

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Censure	Disqualified	Did not participate
Frost		X				
Baugh			X			
Clark				X		
Gallipoli		X				
Hoberman		X				
Singer			X			
Yamner		X				
Zmirich		X				
Total:		5	2	1		

Ellen A. Brodsky
Chief Counsel