

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-196
District Docket No. XIV-2013-0364E

IN THE MATTER OF :
EDWARD A. MAC DUFFIE, JR. :
AN ATTORNEY AT LAW :
:

Decision

Decided: December 18, 2014

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

This matter was before us on a certification of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The complaint charged respondent with having violated RPC 1.4(b) (failure to communicate with a client) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). For the reasons expressed below, we determine that a three-month suspension is appropriate discipline.

Respondent was admitted to the New Jersey bar in 1971. In 2008, he was reprimanded for engaging in a conflict of interest and for improperly disbursing a portion of settlement proceeds.

There, he represented a husband in a personal injury matter and his wife in a per quod claim arising from the same incident. Respondent continued to represent the couple after they separated and filed for divorce, even though their interests became adverse and the wife claimed that respondent favored the husband's interests over her own. Respondent also improperly disbursed settlement funds to the husband, after the wife withheld her consent to the disbursement and the court prohibited payments to anyone other than the parties' attorneys. In re Mac Duffie, 196 N.J. 532 (2008).

In 2010, respondent received another reprimand for negligently misappropriating client funds due to poor recordkeeping practices. In re Mac Duffie, 202 N.J. 138 (2010).

In January 2014, respondent was temporarily suspended for failure to comply with the Court's prior order, compelling him to cooperate with ethics authorities. In re Mac Duffie, 216 N.J. 392 (2014). Respondent remains suspended to date.

Service of process was proper in this matter. On April 29, 2014 (after respondent was temporarily suspended), the OAE sent a copy of the complaint, by regular and certified mail, to respondent's office address, 1605 Grand Central Avenue, Lavallette, New Jersey 08735. According to the certification of the record, respondent signed the certified mail receipt. The

regular mail was not returned. Respondent did not file an answer.

On May 19, 2014, the OAE sent letters, by regular and certified mail, to respondent's office address listed above and to respondent's home address. The letters notified respondent that, if he did not file an answer to the ethics complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to include a willful violation of RPC 8.1(b). The certified mail sent to respondent's office was returned as unclaimed. The regular mail was not returned. The certified mail sent to respondent's home address was returned (not deliverable as addressed). The regular mail was not returned.

As of the date of the certification of the record, June 18, 2014, respondent had not filed an answer to the complaint.

In February 2013, grievant Florence Liddie, the executrix of the estate of Eleanor Fullen, retained respondent to represent the estate in the sale of real property in Lavallette, New Jersey. Respondent recommended a realtor to list the property and to assist in locating a buyer.

On March 30, 2013, Frank Shilling signed a contract of sale to purchase the Fullen estate property. On April 1, 2013, Liddie, too, signed the contract, which stated, in relevant part:

7. Gas, electric and lighting fixtures, cooking ranges and ovens, hot water heaters, linoleum/vinyl, wall to wall carpeting, cable/telephone wiring, screens, storm windows/doors, shades, blinds, window hardware, awnings, radiator covers heating/air condition systems, landscaping and sump pump, if applicable, except where owned by tenants, attached to the Property are included in the sale.

. . . .

18. The seller agrees to maintain the grounds, buildings and improvements on the Property in good condition, subject to ordinary wear and tear. The property shall be in "broom clean" condition and free of debris on the date of Closing. [The seller represents that all electrical, plumbing, heating and air conditioning systems (if applicable), together with all fixtures and appliances included within the terms of this Contract, now work and shall be in proper working order at the time of Closing.]¹ The Seller further states that, to the best of the Seller's knowledge, the roof, walls and windows do not leak and the basement is watertight.

[C18;Ex.2.]²

¹ Although the portion of the paragraph in brackets appears in the complaint, the exhibit shows that this provision was stricken from the contract of sale and initialed by Liddie.

² C refers to the April 29, 2014 ethics complaint.

On April 2, 2013, respondent wrote to Shilling's attorney, requesting that the contract of sale be modified to indicate that the property was being sold in "as is where is" condition. The letter stated further that, if this modification was acceptable, the attorney review period could be concluded. The complaint is silent about whether the modification was accepted.

On April 13, 2013, respondent hired a contractor to remove items from the Fullen property, including shingles from the exterior, plywood from the attic, the front storm door, the oven, the bathroom mirror/medicine cabinet, the bathroom switch plate, and personal possessions belonging to the Fullen estate. Respondent neither discussed his plan to remove these items with Liddie, prior to hiring the contractor to remove them, nor obtained her consent or authorization to do so. Liddie learned that the items were being removed from the property only when so informed by a friend of the decedent.

Liddie then contacted respondent and requested that he "rectify the situation." Respondent failed to replace the missing items, despite Liddie's and the realtor's repeated requests that he do so.

According to the complaint, the items that were removed from the property at respondent's direction were included in the contract of sale and should not have been removed, prior to the

closing, without Liddie's authorization. Moreover, because of the removal of the shingles from the exterior of the house and plywood from the attic, the property was no longer in the same condition as it was when the parties entered into the contract of sale.

Respondent failed to take the requested corrective action. As a result, Liddie was required to give the buyer a \$3,500 seller's credit to replace the items that respondent had removed from the Fullen property. On May 13, 2013, the closing took place, with the agreed upon seller's credit.

The complaint charged respondent with violations of RPC 1.4(b), for failing to discuss with Liddie his plans to hire a contractor to remove fixtures and other items from the property and to inform her of that action, before and after the items were removed, and RPC 8.4(c), for directing the contractor to remove the fixtures and items without "consent or authorization" and in direct contradiction to the contract of sale.

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

The complaint alleged sufficient facts to support a finding that respondent failed to discuss with Liddie his plans to hire a contractor to remove the items from the estate's property, either before or after the items were removed. We find that RPC 1.2(a) also applies to the allegations cited in the complaint. That rule provides that a lawyer shall abide by a client's decisions concerning the scope and objectives of the representation and, as required by RPC 1.4, shall consult with the client about the means to pursue them. We note that our finding a violation of RPC 1.2(a) will not violate R. 1:20-4(b) (requiring an ethics complaint "to set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated"), because sufficient facts are set forth in the complaint to give respondent notice of a possible finding of a violation of RPC 1.2(a).

By having the items removed from the property, without Liddie's knowledge or authorization, respondent also violated RPC 1.15(a) (failure to safeguard the property of a client or third person). The items were part and parcel of the property being sold. Once Liddie learned that respondent had arranged for removal of those items, she and the realtor repeatedly asked him

to replace them, to no avail. He failed to restore the property to its original condition.

Typically, the type of "property" governed by RPC 1.15(a) has material worth, such as cash, securities, bonds, art, jewelry, etc. The Annotated Rules of Professional Conduct (Annotated Rules) state that, under RPC 1.15(a), a lawyer "is responsible for safekeeping the client's property, whether money or personal property, including documents." Annotated Rules (5th ed.) 251 (2003). Clearly, respondent violated this rule. Again, we find that, even though the rule was not charged in the complaint, there were sufficient facts alleged to give respondent fair notice of the unethical conduct with which he was being charged.

The complaint did not allege sufficient facts, however, to establish that respondent violated RPC 8.4(c). The complaint did not assert that respondent tried to steal, convert, or otherwise make improper use of the items removed from the property. We cannot speculate on respondent's intent for his actions or about what became of those items.

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.2(a), RPC 1.4(b), and RPC 1.15(a).

In In re Chambers, 209 N.J. 417 (2012), the attorney was guilty of failure to safeguard property and other violations, for which he received a three-month suspension. The RPC 1.15(a) charge was based on Chambers' holding five \$100 bills and a travel gift certificate, in his safe, on behalf of a client who had retained him to pursue an individual suspected of improperly taking funds from the client's retirement party. The gift certificate expired while in Chamber's possession and the evidential bills were not the same bills that the client had given him.

Although Chambers succeeded in obtaining a default judgment on the client's behalf, he did not timely take steps to seek an execution. The judgment was eventually discharged in bankruptcy.

Chambers was also found guilty of gross neglect, lack of diligence, failure to communicate with the client, making false statements to a disciplinary authority, failure to cooperate with disciplinary authorities, and making a misrepresentation to his client. It was his first brush with the ethics system.

A reprimand was imposed in In re Merqus, 210 N.J. 222 (2012), on a motion for discipline by consent. There, the attorney was found guilty of having violated RPC 1.2(a), RPC 1.15(a), RPC 1.15(d), and RPC 8.4(c), for accepting a settlement on behalf of an estate in a personal injury matter without

obtaining the executrix' consent, endorsing the settlement check on the decedent's behalf, failing to notify the insurer that the client had died, failing to advise the executrix that he had already accepted the settlement and deposited it into his trust account, when he sought the release and authorization for the settlement, and committing recordkeeping violations. Mitigation considered was the attorney's lack of a disciplinary record, his disbursement of all funds due to the estate, and his acknowledgement that his office procedures needed improvement.

Here, respondent's violations are not as numerous as those of the attorney in Chambers (three-month suspension). Several aggravating factors, however, require discipline greater than the reprimand imposed on Mergus, who cooperated with ethics authorities by admitting his wrongdoing. Specifically, respondent's conduct cost the estate \$3,500, he has an ethics history (two reprimands and a temporary suspension for failure to cooperate), and he defaulted in this matter. "[A] respondent's default or failure to cooperate with the investigative authorities operates as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332, 342 (2008).

Based on these factors, we determine to impose a three-month suspension, to take effect at the expiration of respondent's temporary suspension.

We also determine that respondent should not apply for reinstatement until any pending ethics matters against him are resolved.

In addition, respondent must reimburse the estate the \$3,500 that it lost because of his improper removal of items from the property.

Vice-Chair Baugh voted to impose a six-month suspension, with the above conditions. Member Gallipoli voted to recommend respondent's disbarment. Members Yamner and Rivera did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Edward A. MacDuffie, Jr.
Docket No. DRB 14-196

Decided: December 18, 2014

Disposition: Three-month consecutive suspension

Members	Disbar	Six-month Suspension	Three-month consecutive suspension	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh		X				
Clark			X			
Gallipoli	X					
Hoberman			X			
Rivera						X
Singer			X			
Yamner						X
Zmirich			X			
Total:	1	1	5			2


Ellen A. Brodsky
Chief Counsel