SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 13-064 and 12-371
District Docket Nos. XIV-2010-0698E
and I-2011-0010E

IN THE MATTERS OF	:
ERNEST A. APONTE	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 18, 2013

Decided: June 25, 2013

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Jose Silva, Jr. appeared on behalf of respondent.

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

At our February 21, 2012 session, we considered a recommendation for an admonition filed by the District I Ethics Committee (DEC) in a matter then docketed as DRB 12-333 (District Docket No. XIV-2010-0698E). We determined to treat that recommendation as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4). The matter was re-docketed as DRB 13-064 and placed on our April 18, 2013 calendar, together with

a matter formerly docketed as DRB 12-210 (District Docket No. I-2011-0010E), also a recommendation for an admonition that we determined to treat as a recommendation for greater discipline, under R. 1:20-(f)(4). DRB 12-210 was re-docketed as DRB 12-371. The two matters were consolidated for resolution.

For the reasons expressed below, we determine that a censure is appropriate for the totality of respondent's conduct in both matters.

Respondent was admitted to the New Jersey bar in 2005. At the relevant time, he maintained law offices in Atlantic City and Galloway, New Jersey. He has no history of discipline.

DRB 13-064; District Docket No. XIV-2010-0698E

The two-count complaint in this matter charged respondent with having violated RPC 1.15(d) and R. 1:21-6 (recordkeeping improprieties), RPC 5.4(a) (sharing legal fees with a non-lawyer), and RPC 5.4(b) (forming a partnership with a non-lawyer).

At the DEC hearing, the parties entered into a stipulation of facts, which, for the most part, mirrored the allegations of the complaint. Respondent was, thereafter, given an opportunity to present mitigating factors.

Respondent stipulated to having violated RPC 1.15(d) and R. 1:21-6 for failing to maintain a trust account from March 2009 through March 2011. According to respondent, he was not aware that he was required to maintain it because he charged flat fees for his services. When he started his own practice, in 2008, he opened a trust account and maintained the account for approximately a year and a half. He did not have any client funds in the account because of the nature of his practice. He did not practice in the areas of personal injury and real estate law. When the bank began to deduct fees from his trust account, he took whatever money was left in the account and "shut it down." He did not open another trust account until this complaint was filed against him.

As to the remaining charges (RPC 5.4(a) and RPC 5.4(b)), respondent admitted that he entered into an arrangement with Miguel Ruiz and Nicholas Velecico, two former loan officers who were in the mortgage modification business, but were not attorneys. Ruize and Velecico had their own business and operated under the name of Casa, LLC.

Respondent, who served clients of limited financial means, realized that a large number of his bankruptcy clients were facing foreclosure and, thus, wanted to expand his law practice into the mortgage modification area. He then entered into a

professional service agreement with Ruiz and Velecico. The parties were not in a formal partnership together, but had separate businesses that complemented each other. Their agreement set forth a flat fee schedule for services provided to clients, as well as a flat fee to be paid to Ruiz and Velecico, for their services as subcontractors. All fees were paid to respondent, who then paid Ruiz and Velecico. Respondent supervised the files and Ruiz' and Velecico's work product. Ruiz and Velecico did not provide legal advice to clients. They produced mortgage modification clients for respondent and assisted respondent in "putting his bankruptcy petitions together." Respondent provided them with business cards that identified them as mortgage analysts for respondent's law firm and listed respondent's law office address and telephone number.

As to the mortgage modifications, Ruiz and Velecico collected all the data and paperwork from the clients; processed and submitted the mortgage applications; contacted the lending institutions about the status of applications; provided clients with regular updates on the status of their applications; performed net present value calculations and debt ratios; prepared financial statements and budget expense forms; mailed information to banks; and followed up with the banks on the

status of the modifications. The clients were notified that respondent was using Casa to do the loan modifications.

As for bankruptcy clients, Ruiz and Velecico collected the paperwork and processed data. Respondent reviewed the data, electronically filed applications, attended first meetings of creditors, and supervised the files to completion. Together, they processed approximately seventy-seven bankruptcy and mortgage modifications matters, from August 16, 2010 to December 31, 2010.

In 2010, respondent paid Ruiz $7,000 and Velecico $4,500. Respondent admitted that he engaged in a prohibited fee-sharing arrangement with non-lawyers and formed an impermissible partnership with non-lawyers. He also acknowledged that he had made a mistake in doing so. He pointed out, however, that his clients had received quality services and that not one of them had been negatively affected by his arrangement with Ruiz and Velecico. He stated to the DEC, "I ask that you punish me accordingly but that you take into consideration the good work that I've done, the lack of malice in my heart, and again that I am truly, truly sorry that we have to panel this."

The presenter argued that a reprimand was appropriate discipline for respondent's violations, while respondent's

counsel urged either the imposition of no discipline or the "lowest" form of discipline.

The DEC found clear and convincing evidence that respondent violated RPC 1.15(d), RPC 5.4(a), and RPC 5.4(b). In determining that an admonition was sufficient discipline, the DEC considered certain mitigating factors, such as respondent's contrition and sincere remorse for his actions, his admission of wrongdoing, the little likelihood that he will repeat the offenses, his cooperation with ethics authorities, that respondent did not realize significant financial gain, the lack of injury to clients, and the remedial measures that he took. The DEC did not specify such remedial measures. Although the DEC cited cases in which the attorneys received reprimands, it was swayed by the fact that respondent's intent was to help financially disadvantaged clients modify their mortgages and obtain relief from creditors.

DRB 12-371; District Docket No. I-2011-0010E

The four-count complaint in this matter charged respondent with having violated R. 1:21-1A(a)(3) (failure to maintain liability insurance while practicing as a professional corporation), RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), and RPC 1.3 (lack of diligence).

Respondent has practiced bankruptcy law since 2005. In 2008, he opened his own law firm.

Grievant Robert Chester is respondent's former friend and former employee. They attended law school together. In 2010, Chester ran into financial problems and sought respondent's assistance. Chester was not yet admitted to the practice of law and wanted to gain some experience while he worked on his own bankruptcy petition. He, therefore, volunteered to work at respondent's office.

In November 2010, respondent began paying Chester $100 a day to work full-time. According to respondent, he trained Chester in bankruptcy and municipal court work. Chester worked with respondent from mid-September 2010 through January 14, 2011, when he was "let go" because of financial and other "numerous reasons." During Chester's association with respondent, they filed approximately twenty to twenty-five bankruptcy petitions.

Respondent stated that he gave Chester access to PACER (national public access to court electronic records) and to his email account. He expected Chester to log onto his email account, to print out emails, and to prepare memoranda on work that respondent "was unable to do." Chester testified, however, that he assumed that the emails from PACER were sent to

respondent's email address. He testified also that he did not have access to that account, that he did not look at the emails sent from the bankruptcy court, and that respondent checked his own emails.

Failure to Maintain Liability Insurance

Respondent stipulated that he did not maintain malpractice insurance from 2009 to 2010.

Chester testified that, in the fall of 2010, he suggested that respondent seek appointments as the public defender in Galloway Township and Atlantic City. As part of the application process, respondent, who practiced law as a corporation, was required to submit a copy of his liability policy. Chester helped respondent prepare the applications. When he asked respondent for a copy of his liability policy, respondent told him that he did not have the insurance because he could not afford it.

Respondent dropped the coverage in 2009, even though his business operated as a corporation. He maintained that, when he became a professional corporation, he obtained liability insurance, but admitted that he did not have it from June 2, 2009 to April 18, 2011. He asserted that, on June 3, 2009, he tried to submit a "quick renewal form" and premium payment,

after learning that his policy had lapsed, but that, "for whatever reason," the insurance company never cashed his check or renewed his policy. When he discovered that the insurance company had not cashed his check, he decided not to reinstate the policy because he could not afford it.

On April 25, 2011, on the advice of his attorney, respondent obtained liability insurance.

Gross Neglect, Pattern of Neglect, and Lack of Diligence

Chester testified that the United States Bankruptcy Court operates primarily on an electronic basis; petitions and motions are filed electronically; correspondence and court notices, including orders, are sent electronically to attorneys' email accounts; and cases may be monitored electronically through the PACER system.

Chester testified that, after a bankruptcy petition is filed, the court sends notices to all creditors advising them, among other things, that the debtor is seeking bankruptcy protection through the automatic stay provision and that the first meeting of creditors has been scheduled. According to Chester, the court's notices to creditors were often returned to respondent's clients as "undeliverable" because respondent's office had provided the court with incorrect addresses. Chester

added that six to eight clients had complained about the return of letters. Chester claimed that, as a result, creditors did not receive notices of bankruptcies and debtors did not receive the benefit of the automatic stay that would have protected them from those creditors' collection procedures.

In his own bankruptcy case, Chester realized that respondent was not complying with the provisions of the bankruptcy order. According to Chester, in early January 2011, when he mentioned to respondent that they had to mail out the "extra creditors' letters," respondent replied, "I never do that, don't worry about it" and never told Chester to do it himself.

Chester found that the lack of notice to the creditors was unfair because they were not aware that the debts were being discharged. He claimed that he would make the corrections himself, without being told to do so. On occasion, clients notified respondent's office of additional debts that had not been listed on the original bankruptcy petition. Such omissions required the filing of a motion to amend the petition to include a new creditor.

In 2010, respondent filed such motions in at least fifteen of the more than one hundred bankruptcy petitions that he filed that year. Chester noted that, when additional creditors were

added to a petition, respondent did not advise the new creditors of the bankruptcy. He claimed that respondent told him that it was not necessary to notify them.

Chester testified further that, after a motion to amend is electronically filed, the bankruptcy court sends a document titled "Order Respecting Amendment to Schedule, D, E, or F or List of Creditors," which requires the debtor's attorney to send the added creditor a copy of the order. The order gives the creditor sixty days, or until a specified date, to file a proof of claim, to file a complaint objecting to the discharge, or to determine the dischargeability of its debt. The order further requires the debtor to serve on the creditor a notice advising the creditor of, among other things, the date of the filing of the petition for relief, the date of the first meeting of the creditors, the date within which a proof of claim must be filed, and the date within which a complaint objecting to the discharge must be filed. Within fourteen days of the order, the debtor is required to file an affidavit with the court certifying compliance with the terms of the order and attaching to it a true copy of the notice required by the order.

For his part, respondent stated that, once an amendment had been filed, his "worry was to make sure that we weren't getting adversary proceeding notices and to get the client discharged."

He contended that he was not afraid of creditors initiating adversary proceedings, but that "an adversary proceeding takes a case where you made $800 and turns it into a mess. It turns into . . . a whole blown-out hearing."

Respondent denied Chester's assertions. He claimed that he showed Chester how to file the orders and amendments. He added that it was his practice to send to the newly added creditors, by regular mail, a copy of the motion seeking to amend the petition. He conceded that the subsequent Orders Respecting Amendment were sent electronically by the court to his email account, that he did not read the emails or Orders Respecting Amendment, that he never sent the required notices or orders to any newly added creditor, and that he did not file the required affidavit of compliance in fifteen cases. He admitted that the creditors were entitled to notification that they had been added whether or not the debtor's case was an "asset or no asset case."

Respondent maintained that he relied on his staff to review the hundreds of emails he received each week because he was "trying to make rain, trying to bring in clients." His workload was voluminous and it was his staff's responsibility to calendar hearing dates and copy documents to be sent to trustees. He

claimed that Chester had access to his email account and that Chester never gave him the emails relating to the orders.

As mentioned previously, Chester disputed respondent's testimony. He stated that he never tried to access respondent's emails, that he did not have access to respondent's email account, and that he never looked at the bankruptcy court's emails.

Relying on Judd v. Wolfe & Judd, 78 F.3d 110 (3rd Cir. 1996) (concluding that it is not necessary to file a motion to discharge a debt if statutory exceptions to the discharge do not apply), respondent argued that it was not necessary to notify creditors in Chapter 7 or 13 cases if the debtors had no assets because there were no assets to liquidate to pay debts; that the creditors were not harmed if they did not receive the required notices because they received a notice of the discharge directly from the court; and that a creditor could always reopen a case after the discharge, but it would cost money to do so. He conceded that he had an obligation to read the courts' orders, that he was required to follow the mandates set forth therein, and that he failed to follow those mandates.

As part of the DEC's investigation, respondent prepared a list of fifteen cases where he did not properly comply with the requirements of amending bankruptcy petitions. Respondent

claimed that the bankruptcy court never contacted him about his failure to file the required affidavits. He claimed further that he had spoken to a bankruptcy court clerk about the failure to give the notice required in the Order Respecting the Amendment and had been advised that "a lot of attorneys miss it." Respondent conceded, however, that such widespread failure did not "make it right."

According to respondent, none of his clients were harmed by his failure to read or comply with the Orders Respecting Amendment. He added that, if any client had been affected, he would have corrected the error, free of charge.

Respondent told the DEC that he is trying to be a better lawyer, but acknowledge that he should be sanctioned for his conduct. He testified that he recently took ICLE courses, including ethics courses, but that the bankruptcy courses he had taken were too elementary. He added that he has also "reached out" to bankruptcy trustees for help and guidance. He now opens all of his emails and has employed a full-time paralegal and a part-time secretary. He continues to work as a sole practitioner and also works part-time as an Atlantic City prosecutor.

The DEC noted that respondent was emotional throughout the proceedings, and that, for the most part, "appeared to be credible." The DEC found that respondent violated R. 1:21-

1A(a)(3) by failing to maintaining liability insurance from June 2, 2009 to April 18, 2011. It observed that the lack of insurance posed a great potential for injury to respondent's clients.

The DEC could not find by clear and convincing evidence that respondent had failed to update creditor addresses, a violation of RPC 1.1(a), because respondent's and Chester's testimony on that point was at odds. According to the DEC, respondent admitted that he failed to read and comply with Orders Respecting Amendments in fifteen instances during 2010. Although respondent provided the creditors with notice of the motion to amend the petition to include their claims against debtors, he did not provide them with notice of the Order Respecting Amendment, the date of petition for relief, the date of the first meeting of creditors or other information in the Orders Respecting Amendment. The DEC determined that respondent's defense that "no harm" was suffered by the creditors or clients because the bankruptcies were "no asset" cases did not excuse his negligence in reading and complying with the orders. The DEC maintained that a creditor could have taken further action to ascertain whether the cases were truly "no asset" cases. Moreover, the DEC found that respondent's offer to represent a client without charge, if a creditor sought

to reopen a case, did not excuse his failure to read and comply with the orders.

The DEC concluded that respondent's failure, in 2010, to open and read orders and emails from the bankruptcy court in fifteen cases, over a one-year period, amounted to gross neglect, pattern of neglect, and lack of diligence. It also concluded that his failure to maintain liability insurance violated R. 1:21-1A(a)(3).

In assessing discipline, the DEC found, as mitigating factors, that respondent did not attempt to "intentionally or unintentionally" mislead clients, the judiciary or disciplinary authorities; that he testified credibly and took responsibility for failing to obtain liability insurance and to read and comply with the orders; that he readily admitted his wrongdoing; that he cooperated with the DEC investigation; and that there was no evidence that any specific client or creditor had been harmed.

The DEC did not give great weight to the fact that (1) respondent took CLE courses, reached out to bankruptcy trustees and improved his office practices because, according to the DEC, these efforts "did not represent enough" to be considered mitigating factors; that (2) he was relatively young and inexperienced, noting that he had practiced with an experienced attorney before opening his own practice; that (3) he relied on

his staff to inform him about notices and email notifications, he was responsible for the actions of his employees; and that (4) finding that his liability insurance was "erroneously" terminated, the DEC noted that, when respondent became aware of the termination, he did not act to obtain new coverage.

The DEC concluded that an admonition was sufficient discipline for respondent's conduct in this matter.

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

In DRB 13-064, respondent stipulated to violating RPC 1.15(d), RPC 5.4(a), and RPC 5.4(b). Indeed, the proofs establish, by clear and convincing evidence, respondent's violation of these rules.

In DRB 12-371, the evidence demonstrates, and respondent admitted, that he did not maintain professional liability insurance, as required by R. 1: 21-1A(a)(3). Although not so charged in the complaint, the violation of this Court Rule has been deemed a violation of RPC 5.5(a) (practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction) (count one).

The remaining counts in DRB 12-371 alleged that respondent engaged in gross neglect by failing to review email

notifications, pleadings, orders, and correspondence forwarded by the bankruptcy court (count two); that he displayed a pattern of neglect by failing to provide notice to newly added creditors and failing to review the same items listed in count one (count three); and that he lacked diligence (count four).

Respondent admitted that, after he filed motions to amend bankruptcy petitions to add creditors, he failed to read or comply with the Orders Respecting Amendment in at least fifteen instances. He, therefore, failed to send the required notices to the additional creditors informing them of the date of creditors' meetings, when proofs of claim needed to be filed and the date within which complaints objecting to the discharges had to be filed. He claimed that there was no harm to any client or creditor. No proof of harm was offered by the presenter. We, nevertheless, find that respondent's practice of ignoring the Orders Respecting Amendment was a dangerous practice that had the potential to cause serious harm to creditors or debtors or to result in unnecessary litigation. No actual harm to clients is necessary to find an ethics violation. Thus, we find that respondent lacked diligence and grossly neglected the petitions, after he filed the motions to amend.

The number of cases involved also establishes that he engaged in a pattern of neglect. To find a pattern of neglect at

least three instances of neglect must have occurred. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). Finally, respondent violated R. 1:21-1A(a)(3) by failing to continue with his liability insurance, a violation of RPC 5.5 (a).

The only issue left for determination is the proper discipline for this respondent for violating RPC 1.15(d), RPC 5.4(a) and RPC 5.4(b) in DRB 13-064 and RPC 1.1(a), RPC 1.1(b), RPC 1.3, and R. 1:21-1A(a)(3) (a violation of RPC 5.5(a) in DRB 12-371.

As to respondent's recordkeeping violation (his failure to maintain a trust account), he asserted a mistaken impression that, because he charged flat fees, he was not required to maintain a trust account. "Ignorance of ethics rules and case law does not diminish responsibility for an ethics violation." In re Eisenberg, 75 N.J. 454, 456 (1978), and In re Goldstein, 116 N.J. 1, 5 (1989).

The appropriate discipline for recordkeeping irregularities, as long as they do not result in negligent misappropriation of clients' funds, is an admonition. See, e.g., In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009) (for extended periods of time, attorney left in his trust account unidentified funds, failed to satisfy liens, allowed

checks to remain uncashed, and failed to perform one of the steps of the reconciliation process; no prior discipline); In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (attorney failed to maintain a trust account in a New Jersey banking institution); In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001) (attorney failed to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards); and In the Matter of Arthur N. Field, DRB 99-142 (July 19, 1999) (attorney did not maintain an attorney trust account in a New Jersey banking institution).

Here, respondent also stipulated to having violated RPC 5.4(a) (fee-sharing with non-lawyers) and RPC 5.4(b) (impermissible partnership with non-lawyers). The fully executed professional service agreement among respondent, Ruiz, and Velecico clearly demonstrates that he violated these rules.

RPC 5.4 was enacted to preserve and to ensure an attorney's independent professional judgment. The rationale for the rule was concisely stated in Emmons, Williams, Mires & Leech v. State Bar of California, 86 Cal. Rptr. 367, 372-373 (Cal. App. 1970): "fee-splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own

profit, rather than the client's fate."[1] RPC 5.4(a)'s prohibition against the sharing of legal fees with non-lawyers was designed to ensure that referrals are made in the client's interest, not in the interest of the party making the referral. Also, the rule is intended to preserve the lawyer's independent professional judgment by having the lawyer, not the referring party, retain control over the case. In re Weinroth, 100 N.J. 343, 350 (1985). In Weinroth, the Court discussed the purpose of the predecessor to the rule:

> The prohibition of the Disciplinary Rule is clear. It simply forbids the splitting or sharing of a legal fee by an attorney with a lay person, particularly when the division of the fee is intended to compensate such a person for recommending or obtaining a client for the attorney. The policy served by this Disciplinary Rule is to ensure that any recommendation made by a non-attorney to a potential client to seek the services of a particular lawyer is made in the *client's* interest, and not to serve the business impulses of either the lawyer or the person making the referral; it also eliminates any monetary incentive for transfer of control over the handling of legal matters from the attorney to the lay person who is responsible

[1] The plaintiffs in Emmons sought a declaratory judgment to nullify the defendant bar association's claim to a one-third forwarding fee, arising from a matter that had originated in the defendant's lawyer referral service. The court held that the plaintiff's claim of illegality raised an abstract argument that did not affect entitlement to the fee to which the parties had already agreed by contract.

> for referring in the client. The Disciplinary Rule also serves to discourage overzealous or unprofessional solicitation by denying compensation to a lay person who engages in such solicitation on behalf of a lawyer, or even as to another lawyer unless the latter has also rendered legal services for the client and the fee that is shared reflects a fair division of those services. For these policies to succeed, both indirect as well as direct fee-sharing must be banned so as fully to preserve the integrity of attorney-client relations.
>
> The plain terms of the Disciplinary Rules and the salutary policy they serve indicate that infractions are to be regarded as serious matters.
>
> [Id. at 349-50; citations omitted.]

In cases involving fee-sharing with a non-lawyer, the discipline has ranged from an admonition to a three-year suspension, depending on the severity of the lawyer's conduct, the presence of other, serious violations, and the lawyer's ethics history. See, e.g., In the Matter of Paul R. Melletz, DRB 12-224 (November 16, 2012) (admonition for attorney who hired a paralegal for immigration matters as an independent contractor and for a few years evenly divided the flat fee charged to immigration clients; mitigation included that the attorney was unaware that the fee-sharing arrangement was unethical and that he terminated the arrangement as soon as he learned of its impropriety); In the Matter of Ejike Ngozi Uzor, DRB 12-075 (May

29, 2012) (admonition for attorney who permitted a loan-modification entity, non-lawyers, to operate under his law firm name and shared fees charged to the loan-modification clients; the entity's non-lawyers also violated RPC 5.4(d)(3) (prohibiting a non-lawyer from exercising control over the professional judgment of the lawyer) by administering "law firm finances" through the attorney's business account; mitigation included the attorney's inexperience at the time of the misconduct, his bar admission only months earlier, his short-term involvement with the entity, the immediate termination of the relationship once he realized its impropriety, his protection of the entity's clients from harm by working gratis, and the contribution of his own funds to pay former staff to complete open files); In the Matter of Geno Saleh Gani, DRB 04-372 (January 31, 2005) (admonition for attorney who contracted with a Texas organization to develop a New Jersey practice to prepare living trusts, made misleading communications about his services, and engaged in other advertising violations; we considered numerous mitigating factors, including the attorney's otherwise unblemished sixteen-year record, his contrition and remorse, his cessation of the improper advertising, the termination of his relationship with the Texas company, his refusal to accept referrals from New Jersey clients, the lack of

harm to clients, and the character letters on his behalf); In re Lardiere, 200 N.J. 267 (2009) (censure for attorney who improperly shared fees with a company that retrieved surplus funds from sheriff's sales of foreclosed properties, engaged in recordkeeping improprieties, and failed to cooperate with disciplinary authorities); In re Malat, 177 N.J. 506 (2003) (three-month suspension for attorney who entered into an arrangement with a Texas corporation to review various estate-planning documents on behalf of clients, for which the corporation paid him; the attorney had a previous reprimand and a three-month suspension); In re Carracino, 156 N.J. 477 (1998) (six-month suspension for attorney who agreed to share fees with a non-lawyer, entered into a law partnership agreement with a non-lawyer, engaged in a conflict of interest, displayed gross neglect, failed to communicate with a client, engaged in conduct involving misrepresentation, and failed to cooperate with disciplinary authorities); In re Moeller, 177 N.J. 511 (2003) (one-year suspension for attorney who entered into an arrangement with a Texas corporation (AES) that marketed and sold living trusts to senior citizens, whereby he filed a certificate of incorporation in New Jersey for AES, was its registered agent, allowed his name to be used in its mailings and was an integral part of its marketing campaign, which

contained many misrepresentations; although the attorney was compensated by AES for reviewing the documents, he never consulted with the clients about his fee or obtained their consent to the arrangement, and he assisted AES in the unauthorized practice of law, misrepresented the amount of his fee, and charged an excessive fee); and In re Rubin, 150 N.J. 207 (1997) (one-year suspension in a default matter for attorney who assisted a non-lawyer in the unauthorized practice of law, improperly divided fees with the non-lawyer without the client's consent, engaged in fee overreaching, violated the terms of an escrow agreement, and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation).

Were respondent's violations limited to improper fee-splitting, forming an improper partnership, and recordkeeping improprieties, a reprimand would have been appropriate discipline because his circumstances fall between Uzor's (admonition) and Lardiere's (censure). Respondent's conduct is similar to Lardiere's but, unlike Lardiere, he is not guilty of failure to cooperate with disciplinary authorities. In fact, by stipulating to the charges, he gave his full cooperation to the ethics system. By the same token, respondent's conduct is more serious than Uzor's, in that respondent was not inexperienced like Uzor, whose misconduct occurred only months after having

been admitted to the bar. Moreover, Uzor took great steps to protect the clients, once he learned that his practices were improper.

But we must also consider respondent's conduct in the bankruptcy matters (DRB 12-371), where he exhibited gross neglect, pattern of neglect, and lack of diligence. Those violations, which are often accompanied by failure to communicate with clients, ordinarily result in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history. See, e.g., In the Matter of Edward Benjamin Bush, DRB 12-073 (April 24, 2012) (attorney admonished for failure to reply to his client's numerous telephone calls and letters over an eleven-month period and for lacking diligence in handling the client's matter); In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (admonition for attorney who grossly neglected a federal civil rights and a foreclosure matter and failed to properly communicate with the client; the attorney also failed to cooperate with disciplinary authorities); In the Matter of Ronald M. Thompson, DRB 10-148 (June 23, 2010) (admonition for attorney whose inaction led to the dismissal of his minor client's complaint and the denial of his motion to restore; when

the client turned eighteen, the attorney did not file a new lawsuit; the statute of limitations expired two years later; the attorney also failed to keep the client's parents informed of the status of the matter, including that the case had been dismissed and that another lawsuit could be filed upon the child's eighteenth birthday); In the Matter of Daniel G. Larkins, DRB 09-155 (October 8, 2009) (admonition imposed where the attorney's gross neglect and lack of diligence resulted in the dismissal of his client's personal injury complaint; he failed to seek its reinstatement; the attorney also lost touch with his client and failed to turn over the file to his client because it was "lost for a time;" mitigating factors included personal problems at the time of the representation and the attorney's lack of disciplinary history since his 1983 admission to the bar); 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); In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (admonition imposed when attorney's inaction in a personal injury action caused the dismissal of the client's complaint; the attorney took no steps to have it reinstated; also, the

attorney did not communicate with the client about the status of the case); In re Dargay, 188 N.J. 273 (2006) (admonition for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior admonition for similar conduct); In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (admonition for attorney whose inaction caused a trademark application to be deemed abandoned on two occasions; the attorney also failed to comply with the client's requests for information about the case); In re Uffelman, 200 N.J. 260 (2009) (reprimand for attorney guilty of gross neglect, lack of diligence, and failure to communicate with a client; although the attorney had no disciplinary record, the reprimand was premised on the extensive harm caused to the client, who was forced to shut down his business for three months because of the attorney's failure to represent the client's interests diligently and responsibly); and In re Zeitler, 165 N.J. 503 (2000) (reprimand for attorney guilty of lack of diligence and failure to communicate with clients; extensive ethics history).

When an attorney displays a pattern of neglect, combined with other non-serious violations, a reprimand may also be imposed. See, e.g., In re Tyler, 204 N.J. 629 (2011) (motion for discipline by consent; in six bankruptcy cases the attorney was found guilty of gross neglect, pattern of neglect, lack of

diligence, and failure to communicate with clients; in one of the matters she communicated directly with a client when she should have known that subsequent counsel had already been engaged; mitigating factors considered were her lack of a disciplinary history and her physical and mental health problems at the time of the misconduct); In re Gellene, 203 N.J. 443 (2010) (attorney guilty of gross neglect, pattern of neglect, and lack of diligence by failure to timely file three appellate briefs); In re Weiss, 173 N.J. 323 (2002) (motion for discipline by consent; attorney engaged in gross neglect, pattern of neglect, and lack of diligence); In re Balint, 170 N.J. 198 (2001) (in three client matters, attorney engaged in gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (attorney guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate in a number of cases handled on behalf of an insurance company).

Respondent is also guilty of having violated R. 1:21-1A(a)(3), for which we previously determined that an admonition was the appropriate form of discipline. In In the Matter of F. Gerald Fitzpatrick, 99-046 (April 21, 1999) we determined that the lack of liability insurance was a violation of RPC 5.5(a).

In Fitzpatrick, the attorney did not have professional liability insurance for a six-year period. In this matter, respondent did not have coverage for approximately two years. He made a conscious decision not to renew his policy because of financial considerations, thereby putting his own monetary interests above those of his clients.[2]

The mitigation noted by the DEC in this matter was respondent's lack of intent to mislead clients or others, his admission of wrongdoing, his cooperation with the DEC investigation, his CLE courses, his reliance on his staff to inform him about notices and emails, the improvement of his office practices, his lack of an ethics history, and his relative youth and inexperience at the time of the misconduct. Some of the mitigation is not sufficiently compelling to merit a reduction of the warranted discipline: attorneys have a duty to cooperate with ethics investigations; they are required to take CLE courses; and respondent was not a newly admitted attorney at the time of his infractions (he had practiced with another attorney, prior to opening a solo practice and had practiced bankruptcy law since 2006).

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[2] The letter of admonition in Fitzpatrick does not mention whether the lack of insurance was intentional or an oversight.

In view of the above precedent and of the number of matters involved (fifteen), tempered by respondent's lack of an ethics history and no evidence that either clients or creditors were harmed, a reprimand might have been the appropriate discipline for this matter as well.

Based on the totality of respondent's misconduct in both matters, which include violations of RPC 1.1(a), RPC 1.1(b), RPC 1.3, RPC 1.15(d) and R. 1:21-6, RPC 5.4(a), RPC 5.4(b), and RPC 5.5(a), balanced against mitigating factors (respondent's contrition, the correction of the problems in his practice, and his admission of wrongdoing), we determine that a censure is adequate for the aggregate of respondent's misconduct in both matters.

Member Clark 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
Bonnie Frost, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Ernest A. Aponte
Docket Nos. DRB 12-371 and DRB 13-064

Argued: April 18, 2013

Decided: June 25, 2013

Disposition: Censure

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

Julianne K. DeCore
Chief Counsel