SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-279
District Docket No. VII-2013-0020E

IN THE MATTER OF	
EDWARD HARRINGTON HEYBURN	
AN ATTORNEY AT LAW	

Decision

Argued: November 20, 2014

Decided: March 10, 2015

Robert W. Rubinstein appeared on behalf of the District VII 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 a three-month suspension filed by the District VII Ethics Committee (DEC). The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client) and RPC 8.1(b) (failure

to cooperate with an ethics investigation). We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1997. On November 13, 2013, he received a censure for the totality of his conduct in two default matters. In one matter, respondent continued to use a certified civil attorney designation after the certification had been revoked for nonpayment of fees, a violation of RPC 7.1(a)(1) (false or misleading communication about the lawyer's services), RPC 7.4(d) (false or misleading communication about certification as a specialist or in a field), and R. 1:39-6 (no use of designations set forth in regulations by Board on Attorney Certification except as therein provided). In the second matter, respondent lacked diligence, failed to communicate with the client, failed to turn over property that the client was entitled to receive, failed to cooperate with disciplinary authorities, and lied to the client about the status of the case. In re Heyburn, 216 N.J. 161 (2013).

We now turn to the facts in the matter before us. In June 2007, Leslie Ford retained respondent in connection with a

pending malpractice suit for alleged negligent care that his mother had received at the Mercer County Geriatric Center and Water's Edge Nursing Home. His mother passed away in May 2007.

After the defendants in the litigation moved for summary judgment, the complaint against them was dismissed, in September 2010 and May 2011, respectively.

Although the formal ethics complaint charged respondent with gross neglect, lack of diligence, and failure to communicate with the client in handling the underlying malpractice litigation, the presenter withdrew those charges, at the inception of the hearing, for lack of clear and convincing evidence.

The complaint also charged respondent with improper conduct after the dismissal of the malpractice lawsuit. Both in his answer and during his testimony, respondent conceded that he had engaged in gross neglect and a lack of diligence, failed to reply to the client's reasonable requests for information about the case, and misrepresented the status of the case to the client.

At the DEC hearing, respondent explained that, often, when he attended hearings on summary judgment motions, the judge

would sign a summary judgment order and hand it to him. Upon his return to the office, he would then calendar the matter to keep track of the deadline for filing an appeal. In this case, however, the order was mailed to him. He maintained that he had not received it.

Respondent asserted that, although Ford had not originally retained him to file an appeal of the dismissal of the malpractice suit, when he informed Ford that the complaint had been dismissed, he also told Ford that he thought that the judge had erred and that he would file an appeal.

Respondent claimed to have had "every intention" to file an appeal:

> By the time I -- you know, I called around to see if the Judge had issued the Order because it seemed late, it had passed the 45 days and I called over to the Court and they indicated that they sent it to my adversary. Nonetheless, I went through the file, the records, the mail. It hadn't gotten to me. I picked up a copy from the Court and then obviously I had to do research to see whether I was in the appropriate timeframe. When I did the research, it was clear that it's from -- that the time starts to run not from when you get the Order but from when the Order was issued. So I was already out of time.
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> What I should have done is just advise Mr. Ford that that's what happened and then permit him to get another attorney and address the matters as they were. I was

> still investigating the possibility of filing – my understanding is sometimes there are cases where you can file nunc pro tunc and out of time. Nonetheless, Mr. Ford, Leslie Ford did call me and I did represent to him that I had filed the appeal. This was untrue and I should have never made that representation. I apologize to Mr. Ford. I was -- I apologize now to Mr. Ford. It was something that was wrong. I'm not saying that I didn't know that it was wrong. What I am saying is at the time my practice was caving in on me and I didn't know exactly where I was going with -- with everything.
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> After that I then lost touch, communication with Mr. Ford. That's where I'm acknowledging that that was my responsibility. Not during the pendency of the case but after the -- the time that the case was dismissed and I told him that I would appeal.
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> [T20-24 to T21-23.][1]

Respondent denied the final charge in the complaint (failure to cooperate with the ethics investigation). He testified as follows about that issue.

According to respondent, he received almost none of the correspondence from the DEC in this matter. He maintained a law

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[1] "T" refers to the transcript of the June 3, 2014 DEC hearing.

office in Robbinsville, from 2004 to January 2011, when he relocated to an office at 103 Carnegie Center, Princeton.

Respondent sent a change-of-address letter to the Clerk of the Superior Court, where he had cases pending. He did not notify the attorney registration system (which was repeatedly referred to as "IOLTA" in the record) about his new Princeton address until about May 2011, when filling out annual attorney registration materials.

Respondent closed the Princeton office in August 2012, directing the post office to forward his law office mail to his home address. On October 1, 2012, respondent became an associate attorney with Mandelbaum, Salsburg, Lazris & Discenza, P.C., in Edison (the Mandelbaum firm).

Respondent told his supervisor at the Mandelbaum firm about the need to change addresses:

> Okay. So I spoke with my boss and I said well, I need to change over. I said I gotta let them know, I gotta let the State know my new address. I have to change over my IOLTA account and I also need to make sure that my old cases, they understand that -- that I'm here and Joe Discenza was my immediate boss and he said, oh, no, don't worry about it, we -- you know, it's a 60 lawyer firm, hundred and fifty staff, he said we have people that take care of that, just forward it to the accounting department. So I spoke with a woman named Tanya up at the

> accounting department in their main office in Essex County and she said well, fill out the -- IOLTA had a form that I could fill out and update my new address and put in what my -- my old bank accounts were and I obviously didn't know what the Firm's accounts were. They had to fill that in. So I — I sent that to her and we have -- we send Lawyers' Service everyday [sic] and I followed up with her and she said no problem, I filled it in, it's taken care of and it was my understanding is that was she [sic] advising both the State and IOLTA that I was their -- I was now their employee and I assumed at that point that everything was taken care of.
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> [T40-17 to T41-12.]

With each move, respondent advised the post office of his new office address.

The DEC sent letters to respondent's 103 Carnegie Center address, dated March 20, April 3, April 26, June 27, and July 12, 2013. Respondent denied having received any of them.

On July 12, 2013, the DEC sent a letter to respondent at the Mandelbaum firm.[2] The certified mail receipt was signed by Jasmine Brown, a receptionist at the firm. According to

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[2] The presenter located respondent through an internet search, because he "knew respondent well enough to know that it would not be in his character to just ignore" the DEC.

respondent, attorney mail was examined by a supervisor, before it reached the attorney. Respondent never received the DEC letter from his supervising attorney, Joseph Peters. Similarly, Peters never turned over to him a second DEC letter, dated September 23, 2013.

Finally, on October 17, 2013, the DEC sent respondent a "five-day" letter to the Mandelbaum firm's address. Because Peters was not in the office the day that the letter was received, a secretary brought it to respondent. According to respondent, as soon as he received the letter, he prepared and filed a verified answer, "took ownership" of his wrongdoing, and cooperated fully with ethics authorities.

In his brief to us, respondent revisited the matters for which he was censured, reiterating his belief that the complaints in those default matters were not properly served on him, having been sent when he was "having issues with [his] mail being properly forwarded." In his brief, respondent maintained that a censure was adequate for the within misconduct, pointing out that several three-month suspension cases involved more severe conduct, including In re Carmel, 214 N.J. 539 (2014), In re Shapiro, 169 N.J. 219 (2001), In re Nihamin, 217 N.J. 616

(2014), In re Brown, 217 N.J. 614 (2014) and In re Tiffany, 213 N.J. 37 (2013):

> In my matter, the Office of Attorney Ethics[3] recommends a three (3) month suspension even though my matter did not contain any of the hallmarks that the DRB typically looks for before it suspends a lawyer's license, e.g. Misappropriation of a client's funds, criminal conviction, lying in the course of the OAE investigation and fabricating evidence to conceal the lawyer's conduct. Conversely, I did the opposite. I admitted my misconduct to the OAE and did not make excuses for my misrepresentation.
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> [RB11.][4]

In urging the imposition of a censure, respondent cited cases ranging from admonitions to censures, including one in which the conduct mirrored his own. In re Bush, 210 N.J. 182 (2013), involved an attorney recently censured for gross neglect, lack of diligence, failure to communicate with the client, misrepresentation of the status of the case to the client, and failure to cooperate with the ethics investigation,

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[3] As previously noted, this matter was investigated and presented by the District VII Ethics Committee, not the Office of Attorney Ethics.

[4] "Rb" refers to respondent's October 22, 2014 brief to us.

all in a single client matter. The matter was decided on a certified record. Bush had a prior admonition.

Respondent urged us to consider, in mitigation, that he admitted his wrongdoing, demonstrating that he has learned from his mistakes, and that a significant portion of his law practice is devoted to "poor and disadvantaged" clients. He added that, if suspended, he will be unable to serve those clients and it is "doubtful that another attorney will represent them."

The DEC found respondent guilty of the admitted violations of gross neglect, lack of diligence, failure to communicate with the client, and misrepresentation to the client.

With respect to RPC 8.1(b), the DEC was "skeptical" of respondent's claim that he had received no DEC mail directed to him at the Mandelbaum firm, due to a supervising attorney's intervention. Nevertheless, the DEC dismissed the RPC 8.1(b) charge. The DEC remarked that, although, in respondent's prior disciplinary matter, he had made a written request that the DEC send all correspondence to his home address, the mail in the within matter had not been sent there.

In aggravation, the DEC considered respondent's "frivolous defense," that is, motions to have the presenter recuse himself because of "bad blood" between them over litigation "against

each other," several years earlier, and to dismiss the ethics complaint for the presenter's alleged failure to provide discovery on the "bad blood" issue. The DEC denied those motions, as well as respondent's motion to adjourn the hearing date.[5]

The hearing panel report stated as follows:

> Having placed so much emphasis on "bad blood" between himself and the presenter prior to the hearing, the issue disappeared at the hearing - respondent never raised the subject of any "bad blood" at the hearing, presented any evidence about it or made any offer of proof concerning the issue. Respondent never even uttered the phrase "bad blood." The panel concludes that respondent asserted the "bad blood" issue as a groundless strategic effort to gain a tactical advantage over the presenter and the DEC and that he then abandoned that unfounded effort seeing that it was unavailing. It also renders hollow his

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[5] Respondent originally attempted to file his motion to dismiss the complaint or to compel discovery not with the DEC, but with us, on March 17, 2014. By letter dated March 25, 2014, Office of Board Counsel Acting Chief Counsel, Isabel Frank, informed respondent that the Board did not have jurisdiction over the matter and that he should file his motion with the hearing panel chair. Respondent then waited two months, until just ten days before the hearing, to file his motion. Respondent never raised the issue of bad blood at the hearing.

> apology to his client and the grievant at the hearing.
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> [HPR¶34(j).][6]

In mitigation, the DEC considered that the censure imposed in respondent's combined default matters occurred contemporaneously with the conduct in this matter and that, therefore, respondent did not "have an opportunity to alter his behavior for the better in light of that censure."

The DEC recommended a three-month suspension, citing In re Boyer, 194 N.J. 3 (2008), where the attorney engaged in a conflict of interest, when representing an estate in the sale of property for which he provided the funding, and misrepresented that a jurat had been properly taken. Boyer had received an admonition in 2007.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. Respondent conceded that, after promising Ford that he would appeal the dismissal of a nursing home malpractice/wrongful death complaint,

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[6] "HPR" refers to the August 25, 2014 hearing panel report.

he failed to do so. Thereafter, he misrepresented to Ford that he had filed an appeal and then ignored Ford's repeated requests for information about the appeal. Respondent admitted having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 8.4(c).

Respondent was also charged with failure to cooperate with the DEC investigation of the Ford grievance. RPC 8.1(b) prohibits attorneys from knowingly failing to respond to a lawful demand for information from a disciplinary authority. Respondent testified that he had not received the DEC's several letters requesting information about the grievance.

R. 1:20-1(c) requires all attorneys to file a supplemental statement with the New Jersey Lawyers' Fund for Client Protection (CPF) "of any change in the attorney's billing address and [to] file with the Office of Attorney Ethics [OAE] a supplemental statement of any change in the attorney's home address and the address of the primary law office . . . either prior to such change or within thirty days thereafter." Respondent did not do so. He gave his new addresses to the Superior Court's Clerk Office, the post office, a supervising attorney and, he claimed, the DEC, in another disciplinary

matter.[7] What he did not do was to notify the CPF and the OAE of his address changes, as a result of which he received no mail from the DEC, with the exception of the DEC's last letter to him, dated October 17, 2013.

Although respondent was responsible for his failure to receive the DEC's letters, he got a "five-day" letter and immediately filed an answer admitting his misconduct and cooperated with ethics authorities. He acknowledged his fault in his testimony below and, again, in his brief to us. For all of these reasons, we determine to dismiss the RPC 8.1(b) charge.

A misrepresentation to a client requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed, if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Winston, 219 N.J. 426 (2014) (attorney failed to file an appellate brief in a timely fashion; when he realized his mistake, he

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[7] Respondent was referring to the censure matter, wherein he filed a motion to vacate the default. His supporting affidavit in that matter contained a request that we use his home address on future correspondence. The DEC received a copy of those materials. In the Matters of Edward Harrington Heyburn, DRB 13-028 and DRB 13-062 (July 29, 2013) (slip op. at 5 to 6).

misrepresented to the client that he had filed it timely and that the matter was proceeding apace; gross neglect, lack of diligence, and failure to communicate with the client for a period of four years also found); In re Singer, 200 N.J. 263 (2009) (for a period of four years, attorney misrepresented to his client that he was working on the case; the attorney also exhibited gross neglect and lack of diligence and failed to communicate with the client; no ethics history); 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; he also 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; no prior discipline); 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).

The three-month suspension case that the DEC cited, Boyer, is more serious than this matter, as it involved a conflict stemming from a prohibited business transaction, out of which misrepresentations grew. Here, respondent is guilty of the same combination of misconduct as in Winston, where a reprimand was issued.

In mitigation, respondent readily admitted his wrongdoing, when he learned about the grievance against him. In addition, this is not the case of an attorney's failure to learn from prior mistakes. As the DEC pointed out, respondent's conduct in this matter and in his prior disciplinary matters are so close in time that he did not "have an opportunity to alter his behavior for the better in light of that censure."

In aggravation, however, we note that this is not the first time that respondent is facing discipline for lying to a client. He also lied to the client in DRB 13-062, one of the two matters for which he received a censure. In that matter, the client retained him for a medical malpractice claim. He filed a complaint, but after motions to dismiss the complaint were granted, he lied to the client that it would be unwise to try to

reinstate the case. He did not disclose to the client that the complaint had been dismissed because of his own inaction.

Because respondent has shown a proclivity to lie to his clients, we conclude that a censure is warranted in this instance.

Members Gallipoli and Zmirich voted for a three-month suspension. Vice-Chair Baugh 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 H. Heyburn
Docket No. DRB 14-279

Argued: November 20, 2014

Decided: March 10, 2015

Disposition: Censure

Members	Disbar	Three-month Suspension	Censure	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh						X
Clark			X			
Gallipoli		X				
Hoberman			X			
Rivera			X			
Singer			X			
Yamner			X			
Zmirich		X				
Total:		2	6			1

Ellen A. Brodsky
Chief Counsel