SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-133, formerly 07-339
District Docket No. XIV-08-0119E, formerly XI-2004-007E

IN THE MATTER OF	:
ANTHONY J. GIAMPAPA	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 16, 2009

Decided: September 16, 2009

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

Respondent, through counsel, waived appearance for oral argument.

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, 2008 session, on a recommendation for a reprimand filed by the District XI Ethics Committee ("DEC"). At that time, we determined to remand the matter to the Office of Attorney Ethics ("OAE") to investigate whether respondent had maintained inviolate in his trust account a portion of the proceeds from the sale of a liquor license, the transaction at issue in this

case. The OAE concluded that the monies had remained intact during the relevant period and re-submitted the matter for our de novo review.

The complaint charged respondent with violating RPC 1.15, presumably (b) (failure to promptly deliver funds to a client or a third person); RPC 4.1 (knowingly making a false statement of material fact or law to a third person) by misrepresenting to the buyer's attorney that he was not holding funds in escrow and by making false statements to the DEC investigator; and RPC [sic] 1:21-6(d), more properly RPC 8.1(b), for failing to produce certain attorney records requested by the DEC investigator. For the reasons expressed below, we determine that a censure is the appropriate discipline for respondent's ethics infractions.

Respondent was admitted to the New Jersey bar in 1973. At the relevant time, he maintained a law office in Clifton, New Jersey.

Respondent was twice privately reprimanded in 1988. In a real estate matter, he improperly disbursed to his client trust funds to which he believed his client was entitled, without receiving authorization from the seller of the property. In the Matter of Anthony J. Giampapa, DRB 84-382 (June 27, 1988). In another matter, respondent engaged in a social and/or business relationship with his client's spouse and communicated directly with her on the subject of the representation of his client, knowing that she was represented by counsel and without obtaining

that counsel's consent. He also concealed from his client the nature of his relationship with the client's spouse. In the Matter of Anthony J. Giampapa, DRB 85-210 (June 30, 1988).

In November 2007, we admonished respondent for his failure to return his client's telephone calls, failure to promptly return the balance of funds from his client's refinancing of a real estate loan, and failure to turn over his client's file, despite repeated requests from his client and the client's new attorney. In the Matter of Anthony J. Giampapa, DRB 07-178 (November 15, 2007).

In 2008, respondent received a censure for his representation of clients, with whom there existed a language barrier, in a breach of contract action. He failed to keep the clients apprised of the status of their matter and did little to advance their interests. He filed a complaint in their matter only after they filed a grievance against him, two and one-half years after he was retained. In all, respondent was guilty of violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b) (failure to communicate with a client). In re Giampapa, 195 N.J. 10 (2008).

As indicated above, in February 2008, we remanded this case to the OAE to investigate whether funds for the satisfaction of certain liens had been kept untouched in respondent's trust

account until the discharge of the liens. Following our remand, the OAE conducted a demand audit of respondent's books and records. Initially, respondent was unresponsive appearing at the audit without the required documentation. Respondent claimed, among other things, that many of his records had been destroyed in a flood. The OAE instructed respondent to reconstruct his records, which he did. From the reconstructed records, the OAE audit revealed that, between August 2002 and February 2003, respondent deposited $51,500 in his trust account on behalf of the parties to the transaction at stake, disbursed $31,189 between February 2003 and October 2003 (the audit report does not identify the payee(s)), and continuously held in trust sufficient funds to pay off the liens until June 2005, when the parties settled their differences.

The RPC 1.15 and RPC 4.1 charges arose out of respondent's representation of Juan Cabrera and Rosado, Inc. ("Rosado")[1], in the sale of a liquor license to Javier Santa and E & D Management, Inc. ("E & D"). Bennett Wasserstrum represented the buyers. The contract of sale, dated August 28, 2002, provided for a sale price of $51,500. That entire sum was turned over to respondent, in trust, before the closing. Because Rosado had questioned the sufficiency

[1] The OAE's March 23, 2009 audit report refers to respondent's client as "Elegante Restaurant – Cabrera Rey Sanchez."

of E & D's financial resources, he had required E & D to deposit the entire sale proceeds with respondent.

The exact date of the closing is unknown. Although the time-of-the-essence closing was scheduled for July 25, 2003, apparently it did not take place until several days later.

At some point, an issue arose about some old, unpaid liquor bills/liens affecting the liquor license. They totaled about $19,000. Respondent testified that both he and Wasserstrum had learned of the problem only after the closing. Contrarily, Wasserstrum testified that he had found out about the outstanding bills before the closing, which, he recalled, had taken place in early August 2003. Wasserstrum remembered that, in early August 2003 he had discussed the problem with respondent, who was attempting to negotiate a compromise with the lienholder. Wasserstrum explained that he did not memorialize his conversation with respondent because there was no question in his mind that respondent would pay off the liens in the normal course of business. According to Wasserstrum, he did not know then that Rosado was disputing the validity of the bills.

Wasserstrum testified that, at first, he believed that respondent would honor his request for the payment of the bills. He had known respondent for at least twenty years, during which time they had had many transactions together, without incident.

Although Wasserstrum conceded that there was no escrow agreement between him and respondent, he saw no distinction between funds held in escrow under an escrow agreement and funds held in a trust account, absent an agreement.

At some point, however, Wasserstrum realized that he and respondent "were not on the same wave length." He then began memorializing his position. Between July 31 and September 4, 2003, he sent four letters to respondent about the outstanding bills. His August 6, 2003 letter asked respondent for the original bill of sale and proof of payment of the bills.

On August 7, 2003, respondent provided Wasserstrum with the bill of sale. The affidavit to the bill of sale stated that there were "no liens, mortgages, security interests, judgments, levies, Municipal, State, Federal, Unemployment Compensation or Social Security taxes unpaid, nor any persons or corporations who have any claim of any nature whatsoever against the said business . . . ." Under the section for a complete list of the seller's existing creditors, the affidavit stated "None."

According to Wasserstrum, upon his receipt of the bill of sale, he and respondent had "a very friendly conversation" about the need to satisfy the $19,000 lien. Wasserstrum trusted that respondent would do so. In a letter to respondent dated September 4, 2003, however, Wasserstrum complained that

respondent still had not paid the bills and demanded that he do so forthwith:

> To date, the monies held by you have not been utilized for full payment to the lien creditors for the outstanding liquor bills.
>
> As the escrow agent, demand is hereby made that full payment be made immediately to the outstanding lien holders. My client cannot receive deliveries until these bills are paid in full.
>
> [Ex.P12.]

Respondent did not reply to any of Wasserstrum's letters.

In October 2003, Wasserstrum filed suit against respondent and Rosado, demanding the payment of all outstanding liens against the liquor license.[2] Respondent testified that he advised his client to settle the case because the Attorney General's Office had intervened and, therefore, to litigate the suit would have been too costly.

In June 2005, the parties reached a settlement. On June 10, 2005, respondent paid three liquor bills in the amount of $14,700 and Wasserstrum's $2,500 legal fee, for a total of $17,200. A balance of $3,111 remained from the $20,311 that respondent was maintaining in his trust account.

[2] According to the civil complaint, the liens totaled $27,450 plus interest. There is no explanation in the record for the difference between the $27,000 figure cited in the civil complaint and the $19,000 amount quoted by Wasserstrum in his letters to respondent.

The complaint charged that "Respondent represented to the Buyer's Attorney that he would hold an escrow to pay certain liquor bills totaling $19,118.49" and that he "was requested by the Attorney for the Seller [sic] Mr. Wasserstrum, to pay these liquor bills. The respondent indicated to Mr. Wasserstrum that he was not holding an escrow. The respondents [sic] conduct and his deceit to the Attorney for the Buyer constituted a violation of RPC 4.1."

The complaint also charged that "the conduct of the respondent in his statements to the [DEC] investigator constitute [sic] a violation of RPC 4.1." The record does not clarify which statements to the DEC investigator were allegedly untruthful.

In the alternative, the complaint alleged that, "[i]f the respondent is holding an escrow but not paying same to either pay [sic] the outstanding liquor bills or has not released same to his client, his conduct is in violation of RPC 1.15," presumably paragraph (b), which requires an attorney to promptly deliver funds that either a client or a third party is entitled to receive.

Before we turn to the charge of failure to cooperate with disciplinary authorities, we address an issue concerning respondent's representation to a court in March 2004.

At the DEC hearing, Wasserstrum testified that, at some point, respondent filed a motion to vacate a default entered in the civil lawsuit. During a March 5, 2004 court appearance,

respondent informed the judge that he was no longer holding the Rosado money in his trust account. According to Wasserstrum, that was when he first found out that respondent had disbursed all of the sale proceeds.

Respondent's March 2004 representation to the court was untrue. As mentioned above, the OAE's March 2009 audit of respondent's attorney records showed that the funds remained in respondent's trust account until June 2005, when the Rosado/E & D matter was settled.

The complaint did not charge respondent with having made a misrepresentation to the court. [3]

The complaint charged respondent with failure to cooperate with the DEC investigator, in that respondent did not promptly produce the files pertaining to the purchase and transfer of the liquor license, as requested by the investigator on several occasions. Indeed, in a letter dated October 1, 2004, the investigator mentioned an earlier request and noted that respondent had "oft times" promised the trust account records. The investigator specifically requested a copy of the original deposit slip, copies of all checks, and respondent's trust account ledger

[3] The complaint was filed before the OAE audit was conducted, that is, before the OAE concluded that respondent had continuously kept the monies in his trust account until June 2005. The complaint was not amended or supplemented to reflect a charge of misrepresentation to a court.

sheet for Rosado. Respondent claimed that he could not locate the specific documents.

By letter dated October 12, 2004, the investigator referred to his earlier telephone calls and letters requesting the production of respondent's trust account records, showing that he was holding the money in escrow. The investigator gave respondent until October 21, 2004 to produce the records, lest he assume that respondent was not holding the money in escrow and that respondent had "continually misstated that fact" to him. Still, respondent did not promptly deliver the requested documents to the investigator.

Respondent testified that he did not interpret his conversations with the investigator or the investigator's letters as requests for specific records, but for all records relating to Rosado. Respondent understood that the investigator was requesting all of Rosado's files, dating back to Rosado's original acquisition of the liquor license. In response, on April 8, 2004, respondent brought twelve or thirteen years of files to the investigator's office, a three- to four-foot stack. The investigator then told him that he did not want to look at "every single file that [he] had over a 12- or 13-year period."

According to respondent, the supplied documents contained proof that the funds were still in trust, as evidenced by a copy

of the ledger card for the transaction. Respondent stated that the presenter had not been interested in looking at "any of it."

Respondent explained that he had neither attached his trust account records to his answer nor brought them to the DEC hearing because he had not been requested to do so. He added that he had brought two files to the DEC hearing that he thought were germane to the proceedings but that, while driving to the hearing, the papers had scattered all over his car when he had applied the brakes to prevent an accident.

As to why he did not specifically reply to the investigator's requests for certain documents, respondent offered the following:

> I understand now that he would have accepted just the records that I found, not all of them, even though he had indicated to me that he wanted all of them. But the records that I thought were pertinent were brought to his office for him to look at, and he didn't want to look at them. Maybe because at the point I had also brought everything else he asked for, and they were so voluminous that he didn't want to look at them . . . .
>
> [T49-7 to 16.][4]

The DEC investigator, who was also the presenter before the hearing panel, testified that, on April 8, 2004, respondent came to his office with brown files that stacked three- or four-feet

[4] T refers to the transcript of the DEC hearing on May 9, 2007.

high. The investigator then asked respondent to locate his trust account records within those files, but, after ten or fifteen minutes, respondent could not locate the requested records. The investigator, therefore, instructed respondent to return to his office, examine the files, and produce the trust account records for the transaction, more specifically, records showing that respondent had escrowed the funds in question. The investigator denied that he had refused to look at respondent's records; rather, he wanted respondent to sort the relevant documents from the pile.

As of the date of the DEC hearing, respondent had not produced the requested records.

The DEC determined that respondent violated RPC 1:21-6(d) [sic] (more properly, RPC 8.1(b)), by failing to provide his trust account records to the ethics investigator. The DEC noted that respondent's own counsel had conceded that respondent had not fully cooperated with the investigator.

On the other hand, the DEC found that the alleged violations of RPC 1.15 and RPC 4.1 were not established by clear and convincing proof.

The DEC recommended a reprimand for respondent's failure to turn over his trust account records to the DEC investigator.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of failure

to cooperate with the DEC investigator was fully supported by clear and convincing evidence. Unlike the DEC, however, we find that the record amply supports a violation of RPC 1.15(b).

Regardless of respondent's and Wasserstrum's differing testimony about when they first learned of the outstanding bills (before or after the closing) and regardless of who was entitled to the funds (the lienholder or Rosado), under RPC 1.15(b) respondent was obligated to promptly disburse them. He did not do so. Wasserstrum's letter to respondent, dated July 31, 2003, mentioned the bills and asked that respondent pay them off. Wasserstrum's pre-litigation letters to respondent, too, dated August 6, August 18, and September 4, 2003 demanded the payment of the bills. Yet, respondent did nothing. He ignored Wassertrum's letters. There is no evidence that, throughout those pre-litigation months, respondent was awaiting the occurrence of a specific event to either pay the bills or turn the funds over to Rosado. In fact, during those months, he did not even advance a position that Rosado was not responsible for the bills. We find, thus, that respondent violated RPC 1.15(b) by not promptly disbursing from his trust account funds that either a client or a third party was entitled to receive.

We also find that respondent violated RPC 8.1(b) by not fully cooperating with the ethics investigator.[5] As seen above, respondent had many explanations for failing to turn over the information sought by the presenter: he could not locate the documents; he did not attach his trust account records to his answer or bring them to the DEC hearing because, he claimed, he had not been requested to do so; he brought to the DEC hearing two files germane to the proceedings but did not present them because the papers had scattered all over his car when he had stopped short to avoid an accident; he did not understand which specific documents the investigator wanted; and his files were destroyed in a flood.

When respondent appeared at the investigator's office with a three- to four-foot high stack of files, he was unable to

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[5] We are mindful that the complaint did not specifically cite RPC 8.1(b), but instead "RPC [sic] 1:21-6(d)." R. 1:21-6(d) (Type and Availability of [Attorney] Bookkeeping Records") is inapplicable here. It is a rule that regulates attorney recordkeeping. Finding a violation of RPC 8.1(b) in this instance, however, will do no violence to R. 1:20-4(b), which requires the recitation of sufficient facts to give a respondent notice of the alleged misconduct and also requires the citation of the "unethical rules alleged to have been violated." Here, although the complaint cited the wrong rule, the facts recited therein gave respondent "fair notice of the nature of the alleged unethical conduct," R. 1:20-4(b), that is, fair notice that he was being charged with failure to cooperate with the DEC investigator. The complaint alleged that "[t]he respondent was asked both verbally and in writing for his Trust Account records" and that he "failed to deliver or produce same . . . ."

locate his trust records and seemingly offered the investigator the opportunity to search for them himself. The investigator then instructed respondent to return to his office to look for the requested records. Respondent never provided them to the investigator. In fact, respondent's counsel conceded, at the ethics hearing, that respondent had not cooperated fully with the DEC investigator.

The complaint also charged respondent with violating RPC 4.1 by first representing to Wasserstrum that he would hold certain monies in escrow to pay the liquor bills and then telling Wasserstrum that he was not "holding an escrow." We dismiss that charge for lack of clear and convincing evidence. Nothing in the record establishes that the parties had either a written or oral escrow agreement or that, absent an agreement, respondent unilaterally agreed to withhold certain sums in his trust account. Likewise, nothing shows that respondent represented to Wasserstrum that he was not holding some of the closing funds in his trust account when, in truth, he was, as determined by the OAE audit.

We also dismiss the charge that "[t]he conduct of the respondent in his statements to the investigator constitute [sic] a violation of RPC 4.1." There is no evidence that respondent lied to the ethics investigator.

The only misrepresentation that the record establishes is respondent's statement to a court, in March 2004, that he was no longer holding the Rosado funds in his trust account. That was untrue. As the OAE audit showed, the funds remained in respondent's account until June 2005.

The complaint, however, did not charge respondent with such a misrepresentation. As noted previously, R. 1:20-4(b) requires a complaint to "set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." Nothing in the complaint gave respondent fair notice that he was being charged with having made a misrepresentation to the court. We cannot, thus, find that respondent's misrepresentation to the court violated any of the applicable rules, that is, RPC 3.3 (candor toward the tribunal), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), or RPC 8.4(d) (conduct prejudicial to the administration of justice).

On the other hand, we may find that such conduct constitutes an aggravating factor. In another context, the Court agreed with our finding that a charge not alleged in the complaint, but proven at the ethics hearing, served to aggravate the attorneys' misconduct. In re Pena, In re Rocca, In re Ahl, 164 N.J. 222 (2000).

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.15(b) and RPC 8.1(b), as aggravated by his lack of candor to the court and his disciplinary record (two private reprimands in 1988, an admonition in 2007, and a censure in 2008).

Ordinarily, failure to promptly deliver funds to clients or third persons will lead to an admonition. See, e.g., In the Matter of Craig A. Altman, DRB 99-133 (June 17, 1999) (attorney did not promptly pay a doctor's bill despite having signed a "letter of protection") and In the Matter of William E. Norris, DRB 97-400 (December 30, 1997) (after the cancellation of a real estate contract, attorney who held the deposit in escrow returned only a portion to the buyers, taking his legal fee and one-half of the interest earned on the funds, which he turned over to his clients, the sellers; he did not make full restitution to the buyers until they filed a grievance against him).

Even when the RPC 1.15(b) violation is accompanied by other, non-serious infractions, an admonition may still result. See, e.g., In the Matter of David J. Percely, DRB 08-008 (June 9, 2008) (for three years attorney did not remit to client the balance of settlement funds to which the client was entitled, a violation of RPC 1.15(b); the attorney also lacked diligence in the client's representation, failed to cooperate with the

investigation of the grievance, and wrote a trust account check to "cash," violations of RPC 1.3, RPC 8.1(b), and RPC 1.15(d), respectively; significant mitigation presented, including the attorney's unblemished twenty years at the bar); In the Matter of Anthony Giampapa, DRB 07-178 (November 15, 2007) (attorney did not promptly disburse to a client the balance of a loan that was refinanced; in addition, the attorney did not adequately communicate with the client and did not promptly return the client's file; violations of RPC 1.15(b), RPC 1.4(b), and RPC 1.16(d)); In the Matter of Walter A. Laufenberg, DRB 07-042 (March 26, 2007) (following a real estate closing, attorney did not promptly make the required payments to the mortgage broker and the title insurance company; only after the mortgage broker sued the attorney and his client did the attorney compensate everyone involved; violations of RPC 1.1(a) and RPC 1.15(b)); and In the Matter of Gordon Allen Washington, DRB 05-307 (January 26, 2006) (for a seven-month period attorney did not disburse the balance of escrow funds to which a party to a real estate transaction was entitled; the attorney also lacked diligence in addressing the problem once it was brought to his attention).

For failure to cooperate with disciplinary authorities, admonitions are typically imposed if the attorney does not have an ethics history. See, e.g., In re Ventura, 183 N.J. 226 (2005)

(attorney did not comply with ethics investigator's repeated requests for a reply to the grievance); In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the ethics investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to the district ethics committee's requests for information about two grievances); and In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous communications regarding a grievance).

If the attorney has been disciplined before, but the attorney's ethics record is not serious, then reprimands have been imposed for failure to cooperate with disciplinary authorities. See, e.g., In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

Taken in isolation, respondent's failure to promptly disburse the Rosado funds from his trust account and his failure to cooperate with the DEC investigator would merit no more than a reprimand for both infractions. Respondent, however, has an ethics history and, moreover, an ethics history that includes trust account improprieties. His 1988 private reprimand included the premature disbursement of trust funds to his client without the consent of the other party and his 2007 admonition included failure to promptly return to his client the balance from the refinancing of a loan.[6] There is also his misrepresentation to the court to consider.

Based on the totality of the circumstances -- respondent's ethics violations, his misrepresentation to a court as an aggravating factor, and his disciplinary history -- we determine that a censure is the appropriate degree of discipline in this matter.

[6] Parenthetically, our November 15, 2007 letter of admonition required respondent to submit to the OAE, within fifteen days, proof that he had turned over all the funds to his client. He did so only in March 2008.

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
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony J. Giampapa
Docket No. DRB 09-133

Argued: July 16, 2009

Decided: September 16, 2009

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			

Julianne K. DeCore
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Chief Counsel