SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-371
District Docket No. XIII-07-8E

IN THE MATTER OF

RICHARD S. YUSEM

AN ATTORNEY AT LAW

Corrected Decision

Argued: March 19, 2009

Decided: June 19, 2009

JoAnne Byrnes appeared on behalf of the District XIII Ethics Committee.

Counsel for respondent waived appearance for oral argument.

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

This matter came before us on a recommendation for a three-month suspended suspension, filed by the District XIII Ethics Committee ("DEC"), based on respondent's billing practices toward one of his clients, as well as his conduct during the

DEC's investigation of the client's grievance. The DEC found that respondent had violated RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 1.5(b) (when the lawyer has not regularly represented the client, failure to communicate to the client in writing the basis or rate of fee), and RPC 8.1(b) (failure to cooperate with disciplinary authorities). For the reasons stated below, we determine to impose a censure on respondent for his violations of RPC 1.5(b) and RPC 8.1(b).

Respondent was admitted to the New Jersey bar in 1977. At the relevant times, he maintained an office for the practice of law in Somerville.

In 1993, respondent received a private reprimand for gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities in a matter where he had failed "to take required action for two and one-half years as an assignee and for failure to respond to requests for information from the grievants and the ethics investigator." In the Matter of Richard S. Yusem, DRB 97-494 (June 29, 1998) (slip op. at 2). Five years later, respondent

was reprimanded, in a default matter, for the same infractions (except gross neglect). In re Yusem, 155 N.J. 595 (1998). In that case, he was retained to represent a client in a collection matter. After three months, however, the client discharged respondent as counsel for failure to take any action and to return his client's telephone calls. In addition, respondent did not reply to the DEC's requests for information about the grievance.

From September 26 to 30, 2005, respondent was on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

The complaint alleged that, on April 29, 2005, respondent was retained to represent the interests of Kirollos and Silvana Dimian[1] in a bankruptcy-related matter. According to the complaint, respondent failed to communicate in writing to Dimian

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[1] Because the attorney-client relationship primarily involved Kirollos Dimian and it was he who testified at the ethics hearing, this decision will refer only to Kirollos Dimian.

the basis or rate of his fee (RPC 1.5(b)). In addition, respondent failed to bill Dimian for more than eight months and then only on the eve of a real estate closing for an investment property and after having previously informed Dimian that his bill would be much lower, in violation of RPC 1.4(b) and (c). Respondent also was charged with having violated RPC 1.2, based on the lack of a fee agreement, which "left the scope and objectives of representation unclear." Finally, respondent was charged with failure to cooperate with disciplinary authorities, pursuant to R. 1:20-3(g)(3) and (4) (more properly, a violation of RPC 8.1(b)), based on his failure to cooperate with a fee arbitration committee and with the DEC during its investigation of this disciplinary matter. Specifically, the complaint alleged that respondent had failed to respond to the presenter's two letters requesting a reply to the grievance. Moreover, when contacted by the presenter, respondent promised to fax a reply the next day, but then failed to do so.

The DEC conducted a formal hearing on September 8, 2008, where it received testimony from Dimian and respondent. Prior to the testimony, respondent's counsel acknowledged that there was no written fee agreement and that respondent did not

cooperate with either the fee arbitration committee or the DEC's investigator.

As to the fee matter, on September 15, 2006, a district fee arbitration committee determined that, of the $35,038.81 charged by respondent for his services in the bankruptcy matter, the total reasonable charge was $25,392.88. Because Dimian had already paid respondent $29,206.98, the committee ordered respondent to refund $3,814.10 to him.

Respondent was barred from participating in the fee arbitration committee's hearing because he had failed to reply to Dimian's fee arbitration request. At the disciplinary hearing, respondent admitted that he had received a copy of the request, but he could not explain why he did not reply to it. Respondent stated:

> I sincerely apologize to Miss Byrnes and everyone else for making them come in here on this, it's inappropriate. The job I did for Mr. Dimian was a good job, I got him a good recovery and good result even though he finished it up himself. It was probably the best he could have gotten under the circumstances. But my failure to respond

> and cooperate is my own and I am sorry for the problems I've caused all of you and also for making Mr. Dimian come here today.
>
> [T124-2 to 11.][2]

The fee arbitration committee referred the matter to the DEC, due to the absence of a written fee agreement between respondent and Dimian.

Respondent acknowledged that he did not comply with the fee arbitration committee's decision within the time required. He did not refund Dimian's money until after he was prompted to do so by the OAE.

Much of the testimony at the disciplinary hearing focused on the nature of respondent's representation of Dimian's interests, the billing process, the justification of the charges in the bill, and the manner in which the bill was presented. We will not repeat most of these details, which were the subject of the fee arbitration proceeding.

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[2] "T" refers to the transcript of proceedings, dated September 8, 2008.

In the spring of 2005, Dimian, an engineer with the New York City Department of Transportation, was referred to respondent by Robert Adochio, his lawyer in a civil suit. Dimian had instituted suit against Maher Makram, Maher's son Mina Makram, and others, based on a claim that he had been cheated by the Makram father-son team in a real estate investment.

Respondent testified that Dimian and his wife had invested $130,000 in a corporation that was supposed to purchase and develop two properties, which would then be sold for a profit. However, after Dimian had invested the money, he learned that the properties were not titled in the name of the corporation. The purpose of the lawsuit was to recover the Dimians' $130,000 investment. The referral to respondent was necessary because the Makrams had declared bankruptcy, which was beyond Adochio's expertise.

The parties testified that the purpose of respondent's representation was to vacate the stay of the state court action, which had been imposed by the bankruptcy court, and to place title to the property in Dimian's name. The parties agreed that, when Dimian met with respondent, in either late March or

early April 2005, he paid respondent a $3500 retainer. Respondent informed Dimian that his fee would be $350 per hour.

Dimian and respondent further agreed that respondent, who had never represented Dimian in the past, did not present Dimian with a written fee agreement.[3] Respondent could not explain the reason for this omission.

Also, respondent did not provide Dimian with an estimate of what the total fee would be. In fact, between April 2005 and January 2006, respondent issued no bill to Dimian.

According to Dimian, respondent had told him at their initial meeting, that he would file a motion to vacate the automatic stay within three weeks. Yet, the motion was not filed until July 28, 2005. According to Dimian, respondent's delay harmed him financially, as he had taken a loan to purchase the property and he was paying interest on a loan for a property that he did not possess, due to the bankruptcy.

Notwithstanding respondent's alleged delay in filing the motions to vacate the stay, the parties agreed that respondent

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[3] Respondent's counsel also stipulated to this fact.

and Dimian were in regular contact throughout the course of the litigation in the bankruptcy proceeding. Respondent described Dimian as "extensively engaged in the case." For his part, Dimian testified that respondent kept him reasonably informed about the status of his case. He testified that he was kept up to date and that there was a free exchange of communication between them, including numerous emails and telephone conversations. Specifically, Dimian testified, he and respondent discussed a motion to vacate the stay, the eventual settlement of the matter, and the problems in the case caused by other participants.

Respondent testified that the motions to vacate the stay were filed in both Makram bankruptcy matters and were heard and denied in October 2005. Within five minutes of the decision, the parties had reached a settlement.

Dimian testified that, after the settlement, he and respondent had a meeting, where respondent estimated that the cost of his representation would be $8000 to $9000. Respondent acknowledged that he did not give a writing to Dimian at the meeting, showing how the estimated fees had been calculated. He

did, however, run the time sheets for Dimian and show him the work that had been done.

According to respondent, if the settlement had been implemented timely, his bill would have been in the $8000-$9000 range. However, the matter had dragged on because the attorney for the trustee was very aggressive.

The global settlement agreement was finally signed in November 2005, but was not "put through until December." According to respondent, the attorney for the trustee made it very difficult to finalize the settlement because "[n]o matter what we tried to put to bed, she would reopen so you would put one, two, three, four items to bed and suddenly she would be talking about item one again and you would try to put item one to bed and item two would open up and you had put item three to bed and item four would open up and we just couldn't get anything resolved." Respondent added that the existence of so many parties also protracted the settlement because, every time a change was proposed, every party had to consider it. According to respondent, Dimian was intimately involved in this process and furious at the delay. During this time, respondent testified, he and Dimian had no discussions about his fee.

The closing on the investment property took place on Monday, January 23, 2006. Dimian testified that, at 6 p.m. on the Friday evening preceding the closing, respondent's secretary had called Dimian and informed him that the invoice would be "around $29,000." Dimian was shocked, as this was the first invoice he had received. Moreover, during the multiple telephone calls between Dimian and respondent, in the week leading up to the closing, respondent never mentioned his bill.

As stated previously, the fee arbitration committee determined that respondent was to refund Dimian $3,814.10.

On April 19, 2006, as part of the fee arbitration process, Dimian sent an email to respondent, asking him to email a copy of the agreement he "might have signed." In his reply, respondent stated, "There was no signed retainer agreement."

Respondent stated that, when he and Dimian discussed the fee, just prior to closing, Dimian "understood that the case had been extremely complicated" and that the additional fees were not the result of the conduct of respondent but, rather, the conduct of the trustee and the attorney for the trustee. According to respondent, Dimian did not express any concern that he had not received a bill previously.

When asked whether he could offer any mitigating factors, respondent stated: "I don't know what I can say in mitigation, I can apologize, I don't know that I can explain it." He did, however, express "great remorse for having put everyone through this."

The DEC found that respondent had "reasonably communicated to and with the Client the scope and objectives of the representation." The client was, in his words, "extensively engaged" in the matter and respondent kept him reasonably informed about the status of the case. Accordingly, the DEC concluded, respondent did not violate either RPC 1.2 or RPC 1.4(b).

The DEC found, however, that respondent "did not provide to the Client a written fee agreement explaining his fee and billing arrangement" and that he had admitted to this misdeed, a violation of RPC 1.5(b). In addition, the DEC determined that respondent violated RPC 1.4(c). The DEC reasoned:

> Concomitant with the duty established by RPC 1.4(c) of "explaining a matter" to a client so that "informed decisions regarding the representation" can be made is the duty to thoroughly explain to the client the quantum of fees in a matter and the projected additional costs which continued

litigation or various options or strategies may generate. The client should be informed about the legal fees being incurred in a matter on a regular basis by way of, for example, written monthly bills or statements of account so that, precisely, the client can make critical and well-informed decisions regarding the representation and the case in general. Legal fees are a critical and substantial component of the cost of litigation, particularly at Respondent's rate of $350/hour. Legal fees are an integral part of the substance and strategy of a matter. Even though Mr. Dimian is a well-educated professional engineer who is sophisticated and was extensively involved in the matter, we will not hold that against him or against any other client. From Fortune 100 corporations to individual homeowners, everyone is legitimately concerned and entitled to be well-informed about the costs of litigation from beginning to end of a matter, especially during the pendency of a litigated matter. It is the attorney's duty to ensure that informed decisions about the representation include the issue of legal fees, bills, outstanding balances and projected additional fees.

[HPR15-HPR16.][4]

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[4] "HPR" refers to the hearing panel report, dated September 17, 2008.

In this case, the DEC was "troubled" by respondent's inability to explain why he did not provide Dimian with monthly invoices, waiting instead until just before the closing to inform him of the total fee and then deducting his fees from the closing proceeds, thereby presenting his "bill" as a "fait accompli" to the client.

In the absence of mitigating factors on this issue, the DEC inferred that respondent "sought to exercise against the Client the leverage of the impending closing to establish his fee."

Finally, the DEC determined that respondent violated RPC 8.1(b) by failing to cooperate with the fee arbitration committee and the DEC investigator. The DEC noted, as an aside, that the Court Rules cited in the complaint, R. 1:20A-3(g)(3) and (4), were procedural rules. Nevertheless, it considered R. 1:20A-3(g)(3) "a procedural rule which arises out of RPC 8.1(b) and, therefore, a finding that this ethics rule was violated could be sustained."

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

Specifically, we find that respondent violated RPC 1.5(b) and RPC 8.1(b). Prior to the referral from Adochio, respondent had not represented Dimian in any matter. As stipulated, respondent failed to present Dimian with a writing that communicated his fee to him either "before or within a reasonable time after commencing the representation." This is a clear violation of the RPC 1.5(b).

The DEC was correct, however, in its determination that respondent's failure to comply with RPC 1.5(b) did not constitute a violation of RPC 1.2. This rule pertains to the scope of a representation and the allocation of authority between the client and the attorney. It does not apply to the failure to communicate an attorney's fee in writing to the client. The DEC also properly found no violation of RPC 1.4(b). Dimian acknowledged that respondent kept him abreast of the status of the case.

Also, as stipulated, respondent violated RPC 8.1(b) when he failed to cooperate with the DEC. As the complaint alleged, respondent failed to reply to the DEC investigator's letters requesting a written response to the grievance. Moreover, even

though respondent informed the investigator that he would fax a response to the grievance, he never did.

We are unable to agree with the DEC, however, that respondent violated RPC 8.1(b) when he failed to file a response to Dimian's fee arbitration request. First, this rule applies only to applications for admission to the bar and disciplinary matters. RPC 8.1(b). Second, respondent's recalcitrance was addressed at the fee arbitration hearing, when he was barred from participating in the proceeding.

We are also unable to agree with the DEC's finding that respondent violated RPC 1.4(c). That rule provides:

> (c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The DEC mistakenly concluded that respondent had pre-empted Dimian's ability to make an informed decision regarding the representation by failing to keep him apprised of the cost of the litigation or to provide him with monthly bills until the final bill was presented for payment just before the closing. The purpose of RPC 1.4(c) is to ensure that the attorney provides the client with the information and opportunity to make

informed decisions about the representation, such as whether to file or respond to motions, serve discovery requests, accept or reject settlement offers, etc. The rule does not to govern fees, which is the domain of RPC 1.5, particularly (a) (reasonableness of the fee) and (b) (communication of the rate and basis of the fee). We, therefore, dismiss the charged violation of RPC 1.4(c).

There remains for determination the quantum of discipline to be imposed for respondent's failure to communicate in writing to Dimian the basis or rate of his fee and his failure to cooperate with disciplinary authorities.

When an attorney who has not regularly represented a client fails to communicate to the client in writing the basis or rate of the fee before or within a reasonable time after commencing the representation, an admonition is typically imposed. See, e.g., In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007); In the Matter of Carl C. Belgrave, DRB 05-258 (November 9, 2005); and In the Matter of Neal M. Pomper, DRB 04-216 (September 28, 2004).

Admonitions are ordinarily imposed also for failure to cooperate with disciplinary authorities, if the attorney does

not have an ethics history. See, e.g., In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the DEC investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to DEC's requests for information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the DEC's numerous communications regarding a grievance); In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance); In the Matter of Andrew T. Brasno, DRB 97-091 (June 25, 1997) (attorney failed to reply to the ethics grievance and failed to turn over a client's file); and In the Matter of Mark D. Cubberley, DRB 96-090 (April 19, 1996) (attorney failed to reply to the ethics investigator's requests for information about the grievance).

If the attorney who did not cooperate with ethics authorities has been disciplined before, but the attorney's ethics record is not serious, then reprimands have been imposed. See, e.g., In re Wood, 175 N.J. 586 (2003) (attorney failed to

cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

In this case, respondent has an ethics history consisting of a private reprimand and a reprimand. In both matters, he failed to cooperate with disciplinary authorities. In light of this pattern, and in the absence of any mitigation, other than his remorse, we determine to impose a censure for his lack of cooperation with the DEC and his failure to reduce to writing the basis and rate of his fee.

Chair Pashman and Vice Chair Frost 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
Edna Y. Baugh, Acting Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard S. Yusem
Docket No. DRB 08-371

Argued: March 19, 2009

Decided: June 19, 2009

Disposition: Censure

| ***Members*** | Disbar | Suspension | Censure | Dismiss | Disqualified | Did not participate |
|---|---|---|---|---|---|---|
| Pashman | | | | | | X |
| Frost | | | | | | X |
| Baugh | | | X | | | |
| Clark | | | X | | | |
| Doremus | | | X | | | |
| Lolla | | | X | | | |
| Stanton | | | X | | | |
| Wissinger | | | X | | | |
| Total: | | | 6 | | | 2 |

Julianne K. DeCore
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Chief Counsel