SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-109
District Docket No. VC-06-062E

IN THE MATTER OF	:
G. JEFFREY MOELLER	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 16, 2009

Decided: September 3, 2009

Andrew Epstein appeared on behalf of the District VC Ethics Committee.

Michael S. Weinstein appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (a three-year suspension) filed by the District VC Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client), RPC 1.5(a) (failure to charge a reasonable fee), RPC 1.5(b) (failure to

communicate the basis for the fee in writing), RPC 1.8(a) (conflict of interest: business transaction with a client), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

We determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1978. His disciplinary history includes a one-year suspension imposed after a recommendation for discipline filed by the Committee on Attorney Advertising ("the CAA"). In re Moeller, 177 N.J. 511 (2003). The CAA concluded that discipline was required for respondent's affiliation with a Texas corporation that marketed and sold living trusts to senior citizens. The Court accepted our determination and suspended respondent for the following infractions: failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; charging an excessive fee; conflict of interest; accepting compensation from someone other than the client; sharing legal fees with a non-lawyer; permitting a person who recommends, employs or pays the lawyer to render legal services to another to direct the lawyer's professional judgment in rendering such legal services; assisting another in the unauthorized practice of law; making false or misleading communications about a lawyer, the lawyer's

services or any matter in which the lawyer has or seeks a professional involvement; making false or misleading communications likely to create an unjustified expectation about results the lawyer can achieve; making false or misleading communications about the lawyer's fee; compensating a person to recommend or secure the lawyer's employment by a client or as a reward for having made a recommendation resulting in the lawyer's employment by a client; using a firm's name or letterhead that violates RPC 7.1; making a false statement to disciplinary authorities; failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in a disciplinary matter; misrepresentation; and improper use of a corporate name that does not comply with RPC 7.5. Respondent's suspension was effective October 4, 2003. He did not seek reinstatement after the term of his suspension expired. As of the date of the DEC hearing in the present matter, respondent had no intention to return to the practice of law.

Respondent also received a one-year suspension in Pennsylvania, in 2003, based on the same violations in the New Jersey matter.

In 2006, respondent received a reprimand for failing to explain a matter to the extent necessary to permit the client to

make informed decisions about the representation and failing to protect a client's interests on withdrawal from the representation. In re Moeller, 188 N.J. 338 (2006).

The facts of this matter are as follows:

In 2002, Frank Allia consulted with respondent regarding the administration of his deceased brother's trust, of which Allia was the trustee. Respondent had previously established the trust. Allia testified that his brother had already paid respondent's legal fee for the trust and its administration. Therefore, respondent and Allia never discussed respondent's legal fee for handling the matter.

In March 2002, Allia gave respondent a check for $7,500 for "administrative fees" for the settlement of the trust. In May 2002, Allia gave respondent another $7,500, at respondent's request, also for administrative expenses. Allia paid respondent directly, rather than paying his law firm.

According to respondent, he and Allia had agreed on a $15,000 flat fee to administer and settle the trust. All expenses for settling the trust were to come from the $15,000. Respondent could not recall if he had explained the nature of his fee in a writing. Because his payment was a flat fee, he sent no bills or invoices to Allia.

Allia testified that, during the course of the representation, he met with respondent approximately six times and had three or four telephone conversations with him. Allia received no correspondence from respondent. Respondent, on the other hand, testified that he had at least ten meetings with Allia and probably two telephone calls per week.

The complaint charged that respondent "performed virtually no services for grievant." Respondent disagreed with that accusation. He testified:

> Frank Allia is a really good man, and I understood, you know, that he needed some accommodations, in terms of new services. So for example, I went several times to his home after hours, after normal business hours, I should say, to meet with him, and his wife was present at several meetings, as well, to go over all of the particulars that go into organizing an estate for settlement purposes, and in getting the information that I would need, and that Mr. Farrone [the CPA] would need. Mr. Farrone, for example, would say, I need this, this, this, and this, and I would discuss that obviously with the Allias, I would ask them to get whatever information was necessary, I would explain to them where we were in the process, what we were doing. I know that Frank, several times, came over to the office on Route 10, at the time, the office, and I accommodated him, I never made him make an appointment or anything like that. I mean, sometimes, I think he may have come, and I wasn't in the office, but that's not because I knew he was coming, obviously,

telephone calls, I remember, on his behalf, on the — on the estate's behalf, I think, with Mr. Farrone had some traveling there, I didn't live in Succasunna there, at the time, I lived in Vernon, working with Mr. Farrone, yes, with Mr. Farrone, there was — there is a specific recollection that I do have, actually, of, I think, Mr. Steinberg testified about a problem with other folks involved in the Allia family, and I remember going to an attorney's law office, along with Mr. Allia, I want to say West Orange, it might not have been West Orange. Anyway, as I remember it, this attorney was representing another faction, if you will, of the Allia estate, if you will, that was at odds with Frank, and I know that a lot of times, involved in discussing the nature of that dispute, what could be done to resolve it, and I can recall at least one occasion going to that other meeting with — I don't remember the attorney's name, sorry, the other attorney that is, who is representing the other faction, and meeting with some of those folks, and trying to resolve their dispute so that we could put this thing to bed, and not, you know, have this thing drag on, which unfortunately it appears to have.

Q [by respondent's counsel] Did you ever file any court documents, as part of your representation on behalf of Mr. Allia?

A Court documents, no, not that I remember.

Q. Did you ever file anything, not in court, but either through regulatory or administratively, on behalf of Mr. Lehman [sic]?

A. I don't remember. I mean, I just — I just can't remember.

[T129-22 to T131-22.][1]

In response to questioning by the presenter, respondent conceded that he did not prepare any releases and refunding bonds, did not prepare a settlement agreement for execution by the trust beneficiaries, and did not receive releases from any other beneficiaries of the trust. Respondent's recollection was that, when he left his former firm, all the work that was necessary to settle the estate had been completed.

Respondent hired Frank Farrone, CPA, to perform accounting services for the trusts that he was handling. Farrone and respondent worked out flat fee agreements for the work. In the present matter, Farrone's agreed upon fee was $3,000, to be deducted from the $15,000 Allia paid respondent. In the fall of 2002, Farrone received two payments of $1,000 each from respondent. According to Farrone, he allocated those funds to another matter, Russell, which was unrelated to the Allia trust.

Respondent did not recall the Russell matter and testified that the $2,000 he sent Farrone had been intended for the Allia

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[1] T refers to the transcript of the hearing before the DEC on January 19, 2009.

matter. Although Farrone testified that he attempted to reach respondent about the balance owed for the Allia trust, respondent testified that he never received notice from Farrone that he owed him additional funds. Both Farrone and Allia said that Farrone continued to work on the trust after respondent was no longer involved and received payments directly from Allia.

In October 2002, Allia loaned respondent $3,000. Respondent prepared a promissory note, dated October 9, 2002, and offered Allia interest on the loan, which Allia refused. Respondent did not advise Allia of his right to consult with another attorney about the personal loan. Allia considered respondent to be his attorney at the time of the loan.[2] By mid- to late December of that year, Allia could not locate respondent. Respondent did not repay Allia.[3]

Apparently, in early 2003, respondent's former law firm, which was New York-based, closed its New Jersey office, ending respondent's employment. Respondent left the practice of law in

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[2] Respondent was ineligible to practice law from September 30, 2002 to October 7, 2002, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection. For a brief time, he represented the Allia trust while he was ineligible. Given the brief time involved, respondent's failure to pay the assessment was likely an oversight. The complaint did not charge respondent with practicing law while ineligible.

[3] In September 2004, respondent filed for bankruptcy.

early 2003, after the CAA's recommendation for discipline that led to his one-year suspension later that year. Respondent testified that his former law firm knew his whereabouts and that he had been told that no files were to be removed from the law firm when he left. He assumed that the files he left would be "handled." He explained that he did not refund any of the $15,000 to Allia because his duties had been performed and he had earned or incurred $15,000 in expenses.

When Allia contacted respondent's law office, he was told that the firm knew nothing about the file or respondent's whereabouts and that the firm was not interested in handling the case. Respondent never contacted Allia, who never received his file. Respondent conceded that he could have done a better job of communicating with Allia, when he left his former law firm. He expressed regret for not having done so. When asked, however, if he had told Allia he was no longer working on the case, respondent replied, "I never told him that, I don't know that it was necessary to tell him that.

In 2003, Allia retained Franklyn C. Steinberg, III to assist him in administering the trust. Steinberg was unable to locate respondent, despite attempting to reach him by letter, hiring a private investigator, and contacting "some state authority" in

New Jersey and Pennsylvania.[4] Steinberg testified that respondent "had done no significant work on the trust."

The DEC found Allia credible and also "a reluctant witness against the respondent." Steinberg was also deemed credible. The DEC found Farrone "less than credible."

With regard to the specific violations charged, the DEC was divided only as to whether respondent had violated RPC 1.1(a). The two panel members who found clear and convincing evidence of gross neglect based their finding on respondent's "overall course of conduct." In their view,

> [r]espondent's failures occurred from the start. He did not have a signed retainer agreement setting forth his fees, as he admitted. He did not have a clear recollection detailing the services, never submitted a statement for services he alleges he performed, did not have a file to demonstrate a record of his services, failed to communicate his whereabouts and could not be found nor could the file be found, and made no attempt to communicate with Mr. Allia once he left the disbanding firm, made no effort to secure the file or a copy thereof to continue with and then complete

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[4] Steinberg did not recall with specificity whom he had contacted. It is unclear why Steinberg and Allia could not locate respondent. During 2003, the OAE would have known respondent's location, since his earlier disciplinary matter that led to his one-year suspension was underway. Moreover, in 2003, respondent was appearing in court in the matter that led to his 2006 reprimand.

> the work for the trust for which he was paid, and made no effort to secure a continuity of services for the trust at anytime, let alone when his employing firm ceased its New Jersey operations the ensuing January, or when he learned he was to be suspended from practice. He walked away.[5]
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> [HPR7.][6]

In connection with respondent's departure from his former law firm, the DEC noted that, although respondent testified that his fees from the Allia matter were solely his and that he worked alone on the file,[7] he also testified that he was not allowed to remove the file from the office, when it disbanded, and that he did not know the file's whereabouts.

The DEC unanimously determined that RPC 1.3 was "at odds" with the charge of gross negligence and deemed it to be a lesser included charge. The DEC found that respondent violated RPC 1.4(b), based on the findings made in connection with RPC

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[5] We note that, although the presenter referred to RPC 1.16(d), (failure to take steps to protect a client's interests upon termination of representation), respondent was not charged with violating that rule.

[6] HPR refers to the hearing panel report, dated February 26, 2009.

[7] Respondent testified that he did not have his own attorney business account.

1.1(a), quoted above. As to respondent's fee, the DEC found that he violated RPC 1.5(a):

> Respondent had not only nothing to show for the $15,000.00 he charged and received, but his testimony was less than credible in explaining what he specifically had done for the trust or the trustee. Yes, he had a few meetings with the trustee and calls, but there was nothing explained that could give rise to justify the $15,000.00 received.
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> [HPR8.]

The DEC also found that respondent violated RPC 1.5(b) by failing to communicate to Allia, in writing, the basis or rate of his fee.

The complaint also charged respondent with violating RPC 1.8(a) in connection with the $3,000 loan from Allia, by not advising Allia, in writing, to seek independent counsel about the transaction. Respondent admitted that he had not advised Allia to obtain independent legal advice. Because Allia did not require that the loan be secured by a writing, the DEC surmised that Allia would not have sought independent counsel's advice. However, the DEC added, had respondent complied with the mandate of the rule, Allia would have known of his right to consult with counsel, might have understood the seriousness of entering into the transaction, and might have sought advice or decided on his

own not to enter into the transaction. The DEC, thus, concluded that respondent violated RPC 1.8(a).

The complaint charged respondent with violating RPC 8.4(c) in three regards. First, it alleged that respondent received a $15,000 "retainer," of which $3,000 was for Farrone. The complaint alleged that respondent, instead of giving the $3,000 to Farrone, had knowingly misappropriated it. As to this charge, the DEC found no clear and convincing evidence. Farrone testified that he received $2,000 from respondent, which he, without consulting with respondent, allocated to another matter.

Second, the complaint charged respondent with violating RPC 8.4(c), essentially by all of his conduct in this matter. The complaint alleged that respondent performed almost no services for Allia, did not send him bills, did not issue a refund, disappeared without notice to Allia where he could be located, and failed to communicate with Allia. The DEC made no specific finding as to RPC 8.4(c) in this regard.

Finally, the complaint charged respondent with violating RPC 8.4(c) in connection with the loan from Allia. Here, too, the DEC did not find clear and convincing evidence of an RPC 8.4(c) violation.

Following a de novo review of the record, we find that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. We are unable to agree, however, with some of the DEC's findings and with the recommended measure of discipline.

Specifically, as to gross neglect, although respondent could point to no documents he had prepared, the record does not establish what was required of respondent that he neglected to do. The panel report pointed to a laundry list of items that respondent failed to complete:

> On cross, the Respondent stated there was no written statement given to Mr. Allia for the services. He recollected there was work done to settle the "estate" (the word he used versus "trust"), but when asked, stated there was no litigation versus the "estate" when he was involved, no formal accounting and no court papers, no complaint for accounting, no Refunding Bond and Release, no settlement agreement, nor any releases.
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> [HPR6.]

It is not altogether clear, however, that those items were required to be prepared during the less than one-year that respondent was involved in the matter. Although, arguably, the best practice was to complete them, the record points to no specific tasks required by law or practice that were not done.

It is true that Steinberg, the new lawyer, handled the litigation that arose out of the trust. But, when respondent ceased his involvement in the matter, there was no litigation pending. Under the circumstances, that there was work to be performed after respondent's representation ended does not equate to gross neglect on his part. Moreover, the DEC's reference to respondent's "overall course of conduct" in his handling of the Allia trust and its note of his failure to have a signed retainer, lack of a file, and lack of communication do not support a finding of gross neglect to a clear and convincing standard.

We concur, however, with the DEC's dismissal of the charge of a violation of RPC 1.3. Although suspicions may abound that respondent did not do what he should have for the Allia trust, there is no clear and convincing evidence that he lacked diligence in handling it.

The DEC found that respondent failed to communicate with Allia, in violation of RPC 1.4(b). We agree. Although it does not appear that respondent's communications with his client were deficient during the time of the representation, when he left his former firm he should have reached out to Allia and advised him of this development.

The DEC concluded that respondent violated RPC 1.5(a) and (b), finding that he charged an unreasonable fee and failed to reduce the basis or rate of his fee to writing. As to the latter finding, the DEC was correct. As to the former, we are unable to agree. The evidence does not demonstrate that respondent's fee was unreasonable at the outset. Indeed, the record tells little about the trust and what needed to be done to wind it down.

Unquestionably, however, respondent also violated RPC 1.8(a) when he borrowed $3,000 from Allia, without advising him of his right to consult with counsel. Although it is possible, as noted by the DEC, that Allia would not have consulted with counsel even if he had known of his right to do so, that fact does not absolve respondent of his duty to comply with the mandates of the rule.

As indicated above, the complaint charged respondent with violating RPC 8.4(c) in three ways. Respondent was charged with dishonest conduct because he "performed virtually no services for grievant, sent no bills to grievant, issued no refund to grievant applicable to unperformed services, disappeared without advising grievant where respondent would be located, and failed to communicate with grievant regarding the status of the matter, thereby requiring grievant to obtain a new attorney." Because these derelictions, even if true, are evidence of poor

lawyering, but not necessarily of dishonest conduct, we dismiss that allegation.

The complaint also charged respondent with violating RPC 8.4(c) based on his failure to pay the $3,000 that had been earmarked for Farrone. Both respondent and Farrone testified that respondent paid him $2,000. Farrone testified that he tried to contact respondent about the remaining fees owed, but eventually "let it go." Respondent disputed that testimony. He was not asked why he had failed to send the remaining $1,000 to Farrone. Perhaps respondent felt that it had not yet been earned. Without an explanation as to why the additional $1,000 was not paid to Farrone, there is no sufficient basis in the record to find a violation of RPC 8.4(c).

Finally, the complaint charged respondent with violating RPC 8.4(c) in connection with the $3,000 loan. Here, too, there is no evidence that, at the time that respondent took the loan from Allia, he did not intend to repay it. Respondent's financial circumstances at the time may raise a suspicion that he knew that he would not be able to repay Allia. But that is not tantamount to clear and convincing proof.

In sum, respondent violated RPC 1.4(b) by failing to communicate with Allia when he left his former law firm, RPC

1.5(b) by failing to provide Allia with a writing setting forth the basis or rate of his fee, and RPC 1.8(a) by entering into a business transaction with his client without complying with the requirements of that rule.

Failure to communicate with clients, standing alone, results in an admonition. See, e.g., In the Matter of William H. Oliver, DRB 04-211 (July 16, 2004) (attorney failed to keep client apprised of developments in her matter, including a sheriff's sale of her house) and In the Matter of Paul A. Dykstra, DRB 00-182 (September 27, 2000) (attorney failed to inform his clients that an arbitration award that the clients declined to accept had never been appealed but had been dismissed a year earlier).

Similarly, failure to memorialize the rate or basis of the fee leads to an admonition. See, e.g., In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007) (failure to have a written fee agreement with an estate client); In the Matter of Louis W. Childress, Jr., DRB 02-395 (January 6, 2003) (failure to provide a written fee agreement in real estate matters); In the Matter of Nedum C. Ejiogu, DRB 02-187 (July 23, 2002) (failure to provide a written retainer agreement in a personal injury matter); In the Matter of Richard M. Roberts, DRB 02-148 (July

8, 2002) (failure to provide a written retainer agreement in a criminal matter); and In the Matter of Joseph Taboada, Jr., DRB 01-453 (March 15, 2002) (failure to provide a written fee agreement in an immigration matter).

When an attorney enters into a loan transaction with a client without observing the safeguards of RPC 1.8(a), the ordinary measure of discipline is an admonition. See, e.g., In the Matter of Frank J. Shamy, DRB 07-346 (April 15, 2008) (attorney made small, interest-free loan to three clients, without advising them to obtain separate counsel; the attorney also completed an improper jurat; significant mitigation considered); In the Matter of April Katz, DRB 06-190 (October 5, 2006) (attorney solicited and received a loan from a matrimonial client; the attorney did not comply with the mandates of RPC 1.8(a)); and In the Matter of Frank J. Jess, DRB 96-068 (June 3, 1996) (attorney borrowed $30,000 from client to satisfy a gambling debt; the attorney did not observe the requirements of RPC 1.8(a)).

Here, there are aggravating factors to consider, in assessing the discipline for respondent's overall transgressions. As noted above, respondent took no steps to protect Allia and the Allia trust when he left his law firm. He

did not communicate with his client and made no effort to ensure that the file was protected and available to his client. Although the proofs adduced at the hearing would have sustained a finding that respondent violated RPC 1.16(d), the complaint did not charge respondent with that rule violation.[8] We may, however, consider respondent's conduct on this score an aggravating factor. In another context, the Court considered as an aggravating circumstance conduct that had not been charged in the complaint. In re Pena, In re Rocca, In re Ahl, 164 N.J. 222, 231-232 (2000).

Furthermore, at the time of this misconduct, respondent was the subject of earlier disciplinary proceedings. Although he had not yet been disciplined at the time he "withdrew" from the Allia matter, he knew that his conduct was under high scrutiny by disciplinary authorities in New Jersey and in Pennsylvania. He, therefore, should have taken special care to ensure that he complied with all of his ethical responsibilities.

In our view, the nature of respondent's overall misconduct, as well as his failure to take reasonable steps to protect his

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[8] R. 1:20-4(b) requires the 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."

client when he withdrew from the matter, and his disciplinary record call for the imposition of a three-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
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 G. Jeffrey Moeller
Docket No. DRB 09-109

Argued: July 16, 2009

Decided: September 3, 2009

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	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
Julianne K. DeCore
Chief Counsel