

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-097
District Docket No. VA-2012-0015E

IN THE MATTER OF
OUSMANE D. AL-MISRI
AN ATTORNEY AT LAW

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Decision

Argued: June 19, 2014

Decided: October 3, 2014

John Charles Garde appeared on behalf of the District VA Ethics Committee.

Respondent waived appearance for oral argument.

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 (censure) filed by the District VA Ethics Committee (DEC). A two-count amended complaint charged respondent with having violated RPC 5.5(a)(1) (practicing law while ineligible)

and RPC 8.1(b) (failure to cooperate with an ethics investigation).¹ We determine to impose an admonition.

Respondent was admitted to the New Jersey bar in 1979. On September 30, 1996, he received an admonition (when he was known as Ronald A. Davis) for failing to communicate with a client and improperly depositing a former client's check into his trust account, as a favor to the client, even though the check did not relate to a client matter. In the Matter of Ronald A. Davis, DRB 96-271 (September 30, 1996).

On December 20, 2002, respondent received a second admonition, this time for gross neglect, lack of diligence, failure to memorialize the rate or basis of the fee, and failure to communicate with the client in a real estate matter. In the Matter of Ousmane D. Al-Misri, DRB 02-351 (December 20, 2002).

On February 13, 2009, respondent was censured for gross neglect in one matter, commingling, recordkeeping violations, and practicing law while ineligible. In re Al-Misri, 197 N.J.

¹ The original complaint failed to cite any RPCs. It was amended on September 27, 2013, without objection, to include them.

503 2009). The Supreme Court's February 13, 2009 order required respondent to submit to the Office of Attorney Ethics (OAE) quarterly reconciliations of his attorney trust account for a period of two years and until further order of the Court.

The facts are as follows:

Respondent was ineligible to practice law, from September 29, 2008 to February 17, 2009 and from September 27, 2010 to June 27, 2012, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection (the CPF).

On January 12, 2012, during a period of ineligibility, respondent sought to be relieved from the previously-imposed monitoring and reporting requirements to the OAE. That application was granted by Court order dated March 9, 2012.

According to the complaint, respondent sent his January 12, 2012 petition to the Court on his attorney letterhead, which referenced him as an "Attorney at Law." Moreover, in his certification in support of the petition, he stated that he maintained an office for the practice of law at 33 Halsey Street, in Newark.

When respondent made the application to the Court, he had been declared ineligible for 2010 and 2011. According to the complaint, respondent held himself out to the Court as "a lawyer in good standing even though he was ineligible to do so," a violation of RPC 5.5(a)(1).

By memorandum dated March 15, 2012, the Supreme Court Clerk's Office referred this matter to the OAE for an investigation into whether respondent had practiced law while ineligible.

On June 28, 2012, the OAE referred this matter to the DEC. The ethics investigator assigned to the matter communicated with respondent, on July 24, 2012, about respondent's possible activities during the two ineligibility periods and asked respondent whether he had practiced law during them. Respondent was then granted "at least two extensions" of time to reply.

Respondent's September 20, 2012 reply letter detailed certain personal issues that, he claimed, had negatively affected his ability to focus on, and to stay current with, his CPF obligations. He did not address the question of whether he had engaged in the practice of law during the ineligibility periods, but indicated that he had become current with his CPF obligations.

On October 8, 2012 and February 5, 2013, the DEC investigator sent respondent additional written requests for an answer to the question of whether he had practiced law during his periods of ineligibility. Respondent did not reply to those requests for information. He also failed to return two telephone calls requesting the same information.

Respondent filed a somewhat "jumbled" answer to the complaint, in that the paragraph set-up did not match that of the complaint, in all respects. He admitted the general allegations, which appear as seven numbered paragraphs. He also admitted to count one, paragraphs one through seven, although that count contains only four paragraphs, the last of which alleges that respondent practiced law while ineligible, in violation of RPC 5.5(a)(1).

Paragraphs six and seven of count two of the complaint charged respondent with failure to cooperate with the ethics investigation, a violation of RPC 8.1(b). In respondent's answer, he admitted paragraphs six and seven, in part, and denied them, in part, without any further elaboration. His answer also contained affirmative defenses to the charge that he had failed to cooperate with ethics authorities.

First, he claimed that personal issues had interfered with his ability to cooperate with the DEC investigation. Specifically, he was dealing with the break-up of his family, which included his "bi-polar" wife, who had "kidnapped" their two minor children and moved to Arizona with them. Respondent attached to his answer an October 11, 2011 court order granting him custody of the children and requiring the mother to return the children to him. The order called for respondent to fly to Arizona, meet the children at the airport, and return with them to New Jersey.

Second, in 2012, respondent experienced a series of "TIA" strokes that required a five-day hospitalization, from November 11 to 16, 2012. Respondent furnished medical bills and collection notices associated with his medical care on those dates, as well as with care on December 31, 2012 and March 3, 2013. Respondent's most recent episode occurred on November 10, 2013. Ultimately, he underwent "extensive mental, verbal and physical therapy," as a result of the TIAs. He claimed to have made "considerable progress in these respective areas," but asserted that his condition had prevented him from replying to the ethics investigator in a timely manner.

Respondent did not testify at the DEC hearing, providing no information on whether he had practiced law while ineligible. Rather, when asked by the panel chair whether he had any witnesses to present, respondent replied:

No, I have no witnesses. Given that D-1 through D-9 has been entered into evidence I think they best address mitigating factors that I had alluded to which I entreat [sic] the Panel to consider. I don't really take issue with what [the presenter] has indicated for the most part with respect to the technical aspects of this case. The only thing I would do would be to apologize to you for not communicating in a more forthcoming manner. But again, I attribute that to what I was going through at the time. Any testimony I would have given would have related to the mitigating factors involved in this case. I think it should be controlling because on one hand the fact is -- the facts are as they are, this period of time when I did not pay my requisite fees.

When I became aware of it I did so, but that doesn't change the fact that there were those periods of time when they were outstanding. When it came to my attention I did so. I paid the fees. But that still would have left me technically not having paid them during a certain period of time.

[T37-4 to 22.]²

² "T" refers to the transcript of the December 4, 2013 DEC hearing.

The panel chair advised respondent that his comments would not be given any weight as evidence. Respondent's limited comments dealt with a discussion of the events surrounding the family break-up, as well as the medical issues described above. Although respondent had termed those problems as "affirmative defenses" in his answer, he referred to them differently at the DEC hearing, when stating, "my main defense is mitigation."

Respondent also explained his use of his attorney letterhead:

Reference has also been made to the fact that I wrote a letter, P-3, indicating that I was petitioning to be reinstated. And that letter would give rise to the impression, that I was knowingly practicing law, et cetera and so forth. The fact of the matter is I used a letterhead. And I used the letterhead for identification purposes. It never even crossed my mind that in communicating within my profession that that in and of itself because I was trying to be informative as to who was communicating that that constituted in itself the practice of law. I was simply informing them who it was that was petitioning.

[T26-16 to T27-3.]

The DEC found respondent guilty of practicing law while ineligible, by virtue of his application to the Court (RPC 5.5(a)(1)), and failure to cooperate with an ethics investigation (RPC 8.1(b)).

The DEC noted that respondent had admitted, in his answer, at paragraph four, that he had practiced law while ineligible. The DEC disregarded paragraphs five through seven as "superfluous."

The DEC declined to consider the documents that respondent offered in mitigation, on the basis that, because he had not testified about them, they were without "context."

The DEC recommended the imposition of a censure, based on the aggravating factor of respondent's prior discipline.

At oral argument before us, the presenter stated that the issue "was not the fact that [respondent] represented himself before the Supreme Court, which he is entitled to do under the rules, but the fact that he held himself out as a lawyer in filings with the Supreme Court. . . ."

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.

It is undeniable that respondent was ineligible to practice law, when he filed his application for relief with the Court. He had been placed on the CPF list of ineligible attorneys for failing to pay the annual attorney assessment. It is also undeniable that he used his attorney letterhead, apparently

believing that it was permissible for him to do so. Finally, he certified that he was an attorney "duly licensed to practice" law in New Jersey and signed the cover letter and certification as "Esquire."

Respondent explained that he mistakenly believed that all dealings with the Court should be done on his attorney letterhead, because he is an attorney of this State. We, therefore, find that respondent's use of attorney letterhead, when petitioning the Court, was not intended to be the practice of law. No member of the public was misled by respondent's use of his letterhead. While it may have been technically improper for respondent to address the Court Clerk's office on his attorney letterhead and sign his documents as "Esquire," we are also mindful that he was acting in a pro se capacity.

For all of the above reasons, we decline to find that respondent "practiced law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction" (RPC 5.5(a)(1)). At most, respondent's conduct in this regard was de minimis and, as such, not warranting discipline.

Respondent was also faulted for having stated, in his application to the Court, that he maintained an office for the

practice of law. There is, however, no prohibition against an ineligible attorney maintaining an office for the practice of law, so long as the attorney does not practice law. We, therefore, make no finding of unethical conduct in this context.

Undoubtedly, respondent is guilty of failure to cooperate with ethics authorities, a violation of RPC 8.1(b), by ignoring the investigator's requests for information on whether he had practiced law during his ineligibility period.

Generally, failure to cooperate with an ethics investigator results in an admonition, if the attorney does not have an ethics history. See, e.g., In the Matter of Richard D. Koppenaar, DRB 13-164 (October 21, 2013) (attorney failed to cooperate with an ethics committee's attempts to obtain information about the attorney's representation of a client); 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 she retained ethics counsel to assist her); In the Matter of Douglas Joseph Del Tufo, DRB 11-241 (October 28, 2011) (attorney did not comply with the ethics investigator's request for a reply to the grievance; also, he did not communicate with the client); In the Matter of James M. Docherty, DRB 11-029

(April 29, 2011) (attorney failed to comply with ethics investigator's request for information about the grievance; attorney also violated RPC 1.1(a) and RPC 1.4(b)); In the Matter of Marvin Blakely, DRB 10-325 (January 28, 2011) (after his former 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 lawyer for the former wife, and the attorney's mortgage company); In re Ventura, 183 N.J. 226 (2005) (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); and In the Matter of Kevin R. Shannon, DRB 04-152 (June 22, 2004) (attorney did not promptly reply to the ethics investigator's requests for information about the grievance).


Here, even taking into account respondent's ethics history (two admonitions and a censure), we determine that an admonition sufficiently addresses his minor infraction, especially when it is coupled with the mitigation presented.

Members Gallipoli and Zmirich voted for a reprimand, finding that respondent violated both RPC 5.5(a) and RPC 8.1(b).

Vice-Chair Baugh did not participate. Member Rivera abstained.

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: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

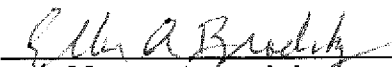
In the Matter of Ousmane D. Al-Misri
Docket No. DRB 14-097

Argued: June 19, 2014

Decided: October 3, 2014

Disposition: Admonition

Members	Disbar	Reprimand	Admonition	Dismiss	Abstained	Did not participate
Frost			X			
Baugh						X
Clark			X			
Gallipoli		X				
Hoberman			X			
Rivera					X	
Singer			X			
Yamner			X			
Zmirich		X				
Total:		2	5		1	1



Ellen A. Brodsky
Chief Counsel