SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-065
District Docket No. VA-2011-0004E

IN THE MATTER OF	
GERALD M. SALUTI	
AN ATTORNEY AT LAW	

Decision

Argued: September 19, 2013

Decided: November 4, 2013

John M. Deitch appeared on behalf of the District VA Ethics Committee.

Thomas P. Scrivo appeared on behalf of respondent.

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

This matter was previously before us at our February 21, 2013 session, on a recommendation for an admonition, filed by the District VA Ethics Committee (DEC). We determined to treat

the panel report as a recommendation for greater discipline, pursuant to R. 1:20-15(f).[1]

The eleven-count complaint charged respondent with having violated RPC 1.5(a) (charging an unreasonable fee), RPC 1.5(b) (failing to provide the client with a writing setting forth the basis or rate of the fee), RPC 3.3(a)(1) (making a false statement of material fact or law to a tribunal), RPC 3.3(a)(5) (failing to disclose to a tribunal a material fact knowing that its omission is reasonably certain to mislead the tribunal), RPC 7.1(a)(1) and (2) (making a false or misleading communication about the lawyer's services that is likely to create an unjustified expectation about results the lawyer can achieve), RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct), RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice), RPC 8.4(e) (stating or implying an ability to improperly influence a government agency or judicial determination), and RPC 8.1(b) (failing to reply to a lawful demand for information from a disciplinary authority). As to the

[1] That section provides that, in our discretion, we may direct that transcripts be produced, briefs be filed, or oral argument be held.

latter charge, although the complaint omitted a citation to the applicable rule, it alleged that respondent "had not provided any response to the investigator's letters," and failed to cooperate in the investigation of the grievance.

For the reasons expressed below, we determine that a three-month suspension is warranted, rather than the admonition that the DEC recommended.

Respondent was admitted to the New Jersey bar in 1992. At the relevant time, he maintained a law office in Newark, New Jersey.

In 2007, respondent was admonished for his conduct spanning a two-year period. He had been retained, in September 2003, for a criminal matter. His communications with his client broke down when respondent's wife became seriously ill. In imposing only an admonition, we considered that, at the time, respondent was "beset" by his wife's illness, he made restitution to his client, and he had no disciplinary history. In the Matter of Gerald M. Saluti, Jr., DRB 07-117 (June 22, 2007).

In 2012, respondent was again admonished for his 2003 representation of a client in connection with a second post-conviction relief application and potential appeal of his conviction. He violated RPC 1.5(b) by failing to communicate the basis or rate of the fee to the client. Here, too, we considered

that respondent had experienced personal problems at the time of his misconduct. In the Matter of Gerald M. Saluti, Jr., DRB 11-358 (June 22, 2007).

In 2013, respondent was reprimanded for failure to cooperate with the ethics investigation by failing to reply to three letters requesting a reply to the grievance, even after having advised the investigator that a reply was forthcoming. It was not until after an ethics complaint was filed that he retained counsel, filed an answer, and participated at the hearing. We did not give great weight to his wife's health problems because those problems did not prevent him from practicing law or accepting cases. In re Saluti, 214 N.J. 6 (2013).

This matter involves respondent's representation of a criminal defendant, Peter Bragansa. Respondent was the only witness to testify at the DEC hearing.

In April 2007, Bragansa, along with seventeen others, was indicted on federal criminal charges involving the internet sale of pharmaceuticals. The case was venued in California; Bragansa was incarcerated in New York. His brother John and their company, "IMI," were not indicted.

In or around August 2007, Bragansa retained respondent for assistance with bail issues. Respondent's fee was $10,000. He

admitted that he had not provided Bragansa with a writing setting forth the basis or rate of the fee for the bail proceeding because it was a "frenetic period of time trying to get Peter out of jail" and he did not feel that a retainer agreement was necessary.

Respondent could not recall whether he had made one or two court appearances in connection with the bail proceedings. He asserted that he and Bragansa had many discussions about how to obtain his release from jail. Respondent claimed that, after he was retained for the bail matter, he "got on the phone with, that very day, Corbin Weiss . . . the attorney from the Department of Justice [in Washington] that was handling the entire matter." The indictment was "nationwide," involving numerous defendants from many states. Respondent conceded that his direct negotiations with the U.S. Attorney's Office occurred only in the beginning of his representation of Bragansa for a bail package and consisted of his placing only two telephone calls. One call was to Assistant United States Attorney (AUSA) Weiss. Respondent could not remember the name of the other person he had contacted in September 2007. He also could not recall having any other conversations with Weiss or anyone else from the Department of Justice about a plea deal or cooperation agreement.

According to respondent, Bragansa's first court appearance was "basically an all-day experience," between travel to court and his discussions with AUSA Weiss. It went from "7:00 in the morning until probably 7:00 at night."

Respondent remarked that he reviewed the "115-120 page indictment" with Bragansa and visited Bragansa in jail prior to their court appearance. The entire process of signing in at the jail, passing through security, and conferring with Bragansa took six to seven hours of his time. He did not prepare any written submission in connection with Bragansa's bail application. Bragansa was released on bail, in September 2007, and was required to wear an ankle monitor.

Respondent maintained that, after Bragansa's release, Bragansa was constantly "on top of [him]," making telephone calls and sending him emails. Bragansa also had problems with his "pre-trial services officer." Through correspondence and telephone calls, respondent succeeded in obtaining a new officer for Bragansa. Those efforts took him "a couple of hours."

Afterwards, respondent offered to represent Bragansa in connection with the criminal prosecution, quoting a flat fee of "around a quarter of a million dollars," based on the number of defendants in the case, his impression of what the case would entail, and his anticipated need to stay in San Diego for

approximately one month. Bragansa could not afford his fee. Respondent, therefore, told Bragansa that he would have to get a public defender to handle his case.

Respondent believed that, because Bragansa had specific knowledge of what was happening in the "industry," the government would be interested in that information and would allow him to "cooperate." Respondent, who did not like Weiss' treatment of Bragansa, had been hopeful "based upon a relationship" he had, that he "could get some doors open" and deal with someone other than Weiss.

Respondent claimed that his contact was Michael Chertoff, to whom he was "lucky enough to have been introduced."[2] He remarked that Chertoff is a very "powerful individual." He claimed that he had met Chertoff through a friend of his, Kevin Marino, another criminal attorney. According to respondent, after Chertoff left the U.S. Attorney's Office, he rented office space in Newark to Marino "and that's how I became friends [with Chertoff]." He asserted that, although he had met Chertoff multiple times at Marino's office, he did not socialize with Chertoff.

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[2] At that time, Chertoff was the Secretary of Homeland Security.

On September 10, 2007, respondent sent the following email to Bragansa's father to explain the services he would provide to his son, as a "consultant":

> I hesitate to write this email because I am always concerned that these things are monitored . . . . However, Peter has asked that I explain briefly the basics of how I believe my representation of him would work.
>
> First, a deal needs to be made with the prosecutor from san diego [sic], basically ensuring peter [sic] remains out of jail and allowed to continue to operate his current business. . . .
>
> San Diego also wants to proffer peter [sic] before he is used in florida. . . [sic] a lot needs to be done quickly and I do not think you, his family, understand this fact . . . the price I have offered is terribly reasonable and I am somewhat tired of trying to convince you collectively that my services are worth the sum for which I have asked. . . . I have placed us in a position of power when in truth we were not . . . time to decide?
>
> Do you want my help for Peter and can you pay? Please let me know, my patience is wearing thin and I have other worthy clients that are literally begging for my time and service.
>
> [Ex.C-9.]

On September 17, 2007, respondent also sent an email to Bragansa that stated:

> My "consultation" fee for your case is [a] flat fee of $25K. . . I will go to DC and meet the powers that be for that payment.

You will not be retaining me as your attorney (because you could lose your CJA [Criminal Justice Act] appointed counsel) (if you have money for me then you can afford a lawyer and shouldn't qualify for the CJA counsel). I will go to DC immediately upon said payment under the guise of other business. While taking in the sights I will make it my business to meet with Corbin's boss and happen to mention your case. From there I will begin a basic third party negotiation on your behalf. Such a meeting can be easily made based upon my relationship.

All the conditions you require would be discussed along with the "political" benefits of the feds seeking your cooperation. I will make them come to me so to speak. I will of course coordinate this effort with your Cali. lawyer so that any deal struck includes the case for which you are currently under indictment. Also the protection of John and IMI would be [of] tantamount importance. . . . All would depend on my negotiation skills and your information . . . .

No promises are listed above as you see. I am capable of many things and I happen to like you and your family. Let us not forget, you had no "knowledge" and I dare them to prove you did. I relish the opportunity to strike a deal on your behalf as a third party consultant in this fashion. However, I wish more so that you could afford to let me try this case and hear the words "not guilty" from the jury. . . . . Ask yourself this simple question, why do they want to work with you so badly? I shall answer the question with these parting words . . . Saluti made them want to, you know it and I know it.

[Ex.C-10.]

Bragansa borrowed money from his brother John for respondent's fee. On September 25, 2007, John wired $20,000 to respondent (the amount Bragansa could afford) for respondent's continued services even though Bragansa was being represented in California by a court-appointed attorney, Marc Carlos.

Respondent admitted that, as stated in his September 17, 2009 email, he told Bragansa to retain him as a "consultant" rather than as an attorney, in order to protect Bragansa's ability to receive legal services from a court-appointed attorney. He reasoned that, if Bragansa had money to pay respondent, he could afford a lawyer and would not qualify for a court-appointed attorney.

Other than the two emails, there were no writings setting forth the basis or rate of respondent's fee to represent Bragansa or the Bragansa family. Respondent admitted that the main focus of the email concerned obtaining a plea or cooperation agreement with the federal government. He further admitted that, although the email referred to the importance of the protection of Bragansa's brother John and the company "IMI," it made no reference to respondent's representing John or the Bragansa family. Respondent considered the email to Bragansa to be, in part, a retainer agreement. He did not have a retainer

agreement with John or IMI. John was represented by his own attorney.

As to the services respondent was to provide for the $20,000 payment, he first stated that it was to represent "Peter Bragansa." Later, he testified that Peter could not afford his fee for representation at the San Diego trial. Therefore, John retained him to "assist the Bragansa family, and Peter most specifically."

In a certification, Bragansa's California attorney, Carlos, stated that respondent had informed him that "he had been retained by the Bragansa family to act as a 'counselor' to the family so that they would feel more comfortable about the proceedings in the Southern District of California." Respondent never informed Carlos that he was negotiating or attempting to negotiate a settlement for Bragansa.

Carlos's certification stated: "At no time did Mr. Saluti indicate to me that [sic] attempting to contact United States Department of Justice attorneys and/or their supervisors on behalf of Mr. Bragansa. If that were the case, I would [have] demanded that he cease his activities since I was the attorney of record and the only attorney empowered to negotiate a settlement on his behalf."

Respondent's interaction with Carlos was very limited and related primarily to the scheduling of matters and accommodations for Peter. The only communications he had with Carlos concerned Bragansa's bail violation. He spoke to Carlos approximately five times, for no more than a few minutes each time, regarding the scheduling of trial. They did not discuss factual matters concerning Bragansa's case.

Respondent testified that his goal in the representation was to "get an audience" with the highest level representative from the Department of Justice as possible. He would have been happy to speak with the Attorney General. However, the "task proved more difficult" than he anticipated. Despite his representation to Bragansa, he never went to Washington.

Respondent explained that his reference in his email to the "powers that be" was to Michael Chertoff, the person he "would have attempted to [have] assist [him] in opening the appropriate door" to help Bragansa. He intended to have Chertoff arrange a meeting for him with the U.S. Attorney General. However, respondent never spoke to Chertoff. The two calls he purportedly made to him went unanswered. He never followed up with a letter. He never met or spoke to the Attorney General or to Chertoff.

Respondent explained further that he never went to Washington because Chertoff never returned his calls, despite

his email to Bragansa boasting that, based on "his relationship," he could easily obtain a meeting with Weiss' boss, and would do so when he went to Washington under the guise of other business. Even though respondent's email to Bragansa stated that he would find an excuse to go to Washington, respondent remarked that he did not think that was an appropriate thing to do, without first having spoken to someone from the Attorney General's office.

As late as March 2009, respondent intimated that he was still pursuing some type of cooperation agreement. In a March 26, 2009 email, Bragansa stated to respondent that Weiss did not want to strike a deal with him and wanted to go to trial. Bragansa added that he thought that respondent planned to go "over or around" Weiss' head. Respondent's reply email that same day stated: "Please lemme [sic] do my thing so u [sic] will be forced to buy me a cigar." In another email to Bragansa that day, respondent wrote, "I called corbin [sic] [Weiss] yesterday . . . we shall see if I can disappear your case today [sic]."

Despite those emails, respondent admitted that, after March 26, 2009, he had not spoken to Weiss about a plea or cooperation agreement on Bragansa's behalf. Respondent testified that he had tried to call Weiss, in 2009, because Bragansa's trial was getting closer and he "had gotten nothing accomplished for him

in Washington, D.C." He, therefore, tried to make "a last-ditch effort to help" Bragansa, but did not recall receiving a return call from Weiss.

In a March 27, 2009 email, Bragansa asked respondent about the status of his efforts with Weiss. Respondent replied "I'm waiting for a call back, this is when shit gets done . . . relax and watch me pull a rabbit outta [sic] my hat." At the DEC hearing, respondent explained that these emails were sent one week before the trial and if "we were able to get something done on his behalf it literally at that point would have been like pulling a rabbit out of a hat." He added that, by that time, the issue of his going to Washington had died. According to respondent, it "wasn't gonna' [sic] be successful, I didn't believe." Respondent could not state unequivocally whether he had informed Bragansa that his phone calls to Chertoff or Weiss had gone unanswered, but believed that he must have told him at some point.

Respondent estimated that, from the time of the indictment to September 17, 2007, between telephone calls, court appearances, jail visits, discussions with Bragansa's family, "some stuff after the bail" and research, he had spent approximately forty hours on the matter.

As to the additional $20,000 fee, respondent stated that there were "an unbelievable amount of e-mails back and forth, [and] calls back and forth," because of problems with the conditions of Bregansa's bail and with his pre-trial services officer. Respondent estimated that the number of Bragansa's visits to his office was "[m]ore than I can count on my fingers and toes." He added that he spent a significant amount of time dealing with bail issues because Bragansa was concerned about his home detention and the problems that he was having with his pre-trial services officer. He conceded, however, that his September 17, 2007 email did not address those issues. He had multiple meetings with Bragansa to digest the indictment, and to determine whether Bragansa could provide his cooperation.

According to respondent, his representation "morphed" into his being Bragansa's sounding board for his defense, because it turned out that Bragansa "wasn't gonna be able to cooperate and ended up going to trial." He was acting as an "auxiliary" sounding board to the criminal attorney. Altogether, he estimated that he spent between seventy-five and one hundred hours on Bragansa's case. It is not clear, however, whether that included the time he spent on the bail issues as well as the time he spent trying to put together a cooperation agreement. Respondent had no time records to show the work he performed in

connection with the bail issue for Bragansa or for the Washington, D.C. negotiations.

In April 2009, Bragansa's California criminal case went to trial. It lasted several months and ended in a mistrial. Subsequently, Bragansa entered into a plea agreement, without respondent's assistance.

Respondent stated that, while Bragansa was in California, he needed living expenses and had demanded the return of his fee. Because respondent had been unable to obtain a plea or cooperation agreement for Bragansa, respondent believed that Bragansa was entitled to the return of a portion of the $20,000. He, thus, wired to Bragansa $7,000 in increments of $1,000, claiming that Western Union would permit him to wire only that amount at a time. Thereafter, his then law partner objected to his refunding any more money. He told respondent that Bragansa could file for fee arbitration.

After Bragansa filed a fee arbitration request, a fee arbitration hearing took place on September 2, 2010.[3] According to the fee arbitration determination, because Bragansa was

[3] Although R. 1:20A-5 provides that fee arbitration matters are confidential, in this case, respondent participated, without objection, in the ethics hearing in which documentary and testimonial evidence about the fee arbitration matter was involved.

forced to appear for trial, contrary to respondent's assurances, Bragansa had asked respondent to return the entire $20,000 fee. The fee arbitration committee (FAC) determined that respondent was entitled to only $2,000. Considering that respondent had already refunded $7,000, FAC awarded Bragansa an additional $21,000. Thereafter, in a January 25, 2011 email, Bragansa threatened respondent with an ethics grievance. He wrote:

> Even if you successfully discharge this debt to me, you will have me going after your license. All the evidence from the Fee Arbitration matter will be given to the Ethics Committee and this time I will only be trying to have you disbarred. Again, for 20K you are playing with your license. It's a very bad price for your license.
>
> [T220-15 to T220-21.][4]

In February 2011, respondent filed for bankruptcy, listing Bragansa as a creditor.

According to the DEC presenter, following the Supreme Court's determination that the bankruptcy did not discharge the outstanding fee arbitration award, respondent was given a period of time in which to satisfy the obligation, which he did.

Respondent claimed that he had not participated in the fee arbitration hearing because, in September 2010, his wife had her twentieth surgery, an unsuccessful hernia operation, which has

[4] "T" refers to the transcript of the July 11, 2012 DEC hearing.

since been repaired. It was his focus at the time. He stated that "more than likely" he failed to file an answer and was precluded from participating in the proceedings. Respondent, however, neither alerted the FAC about his wife's condition nor directed his staff to notify it about his personal problems.

Respondent explained further that, two weeks after he and his wife were married, his wife's medical problems began. She was diagnosed with a cyst that was removed. The operation, however, caused significant damage requiring reconstructive surgery over a period of years, which, respondent claimed, took "basically" twenty surgeries to repair.

As to the charge relating to respondent's failure to cooperate, the investigator (also referred to as the presenter) sent letters, on May 10 and June 14, 2011, to respondent, requesting a reply to Bragansa's grievance. Although respondent claimed that he had replied to the letters through counsel, the investigator did not receive a reply to the grievance.

According to respondent, on May 10, 2011, he had moved his office from 60 Park Place to 50 Park Place, Newark, New Jersey and both of the DEC's letters were sent to his former address. Respondent admitted that he had received the letters "at some point," although he did not know when. He testified that he thought that he might have been involved in another grievance

with the same investigator and that his current attorney was representing him in that matter as well. At some point, he asked that attorney to represent him in this matter. He turned the letters over to his attorney sometime after June 14, 2011. His answer to the ethics complaint admitted that "he received letters from the investigator but states that the investigator was aware that Respondent was represented by counsel and that all communications should have gone through counsel." Shortly after he received the follow up letter, he met with his attorney to discuss the Bragansa matter and how they would respond to it. When asked if he had anything else to offer about why he failed to respond to the two letters, he replied, "[N]o. That's my answer."

Respondent did not produce Bragansa's file at the presenter's request, claiming that he was unable to locate it.

At the DEC hearing, the presenter argued, among other things, that respondent charged an unreasonable fee. He contended that the bail issues did not require any extraordinary skill or expertise, noting that bail issues are the "bread and butter" of the services provided by criminal lawyers. The presenter pointed out that, with respondent's years of experience, no novel issues requiring research were presented. Moreover, he argued that respondent provided no records or

itemized bills to support the expenditure of forty hours. Thus, the presenter concluded that respondent's fee in that regard was unreasonable.

According to the DEC's hearing panel report, respondent testified that he was "a seasoned criminal attorney and had tried over 100 jury cases to conclusion." Although he was unable to "find his file or time sheets," the DEC was satisfied that, as to the initial representation, respondent had successfully performed "significant services" for Bragansa by "quickly effectuating his release from jail." The DEC, therefore, did not find clear and convincing evidence that respondent's fee was unreasonable and, therefore, did not find a violation of RPC 1.5(a). However, because respondent admitted that he did not have a "written retainer" with Bragansa, the DEC found that respondent violated RPC 1.5(b).

As to lack of candor to a tribunal (knowingly making false statements or failing to disclose material information), the hearing panel noted that the basis for the charge was Carlos' affidavit read in conjunction with respondent's email. The hearing panel report stated that, according to respondent, in September 2007, Bragansa was not able to pay respondent's $250,000 fee for defense at trial on the charges of illegal drug sales. Respondent, therefore, informed Bragansa that he would

limit his represention to attempting to obtain "some favorable treatment in a 'cooperation deal' with the federal prosecutor." The DEC did not find any evidence that respondent had made a misrepresentation to a tribunal. Likewise, the DEC did not find clear and convincing evidence that respondent and Bragansa had engaged in a fraud to obtain a public attorney for Bragansa's defense in the criminal action and, therefore, did not find a violation of RPC 3.3.

The DEC found that respondent did not violate RPC 7.1, based on his undisputed testimony about statements that he made to Bragansa, including the statement in respondent's September 17, 2007 email, that "no promises are listed above as you see." Likewise, the DEC did not find that respondent violated RPC 8.4(a) or RPC 8.4(d).

As to RPC 8.4(e), the DEC stated that it carefully considered respondent's statements and concluded that respondent was attempting to use his acquaintance with Chertoff or anyone else "to begin a dialogue for the benefit of his client." It, therefore, did not find clear and convincing evidence that he violated this rule.

For the failure to cooperate charge, the DEC accepted respondent's explanation that he had moved his office and that the investigator's letters had been sent to his former address.

When he received the letters, respondent turned them over to his attorney. Because it was not clear how much time had elapsed between respondent's receipt of the letters and his communications with the investigator, the DEC did not find a violation of RPC 8.1(b).

Finding only that respondent violated RPC 1.5(b), the DEC determined that an admonition was the appropriate level of discipline.

In a brief submitted to us and at oral argument, respondent's counsel urged us to affirm the DEC's admonition recommendation for respondent's violation of RPC 1.5(b). In turn, the presenter contended that respondent was guilty of all of the RPCs with which he was charged and recommended that respondent receive at least a reprimand and that he practice under the supervision of a proctor.

Following a de novo review of the record, we are satisfied that the conclusion of the DEC, that respondent was guilty of unethical conduct, is fully supported by clear and convincing evidence. We part company, however, with some of the DEC's findings and its recommendation.

After handling Bragansa's bail hearing and other issues, respondent tried to persuade Bragansa's father to retain him to assist Bragansa on the pending indictment. Respondent wrote, in

a September 10, 2007 email, that he was tired of trying to convince them "collectively" that his services were worth the fee he sought. He claimed that he had "placed us (presumably the Bragansa family) in a position of power when in truth we were not." He asked whether Bragansa's father was willing to help Bragansa pay his legal fees because, he claimed, he had other "worthy clients" that were "literally begging" for his services. His September 17, 2007 email to Bragansa boasted that he had powerful connections in Washington. The emails succeeded in persuading Bragansa to retain respondent to secure a plea or cooperation agreement and that respondent's services were worth the price.

Respondent's purported connection to the "powers that be," Michael Chertoff, was a gross exaggeration. In truth, he had met Chertoff only a few times and only by chance. Bragansa was, nevertheless, persuaded to borrow $20,000 for services that respondent ultimately failed to provide.

Count one of the ethics complaint alleged that respondent charged unreasonable fees: $10,000 for the bail issues and $20,000 to negotiate a plea or cooperation agreement. Notwithstanding that the FAC ordered respondent to return all but $2,000 of the total $30,000 that he received from Bragansa, we do not find clear and convincing evidence that respondent

violated RPC 1.5(a). Although respondent failed to provide any documentation to establish the amount of time he spent in connection with the bail hearing and the subsequent issues that arose, his unrefuted testimony was that he met with Bragansa at the prison, spoke to the AUSA attorney, attended one or two court appearances, dealt with post-bail issues, spent hours traveling to and from the prison and court, and communicated with Bragansa via emails, telephone calls, and in person. Had respondent spent the forty hours that he claimed he had, his $250 hourly rate would not have been unreasonable, considering his years of experience as a criminal attorney. Respondent, however, failed to provide Bragansa with a writing setting forth the basis or rate of his fee and admitted that he violated RPC 1.5(b) as to the bail retention.

With regard to negotiating a plea or cooperation agreement, respondent charged Bragansa $20,000. He was unable to substantiate what, if any, work he did in that regard. He claimed that he made a couple of telephone calls that were not returned. He never went to Washington, as he stated he would, and he did not succeed in obtaining any type of agreement for Bragansa. A $20,000 fee may have been reasonable given what respondent intended to do. We, thus, do not find a violation of RPC 1.5(a). Respondent, however, failed to return an unearned

fee, a violation of RPC 1.16(d), because he did not achieve his goals, did not make contact with Department of Justice personnel, did not go to Washington, did not obtain any type of agreement at all, and did not return the fee when his client requested it. Because the complaint did not charge respondent with having violated RPC 1.16(d), we do not find that he violated that rule. See R. 1:20-4(b).

Bragansa ultimately filed for fee arbitration. Respondent tried to avoid paying the fee arbitration award by filing for bankruptcy and listing Bragansa as a creditor. The debt proved to be non-dischargeable in bankruptcy and respondent eventually returned the excess fee to Bragansa.

As to the charge in count two, that respondent failed to provide a writing stating the basis or rate of the fee for the cooperation agreement, we find that respondent's September 17, 2007 email was sufficient to fulfill the requirements of RPC 1.5(b). That rule states that, when a lawyer has not regularly represented a client "the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation."

Count three charged respondent with violating RPC 3.3(a)(1) for accepting a fee from Bragansa, while he was fully aware that Bragansa was being represented by a court-appointed attorney;

advising Bragansa that he was acting only as a "consultant" so that Bragansa's eligibility for the court appointed attorney would not be jeopardized; and telling Carlos several times that he had been retained to act only as a counselor to the Bragansa family, when he had not been. RPC 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal. Because respondent made those statements to Carlos, not to a tribunal, we find this rule is inapplicable. Instead, this misconduct is governed by RPC 8.4(c) and RPC 8.4(d), as charged in counts eight and nine, respectively, discussed below.

Count four charged respondent with having violated RPC 3.3(a)(5) for (1) accepting a $20,000 fee from Bragansa, even though he was aware that he was being represented by a court-appointed attorney; (2) calling himself a consultant so as not to jeopardize Braganza's eligibility for the court-appointed attorney; and (3) informing Carlos that he was merely acting as the family's counselor.

RPC 3.3(a)(5) states, in relevant part, that a lawyer shall not "fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal." Respondent's email to Bragansa specifically informed Bragansa that he would be acting as a consultant, not an

attorney, so that Bragansa would not lose his appointed counsel. Respondent, thus, assisted or induced Bragansa to withhold the truth from the court when, as Bragansa's lawyer, he had a duty to divulge the true arrangement. In other words, he assisted his client in perpetrating a fraud on the tribunal, a violation of RPC 3.3(a)(5). In fact, respondent's September 17, 2007 email shows that he was the mastermind of the scheme, even though he did not physically appear before the tribunal.

Counts five and six charged respondent with violations of RPC 7.1. Count five alleged that respondent made numerous false statements regarding his representation: that he would go to Washington and negotiate a settlement on his behalf, and, over the next two years, that the matter was moving forward when respondent had not made any contacts on Bragansa's behalf (RPC 7.1(a)(1)). Count six alleged that respondent created an unjustified expectation about the results he could achieve, by stating that he could ensure that Bragansa would never have to appear at trial and that he could arrange a deal for him as a cooperating witness because respondent knew the right people in Washington (RPC 7.1(a)(2)).

RPC 7.1(a) states:

> A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional

> involvement. A communication is false or misleading if it:
> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
> (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law . . . .

Respondent's September 10 and September 17, 2007 emails, to Bragansa's father and to Bragansa, respectively, were replete with misrepresentations and promises that respondent knew he could not keep. Respondent represented that he would meet, in Washington, D.C., with powerful people and that he would do so immediately upon receipt of his fee. Respondent failed to honor those promises.

As late as March 26, 2009, more than eighteen months after respondent sent those emails, Bragansa informed respondent that AUSA Weiss did not want to strike a deal with him, and instead wanted to go to trial. Respondent replied "[p]lease lemme do my thing so u will be forced to buy me a cigar." That same day, he emailed Bragansa that he had called Weiss the day before, suggesting to Bragansa that he might resolve his case that day. Later, on March 27, 2009, respondent informed Bragansa that he

was awaiting a return call, boasting that he was about to "pull a rabbit" from his hat.

In our view, respondent's emails contained material misrepresentations that misled Bragansa and his family about the services he would and could provide. He misrepresented that he had powerful contacts and that he would go to Washington, D.C., immediately upon payment of his fee. He continued to make misrepresentations up until the eve of trial. Respondent's counsel argued that, because respondent offered no guarantee for his services, he is not guilty of violating RPC 7.1. Regardless of respondent's disclaimer that he did not offer any promises, he did, however, promise to take certain actions, which he failed to do. He is, therefore, guilty of violating RPC 7.1(a) and (b), as well as RPC 8.4(c).

Count eight alleged that respondent again violated RPC 8.4(c) by telling Bragansa that he would arrange a deal for him as a cooperating witness through his alleged connections in Washington and by asserting, over a two-year period, that the matters were moving forward, even though he had not contacted anyone in Washington and had not done any substantive work on Bragansa's behalf. We find that respondent's misrepresentations about the status of Bragansa's matter violated RPC 8.4(c). In addition, we find that, by suggesting that his client retain him

as a consultant rather than an attorney, so as to avoid jeopardizing his entitlement to a court-appointed attorney, respondent engaged in conduct prejudicial to the administration of justice, as charged in count nine of the complaint.

As to RPC 8.4(e) (stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct), there is no evidence that respondent intended to "improperly" influence a government official. Count ten of the complaint alleged that respondent advised Bragansa that he could arrange a deal for him as a cooperating witness, based on his alleged connections in Washington. While the record supports a finding that respondent had no connections in Washington, there is no evidence that he intended to improperly influence anyone. His stated intent, to achieve a cooperation agreement, is not an improper goal. We, thus, dismissed the charge that respondent violated RPC 8.4(e).

The eleventh count alleged that respondent failed to cooperate with the DEC's investigation, a violation of RPC 8.1(b) (although not specifically cited), for failing to provide any response to the investigator's letters. Although respondent filed an answer to the complaint, we find that respondent violated RPC 8.1(b) because he did not submit a reply to the

investigator's letters, which he admitted he had received. Respondent's defense, that the letters were sent to the wrong address and that they should have been sent to his counsel, do not absolve him of his duty to reply, pursuant to R. 1:20-3(g)(3).

Finally, count seven alleged that respondent was guilty of violating RPC 8.4(a) for his actions listed in the complaint. This rule states that it is misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Because respondent violated other Rules of Professional Conduct, we find that he violated RPC 8.4(a).

In all, respondent is guilty of having violated RPC 1.5(b), RPC 3.3(a)(5), RPC 7.1(a)(1) and (2), RPC 8.1(b), RPC 8.4(a), and RPC 8.4(c) and (d). Clearly, based on these violations and respondent's ethics history (two admonitions and a reprimand), another admonition is not appropriate discipline here.

Viewed independently, each rule violation warrants no more than an admonition or a reprimand. For example, conduct involving a violation of RPC 1.5(b), even when accompanied by other, non-serious ethics offenses, typically results in an admonition. See, e.g., In the Matter of Gerald M. Saluti, DRB 11-358 (January 20, 2012) (attorney failed to communicate his

fee in writing with respect to a post-conviction relief application and a potential appeal from the client's conviction);[5] In the Matter of Myron D. Milch, DRB 11-110 (July 27, 2011) (attorney did not memorialize the basis or rate of the fee in writing, lacked diligence, and failed to communicate with his client); and In the Matter of Eric S. Pennington, DRB 10-116 (August 3, 2010) (attorney did not timely set forth the basis or rate of the fee in writing).

Violations of RPC 7.1, communications about a lawyer's services, have usually involved attorney advertising and have generally resulted in the imposition of a reprimand. See In re Garces, 163 N.J. 503 (2000), and In re Grabler, 163 N.J. 505 (2000) (attorneys in companion cases reprimanded for making false and misleading statements in a Yellow Pages advertisement that included the designation "certified civil and criminal trial attorney," when neither attorney was so certified; the ad also included the statement "largest recovery in the shortest time," in violation of RPC 7.1(a)(1), (2), and (3)); In re Anis, 126 N.J. 448 (1992) (reprimand where an attorney misrepresented

[5] It is not likely that this is a case where respondent failed to learn from prior mistakes because the grievance in his earlier matter was docketed in July 27, 2010. He was retained in this matter in August 2010. He probably had not received a copy of the grievance at the time Bragansa hired him for his bail hearing.

that he was an experienced personal injury litigator and falsely implied that other attorneys routinely charged a one-third contingent fee in certain matters, despite the graduated fee provisions of R.1:21-7); and In re Caola, 117 N.J. 108 (1989) (attorney sent a targeted direct-mail solicitation letter misrepresenting the number of years he was in practice, his status in the law firm, and the number and types of cases he handled). But see, In re Picker, 213 N.J. 251 (2013) (three-month suspension for attorney who, in five client matters, was guilty of multiple violations including RPC 7.1(a)(2); despite a non-guarantee provision in her retainer, the attorney sent an email guaranteeing the outcome of her client's case; she was also guilty of gross neglect, failure to communicate with the client, charging an unreasonable fee, failure to continue a representation when ordered to do so by a tribunal, failure to protect a client's interests on termination of the representation, knowingly disobeying an obligation under the rules of a tribunal, failure to cooperate with disciplinary authorities, and conduct prejudicial to the administration of justice; no ethics history); and In re Palombi, 152 N.J 453 (1998) (three-month suspension for attorney who implied to his client that he was using wrongful means to obtain a more favorable recommendation for him on sentencing, violations of

RPC 1.4(d) (formerly RPC 1.2(e) (failure to advise the client of relevant limitations on the lawyer's conduct, when the lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct) and RPC 7.1(a)(2)).

Generally, failure to cooperate with a DEC's investigation also results in an admonition, if the attorney does not have an ethics history. See, e.g., In the Matter of Lora M. Privetera, DRB 11-414 (February 21, 2012) (attorney submitted an inadequate reply to an ethics grievance; thereafter, she failed to cooperate in the ethics investigation until finally retaining ethics counsel to assist her); In the Matter of Douglas Joseph Del Tufo, DRB 11-241 (October 28, 2011) (attorney did not reply to the DEC's investigation of the grievance and did not communicate with the client), In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (attorney failed to comply with DEC investigator's request for information about the grievance; attorney also violated RPC 1.1(a) (gross neglect) and RPC 1.4(b) (failure to communicate with a client); and In the Matter of Marvin Blakely, DRB 10-325 (January 28, 2011) (after his ex-wife filed a grievance against him, attorney ignored numerous letters from the district ethics committee seeking information about the matter; the attorney's lack of cooperation forced ethics authorities to obtain information from other

sources, including the probation department, the ex-wife's former lawyer, and the attorney's mortgage company).

A misrepresentation to a client will generally result in a reprimand, even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Singer, 200 N.J. 263 (2009) (attorney misrepresented to his client, for a period of four years, that he was working on the case; the attorney also exhibited gross neglect and lack of diligence and failed to communicate with the client; no ethics history); In re Wiewiorka, 179 N.J. 225 (2004) (attorney misled the client that a complaint had been filed; in addition, the attorney took no action on the client's behalf, and did not inform the client about the status of the matter and the expiration of the statute of limitations; no prior discipline); In re Onorevole, 170 N.J. 64 (2001) (attorney made misrepresentations about the status of the case; he also grossly neglected the case, failed to act with diligence, and failed to reasonably communicate with the client; prior admonition and reprimand); and In re Till, 167 N.J. 276 (2001) (over a nine-month period, attorney lied to the client about the status of the case; the attorney also exhibited gross neglect; no prior discipline).

One of the more troubling aspects of respondent's actions is that Bragansa paid him, purportedly to act as a consultant,

so that Bragansa would not lose his court-appointed attorney. Respondent specifically wrote in an email to his client: "if you have money for me then you can afford a lawyer and shouldn't qualify for the CJA counsel." Respondent masterminded and assisted his client in perpetrating a fraud on the court.

Conduct involving lack of candor to a tribunal has resulted in a wide range of discipline. See, e.g., In the Matter of Robin K. Lord, DRB 01-250 (September 24, 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; unaware of the client's significant history of motor vehicle infractions, the court imposed a lesser sentence; 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 Jaffe, 211 N.J. 1 (2012) (reprimand for attorney who made a false statement and withheld information to the trial judge in a municipal court matter, which resulted in the judge permitting him to withdraw from the case without notice to his non-English-speaking client or her English-speaking representative); In re Whitmore, 117 N.J. 472 (1990) (reprimand imposed on a municipal prosecutor who failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a DWI charge had intentionally left the courtroom before the case was

called, resulting in the dismissal of the charge); In re Stuart, 192 N.J. 441 (2007) (three-month suspension for assistant district attorney in New York who, during the prosecution of a homicide case, misrepresented to the court that he did not know the whereabouts of a witness; in fact, the attorney had made contact with the witness four days earlier; compelling mitigation justified only a three-month suspension); In re Hasbrouck, 186 N.J. 72 (2006) (attorney suspended for three months for, among other serious improprieties, failing to disclose to a judge his difficulties in following the judge's exact instructions about the deposit of a $600,000 check in an escrow account for the benefit of the parties to a matrimonial action; instead of opening an escrow account, the attorney placed the check under his desk blotter, where it remained for eight months); In re Norton and Kress, 128 N.J. 520 (1992) (both the prosecutor and defense counsel were suspended for three months for permitting the dismissal of a DWI charge; although the attorneys participated in a representation to the court that the arresting officer did not wish to proceed with the case, they did not disclose that the reason therefor was the officer's desire to give a "break" to someone who supported law enforcement); In re Kernan, 118 N.J. 361 (1990) (three-month suspension for attorney who, in his own divorce matter, submitted to the court a case information statement with a

list of his assets and one day before the hearing transferred to his mother one of those assets, an unimproved 11.5 acre lot, for no consideration; the attorney's intent was to exclude the asset from marital property subject to equitable distribution; the attorney did not disclose the conveyance at the settlement conference held immediately prior to the court hearing and did so only when directly questioned by the court; the attorney also failed to amend the certification of his assets to disclose the transfer of the lot ownership; prior private reprimand); and In re Forrest, 158 N.J. 428 (1999) (attorney who failed to disclose the death of his client to the court, to his adversary, and to an arbitrator was suspended for six months; the attorney's motive was to obtain a personal injury settlement).

There remains the question of the appropriate degree of discipline for respondent's ethics infractions . While none of the cases cited above are directly on point, the Picker case (three-month suspension) has similar elements to respondent's: making misleading communications about the attorney's services, failing to cooperate with disciplinary authorities, and engaging in conduct prejudicial to the administration of justice. Both attorneys did not treat a tribunal with the required respect. Picker was guilty of knowingly disobeying an obligation under the rules of a tribunal, while here, respondent instructed his

client to mischaracterize the representation in order to mislead the tribunal. Although Picker's matter involved five clients and respondent's matter involved only one client, Picker had no ethics history while respondent's ethics history consists of two admonitions and a reprimand.

An additional aggravating factor here, that respondent did not return his client's unearned fee, is offset by his bankruptcy, and thus a presumed inability to repay his client. He has since repaid Bragansa. We note also that respondent was beset by his wife's serious and continuing health problems. Balancing the mitigating and aggravating factors, we determine that a three-month suspension is warranted.

Member Gallipoli voted to impose a six-month suspension.

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: for Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Gerald M. Saluti
Docket No. DRB 13-065

Argued: September 19, 2013

Decided: November 4, 2013

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Six-month suspension	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Gallipoli			X			
Yamner		X				
Zmirich		X				
Total:		6	1			

for Ellen A. Brodsky
Isabel Frank
Acting Chief Counsel