SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
District Docket Nos. VIII-2009-0010E, VIII-09-0022E, VIII-09-0023E, and VIII-09-0041E
Docket No. DRB 10-250

IN THE MATTER OF	:
MICHAEL DAVID HALBFISH	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 21, 2010

Decided: December 14, 2010

Peter J. Hendricks appeared on behalf of the District VIII Ethics Committee.

Respondent appeared pro se.

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 filed by the District VIII Ethics Committee (DEC). Two formal ethics complaints charged respondent with unethical

conduct. Count one of the first complaint charged respondent with violating RPC 1.4(b) (failure to keep a client reasonably informed)[1] and RPC 8.4, presumably (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). Count two was withdrawn by the presenter after the grievant failed to appear at the DEC hearing. Count three charged violations of RPC 1.4(b) and RPC 8.4(c). Count four charged a violation of RPC 1.1(b), (pattern of neglect) (inadvertently cited as RPC 1.11(b)), based on the allegations in counts one, two, and three. Although respondent was also charged with violating RPC 8.1(b) (failure to cooperate with disciplinary authorities) in two counts, the presenter withdrew that charge at the DEC hearing.

The second complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.1(b), RPC 1.3 (lack of diligence), and RPC 1.4(b).

We determine to impose a censure for the combination of respondent's misconduct.

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[1] RPC 1.4(b) is inadvertently cited as RPC 1.14(b) in both complaints.

Respondent was admitted to the New Jersey bar in 1997. In April 2010, he was censured for misconduct in two matters. There, he was found guilty of negligent misappropriation and recordkeeping violations in one matter and gross neglect, lack of diligence, failure to communicate with the client, and failure to withdraw from the representation in a second matter. In re Halbfish, 203 N.J. 441 (2010).

The Springer Matter (District Docket No. VIII-09-0023E)

In April 2007, Joseph A. Springer retained respondent to pursue litigation against Dura-Bilt Contractors, Inc. Springer gave respondent a $2,000 retainer.

In May 2007, Springer received a $1,000 check from Dura-Bilt.[2] At respondent's direction, Springer brought him the check. As of the date of the DEC hearing, respondent was still holding the check. Respondent testified that he wanted to be certain that the check was not cashed without first "work[ing]

[2] The hearing panel report states that "[r]espondent received a check in the amount of $1,000.00 from Dura-Bilt, Inc., on behalf of Complainant Springer . . . . Respondent never forwarded the check to Complainant Springer." The testimony establishes that Springer received the check directly from Dura-Bilt and brought it to respondent.

something out with Dura-bilt, where it would be a partial satisfaction or an undisputed amount." In addition, he claimed, the check had an address and banking information that would prove useful in pursuing Dura-Bilt.

According to Springer, respondent did not return a number of his telephone calls, with one exception, in either 2007 or 2008, when Springer called to tell respondent that he was filing for bankruptcy. Contrarily, respondent testified that he spoke with Springer whenever he called or came to his office.

In mid-February 2009, respondent relocated his office. In April 2009, Springer attempted to visit respondent's office. On arrival, Springer learned that respondent had moved his office location. Springer called respondent's office telephone number and located the new office. Springer met with respondent and requested a copy of the complaint that respondent had filed with the court. Respondent gave Springer a copy printed from his computer, which lacked a filed stamp from the court, and told him that it had been filed. Respondent explained, at the DEC hearing, that Springer had come to his office shortly after they had relocated and files had not yet been unpacked. He then printed a copy of the complaint from the computer to give to Springer.

In fact, respondent had filed two complaints on Springer's behalf and had obtained a default against Dura-Bilt.[3] However, the complaints were dismissed in January 2009. In respondent's opposition to the hearing panel report, he stated that, due to problems with his mail delivery, he did not receive notice of the "dismissal[s]." Presumably, respondent later found out about the dismissals. Indeed, at the DEC hearing, he testified that he did not tell Springer about the default or the dismissals because he "didn't see any reason to either upset him about a dismissal or raise false hopes with a default." In October 2009, the court ordered that the dismissal be vacated and the case be set for a proof hearing.[4]

Respondent offered into evidence a letter to Springer, which was returned to respondent's office as undeliverable and in which he was trying to schedule a date for a proof hearing. The envelope was stamped January 21, 2010 by the post office. The letter itself, however, was dated January 4, 2007 and

[3] It was unclear below why respondent filed two complaints against Dura-Bilt. In his opposition to the hearing panel report, he stated that he filed the complaint twice because of difficulties serving the defendant.

[4] Springer had already filed a grievance against respondent by that date.

suggested a future meeting date of January 19, 2009. Respondent stated that the incorrect dates in the letter were clerical errors. He claimed that Springer did not notify him that he had moved.

The Kanus Matter (District Docket No. VIII-09-0041E)

In December 2004, Alexandre and Natalya Kanus retained respondent to pursue a consumer fraud action against Big Lou's, d/b/a Century 21. The Kanuses signed a retainer agreement and paid respondent $1,500. Respondent advised the Kanuses that the case would take two-to-three years to resolve.

Two years after retaining respondent, Natalya began calling him. She left several messages for respondent, before getting a return call from him. At one point, respondent told Natalya that a trial would be taking place in the coming months, which led her to assume that a complaint had been filed. The Kanuses received no written communications from respondent.

Periodically, the Kanuses contacted Max Spinrad, Esq., who had referred them to respondent, asking that he check into the status of their case for them. The record contains a series of letters from Spinrad to respondent, seeking information about the Kanus matter. According to Spinrad, he received a few calls

from respondent stating that he was working on the case. Respondent led Spinrad to believe that he had filed "papers" on the Kanuses' behalf.

Respondent conceded that he "dropped the ball" in the Kanus matter and that he had never filed a complaint. He explained that he was representing the Kanuses while his partner was serving a disciplinary suspension, that he had lost a long-time secretary, and that he was dealing with his mother's serious illness. He acknowledged that the Kanus matter had "slipped through the cracks."

Ultimately, in May 2009, respondent advised the Kanuses that he would be unable to successfully pursue their case because the defendant was having financial difficulties. Respondent added at the DEC hearing that changes in the law also made it difficult to proceed with the case. Respondent agreed to reimburse the Kanuses $1,500. He set up a meeting with Natalya for the following month.[5]

Just prior to the meeting, respondent's partner (Tunney) called Natalya and advised her that respondent was in court and

[5] Respondent had notified the Kanuses that he had relocated his office.

unable to make their meeting. Natalya did not want to set up another time for a meeting.

In November 2009, respondent obtained a bank check from TD Bank for $1,500 and sent it to the Kanuses.[6] The Kanuses never received the check. TD Bank's records indicate that the check was never cashed. Upon learning, at the DEC hearing, that the Kanuses had not received the check, respondent obtained another bank check for $1,500, which he presented at the second DEC hearing date.

The Mergott Matter (District Docket No. VIII-09-0010E)

In March 2008, Eileen S. Mergott retained the law firm of Tunney & Halbfish (the firm) to represent her in a consumer fraud matter against Kushner Companies, LLC, arising from water and mold damage to her residence.[7] Mergott's initial meeting was with both respondent and Tunney. She gave the firm a $10,000 retainer. Mergott had three or four subsequent meetings with respondent and Tunney, who discussed her case with her. She

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[6] The Kanuses had filed a grievance against respondent in September 2009.

[7] Respondent signed the retainer agreement.

understood from them that it would take two or three months before the firm would file a lawsuit on her behalf.

Between March and September 2008, Mergott did not receive any written communications from the firm about her case. On cross-examination, however, she testified that her meetings with the firm, some of which lasted for several hours, "to some extent eliminated some of the need for correspondence." According to Mergott, for the first six months after she retained the firm, their "communication was [their] meetings."

In August or September 2008, Mergott began making more inquiries into the status of her case. At that time, she was advised (by whom it is not clear) that a complaint had been filed on her behalf. Specifically, she testified that she "was told not by [respondent and Tunney], but I believe by the staff or I'm not really sure to be honest with you who I was told [sic] that there was a combination [sic], that it was filed, that the suit was filed." Thereafter, Mergott made an unspecified number of attempts to communicate with either respondent or Tunney. The firm's staff advised her that they were unavailable. Her calls were not returned.

Although Mergott had a meeting with respondent and Tunney on October 22, 2008, at about that time she became frustrated

with her inability to reach them. In October or November 2008, she went to the firm's office and requested a copy of her file, which she was given. A staff member advised her that there was a copy of a complaint in her file, but that it had not been filed with the court. Mergott was not given a copy of the complaint.

In late November 2008, Mergott retained another attorney, Lawrence B. Sachs. Sachs wrote a letter to respondent, dated December 1, 2008, terminating the firm's representation of Mergott, requesting a copy of her file, and seeking the return of her $10,000 retainer. Sachs did not receive a reply to his letter.

Three days after the date of Sachs' letter, December 4, 2008, respondent's firm filed the complaint on Mergott's behalf. The R. 4:5-1 certification accompanying the complaint, which was signed by respondent, is dated November 19, 2008. Tunney testified that the complaint was probably sent to the court for filing by regular mail. There was no indication in the record when it was mailed. The firm did not advise Mergott that the complaint had been filed. At an undisclosed time, Sachs learned that the complaint had been filed.

When respondent was asked why the firm had filed the complaint after Mergott had requested her file, he replied that there is a difference between a client's request for a copy of their file and a request for the file itself. He claimed that, when Mergott requested a copy of the file, he thought that she wanted to maintain her records and did not realize, when she came to the office, "that that was it."

On December 17 and December 19, 2008, Sachs wrote additional letters to respondent, reiterating his request for Mergott's file and for the return of her retainer. Following that letter, Tunney called Sachs and informed him that the file was forthcoming. Sachs did not receive the file, however. He then sent a fourth letter, this time to respondent and Tunney, dated January 20, 2009.[8] In April 2009, the firm returned the $10,000 to Mergott.

As to the reason for the delay in returning the funds, respondent explained that the file had been misplaced. He added that the firm had moved and was having problems with its mail delivery. He also stated that, because of the issues with the

[8] Only a part of the January 20, 2009 letter is in the record. The firm was having difficulties with mail delivery. Sachs' letters were also "faxed" to the firm's office.

mail, he and Tunney were not receiving court notices and were finding themselves in emergent situations that had to be addressed.

Neither respondent nor Tunney recalled telling Mergott that the complaint had been filed. They both testified as to why the complaint had not been filed until December 2008. Specifically, they claimed, Mergott had moved to another apartment. Because repairs were being made, inspections were being performed, and because the builder, Kushner, was paying Mergott's rent, it would have been "premature" to file the complaint. According to respondent, at the time that the complaint was filed, the situation had become emergent because Mergott believed that Kushner would soon be stopping the payment of her rent.

It is not clear why the firm did not advise Mergott that the complaint had been filed. The following exchange took place between respondent and the hearing panel chair:

> [Panel Chair]: After you filed this case which at least it went in some time in November. It was filed for [sic] December and at this point you got numerous letters from Mr. Sachs. Why didn't you at that point communicate with Ms. Mergott that this had been filed?
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> [Respondent]: We had been relieved of counsel.

> [Panel Chair]: But you still filed the case so you had an obligation to tell her it was filed. Why didn't you tell her it was filed?
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> [Respondent]: I didn't realize the status of this at that time to tell her. I left things in a prepared state with my staff, but I didn't realize at the time that I had to raise these issues. I also thought we were turning over our full file and I didn't think that there would be any issue as to this and she independently learned about it rather quickly also because her correspondence made note of it which completely eliminated any need when the court notices started coming in.
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> [5T75-13 to 5T76-10.][9]

The original draft of the complaint indicated that it would be filed in Middlesex County. It was filed in Essex County. Mergott was unaware that the complaint would not be filed in Middlesex County. Respondent testified that, because Kushner has a large presence in Middlesex County, there was a concern over the company's influence. Thus, he claimed, filing outside of the county would be prudent.

The firm's file contained a track assignment notice, dated December 10, 2008. As of the date of the DEC hearing, the firm

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[9] 5T refers to the transcript of the DEC hearing on April 20, 2010, beginning at 2:30 p.m.

remained as attorneys of record. Mergott did not pursue her lawsuit further.

At the conclusion of the hearing below, the DEC found that respondent violated RPC 1.1(a), RPC 1.4(a), RPC 1.4(b), and RPC 8.4(c) in Springer; RPC 1.1(a), RPC 1.4(a), RPC 1.4(b), and RPC 8.4(c) in Kanus; and RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 8.1(b), and RPC 8.4(c) in Mergott. The DEC also concluded that respondent violated RPC 1.1(b) based on his conduct in Springer, Mergott, and Kanus.

The DEC recommended that respondent be suspended. The DEC did not specify the duration of the suspension.

Following a de novo review of the record, we are satisfied that the record clearly and convincingly establishes that respondent's conduct was unethical. We are unable to agree, however, with a number of the DEC's findings.

In Springer, the DEC found that respondent violated RPC 1.1(a), RPC 1.4(a), RPC 1.4(b), and RPC 8.4(c). As to RPC 1.1(a), the complaint did not charge respondent with violating that rule. Although there is reference in the complaint to the dismissal of the two complaints that respondent filed on Springer's behalf, the reference is insufficient to provide

notice to respondent of a possible finding of a violation of RPC 1.1(a). Specifically, the complaint states that

> [u]pon review of that document, it is indicated that the Complaint was dismissed by the Court on January 30, 2009. On the same date upon further inquiry, there was also another lawsuit filed on Complainant's behalf with a Docket No. of MID-L-005346-08. That matter was initially scheduled to be dismissed on January 16, 2009.
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> [AC¶29.][10]

Although there is no question that respondent filed complaints on Springer's behalf and allowed the matter to be dismissed by the court, the language in the complaint does not indicate that respondent was being charged with neglect. We, therefore, do not find a violation of RPC 1.1(a).

As to RPC 1.4(b), the DEC properly found that respondent failed to keep Springer informed about his case. Springer made a number of calls to respondent, which went unanswered. Unquestionably, thus, respondent breached his duty to adequately communicate with his client.[11]

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[10] AC refers to the amended complaint, dated October 12, 2009.

[11] Parenthetically, in all three cases, the DEC found that respondent violated RPC 1.4(b) by failing to return the file to the clients. That impropriety, if proven, would have been a

(footnote cont'd on next page)

The DEC further found that respondent violated RPC 8.4(c), when he failed to turn over the check from Dura-Bilt to Springer and failed to notify Springer that he had relocated his office. The latter is not a misrepresentation and, therefore, does not support an RPC 8.4(c) charge. As for respondent's failure to return the check to Springer, respondent had possession of the check as of the date of the DEC hearing. He did not take the money for his own purposes or for the benefit of parties unrelated to the Springer case. Therefore, his conduct was not dishonest, as contemplated by RPC 8.4(c). Rather, his failure to promptly turn over the check was a violation of RPC 1.15(b), which we find.[12]

(footnote cont'd)

violation of RPC 1.16(d), rather than RPC 1.4(b). For lack of clear and convincing evidence we do not make a finding of a violation of RPC 1.16(d).

In addition, the DEC found that respondent violated RPC 1.4(a) in all three cases, based on his failure to keep his clients informed about the status of their cases. This is more properly a violation of RPC 1.4(b). RPC 1.4(a) addresses an attorney's failure to advise a prospective client of how to contact the attorney and is not applicable here.

[12] The paragraph of the complaint that charged respondent with violating RPC 8.4(c) states: "The Respondent certainly made material misrepresentations to the Complainant by: . . . b) for

(footnote cont'd on next page)

Respondent's failure to tell Springer that the complaints had been dismissed, however, does support the charged violation of RPC 8.4(c). The paragraph in the complaint alleging that respondent violated RPC 8.4(c) states: "The Respondent certainly made material misrepresentations to the Complainant by: a) not advising him of the status of the case as against Dura-Bilt, Inc." Here, too, respondent had notice of a potential finding of a violation of RPC 8.4(c). His failure to advise Springer of the dismissals was, thus, a violation of RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispen v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984).

In Kanus, the DEC found that respondent violated RPC 1.1(a), RPC 1.4(a), RPC 1.4(b), and RPC 8.4(c). Respondent's violation of RPC 1.1(a) was amply established. He did not file a complaint on the Kanuses' behalf. It is unclear what, if

(footnote cont'd)

whatever reason holding the $1,000.00 check which was made payable to the Complainant by the Defendant." The complaint, thus, gave respondent clear notice that his retention of the check was under scrutiny. Accordingly, his due process rights will not be violated by a finding that he did not comply with RPC 1.15(b).

anything, he did to further their claim. Such conduct also violated RPC 1.3.

As to RPC 1.4(b), the DEC properly found that respondent failed to keep the Kanuses advised about the status of their case. Respondent did not adequately communicate with them. They made numerous calls to him, to no avail. We find, thus, that he violated RPC 1.4(b).

As for RPC 8.4(c), the DEC based its finding on respondent's statement to the Kanuses that their retainer was being returned to them. However, the record clearly demonstrates that respondent obtained a check from TD Bank for the amount he owed the Kanuses. It is unlikely that he would get the check and not forward it to the Kanuses. We, therefore, dismiss that finding.

In Mergott, the DEC found that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 8.1(b), and RPC 8.4(c).

As for RPC 1.1(a) and RPC 1.3, the complaint did not charge respondent with violating those rules. In the paragraph of the complaint that charged respondent with violating RPC 1.4(b), there is a brief reference to his handling of the case. Specifically, the complaint states: "The Respondent . . . based

on information and belief, did nothing but file a Complaint after the Complainant terminated Respondent's representation of her in December of 2008." We find that this is insufficient notice of a potential finding of neglect. Moreover, respondent maintained that he had waited to file a complaint on Mergott's behalf because the builder was working to remedy the situation. There is no evidence to the contrary in the record and no indication that respondent neglected Mergott's case. The DEC's findings that respondent violated RPC 1.1(a) and RPC 1.3 are, thus, dismissed.

With regard to RPC 1.4(b), at a minimum respondent failed to advise Mergott that he had filed the complaint on her behalf. His argument that he had been relieved as counsel is without merit. Even in that situation, he should have advised Sachs that the complaint had been filed. A finding that respondent violated RPC 1.4(b) is, thus, fully supported by the record.

As for RPC 8.4(c), the DEC concluded that respondent made misrepresentations to Mergott by (1) allowing her to believe that the complaint had been filed and (2) filing the complaint in Essex County without her knowledge. We cannot agree with the DEC. Mergott testified that someone at respondent's law firm had told her that a complaint had been filed; there is no

evidence that it was respondent. As to his filing the complaint in Essex county, rather than Middlesex, this action was not a misrepresentation, but a tactical decision. It is true that Mergott should have been advised where the complaint was being filed, but the failure to do so does not rise to the level of a misrepresentation.

The DEC found a violation of RPC 1.1(b) in all three cases. As noted earlier, however, respondent did not neglect Mergott's case. Also, we cannot find neglect in Springer. Therefore, only one instance of neglect is at issue (Kanus). For a finding of a pattern of neglect at least three instances of neglect are required. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). That being so, the allegation that respondent violated RPC 1.1(b) cannot be sustained.

In sum, in Springer, respondent violated RPC 1.4(b), RPC 1.15(b), and RPC 8.4(c). In Kanus, respondent violated RPC 1.1(a), RPC 1.3, and RPC 1.4(b). The sole violation supported by the record in Mergott is that of RPC 1.4(b).

There remains the question of the appropriate measure of discipline for respondent's infractions. In one case, Springer, respondent misrepresented (by silence) the status of the client's matter. Misrepresentation to clients requires the

imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions, as in this case. See, e.g., In re Singer, 200 N.J. 263 (2009) (attorney misrepresented to his client for a period of four years that he was working on the case; the attorney also exhibited gross neglect and lack of diligence and failed to communicate with the client); In re Wiewiorka, 179 N.J. 225 (2004) (attorney misled the client that a complaint had been filed; in addition, the attorney took no action on the client's behalf and did not inform the client about the status of the matter and the expiration of the statute of limitations); In re Onorevole, 170 N.J. 64 (2001) (attorney made misrepresentations about the status of the case, grossly neglected the case, failed to act with diligence, and failed to reasonably communicate with the client; prior admonition and reprimand); In re Till, 167 N.J. 276 (2001) (over a nine-month period, attorney lied to the client about the status of the case; the attorney also exhibited gross neglect); and In re Riva, 157 N.J. 34 (1999) (attorney misrepresented the status of the case to his clients; he also grossly neglected the case, thereby causing a default judgment

to be entered against the clients and failed to take steps to have the default vacated).

Here, in addition to making a misrepresentation to a client, exhibiting lack of diligence and gross neglect in one matter, and failing to properly communicate with three clients, respondent failed to promptly turn over Dura-Bilt's check to Springer, a violation of RPC 1.15(b). Moreover, this is not his first brush with the disciplinary system. As indicated above, he received a censure in April 2010. Although the conduct in these matters preceded the 2010 censure, respondent had been on notice, since mid-2008, that his conduct in the matters that led to his censure was under scrutiny by disciplinary authorities. By that time, formal ethics complaints had been filed in the censure matter. In light of the above, a reprimand is insufficient discipline in this case. We determine to impose a censure.

We are aware that, in mitigation, respondent offered that he ended his partnership with Tunney and replaced his office staff. While those are beneficial steps, we are not persuaded that discipline short of a censure is appropriate for respondent's multiple infractions and his disciplinary record.

Member Baugh dissented, voting for 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 Michael D. Halbfish
Docket No. DRB 10-250

Argued: October 21, 2010

Decided: December 14, 2010

Disposition: Censure

Members	Disbar	Censure	Three-month suspension	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh			X			
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		8	1			

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel