SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-037
District Docket No. IV-2010-0025E

IN THE MATTER OF	:
WARREN H. CARR	:
AN ATTORNEY AT LAW	:

Decision

Argued: June 20, 2013

Decided: July 24, 2013

Andrew J. Karchich appeared on behalf of the District IV Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for discipline (censure) filed by the District IV Ethics Committee (DEC). A single-count complaint charged respondent with failing to abide by the client's decisions concerning the scope and objectives of the representation (RPC 1.2(a)), failing to set forth in writing the rate or basis of his fee (RPC 1.5(b)), and

conflict of interest (RPC 1.7(a) and (b)). We determine to dismiss the RPC 1.2(a) and RPC 1.7(a) and (b) charges for lack of clear and convincing evidence. We find the violation of RPC 1.5(b) to be de minimis and, for the reasons expressed below, determine to dismiss the complaint in its entirety. If the Court disagrees, we recommend that the Court enter an order for an agreement in lieu of discipline for respondent's sole violation (RPC 1.5(b)).

Respondent was admitted to the New Jersey bar in 1962. He has no prior discipline.

In early September 2009, Frances Gigliotti, the grievant, met with respondent at his law office to discuss an estate matter. At the DEC hearing, Gigliotti testified that her uncle, Meyer Solovitz, had passed away intestate on August 14, 2009, leaving behind two grown sons, Michael and David.

Gigliotti told respondent that she sought to be named administratrix of Solovitz' estate. According to Gigliotti, neither son was capable of handling that position. Michael was too ill with advanced diabetes and David was an unreliable drug addict, who preferred to live on the street.

Gigliotti testified that, toward the end of her uncle's life, she frequently visited him at his home and helped him with

his bill-paying and taxes. When, in July 2009, Solovitz' health declined, he executed a power of attorney in her favor.

There came a time when Solovitz was unable to care for himself. Gigliotti placed him in a nursing home and prepared to sell the house, listing it for sale with "Budd Realty," through an agent named Stephen Burkhead. Shortly thereafter, on August 14, 2009, Solovitz passed away.

Between September 4 and 9, 2009, respondent and Gigliotti discussed the estate matter and had meetings at his office. On September 4, 2009, respondent sent an initial letter to Beverly Kovacs, Probate Clerk, Camden County, stating that he represented the Solovitz estate and that Gigliotti had already applied for administration. Respondent included the renunciations of Michael and David, the latter one not notarized, which he had obtained directly from Gigliotti.

On September 10, 2009, respondent sent a letter to David, stating that he represented Gigliotti, "who seeks to become the Administratrix" of Solovitz' estate. The letter alerted David that the house was being sold (he had lived there sporadically up until his father's death, when not on the street), explained what an administration entailed, and requested that he sign a new renunciation, this time before a notary public. Gigliotti

was not copied on the letter and denied having seen it before the DEC hearing.

That same day, September 10, 2009, Gigliotti signed a $30,000 contract of sale for Solovitz' house. She did not discuss it with respondent or any other attorney beforehand. According to Gigliotti, Burkhead had provided her with the contract, which she signed, believing that she still had her uncle's power of attorney. Burkhead then suggested to her that they meet with respondent, at respondent's office. At that meeting, according to Gigliotti, they discussed the sale of the house, "the boys, different things like that."

Gigliotti recalled that, when she first met with respondent, she had not yet applied for a bond, which was required for her to become the administratrix, and that respondent had advised her, on that day, that he would take steps to have her bonded. Gigliotti had filled out forms at the Camden County surrogate's office, prior to ever meeting respondent, but she was adamant that they were not an application for a bond.

On September 22, 2009, the contract of sale was amended to reflect that the seller was the "Estate of Meyer Solovitz, Deceased; By Frances Gigliotti, Administrator." A new purchase

price of $34,000 was inserted. Settlement was scheduled to occur on or before October 23, 2009. By letter of even date, respondent advised the probate clerk that the sale of the house had become an urgent matter, in that the property was uninsured and Gigliotti had no legal authority to insure it. The letter indicated that Gigliotti was copied on the letter. However, Gigliotti denied having received it.

On September 30, 2009, respondent sent another letter to the probate clerk, indicating that the house was to be sold for $30,000, listing nine known expenses to be paid from the sale proceeds and asking in what amount the administrix should seek a bond. Gigliotti was copied on the letter, but could not recall if she had received it.

On October 1, 2009, respondent sent a letter to C.G. Budd Hendrickson Co. (CGBH), a bonding agency located across the street from his law office, containing information necessary for Gigliotti to be bonded. Gigliotti was copied on the letter, but, again, denied having received it.

On October 6, 2009, CGBH sent a facsimile cover sheet to respondent stating, "As you can see, the [bonding] company, (RLI) has declined to write this bond now and in the past with another agent." The attached letter from RLI simply stated, "We

have received the information that you submitted for this Applicant. Unfortunately, we must decline this bond for the following reason(s): This is a messy case and we had already declined for another agent a month ago."

Gigliotti was asked about her apparent denial of bond a month earlier. She again stated that she had not applied for a bond, prior to meeting respondent. Respondent, however, sent her across the street to meet with CGBH, in order to inquire about a bond.

On October 8, 2009, respondent sent a letter to Michael, stating:

> Your aunt has brought to us the sale of your late father's home at Ironside Road. You had earlier consented to Frances Gigliotti, your aunt, to act as Administratrix of your father's estate. The bonding company has rejected her based upon inexperience and suggested that counsel be substituted [as administrator]. The Surrogate of Camden County agrees. We are, therefore, asking you to sign an original and copy of the renunciation and consent and Frances will return the document to my office for filing with the Court.
>
> [Ex.P-9]

When shown the letter at the DEC hearing, Gigliotti denied ever having received it.

Respondent testified as follows:

> [T]he bonding company had rejected [Gigliotti] and the bonding company, however, did suggest that – it was Bud at the bonding company suggested, well, would you serve [as administrator]? And I said, well, I would probably serve if somebody asked me. I discussed this at length with Ms. Gigliotti in the office, and she said fine, that would be okay. I knew at that point that we would have to get a renunciation. I had not known of the earlier renunciation, but I learned later about the first renunciation. I prepared the document, told her what had to be done. She picked it up personally. There was no cover letter with it. There were three or four copies of it, and she took it with her.
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> [T159-13 to T160-2.][1]

On October 9, 2009, respondent wrote to the Camden probate clerk:

> In the matter of the above estate attempts have been made to find David Solovitz, his son, however, no one has seen or heard from David since September 8, 2009. I don't believe it is possible to obtain his signature on a document. Therefore, I am submitting an affidavit of Richard Schaefer as to attempts made to locate David. [I am also enclosing the certified correspondence that we mailed on September 10, 2009, and was returned to us this date as "unclaimed, unable to forward]. I am also submitting a signed renunciation from Michael Solovitz,

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[1] "T" refers to the transcript of the October 9, 2012 DEC hearing.

> the other son, and am making application to be appointed Administrator of this estate in order that the house may be sold and the bills of the estate paid. Please advise what else you may require in order for me to be appointed Administrator of this Estate. I will come in to sign any documents you may require as soon as you advise.
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> [Ex.P-10.]

Although this letter, too, indicates that a copy was sent to Gigliotti, she denied having received it. She also contradicted respondent's version of events, claiming never to have discussed with him the possibility that he become administrator of the estate.

As seen below, respondent was appointed as administrator in October 2009. The presenter questioned Gigliotti about the events surrounding her first having learned about respondent's appointment as the estate administrator:

> Q. Okay. When was it that you first found out that you were not the administratrix of the estate, and that Mr. Carr had been appointed as the administrator of the estate?
>
> A. About a week or two weeks after I seen him. I would say no longer than two weeks.
>
> Q. Okay. And how did you find out?
>
> A. On the phone.
>
> Q. From whom?

A. From Mr. Carr.

Q. And what did he tell you?

A. He told me -- he said I have some bad news. And I said, what is it? He said you were turned down from the bonding company. And I said, why? I said, what did I do? He said, I don't know, but I will get back to you. And he called me back a couple days later and he said, well, you didn't do anything wrong. It is just that you were inexperienced.

Q. And what did you say to him?

A. I said, what do you need experience for? I have good credit. I never was in trouble. I didn't do anything wrong. He said, I don't know, but that's all they told me. And that's when I got in touch with these [CBGH] people.

[T56-21 to T57-20.]

Nicole Karolinski, a Beneficial Bank employee and notary public, filed a September 16, 2011 affidavit in the underlying estate matter, which respondent attached to his pre-hearing memorandum for the DEC. According to the affidavit, Karolinski had notarized two renunciation documents for Michael, in 2009. The first in August and the second in October:

> On the day in question, October 9, 2009, [Michael] came with his Aunt, a person by the name of Frances Gigliotti with a document, copy of which I see appended to my Affidavit, dealing with the issue of

> renunciation in the matter of the estate of Michael's father, Meyer Solovitz, who was at that time deceased. I know very little of the history except that from time to time Michael advised that he had lived with his father in Camden.
>
> On the day in question, October 9th, he came with his Aunt, whose name I recall well, to sign a document entitled Renunciation and naming another person as the Administrator of the Estate of Meyer Solovitz.
>
> It is my belief both as a bank teller and as a notary that Michael Solovitz knew exactly what he was doing and what he was signing. The fact that he was accompanied by his Aunt would also lead me to the conclusion that they both knew the document that was being executed.
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> [Ex.R-25.]

At the DEC hearing, Karolinski testified briefly about her role in the matter. She recalled having been familiar with Meyer Solovitz and his sons, David and Michael, because all three had been customers of the bank through the years. Karolinski also recalled her dealings with Gigliotti and Michael. Gigliotti had come to the bank with Michael, on August 28, 2009, with a renunciation and request that Gigliotti be appointed as administratrix. She notarized Michael's signature that day.

On October 9, 2009, Michael returned to the bank to have a new renunciation notarized, this time with a request that

respondent be appointed as administrator of Solovitz' estate. Karolinski could not recall if Gigliotti was present with Michael for the October notarization. Karolinski was not questioned about her affidavit.

Gigliotti clarified, on cross-examination, that she met Michael at the bank, on October 9, 2009, to have a new renunciation notarized. When shown the October 9, 2009 renunciation at the hearing, Gigliotti recognized it as the document that Michael had signed on that day. The renunciation requested that respondent be named administrator.

In a May 27, 2011 document supplementing his answer to the formal ethics complaint, respondent recalled that Gigliotti took the renunciation

> to Atco where I believe [Michael] may have been living and returned it to me with Michael's renunciation to act as Administrator in my favor. I do not know the notary nor do I know any of the circumstances of it being signed except it was returned to me by Mrs. Gigliotti with the request that I act as the Administrator. I advised her that I would do so reluctantly as it was a very small estate and a mess in that the decedent had multitudes of medical bills, parts of which were outstanding.
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> [Ex.3 at 2 to 3.]

On October 13, 2009, respondent filed documents with the Camden surrogate to be named administrator of the estate.

Two days later, on October 15, 2009, respondent sent another letter to the Camden probate clerk, enclosing the "original Surety Bond, Power of Attorney and RLI Insurance Company Statement," in order "to be sworn" as administrator. Respondent placed a footnote in the letter, stating, "I also want to extend my appreciation for both your kindness and your patience. For such a miniscule estate, this is [sic] certainly been a 'mess'. Thanks for your help." Gigliotti was copied on the letter, but denied having received it.

On October 21, 2009, respondent sent a detailed letter to Gigliotti, advising her that he had received his appointment as administrator of the estate. In the letter, respondent discussed arrangements for the disposition of property and requested a meeting to review materials for the closing on the house, "as soon as practicable." Gigliotti did not testify about the status of her receipt of this letter from respondent.

Two days later, on October 23, 2009, the contract of sale was amended to reflect that the seller was now the "Estate of Meyer Solovitz, Deceased; By Warren Carr, Administrator."

On October 30, 2009, respondent obtained the City of Camden's certificate of resale. The sale of the property took place in December 2009. Gigliotti claimed to have been unaware of the sale.

During the same period that she was unaware of developments in the estate, Gigliotti sought repayment from the estate for certain expenses that she had personally incurred for her uncle's funeral. They included suits for Michael and David, flowers, and the like. On November 30, 2009, respondent reimbursed Gigliotti by way of trust account check #4148, in the amount of $2,460.89.

Respondent prepared a decedent's inheritance tax return for the estate, listing the expenses incurred by the estate, including his law firm's estimated fee of $3,750. In the column on the form for the administrator's fee, respondent placed "0."

On January 11, 2010, the New Jersey Division of Taxation issued a transfer inheritance tax waiver, which was recorded in Camden County, on April 12, 2010.

Thereafter, some time elapsed, while respondent awaited information from the Social Security Administration (SSA) regarding SSA benefits that Michael had received and that might have acted as a prior claim against the estate.

On April 17, 2010, Michael passed away. Gigliotti was very upset with respondent about his handling of issues surrounding Michael's death. She testified as follows:

> Q. [PRESENTER] Did you ever consider to be appointed as the administratrix of Michael's estate?
>
> A. No, no.
>
> Q. Is there in [sic] reason why?
> A. Well, Mr. Carr had told me that he had nothing to do with the two boys, that he couldn't do nothing for them, and that I would have to hire a lawyer. And I didn't have money to hire a lawyer.
>
> Q. Okay.
>
> A. So I just let it go, but he told me that whatever money was left over from the sale of the house would be divided between the two boys. That's what I was told. And it never happened, so when I called him and told him that Michael had passed away, that I needed Michael's share so I could -- whatever was there, to pay for the funeral director, and I told him for him to write the check to him. I didn't want it.
>
> . . .
>
> Q. What would your goal have been in administering the estate?
>
> A. To take care of the boys.
>
> Q. The boys being your —

A. -- my cousins.

[T73-10 to T74-23.]

Respondent, on the other hand, took issue with Gigliotti's assessment, stating that the

> [n]ext disagreement she had, she wanted me to pay all the expenses relating to Michael's estate when he died. She sent me everything, even the markings for a gravestone. And I said I can't do that because she would have to apply, and I wrote her a letter to the extent that she would have to apply for Michael. And I had already written her at least one letter suggesting that she apply for both Michael and David as guardian.[2] Now, guardians ordinarily don't require a bond, but just someone to act in a capacity or direct the affairs of the two children who were both probably incompetent. I never met Michael so I don't know what his level of competency was, but I assume he was competent enough to sign the affidavit which Ms. Gigliotti got him to sign. I did not talk to that lady [the bank notary] until long afterwards, so I don't know who she was at that time other than the fact that the document was delivered back by Ms. Gigliotti to us. It is a rather drawn out story, and I apologize for the length of it, but there is

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[2] See respondent's March 26, 2010 letter to Gigliotti, just prior to Michael's death, in which he states that he has already discussed these issues and written a prior letter recommending that she seek an appointment as guardian for the sons.

> a lot of problems here that were very much the problem of Ms. Gigliotti.
>
> [T29-2 to 23.]

On July 20, 2012, the Camden County Chancery Division, Probate Part, issued a final order in the matter and approved respondent's $3,750 legal fee in full. The estate balance of $19,290.91 was to be divided between David and Michael. Respondent was permitted to pay David directly and was granted his request to place Michael's share into court, pending an application from a representative of his estate.

With regard to the charged violation of RPC 1.5(b), respondent readily acknowledged that he had not set forth, in writing, the rate or basis of his legal fee:

> MR. SICILIANO [Panel Chair]: I think I just have a few [questions], Mr. Carr. With regard to your testimony, you would agree with me, sir, that there was no written fee agreement ever prepared by your office?
>
> [RESPONDENT]: That's correct.
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> MR. SICILIANO: And it is your understanding that the scope of your representation in this matter was for the Estate of Meyer Solovitz?
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> [RESPONDENT]: That would be the ultimate result, yes.
>
> MR. SICILIANO: That was the ultimate result. Did it initiate in that fashion?

[RESPONDENT]: No. It started off with a request to help her sell the house. That was her initial -- that's what my notes reflect.

MR. SICILIANO: And so when you say help her, that would be Ms. Gigliotti?

[RESPONDENT]: Yes.

[T197-2 to 19.]

As to the charge that respondent engaged in a conflict of interest, the presenter laid out his argument as follows:

> Ms. Gigliotti came to [respondent] for assistance in the administration of the estate. We do know that [respondent] did not prepare an engagement letter to Ms. Gigliotti either setting out what his fees would be nor setting out what the scope of his duties would be. Then later, he became the administrator of the estate, at which time he no longer would take calls from Ms. Gigliotti as his client because he was the administrator of the estate and was carrying out his duties. That is the sum and substance of this case.
>
> When somebody calls to a lawyer for assistance, that lawyer should and must represent the client's interest before he represents his own interests. And at the point in time when he then crosses over from being the attorney for the client to becoming the administrator of the estate, at that time that attorney puts himself in conflict with the interest of his clients and his clients' goals.
>
> Whether [respondent's] intentions were noble and good and he thought he was doing what's

> correct for the administration of the estate is irrelevant to these proceedings. It is not a matter of intent here. It is a matter of what, in fact, happened. And that is the sum and substance of this case. That is the case that I will prove, and I believe that we will establish the violations that have been charged in the complaint that's been filed.
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> [T17-20 to T18-22.]

For his part, respondent argued that intent is important. He initially believed that he would be representing either Gigliotti or the estate, after she became the administratrix. She twice failed to qualify for a bond, with no involvement on his part. Respondent went further with his assessment of Gigliotti's situation:

> For example, no one seems to know about her rejection for a bond in Camden County. No one seems to know anything about that. She denies she ever applied. She denies also that she ever applied at [CGBH], and yet in the one letter they provided, they show two applications and two rejections. So I don't know what we have here except perhaps a lack of memory or lack of understanding of what she was doing.
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> [T162-17 to 25.]

The following exchange between the presenter and respondent captured the tenor of the questioning and respondent's view of the representation:

Q. Did you write a letter to Ms. Gigliotti at that point in time, sometime between October 6th and October 8th, 2009, wherein you indicated that she did not qualify for a bond and that the bonding company, as you indicate in your letter to Michael Solovitz, had suggested that experienced counsel be substituted?

A. And your question is?

Q. Did you write to Ms. Gigliotti and explain that to her?

A. I called her and told her I had bad news. That was the first thing, and then I don't see a letter in my immediate package here. I probably did write her a letter. There were many letters.

Q. Did you write a letter to her terminating your representation of her?

A. I never started representing her. I couldn't. She didn't have any authority. I couldn't terminate something I never really started. I tried to help her initially. That's about it. I reached out to help her and it didn't turn out very well.

Q. Did you ever suggest to Ms. Gigliotti that you could make a petition to the surrogate's court, probate court for the purposes of having perhaps another attorney appointed as the administrator or administratrix of the estate?

A. No.

Q. And you've done probate work for a while; have you not?

A. Quite a few years, yes.

Q. And you realized, had you made that application, that Ms. Gigliotti would have been entitled to a counsel fee for that application, would she not?

A. She would have to ask for it to the court, and it would be up to the court whether it would be granted or not.

Q. Did you ever advise her that that is something she should -- she could do under the circumstances?

A. No, I did not. She told me if I wanted to act, go ahead. She seemed to be very happy to get it over with.

Q. Once you became the administrator of the estate, your interests in administering the estate were different from those of Ms. Gigliotti; were they not?

A. I don't think so.

Q. Well, if her goal was to become appointed as the administratrix of the estate and that was not accomplished but you then became appointed as the administrator of the estate, at that point in time your interest diverged, did it not?

A. I only became appointed because she asked me to, and that's all there was to that. There was no other issue and she didn't want anything out of it either. She even wrote the letter that I didn't get anything out of it either, which you have.

Q. But you did not, personally, get something out of it, but you did get a legal fee out of it?

A. I got a legal fee out of it.

Q. Okay.

A. That's what the court granted.

Q. Who at the bonding company suggested that counsel be substituted?

A. That would be the director of C.G. Budd Hendrickson. I don't know his first name. His real name is Donahue but we've called him Bud forever.

Q. But you say in P-9, your letter of October 8, 2009, the bonding company has rejected her based on inexperience and suggested that counsel be substituted; is that correct?

A. That's what they told me on the phone.

Q. Okay. Have you ever heard of somebody being rejected for a bond based on inexperience?

A. Yes. Many times.

Q. Okay. And being rejected for a bond based on inexperience when they are actually being represented by counsel who is experienced?

A. It is an independent [sic] of the person who is being appointed, whether they have any experience in this, and bonding companies, as you probably read in the Wall Street Journal, have been taking a big hit on estates where people have taken money out that shouldn't have.

Q. Okay. The question is, bonding companies would be declined -- decline issuing a bond to somebody based on inexperience even when they're represented by competent and experienced counsel?

A. I'm not a bonding company. I can't explain that. All I can tell you is that's what they told me on the phone, and then in the document that was sent, it talked about being messy and was rejected once before. Beyond that, I don't know.

Q. And then you say the surrogate of Camden County agrees. You had a discussion with somebody at the surrogate's office in Camden County that you should be substituted as the administrator of this estate?

A. Only after Ms. Gigliotti said yes, go ahead.

Q. Is there anything -- you are writing to Michael Solovitz for the purpose of administering the estate. Is there anything in this letter [renunciation] that says, and your Aunt Frances, she's not his aunt, but her [sic] cousin, but your Aunt Frances has also suggested and is assisting us in becoming the administrator of your father's estate?

A. The letter speaks for itself. I wrote it, and she picked up the document, and got it signed, and brought it back.

[T184-20 to T189-12.]

The DEC found respondent guilty of all three charged RPC violations. With regard to RPC 1.2(a), it found that respondent, "unbeknownst to and against his client's wishes, sought appointment [as administrator]," which "was a clear and direct violation of [Gigliotti's] decisions concerning the goals of the representation."

The DEC further determined that Gigliotti had "attempted to contact respondent on multiple occasions, via letter and telephone, regarding the status of the Estate, but was met with resistance.[3]

The DEC found a violation of RPC 1.5 (b), based on respondent's admission that he had failed to set forth the basis or rate of his fee, in writing.

With regard to the remaining charge, conflict of interest (RPC 1.7(a)), the DEC stated,

> Respondent is charged to have violated the rule by petitioning the Camden County Surrogate to appoint himself as the Administrator of the Estate of Meyer Solvoitz [sic], while at the same time, representing the Grievant, who also desired to be the Administratrix. Grievant [sic] is alleged to be in violation of the rule for failing to abide by the client's decisions concerning the representation desired.
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> [HPR5.][4]

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[3] The record contains only two letters from Gigliotti to respondent, dated May 28 and 29, 2010. Both letters post-dated her March 29, 2010 ethics grievance and dealt with Michael's death and his estate matters.

[4] "HPR" refers to the hearing panel report.

The DEC determined that, as soon as respondent learned that Gigliotti could not obtain a bond, he was required to inform her of the options to accomplish the objectives of the representation, including obtaining a qualified administrator.

Instead, according to the DEC, respondent positioned himself to become appointed administrator, without Gigliotti's consent. Respondent's actions "resulted in a conflict of interest whereby [he] was counsel to both [Gigliotti] and the Estate of Meyer Solovitz."

The DEC suggested that, once appointed administrator, respondent could have cured the conflict by fully disclosing the situation to Gigliotti and obtaining her written consent to the representation of the estate, as outlined in RPC 1.7(b).

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

In early September 2009, Gigliotti approached respondent about her uncle's estate. Meyer Solovitz had died a month earlier, on August 14, 2009. Unbeknownst to respondent, by the time Gigliotti met with him, she had already filled out forms in

the surrogate's office to become administratrix of Solovitz' estate. She had also applied for a bond, although she would testify that, to her knowledge, she had not done so.

On September 10, 2009, without authority to do so, Gigliotti signed a contract for the sale of Solovitz' house, using his now-defunct power of attorney.

Only after this series of events took place, did respondent become involved. When he and Gigliotti first discussed the representation, at respondent's office, she expressed her wish to become administratrix of the estate, because the beneficiaries of the estate, Solovitz' sons, Michael and David, were incapable of handling the position. It was at this point that respondent should have, but admittedly failed, to set forth the rate or basis of his fee, in writing. In this regard, respondent explained that it soon became obvious to him that he would be representing the estate, not Gigliotti. He never re-visited the issue of a fee agreement and, therefore, violated RPC 1.5(b).

The sustainability of the remaining charges against respondent (RPC 1.2(a) and RPC 1.7(a) and (b)) depends on whose version of events is more believable, respondent or Gigliotti's.

We analyzed the evidence and inferences that can be drawn from it, as measured against each witness's story.

Regarding the RPC 1.2(a) charge that respondent failed to abide by his client's decisions concerning the scope and objectives of the representation, the DEC presenter sought to establish that Gigliotti was respondent's client, based on a single, September 10, 2009 letter from respondent to David, stating that he represented her. Respondent testified, however, that he was unsure, at that early stage, whether he would ultimately represent Gigliotti or the estate.

Respondent also sent what appears to be his first correspondence in the matter, a September 4, 2009 letter to the probate clerk, in which he stated that he represented the Solovitz estate.[5] As the case unfolded, it appears that respondent did so, always mindful of Gigliotti's objective, that is, to protect the two sons' share of the estate.

When respondent advised Gigliotti to seek a bond from the bonding agency across the street from his office (CGBH), he had

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[5] The DEC incorrectly concluded that this letter contained a claim that respondent represented Gigliotti.

no idea, because she never told him, that she had already been to the surrogate's office and had been denied a bond a month earlier. Respondent only learned of it after she utilized that bonding agency, CGBH. Once Gigliotti was denied bond a second time, everything changed. There were no other family members to take on the role of administrator.

At the urging of the owner of CGBH, respondent approached Gigliotti about becoming the administrator himself. His version of events in this regard makes sense — that he was reluctant to take the case, as it was a very small estate with potentially high expenses, a "messy" case. However, the only way that he could help Gigliotti achieve her goal of settling the estate for the two sons was to administer the estate himself, if she asked him to do so.

Respondent testified that he then discussed this scenario with Gigliotti, in his office, and that she approved of his becoming the administrator. Although she flatly denied that such a conversation ever took place, the record supports respondent's version of events, inasmuch as he took the necessary steps to be appointed as administrator and copied Gigliotti on numerous correspondence related to the administration of the estate, among them, letters dated September 22, September 30, October 1,

October 8, October 9, October 15, and October 21, 2009. No one questioned the bona fides of these letters or suggested that they were fabricated.

For her part, Gigliotti denied having received virtually all of the important correspondence that respondent sent to her in the case. Yet, each letter indicated that a copy was sent to her. Inexplicably, Gigliotti was never asked how it could be that she experienced trouble receiving so much important mail from respondent.

During the most active period, September to December 2009 (and contrary to the DEC's conclusion that respondent failed to communicate with Gigliotti), respondent sent many letters to Gigliotti. Again, there is no suggestion in the record that respondent did not send the various letters to Gigliotti – other than her denials of receipt of them.

The hearing panel report, however, virtually ignored respondent's version of events, as though he never testified or sent any correspondence to Gigliotti. We have carefully considered his version of events in the case. Respondent was clear throughout that Gigliotti was aware of the goings-on in the case — that she had approved of his becoming administrator,

and that numerous letters to her show that he kept her up to date about the estate matter.

The DEC accepted Gigliotti's testimony that respondent inserted himself as administrator, "in direct violation of [Gigliotti's] decisions concerning the goals of the representation." Yet, Gigliotti's own testimony was that her only goal for the representation was for the estate to be settled for the benefit of the decedent's two sons.

So, too, there was no analysis in the hearing panel report about Gigliotti's knowledge of respondent's future role as administrator. Recall that, on October 9, 2009, she took a renunciation prepared by respondent – in favor of respondent – to Michael, hand-delivered it to him at the bank, and had him sign it before a notary. She then returned it to respondent. It is clear to us from this record that she did not object, at that time, to respondent's becoming administrator. To the contrary, she helped to facilitate it.

For all of these reasons, it strains credulity that Gigliotti was unaware of the developments in the case, especially the role that respondent would play as administrator, once she knew that she could not do so.

To find that respondent violated RPC 1.2(a), in that he not abide by his client's directives regarding the representation, we are asked to conclude that the sole September 10, 2009 letter stating that he represented Gigliotti established the attorney/client relationship between them.

We believe respondent's testimony that he was unsure who the client would be and had to see how things "shook out," before he could best tell how to achieve Gigliotti's stated goal of settling the estate for the benefit of the sons. The estate, not Gigliotti, ultimately became the client.

In view of the foregoing, for lack of clear and convincing evidence of a violation of RPC 1.2(a) charge, we determine to dismiss it.

Regarding the charge that respondent engaged in a conflict of interest, the DEC relied on respondent's September 4, 2009 letter to the probate clerk, as well as his September 10, 2009 letter to David, to establish that respondent represented Gigliotti. The DEC then concluded that respondent had engaged in a conflict of interest by becoming administrator, against Gigliotti's wishes.

Yet, as previously noted, only respondent's September 10, 2009 letter to David stated that respondent represented

Gigliotti. In the other letter, respondent stated that he represented the estate. For us to accept the version of events adopted by the DEC, it must be that respondent and Gigliotti never agreed on his representation of the estate. Moreover, in that scenario, he and Gigliotti must never have met in his law office, as respondent testified, to discuss his possible role as administrator. Gigliotti must also have been unaware that he became administrator, despite having helped to obtain a renunciation in his favor. The record does not support the conclusion that respondent represented Gigliotti from the outset, and engage in a conflict of interest when he took on the role of estate administrator, all of it without her knowledge and against her wishes, which were to be the administrator and to settle the estate for the sons? We do not believe so.

Rather, the credible evidence supports respondent's testimony that he sent numerous letters to Gigliotti, who likely received them, for there is no inkling that she had trouble receiving mail; he met with her and discussed the case with her; she approved of his becoming administrator, when they met, and ratified it by knowingly obtaining the renunciation in his favor; he was less than "sharp," when failing to document his file regarding every meeting, conversation, and understanding

that he and Gigliotti arrived at over the course of the representation; Gigliotti knew that he represented the estate and that he was acting as administrator, in accordance with her stated wishes; he handled the underlying matter in a fashion that was in the best interests of the sons, Gigliotti's expressed overarching concern; and he shepherded a small, yet messy, estate to conclusion, never engaging in a conflict of interest. For these reasons, we dismiss the RPC 1.7(a) and (b) charges against respondent.

Parenthetically, the DEC faulted respondent for several other things for which he was not charged, such as failing to reply to correspondence from Gigliotti regarding the matter. Yet, the record contains only two letters from Gigliotti to respondent, both of which post-dated the filing of her ethics grievance, reason enough for respondent not to reply. Moreover, the letters dealt with issues, such as seeking Solovitz' estate funds for Michael's estate, in which she had no legal standing.

The DEC also faulted respondent for taking a legal fee of $3,750, when an administrator's commission may have amounted to less. Respondent was never charged with an ethics violation related to the fee. His fee was approved, in full, by order of

the probate court, at the conclusion of the case. We are unable to agree with the DEC's comments in this regard.

When all is said and done, we are left with a sole ethics violation. Respondent failed to formally set forth, in writing, the rate of basis of his fee, after it became clear that he was representing the estate, a non-serious infraction for which an admonition would ordinarily suffice. See, e.g., In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009); In the Matter of Alfred V. Gellene, DRB 09-068 (June 9, 2009); and In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007).

In mitigation, we have given considerable weight to respondent's sterling career of fifty years as a New Jersey attorney, with no prior ethics infractions. Furthermore, he achieved a favorable result for Solovitz' beneficiaries, Michael and David Solovitz.

Although we find a violation of RPC 1.5(b), we deem it to be a de minimis infraction, partially in light of respondent's fifty-year career as an attorney of this state, without prior incident, and the results obtained for the estate. Therefore, we determine that the complaint should be dismissed in its entirety. See In re Romanowski, N.J. (2013).

If the Court disagrees with our dismissal determination, we recommend that the Court enter an order determining that "respondent's actions constitute minor unethical conduct that warrants treatment under *Rule* 1:20-3(i)(2)." In re Snyder, 202 N.J. 28 (2010).

Member Doremus 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 C. Frost, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Warren H. Carr
Docket No. DRB 13-037

Argued: June 20, 2013

Decided: July 24, 2013

Disposition: Dismiss

Members	Disbar	Suspension	Reprimand	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
Julianne K. DeCore
Chief Counsel