Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-114
District Docket No. VIII-2016-0006E

In the Matter of	
Emery Z. Toth	
An Attorney at Law	

Decision

Argued: May 23, 2019

Decided: October 29, 2019

Howard Duff appeared on behalf of the District VIII Ethics Committee.

Respondent's counsel waived appearance for oral argument.

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

This matter was before us based on a recommendation for a reprimand filed by the District VIII Ethics Committee (DEC). A formal ethics complaint charged respondent with a violation of RPC 1.4(b) (failure to keep a client reasonably informed about a matter and to promptly comply with reasonable requests for information).

Although we determine that respondent committed misconduct, we are unable to reach a consensus on the proper quantum of discipline. Three members voted for a three-month suspension; three members voted for a censure.

Respondent was admitted to the New Jersey bar in 1974. In 2009, he received a reprimand in his role as a judge for acting in a "discourteous and distasteful manner to a defendant" and failing to abide by the New Jersey Court Rules while performing the duties of a municipal court judge. In re Toth, 200 N.J. 217 (2009). He was not disciplined reciprocally as an attorney.

On May 22, 2018, respondent received an admonition for engaging in a conflict of interest.

On February 23, 2012, DE, the grievant, retained respondent to vacate a May 7, 2010 Amended Dual Final Judgment of Divorce (JOD) and to defend an enforcement action. DE testified at the ethics hearing that he and respondent executed a written fee agreement calling for a $3,500 flat fee, which DE paid in several installments.

DE and respondent realized early in the representation that the JOD need not be vacated. Thereafter, the representation centered on DE's desire to retrieve his personal belongings from the former marital home. Over the

ensuing three years, neither DE nor his former wife, JD, filed a motion to enforce the JOD.

Presumably, on June 1, 2010, a final restraining order had been entered, which prevented DE from entering the marital premises. He was to arrange the retrieval of his personal belongings, but only with police present. Two or three times, DE had arranged for police to meet him at the house to obtain his belongings, but JD turned them away each time. After those failed attempts, DE retained respondent to arrange for the removal of his belongings through JD's counsel, with police present.

For the next three-plus years, DE did not retrieve his belongings. He and respondent, the only witnesses to testify at the DEC hearing, differ as to the reasons for that outcome.[1]

DE and JD had owned and operated a landscaping business, which JD received in the divorce. Pursuant to the JOD, DE was required to transfer to JD the title of two landscape trailers and his interest in the former marital home.

DE kept records of his communications with respondent and his office staff during the representation. He testified that, from about April 2012

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[1] The ethics complaint did not charge respondent with lack of diligence or gross neglect.

through October 2015, he sent respondent or his staff fifty-three e-mails seeking information. Those e-mails generated nineteen replies. He telephoned the office fifty-seven times, generating eight return calls from respondent. He also sent eighteen texts to respondent's personal cell phone, which respondent answered five times.

DE further testified that he placed handwritten notes in daily calendars that he maintained for the years 2012 through 2016, describing events that occurred in the matter. He also produced a list of e-mails that he sent to respondent (without the e-mails themselves) from his e-mail account, and several individual e-mails to respondent from that account. DE admitted that the records of his communications with respondent were not exhaustive. Rather, he grew weary of keeping records and tracking his communications with respondent and his office staff.

According to DE, in 2012, respondent had arranged for movers to retrieve his belongings from the former marital home, but that task was not completed because the movers' truck broke down. In an October 28, 2012 e-mail to respondent, DE complained that he had paid respondent $3,000 in fees, had seen no resolution of his case, and had not been kept informed about the matter. In respect of the failed move, the e-mail stated that they "had a two-week deadline and after a week and a half I had not heard from you, that's

when you told me the moving truck broke." Two months later, respondent sent a similar text to respondent, who did not reply to either communication.

Respondent denied that a truck breakdown had been responsible for DE's failure to obtain his belongings. Respondent claimed that he had arranged for a small moving company to retrieve DE's belongings, but at the last minute, DE, not the mover, had canceled the move. Moreover, via a July 20, 2012 letter to JD's attorney, Marisa Baker Trofimov, respondent had requested a one-week extension because his moving company had "a disabled van." In turn, respondent explained that, because the owner of the moving company was a mechanic, respondent had assumed that he had fixed the truck prior to the attempted retrieval of DE's property. Respondent was confident that "it was [DE] who did not want or could not go that day. That's what was relayed to me."

DE contacted respondent's office numerous times from late December 2012 to March 2013, seeking to retrieve his possessions, occasionally speaking with respondent's staff, but not advancing his cause. On March 23, 2013, respondent sent DE a letter stating, in part, as follows:

> As you know I had made arrangements for you to pick up your belongings, even thought [sic] you physically

> were restrained from entering the premises, you could have coordinated this with friends and relatives. Your belongings have been at the house for approximately five years. Your ex-wife threatened to discard them, which is the last communication I got from her attorney but she did not respond when we followed up with phone calls.
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> [Ex.R-1.]

DE continued to text respondent and to call his office through June 2013, garnering respondent's reply on June 26, 2013, that he would "check out" the status of the matter. In July 2013, DE texted respondent that it had been almost "a year and a half and I'm not getting any closer to getting my stuff." At that point, respondent's staff sent DE the following e-mail:

> [DE], while I was looking through your file I came across a letter from your former wife's attorney. When I read the letter I realized that you never executed the Quit Claim Deed nor did you give her the title for one of the trailers. We cannot file a motion for you to enforce litigant's rights if you, yourself have not complied with the Judgment of divorce. I suggest that you bring the title to our office so that I can forward it to your wife. She is willing to pay for the preparation of the Quit Claim Deed and I believe that we must make sure that you are in compliance with the divorce before we file a motion, it is called "unclean hands" which means you have not complied with an order of the court but yet you are filing a motion to make you [sic] former wife comply. Please let me know about this.
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> [Ex.P-7.]

In contrast to DE's allegation that respondent did not communicate with him, respondent produced seventeen letters, dated from February 2012 to September 2013, about DE's matter. The letters address DE's personal property, the need for him to execute a quitclaim deed for his interest in the marital home, and his transfer of title to a landscape trailer to JD. Respondent testified that, despite DE's claimed desperation to obtain his belongings, DE was stalling in order to prevent the resolution of the issues in his case. For example, DE had the original title to the trailer, only to lose it a month or two later, when he was pressured to transfer it to JD. Respondent believed that DE was holding items "hostage" until after he obtained his personal property. DE admitted at the DEC hearing that he sent a July 26, 2013 e-mail to respondent's office, stating, "I can get title to you by mail, although I'm hesitant to do so for fear that she'll get the title and still give me a hard time getting my things."

By letter dated September 17, 2013, respondent reminded DE that respondent could not file a motion to obtain DE's belongings until he transferred title for the trailer, and executed a quitclaim deed to the marital home, in accordance with the JOD. Respondent enclosed a copy of an August 27, 2013 letter from Trofimov in which she had agreed to prepare the deed for DE's signature, but requested the trailer title.

Respondent produced no evidence of communications with DE after September 2013. However, DE produced scores of e-mail and telephone contacts with respondent's office during 2014, in attempts to resolve his matter. Although DE received sporadic replies from respondent's staff, those replies did little to assist him in the recovery of his belongings.

In a December 24, 2014 e-mail to respondent's office, DE commented, "I just feel like in almost three years my matter has not been important, I keep being put on the back burner." Thereafter, from January 9 to March 24, 2015, DE telephoned respondent's office numerous times and sent a March 24, 2015 e-mail expressing his dissatisfaction with the lack of progress in his case. The next day, respondent's staff replied that respondent was out of town.

Although respondent called DE a month later, on April 21, 2015, respondent blamed DE for failing to retrieve his belongings in 2012, because DE had a problem that day. DE recalled correcting respondent that respondent's mover, not he, had a problem that day.

On April 30, 2015, DE called respondent's office and was told that a letter had arrived that he needed to review, and that it would be e-mailed to him. Eleven days later, on May 11, 2015, DE sent respondent's office an e-mail because, "in typical fashion," he had not yet received the letter. DE's e-mail further stated, "these long lapses have done nothing but hurt my chances of

getting my belongings, it's made me look like I don't want my stuff when in fact I'd die for my belongings."

Finally, on June 4, 2015, DE went to respondent's office, an hour's drive, to pick up the letter that was supposed to have been mailed to him. Upon his return home, he sent an e-mail addressed to respondent and his staff which stated as follows:

> I just got home from picking up the letter I waited over a month to receive, and it states that they [JD and her counsel] wanted to hear by close of business on Friday, May 1st or they will file a motion to get the deed, hold me in contempt, and will seek full reimbursement of counsel fees since she first became involved with the case in 2012. This is absolutely unacceptable. I am not and will not be responsible for your office's failure to provide me with a letter you told me about over a month ago and called your office about. This makes me look and feel like a terrible person. I'm at a loss of what else to say.
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> [Ex.P-22.]

DE testified that, although he filed the ethics grievance on November 9, 2015, he communicated with respondent's office in early 2016. On January 11, 2016, he called respondent's office because Trofimov had not yet received his signed quitclaim deed and, according to DE, was about to file a motion to

obtain the deed, for which DE would be liable for attorney's fees. On January 13, 2016, he called and was told that the deed would be sent.

On March 30, 2016, DE wrote in his daily calendar that he had "signed and delivered quitclaim deed and brought to [JD's] lawyer" that day. At the DEC hearing, he admitted being somewhat confused by this entry, "because early on in my bullet points, there was talk of going to [respondent's] office and signing the quitclaim deed. And here we are, couple years later, and it's finally being delivered by me."

In 2017, at a fee arbitration proceeding, DE was awarded the return of the entire $3,500 fee he had paid respondent.[2]

For his part, respondent testified that he spoke with DE as many as eighty times via cell phone during the representation, far more than the eight times that DE had alleged. He also claimed to have met DE at diners to discuss his case, because respondent's office was quite a distance from DE's home.

Respondent claimed that DE stalled on the issue of the deed and trailer title, was untruthful about the moving truck, and was abusive and volatile toward both of respondent's legal assistants. The assistants told respondent that

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[2] Although fee arbitration proceedings are confidential, we deem respondent to have waived confidentiality at the ethics hearing.

DE had "threatened to come down the office and they asked whether they should call the police. He said he was going to make a scene at my office." Respondent did not support this allegation with documents or other testimony.

Respondent presented no evidence beyond his testimony and the letters from 2012 and 2013. There were no office telephone records; no personal cell phone records; no e-mail chains with DE; no text messages between them; and no notes to his file to support his position that he properly communicated with DE over the course of the representation.

As previously mentioned, neither respondent nor Trofimov filed a motion to enforce litigant's rights. It is unclear whether DE ever retrieved his belongings.

The hearing panel found that communications between respondent and DE during 2012 and 2013 were less than perfect, but did not rise to the level of ethics infractions. After March 2014, however, respondent and his staff ignored numerous pleas for information from DE until his staff finally contacted DE on December 24, 2014. The hearing panel concluded that respondent had failed to communicate important aspects of the case to DE, including the events surrounding the quitclaim deed, which DE hand-delivered to Trofimov himself, on March 30, 2016.

The hearing panel also rejected respondent's assertion that DE had been inappropriate or abusive to his staff, a claim that was "not consistent with the many emails sent by the Grievant which are all polite to a fault."

The panel considered, in mitigation, that respondent has been a member of the New Jersey bar for forty-five years; that he has held non-judicial municipal positions as a zoning officer and parking authority attorney; that he represented patients who were involuntarily committed to various institutions; and that he has served as a municipal court judge in ten municipalities over the past twenty-five years, and was named chief judge in three of them. In aggravation, the panel considered that respondent "has a prior history of unethical conduct from 2009 in the context of his service as a municipal court judge."

The hearing panel recommended the imposition of a reprimand and ten hours of Continuing Legal Education (CLE) each year, for three years, in addition to mandatory courses. Two of the ten hours should focus on technology for private law offices.

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

In February 2012, DE retained respondent in respect of post-judgment divorce issues, for which he paid respondent a flat fee of $3,500. The representation revolved around DE's desire to retrieve personal property that remained at the former marital home after the divorce and, if necessary, to defend a motion to enforce litigant's rights. As it turned out, neither DE nor JD resorted to such a motion during the representation. The ethics complaint charged respondent with a sole violation of RPC 1.4(b) for his failure to communicate with DE.

DE produced numerous contemporaneous notes and records of his interactions with respondent and his office staff during the three-plus-year representation: daily calendars for 2012 through 2016; a list of e-mails that he sent to respondent; several individual e-mails that he sent to respondent; and texts messages between DE and respondent.

In turn, respondent produced seventeen letters sent between February 2012 and September 2013. Those letters evidence communications between respondent and Trofimov, and respondent and DE, which revealed that, in accordance with the JOD, Trofimov required a quitclaim deed to the marital home and title to a landscape trailer, while respondent sought to retrieve DE's personal property from the former marital home.

Respondent, however, failed to produce documentation that he kept DE informed about the status of his case after September 2013. It is clear from DE's records that he reached out to respondent, often through office staff, numerous times during 2014 and early 2015 regarding the status of his case. To the extent that he received replies from respondent or staff during that time, they did little to accomplish the return of DE's personal belongings.

Additionally, by his constant questioning of respondent over the course of the representation, DE learned that a quitclaim deed that he had signed on August 6, 2014 had not been received by Trofimov as of May 1, 2015. DE resolved that issue on March 30, 2016, more than four years after he had retained respondent and several months after he filed the ethics grievance. He traveled to respondent's office, signed another quitclaim deed, and hand-delivered it to Trofimov.

The record clearly established that, from 2014 through March 2016, respondent failed to keep his client reasonably informed about the status of the matter, in violation of RPC 1.4(b).

Although respondent cast DE as a difficult and abusive client, he offered no support for those accusations. In light of the obvious even-tempered and polite nature of DE's written communications throughout the representation, it was incumbent on respondent to document any alleged difficulties or abuses,

especially if, as respondent claimed, staff felt so threatened that they were inclined to call police. Yet, respondent did not make corresponding notes to DE's file or present the testimony of staff about DE's alleged abuses. Like the DEC, we reject respondent's assertions as being without merit.

In respect of respondent's apparent failure to obtain DE's belongings for more than three years and to timely provide his adversary with a quitclaim deed, the complaint did not allege gross neglect or lack of diligence. Accordingly, we make no finding that respondent violated RPC 1.1(a) or RPC 1.3. See R. 1:20-4(b), requiring the complaint to specify the ethics rules alleged to have been violated.

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Cynthia A. Matheke, DRB 13-353 (July 17, 2014) (attorney violated RPC 1.4(b) and (c) by failing to advise her client about "virtually every important event" in the client's malpractice case between 2006 and 2010, including the dismissal of her complaint) and In the Matter of Sean Lawrence Branigan, DRB 14-088 (June 23, 2014) (attorney failed to send the client an invoice for the time spent on her matrimonial case and ignored her e-mail and telephone calls seeking an accounting of the work he had performed and the amount she owed; a violation of RPC 1.4(b); we considered that the attorney had an unblemished record in

fourteen years at the bar and that the matter seemed to be an isolated event that may have been exacerbated by the confluence of several random events, including the flooding to his office, in the wake of hurricane Irene, the hacking of his e-mail system, and the fact that his firm was undergoing a change of the program and process to track and bill for its time).

If the attorney has a disciplinary record, a reprimand may result. See, e.g., In re Tyler, 217 N.J. 525 (2014) (attorney violated RPC 1.4(b) when, after a client had retained her to re-open a Chapter 7 bankruptcy to add a previously omitted creditor and to discharge that particular debt, she ceased communicating with him and never informed him that the creditor had been added to the bankruptcy schedules, the debt had been discharged, and the bankruptcy closed; prior reprimand for, among other things, failure to communicate in six bankruptcy cases) and In re Tan, 217 N.J. 149 (2014) (attorney violated RPC 1.4(b) when he failed to return approximately twenty calls from his client; due to his disciplinary history, which included, among other things, a censure for failure to communicate with a client, a reprimand was imposed for his failure to learn from his prior ethics mistakes).

In mitigation, respondent stated that he has been a member of the bar for forty-five years and a municipal court judge for twenty-five of them. In

addition, he has served as a zoning officer and parking authority attorney, and represented involuntarily committed patients at various institutions.

In aggravation, respondent has prior discipline, albeit for dissimilar misconduct. In 2009, he was reprimanded in his role as a judge, without reciprocal discipline as an attorney, for acting in a "discourteous and distasteful manner to a defendant," while performing the duties of a municipal court judge. On May 22, 2018, respondent received an admonition for a conflict of interest.

With an admonition as the baseline sanction for respondent's misconduct, we conclude that his mitigation does not outweigh the aggravating factors presented. Respondent's forty-five years at the bar were not problem-free, as seen by his disciplinary history. Moreover, the fact that he has served as a municipal court judge for twenty-five years, while admirable, is also marred by the 2009 reprimand that he received for misconduct while serving as a municipal court judge.

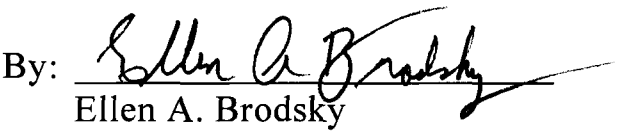
We were divided on the issue of sanction. Chair Clark and Members Boyer and Hoberman voted for a censure. Vice-Chair Gallipoli, and Members Joseph and Zmirich voted to impose a three-month suspension. We also require respondent to take two hours of CLE per year for three years, focused

on office technology, in addition to the courses required of all New Jersey attorneys.

Members Petrou, Rivera, and Singer 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
Bruce W. Clark, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Emery Z. Toth
Docket No. DRB 19-114

Argued: May 23, 2019

Decided: October 29, 2019

Disposition: Other

Members	Three-Month Suspension	Censure	Recused	Did Not Participate
Clark		X		
Gallipoli	X			
Boyer		X		
Hoberman		X		
Joseph	X			
Petrou				X
Rivera				X
Singer				X
Zmirich	X			
Total:	3	3	0	3

Ellen A. Brodsky
Chief Counsel