Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-381
District Docket No. VIII-2014-0023E

In the Matter of

Mark R. Silber

An Attorney at Law

Decision

Argued: February 20, 2020

Decided: August 5, 2020

Patricia M. Love appeared on behalf of the District VIII Ethics Committee.

Respondent appeared pro se.

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

On October 17, 2019, this matter was before us on a recommendation for an admonition filed by the District VIII Ethics Committee (DEC). We determined to treat the matter as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4). The complaint charged respondent with having violated RPC 1.2(a) (failing to abide by client's decisions concerning the scope

and objectives of representation); RPC 1.5(a) (charging an unreasonable fee); RPC 1.6(a) (revealing confidential client information); RPC 1.7(a)(2) (engaging in a conflict of interest); RPC 1.8(b) (using client information to the client's detriment); RPC 1.16(a)(1) (failing to withdraw from representation); RPC 1.16(d) (failing to protect the client's interests upon termination of the representation); RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

For the reasons set forth below, we determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1973. He has no prior discipline. At all relevant times, he maintained an office for the practice of law in Metuchen, New Jersey.

At the outset of the ethics hearing, the presenter withdrew the charges that respondent had violated RPC 8.4(c) and RPC 8.4(d).

According to a June 9, 2017 stipulation of facts, Lois Krupowies, the grievant, had initiated a breach of warranty and Lemon Law suit against Ford Motor Company (FMC) after purchasing an automobile from its dealership, Bell Ford. Krupowies's former counsel had obtained a $3,500 arbitration award. Dissatisfied with that result, she retained respondent and paid a $7,500 retainer.

After evaluating Krupowies's case, respondent concluded that her prospects for a better result were poor. In a September 4, 2012 e-mail to Krupowies, he explained that she had placed extensive mileage on the car and that the expert she previously had obtained was poor. Respondent asserted that the strongest aspect of her case was that "[FMC] knows and respects me."

Respondent negotiated a settlement whereby FMC repurchased the car from Krupowies and Bell Ford for $33,000, in exchange for clear title to the vehicle. Thereafter, FMC sent the settlement funds to respondent to hold in escrow. Krupowies delivered the vehicle to Bell Ford, signed a document transferring title to FMC, and accepted a receipt for the vehicle and copies of the signed documents. On January 11, 2013, Krupowies delivered the receipt and copies of the signed documents to respondent, they executed a closing statement, and respondent gave Krupowies a trust account check for $30,851, representing her net settlement proceeds.

In May 2013, because Bell Ford had failed or refused to send the title documents to FMC as required, FMC or its counsel informed respondent that FMC required Krupowies to obtain a duplicate title or execute a power of attorney (POA) so that FMC could do so. Krupowies executed a POA, which respondent sent to FMC. In July 2013, FMC informed respondent that the New Jersey Motor Vehicle Commission would not issue a duplicate title without a

copy of Krupowies's driver's license to authenticate its request. Therefore, FMC requested that Krupowies obtain a duplicate title herself or provide FMC a copy of her driver's license.

Krupowies contended that she had no obligation to provide FMC with a copy of her driver's license. Between August 26 and 28, 2013, respondent sent Krupowies e-mails and text messages informing her that she was obligated to cooperate with FMC by conveying good title, and that, if she failed to do so, and litigation ensued, the court would not permit her to retain the settlement proceeds of $33,000. Respondent also chided Krupowies and cautioned her that he would begin billing her for additional legal services.

On August 26, 2013, respondent sent Krupowies a threatening text message, pressuring her for a copy of her license. In the text message, respondent warned Krupowies that he would soon file an order to show cause seeking legal fees, costs, and a legal penalty of $100 per day for each day that she refused to cooperate. He also complained that she was jeopardizing his reputation for integrity with FMC, which he needed to "jealously protect." In a second text message that day, respondent warned Krupowies that he would send his application to the court the next day, and that she should provide her driver's license to him before he contacted the court. He also advised her to consult another attorney, because FMC could sue her for damages.

Thereafter, by letter dated September 25, 2013, respondent informed FMC's counsel that his client had refused to fulfill her obligation to convey title to her repurchased vehicle to Ford Motor Company. The letter contained a detailed timeline of his attempts to obtain a copy of Krupowies's driver's license, and her refusal to cooperate with him. Respondent concluded the letter by stating, "I regret I was not able to fulfill my professional duties and responsibilities to deliver title to your client."

From September through December 2013, respondent sent Krupowies monthly bills, with interest, charging for the time he spent trying to obtain a copy of her driver's license. In January 2014, he sent Krupowies a "Pre-Action Notice" informing her of her right to request fee arbitration and of his right to sue her for the fees after thirty days.

Respondent testified that Krupowies had purchased the 2012 Ford Focus from Bell Ford for $25,000, and accumulated 14,000 miles on the vehicle. He claimed that he had obtained a very good result for her, due to his good reputation with FMC. Furthermore, respondent considered his reputation with the auto manufacturer to be a factor in Krupowies's decision to retain him in the first place.

At several points during the hearing, respondent conceded that he came to treat Krupowies in an adversarial manner, explaining that he believed she had a

continuing obligation to provide good title to FMC. Moreover, he was concerned that his trust account had been used for the transaction. Thereafter, the following exchange took place between respondent and the panel chair:

> MR. GALAX: I believe the Complainant says here she knows of no requirement.
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> MR. SILBER: She's wrong. She's wrong. You can't get a duplicate title unless you prove who you are. And if you have a power of attorney, now you're one person removed. I don't care what she says. She's wrong. And let's assume I'm wrong. It doesn't matter, because under the RPCs the definition is if I have a reasonable basis to believe that I haven't committed an ethical violation. And I stand here before you telling you, you just can't take a power of attorney, go to Motor Vehicles, and get a duplicate title. You can't do it. You have to have a photocopy of a driver's license.
>
> MR. GALAX: Okay. So we all have difficult clients from time to time.
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> MR. SILBER: I know. I did the wrong thing.
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> MR. GALAX: You had a client who refused to cooperate, right?
>
> MR. SILBER: She did.
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> MR. GALAX: So you could have gone to Ford and said, there's nothing more I could do.
>
> MR. SILBER: Yeah.
>
> MR. GALAX: Is that correct?
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> MR. SILBER: That's correct. Not could have. I should have.
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> MR. GALAX: But instead –
>
> MR. SILBER: I wish I had.

MR. GALAX: Instead you took Ford's position, which was a position contrary to your client's position; is that correct?

MR. SILBER: Yes. But, again, I have mitigation. But, go ahead. I did. I did.

[T43-8 to T44-18.][1]

Respondent conceded that, when Krupowies took a contrary position, he should have withdrawn and he should have told FMC's counsel, "I can't help you. That's what I should have done."

Respondent urged the panel to consider, in mitigation, that Krupowies sought him out due to his reputation with FMC. Respondent also testified that, during the representation, he had joined in her search for a replacement vehicle and followed her to a Subaru dealership on a Saturday to negotiate a purchase. Subaru held the car of her choice "for three, four months with no signed contract, no deposit, nothing. They held it for her until she got her money back from Ford."

Respondent also urged the panel to consider that the Office of Attorney Ethics (OAE) originally had offered him a diversion,[2] after which he took

[1] "T" refers to the transcript of the June 12, 2017 ethics hearing.

[2] Although agreements in lieu of discipline are confidential, respondent waived confidentiality by raising it in a public forum.

Continuing Legal Education credits in an attempt to satisfy the agreement, only to have the agreement in lieu of discipline rescinded before it was fully executed.

In addition, respondent presented a character witness, Lori Faiello, his former legal secretary, who appeared by telephone. According to Faiello, respondent had not asked her to testify on his behalf. Rather, she volunteered to do so, having worked for him up to the time of her move out of state two weeks before the ethics hearing. Faiello gave a glowing account of respondent as her employer of seven years. His integrity was unquestionable, he went above and beyond for his clients, and often traveled to their homes if they could not go to the office. Respondent was meticulous, even-tempered, and spent as much time on calls with potential clients as necessary: "He'll – after being on the phone with someone for an hour, hour and a half, he'll tell them, you don't need me. Do A, B, C, and D, and this will take care of your problem."

According to Faiello, respondent never lost his temper with anyone in the seven years that she worked for him. She was shocked to learn about Krupowies's allegations of threatening behavior.

The hearing panel found respondent guilty of a conflict of interest for his actions after Krupowies refused to provide him with a copy of her driver's license. Krupowies had the power to obtain a duplicate title for her Ford vehicle or thwart FMC's efforts to obtain one. Once respondent realized that his client

would not assist him to obtain a duplicate title, after she delivered the original title to Bell Ford, he resorted to acts that benefited FMC and protected his own interests – a rewarding relationship with FMC. The DEC, thus, found a violation of RPC 1.7(a)(2).

Because the initial hearing panel report had failed to address the remaining charges, the DEC issued an April 11, 2019 Addendum Report Recommending Admonition. Essentially, the hearing panel found respondent guilty of all the charged violations, but determined that all the RPC infractions were subsumed by the conflict of interest charge.

Specifically, in respect of RPC 1.16(a)(1), the DEC found that respondent failed to protect Krupowies's interests upon termination of the representation, and that he had effectively terminated the representation by threatening to file an order to show cause against her. In addition, the panel concluded that respondent had disclosed to his adversary information relating to the representation, without Krupowies's consent, a violation of RPC 1.6(a)(1), and that he revealed to FMC confidential information about communications with his client, to her disadvantage, a violation of RPC 1.8(b).

Finally, the panel found that, once respondent engaged in the conflict of interest, "his actions were beyond the scope of his contract and representations and were not for the benefit" of Krupowies. Rather, they were for his and FMC's

own benefit, which was outside the scope of the representation, and, therefore, a violation of RPC 1.2(a).

The hearing panel recommended the imposition of an admonition.

On September 4, 2019, the presenter filed exceptions to the hearing panel's recommendation of an admonition. In the presenter's view, although the additional violations arose from the same set of facts, they should not have been subsumed in the RPC 1.7(a)(2) finding. The presenter contended that the additional violations should not be treated as "lesser included offenses," as in criminal matters, but should have been found to be violations in their own right. Consequently, she argued that, with a reprimand as the baseline sanction for a conflict of interest, the additional violations warrant the imposition of a censure.

In a September 16, 2019 letter brief, respondent urged us to revert to the diversionary agreement that he had accepted, but which the OAE withdrew. Respondent's letter cited facts that would have occurred, if at all, before the matter was public, i.e., before the filing of the complaint. According to respondent, he was twice offered an agreement in lieu of discipline, which he accepted and executed. Thereafter, respondent claims, someone involved with the diversion failed to send it to him or explain why it was not forthcoming.

Respondent's brief did not provide a reason for the rescission of the diversion. He lamented, however, that three investigators took a total of five

years to bring this ethics matter to a conclusion, all because he "grew indignant and self-righteous over an outrageous position my client took. . . . The irony is that she ultimately took my advice and signed a limited power of attorney rather than face a Ford motion to return the settlement money." In respondent's view, fundamental fairness required that the diversion should again be offered to him.

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.

Respondent represented Krupowies after she encountered problems with a Ford vehicle that she purchased from Bell Ford. After respondent obtained a favorable result for her, Bell Ford lost the document transferring title that Krupowies had executed for FMC's benefit. Thereafter, FMC was unable to secure a duplicate title for the vehicle without Krupowies's assistance, but, after she signed a power of attorney, she ceased cooperating with respondent and FMC in that effort.

Respondent believed that Krupowies had a continuing duty to assist FMC in obtaining good title to the vehicle, inasmuch as she had accepted the settlement funds from FMC. Frustrated by his client's recalcitrance, respondent admittedly engaged in a conflict of interest beginning in August 26, 2013, when

he sent two text messages to Krupowies, challenging her refusal to provide a copy her driver's license for FMC.

In the texts, respondent advised Krupowies to consult with another attorney, effectively terminating the representation. He also informed her that he was filing a lawsuit against her for legal fees in addition to the $7,500 that she had paid for the representation and that he would seek a legal penalty of $100 per day until she acquiesced to his demands.

Respondent admitted that, as of August 26, 2013, he had allowed his own personal interest in preserving a favorable relationship with FMC to cloud his judgment about Krupowies's representation. Respondent conceded that he should have withdrawn from the representation. He did not, and from that day forward, his own personal interests were adverse to those of his client, a violation of RPC 1.7(a)(2).

Although the complaint also charged a violation of RPC 1.16(a) for respondent's failure to withdraw from the representation once he created a conflict, that charge is based on the same misconduct addressed by the RPC 1.7(a)(2) finding and, thus, we dismiss it as duplicative.

Had respondent limited his misconduct to the conflict situation, he might have minimized his wrongdoing. However, just a month later, on September 25, 2013, he doubled down on prior texts, copying Krupowies on a letter to FMC's

counsel in which he itemized numerous privileged documents and communications with her over the course of the representation. Respondent's failure to protect his client's interests upon termination of the representation constituted a violation of RPC 1.16(d). Moreover, he divulged the existence of confidential attorney-client communications, for which we find a violation of RPC 1.6(a).

The complaint also charged respondent with a violation of RPC 1.8(b) for sharing information to the client's detriment, regarding privileged documents and communications about the representation. It was inherently detrimental to Krupowies for respondent to have provided her adversaries at FMC with a listing of documents and communications that might have been used against her in the future. We find that respondent's actions violated RPC 1.8(b), but that finding will not change the appropriate quantum of discipline in this case, in light of the close factual connection between the violation of that Rule and the RPC 1.6(a) and RPC 1.16(d) violations already applicable to these facts.

In addition, the complaint charged respondent with having violated RPC 1.2(a) and RPC 1.5(a), under the theory that, in September 2013, despite his unilateral termination of the representation, he began to pressure Krupowies for a copy of her driver's license, purportedly billing her for time spent in his attempts to obtain a copy of it, including for the time spent drafting his

September 25, 2013 letter to FMC's counsel. He continued to send monthly invoices to her through February 2014, adding interest charges along the way. Because he had terminated the representation before those purported legal services and fees were generated, we determine that those additional charges are inapplicable and dismiss them. At best, respondent's misguided conduct constituted an attempt to violate these RPCs, but respondent was not charged with having violated RPC 8.4(a) (attempt to violate the RPCs). Moreover, because the purported legal services were truly for the benefit of FMC, and an attempt to buttress respondent's relationship with FMC, they are adequately addressed by the RPC 1.6(a), RPC 1.7(a)(2) and RPC 1.16(d) violations.

Finally, as previously noted, the presenter withdrew the RPC 8.4(c) and RPC 8.4(d) charges at the outset of the ethics hearing below.

In sum, we find that, in a single client matter, respondent violated RPC 1.6(a)(1), RPC 1.7(a)(2), RPC 1.8(b), and RPC 1.16(d). We determine to dismiss the charges that he violated RPC 1.2(a), RPC 1.5(a), and RPC 1.16(a). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

It is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). See, also, In re Rajan, 237 N.J. 434 (2019)

(the attorney engaged in a conflict of interest and an improper business transaction with a client by investing in a hotel development project spearheaded by an existing client; no prior discipline); In re Drachman, 239 N.J. 3 (2019) (the attorney engaged in a conflict of interest by recommending that his clients use a title insurance company in eight, distinct real estate transactions, without disclosing that he was a salaried employee of that company; there was no evidence of serious economic injury to the clients; the attorney also violated RPC 5.5(a)(1) by practicing law while ineligible to do so; no prior discipline); In re Allegra, 229 N.J. 227 (2017) (the attorney engaged in a conflict of interest by engaging in a sexual relationship with an emotionally vulnerable client; the attorney also engaged in an improper business transaction with the same client by borrowing money from her; respondent promptly repaid all the funds and had no prior discipline); and In re Lord, 220 N.J. 339 (2015) (reprimand for attorney who engaged in a conflict of interest in violation of RPC 1.7(a)(2) when she sent her clients a pre-action letter informing them of their right to request fee arbitration, a prerequisite to the filing of a lawsuit for unpaid fees; she did so while still representing the clients; in addition, the attorney forwarded to her adversary a copy of a letter to her clients that contained confidential attorney-client information, a violation of RPC 1.6(a); finally, the attorney summarily ended the representation of her clients, without notice, prior to her completion

of legal work on their behalf, a violation of RPC 1.16(d); in mitigation, the attorney had no history of discipline in more than thirty years at the bar).

This case is similar to Lord (reprimand), where the attorney engaged in a conflict of interest and then divulged confidential client information to her adversary when she threatened legal action for the recovery of her legal fees. Unlike the attorney in Lord, however, respondent exacerbated his wrongdoing by repeatedly threatening his client with litigation and additional legal fees. Respondent presented compelling mitigation, as considered in Lord – a long legal career without prior discipline (over thirty years for Lord and forty-five years for respondent). In additional mitigation, respondent cooperated with ethics authorities by stipulating to the facts of his misconduct and genuinely accepting responsibility and expressing remorse.

On balance, we determine that a reprimand is adequate to protect the public and preserve confidence in the bar.

Member Singer voted for an admonition. Vice-Chair Gallipoli and Members Joseph and Petrou 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 Mark R. Silber
Docket No. DRB 19-381

Argued: February 20, 2020

Decided: August 5, 2020

Disposition: Reprimand

Members	Reprimand	Admonition	Recused	Did Not Participate
Clark	X			
Gallipoli				X
Boyer	X			
Hoberman	X			
Joseph				X
Petrou				X
Rivera	X			
Singer		X		
Zmirich	X			
Total:	5	1	0	3

Ellen A. Brodsky
Chief Counsel