SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-345
District Docket No. VA-2012-0041E

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| IN THE MATTER OF | |
| RICHARD M. ROBERTS | |
| AN ATTORNEY AT LAW | |

Decision

Argued: February 19, 2015

Decided: June 11, 2015

Thomas S. Cosma appeared on behalf of the District VA Ethics Committee.

Robert J. Brass appeared on behalf of respondent.

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 reprimand filed by the District VA Ethics Committee (DEC). The two-count complaint charged respondent with having violated RPC 1.16(d) (upon termination of the representation, failure to return an unearned fee) and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority).

On January 23, 2015, respondent's counsel moved to supplement the record in this matter. For the reasons detailed below, we grant respondent's motion to supplement the record and determine to impose a three-month suspension on him, with the conditions set forth below.

Respondent was admitted to the New Jersey bar in 1971. He maintains a law office in Newark, New Jersey.

In 1993, respondent received a private reprimand for failure (1) to provide his client with a writing setting forth the basis or rate of the fee, (2) to reinstate a complaint or to file a new complaint until after the client filed a grievance, (3) to keep the client apprised about the status of the matter or to reply to the client's numerous requests for information, and (4) to comply with the investigator's numerous requests for information or to timely file a written reply to the grievance. In the Matter of Richard M. Roberts, DRB 93-342 (November 23, 1993).

In 2002, respondent was admonished for failure to provide a client with a writing setting forth the basis or rate of the fee. In the Matter of Richard M. Roberts, DRB 02-148 (July 8, 2002).

In 2009, respondent was censured in two consolidated disciplinary cases that addressed four client matters. In re

Roberts, 199 N.J. 307 (2009). There, respondent failed to provide his clients with writings setting forth the basis or rate of the fee in three matters, grossly neglected two matters, lacked diligence in three matters, failed to communicate with clients in two matters, engaged in a conflict of interest in one matter, and made a misrepresentation in one matter. We also found aggravating factors: respondent made misrepresentations to a tribunal, failed to take responsibility for his misconduct by trying to blame others, and was less than forthcoming in his testimony before the DEC. The Court ordered respondent to complete a course in law office management and to provide the Office of Attorney Ethics (OAE) with proof of his fitness to practice law.

In 2009, respondent received yet another censure and was ordered to practice under the supervision of an OAE-approved attorney for a two-year period. In re Roberts, 200 N.J. 226 (2009). In that matter, he failed to set forth in writing the basis or rate of his fee, failed to act with diligence in securing a bail reduction for a client, and failed to communicate with the client. He had twice filed a motion for bail reduction, but failed to appear on the return dates of both of the motions.

This matter resulted from respondent's failure to attend a bail reinstatement hearing for grievant Shaun Gourdine, even though either respondent or his firm had accepted $5,000 to do so. Respondent was not charged with any wrongdoing for failing to attend the hearing or to perform any services on Shaun's behalf, but only for failing to return the $5,000 and failing to cooperate with the DEC investigation.

In a nutshell, respondent's defense to the ethics charges was that he recalled neither Shaun nor accepting a fee from him and that his office manager must have accepted the fee, embezzled it, and then diverted calls from Shaun and correspondence from the DEC to conceal her misconduct. After that office manager's termination of employment from respondent's firm, his new office manager also embezzled funds and diverted communications relating to Shaun's matter.

At the DEC hearing, Shaun testified that, prior to May 9, 2007, he had met respondent while represented by Raymond Brown, Sr. According to Shaun, respondent had offered his services and informed him that Brown was "a rip off." Subsequently, Shaun was incarcerated, presumably on a bail violation. Shaun claimed that he then contacted respondent, from jail, about getting his bail reinstated and that respondent told him that, if he arranged for

someone to bring him cash, he would secure Shaun's release. Shaun was incarcerated from April 17, 2007 to March 10, 2010.

Shaun's sister, Twanna Gourdine, testified that she had known respondent, prior to her brother's matter, as she had previously communicated with him with regard to his representation of her ex-boyfriend. Twanna had personally met with respondent and spoken to him, on the phone, several times in connection with that earlier case.

On May 9, 2007, Twanna brought $5,000 in cash to respondent's office as respondent's legal fee to appear at Shaun's bail hearing the next day. Twanna claimed that she met personally with respondent and handed him the cash, which he counted in front of her, and that, on her way out, respondent's office manager, Tiffany Perez, gave her a receipt for the payment. The receipt contained the notation "To be held until 5/10/07 court date." Twanna did not receive a writing setting forth the basis or rate of the fee. A client ledger card confirmed that respondent was retained on May 9, 2007 and that his office had received $5,000 on that date.

Respondent maintained that he never personally received the $5,000. At the DEC hearing, he strongly implied that Perez had taken the funds. He claimed that he had come across Shaun's ledger sheet, for the first time, only a month before the DEC

hearing. Once he saw it, he realized that something was wrong and that Shaun had not fabricated his claim, which was his previous belief. He "didn't know what to believe." He stated, "I would like not to believe that Tiffany took money. I would like not to believe that." Respondent's answer to the ethics complaint had accused Perez of "willfully and without authority" preventing Shaun from communicating with him. According to the answer, a subsequent office administrator, Gabriel Iannacone, interfered with the return of Shaun's funds. Respondent testified that, in December 2012, he merged his practice with Gerald Saluti, thus giving him the opportunity to terminate Perez' employment because Iannacone, whom Saluti highly "touted," would become the office manager.[1]

Respondent did not appear in court on May 10, 2007. Shaun claimed that, thereafter, he "burned the wires up," in an effort to find out what had become of his bail motion and to obtain a

[1] Respondent testified that Iannacone is no longer with the firm. He discovered that Iannacone was holding himself out to be an attorney and accepting "funds" both "outside and inside of the office and not turning those over." He further accused Iannacone of forging Saluti's name on trust account checks and "setting up false corporations." According to respondent, the misconduct was reported to "Ethics" and to the prosecutor. Respondent's August 2013 answer stated further that, "[a]s recently as this month, new fraud and misfeasance was [sic] uncovered following our investigation." Counsel's motion to supplement the record relates to Iannacone's alleged improprieties.

refund. He began calling respondent every day and spoke to him on occasion, but respondent just told him "many stories." Although respondent promised to return the money, he never did.

Shaun asserted that he had daily access to the jail's phone. At one point, he testified that he called respondent "[m]aybe a thousand times" and spoke to him directly many times. Later, he stated that he talked to respondent forty or fifty times in the last seven years but never got the result he sought.

On an unknown date, Shaun retained attorney Brian Dratch to secure his refund from respondent. According to Shaun, he and Dratch called respondent, via speaker phone, to try to resolve the matter without filing a lawsuit, because Dratch's legal fees were high. Shaun asserted that respondent asked Dratch for a payment plan, because he was going through a divorce at the time and did not have the funds available to reimburse him.[2] Respondent did not recall having had such a conversation.

Hearing nothing further from respondent, on December 9, 2010, Dratch filed a civil complaint on Shaun's behalf.

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[2] Respondent's third affirmative defense to his answer was that, during the period in question, he was "embroiled in a divorce proceeding that caused terrific strain on his business affairs."

Respondent contended that he never saw any documents relating to the lawsuit until the presenter provided them to him.

On January 19, 2011, an answer prepared by respondent's former per diem associate, Panatda Hengboonyaphan, was filed in response to the civil complaint. Hengboonyaphan testified that Perez had asked her to prepare the answer, which she did. She relied solely on information from Perez, without conferring with respondent. Respondent corroborated that he had not discussed the civil complaint with Hengboonyaphan. He denied (1) knowing anything about the civil complaint or the answer, including who had signed the cover letter to file the answer; (2) signing the answer; and (3) authorizing anyone to sign the answer on his behalf. He later admitted that, although it was his responsibility to supervise Hengboonyaphan's work, he did not review her cases with her, on a regular basis, because they were not complicated.

Respondent claimed that it was not until Dratch, or another attorney from Dratch's firm, approached him at the Morris County courthouse (on a date respondent could not recall), that he first learned about Shaun's claim. The attorney stated that respondent owed them money. When respondent questioned the attorney, the attorney replied: "Shaun, you know, from the Gourdine matter." Respondent maintained that he had no idea who

the attorney was talking about but "didn't want to look like an idiot to him."

The civil case was scheduled for trial on May 23, 2011. To save legal fees, Shaun discharged Dratch and appeared pro se at the trial call. No one appeared on respondent's behalf, even though, at that time, Hengboonyaphan still worked for him. Shaun obtained a default judgment against respondent. Thereafter, on June 27, 2011, he obtained a writ of execution in the amount of $5,509.90. According to Shaun, he mailed the judgment to respondent and called him several times to try to collect on it. Although respondent told him that they would work things out, he heard nothing further from respondent. Shaun claimed that, at one point, he went to respondent's office, but respondent threatened to call the police if he did not leave. He left and, thereafter, in December 2012, filed the grievance against respondent. Respondent denied that any such confrontation had occurred.

Respondent's legal secretary, Daisy Sanchez, testified negatively about Perez' character and accused Iannacone of having "frauded the firm by thousands of dollars. And he was terminated, in September 2013."

As to the failure to cooperate charge, respondent initially claimed that he did not recall seeing the presenter's December

19, 2012 letter requesting a reply to Shaun's grievance. Later, he stated that he did not recall "when I got it if I saw it." On January 11, 2013, the investigator/presenter sent respondent a second letter, enclosing the original request for a reply. Likewise, respondent did not recall having seen this letter, prior to receiving it in discovery.

Respondent denied drafting, signing, or authorizing the preparation of a January 21, 2013 letter to the presenter (1) apologizing for not contacting him sooner; (2) attributing his failure to do so on his illness, his trial demands, his new law firm, and moving his office across the hall, when he merged his practice with Saluti's; and (3) requesting an additional twenty days to reply to the grievance. Respondent later conceded that the information in the letter was "probably" accurate.

Respondent also denied signing or authorizing anyone to send several letters to the investigator/presenter seeking extensions to reply to the grievance, including letters dated January 21, February 7, February 11, and February 28, 2013.

By letter dated February 11, 2013, faxed to respondent, the presenter acknowledged receipt of respondent's February 7, 2013 letter, granted respondent a twenty-one day extension, and emphasized that there would be no further extensions "without

good cause." Respondent again claimed that he did not see that fax, prior to obtaining discovery in the matter.

Respondent further denied signing or authorizing anyone to send a March 8, 2013 letter to the investigator/presenter, which was hand-dated March 11, 2013 and contained only respondent's initials on the signature line. The letter stated, in relevant part:

> I have no recollection of agreeing to represent the Grievant, Shawn [sic] Gourdine. On May 9, 2007, Mr. Gourdine evidently sought my legal services in connection with a criminal matter scheduled for a hearing the following morning. My former office administrator accepted a $5000 deposit with the understanding that it would be returned if I did not participate in Mr. Gourdine's case.
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> During the timeframe relevant to Mr. Gourdine's grievance, I was embroiled in an acrimonious and concededly quite addling separation from my then wife. The estrangement of my marriage and my subsequent divorce led me to consult a psychiatrist for some time. Despondency over my personal affairs affected my direct involvement with the day-to-day operations of my law practice. To an extent that was unacceptable, I entrusted client communications and billing to my office administrator. I operated under the assumption that these matters were always handled fairly and competently, but I later learned otherwise.
>
> [M]y inattentiveness to other concerns threatened the financial solvency of my practice and led to intolerable problems,

> including this ethical lapse regarding Mr. Gourdine.
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> . . . .
>
> I have now made arrangements to fully recompense Mr. Gourdine, with interest. Upon payment, I will submit proof thereof to the Ethics Committee.
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> . . . .
>
> With regard to ethics professional responsibility, our firm has retained an expert consultant, Professor Michael Ambrosio, Esq., who is devising a course of action specifically tailored to address any lingering issues or problems that may arise.
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> [Ex.11.][3]

Respondent claimed that the March 8, 2013 letter to the investigator/presenter contained "half truths." As to the first paragraph, stating that $5,000 "would be returned if I did not participate in Mr. Gourdine's case," respondent remarked that that statement was "patently ridiculous" because he would never make the representation that a client would get money back, if he were not successful. He claimed that he did not know who had authored the letter. He later conceded that a criminal attorney is not entitled to a flat fee for services not performed.

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[3] The hearing panel report contains different designations for the exhibits from those used at the hearing. This decision uses the hearing panel report designations.

Additionally, respondent doubted that Ambrosio had been retained and claimed that, if he had been, it was without respondent's knowledge or authorization. He added that "[b]asically this whole thing [the letter] is wrong. . . . half truths in some of it."

On April 11, 2013, the presenter faxed a letter to respondent, which stated the following:

> [Y]our March 8, 2013 letter to me states that your "former office administrator accepted a $5,000 deposit with the understanding that it would be returned if I did not participate in Mr. Gourdine's case." Please advise me with respect to the following questions:
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> 1. Did you represent Mr. Gourdine in connection with the matter scheduled for May 10, 2007 or in any other matter at or about that time?
> 2. Do you have any records reflecting in what account the $5,000 retainer was deposited, and the disposition of those funds? If so, would you kindly provide any documentation that you have reflecting the deposit and the disposition of funds?
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> [Ex.12.]

On May 29, 2013, the presenter sent a follow-up fax to respondent, informing him that a failure to reply to the two questions would be deemed a violation of RPC 8.1(b). Respondent denied seeing this letter as well.

Respondent asserted that he did not personally see the faxes, before receiving them through discovery, and contended that no one from his office had informed him of the faxes.

Despite respondent's above denials, at the DEC hearing, about the March 8, 2013 letter, his verified answer to the ethics complaint stated, under the heading "mitigating circumstances":

> The letter I submitted to the Ethics Committee, dated March 8, 2013, I incorporate and attach hereto as **EXHIBIT A**, recounts my personal issues that took an enormous toll on my practice of law during the period of several years and which I have now put behind me.

At the ethics hearing, respondent admitted that it was his signature on the verification of the answer and that the verification was "[b]asically accurate;" that he had read every paragraph; and that the statements therein were true and based on his personal knowledge. He later testified that he did not know whether he had actually drafted the answer, but added that he had reviewed it. He admitted that the answer had attached and incorporated the March 8, 2013 letter to the presenter and conceded that he "must have" provided the information contained in the answer to Saluti, but stated that it was not Saluti's signature on the answer. He surmised that it was Iannacone's. Respondent could not explain why he had incorporated the letter

into his answer, which he claimed he had not authored and which contained "half truths."

Respondent asserted that, at some point, he had instructed Iannacone to issue a refund check to Shaun and that Iannacone had told him that he had done so. Respondent had testified earlier, however, that only he was authorized to sign trust account checks and, later, after the merger, only he or Saluti had such authority. His attorney then pointedly asked him, when he was "operating as a solo," whether anyone else was authorized to sign operating account checks. Respondent replied, "No, no." At the DEC hearing, respondent testified that he could not review his records to verify whether the fee refund had been made, because he had turned his records over to the ethics committee and the prosecutor's office. Notwithstanding this claim, he stated, "[b]ut my cursory look at it [his records] I could find nothing." When asked whether he was suggesting that Iannacone had taken the $5,000, respondent replied that he did not know.

In respondent's answer, he claimed that he was taking "active steps to repay the debt" owed to Shaun, "with interest." At the DEC hearing, when asked what those steps were, respondent replied that he had told Iannacone to pay Shaun. He added that, when he discovered that Iannacone had not made the payment, he

"took steps with Iannacone." His answer stated that Iannacone was no longer affiliated with his practice.

According to respondent, as of the date of the DEC hearing, he had not yet reimbursed Shaun because he and his attorney were concerned that it might be viewed as improper, in light of the pending ethics matter.[4]

Count two of the ethics complaint charged respondent with failure to reply to the grievance. In his answer, respondent admitted that he had requested and received three extensions of time to submit a reply to the grievance and that he had failed to reply to the two questions in the presenter's April 11 and May 29, 2013 letters.

One of respondent's affirmative defenses was that he had been treated by a psychiatrist for personal issues and that the "treatment" had prevented him from handling his practice with the care it deserved. After the ethics hearing had concluded, on September 4, 2014, respondent submitted to the hearing panel chair a May 12, 2009 letter, addressed to Thomas Ashley (respondent's attorney in his prior matter) from his therapist, Howard L. Schwartz, M.D., from whom he had been treated until 2009. The letter, which had also been submitted in his prior

[4] At oral argument before us, respondent's counsel noted that respondent had reimbursed Shaun.

matter (In re Roberts, supra, 199 N.J. 307), stated in relevant part, that respondent had first consulted Schwartz for symptoms of anxiety and depression, accompanied by insomnia, guilt feelings, episodes of tearfulness and inability to concentrate, related to intense and recurrent marital stress. The doctor noted that, although respondent continued to work, respondent was preoccupied with "his attempts to resolve conflicting feelings about how to proceed with his marriage." The doctor treated him once or twice weekly and prescribed medication. He diagnosed respondent as suffering from an acute and chronic depressive reaction, as well as a personality disorder of mixed type. Respondent discontinued the therapy in February 2009.

Presumably, respondent contacted Schwartz again, later in 2009. At that time, Schwartz recommended regular psychotherapy and antidepressant medication so that respondent could return to a better level of functioning professionally and personally.

Aware of respondent's ethics problems at the time of his letter, Schwartz noted that the suspension respondent was then facing would be financially ruinous and an event from which respondent feared being unable to recover professionally. Schwartz remarked that this fear was a major factor in respondent's acute depression and that, while respondent was not actively suicidal, he had recently "ruminated about running his

car off the road to escape the humiliation he believes is inevitable and from which at his age he cannot recover." Schwartz opined that therapy would be "more likely to be rehabilitative and beneficial to the public" and to respondent than suspending his law license.

Respondent advanced, as a mitigating factor, his plan to retire from the practice of law within the "next several years," because his age and health "dictate a less-stressful lifestyle than the litigation [he has] known for the past 40 years."

Respondent also presented three attorneys as character witnesses. Vincent Scocca had both a professional and personal relationship with respondent. Professionally, Scocca had known respondent for more than thirty-years. In Scocca's view, respondent had a good reputation in the legal community, was very knowledgeable, was known for his honesty and decency, and was a skilled criminal trial attorney. Eileen Cosgrove, a retired assistant prosecutor trial section supervisor, had known respondent for twenty-five years. She remarked that respondent was a highly regarded defense attorney who was polite, diligent, revered within the profession, punctual, responsible, and respectful of his clients. Thomas McTigue, also a retired prosecutor, opined that respondent's reputation in the legal community was excellent. According to McTigue, respondent was

conscientious about appearing in court on time and notifying the courts of conflicts. McTigue asserted that respondent was responsible, always prepared, patient and polite with his clients, and the type of attorney who elevates the practice of law. He also assisted young attorneys.

The DEC noted that the facts were "very much in dispute" about the events from May 2007 to late 2011; that the testimony of respondent and Shaun was "equally unreliable and neither more trustworthy than the other;" and that Shaun's testimony was "exaggerated and overblown." The DEC's findings of unethical conduct were, therefore, based on events that took place after 2011 and were culled primarily from respondent's testimony, verified answer, and exhibits.

The DEC found that respondent violated RPC 1.16(d), based on his failure to provide services to Shaun and to refund the $5,000 to him. The DEC also found that respondent failed to cooperate with the DEC's investigation, thereby violating RPC 8.1(b).

The DEC recognized the possibility that Iannacone may have defrauded respondent's firm. It was, nevertheless, troubled by respondent's inattention to Shaun's judgment and viewed his failure to confirm that it had been satisfied "as problematic to his defense . . . and emblematic to his inattention to his

ethical obligations to return unused retainers to his clients." The DEC noted further that, at the DEC hearing, respondent seemed indifferent and unapologetic.

The DEC emphasized that respondent defended the ethics charges by blaming Perez and Iannacone and by claiming that, although they did not know each other, they had deceived him about the status of the refund to Shaun and had intercepted his communications from Shaun to hide their deception. The DEC concluded that, even if there were "some truth" to respondent's version of events and despite the inconsistent testimony, respondent's later inaction was sufficient to find a violation of RPC 1.16(d).

Likewise, the DEC did not find credible respondent's claim that an "unknown third party" had intercepted the ethics committee's communications to him, thus preventing him from cooperating with the investigation. The DEC noted respondent's change in defense strategy and stated:

> Nevertheless, considering that Respondent has been a practicing attorney for more than four decades, it was unbelievable, bordering on incredible, that he took the position he did with respect to the veracity of the Verified Answer responses or the March 8, 2013 letter. Indeed of all the conflicting testimony given during the Hearing, it was this testimony in particular that [was] most troubling to the Panel especially as

> Respondent seemed entirely unphased by his own about-face.
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> [HR13-14.][5]

The DEC found that respondent's admissions, in his verified answer, were sufficient support for a finding of an RPC 8.1(b) violation.

As to Schwartz' report, the DEC remarked that respondent's unethical conduct had post-dated the outlined treatment and that, if respondent continued to suffer from the maladies outlined therein, that information was not before the DEC.

In light of respondent's disciplinary history, the DEC determined that a reprimand was appropriate discipline.

By way of a motion filed with us, respondent's counsel sought to supplement the record with a ten-count criminal indictment returned against Iannacone, on November 20, 2014, charging him with one count of second-degree theft by unlawful taking (more than $75,000) from the firm of Roberts and Saluti, LLC, and nine counts of uttering a forged instrument.

Counsel argued that the indictment

> demonstrates that probable cause has been established as to Mr. Iannacone's fraudulent activities, while acting as [respondent's] firm's office manager, during the time in

[5] HR refers to the September 5, 2014 hearing panel report.

> which we presented evidence to the [DEC] Panel that Mr. Iannacone falsely told [respondent] that he (Iannacone) had seen to it that [Shaun] was reimbursed for his retainer monies; and, intercepted subsequent communications from [Shaun] to [respondent].

Counsel noted that the indictment, which was not available at the time of the ethics hearing, would have corroborated respondent's testimony regarding Iannacone's "fraudulent and deceptive activities," while employed as respondent's office manager.

By letter dated January 29, 2015, the presenter objected to the supplementation of the record. The presenter noted that the DEC found respondent's explanation for failing to return the retainer "highly unlikely," even giving him the benefit of the doubt that Iannacone may have embezzled funds. The presenter contended that the indictment did not satisfy the "materiality test" required to supplement the record, that is, whether the inclusion of the document would have a likely effect on the outcome below, citing Liberty Surplus Insur. Co. v. Nowell, P.A., 189 N.J. 436, 452-453 (2007).

In addition, the presenter remarked that the DEC did not have the opportunity to consider the indictment. Because Iannacone was not a witness, the impeachment of his testimony was not at issue. The use of an accusatory document, such as the

indictment, to attack a witness' credibility in a civil proceeding was insufficient under N.J. Evid R. 609 (for the purpose of affecting the credibility of a witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes). The presenter pointed out that, here, respondent's counsel sought to supplement the record with an indictment, not a conviction.

By letter dated February 4, 2015, respondent's counsel argued, among other things, that Iannacone's indictment was admissible evidence and that it lent credibility to respondent's version of events: Iannacone falsely told respondent that he had reimbursed Shaun's retainer and that Iannacone had intercepted Shaun's communications to respondent. Thus, counsel asserted, respondent lacked intent to treat Shaun in an unethical manner.

In addition, counsel contended that Shaun's prior criminal conviction for theft and aggravated assault served to impeach his credibility and that we should so find. Counsel maintained that, had the indictment been available at the DEC hearing, the DEC would have reached "a less onerous conclusion."

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

For the purpose of developing a complete record, we grant counsel's motion to supplement the record. We find, however, that the indictment bears little on the charged ethics violations and does not absolve respondent from the charged wrongdoing.

Although the DEC found the testimony of respondent and Shaun equally unreliable, Shaun's version, despite his exaggerations and prior criminal conviction, had the ring of truth. For example, he testified that, during a conference call with respondent and Dratch, respondent had blamed his inability to repay Shaun on his acrimonious divorce and his resultant lack of available funds. This testimony was corroborated by respondent's March 8, 2013 letter to the DEC, submitted as an attachment to his verified answer.

Respondent testified that he and Saluti were the only authorized signatories on trust account checks and that only respondent was authorized to sign checks from the operating account, at least while he was a sole practitioner. Thus, even if respondent had directed Iannacone to reimburse Shaun, respondent, not Iannacone, would have been authorized to sign the reimbursement check. Therefore, respondent knew, or should have known, that no such check had been issued to Shaun. In addition, respondent testified that his cursory review of his

records, presumably before he turned them over to the DEC and to the prosecutor, on an unknown date, did not show any such payment to Shaun. Clearly, respondent had made no effort to reimburse the unearned fee.

The clear and convincing evidence establishes that respondent, or his office, accepted $5,000 on Shaun's behalf and provided no services in return.[6] At some point, after respondent happened to encounter either Dratch or another attorney from Dratch's firm, at the courthouse, respondent became fully aware of the judgment against him. Yet, as of the date of the DEC hearing, respondent had taken no steps to satisfy that judgment. Moreover, respondent knew, at least as of the date of his March 8, 2013 letter to the investigator/presenter (of which he denied knowledge, yet inexplicably and knowingly appended to his answer), that the refund to Shaun had not been made. A full year later, respondent still had not repaid Shaun or asked the DEC whether it was permissible to do so during the pendency of his ethics case.

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[6] As to the receipt that Perez gave Shaun, respondent maintained that he would never make the representation to a client that the client would receive a refund if he were unsuccessful in the client's case. That is not what the receipt says, however. The receipt simply stated that Shaun would receive a refund if respondent did not appear at his bail hearing the next day, which is what occurred.

The DEC found not credible respondent's explanations as to why the judgment remained unsatisfied. So do we, notwithstanding Iannacone's indictment. The more plausible explanation for respondent's failure to repay Shaun was his stated financial inability to do so. Even if Iannacone had stolen money from the Roberts and Saluti firm or Perez had taken the money, as respondent implied at the DEC hearing, respondent was still required to reimburse Shaun. Respondent, therefore, violated RPC 1.16(d) by failing to refund an unearned legal fee to the client.

As to the failure to cooperate charge, although respondent's answer admitted all of the allegations in count two, he took an about face at the DEC hearing, claiming that all of the DEC's letters were diverted to conceal the wrongdoing of both Perez and Iannacone. Respondent's arguments simply strain credulity. How could both Perez and Iannacone be responsible for diverting the same funds? And why would they each divert communications, Perez from Shaun, and Iannacone from the DEC? We, therefore, find that respondent is guilty of violating RPC 8.1(b) for his failure to reply to the grievance.

We note that respondent made misrepresentations in the course of a prior ethics matter. We so found in In the Matter of Richard M. Roberts, DRB 08-362 and 08-363 (April 7, 2009).

There, we determined that respondent made misrepresentations about his reasons for delaying the filing of a brief, either in a letter and certification to the Appellate Division or in his testimony at the DEC hearing. We found that respondent made misrepresentations to a tribunal, failed to take responsibility for his misconduct by trying to blame others, and was less than forthright in his testimony before the DEC. Our findings in that regard apply with equal force to this case.

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.16(d) and RPC 8.1(b).

Generally, failure to cooperate with an ethics investigation results in an admonition, if the attorney does not have an ethics history, even if other minor ethics violations are present. See, e.g, In the Matter of Jeffrey M. Adams, DRB 14-243 (November 25, 2014) (failure to cooperate with the committee's investigation; the remaining charges were dismissed); In the Matter of Richard D. Koppenaal, DRB 13-164 (October 21, 2013) (failure to cooperate with an ethics committee's attempts to obtain information about the attorney's representation of a client; the remaining charges were dismissed); and In the Matter of Lora M. Privetera, DRB 11-414 (February 21, 2012)(attorney submitted an inadequate reply to an

ethics grievance; thereafter, she failed to cooperate in the ethics investigation until finally retaining ethics counsel to assist her).

If the attorney has been disciplined before, but the attorney's ethics record is not serious, reprimands have been imposed. See, e.g., In re Picker, 218 N.J. 388 (2014) (consent to discipline; failure to cooperate with disciplinary authorities and improper deposit of personal funds into the trust account; prior three-month suspension); In re Moses 213 N.J. 497 (2013) (failure to cooperate with disciplinary authorities, failure to safeguard funds, and recordkeeping violations; prior admonition and temporary suspension); In re Ruchalski, 200 N.J. 479 (2009) (default; failure to cooperate with disciplinary authorities; prior admonition); In re Blunt, 187 N.J. 71 (2006) (failure to cooperate with disciplinary authorities; negligent misappropriation of client funds, failure to promptly deliver funds to a third party, and recordkeeping violations; prior reprimand); In re DeMasi 186 N.J. 267 (2006) (failure to cooperate with disciplinary authorities, gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, and failure to provide a client with a writing setting forth the basis or rate of the fee; prior reprimand); In re McBride, Jr., 188 N.J. 388 (2006) (failure to

cooperate with disciplinary authorities, gross neglect, pattern of neglect, failure to communicate with clients and failure to safeguard funds; prior reprimand); In re Wood, 175 N.J. 586 (2003) (failure to cooperate with disciplinary authorities; prior admonition for similar conduct); and In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension).

Here, respondent is also guilty of failing to return an unearned fee. Such a violation is generally accompanied by other misconduct. The discipline in such cases has ranged from a reprimand to a term of suspension, depending on the attorney's ethics history, other violations present, and mitigating or aggravating factors. See, e.g., In re Duffy, 208 N.J. 431 (reprimand for misconduct in five client matters, including failure to return unearned fees, gross neglect, lack of diligence, and failure to communicate with clients; prior admonition; compelling mitigating circumstances considered); In re Nichols, 182 N.J. 433 (2005) (reprimand for misconduct in two immigration matters, which included failure to return an unearned fee and failure to communicate with clients; prior reprimand); In re Schiavo, 165 N.J. 533 (2000) (three-month suspension in a default, involving four client matters; misconduct included failure to return an unearned fee, failure

to promptly deliver funds to a third party, failure to comply with a court order to disburse escrow funds, failure to communicate with clients, failure to act with reasonable diligence, and misrepresentation of the status of a matter; temporary suspension for failure to cooperate with an ethics investigation); and In re Angelucci, 194 N.J. 512 (2008) (six-month suspension in a default matter; failure to return an unearned fee, gross neglect, lack of diligence, failure to comply with a court order to appear at an order to show cause; prior reprimand and temporary suspension).

Had this been respondent's first brush with the ethics system, a reprimand might have been justified for his misconduct involving one client matter. However, this is respondent's fifth disciplinary case. Moreover, we find his testimony before the DEC troublesome. Even if there were some truth to his defense, the fact remains that he abdicated his supervisory responsibilities over his staff. In addition, he continues to blame others for his ethics problems, rather than to take responsibility for his wrongdoing. For these reasons, we determine that a three-month suspension is warranted in this matter.

Members Gallipoli and Zmirich voted to impose a six-month suspension. Member Hoberman did not participate.

We further determine that respondent's reinstatement to practice law should be conditioned on the resolution of any ethics matters pending against him. To the extent possible, those matters should be consolidated. In addition, as previously ordered by the Court, prior to reinstatement, respondent should provide (1) proof of fitness to practice by a mental health professional approved by the OAE and (2) proof that he has completed a course in law office management. We further determine that, upon reinstatement, respondent should practice under the supervision of an OAE-approved proctor, until he is released from that condition.

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 Richard M. Roberts
Docket No. DRB 14-345

Argued: February 19, 2015

Decided: June 11, 2015

Disposition: Three-month suspension

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

Ellen A. Brodsky
Chief Counsel