SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-139
District Docket No. IV-2011-0016E

IN THE MATTER OF

JOSEPH GEMBALA, III

AN ATTORNEY AT LAW

Decision

Argued: October 17, 2013

Decided: December 10, 2013

Salvatore J. Siciliano appeared on behalf of the District IV Ethics Committee.

Mark J. Molz 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 disciplinary stipulation between the District IV Ethics Committee (DEC) and respondent. Respondent admitted that he violated RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with a client), RPC 1.4(c) (failure to explain a matter to the extent necessary

for the client to make informed decisions about the representation), RPC 1.5(b) (failure to communicate the basis or rate of the fee in writing), RPC 1.15(d) and R. 1:21-6(b) and (c) (recordkeeping), RPC 1.16(b) (improper withdrawal from representation), RPC 5.5(a)(2) (assisting in the unauthorized practice of law), RPC 5.4(a) (sharing fees with a nonlawyer), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The DEC recommended that we impose a reprimand. We agree with the recommended discipline.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1985. He has no history of discipline. He maintains an office for the practice of law in both jurisdictions.

The following facts gave rise to this matter.

In April 2009, respondent and Secure Property Solutions, LLC (Secure), entered into a verbal agreement whereby respondent would represent Secure in the preparation of deeds and mortgages. Respondent did not provide Secure with a writing setting forth the basis or rate of the fee. Pursuant to the agreement, respondent would perform document review, offer legal opinions, and, on occasion, communicate with Secure's customers who were seeking loan modifications. "Letters were sent" to

Secure's customers, bearing respondent's name and his New Jersey office address, and attaching "what appeared to be" a fee agreement soliciting respondent's services, thereby inducing Secure customers to believe that respondent was their attorney.[1]

In addition to allowing Secure to place his name and address on its letterhead, respondent permitted Secure to "directly deposit" money into his Pennsylvania attorney trust account. Respondent continually accepted payments from Secure and from Secure's customers. There is no indication that respondent's trust account, "dedicated to Secure" and, thus, to Secure's customers, was located in New Jersey. Furthermore, respondent's trust account bank records indicated that, "on multiple occasions, almost daily, electronic bank transfers were made to various companies." Respondent provided no record of any written instructions to the bank regarding these transfers or any returned confirmation authorizing the transfers.

At some point after respondent formed his relationship with Secure, John Heckler, a New Jersey resident and the grievant in this matter, became a customer of Secure. In an effort to modify his home loan and prevent foreclosure, Heckler paid

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[1] The stipulation does not reveal by whom the letters were sent.

Secure $2,995 in November 2009. Shortly thereafter, his mortgagee notified him that, if he did not pay $36,000 in thirty days, he would lose his home. Presumably, Heckler's $2,995 fee was deposited in respondent's trust account to modify Heckler's loan and prevent the foreclosure.

Heckler and Secure exchanged a number of email messages about the loan modification. On January 21, 2010, Heckler, through his sister, sent an email to a Secure employee, after learning from his mortgagee that he was at risk of losing his house. The email indicated that the loan negotiator with whom Heckler had worked was no longer employed by Secure and that, therefore, he was having difficulty contacting anyone from Secure about the thirty-day notice that he had received from the mortgagee.

On January 22, 2010, a Secure employee sent an e-mail to Heckler, indicating that someone would send him a reply shortly. On January 25, 2010, Heckler's sister again emailed the Secure employee, but received no reply.

According to the stipulation, at no time during the course of the emails did respondent communicate with Heckler. Respondent stipulated that, "[e]ven if [he] was unaware as to the emails, he had a fiduciary duty keep [sic] himself

reasonably informed of the business between Secure and [Heckler]."

Respondent conceded that he violated RPC 1.3, RPC 1.4(b) and (c), RPC 1.5(b), RPC 1.15(d) and R. 1:21-6(b) and (c), RPC 1.16(b), RPC 5.4(a), RPC 5.5(a)(2), and RPC 8.4(c).

Following a de novo review of the record, we are satisfied that the stipulation clearly and convincingly establishes that respondent's conduct was unethical. We find, however, that many of the conceded violations are not supported by the record.

The rationale for the numerous violations is, in some instances, unclear. We, therefore, set out the stipulated violations individually, followed by an analysis of that conceded violation.

> 1. Respondent did not represent Grievant to the fullest or attempt to cease representation. By virtue of his relationship with Secure, Respondent failed to maintain his fiduciary duty with Secure's clients. Respondent knowingly used his trust account as Secure's business account. This relationship in and of itself, created a fiduciary duty not only between Respondent and Secure but also with Respondent and Secure's clientele, as Respondent thus became the holder of their money as well. As such, he had a fiduciary duty to protect the money of Secure's clients, including Grievant. This behavior directly violates RPC 1.3 and RPC 1.4(b).

In this paragraph, respondent conceded that he lacked diligence and failed to communicate with Secure's customers. The record, however, provides no information about any Secure customer, besides Heckler. As to Heckler, the stipulation states that respondent represented Secure and had agreed to "on occasion, communicat[e] with clients of Secure." An agreement to communicate with Secure's clients does not mean that respondent represented those clients. Indeed, there is no evidence that respondent was even aware of Heckler's matter. We find it significant that Heckler's sister contacted a Secure employee, not respondent, when Heckler was facing foreclosure. When the sister received no satisfactory reply from Secure, she again called Secure, not respondent. Even if we determined that respondent represented Heckler, the record reveals that, from January 21 to January 25, 2010, no one from Secure substantively replied to Heckler's sister's email inquiring about the loan. A failure to communicate over a four-day period would not constitute a violation of RPC 1.4(b).

Moreover, the statement that respondent had a fiduciary duty to protect funds belonging to Secure's customers is not supported in this context. Although the record indicates that Heckler's funds "presumably" were deposited in respondent's

trust account, there is no suggestion that they were jeopardized. We, thus, find that the stipulated violations of RPC 1.3 and RPC 1.4(b) are not supported by the record.

> 2. Respondent failed to form a written fee agreement between himself and Secure, thus violating RPC 1.5(b).

Here, we find that the record supports a violation of RPC 1.5(b). Respondent failed to provide Secure with a document setting forth the basis or rate of his fee.

> 3. Respondent failed to communicate with Grievant about his loan and possible foreclosure, after taking on the fiduciary duty to maintain and hold his money. Respondent simply stopped representation and violated RPC 1.16(b). Further, Respondent, as evidenced by the communication between Grievant and Secure, failed to communicate with grievant about his loan and possible foreclosure, after taking on the fiduciary duty to maintain and hold his money. As such, it appears that Respondent simply stopped representation.

Here, again, the fact that respondent may have held funds that Heckler had paid to Secure does not impose on him a duty to communicate with Heckler. The stipulation states that respondent's services were to include "on occasion, communication with clients of Secure." That obligation could simply require setting up appointment times to sign documents.

It does not necessarily indicate that respondent represented Heckler or that he improperly withdrew from a representation that may never have existed. The statement that respondent violated RPC 1.16(b) is, thus, not supported by the facts.

> 4. Respondent accepted fees from Secure as a result of Secure's signing of new clients. This generated separate fees to the attorney and thus the sharing of fees with a lay person. This partnership further created the practice of an unauthorized lay intermediary, offering legal advice by way of Respondent. This behavior constituted a violation of RPC 5.4(a).

In its analysis of respondent's fee arrangement with Secure, the DEC considered a joint opinion issued by the Advisory Committee on Professional Ethics (ACPE) and the Committee on the Unauthorized Practice of Law (UPL). ACPE Opinion 716/UPL Opinion 45 197 N.J.L.J. 59 (2009) (the joint opinion), addresses attorneys' work with loan modification companies. The joint opinion analyzed three scenarios:

> The Committee struck down a variety of arrangements between attorneys and loan modification companies that amounted to improper fee sharing. Under RPC 7.3(d), the Committee held that attorneys may not pay referral fees to loan companies that refer loan transactions to the attorney. Moreover, an attorney working as in-house counsel for a loan modification company may not share legal fees with the company or provide legal services to the company's

> customers. In addition, the attorney may not partner with or be retained by the company to provide legal services to its customers.
>
> [Kevin H. Michels, New Jersey Attorney Ethics §36:3-1 at 866 (Gann 2012).]

The stipulation sets out insufficient information about respondent's relationship with, and compensation from, Secure for us to find clear and convincing evidence that he was guilty of fee sharing. The stipulation states that "[r]espondent continually accepted payments from Secure and from Secure's customers." Respondent did not pay referral fees to Secure. Beyond that, the stipulation reveals very little. There is no indication that respondent was in-house counsel to Secure, as opposed to being retained to represent Secure with regard to the loan modification agreements. In addition, as stated previously, the stipulation does not provide sufficient grounds to support a finding that an attorney/client relationship existed between respondent and Secure's customers. In light of the uncertainties and voids in the record, we dismiss the stipulated violation of RPC 5.4(a).

> 5. Respondent's failure to keep his client adequately informed and his misrepresentation as grievant's attorney was deceitful and constituted a violation of RPC 1.4(c) and RPC 8.4(c).

As to the violation of RPC 1.4(c), the stipulation does not specify which decisions about the representation Heckler had to make and what information respondent failed to supply to allow Heckler to make those decisions. We emphasize that respondent's client was Secure, not Secure's customers. Although respondent may have agreed to talk to Secure's customers about the progress of their matters, that contact was always on behalf of Secure.

As to RPC 8.4(c), the nature of the alleged misrepresentation is also unclear. The reference may be to the fee agreement. If Secure's customers paid respondent, of necessity, Secure passed onto its customers the cost of the representation. By sending respondent's fee agreement to its customers, Secure may have misled Heckler and others to believe that respondent was representing them. If respondent knew about this possible misunderstanding, he was obligated to explain to the customers that his loyalties were to Secure. We find that the misrepresentation charge is vague and, therefore, insufficient for us to find misconduct. On this score, we note that Heckler sent his $2,995 fee to Secure, not to respondent. Presumably, those funds were for his loan modification, not for respondent's fee. We cannot find, in this record, that Secure's

customers believed that respondent was representing them. We, thus, dismiss the charge that respondent violated RPC 8.4(c).

> 6. Respondent failed to hold his attorney trust account in a New Jersey financial institution. This violates Rule 1:21-6(b) and RPC 1.15(d).

Respondent is admitted to practice law in New Jersey and Pennsylvania, maintaining law offices in both jurisdictions. The fact that Secure's funds were held in a Pennsylvania trust account does not necessarily indicate that respondent did not maintain a New Jersey trust account. We note that the stipulation does not specifically recite that respondent did not maintain a New Jersey trust account. Moreover, the record does not reveal where Secure is located. If Secure is not located in New Jersey, respondent would not be obligated to maintain Secure's funds in a New Jersey trust account. Because Heckler was not respondent's client, his New Jersey residency is not relevant. Because the record lacks clear and convincing evidence that respondent was required to deposit Secure's funds in a New Jersey trust account, we dismiss the charged RPC 1.15(d) and R. 1:21-6(b) violations.

> 7. Respondent authorized electronic bank transfers from Secure's account. Respondent failed to provide any written instructions to the bank regarding these transfers or any returned confirmations authorizing said transfers and thus failed to meet the guidelines of Rule 1:21-6(c) and RPC 1.15(d).

Here, the stipulation sets out a basis for the charged violations. Pursuant to R. 1:21-6(c)(1)(A), each electronic transfer out of an attorney's trust account must be made on signed written instructions from the attorney to the bank. The bank must confirm each authorized transfer by returning a document to the attorney, indicating the date of the transfer, the payee, and the amount. Based on respondent's failure to comply with these electronic transfer requirements, we find that he violated R. 1:21-6(c)(1)(A) and RPC 1.15(d).

> 8. The relationship between Respondent and Secure appears to have created the practice of an unauthorized lay intermediary, offering legal advice by way of the information Respondent was hired to provide. This behavior violates RPC 5.5(a)(2), which requires that a lawyer not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

The record supplies little information about the scope of the relationship between respondent and Secure. It is unclear exactly what he did for Secure and what Secure's employees did,

in turn. Because the stipulation fails to support a finding that Secure provided legal services, we dismiss the charge that respondent assisted Secure in the unauthorized practice of law.

In sum, respondent is guilty of failing to set forth the basis or rate of his fee in writing, a violation of RPC 1.5(b), and failing to comply with recordkeeping rules, a violation of RPC 1.15(d). Before we address the appropriate measure of discipline for those violations, there are two issues that merit brief discussion. First, the stipulation states that respondent's name was on Secure's letterhead. Because a copy of the letterhead is not in the record, it is impossible to know exactly how respondent is portrayed. Nevertheless, he did not stipulate to any violation concerning Secure's letterhead.

Second, the stipulation alludes to Secure's having free reign of respondent's trust account. It also states that "almost daily, electronic bank transfers were made to various companies." The stipulation, thus, suggests that Secure's bills were paid from respondent's trust account, a violation of RPC 1.15(a) (safekeeping property). Because, however, respondent did not stipulate to a violation on this score, we do not find that he violated RPC 1.15(a).

Citing precedent for each of the stipulated violations and noting the guidance of Joint Opinion 716/45, the DEC recommended a reprimand. The DEC noted, presumably by way of mitigation, that respondent has no history of discipline. As additional mitigation, respondent agreed to reimburse Heckler the fee he paid to Secure within thirty days from the execution of the stipulation. The record does not reveal whether respondent made the payment to Heckler.

As to the appropriate measure of discipline, conduct involving a violation of RPC 1.5(b), even when accompanied by other, non-serious ethics offenses, generally 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); 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); In the Matter of Carl C. Belgrave, DRB 05-258 (November 9, 2005) (attorney who was retained to represent the buyer in a real estate transaction failed to state in writing the basis of his fee, resulting in confusion about whether a

$400 fee was for the real estate closing or for a prior matrimonial matter for which the attorney had provided services without payment; recordkeeping violations also found); In the Matter of William J. Brennan, DRB 03-101 (May 23, 2003) (attorney did not memorialize the rate or basis of his fee in a criminal matter); and In the Matter of Louis W. Childress, Jr., DRB 02-395 (January 6, 2003) (attorney did not reduce to writing the rate or basis of his fee in real estate matters).

Similarly, recordkeeping irregularities ordinarily are met with an admonition, so long as they have not caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of Steve Hallett, DRB 12-140 (July 25, 2012) (for five years, the attorney maintained about $9,500 in his trust account because he could not identify the owners; after the attorney became incapacitated by a medical condition, the funds were depleted by automatic debits and bill payments that he had not authorized, resulting in the account being overdrawn; although the attorney had received two reprimands, they were for unrelated conduct; mitigating factors included the attorney's previous regular monitoring of the account to ensure that the funds remained intact, his efforts to replenish the missing funds by making monthly installment payments, and his representation that, once

the funds were fully replenished, he would apply for permission to deposit them in the Superior Court Trust Fund); In the Matter of Christopher J. Carkhuff, DRB 11-062 (May 20, 2011) (attorney kept inactive client balances in his trust account for extended periods of time); In the Matter of John K. Park, DRB 10-333 (February 1, 2011) (after representing clients in the purchase of real estate, the attorney inadvertently deposited the funds in his New York trust account, rather than his New Jersey trust account maintained at the same bank, and failed to maintain trust account records in connection with the transaction); In the Matter of Robert M. Mayerovic, DRB 09-060 (June 9, 2009) (a random audit of the attorney's trust account revealed several recordkeeping deficiencies that had also been identified in a 1990 audit); and In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (attorney failed to maintain a trust account in a New Jersey banking institution).

Here, respondent is guilty of two violations of the RPCs, each of which, standing alone, would warrant an admonition. In determining the appropriate measure of discipline, we have considered, in mitigation, that respondent has maintained an unblemished record for twenty-eight years. Respondent, however, is guilty of more than simple recordkeeping infractions. He

allowed a client to "directly deposit" money into his trust account and recklessly allowed electronic transfers from his attorney trust account, while maintaining none of the safeguards required by the rules for those transfers. We, thus, determine that a reprimand is required for the sum of his misconduct.

Member Zmirich 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: [signature]
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

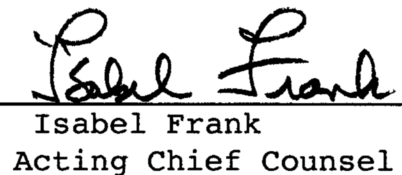
In the Matter of Joseph A. Gembala, III
Docket No. DRB 13-139

Argued: October 17, 2013

Decided: December 10, 2013

Disposition: Reprimand

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



Isabel Frank
Acting Chief Counsel