SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-307
District Docket No. IV-2005-0040E

IN THE MATTER OF	
DAVID S. ROCHMAN	
AN ATTORNEY AT LAW	

Decision

Argued: February 18, 2010

Decided: April 20, 2010

Christine P. O'Hearn appeared on behalf of the District IV Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for an admonition filed by Special Master Andrew Kushner, which we determined to treat as a recommendation for discipline greater than an admonition. R. 1:20-15(f)(4).

The complaint charged respondent with having violated RPC 1.3 (lack of diligence), RPC 1.4(b) and (c) (failure to keep a client informed about the status of a matter and failure to

explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation), RPC 1.15, presumably (b) (failure to safeguard property) and (d) (failure to comply with recordkeeping rules), RPC 3.2 (failure to expedite litigation), RPC 8.4, presumably (c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and R. 1:20-3(g), more properly RPC 8.1(b) (failure to cooperate with disciplinary authorities).

During the hearing, the presenter withdrew the charge that respondent failed to cooperate with ethics authorities.

Although the facts in this case are not lengthy or complex, the hearing spanned thirteen days, from June 25, 2007 to April 23, 2008. The primary reason for the inordinate length of the hearing was respondent's contumacious behavior, including his frequent and unwarranted objections, disrespect shown toward most of the witnesses, and personal attacks on the presenter.

We determine that respondent should be reprimanded, based on both the ethics violations and his reprehensible conduct at the ethics hearing.

Respondent was admitted to the New Jersey bar in 1990. He has no disciplinary history.

On September 30, 2004, the grievant, Jonathan Sellers, Jr., retained respondent to file a motion to reduce his child support

obligation. Respondent never filed this motion. Morris Starkman, respondent's partner, had referred Sellers to respondent, after Sellers' prior attorney, Donald Katz, passed away. Starkman's acquaintance with Sellers arose from Sellers' position as a parking valet at Woodcrest Country Club, where Starkman was a member. Sellers and respondent signed a fee agreement, dated September 30, 2004, setting forth the terms of the engagement: a $250 hourly rate, with a $1,000 retainer. Bills were to be provided every sixty days. Sellers paid the retainer in two $500 installments.

At the time of the fee agreement, respondent was a partner with Starkman, Rochman & Aumiller ("SRA").[1] Although Starkman and respondent's partnership agreement was to be effective September 1, 2004, it did not commence until about September 30, 2004, the same date as the Sellers retainer agreement. As seen below, respondent and Starkman immediately began having problems, leading to the breakup of the partnership in March 2005. Because the events of the Sellers case and the partnership dissolution are inextricably entwined, both issues will be discussed simultaneously.

At their initial office conference, Sellers explained to respondent that, because he had been laid off from his job as a

[1] Despite the name of the law firm, Aaron Aumiller was an employee, not a partner.

network analyst, he was unable to comply with a court order requiring him to pay child support of $425 per week. Sellers was employed part-time as a parking attendant by Woodcrest Country Club. Because of the loss of his primary job, Sellers wanted to reduce his child support obligation. According to Sellers, he told respondent that he needed someone to continue representing him in his divorce, after the death of his prior attorney, Katz, and to obtain a reduction in his support order. Sellers testified that respondent replied that he handled divorce cases and that he would be the attorney from SRA who would be representing him.

When Sellers left the initial office conference, he understood that he was required to provide certain documents to respondent in connection with the representation. Sellers testified that, about one week later, he produced those documents at respondent's office, when he paid the second installment of the retainer. Sellers recalled that, when he returned to respondent's office, he met with respondent for forty-five minutes to one hour. At some point, Sellers delivered to respondent's office his client file from his prior attorney, Donald Katz. Respondent never indicated to Sellers that he needed any other documents from him.

Sellers denied receiving any contact from respondent from October to December 2004. According to Sellers, during this

time, he left numerous telephone messages for respondent and dropped by his office several times to ascertain the status of his matter. Sellers did not receive a return telephone call from respondent.

Sellers received a January 4, 2005 notice of a hearing on a motion to enforce litigant's rights, in connection with his matrimonial matter in Gloucester County. The hearing was to take place on February 4, 2005. Respondent's file contained a copy of that notice, which was sent directly to Sellers. Sellers telephoned respondent four or five times and stopped by respondent's office once during January 2005. He never spoke with respondent during this period.

On the day before the February 4, 2005 hearing, Sellers visited respondent's office to find out whether respondent planned to represent him at the hearing. Sellers gave the following account of that visit. Arnold Aumiller, respondent's associate, whom Sellers had not previously met, informed him that he would be filling in for respondent, who could not attend the hearing; that he knew nothing about Sellers' case; and that he would review the file before the hearing the next day. Aumiller could not answer any of Sellers' questions about the status of his motion to reduce child support.

Respondent did not instruct Aumiller to file a written notice of appearance in the Sellers matrimonial case. Aumiller's practice consisted of personal injury and workers' compensation cases. The Sellers matter was the only matrimonial case Aumiller handled while working at SRA. According to Aumiller, at some point between October and December 2004, respondent had asked him to research whether the bankruptcy or family court had jurisdiction over Sellers' modification motion. As seen below, that issue became moot. Aumiller denied that respondent had directed him to ascertain from Sellers' wife's attorney or from the bankruptcy court the status of the bankruptcy matter.

The judge denied the enforcement motion. After the hearing, Aumiller told respondent that respondent could prepare the modification motion because his adversary was to supply an order granting relief from the automatic bankruptcy stay. On February 7, 2005, Aumiller received by fax that order, dated September 3, 2004, as well as an order, dated February 3, 2005, dismissing the bankruptcy petition. Thus, when Sellers had retained respondent on September 30, 2004, the September 3, 2004 order granting relief from the stay had already been entered.

Previously, on February 4, 2005, Aumiller had faxed to his adversary copies of Sellers' checking and savings account information, which Sellers had given to Aumiller immediately

after the hearing. In addition, Aumiller had obtained from Sellers, at or before the hearing, copies of his work schedule at Woodcrest Country Club for the period from December 22, 2004 to January 4, 2005.

According to Aumiller, respondent never directed him to take any other action in the Sellers case. Aumiller asserted that he had never prepared a motion to modify support and was not aware of the requirements for such a pleading. As far as Aumiller was concerned, after the post-hearing tasks were completed, he had no further responsibility for the Sellers matter.

After the hearing, Sellers again attempted to contact respondent to ascertain the status of his matter. Although Sellers left several messages, both by telephone and by visiting respondent's office, from February through May 2005, respondent did not return his calls.

The record contains copies of six telephone messages, dated between April 21 and May 10, 2005, documenting Sellers' attempts to reach respondent. In addition, Aumiller testified that he had seen telephone messages from Sellers. Aumiller also recalled that he had seen Sellers in the waiting room of the office on several occasions, that Sellers had asked Aumiller about the status of his case, and that he had told Sellers to discuss the

matter with respondent. According to Aumiller, he saw Sellers interacting with the receptionist during these office visits. Starkman, too, testified that, on several occasions, he observed Sellers in the waiting room of the office and that Sellers had expressed frustration because he could not meet with respondent.

In May or June 2005, Sellers told Starkman that he was trying to obtain the return of the fee so that he could retain another attorney. On May 17, 2005, Sellers met with Charles Nathanson, Esq.

Sellers did not retain Nathanson. Sellers testified that he could not retain another attorney without a refund of the $1,000 that he had given to respondent. Nathanson had requested a $1,500 retainer. He suggested that Sellers contact respondent in writing, if he could not reach him by telephone.

On May 19, 2005, Sellers sent a letter to respondent, complaining that he had been unable to contact him, asking for the status of his case, and cautioning respondent that, if he did not obtain the information within five days, he would retain another attorney. Sellers received no reply from respondent.

Despite the fact that he did not represent Sellers, Nathanson sent a June 3, 2005 letter to respondent asking respondent to contact him so that they could make arrangements to pick up Sellers' file and a "check for any monies remaining

in his trust account." Nathanson did not receive a response to this letter. He met with Sellers again on July 12, 2005, called the court in Sellers' presence to ascertain the status of his divorce matter, and provided Sellers with information about filing an ethics grievance.

Nathanson sent another letter, dated July 14, 2005, to SRA, asking that "monies on deposit" be refunded directly to Sellers and stating that Sellers had repeatedly requested a return of those funds. Although Nathanson did not receive a reply from respondent, he received an August 2, 2005 letter from Thomas Hagman, Esq., on Starkman's behalf, suggesting that he contact respondent to obtain Sellers' refund. Nathanson's file notes revealed that, on May 31, 2005, he had left a message for respondent. Although he had no note referring to a second attempt, he recalled that he had tried to contact respondent more than once. He never spoke to respondent about Sellers' case.

On August 2, 2005, Sellers filed the grievance against respondent.

In November 2005, Sellers received a refund of his retainer from Starkman. Sellers then retained another attorney, Ryan Nussey. At that time, Sellers was "thousands of dollars" in arrears on his support obligation. These arrearages began to accrue in August 2004, when Sellers had been laid off.

Sellers never received a bill from respondent or anyone at SRA for the legal services provided to him.

For his part, respondent insisted that Sellers had retained the law firm, SRA, not him individually. Sellers, however, testified that he had signed the retainer agreement with the understanding that respondent would be his lawyer.

At their September 30, 2004 initial conference, respondent gave Sellers a Case Information Statement and an Affidavit of Insurance to be completed and returned. According to respondent, it was important for him to meet Sellers' needs because he was a client brought into the firm by Starkman and because their practice had just been formed.

Respondent denied that Sellers had disclosed to him that a divorce complaint had been filed, claiming that Sellers indicated only that a spousal support order had been entered. He further alleged that Sellers told him that he was working full-time as a valet, not part-time, as Sellers had testified. According to respondent, he told Sellers that he was in a "gray area" because, although Sellers had lost his full-time job, the court will not be impressed with a modification motion without proof that Sellers had applied for other jobs. Although Sellers had testified that he had met with respondent a second time, respondent asserted that, after the initial conference, he never saw Sellers again.

Respondent claimed that he called Sellers on both September 30, 2004 (the day of their office conference) and the following day, October 1, 2004, to ascertain the status of the documents that Sellers was to provide to him. He further testified that he instructed his staff to contact Sellers for the same purpose. These alleged efforts to reach Sellers were not successful. Respondent's two secretaries, Cherie Comp and Mary Carter, testified, however, that respondent had never asked them to contact Sellers during this time period.

As of October 2, 2004, two days after his conference with Sellers, respondent had not received any of the documents from Sellers. According to respondent, on October 2, 2004, he sent the following letter to Sellers: "I have left you repeated calls concerning your Motion for Modification of your current support. I would ask that you immediately contact my office as I have been unable to contact you through telephonic communication." Sellers denied receiving that letter. In addition, Aumiller denied that respondent had ever complained that he was unable to contact Sellers, that Sellers was not cooperative, or that Sellers failed to provide requested documents.

After his conference with Sellers, respondent instructed an employee named Lori to draft a substitution of attorney. Lori mistakenly drafted the document using a form from workers'

compensation court. According to respondent, although he directed Lori to correct the substitution of attorney, she did not do so because, by that time, "lines [had] been drawn" within the firm and Lori was "beholden" to Starkman. Lori did *not* inform respondent that she had not filed the substitution of attorney.

Toward the end of October 2004, respondent reviewed Katz's file, which Sellers had delivered to his office, and discovered that a divorce complaint and answer had been filed, interrogatories had been propounded by both sides, and Sellers' wife had filed a bankruptcy petition. In respondent's view, Sellers had "materially *misrepresented*" the status of his matter to him by failing to disclose these circumstances.

Respondent testified that, within the first month of the SRA partnership, the law firm "fell apart." According to respondent, when they agreed to form the partnership, Starkman represented that he would be the managing partner responsible for supervising staff, keeping books and records, and running the office, so that respondent could concentrate on litigation. Aumiller was to "fill-in" and take direction from respondent. According to respondent, he had no access to the firm's books and records, and had no authority to write a check from the firm's bank accounts. Starkman, however, testified that, had respondent asked for such access, he would have received it.

Respondent claimed that Starkman failed to fulfill his role as managing partner. Within the first two weeks of the partnership formation, one employee left after suffering a "nervous breakdown" and Starkman fired another employee, without consulting respondent. Starkman's former partner sued both Starkman and SRA, claiming that Starkman had improperly terminated their partnership. Employees constantly were hired and quit, existing employees complained about the "hostile work environment" fostered by Starkman, and Aumiller continually threatened to leave the firm.

Respondent's version of the events surrounding the motion in the Sellers case contradicted Aumiller's testimony in almost every respect. According to respondent, after he reviewed Katz's file, he directed Aumiller to file an application with the bankruptcy court for relief from the automatic stay and, thereafter, to prepare a motion to reduce Sellers' support obligation. Respondent admitted that, because Aumiller had previously performed services for him on a per diem basis, he was aware that Aumiller had a tendency to procrastinate.[2]

From November 2004 to January 2005, Aumiller repeatedly assured respondent that he would complete the tasks that respondent had assigned to him. Finally, in January 2005,

[2] Aumiller conceded that he was a procrastinator.

Aumiller disclosed that he had not filed the application with the bankruptcy court or the motion to reduce support. According to respondent, he shouted at Aumiller, in the presence of staff, upon learning that Aumiller had not followed his instructions in the Sellers' matter. Respondent directed Aumiller to confess to the court that he had failed to take any action on Sellers' behalf. Respondent asserted that Aumiller reported to him that he had admitted to both the court and to Sellers that he had done nothing for Sellers and that the court had neither found him in contempt nor granted the enforcement motion. In turn, Aumiller denied that he had acknowledged to anyone his failure to take any action on Sellers' behalf.

In February 2005, after respondent learned that Sellers' wife's bankruptcy petition had been dismissed, he directed Aumiller to prepare the modification motion. At this point, according to respondent, the partnership was failing, Aumiller "quit again," other employees gave notice that they were terminating their employment, the FBI was investigating whether SRA's receptionist was stealing from the firm, respondent was getting a divorce, and respondent's former landlord was suing him for past due office rent. Respondent claimed that Starkman refused to issue a check for the fee for respondent to file an answer to the landlord's lawsuit against him. At this point, a

disagreement ensued and Starkman declared that their law partnership was terminated.[3] Despite the law firm's dissolution, respondent maintained a solo practice in the same office location until the end of July 2005.

Immediately after Starkman declared the partnership dissolved, the message on the law firm's answering machine was changed to exclude respondent's name. Respondent alleged that, because the receptionist was "beholden" to Starkman, she did not distribute respondent's mail to him, at Starkman's instruction.

Respondent testified that, on April 1, April 15, and May 2, 2005, he sent the following letter to Sellers:

> Please be advised of the fact that my former partnership with Mr. Starkman has disbanded. Pursuant to our conversation and insomuch that you were brought into the firm by Mr. Starkman, it is strongest [sic] of suggestions that you contact Mr. Starkman for the purpose of determining whether or not I can continue with my representation, insomuch that the Law Firm of Starkman, Rochman & Aumiller has recently disbanded.
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> [Ex.P-7;Ex.P-8;Ex.P-9.]

Sellers denied receiving any of these letters.

Respondent asserted that he also sent the following letter to Sellers, dated May 31, 2005:

> Despite the fact that I have yet to hear from you concerning my prior three (3)

[3] According to Aumiller, Starkman did not want the answer filed because he was named as a witness in the pleading.

> correspondences, I have taken it upon myself to draft a Notice of Motion seeking the Modification of your current support obligations. I am fearful at this juncture the matter lingered to [sic] long and has become stale. As a result of which, I have drafted a motion and I would ask that you immediately come into my office and execute same.
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> [Ex.P-10.]

Sellers also denied receiving that letter.

Respondent alleged that, after the firm dissolved, Aumiller retained the Sellers file and did not return it until November 2005, despite respondent's numerous requests for it. Although respondent's secretaries, Comp and Carter, agreed that Aumiller had returned the file to respondent in late October or mid-November 2005, they admitted that they were aware that the Sellers file had remained on Aumiller's desk, from June or July 2005 until November 2005, and that respondent had never directed them to look for it. Carter further conceded that, although she had removed files from Aumiller's office and brought them to respondent's new office, in July 2005, when respondent moved, she had not taken the Sellers file.

Aumiller denied that he had removed the file, asserting that it had remained in the office.

Respondent questioned Aumiller's credibility, implying that, because Aumiller continued to have a business relationship with Starkman, his testimony favored Starkman.[4]

Respondent denied having received any of Sellers' telephone messages or any notice that he had visited the office. Respondent's secretaries, Carter and Comp, testified that they had never seen Sellers at the office, other than for his initial conference, and had not received any contact from him after March 15, 2005.

In addition, respondent denied having received Sellers' May 19, 2005 letter to him, in which Sellers indicated that he would retain another attorney if he did not hear from respondent within five days. Respondent, however, admitted, in his answer to the formal complaint, that his file contained a copy of that letter.

On May 24, 2005, respondent, through his attorney, Mark Guralnick, filed an Order to Show Cause against Starkman. Because the partnership agreement contained an arbitration provision, on June 7, 2005, the court ordered the parties to submit to binding arbitration, to be conducted by the Honorable

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[4] Aumiller testified that, at the time of the ethics hearing, he was providing legal services to Starkman, in lieu of paying office rent, and that he received a weekly payment from Starkman, as an independent contractor, plus payment of most of his office expenses.

Barry M. Weinberg, a retired judge. In an undated order entered after a July 28, 2005 hearing, Judge Weinberg ruled that respondent could engage a telephone answering service and scheduled a continued arbitration hearing for October 11, 2005.

As mentioned previously, Nathanson had sent letters, dated June 3 and July 14, 2005, on Sellers' behalf. Respondent claimed that, upon receipt of one of those letters (he did not specify which letter), he transmitted it to Starkman, along with a note, instructing Starkman to deliver the file to Nathanson and to return the retainer to Sellers.

Starkman, however, testified that, on March 22, 2005, after the firm dissolved, he had given a $1,000 check to respondent for reimbursement of Sellers' retainer. That check was never negotiated. According to Starkman, he had disbursed to respondent the trust account funds in connection with all matrimonial matters, because respondent had retained all of those cases, when the firm dissolved.

Starkman further claimed that, on July 20, 2005, he gave the following memorandum to respondent:

> I received a fax of a letter sent here by Charlie Nathanson (see copy attached) requesting that our former firm refund Jonathon (sic) Sellers' retainer of $1000. so he can proceed with his matter. As this is the last monies in our Trust account, I attach hereto a check representing the refund which I would ask that you please

> sign and leave for me to forward to Mr. Sellers. Once this has been cashed by him, we can close the Trust Account.
>
> [Ex.P-29.]

This memo referred to the July 14, 2005 letter that Nathanson had sent to the firm.

Starkman explained that the arbitrator had imposed a requirement that both he and respondent sign trust account checks. He identified a July 19, 2005 check as the one that was attached to his memo to respondent. According to Starkman, respondent refused to sign the check.

Although that check was then brought to a July 28, 2005 arbitration hearing before Judge Weinberg, Starkman could not recall whether he or respondent had brought it. Thomas Hagner, who represented Starkman at the arbitration, testified that Starkman had brought the check to the July 28, 2005 hearing.

According to both Starkman and Hagner, respondent refused to sign the check at the arbitration hearing, protesting that he needed to review his records and calculate the amount of time that he had spent on the file. Hagner added that, at the arbitration hearing, he announced that, because he did not want Starkman to have an ethics problem, he was handing the check to respondent's attorney, Guralnick, and that the issue was respondent's, not

Starkman's. Hagner was certain that, at the end of the hearing, either respondent or Guralnick had possession of the check.

The July 19, 2005 check was voided.

In his reply to the ethics grievance, respondent denied receiving the March 22, 2005 check from Starkman or the check at the July 28, 2005 arbitration hearing.[5] He pointed to an October 19, 2005 letter that he had sent to Hagner, in which he had asked Hagner to direct Starkman to issue a $1,000 check to Sellers. On October 20, 2005, Hagner sent a letter to respondent, indicating that Starkman had handed the check to respondent at the arbitration hearing; that the funds were in respondent's control; and that Judge Weinberg had admonished respondent to address Sellers' demands, thereby avoiding a potential ethics problem. Respondent and Hagner exchanged additional letters in which each accused the other of having the check.

On October 29, 2005, Judge Weinberg entered an interim order, following an October 24, 2005 hearing, requiring Starkman to issue another check and to forward it immediately to Sellers' attorney. In that order, Judge Weinberg referred to and attached copies of (1) Nathanson's July 14, 2005 letter; (2) the July 17, 2005 check that Starkman claimed he had given to respondent; (3)

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[5] The charge that respondent violated RPC 8.4(c) is based on respondent's denial, in the reply to the grievance, that he had control of or access to funds with which to reimburse Sellers.

Starkman's July 20, 2005 memo to respondent, enclosing the July 17, 2005 check; and (4) an August 2, 2005 letter from Hagner to Nathanson, informing him that respondent had retained Sellers' funds and suggesting that he contact respondent.

On October 27, 2005, Starkman issued a $1,000 check to Sellers, which Sellers received on November 4, 2005.[6]

Respondent contended that he did not have the ability to return Sellers' funds because he did not have access to any of the firm's bank accounts.

Respondent presented a report and testimony of David Epler, a matrimonial attorney, as an expert in matrimonial law. Although Epler was accepted as an expert, he was not a certified matrimonial attorney and had never previously testified as an expert.

Beginning in about 1990, respondent referred matrimonial matters to Epler, who referred other types of matters to respondent. In addition, Epler represented respondent in his divorce and respondent represented Epler or his law firm in collection matters.

Epler opined that his review of the Sellers file did not indicate any impropriety in respondent's representation of

[6] Although the check predates the written order, presumably, it was issued after the ruling at the October 24, 2005 hearing.

Sellers. Notwithstanding Epler's opinion that respondent had taken appropriate action in Sellers' case, he conceded that the file contained no indication that respondent had (1) entered a written notice of appearance, resulting in respondent's failure to receive notices or other documents from the court; (2) informed Sellers that he needed to provide information necessary to complete the case information statement required for the modification motion; (3) directed Sellers to provide certain documentation, such as pay stubs or wage verifications; (4) inquired about the status of Sellers' wife's bankruptcy proceeding; (5) made any effort to obtain answers to interrogatories that Sellers' wife's attorney had propounded, during Katz's representation of Sellers; (6) filed a motion to compel Sellers' wife's attorney to comply with discovery requests that Katz had served; and (7) replied to Nathanson's letters.

Epler testified that Sellers had never provided respondent with any documents. He acknowledged, however, that respondent's file contained copies of (1) Sellers' work schedule at Woodcrest Country Club, during the period of December 2004 to January 2005, while respondent was representing Sellers; (2) Sellers' separation agreement with BISYS, the company that had ended his employment; (3) Sellers' resumé; and (4) Sellers' bank account statements.

Although Epler concluded that sufficient services had been performed on Sellers' behalf to justify respondent's retention of the $1,000 fee, Epler's opinion was conditioned on respondent's having billed Sellers "on an ongoing basis." Epler also opined that, upon the dissolution of a law firm, letters should be sent to clients, advising them of the breakup and instructing them to indicate which attorney, if any, they choose to continue with the representation. If a client does not reply, the current representation will continue because, until a court or client relieves an attorney of the attorney-client relationship, the attorney has an obligation to continue to represent the client's interests.

As previously noted, respondent's demeanor, tactics, and behavior at the ethics hearing were intolerable and, in our view, warrant enhanced discipline. The following excerpts represent a sampling of respondent's lack of civility and decorum. All fourteen transcripts are replete with many similar incidents.

Respondent was exceedingly resentful that Sellers had filed the grievance against him only and not against Starkman and Aumiller. Respondent perceived both attorneys to be as culpable as he, based, in part, on his belief that the entire firm represented Sellers. Despite Nathanson's testimony that he had

given Sellers information about filing an ethics grievance, throughout the ethics hearing, respondent accused Sellers of being manipulated by Starkman, or Aumiller, or both:

> Respondent: Well, isn't it true sir, the reason that you didn't [file a grievance against Starkman or Aumiller], and let's get to the crux of this, because Mr. Starkman put you up to the filing of the complaint, isn't that true, sir, yes or no?
>
> Sellers: No.
>
> Respondent: So if Mr. Starkman is going to come in and say that's the truth, he's lying?
>
> Sellers: Yes.
>
> [4T28-14 to 21.][7]
>
> Respondent: Isn't it true, sir, whether or not it was Mr. Starkman or Mr. Aumiller, that the two of you or the three of you conspired to file the grievance? Isn't that true?
>
> Sellers: No.
>
> [4T32-25 to 4T33-4.]

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[7] 1T denotes the transcript of the June 25, 2007 hearing.
2T denotes the transcript of the June 26, 2007 (a.m.) hearing.
3T denotes the transcript of the June 26, 2007 (p.m.) hearing.
4T denotes the transcript of the July 17, 2007 hearing.
5T denotes the transcript of the July 18, 2007 hearing.
6T denotes the transcript of the July 23, 2007 hearing.
7T denotes the transcript of the January 31, 2008 hearing.
8T denotes the transcript of the February 20, 2008 hearing.
9T denotes the transcript of the February 21, 2008 hearing.
10T denotes the transcript of the March 4, 2008 hearing.
11T denotes the transcript of the March 27, 2008 hearing.
12T denotes the transcript of the April 1, 2008 hearing.
13T denotes the transcript of the April 22, 2008 hearing.
14T denotes the transcript of the April 23, 2008 hearing.

Respondent: Isn't it true, sir, that they conspired to put you up to this?

Sellers: No.

[4T37-2 to 4.]

Respondent: This particular letter, who penned this letter, who created it?

Sellers: I did.

Respondent: Are you sure it wasn't done by Mr. Starkman or Mr. Aumiller.
Sellers: Absolutely not. . . .

Respondent: You're sure about that?

Sellers: I'm positive.

[4T46-14 to 16;4T48-20 to 24.]

Respondent: Mr. Starkman put you up to this complaint?

[4T158-20.]

Respondent: He put you up to it, you guys rehearsed it, but it's been a long time since it was rehearsed, isn't that true? . . .

Sellers: I was not coerced or put up to this by Mr. Starkman. It was actually Mr. Nathanson that suggested to file something with the Ethics Committee.

[4T159-2 to 4;4T159-16 to 19.]

Respondent similarly interrogated Starkman:

Respondent: You're here in part because you put Jonathan Sellers up to this matter, right?

Starkman: Wrong. . . .

> Respondent: You've had fair and substantive conversations with Mr. Sellers about this litigation?
>
> Starkman. That's not true. . . .
>
> Presenter: Objection. . . .
>
> Respondent: It's not a proper objection. It's not even close.
>
> Special Master: I think the objection . . . is quite appropriate.
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> [7T128-14 to 7T130-7].

Respondent also accused witnesses of lying or being dishonest in some manner. He opened his cross-examination of several witnesses with accusations, as follows:

1. Jonathan Sellers

> Respondent: You testified yesterday honestly?
>
> Sellers: To the best of my knowledge.
>
> Respondent: All right. So there was [sic] things yesterday that you may have testified that were dishonest? . . .
>
> Somebody that does drugs, do you consider that person to be truthful? . . .
>
> Sir, have you used drugs in the past?
>
> [2T4-6 to 2T7-15.]

After Sellers testified forthrightly that he occasionally smoked marijuana:

Respondent: So when you testified that you can't remember, your problem with your memory is what, sir? Is it the marijuana usage?

[2T88-20 to 22.]

2. Morris Starkman

Respondent: Mr. Starkman, it's fair that you're on occasion not an honest individual, correct?

Presenter: Objection. . . .

Respondent: There's [sic] times in the past that you haven't been honest, you've lied, right?
Presenter: Objection. . . .

Special Master: I'm inclined to Ms. O'Hearn's [the presenter's] way of thinking . . . .

Respondent: You've lied in your testimony today, correct?

Starkman: No.

[7T121-5 to 7T123-2.]

Respondent: Okay. We can conclude here. Are you sure, Mr. Starkman – and I'm not even close to done my cross-examination – you're not making this up as you go along?

Presenter: This is a well-respected member of the bar and this is bordering on harassment of the witness, continually asking these questions.

Respondent: It's cross-examination, it's fair cross-examination and you're [sic] comment aside about well-respected and –

unless you have a foundation for that, please keep it to yourself.

Special Master: Mr. Rochman.

Respondent: I haven't seen anybody come in and talk about the man's reputation.

Special Master: Mr. Rochman, you have on several previous occasions asked quite bluntly whether Mr. Starkman was truthful, whether he was making it up and each time he has responded to you. Now, I will admit that you have some latitude in continuing to ask questions such as that, but I will also tell you that you're getting real close to the line here where at some point these types of questions are simply argumentative and that's probably the last time you're going to ask it as far as I'm concerned.

[7T246-9 to 7T247-7.]

3. Thomas Hagner

Respondent: You're sure you – you're not making it up as you go along?

Hagner: No. I'm positive.

Respondent: You're sure?

Hagner: Absolutely positive.

[10T211-3 to 7.]

Ironically, when Starkman suggested that respondent had not sent a letter to Starkman's lawyer, Hagner, respondent became outraged at the implication that he was a liar:

Respondent: [I]t's your testimony that Mr. Hagner never sent this letter to you; is that accurate?

> Starkman: I don't believe Mr. Hagner ever received that letter, and I also don't think that letter was ever written on that date . . . .
>
> Respondent: Mr. Starkman, what you just did in your last comment and statement was you called me a liar. I never sent — and you didn't believe that I sent the letter of October 19, 2005, marked R-10; is that accurate?
>
> Starkman: I never saw that letter.
>
> Respondent: No, sir. I want to know your comment after that that I never sent it, I never created it. That was your comment. You were calling me a liar; isn't that true. Yes or no?
> Starkman: No.
>
> Respondent: You weren't calling me a liar?
>
> Starkman: No.
>
> [9T68-18 to 9T69-25.]

Respondent then made at least four more references to Starkman's having called him a liar. Next, in a sarcastic way, he asked Starkman whether he had suffered a brain injury or taken medication that would have affected his memory during the three-week interim between his direct examination and cross-examination.

Moreover, respondent frequently tried to limit witnesses' testimony on cross-examination to "yes or no" answers, when they reasonably wanted to offer an explanation:

> Respondent: And as of February 4th the job assignment hadn't been completed, is that accurate, yes or no? Yes or no? Had you,

your words, petitioned the bankruptcy court for stay relief, yes or no?

Aumiller: Listen, you're not going to bully me. I'm going to answer the way I want to answer.

Respondent: I'd ask that you ask the hostile witness --

Aumiller: The same way when [the presenter] had a yes or no question, I'm going to answer it fully. I'm going to answer the same way.

Special Master: Provide your explanation.

[5T139-14 to 25.]

Starkman: I can't recall every single word uttered by Mr. Sellers at the time to me.

Respondent: So there's [sic] gaps in your memory, you'll concede that, as to what transpired with Mr. Sellers and Mr. Sellers' representation; is that fair?

Starkman: I know —

Respondent: Yes or no.

Starkman: I can tell you that —

Respondent: It's yes or no, sir.

Presenter: If he can't answer it yes or no . . .

Starkman: I do not have a perfect memory of the events or discussions that I had with Mr. Sellers.

[9T57-5 to 25].

Notwithstanding respondent's argumentative cross-examination techniques, he unreasonably objected to the presenter's cross-examination of his secretary, Cherie Comp:

> Presenter: Do you recall any other correspondence from Mr. Rochman to Mr. Sellers? I know you weren't sure of exactly how many. That was the first you remembered. Do you remember any others?
>
> Respondent: Objection. It's a mischaracterization of her testimony.
>
> Presenter: She can correct me. This is cross-examination.
>
> Respondent: But that doesn't mean you get to bastardize the record. It doesn't mean you get to create your own record. It doesn't mean there's a free wheel to do whatever you want, and that borders on harassing the witness.
>
> [11T192-1 to 13].

Respondent reserved his most egregious personal attacks for the presenter:

> Respondent: [To Grievant] Show us the grievance that you filed against the law firm of Starkman, Rochman & Aumiller.
>
> Presenter: Objection. I don't believe it's procedurally proper nor allowed for an individual to file a grievance against a law firm. Grievances are filed against --
>
> Respondent: You're now testifying, Counsel. . . . I ask for a proffer that there's a basis for that. . . .
>
> Presenter: 1:20-3(e) . . . [T]here's nothing in the rule that provides jurisdiction to file a grievance against a law firm. It is

the attorney and the member of the bar who is subject to the jurisdiction of the Supreme Court.

Respondent: You know, Mr. Kushner, we have the authoritative source. Don't make a ruling. Ms. O'Hearn is absolutely correct. There's nothing in that paragraph that says –

Special Master: Mr. Rochman. You asked all of us to review the rule. Ms. O'Hearn was kind enough to point us to the rule that she believes supports her position.[8]

[2T61-24 to 2T64-9.]

Presenter: [To Nathanson] I'm going to show you what I marked as P-22. . . .

Respondent: Let's just let Counsel continue to attempt to run the shop.

[8T65-21 to 25.]

Respondent: [To Presenter] It's not a business record. It can't be close. You don't know what a business record is. . . .

Special Master: You're not going to do it Mr. Rochman. You're not going to, A, impune [sic] her [the presenter's] ability, and you're not going to force her into a situation where she has to respond. It's not going to happen anymore.

Respondent: I was raising an objection.

Special Master: If you have an objection, then leave it as an objection, not as a personal

[8] Although §20.2 of the New Jersey Disciplinary Ethics Committee Manual prepared by the Office of Attorney Ethics instructs that grievances must be docketed in the name of an individual attorney, R. 1:20-1(a) allows discipline to be imposed against a law firm.

attack on counsel, which is absolutely unwarranted under any circumstances.

[10T249-18 to 10T250-12.]

Presenter: [To Starkman] [L]ooking at what we've marked as P-24, can you tell me if you were able to locate any messages which refer to Mr. Sellers?

Respondent: Objection. How can he — it's hearsay within hearsay. How can he state that? That refers to Mr. Sellers.

Presenter: It's a record of a regularly conducted business activity. I, in very much detail, laid the appropriate foundation as to how they are created, how they are kept, how they are maintained and what custody they are in up until today.

Respondent: He can testify to whether or not that there is a particular notation from what purports to be from a particular individual, but counsel's self-serving objection doesn't get her there and she's done that repeatedly. I've raised my objection to it. She thinks that, Mr. Kushner, because she says it with vim and vigor that she believes that she's done something that you should accept it. We both know that's not the way that it works. . . .

Special Master: I find the objection is not directed toward an improper question and now Mr. Starkman, would you answer it?

[7T53-15 to 7T55-17.]

During respondent's cross-examination of Starkman, the special master noted that respondent repeatedly asked the same question, hoping to elicit different answers. After the

presenter raised an objection, respondent launched the following diatribe:

> Respondent: For the record, there is no appropriate objection as to asked and answered. It's not in the rules. It doesn't exist, Counsel, and I disagree with her completely. I'm sure that comes as no surprise to you.
>
> [The presenter has] repeatedly indicated to you, to my dismay and amazement, that Rules of Evidence don't apply, and then she seeks to raise a Rule of Evidence which doesn't exist.
>
> [9T21-13 to 21.]
>
> Presenter: Same objection. I think billing matters are also covered under attorney-client [privilege].
>
> Respondent: I don't think –
>
> Presenter: I'm not finished. If you want to ask –
>
> Respondent: Counsel, I don't believe that you have the right to raise your loud, obnoxious voice to me at any point in time.
>
> Special Master: Mr. Rochman.
>
> Presenter: We're going to control this or I'm not going to sit here and take this. . . It is inappropriate.
>
> [10T216-7 to 20].

Respondent also objected to the appearance, at the hearing, of a law clerk from the presenter's office. The presenter explained that the law clerk had assisted her in a research

matter and pointed out that the hearings were public. Respondent replied:

> Respondent: First of all, as I've indicated, and I say it with respect to you, Ms. O'Hearn continues to make it up as she goes along. There is nothing that allows a law clerk to attend the matter and assist. There is nothing in the rules that allows a law clerk to sit at counsel table and to participate. . . .
>
> Special Master: I frankly don't have an objection to having an employee of the presenter's firm.
>
> [5T36-15 to 5T37-20.]

Respondent also raised frivolous objections or made specious arguments:

> Presenter: [To Sellers] And you understand that you're here to testify today about a grievance that you filed regarding Mr. Rochman; is that correct?
>
> Respondent: Objection, leading . . . She can't suggest to the witness why he's here to testify. It goes to the truth of the matter asserted. In fact, she said in her question and gave him the answer as to why he's here. It doesn't go to background.
>
> Special Master: It is clear why Mr. Sellers is here as a Grievant, and I don't believe that that's an improper question at this point.
>
> [1T39-23 to 1T40-17.]
>
> Presenter: [A]m I correct, sir, that at the time Mr. Rochman allegedly prepared that certification in May of '05, he had 2005

banking statements for Mr. Sellers in the client file, correct.

Epler: I don't recall.

Presenter: Can you look at Rochman-13 and 14? Let's start with 13 first.

Respondent: You'll note my unlimited objection by the characterization of banking statements which has been identified as two. Now, I don't know if you would characterize two as banking statements but –

Special Master: I just have to respond that it may be the limit that you can have in statements, more than one, but it is indeed plural, so I'll allow that in.

[6T42-12 to 6T43-3.]

Presenter [To Nathanson]: And let me go back then to your July 12, 2005 meeting with Mr. Sellers. What was the purpose – what was your understanding of the purpose of that meeting?

Respondent: Objection. It presupposes there was a purpose. It's leading.

Special Master: Well, I'll allow it. I assume that Mr. Sellers did not have a social engagement.

Respondent: It's not that. The simple question is: Did you have a follow-up and what happened. That's not leading. But when you suggest, what was the purpose, it just becomes leading.

Special Master: Well, we'll have to agree to disagree on that, Mr. Rochman.

[8T58-11 to 25.]

During the hearing, Starkman testified that an arbitration hearing had occurred on July 30, 2005. Starkman had reviewed Exhibit P-31, an order entered by Judge Weinberg, which referred to the July 30, 2005 hearing. However, as it turned out, the reference in Judge Weinberg's order was erroneous because July 30, 2005 fell on a Saturday and Starkman stated that no arbitration hearings had taken place on a Saturday. Respondent asked Starkman numerous questions about this innocuous and irrelevant error, suggesting that Starkman's credibility was at issue, that he had fabricated testimony, and that all of Starkman's accounts of the events that took place at that arbitration hearing were not credible, all because he had relied on the date in Judge Weinberg's order.

The special master found respondent guilty of lack of diligence and failure to safeguard funds. He did not find clear and convincing evidence that respondent failed to communicate with his client, failed to expedite litigation, or engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. He did not address the recordkeeping charge.

As to the lack of diligence charge, the special master noted that respondent could not avoid his professional obligations by delegating responsibility for a portion of the representation to

an associate. In addition, the special master found that respondent allowed the Sellers matter

> to drift from early October, 2004 through at least late May, 2005 without action taken to either gain the information needed to file the appropriate application for support reduction or to terminate the attorney-client relationship with the Grievant in accordance with the provisions of RPC 1.16 due to Respondent's position that the Grievant failed to cooperate.
>
> [SMF17 to 18.][9]

The special master also found that respondent violated RPC 1.15 by failing to promptly return Sellers' retainer. Although the special master acknowledged that respondent had no access to the trust account, he determined that, as an equity partner, respondent had an obligation to reimburse Sellers, once a decision had been made that the retainer should be returned. He observed that respondent should have taken affirmative steps to accomplish the release of the funds. The special master also determined that respondent's former partner, Starkman, had a similar obligation.

The special master's unwillingness to find that respondent failed to communicate with Sellers was based on the litigation between respondent and Starkman, following the dissolution of

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[9] SMR denotes the special master's recommendation for discipline, dated January 7, 2009. SMF denotes the special master's findings, dated December 8, 2008.

the law firm. The special master remarked that the arbitrator in the law firm dispute intervened concerning the telephone messages. He further commented that the evidence about the contact between respondent and Sellers was "inconsistent and contradicting." Essentially, the special master determined that there was no clear and convincing evidence that respondent had received any of Sellers' telephone messages.

As to the RPC 3.2 charge, the special master determined that, because of the possible automatic stay caused by Sellers' wife's bankruptcy petition, respondent's delay in filing the motion to reduce child support did not constitute a failure to expedite litigation.

Finally, concerning the RPC 8.4(c) charge, the special master found that the presenter had proven, by a preponderance of the evidence, that a check had been delivered at the arbitration hearing before Judge Weinberg in July 2005. The special master noted, however, that Starkman's testimony on whether either he or respondent had possession of the check before the arbitration hearing was not clear. The special master, thus, could not find this rule violation by clear and convincing evidence.

Noting that the presenter recommended a suspension, while respondent urged a private reprimand,[10] the special master determined that an admonition should be imposed. The special master stated that, although a reprimand would ordinarily be appropriate, he considered, in mitigation, respondent's unblemished ethics history and the absence of ethics charges against "other attorneys who share in this blame," presumably referring to Aumiller and Starkman.

As to respondent's conduct at the ethics hearing, the special master found:

> I do agree [with the presenter] that this matter, tried over 14 separate days, far exceeded what might have been expected from my initial review of the complaint and answer. I can also agree that the Respondent's demeanor was, at times, unnecessarily adversarial, and at other times, uncivil. At some points he skated very close to the edge of reasonable behavior in his defense. I do not find that the Respondent necessarily advanced his cause in always attributing personal motives to the witnesses or, especially, the Presenter as is evidenced by the transcripts and written submissions. I cannot and will not however, penalize him for taking the time and effort – misplaced as some of it might be – to offer up the best defense he could muster.
>
> [SMR4.]

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[10] Private reprimands were abolished as a form of discipline in 1994. All attorney discipline is public.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

Sellers retained respondent, on September 30, 2004, to file a motion to reduce child support. In May 2005, eight months later, respondent still had not filed the motion, prompting Sellers to contact another attorney to obtain the return of his file and his retainer. Indeed, respondent had not even taken the simple and fundamental step of filing a notice of appearance in the matrimonial matter. We do not accept respondent's defense that he had instructed his staff to submit the notice of appearance. Respondent, not his employee, should have ensured that the pleading was filed. Furthermore, because respondent was required to sign the pleading, he could not have expected his staff to file the notice of appearance without his signature.

Moreover, although Sellers asserted that he had informed respondent that a divorce complaint had been filed, respondent claimed that Sellers had told him only that a support order had been entered. If respondent's version is accurate, at a minimum, he failed to ask the proper questions at his intake conference with Sellers. As an experienced matrimonial attorney, respondent should have known the importance of asking whether divorce litigation had been instituted.

Respondent's contention that, because Sellers had retained the firm, not him individually, he was not responsible for advancing Sellers' case is devoid of merit. The firm may act only through its attorneys. Respondent signed the retainer agreement; respondent undertook the responsibility of representing Sellers; and respondent was duty-bound to file the motion for which he had been retained.

We are troubled that respondent fails to understand his fundamental obligation to represent clients. He does not appear to comprehend the nature of his role in an attorney-client relationship. He repeatedly argued that the law firm of Starkman, Rochman & Aumiller had been retained and that, as a consequence, he had no individual responsibility to Sellers. By signing the retainer agreement, albeit on behalf of the law firm, respondent agreed to represent Sellers. Although respondent attempted to blame others, including Starkman, Aumiller, and clerical staff, his duty to Sellers was non-delegable.

We also reject respondent's other excuses. The argument that Sellers failed to provide necessary information is nullified by respondent's failure to request that information. Respondent claimed that, during the first few days after his September 30, 2004 conference with Sellers, he and his staff had tried

repeatedly to obtain from Sellers the completed documents (case information statement and affidavit of insurance forms), given to Sellers at that conference. He also alleged that he had sent an October 2, 2004 letter to Sellers, requesting those documents. After this initial, alleged flurry of contact attempts, however, respondent made no effort to obtain these documents from Sellers. Respondent did not produce any letters or other evidence that, during the six-month period from October 2, 2004 to April 1, 2005, he had reminded Sellers to return the case information statement and other paperwork.

Moreover, respondent had information in his file that would have permitted him to draft at least a preliminary case information statement. Sellers had provided his work schedule, his bank account information, his separation agreement with his employer, and his resumé. Yet, respondent seemed oblivious to the contents of his own file. This utter lack of attention is at odds with respondent's testimony that, because Sellers was referred by respondent's new partner, Starkman, it was important for him to meet Sellers' needs.

Respondent asserted that, because Sellers' wife had filed a bankruptcy petition, the automatic stay under Section 362 of the Bankruptcy Code may have precluded him from filing the motion. Although respondent allegedly assigned to Aumiller the task of

researching and resolving the bankruptcy issue, he discovered, in January 2005, that Aumiller had not done so. Respondent's assignment to Aumiller to file the motion and to research the bankruptcy issue did not relieve respondent of the responsibility for those items. He could not escape his duties by delegating tasks to an associate, particularly when he admitted an awareness of Aumiller's tendency for procrastination. Moreover, had he taken the basic step of contacting Sellers' wife's attorney, he would have learned that an order granting relief from the automatic stay had been entered on September 3, 2004.

Although not discussed at the hearing or in the special master's report, respondent's failure to file the motion in this case was particularly detrimental to Sellers because N.J.S.A. 2A:17-56.23a precludes the retroactive modification of child support orders without a motion and, even then, only to the date of the motion:

> No payment or installment of an order for child support . . . shall be retroactively modified by the court except with respect to the period during which there is a pending application for modification, but only from the date the notice of motion was mailed either directly or through the appropriate agent. The written notice will state that a change of circumstances has occurred and a motion for modification of the order will be filed within 45 days. In the event a motion is not filed within the 45-day period, modification shall be permitted only from the date the motion is filed with the court.

Based on the above statute, during the eight months that respondent represented Sellers, he accrued arrearages for his noncompliance with the existing court order. At the time that Sellers' wife filed the motion to enforce litigant's rights, his arrears were $6,842.73. These arrearages continued to accrue, without any possibility of relief, because respondent did not file the modification motion.

Furthermore, in respondent's May 31, 2005 letter to Sellers, he acknowledged that the matter had "lingered" too long and had become "stale."

Parenthetically, we note that, although Nathanson was not retained by Sellers, he performed more services for Sellers in fewer than two months than respondent did during the entire period of his representation of Sellers. Nathanson met with Sellers twice; called the court, in Sellers' presence, to ascertain the status of his divorce matter; telephoned respondent at least twice, without reaching him or receiving a return phone call; sent two letters seeking the return of Sellers' file and retainer; and gave him information about the filing of an ethics grievance.

We, thus, find clear and convincing evidence that respondent engaged in a lack of diligence, a violation of RPC 1.3.

Respondent also failed to safeguard client funds. Although RPC 1.16(d) (failure to protect a client's interests upon termination of the representation) would have been a more specific rule for respondent's failure to return Sellers' file and retainer, RPC 1.15(b) also applies. Sellers, through Nathanson, began asking for the return of his retainer as early as June 3, 2005. He did not receive it until five months later, in early November 2005.

Respondent offered many reasons for his failure to refund Sellers' fee. He claimed that he did not have access to the firm's bank accounts. Starkman testified that respondent never asked for such access and that, if he had, it would have been provided. The testimony concerning Starkman's issuance of the March and July 2005 checks for reimbursing Sellers was contradictory. Respondent denied that he had ever received either of those checks. Even if respondent's version of events is accepted, however, he cannot evade his responsibilities. Respondent made little, if any, effort to obtain a check from Starkman for Sellers from May 2005, when Sellers began asking for a refund, through October 2005, when the arbitrator ordered the return of the funds.

Next, respondent contended that he had performed sufficient legal services to authorize him to retain Sellers' fee.

Respondent's expert, Epler, testified that respondent would have been justified in keeping the $1,000 fee, if he had billed Sellers. Respondent, however, never sent a bill to Sellers, in violation of his own fee agreement, requiring the issuance of bills every sixty days, and in violation of R. 5:3-5(a)(5), mandating attorneys in civil family actions to render bills at least once every ninety days. The legal services that respondent and Aumiller provided, therefore, did not justify respondent's failure to refund Sellers' fee. Therefore, respondent's failure to promptly deliver funds that his client was entitled to receive violated RPC 1.15(b).

Although the special master determined that respondent did not fail to communicate with Sellers, we find clear and convincing evidence of this violation. Sellers retained respondent on September 30, 2004. The October 2, 2004 letter that respondent claimed to have sent to Sellers was curious. That letter, written on a Saturday, and only two days after the execution of the fee agreement, refers to "repeated calls" from respondent to Sellers. It is difficult to reconcile this letter, in which respondent appears anxious to proceed with the motion, with respondent's utter lack of communication over the next seven months. The record contains three letters from respondent to Sellers (all of which Sellers denied receiving), written in

April and May 2005, six to seven months after respondent was retained. These letters notified Sellers of the dissolution of SRA, but gave him no information about the status of his matter.

Furthermore, Sellers testified that, beginning in December 2004, he left several messages per month for respondent, both by telephone and by visiting his office. The special master was persuaded that respondent may not have received his phone messages due to his dispute with Starkman. That controversy, however, did not begin until March 2005. Respondent's dispute with Starkman does not explain respondent's failure to communicate with Sellers from October 2004 through March 2005. Moreover, both Starkman and Aumiller recalled seeing Sellers in the office, leaving messages for respondent with the receptionist, and complaining about his inability to obtain information about the status of his matter.

Even if we were to credit respondent's testimony that he did not receive the telephone messages from Sellers, we note that he made no effort to communicate with Sellers from October 2, 2004 through April 1, 2005, a period of six months and, even then, the letters that respondent sent in April and May 2005 did not address the status of Sellers' matter.

We, thus, find that respondent violated RPC 1.4(b) and (c).

On the other hand, the record does not contain clear and convincing evidence that respondent violated RPC 8.4(c). This charge was based on respondent's representations, in his October 19, 2005 reply to the grievance, that he was unable to return Sellers' fee, because he had no control or access to the firm's trust or business account. The presenter contended that, because Starkman had given respondent two $1,000 checks, one in March and one in July 2005, these representations were false.

A more specific charge for this allegation would be RPC 8.1(a) (false statement of material fact in connection with a disciplinary matter). In any event, respondent denied that he had received either the March or the July 2005 checks payable to Sellers. The record does not contain clear and convincing evidence that respondent had possession of either of those checks. We, therefore, dismiss the charge that respondent violated RPC 8.4(c).

The special master correctly dismissed the charge that respondent failed to expedite litigation. That rule applies to pending litigation. Because no litigation was pending, the rule does not apply to these circumstances. See, e.g., In the Matter of Thomas DeSeno, DRB 08-367 (May 12, 2009) (slip op. at 21). We, thus, dismiss the charge that respondent violated RPC 3.2.

The special master did not address the charged violation of RPC 1.15(d) (failure to comply with the recordkeeping rule). That charge was based on the provisions of R. 1:21-6(c)(1)(D), (E), and (H), requiring attorneys to keep, for seven years, copies of statements to clients showing disbursements of trust funds, copies of bills rendered to clients, and copies of records showing that the trust accounts have been reconciled. These provisions, however, do not apply to this matter. The rule requires attorneys to maintain certain records. In this case, respondent did not prepare these records and, therefore, could not have kept records that did not exist. He had not disbursed funds to Sellers or on his behalf. In addition, his failure to render bills violated R. 5:3-5, not the recordkeeping rule. Finally, there was no evidence that respondent failed to reconcile his trust account. Accordingly, we dismiss the charge that respondent violated RPC 1.15(d).

In sum, respondent is guilty of lack of diligence, failure to communicate with a client, and failure to return fees to a client.

Ordinarily, attorneys with no disciplinary history who are guilty of similar misconduct receive admonitions, even if other minor infractions are present. See, e.g., In the Matter of James C. Richardson, DRB 06-010 (February 23, 2006) (attorney lacked

diligence in an estate matter and did not reply to the beneficiaries' requests for information about the estate, violations of RPC 1.3 and RPC 1.4(a)); In the Matter of Gordon Allen Washington, DRB 05-307 (January 26, 2006) (attorney took seven months to disburse escrow funds following a real estate closing, violations of RPC 1.3 and RPC 1.15(b)); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (attorney did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court when the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file; violations of RPC 1.4(a) and RPC 1.3 found); In the Matter of John F. Coffey, DRB 04-419 (January 21, 2005) (attorney did not file a bankruptcy petition until nine months after being retained and did not keep the client informed of the status of the case; only after the client contacted the court did she learn that the petition had not been filed; the attorney violated RPC 1.3 and RPC 1.4(a)); and In the Matter of William F. Aranguren, DRB 97-101 (June 30, 1997) (attorney violated RPC 1.15(b) by failing to disburse settlement funds to a client for four years; in another matter, he violated RPC 1.3 by allowing a litigation matter to be

dismissed and violated RPC 1.4(a) by failing to advise the client of the status of the matter).

Here, the special master asserted that he would have imposed a reprimand, but he considered, in mitigation, the fact that no ethics grievance had been filed against Aumiller and Starkman, although they may also have been guilty of ethics violations. The absence of grievances against other attorneys has not been found to be a mitigating factor, however.

Also, despite the special master's finding that respondent's demeanor was "unnecessarily adversarial" and "uncivil," the special master determined not to "penalize" respondent for presenting his defense as he saw fit. The transcript excerpts quoted above, however, illustrate respondent's combative behavior and "scorched earth" tactics at the ethics hearing. We consider his inappropriate conduct at the hearing an aggravating factor, justifying increased discipline. In 2008, we imposed a censure on an attorney, based, in part, on her disrespectful conduct at the disciplinary hearings. In the Matter of S. Dorell King, DRB 08-130 (December 17, 2008). The Court agreed with our determination to impose a censure. In re King, 198 N.J. 448 (2009).

After full consideration of the relevant circumstances, we determine that a reprimand is the appropriate level of

discipline in this matter. In addition, we determine to refer respondent to the Camden County Bar Association Committee on Professionalism for an assessment and, if appropriate, the appointment of a mentor to assist him in developing and maintaining courtesy and civility in his dealings with others.

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 David S. Rochman
Docket No. DRB 09-307

Argued: February 18, 2010

Decided: April 20, 2010

Disposition: Reprimand

Members	Disbar	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
Chief Counsel