SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 07-341 and
07-342
District Docket Nos. X-05-053E
and X-05-054E

IN THE MATTER OF	
ANDREW M. KIMMEL	
AN ATTORNEY AT LAW	

Corrected Decision

Argued: February 21, 2008

Decided: May 8, 2008

George D. Schonwald appeared on behalf of the District X Ethics Committee.

Respondent appeared pro se.

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

These matters came before us on two separate recommendations for discipline filed by the District X Ethics Committee ("DEC") (reprimand in DRB 07-341 and suspension of unspecified duration in DRB 07-342). Respondent failed to return a client file to subsequent counsel, failed to cooperate with ethics authorities, and practiced law while ineligible to do so for failure to pay the annual assessment to the Lawyers' Fund

for Client Protection ("CPF"). We voted to impose a censure for the combined misconduct in both matters.

Respondent was admitted to the New Jersey bar in 1968. He has no prior final discipline. However, on May 23, 2006, he was temporarily suspended for failure to cooperate with the Office of Attorney Ethics ("OAE") and failure to appear before the Court on its order to show cause associated with the OAE motion. In re Kimmel, 186 N.J. 583 (2006). He remains suspended to date.

We originally considered these matters as defaults, at our May 19, 2005 session. Respondent then filed a motion to vacate the defaults, which we granted. Both matters were remanded to the DEC for the filing of answers and a hearing. The matters are now before us post-remand, after a consolidated hearing below.

Prior to oral argument before us, respondent sent the Office of Board Counsel ("OBC") several sets of documents, some of which were duplicative, but all of which address a claimed mental illness. Because the presenter denied having received those additional documents from respondent, OBC sent them directly to the presenter, in time for his review before oral argument. Respondent's papers included medical records documenting his alleged mental illness, a narrative about the extent of his mental illness during a broad time frame, and his

arguments against allowing the amendment of the complaint (as the DEC had done) in respondent's absence from the DEC hearing.

The presenter objected to respondent's submissions, claiming that they did not prove mental illness.

At oral argument, the presenter also asked us to accept two new sets of documents for our record. One set pertained to the above-referenced ineligibility matter. The new documents consisted of an October 11, 2006 letter from the hearing panel chair to respondent and to the presenter, notifying them of the hearing panel's intention to include documents marked as Exhibits T through X, at the then-upcoming November 30, 2006 DEC hearing. The documents were entered into evidence at the DEC hearing as one global exhibit, Exhibit B, but were inadvertently left out of the record when it was transmitted to us. Those documents address the charge that respondent practiced law while on the CPF list, a violation that respondent recently conceded at oral argument before us. We determined to accept the additional documents, Exhibits T through X, as part of the record.

The presenter offered a second, smaller set of papers, under cover letter dated December 12, 2006, also from the hearing panel chair to respondent and to the presenter. They pertain to the LaBanca matter, detailed below.

In LaBanca, for the first time, the grievant stated, at the DEC hearing, that he had given respondent a $5,000 check for expert witness fees in the case. The hearing panel chair's letter notified respondent that the DEC had amended the ethics complaint, in his absence from the November 30, 2006 hearing, to include additional charges related to the grievant's testimony about the $5,000 check. It also gave respondent until December 29, 2006 to reply to the DEC's determination to allow LaBanca to "provide evidence of the $5,000 he testified he gave to [respondent], which [respondent] never returned."

Attached to the December 12, 2006 letter are a copy of LaBanca's check No. 3273 from First Union National Bank to respondent, dated October 1, 2001, in the amount of $5,000 (the check bears LaBanca's notation "Legal Fee's [sic] J+L Ruberto"), and a page from LaBanca's checking account statement, indicating that the check was written to respondent in that amount.[1] The check was offered to us as LaBanca's proof that respondent had accepted a $5,000 check for expert fees in the case, which LaBanca claimed had not been used for that purpose.

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[1] The statement looks more like an online check-register page than a real bank statement. It does not contain typical information, such as the actual date that the check was presented to or processed by the bank.

At oral argument before us, respondent objected to the inclusion of these documents into the record. He did so on procedural grounds (his absence from the DEC hearing) and on the basis that he had been generally unable to defend himself, due to his mental illness.

The December 12, 2006 letter holding the record open for respondent was not included in the record presented to us or mentioned anywhere in it. It was offered to us at oral argument, over a year later, without a certified mail receipt or indication of its actual delivery, as proof that respondent had been given an opportunity to address the amendments to the complaint.

Unbeknownst to the DEC, respondent was too sick at the time to reply. He stated, in his most recent submission, a March 5, 2008 certification, that he "obviously received" the DEC's letter, but never read it. Paragraph 6 of the certification states:

> Let me reiterate what I said already: I did not attend the LaBanca Hearing; I did not read any of the papers that were presented to me, other than Mr. LaBanca's initial grievance; and I did not read [the hearing panel chair's] December 12, 2006 letter to [the presenter] and me because I was not capable of doing any of that. Brushing my teeth and making my bed were virtually impossible tasks at the time.

According to respondent, he was too ill to deal with these matters until February 2007, when he summoned the will to live, after the birth of his first grandchild. At oral argument before us, he stated,

> I consider myself a person with a disability. I suffer from severe major depression, recurrent, with psychotic features. That's the diagnosis of my physician, Dr. Harvey Hammer, a psychiatrist in Morristown. I'm about to be transferred to another psychiatrist because Dr. Hammer is 75 years old. In June of 2004 I was confined to the Summit Medical Hospital for several days. . . . In February 6, February 7 of 2006 I attempted to commit suicide. In both cases the police knocked down the doors; in the first case of my office, in the second case, of my apartment when my secretary and my son couldn't get in touch with me. And the third time I was confined, both times involuntarily, to the psychiatric unit at Saint Clare's Hospital. I only say this. I consider myself a person with a disability. I say this only in mitigation of what I'm about to get into. I'm not McNaughton insane. I know the difference between right and wrong, but I consider myself a troubled person.
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> [T11-3 to T12-2.][2]

[2] "T" refers to the transcript of the February 21, 2008 oral argument before us.

For the following reasons, we determine not to consider the presenter's second set of documents, relating to the $5,000 check: a) they were sent to respondent after the fact and invited only a reply, not an opportunity to be heard on the record or to cross-examine LaBanca regarding the documents and b) inexplicably, we were not furnished these documents prior to oral argument; therefore, we were unable to question the presenter about them.[3]

We conclude that now is not the time, years later, at oral argument before us, to introduce such a document for consideration. Finally, the check and bank statement are offered to prove amended charges that we disallow below.

I. The LaBanca Matter – District Docket No. X-05-054

Robert LaBanca, the grievant, testified at the DEC hearing that he retained respondent to represent him in an Essex County litigation filed against his restaurant by a contractor. The suit was captioned J&L Ruberto Construction Corp. v. The Appian Way, Docket No. ESX-L-4957-01 ("the J&L litigation").

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[3] For example, LaBanca testified that he intended the $5,000 to go to expert witness expenses. Yet, the check states, on its face, that it was for legal fees.

According to LaBanca, the case involved substandard stone work installed at his restaurant. Respondent took the case on a one-third contingency fee basis, but did not utilize a retainer agreement.[4] LaBanca recalled that respondent had required a $5,000 advance from him, meant for expert fees.

According to LaBanca, in August 2004, respondent had another attorney, Edward Gilhooly, accompany LaBanca to a settlement conference. Respondent had a scheduling conflict. LaBanca contended that, at that conference, the judge had commented that respondent had not "turn[ed] in the proper paperwork nor the expert's testimony and he only turned in five out of 550 photographs." The judge recommended that LaBanca settle the case because he had "no case to defend."

In September 2004, LaBanca terminated respondent's representation and retained Vincent Jesuele[5] as his new attorney. Jesuele requested a copy of LaBanca's file from Gilhooly, but, according to LaBanca, Gilhooley had already returned the file to respondent.

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[4] The complaint does not charge respondent with failure to execute a written fee agreement.

[5] Also cited in the record as Gesuele.

On September 1, 2004, September 22, 2004, September 29, 2004, and October 1, 2004, Jesuele wrote letters to respondent, requesting a copy of LaBanca's file.

LaBanca also recalled telephoning respondent "many, many times, two hundred times." Nevertheless, he asserted, respondent failed to reply to LaBanca's and Jesuele's requests for the file. LaBanca stated that it was not until well after he had filed an October 19, 2004 ethics grievance that respondent finally turned over the file.[6]

LaBanca also recalled that respondent never used the $5,000 to retain experts in the case. Therefore, in August 2004, LaBanca asked him to return those funds. According to LaBanca, respondent repeatedly promised to return the money, but never did so.

The complaint alleged that respondent's failure to return his client's file violated RPC 1.15(b) (safekeeping property) and RPC 1.16 (d) (failure to return file upon termination of representation).

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[6] In respondent's certification in support of his motion to vacate the default, later used as part of his answer to the complaint, respondent claimed that he had personally "picked up the files at Mr. Gilhooly's office in Morristown, and then delivered the file (the next day I believe) to the office of Mr. LaBanca's new attorney." Respondent did not give a date for this action.

The complaint also alleged that respondent failed to cooperate with ethics authorities (RPC 8.1(b)). According to the presenter, he had sent respondent an October 23, 2006 letter, by certified and regular mail, notifying him of the November 30, 2006 hearing date. In his opening statement, the presenter stated that respondent had signed for the certified mail, on October 28, 2006, and that the regular mail had not been returned. On that basis, he urged, respondent's failure to appear at the hearing or to otherwise explain his absence violated RPC 8.1(b).

At the DEC hearing, for the first time, the presenter moved to amend the complaint to include charges that respondent violated RPC 1.4 (no subsection)(failure to communicate with the client) and RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation).

The DEC granted the motion and required LaBanca to provide proof of payment of the $5,000 to respondent. The DEC also listened to a telephone message, allegedly left by respondent on LaBanca's cell phone, which LaBanca had "been saving for years." The message related to the payment. Neither the recording nor a

transcription of the contents of that message is included in the record.[7]

The DEC found respondent guilty of RPC 1.16(d) for his failure to turn over the file to subsequent counsel, upon the termination of the representation.

The DEC also found, based on new information from LaBanca, that respondent had violated RPC 8.4(c) by failing to return both the $5,000 and the file, and by failing to appear at the DEC hearing.

Based on the saved cell phone message – a "phone message to Mr. LaBanca [wherein] he clearly stated that he was sending Mr. LaBanca back his $5,000, when in fact he never returned such money to Mr. LaBanca," the DEC concluded that respondent had again violated RPC 8.4(c).

The DEC also found respondent guilty of having violated RPC 1.5(b), although that RPC appears for the first time in the hearing panel report. It was not charged in the complaint or explored below.

Finally, the hearing panel report did not address the RPC 1.4 charge that was allowed by amendment at the DEC hearing.

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[7] After oral argument before us, the presenter offered us the audio file or a transcript of the telephone call. We did not request or review either one.

The panel recommended a suspension of an unspecified duration, without citing supporting case law.

II. The Ineligibility Matter – District Docket No. X-05-053

A three-count complaint alleged that respondent violated RPC 5.5(a)(1) (practicing law while ineligible), as well as RPC 8.1(b) (failure to cooperate with ethics investigation).

The DEC's sole witness, Gregory Keller, testified that he represented the plaintiff and that respondent represented the defendant in the J&L litigation.

A letter from the CPF to the DEC, dated December 2, 2004, placed that litigation period during five separate instances of respondent's ineligibility: September 15, 1997 to September 17, 1997; September 21, 1998 to October 14, 1998; September 24, 2001 to November 1, 2001; September 30, 2002 to October 21, 2002; and September 15, 2003 to April 14, 2004.

According to Keller, respondent served him with interrogatories in the J&L litigation on October 26, 2001, during the six-week period (September 24 to November 1, 2001) that respondent was on the 2001 ineligible list.

Keller also testified that, in preparation for an October 8, 2003 arbitration hearing, respondent filed a four-page memorandum with the court, dated September 28, 2003, during a

subsequent seven-month ineligibility period (September 15, 2003 to April 14, 2004).

Thereafter, according to Keller, respondent appeared and represented his client at the October 8, 2003 arbitration hearing. On November 5, 2003, respondent sent the court a demand for a trial de novo, rejecting the arbitration award.

Finally, respondent continued to practice law into April 2004, as evidenced by his April 8, 2004 letter to Keller and to another attorney, regarding a trial adjournment.

The complaint also charged respondent with failure to cooperate with the ethics investigation. After respondent's successful motion to vacate the default, in May 2005, it appeared that he had placed the disciplinary matter back on track, having replied to the grievance and filed his answer to the complaint. Nevertheless, he did not appear at the November 30, 2006 DEC hearing.

According to the presenter, he sent respondent an October 23, 2006 letter, by certified and regular mail, notifying him of the November 30, 2006 hearing date. Respondent signed for the certified mail on October 28, 2006; the regular mail was not returned. On that basis, the presenter urged, respondent's failure to appear at the hearing or to otherwise explain his absence violated RPC 8.1(b).

The DEC found respondent guilty of practicing law during two periods of ineligibility in 2001 and 2003 (RPC 5.5(a)(1)). The DEC also found that respondent's absence from the DEC hearing constituted failure to cooperate with ethics authorities (RPC 8.1(b)).

The DEC recommended the imposition of a reprimand.

Upon a de novo review of the record, we are satisfied that the record contains clear and convincing evidence of unethical conduct on respondent's part.

Respondent violated several RPCs in these matters. In the ineligibility matter, a December 2004 letter from the CPF confirmed that respondent was on the list of ineligible attorneys, during certain periods in 2001 and 2003. Keller testified that respondent had continued to represent LaBanca in the J&L litigation, by propounding interrogatories, sending letters to other attorneys, requesting a trial adjournment and the like, all when respondent was ineligible to practice law.

Respondent did not refute the charge that he practiced law while ineligible. In fact, he admitted his wrongdoing at oral argument before us. We, thus, conclude that he violated RPC 5.5(a)(1).

In the LaBanca matter, the evidence clearly and convincingly establishes that respondent failed to promptly turn

over the file to LaBanca's subsequent counsel for many months after the August 2004 termination of his representation. In this regard, respondent violated RPC 1.16(d). Because this RPC more specifically addresses an attorney's failure to return a file, we dismiss the charged violation of RPC 1.15(b).

Respondent was also charged with failure to cooperate with ethics authorities for his unexplained absence from the hearings in both of these matters. Respondent's presence at the DEC hearing was mandatory, pursuant to R. 1:20-6(c)(2)(D). Not only did he not appear, but he did not furnish a reason for his absence.

Although respondent has now supplied ample documentation of his mental illness, nothing in his materials evidences an inability to, at a minimum, advise the DEC of his non-appearance at the DEC hearings. We, therefore, conclude that respondent's failure to take that minimum action violated RPC 8.1(b).

On the other hand, due process considerations require us to dismiss the charges that arose for the first time at the DEC hearing. Respondent had no notice of the facts and charges, as they appeared nowhere in the four corners of the original complaint. Had respondent appeared at the DEC hearing, he would have at least been able to object to the newly raised allegations, one of which (misrepresentation) is a serious

charge. To be sure, respondent's failure to appear at the hearing is not without its own consequences, as discussed below.

In summary, in the LaBanca matter, respondent failed to turn over the file to subsequent counsel (RPC 1.16(d)). In the ineligibility matter, he violated RPC 5.5(a)(1). We dismiss the charges relating to RPC 1.4, RPC 1.15(b), and RPC 8.4(c).

As indicated above, respondent failed to cooperate with the DEC in both matters, a violation of RPC 8.1(b). His lack of cooperation was egregious for two reasons. First, it occurred after we gave him a "second bite at the apple," having previously vacated these matters as defaults and remanded them for the filing of an answer and for a hearing. Respondent's failure to cooperate with ethics authorities – even after our remand – shows a deep disregard for the disciplinary process.

Secondly, respondent's presence at the DEC hearing was not elective, but mandatory, pursuant to the rules. His unexplained absence placed an excessive burden on the disciplinary system, which had assembled all of the parties for a hearing, with the expectation that respondent, too, would appear or, at least, explain his absence. Respondent's absence was so stark an affront to the disciplinary system that we liken it to a default matter, where the attorney allows a matter to proceed to us without the filing of a required answer. We have imposed

enhanced discipline on that basis. In re Nemshick, 180 N.J. 304 (2004) (conduct meriting reprimand upgraded to three-month suspension due to default; no ethics history).

We now address the quantum of discipline that respondent's ethics transgressions deserve.

Failure to return a client's file and failure to cooperate with disciplinary authorities warrant an admonition. See, e.g., In re Carroll, DRB 95-017 (January 30, 1995) (admonition for lack of diligence, failure to communicate with client, failure to return client file, and failure to cooperate with ethics authorities).

As to practicing while ineligible, at oral argument before us, respondent acknowledged that he knew that he was ineligible but practiced law anyway. He stated that he had "no excuse with regard to not paying the annual assessment."

A reprimand is usually imposed when the attorney knows that he or she is ineligible and practices nevertheless. See, e.g., In re Kaniper, 192 N.J. 40 (2007) (attorney practiced law during two periods of ineligibility; although the attorney's employer gave her a check for the annual attorney assessment, she negotiated the check instead of mailing it to the Fund; later, her personal check to the Fund was returned for insufficient funds; the attorney's excuses that she had not received the

Fund's letters about her ineligibility were deemed improbable and viewed as an aggravating factor); In re Perrella, 179 N.J. 499 (2004) (attorney advised his client that he was on the inactive list and then practiced law; the attorney filed pleadings, engaged in discovery, appeared in court, and used letterhead indicating that he was a member in good standing of the Pennsylvania bar); and In re Ellis, 164 N.J. 493 (2000) (one month after being reinstated from an earlier period of ineligibility, attorney was notified of his 1999 annual assessment obligation, failed to make timely payment, was again declared ineligible to practice law, and continued to perform legal work for two clients; prior reprimand for unrelated violations).

Here, respondent knowingly practiced law in multiple years (2001, 2003 and into 2004) when he had been declared ineligible, for which a reprimand is the minimum sanction. In addition, he failed to promptly return a file to the client and failed to cooperate with disciplinary authorities. In our view, the latter violation was so serious as to reflect disdain for the ethics

system.[8] We, thus, determine to censure respondent for his misconduct in these combined matters.

In addition, due to the seriousness of respondent's mental illness, we have, by separate letter to the OAE, requested that office to compel respondent, pursuant to R. 1:20-12, to undergo a medical examination for possible placement on disability inactive status.

Chair O'Shaughnessy and Member Frost recused themselves. Member Lolla 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
Louis Pashman, Vice-Chair

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

[8] Respondent's contempt for the system runs deep. The Court temporarily suspended him, in May 2006, for failure to cooperate with the OAE and failure to appear on the Court's order to show cause associated with the OAE motion. He remains suspended to date.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Andrew M. Kimmel
Docket Nos. DRB 07-341 and DRB 07-342

Argued: February 21, 2008

Decided: May 8, 2008

Disposition: Censure

Members	Disbar	Suspension	Censure	Reprimand	Recused	Did not participate
O'Shaughnessy					X	
Pashman			X			
Baugh			X			
Boylan			X			
Frost					X	
Lolla						X
Neuwirth			X			
Stanton			X			
Wissinger			X			
Total:			6		1	2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel