SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-397
District Docket No. XIV-05-0451E

IN THE MATTER OF	
JEFFREY LUTZ	
AN ATTORNEY AT LAW	

Decision
Default [R. 1:20-4(f)]

Decided: May 20, 2008

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

This matter came before us on a certification of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The two-count complaint charged respondent with violating RPC 1.15(a) (failure to identify, keep or properly safeguard client funds in his trust account), RPC 1.15(b) (failure to promptly disburse funds to a third person), RPC 8.1(b) and R. 1:20-3(g)(4) (failure to cooperate with disciplinary authorities), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or

misrepresentation). The charges stem from an earlier default matter, mentioned below, in which we directed the OAE to audit respondent's trust account to determine the legitimacy of his delay in turning over funds to his client. In the Matter of Jeffrey Lutz, DRB 06-164 (August 31, 2006) (slip op. at 7).

We determine that a three-month suspension is the appropriate discipline for respondent in this matter.

Respondent was admitted to the New Jersey bar in 1975. At the relevant time, he maintained a law practice in Brick, New Jersey.

In 2006, the Court reprimanded respondent, in a default matter, for gross neglect and lack of diligence in a workers' compensation matter, failure to communicate with the client, and misrepresentations to the client by failing to inform him that his case had been dismissed. In re Lutz, 188 N.J. 336 (2006).

The New Jersey Lawyers' Fund for Client Protection report shows that respondent has been ineligible to practice law, since September 25, 2006, for failure to pay the annual attorney assessment. He was previously on the ineligible list from July 21, 1983 to February 17, 1984.

Service of process was proper. On September 25, 2007, the OAE mailed copies of the complaint by regular and certified mail to respondent at three separate addresses: (1) the address

listed as his home and office address – 88 Sandy Point Drive, Brick, New Jersey 08723; his wife's address – 23 Edwards Road, Brick, New Jersey 08723; and his brother's home address – 6532 Chasewood Drive, Jupiter, Florida 33458. On that same date, respondent was also served by publication in The Asbury Park Press and The New Jersey Lawyer. From October 2, 2007 to October 15, 2007, the certified and regular mail sent to both addresses in Brick, New Jersey, were returned with the notation "not deliverable as addressed unable to forward." On November 7, 2007, the certified mail sent to the Florida address was returned as "unclaimed." The regular mail was not returned.

On October 24, 2007, the OAE sent second letters to respondent at the same three addresses, by regular and certified mail. The letters notified respondent that, if he did not file an answer within five days, the matter would be certified to us for the imposition of discipline and the complaint would be amended to include a willful violation of RPC 8.1(b). On November 8, 2007, the certified mail sent to the 88 Sandy Point Drive address was returned with the notations "not deliverable as addressed unable to forward," and "moved, left no address." As of the date of the certification of the record, November 13, 2007, neither the regular mail sent to the Sandy Point Drive address, nor any of the

mail sent to the other two addresses had been returned. Respondent did not file an answer to the complaint.

We now turn to the complaint's allegations.

Count One – Failure to Cooperate

Louis Pollara retained respondent, while respondent was a partner at Bergman and Lutz, to represent him in personal injury and workers' compensation matters. As noted above, respondent has been reprimanded for his conduct in those matters. The Court order imposing discipline directed the OAE to conduct an audit of respondent's books and records.

On October 25, 2006, the OAE requested that respondent provide an explanation for his seven-month delay in disbursing settlement funds to Pollara and submit his financial records for the matter, including the Pollara client ledger and a copy of every trust account check disbursed in connection with Pollara's third-party claim. After respondent failed to comply with that request, the OAE sent him a November 9, 2006 letter, by regular and certified mail, reiterating the request. While the regular mail was not returned, the certified mail was returned unclaimed. Once again, respondent did not reply.

By letter dated November 29, 2006, sent by regular and certified mail, the OAE scheduled a demand audit for December 12,

2006, at respondent's Brick, New Jersey, office. The OAE requested that respondent produce all of his books and records and the Pollara client file. Again, the regular mail was not returned to the OAE. The certified mail was returned unclaimed.

On December 12, 2006, an OAE deputy ethics counsel and an OAE auditor arrived at respondent's office, as scheduled. They were greeted by respondent's brother, Jody Lutz, who informed them that this address was the "family home," where respondent apparently no longer resided. Jody maintained that he and his family currently lived there and disavowed any knowledge of his brother's whereabouts or employment status. As of that date, the Brick Postmaster did not have a forwarding address for respondent. On December 13, 2006, the Brick postal supervisor responsible for overseeing the mail delivery to 88 Sandy Point Drive stated that respondent's mail was still being delivered to that address, but that the certified mail remained unclaimed.

On June 21, 2007, the OAE sent a letter to respondent, directing him to appear at a demand audit scheduled for July 9, 2007, at 23 Edwards Road, Brick, New Jersey. The letter was sent by regular and certified mail to respondent's address of record, 88 Sandy Point Drive, and to his wife's address at 23 Edwards Road, Brick New Jersey. The certified letter sent to the Sandy Point Drive address was returned marked "undeliverable/unable to

forward;" the certified letter sent to the Edwards Road address was accepted; the certified mail receipt was dated, but not signed. The regular mail was not returned. Respondent failed to appear at the audit.

On July 16, 2007, the OAE sent respondent a letter to another brother's address, in Jupiter, Florida, by certified and regular mail. The letter directed him to appear for an August 7, 2007 demand audit. The certified mail was delivered on July 23, 2007; the receipt was signed by James Lutz. The regular mail was returned with the notation "Return to sender, Not here."

On July 24, 2007, the OAE sent a "courtesy" letter to Jody at the Sandy Point Drive address, advising him that a demand audit of respondent's records had been scheduled to take place at his house. The letter added that 88 Sandy Point Drive was the address that respondent had "registered with the Supreme Court of New Jersey as his law office," and that the OAE had sent a letter to respondent at the Jupiter address advising him of the audit. The letter was sent by regular and certified mail. The certified mail receipt was returned, signed by C. Lutz. The regular mail was not returned.

On July 27, 2007, the OAE sent letters to respondent by UPS overnight mail at the Jupiter and Brick addresses, notifying him that the location for the August 7, 2007 audit had been changed

to the OAE's offices. The letter warned respondent that, if he failed to cooperate with the OAE, the OAE would "have no recourse but to immediately petition the [Court] for an Order seeking [his] temporary suspension." Respondent did not appear at the audit.

Count Two – Failure to Safeguard Funds and Misrepresentation

After respondent settled Pollara's personal injury lawsuit, on November 12, 2002, he accepted a $75,000 settlement, with the knowledge that Liberty Mutual Insurance Company (Liberty Mutual) had a $83,282.97 lien on the settlement proceeds.

On November 22, 2002, respondent's partner, Bergman wrote an attorney's fee check to the Bergman and Lutz firm for $25,000. On that same day, respondent issued two trust account checks, each for $25,000, to Pollara and to Liberty Mutual. Even though check #394 to Pollara was dated November 22, 2002, respondent did not forward the check to Pollara until June 10, 2003, more than six and one-half months later. Respondent did not forward the $25,000 check to Liberty Mutual (#395).

In February 2003, respondent telephoned Liberty Mutual and represented that he had a $75,000 offer to settle Pollara's case. He requested that Liberty Mutual compromise the amount of its lien. Respondent knew that this

representation was "untrue," because he had already settled the case and received the settlement proceeds. Liberty Mutual refused to compromise its lien.

In April 2003, respondent left the firm of Bergman and Lutz, taking his client files with him. On July 2, 2003, Bergman wrote two Bergman and Lutz trust account checks to respondent, representing funds held in the firm's trust account for respondent's clients, including $25,000 held on behalf of Liberty Mutual and $15,000 held on behalf of Dominic Suppa. When respondent told Bergman that he was renegotiating the Liberty Mutual lien, Bergman voided the $25,000 check #395 to Liberty Mutual. Respondent knew that his statement to Bergman was not true.

On July 3, 2003, respondent deposited both checks into his Commerce Bank trust account. On August 4, 2003, he closed that account and moved the Pollara and Suppa funds into his Commerce bank business account. On August 16, 2003, respondent wrote a $40,000 check (#258), payable to himself, from his business account. The notation on the check read "Pollara/Suppa." On the same day, he deposited the check into his Commerce Bank trust account.

On January 28, 2004, respondent sent a $25,000 trust account check to Skrod and Baumann, Liberty Mutual's attorneys, noting that the amount represented Liberty Mutual's portion of the Pollara settlement. On March 22, 2004, Skrod and Bauman

returned the $25,000 check to respondent and requested payment of the full Liberty Mutual lien. On May 6, 2004, Skrod and Bauman notified respondent that it would be filing a verified complaint and order to show cause for respondent's failure to satisfy Liberty Mutual's lien, if respondent did not resolve the matter within the next few days. Skrod and Bauman filed the complaint on July 23, 2004. The formal ethics complaint alleged that respondent had made misrepresentations to Liberty Mutual that the case was still active, after it had already been settled, to try to get Liberty Mutual to compromise its lien.

On August 8, 2004, respondent sent two checks to Skrod and Bauman: check #171 for $25,000 from his trust account and check #97 for $24,800 from his personal checking account, each with the notation "Pollara."

On February 11, 2005, the court, on its own "initiative," dismissed Liberty Mutual's lawsuit.

The formal ethics complaint contains sufficient facts to support a finding of unethical conduct. Because respondent failed to timely answer the complaint, the allegations are deemed admitted. R. 1:20-4(f).

The complaint charged that respondent violated RPC 8.1(b) for failing to appear at the OAE demand audit. The rule states that it is misconduct for an attorney to "knowingly fail to

respond to a lawful demand for information from . . . [a] disciplinary authority." The rules define "knowingly" to mean "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances" (RPC 1.0(f)). Here, it cannot be said that respondent had actual knowledge of the OAE demand audit. Therefore, there is no clear and convincing evidence that respondent knowingly failed to appear for the audit, in violation of RPC 8.1(b).

What is clear, though, is that respondent had an obligation to notify the ethics authorities of his current office and home address. The OAE records show his home/business address as 88 Sandy Point Drive, Brick, New Jersey. While there is no clear and convincing evidence that respondent was actually served with notices of the demand audit at any of three addresses used by the OAE, he received notice, by publication, of both the formal ethics complaint and of this default. For the second time respondent has permitted an ethics matter to reach the default stage. In this manner, respondent has failed to cooperate with disciplinary authorities, thereby violating RPC 8.1(b).

As for respondent's conduct in the Pollara matter, there is no clear and convincing evidence that respondent misappropriated his client's funds. Moreover, the complaint did not charge him with such misconduct. The record demonstrates, however, that even

though respondent knew about Liberty Mutual's lien, he settled the matter and then improperly disbursed settlement funds to himself and to his client (almost seven months after the fact), rather than to Liberty Mutual. In light of Liberty Mutual's lien, Pollara was not entitled to a portion of the settlement. Similarly, respondent might not have been entitled to take his fees. His conduct in this regard violated RPC 1.15(a) (failure to safeguard funds) and RPC 1.15(b) (promptly notifying a third person upon receiving funds in which that third person has an interest).

Respondent also engaged in misrepresentations (RPC 8.4(c)), by informing Liberty Mutual that he had a settlement offer and requesting that Liberty Mutual compromise its lien. At that time, respondent had already settled the matter.

In sum, respondent violated RPC 1.15(a), RPC 1.15(b), RPC 8.1(b), and RPC 8.4(c).

The only issue left for determination is the appropriate quantum of discipline. Ordinarily, admonitions are imposed for failure to cooperate with disciplinary authorities alone, if the attorney does not have an ethics history. In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the DEC investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to DEC's requests for

information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney failed to reply to the district ethics committee's numerous communications regarding a grievance); In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance); In the Matter of Andrew T. Brasno, DRB 97-091 (June 25, 1997) (attorney failed to reply to the ethics grievance and to turn over a client's file); and In the Matter of Mark D. Cubberley, DRB 96-090 (April 19, 1996) (attorney failed to reply to the ethics investigator's requests for information about the grievance). But see In re Vedatsky, 138 N.J. 173 (1994) (reprimand for failure to cooperate with the district ethics committee and this Board); and In re Macias, 121 N.J. 243 (1990) (reprimand for failure to cooperate with the OAE; the attorney ignored six letters and numerous phone calls from the OAE requesting a certified explanation about how he had corrected thirteen recordkeeping deficiencies noted during a random audit; the attorney also failed to file an answer to the ethics complaint).

The Court has imposed reprimands when attorneys who fail to cooperate with disciplinary authorities have ethics histories, albeit of a non-serious nature. See, e.g., In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary

authorities; the attorney had received an admonition for similar misconduct) and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

Admonitions ordinarily result for failure to promptly remit funds to satisfy a lien. See, e.g., In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (attorney settled a personal injury case, disbursed his legal fee to himself, withheld money to pay outstanding medical liens but did not promptly disburse those funds, and failed to reasonably communicate with the client about the status of the settlement proceeds despite her numerous requests; the attorney was also ineligible to practice law during a period of the representation); In the Matter of Craig Altman, DRB 99-133 (June 17, 1999) (attorney signed a letter of protection for a medical provider and, after the settlement was paid, did not pay the provider's bill); and In re Spizz, 140 N.J. 38 (1995) (in violation of a court order, the attorney prematurely distributed escrow funds to his clients without notifying his adversary, who had a lien on the recovery, and without obtaining her consent). But see In re Lowenstein, 190 N.J. 58 (2007) (attorney

reprimanded where he knew of a "funding institution"/"factor's" lien against his client's personal injury settlement proceeds, but failed to notify the lienholder when the settlement was reached or the insurer of the lien, thereby permitting the insurer to disburse the settlement to his client and fees to himself, rather than to the lienholder; the attorney had a prior admonition) and In re Zeitler, 158 N.J. 182 (1999) (attorney reprimanded for the improper release of escrow funds to himself and to his client, despite written assurances to the insurance carrier that medical bills and liens would be paid out of the settlement proceeds; admonition would have resulted but for the attorney's extensive ethics history (admonition, one-year suspension, and two-year suspension)).

Cases that include an element of deceit have resulted in more serious discipline. In In re Sonstein, 174 N.J. 293 (2002), the attorney received a three-month suspension for failing to notify a lienholder that he had in his possession settlement funds in which the lienholder had an interest. Although Sonstein had assured the lienholder that it would protect its lien, he escrowed about half of the lien amount and disbursed the remainder of the settlement funds. Sonstein also endorsed the client's and the lienholder's names on the settlement check, without their consent. We found that Sonstein acted with deceit when he improperly endorsed the

settlement check and failed to satisfy the lien, after having assured the lienholder that he would do so. Sonstein also charged his client an excessive fee. See also In re Moorman, 176 N.J. 510 (2003) (three-month suspension for attorney who deceived another attorney to whom he had agreed to pay a partial fee for work performed on the case before its referral; the proofs demonstrated that the attorney had not intended to pay the fee; he deposited the settlement check and disbursed the entire fee to himself, stalled the other attorney's inquiries for several years, and eventually miscalculated his fee; in another matter, the attorney forged a client's endorsement on a settlement check; prior history included a public reprimand, a reprimand, and two three-month suspensions).

Respondent's conduct was not as serious as Sonstein's (three-month suspension for failing to protect the lienholder's rights despite his assurances that he would, endorsing the settlement check without consent, and charging an excessive fee), or Moorman's (three-month suspension for misrepresentations, forgery, and an extensive ethics history). Respondent's misconduct was more like that of Lowenstein (reprimand), in that both attorneys made false statements to others (misrepresentation by silence in Lowenstein) and were guilty of improperly disbursing funds or permitting the improper disbursement of settlement funds. However, while

Lowenstein's misconduct was more passive, this respondent tried to actively mislead Liberty Mutual in an attempt to persuade the insurer to compromise its lien when, in fact, he had already received the settlement proceeds and had disbursed fees to his firm and to the client.

Aggravating factors in this case are that respondent received a reprimand (arising from the same misconduct) and that this is his second default. It is well-settled that discipline in default matters is enhanced to reflect the attorneys' total lack of cooperation with the disciplinary system. In re Nemshick, 180 N.J. 304 (2004) (default matter in which a three-month suspension was imposed for infractions that typically result in a reprimand; no ethics history).

The most troubling aspect here is that respondent has defaulted twice and has made himself totally inaccessible to the ethics authorities. His failure to participate in the ethics process has made it impossible to establish the true extent of his misconduct. We, therefore, determine that a three-month suspension is warranted in this case.

In addition, respondent should not be reinstated to practice until he cooperates with the OAE, by providing it with the information it has requested. Furthermore, because respondent seems to have disappeared without an explanation,

prior to his reinstatement, we require that he provide proof of fitness to practice law from a mental health professional approved by the OAE.

Member Neuwirth 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
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jeffrey W. Lutz
Docket No. DRB 07-397

Decided: May 20, 2008

Disposition: Three-month suspension

Members	Three-month Suspension	Reprimand	Admonition	Disqualified	Did not participate
O'Shaughnessy	X				
Pashman	X				
Baugh	X				
Boylan	X				
Frost	X				
Lolla	X				
Neuwirth					X
Stanton	X				
Wissinger	X				
Total:	8				1

Julianne K. DeCore
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Chief Counsel