SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-001
District Docket No. IIIA-2012-0020E

IN THE MATTER OF	:	
ALEX PAVLIV	:	
AN ATTORNEY AT LAW	:	Decision

Argued: May 16, 2013

Decided: July 2, 2013

Anthony T. Betta appeared on behalf of the District IIIA Ethics Committee.

John T. Rihacek appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (reprimand) filed by the District IIIA Ethics Committee (DEC). A two-count complaint charged respondent with violations of RPC 3.4 (fairness to opposing party and counsel, more specifically, RPC 3.4 (c) (knowingly disobeying an obligation under the rules of a tribunal)) and RPC 3.3(a)(5)(failure to disclose to the tribunal a material fact

knowing that the omission is reasonably certain to mislead the tribunal). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1983. He has no prior discipline.

The facts recited in the complaint are largely undisputed. Respondent, however, denied that his actions violated the RPCs.

Count one of the complaint charged respondent with having failed to serve a form of order, and then the signed court order, on all parties and counsel to a litigation (RPC 3.4(c)).

In December 2003, Dr. Eugenia Babiak retained respondent to represent her in a Chancery Division action in Monmouth County Superior Court. The plaintiff, Irene Lamb, through counsel, Francis Accisano, filed a complaint against Babiak, who had loaned Lamb the funds to purchase a house, secured by a promissory note and a mortgage. Lamb claimed to have paid the mortgage and sought its discharge.

In March 2004, Babiak filed an answer, along with a third-party complaint against the grievant herein, her brother, Bartholomew Babiak, Esq. (Bartholomew). Lamb was employed by Bartholomew.

The third-party complaint related to the Lamb mortgage, as well as other issues, including a different mortgage given by

Babiak to another individual (Gonder), additional real estate, and alleged legal malpractice by Bartholomew, when negotiating the Lamb mortgage and note for his sister and Lamb.

In June 2004, Bartholomew filed an answer and counterclaim to Babiak's third-party complaint. That same month, respondent filed an answer for Babiak.

In August 2004, the Honorable Alexander Lehrer, J.S.C., held a settlement conference, at which time Lamb agreed to pay Babiak $100,000 in settlement of the mortgage and note.[1] Present at the conference were respondent, Accisano, and Bartholomew's attorney, Russell Woods.

Accisano sent a proposed form of order to the court and to all of the attorneys for the parties involved in the litigation. Judge Lehrer signed the order on August 5, 2004, without objection from any party.

Shortly thereafter, on August 16, 2004, respondent sent a cover letter and proposed amended order to Judge Lehrer. The letter stated as follows:

> The language in paragraph 4 of the Order

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[1] Elsewhere in the record, the settlement figure is $110,000.

proposed by Mr. Accisano is somewhat ambiguous. I have contacted Mr. Accisano and advised that while the matter referable to his client is terminated, it is not terminated as to the third party Defendant Bartholomew Babiak.

I have added paragraph 6 to the Order and forwarded same to Mr. Accisano, to clarify the matter. I would ask that your Honor sign the amended Order.

[Ex.J-1,1.]

Paragraph 4 of Judge Lehrer's August 5, 2004 order stated:

Upon satisfaction of the requirements of the settlement as hereinabove described, all claims by the Plaintiff against the Defendant and Counterclaim against the Plaintiff by the Defendant, Eugenia Babiak, as well as those elements of her Third Party Complaint related to the transactions described in the Plaintiff's Complaint are hereby dismissed without costs and with prejudice.

[Ex.C-4,3.]

Paragraph 6 of respondent's amended order stated:

The language of paragraph 4 is in no way to be construed as releasing Third Party Defendant, Bartholomew Babiak from any of the issues surrounding his diversion of funds from the Lamb mortgage payments to himself. All claims against the Third party Defendant, Bartholomew Babiak, will continue and nothing in this Order shall be construed as a release or dismissed [sic] of any claims which the Defendant/Third Party Plaintiff Eugenia Babiak, has or may have against Third Party Defendant, Bartholomew Babiak.

[Unmarked Exhibit, 2.]

Respondent sent the proposed form of order to just two attorneys, Accisano and counsel for the title company. Respondent did not send it to Woods, Bartholomew's attorney. Judge Lehrer signed the amended order on August 24, 2004.

Two years after Judge Lehrer's August 2004 order transferred the remaining issues to the Law Division, in September 2006, respondent filed a motion for summary judgment against Bartholomew. At a September 5, 2006 settlement conference, the day before the return date of respondent's motion, Woods learned for the first time that Judge Lehrer had signed an August 24, 2004 amended order prepared by respondent. Woods immediately filed a motion to vacate the amended order and to reinstall the original order.

On November 3, 2006, Judge Lehrer vacated the August 24, 2004 amended order, leaving the August 5, 2004 order in "full force and effect."

At the DEC hearing, Accisano testified that, in preparation for the sale of her house, Lamb sought to discharge the mortgage and loan from Babiak, claiming that she had paid the mortgage in full. Judge Lehrer held a settlement conference (on August 2, 2004), which he, respondent, and Woods attended. He recalled that Bartholomew also attended the conference. The parties

settled that part of the litigation dealing with Babiak's mortgage. The settlement called for Lamb to pay $110,000 to discharge the mortgage and cancel the note.

Thereafter, Accisano prepared an order, under the "five-day" rule. When no party objected, Judge Lehrer signed the order, which was disseminated to the parties.

Accisano did not recall having received respondent's proposed form of amended order. On cross-examination, Accisano was shown a fax verification report from respondent's office, showing that Accisano's office had, in fact, received a four-page fax right at the time that respondent claimed to have sent the proposed form of amended order to him. Accisano stated, "Well, I have no recollection of having seen the amended order around this time. You might have faxed it, it might have been in my fax machine, but it is not in my file, and I certainly don't recall seeing it."

Accisano further recalled having had no discussion of a proposed amended order with respondent or having seen the order, after it was signed by the judge.

Woods testified at the DEC hearing as well. He represented Bartholomew as a third-party defendant, answering respondent's third-party complaint, which alleged that Bartholomew had failed to

see that Babiak's mortgage note was paid; had kept for himself payments he had collected from an individual named Gonder, regarding another mortgage and loan from Babiak; had sought to settle a dispute between him and Babiak over a Freehold property that Bartholomew used as his law office; and had sought to settle a dispute over the ownership of a vacant lot in Colts Neck that, according to the recorded deed, was in both Babiaks' names and of which Babiak claimed sole ownership. Bartholomew's counterclaim sought to settle the ownership of some stock certificates.

Woods also recalled having been present with his client, at the August 2, 2004 settlement conference before Judge Lehrer, and was aware only of Judge Lehrer's August 5, 2004 order, as prepared by Accisano.

In September 2005, Woods moved to dismiss the remaining issues in the third-party complaint, which he thought were still outstanding, after Judge Lehrer's first order. Paragraph eight of Woods' certification referred to that first order as the settlement order and appended it as an exhibit. Respondent's reply certification made no mention of the superseding, amended order that he had obtained from Judge Lehrer on August 24, 2004.

Woods recalled that it was not until "much later" that he learned about the amended order, even though he had been

actively involved in the litigation since June 2004. When asked if he recalled how he learned about it, Woods stated:

> Yeah, I sure do. Mr. Pavliv had filed from [sic] the Law Division a summary judgment motion with a return date [of] September 8, 2006 seeking summary judgment on the malpractice claims and for some reason, we were called in for settlement conference before Judge English, and either at that conference or a connection [sic] with the papers filed, again, this is September of 2006, I saw for the first time the amended order that essentially eviscerated the portion of the original order that dismissed all the claims against my client regarding the Babiak -- the Lamb mortgage.[2] So I mean, you know, for some of the reasons we're discussing here, I immediately prepared a motion returnable before

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[2] The record is not clear about what transpired in the intervening year, September 2005 to September 2006.

> Judge Lehrer to vacate that amended order and this is my certification in support of that.
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> [T32-16 to T33-5.][3]

Respondent acknowledged never having sent the amended order to Woods. He stated that he did not do so for two reasons:

> I did not send one to Mr. Woods because at that point, although he had been in the case I guess since early June, I'm going to say A, he wasn't entitled to one, which is a simple matter, but B, it was probably more a matter of logistics. If I got his answer in July as I was leaving for vacation, it sat in my office until the middle of July. I didn't file -- I didn't draft an answer and give it to the secretary until well into July, and then it was served on him in late July. My regular secretary would have been on vacation, the substitute I see on there was Nicole who did that. The file had not been amended to reflect Woods's presence on there. She noticed everybody who I put on the letter. She didn't notice Woods because he had not been attached — his name and address had not been attached to the outside of the file. Even had it been [sic], it's irrelevant. He had no right to object to this settlement I entered into with Mr. Accisano. I wasn't going to release Bartholomew Babiak under any circumstance, or my client clearly would have sued me for malpractice. She wanted — the two of them can't stand each other. They each want their pound of flesh. That's what it comes down to.
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> [T45-17 to T46-14.]

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[3] "T" refers to the transcript of the August 28, 2012 DEC hearing.

Respondent also acknowledged that Bartholomew had filed an answer to respondent's third-party complaint and was active in the case at the time. In addition, Bartholomew and Woods were present, outside the courtroom, at the August 2, 2004 settlement conference. Finally, he acknowledged that the amended order that he had drafted for Judge Lehrer changed the terms of the settlement and Bartholomew's legal position from the earlier order.

At the DEC hearing, the presenter asked respondent to read R. 1:5-1 aloud. The rule, titled "Service: When Required," states (with regard to civil actions) as follows:

> In all civil actions, unless otherwise provided by rule or court order, orders, judgments, pleadings subsequent to the original complaint, written motions (not made ex parte), briefs, appendices, petitions and other papers except a judgment signed by the clerk shall be served upon all attorneys of record in the action and upon parties appearing pro se; . . . . The party obtaining an order or judgment shall serve it as herein prescribed within seven days after the date it was signed unless the court otherwise orders therein.

The presenter also asked respondent if he had ever considered serving Woods the amended order. Respondent replied:

> No, this -- you have to understand how big this box was. By that point, this was like, I don't know, it was up to here. There were motions, counter motions, there were discovery motions,

> there were pre-trial orders. This file went on and on and on, and one order with Mr. Accisano was not out of the case. Actually, the Irene Lamb portion of the file had been segregated out already anyway since it was terminated. Irene Lamb would have no role in the balance of this case. That was put in a separate filing bin, and this was the case from hell that just goes on and on. It was the gift that keeps on giving.
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> [T55-8 to 19.]

Respondent went on to testify that it would have been "easier" to serve Woods and Bartholomew with the amended order and that, "had the timing pattern been better, had there been more time elapsed and not vacation schedules, [Woods and Bartholomew] would have gotten a copy." In any event, he claimed, his file was then inadvertently destroyed:

> The file -- now, the Lamb portion of the file was stored in my office over by the -- a window. We're located off of Route 9, the building over here. On the second Saturday in March, there was huge wind storm -- of 2010 – there was a huge wind storm which blew the roof off the building and there was rain that seeped down there, flooded it out and that was file is [sic] oatmeal.
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> [T66-17 to 24.]

At the time of the DEC hearing, no party had a copy of the signed amended order. Respondent stated:

> As for the signed order, the second signed order by Judge Lehrer, I tried going through my files too. I don't believe Judge Lehrer

> ever sent anybody a second signed order. I don't have it. I never got it. It's not in my file. I checked through the appendices for the appeal. Mr. Woods testified that the court couldn't find it as well. My -- I don't believe anyone ever got one.
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> [T56-18 to 25.]

The hearing panel report noted that it later located a copy in materials that respondent had provided to the Appellate Division, in a brief. The DEC admitted the document in evidence as "Unmarked Exhibit":

> [NOTE - At the time of the hearing none of the parties or the witnesses were able to locate a copy of the actual signed and filed Amended Order which is at the heart of this Ethics Matter. During deliberations, the Hearing Panel located a copy of the signed and filed August 24, 2004 Amended Order at page 59a, in bound Appendix 1 of Appellate Brief for Appellant/Defendant-Third Party Plaintiff, Eugenia Babiak, M.D. prepared by Respondent.]
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> [HPR5.][4]

Count two charged respondent with having failed to disclose to a tribunal a material fact, knowing that the omission was reasonably certain to mislead the tribunal (RPC 3.3(a)(5)).

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

On September 14, 2005, Woods filed a motion to dismiss respondent's third-party complaint. As previously stated, paragraph eight of Bartholomew's certification in support of the motion referred to the settlement order:

> As the Court is well aware, an Order was entered by the Honorable Alexander Lehrer confirming a settlement resolving all issues with the Lamb mortgage as well as all "elements of her third party complaint related to the transaction described in the plaintiff's complaint as hereby dismissed without costs and with prejudice." (Exhibit G) Therefore, the only financial aspect before the Court involves the "Gondor mortgage", and defendant/third party plaintiff has provided not one statement indicating that any malpractice in fact took place with regard to this matter.
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> [Ex.C-6,C¶17-¶18,A¶18.][5]

Respondent's reply certification made no reference to a later order, one that altered Bartholomew's legal position in the case. In his answer to the formal ethics complaint, respondent countered simply that Bartholomew "was not a party to the settlement and was not entitled to any further comment."

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[5] "C" refers to the formal ethics complaint.
"A" refers to respondent's answer to the complaint.

At the DEC hearing, respondent added that he did not believe that he had to serve Woods because, when Woods brought the motion to dismiss, Judge Lehrer "then signed a new order vacating the second one if I -- again, I believe he vacated the second order, and then that was part of the appeal that we had taken. I didn't note, you know, I would have seen no point to notifying the Law Division."

Respondent's certification, however, is dated September 30, 2005. Judge Lehrer did not vacate the August 24, 2004 amended order until much later, November 3, 2006, in response to Woods' discovery of its existence two months earlier, during a settlement conference.

The DEC found that, as required by R. 1:5-1 and R. 4:42-1, and in violation of RPC 3.4(c), respondent failed to provide all counsel of record with the proposed form of amended order and with a signed copy of the amended order, when it came back signed by Judge Lehrer. The DEC further found that respondent's failure to advise the Law Division court of the existence of the amended order for more than two years after it was filed violated RPC 3.3(a)(5).

The DEC recommended a reprimand, citing, without elaboration, In re Strupp, 147 N.J. 267 (1997), and In re Goore, 140 N.J. 72 (1995).

Upon 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.

R. 1:5-1 requires New Jersey attorneys to serve orders on all attorneys of record in a civil action. Respondent did not do that in all respects.

Respondent was charged with failure to send the proposed form of order to Accisano. However, respondent produced a fax cover sheet, showing a successful transmission of a four-page document to Accisano, on August 17, 2004, the day after he sent the amended order to the court. Accisano acknowledged that his office must have received that fax from respondent, although he did not recall having seen it. It is plausible that respondent's four-page fax transmission contained the proposed form of order. Thus, for lack of clear and convincing evidence, we dismiss the charge that respondent failed to send this document to Accisano.

Respondent was also charged with failure to provide the parties with the signed order. Respondent claimed that he never received a signed copy of the order from the court – an obvious

indication that he did not send it to Accisano. Yet, a signed copy was found in respondent's own appellate brief, after the DEC hearing was finished. We conclude, thus, that respondent did not send the signed order to Accisano.

Respondent readily conceded that he did not serve either the proposed order or the signed order on Bartholomew's attorney, Woods, and proffered a number of explanations for his failure to do so. First, he argued that Woods was not served because Bartholomew was not a party to the settlement. In respondent's view, Bartholomew was not entitled to a copy of the amended order. Second, respondent recalled that, although the file was destroyed in a 2010 storm, Woods' name was not on the list of attorneys on the outside of the file and that a temporarily assigned secretary who had handled the file, during the summer of 2004, must have forgotten to serve it. Respondent introduced no evidence to support his assertions. The secretary did not testify. Third, respondent claimed that he never received the signed order from the court, although a copy was ultimately located in his file. For all of these reasons, it is clear to us that respondent did not serve a copy of the signed amended order on Woods.

Respondent's arguments do nothing to absolve him. The rules required him to serve all attorneys of record, including Accisano and Woods. Although he had the order in his file, he failed to do so. We find, thus, that his actions in this regard violated RPC 3.4(c).

The remaining allegation is that respondent failed to disclose to the Law Division a material fact, knowing that the omission would likely mislead the court. On this score, respondent withheld information about the amended order from the court for a year after his adversary, Woods, filed Bartholomew's September 8, 2005 certification in support of a motion to dismiss the claims against his client. Woods knew nothing about the amended order at the time because respondent never served it on him. Respondent's September 30, 2005 reply certification to Woods' motion to dismiss the third-party complaint never mentioned the amended order or corrected Woods' misconception about the status of the case.

Respondent offered no reasonable explanation for his actions in this regard – only that Woods "was not a party to the settlement and was not entitled to any further commentt [sic]." Respondent is wrong. He had an obligation, when preparing the certification and thereafter, to advise Woods and the court of

the amended order. We find that his failure to do so violated RPC 3.3(a)(5).

Respondent's failure to abide by the requirements of R. 1:5-1 is akin to failure to abide by a court order, for which the discipline imposed has generally been a reprimand. See, e.g., In re Kersey, 170 N.J. 409 (2002) (motion for reciprocal discipline; attorney failed to comply with orders from a Vermont family court in his own divorce matter); In re Holland, 164 N.J. 246 (2000) (attorney who was required to hold in trust a fee in which she and another attorney had an interest took the fee, in violation of a court order); In re Milstead, 162 N.J. 96 (1999) (attorney disbursed escrow funds to his client, in violation of a court order); In re Skripek, 156 N.J. 399 (1998) (attorney held in contempt for failing to pay court-ordered spousal support and for failing to appear at the hearing); In re Hartman, 142 N.J. 587 (1995) (attorney repeatedly ignored court orders to pay opposing counsel a fee, resulting in a warrant for his arrest); and In re Haft, 98 N.J. 1 (1984) (attorney failed to file a brief for a death row client after the court held him in contempt three times for failing to do so).

Ordinarily, attorneys who are found guilty of lack of candor to a tribunal receive discipline ranging from an admonition to a

censure, absent the presence of certain serious factors that would justify more severe discipline. See, e.g., In the Matter of Richard S. Diamond, DRB 07-230 (November 15, 2007) (attorney admonished for filing certifications with the family court making numerous references to attached psychological/medical records that were actually billing records from the client's medical providers; although the court was not actually misled by the mischaracterization of the documents, the conduct violated RPC 3.3(a)(1)); In the Matter of Lawrence J. McGivney, DRB 01-060 (March 18, 2002) (admonition for attorney who improperly signed the name of his superior, an Assistant Prosecutor, to an affidavit in support of an emergent wiretap application moments before its review by the court, knowing that the court might be misled by his action; in mitigation, it was considered that the superior had authorized the application, that the attorney was motivated by the pressure of the moment, and that he brought his impropriety to the court's attention one day after it occurred); In the Matter of Robin K. Lord, DRB 01-250 (2001) (admonition for attorney who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias, thus resulting in a lower sentence because the court was not aware of the client's significant history of motor vehicle infractions;

in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); In re Whitmore, 117 N.J. 472 (1990) (reprimand for municipal prosecutor who failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a charge of driving while intoxicated intentionally left the courtroom before the case was called, resulting in the dismissal of the charge); In re Mazeau, 122 N.J. 244 (1991) (attorney reprimanded for failure to disclose to a court his representation of a client in a prior lawsuit, where that representation would have been a factor in the court's ruling on the attorney's motion to file a late notice of tort claim); and In re Duke, 207 N.J. 37 (2004) (censure for attorney who failed to disclose his New York disbarment on a form filed with the Board of Immigration Appeals; the attorney also failed to communicate with the client and was guilty of recordkeeping violations; prior reprimand; the attorney's contrition and efforts at rehabilitation justified only a censure).

Here, respondent's misrepresentation to the court is more in line with the conduct in the reprimand cases, Whitmore and Mazeau, where the courts were misled and the attorneys did not

immediately correct the misinformation they furnished to tribunals, as did Lord and McGivney. Although respondent's silence about the existence of the amended order was a serious impropriety, this case is not as serious as Duke (censure), where the attorney stood to personally gain by failing to disclose his New York disbarment to a tribunal and had a prior reprimand.

Respondent committed yet another infraction. He failed to comply with R. 1:5-1, which required respondent to serve the order on all attorneys of record. As shown previously, that sort of conduct generally merits a reprimand. Combined, then, respondent's ethics violations could be deserving of discipline stronger than a reprimand.

However, there is mitigation to consider. Respondent has no prior discipline in thirty years at the bar. In addition, there is no indication that the parties were harmed in any way, as the judge ultimately vacated the amended order. On balance, thus, we determine that a reprimand adequately addresses respondent's misconduct.

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 Matter of Alex Pavliv
Docket No. DRB 13-001

Argued: May 16, 2013

Decided: July 2, 2013

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Gallipoli			X			
Yamner			X			
Zmirich			X			
Total:			7			

Julianne K. DeCore
Chief Counsel