SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-082
District Docket No. XA-2013-0007E

IN THE MATTER OF WALTER D. LEVINE AN ATTORNEY AT LAW	Decision

Argued: May 21, 2015

Decided: December 14, 2015

Douglas Ehrenworth appeared on behalf of the District XA Ethics Committee.

Samuel N. Reiken 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 an admonition, filed by the District XA Ethics Committee (DEC), which we determined to treat as a presentment.

The formal ethics complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.6 (revealing confidential information relating to the representation of a client), RPC 1.9

(representing a client in the same or a substantially related matter in which the client's interests are materially adverse to a former client, without obtaining the former client's informed written consent), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). We determine that a reprimand is the appropriate quantum of discipline.

Respondent was admitted to the New Jersey bar in 1965. At the relevant times, he maintained an office for the practice of law in Florham Park.

On June 5, 2001, respondent received a reprimand for violating RPC 1.8(a) (conflict of interest), RPC 1.15(a) (commingling), and RPC 1.15(d) and R. 1:21-6 (failure to maintain required records), after he twice borrowed client funds, with permission, but without abiding by the safeguards associated with entering into a business transaction with a client. In the mid-1980s, respondent began representing Jeffrey Lichtenstein (Jeffrey).[1] On December 24, 1987, Jeffrey named respondent his Power of Attorney (POA).

Kinda Trust

In June 1996, respondent prepared documents for the creation of the Kinda Trust Indenture (Kinda Trust) for another client, Victor

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[1] Because Jeffrey Lichtenstein and another party, Arleen Lichtenstein, share the same surname, we refer to them by their first names for clarity.

Radzinsky, which named Jeffrey as the sole trustee. Radzinsky and Jeffrey were lifelong friends.

In 2005, Jeffrey asked respondent to amend the Kinda Trust to add Jeffrey's wife, Arleen Lichtenstein (now Arleen Rubin), as a trustee. After finally getting an opportunity to review the trust documents, Arleen requested to be added as co-trustee. Respondent drafted the amendment and sent it to Jeffrey. As a result, Arleen and Jeffrey would be signatories on the Kinda Trust bank account. Respondent did not oversee the execution of the amendment.

Jeffrey and Arleen eventually separated. After their separation, Jeffrey accused her of wrongfully transferring assets from the Kinda Trust. Arleen testified that she transferred funds from the Kinda Trust to a trust solely in her name (Arleen Rubin Family Trust) because she believed that those funds represented her savings from work.

The IRS Subpoena

In August 2005, respondent was served with a subpoena (captioned as a summons) from the Internal Revenue Service (IRS), with a return or compliance date of September 19, 2005. The subpoena sought production of any and all documents in respondent's custody or control relative to Jeffrey, Arleen, the Kinda Trust, and Jeffrey's other business ventures. Attached to the subpoena was a document entitled "Provisions to the Internal Revenue Code" (Provisions).

Section 7609 of the Provisions sets forth "Special procedures for third-party summons." Shalom Stone, Esq., whom respondent offered as an expert in the field of attorney ethics, testified that those third-party procedures applied any time the IRS sought documents from a person or entity other than the person or entity who was the subject of the subpoena and/or the IRS investigation. Thus, under that section, the IRS was required to give notice of its subpoena to Jeffrey as well. The instructions in that section specifically indicated that any party entitled to notice under the Provisions, including the subject of the summons/subpoena, had the right to institute proceedings to quash or otherwise challenge the production of documents sought.

Stone further testified that the IRS Provisions precluded respondent from complying with the subpoena prior to the return date and further precluded the IRS from reviewing any documents received in response before then as well. The purpose of that provision, Stone testified, was to give the subject of the subpoena, Jeffrey, a fair opportunity to move to quash or otherwise challenge it. In the interim, however, and absent a motion to quash by Jeffrey, it was respondent's obligation to assemble the identified documents and to be prepared to submit them on the return date, failing which he would be subject to contempt proceedings and ultimately, the

imposition of a fine, a term of imprisonment, or both, pursuant to Section 7210 of the IRS Code.[2]

Stone testified that, although it might be considered good practice to notify one's client of receipt of an IRS subpoena, it was the IRS's obligation to tell the taxpayer that the person from whom the information is sought is not required to have any communication with the target of the investigation. Thus, absent a need to discuss the disclosure of confidential information, Stone believed that respondent did not have an obligation to inform Jeffrey that he had been served with an IRS subpoena pertaining to Jeffrey's records.[3]

Nevertheless, on August 31, 2005, respondent sent two letters to Jeffrey, one to his home and the other to his business address, notifying him that he was the target of an IRS investigation and that he had the option to file a motion to quash the subpoena. Both

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[2] That section provides, "[any] person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda or other papers, as required under sections . . . 7602; 7603, and 7604(b) neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution."

[3] Presumably, although it is not entirely clear, Stone may have been referring to Section 7609(g) and (h) of the Provisions, which allow the IRS to make an ex parte application to forego notification to the subject of the subpoena where the provision of such notice "may lead to attempts to conceal, destroy, or alter the records relevant to examination . . . . " There is no evidence, however, that such an application was made here.

letters were returned as "undeliverable." On September 12, 2005, respondent re-sent the letter to Jeffrey, by "Priority Mail, Signature Confirm," at the forwarding address listed on the return mail. Although the letter was not returned, Jeffrey did not recall receiving it and further maintained that he never received a letter or telephone call from respondent about the subpoena and that he never gave respondent authority to produce documents to the IRS.

Having heard nothing from Jeffrey, and in the context of the potential consequences for non-compliance, on September 19, 2005, the return date for the subpoena, respondent provided the requested documents to the IRS. He initially asserted that he neither kept a copy of the documents he sent to the IRS nor provided Jeffrey with a copy of the cover letter.[4]

On September 23, 2005, through counsel, Jeffrey asked respondent for a copy of the records he had given the IRS pursuant to the subpoena. Respondent did not produce the documents to counsel, replying that Jeffrey should have already had them in his own records. During the course of the ethics proceedings, however, the

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[4] On the second day of the hearing, respondent indicated that he had located copies of the documents that accompanied the cover letter to the IRS and, over the presenter's objection, the hearing panel accepted these documents into evidence. Respondent, however, denied having any substantive conversation with the IRS agents when they served him with the subpoena.

cover letter was produced, which identified the documents that respondent had provided to the IRS.

Of the ten items listed in the cover letter, seven (including the document entitled "Find Report") consisted of tax returns and forms, some of which had been prepared by respondent based on information Jeffrey had provided, and some of which consisted simply of forms prepared and provided by Jeffrey. One of the documents consisted of correspondence and attachments relating to amendment of the Kinda Trust; one pertained to a filing respondent had made with the Department of Labor in respect of a claim; and one consisted of a copy of a prior IRS summons/subpoena, which had been served on Jeffrey in respect of World Savings Bank, along with a cover note from Jeffrey and respondent's reply thereto, declining to act in his behalf in that matter.

In discussing the confidentiality and/or privilege that could apply to each of the documents listed in the cover letter, Stone concluded that the tax returns are were not subject to attorney-client privilege and that a tax return filed with the IRS is "never privileged." Therefore, he concluded, those items were not protected by any privilege. Stone testified that there may be some privileged aspects of tax preparation, such as legal advice given in connection with that preparation. However, he maintained, those aspects do not extend to the tax returns and other financial documents themselves, such as forms or financial data prepared by the client and given to

the attorney in connection with the preparation of the tax returns. Thus, Stone also did not consider privileged the "Find Report," which Jeffrey had provided to respondent, along with his own handwritten notes, to assist in the preparation of his tax return.

Stone further testified that the documents relating to the Department of Labor claim lost any privilege that previously might have attached to them once they were filed with or distributed to a third party – here the Department of Labor itself. Although he conceded that there may be situations in which privilege is retained even in the face of distribution to third parties or a state agency, he did not view that to be the case here.[5]

Stone was asked to offer his opinion on the prior IRS summons/subpoena that had been served on Jeffrey. He testified that

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[5] Stone acknowledged that privilege still may attach where, for example, the lawyer and the client are pursuing the same objective as the government agency, such as where the agency is conducting an investigation and the lawyer is representing the client in that investigation. Stone further acknowledged that privileged documents shared with third parties who have a "joint type of relationship" would retain their privileged status, citing the "case the Supreme Court ruled on this morning" – presumably referring to O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). In that case, the Court adopted the "common interest rule" articulated in LaPorta v. Gloucester County Board of Chosen Freeholders, 340 N.J. Super. 254 (App. Div. 2001) and held that the attorney's work product remained privileged despite its disclosure to third parties (co-defendants' counsel) because the documents were shared in furtherance of a common purpose and in a manner calculated to preserve their confidentiality. The Court did note, however, that the work-product doctrine permitted disclosure to a wider circle of third parties without a waiver than does the attorney-client privilege.

the summons itself was not privileged and that the letter from Jeffrey to respondent, asking him to respond or take action, and from respondent to Jeffrey, declining to represent him in that matter, similarly was not the subject of privilege because it offered no legal advice, but rather merely declined representation. Thus, no attorney-client relationship had been established.

Finally, in response to the hearing panel chair's specific question, Stone testified that if the subpoena had encompassed clearly privileged documents, the IRS would not expect those documents to be produced and, further, that it would not necessarily require a privilege log to identify excluded documents.

Jeffrey revoked respondent's authority as POA on November 2, 2005. Thus, the last work respondent had performed for Jeffrey was in 2005, when he prepared the amendment for the Kinda Trust.

Arlene Rubin Family Trust

In December 2011, Arleen requested that respondent create the Arleen Rubin Family Trust to protect assets she had received upon her mother's death. Arleen explained during her testimony that she had known respondent for thirty years and would not call anyone else for legal advice.

Respondent drafted the trust documents, naming Arleen's daughters Brooke, Lindsey, Allie, and Jodie as trustees. Respondent oversaw the execution of the trust documents. On December 7, 2011,

Arleen appeared at respondent's office and executed the trust documents. Because Brooke, Lindsey, and Allie were away at school at the time, they were not able to execute the documents. They testified that they had not signed the trust document. Arleen signed them on behalf of her absent daughters. Respondent signed as "witness" to the signatures. He also executed a jurat indicating that the three individuals personally appeared before him.

After Brooke learned that Arleen had signed the trust documents on her behalf, she asked to be removed as trustee. On the new signature page, respondent witnessed the signatures of only Arleen and Lindsey. Brooke's signature line was marked "N/A," while Allie and Jodie signed both the signature and witness lines.

According to the hearing panel report, respondent conceded that the jurat was false but asserted that Arleen had the authority to sign the trust documents on behalf of her absent daughters.

Kinda Trust Dispute

In 2013, Jeffrey questioned Arleen's authority to serve as a trustee of the Kinda Trust. Prior thereto, in 1996, Jeffrey's mother, Claire Lichtenstein, had created the Claire Lichtenstein Family Trust Fund (the Claire Trust), naming respondent as the co-trustee. Jeffrey and his brother, Steven, were beneficiaries.

In 2010, the Claire Trust was amended to require that any distributions to Jeffrey be made to the Kinda Trust, for the benefit

of Jeffrey's children. After Claire's death in 2013, the Claire Trust was required to make distributions to Steven and to the Kinda Trust. Respondent, as trustee, insisted that both Jeffrey and Arleen, as trustees of the Kinda Trust, execute a refunding bond and release for the distribution.

Jeffrey refused, claiming that, because Arleen was not a proper trustee on the Kinda Trust, her signature was not required. Although Jeffrey had asked, in 2005, that Arleen be added as a co-trustee, he now asserted that the Kinda Trust did not allow for the appointment of a second trustee. He claimed that, during the probating of his mother's estate, an attorney reviewed the Kinda Trust documents and questioned the appointment of a co-trustee. Jeffrey was told that the addition of Arleen as a co-trustee was invalid under the trust agreement. He claimed that he "fired" respondent as a result of what Jeffrey viewed as incorrect legal advice.

On November 26, 2013, Jeffrey sent a "Notice of Termination" to Arleen, stating that she was not properly appointed as a trustee, she had no authority to execute any documents for the Kinda Trust, and, if she did so, it would be considered fraudulent. Arleen forwarded Jeffrey's notice to respondent, who told her in an e-mail, that the notice was "inaccurate" and he disagreed with Jeffrey's position, citing to specific language in the Kinda Trust document

he had prepared.[6] Respondent claims that this information was provided in his capacity as trustee of the Claire Trust, not as legal counsel.

Respondent attempted to resolve the Kinda Trust dispute by acting as an intermediary between Arleen and Jeffrey, but he was unsuccessful. The last involvement respondent had with the Kinda Trust was in October 2013, at which time, the Kinda Trust dispute was still ongoing.

In his brief to us, respondent limited his argument to the RPC 8.4(c) finding. He reiterated that he was acting in his capacity as notary public and not an attorney and, therefore, should not be held responsible under the Rules of Professional Conduct for acknowledging the false signatures. In the alternative, he alleged that, if he is subject to the RPCs, his conduct amounted to "mere negligence" and did not constitute an ethics violation.

The DEC found that respondent violated RPC 8.4(c) by witnessing Arleen execute the trust documents and sign her daughters' names, and then misrepresenting that the daughters had personally appeared before him. The panel concluded that an admonition was the appropriate discipline because respondent believed that Arleen had

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[6] Although it is not relevant to the finding of whether respondent engaged in a conflict, the presenter produced an expert witness who testified that the amendment, adding Arleen as trustee, was invalid.

the authority to sign the trust document on behalf of her daughters, there was no intent to defraud or harm anyone, the original trust document was never used for any purpose, and respondent appreciated that his actions were wrong. The panel declined to find that respondent's disciplinary history (a 2001 reprimand for conflict of interest, commingling, and recordkeeping) amounted to an aggravating factor because that infraction had occurred thirteen years earlier and was not related to the present violation.

The DEC dismissed the remaining counts of the complaint. In considering the allegations related to the IRS subpoena, the panel found that the evidence failed to establish violations of RPC 1.1(a) and RPC 1.6(a). The DEC determined that respondent had made several good faith attempts to contact Jeffrey about the IRS subpoena and that Jeffrey had to have received the final letter. Further, the DEC found that respondent's failure to send a copy of the documents to Jeffrey did not violate RPC 1.1(a).

Likewise, the panel found that the documents provided to the IRS were not confidential or protected by the attorney-client privilege. Therefore, there was no evidence to support a finding of a violation of RPC 1.6. The panel found that respondent was obligated to reply to the IRS.

Additionally, the DEC declined to find that a conflict arose as a result of respondent's involvement in the Kinda Trust dispute. The complaint alleged that respondent represented Arleen in a matter

adverse to Jeffrey, his former client, when he discussed with her the validity of her status as co-trustee of the Kinda Trust. Determining that respondent was acting in his capacity as a trustee and not legal counsel, the DEC declined to find that respondent violated RPC 1.9(a). The DEC, thus, recommended that respondent receive an admonition for his sole violation of RPC 8.4(c).

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.

The Court has long held that the requirements for the execution of jurats and the taking of acknowledgements must be met in all respects. In re Surgent, 79 N.J. 529, 532 (1979). Five steps are required to notarize documents properly:

> (1) the personal appearance by the party before the attorney;
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> (2) the identification of the party;
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> (3) the assurance by the party signing that he is aware of the contents of the documents;
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> (4) the administration of the oath or acknowledgment by the attorney; and
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> (5) execution of the jurat or certificate of acknowledgment by the attorney in presence of the party. Jurats and Acknowledgments, Disciplinary Review Board Notice to the Bar, 112 N.J.L.J. 30 (July 14, 1983).
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> [In re Friedman, 106 N.J. 1, 7-8 (1987).]

Here, respondent clearly did not abide by the requirements for notarizing documents and, as a result, violated RPC 8.4(c). The testimony and respondent's own admissions establish that he permitted Arleen to sign on behalf of her daughters, who were not present, and then affixed his jurat to the trust documents.

Respondent attempts to excuse his conduct by alleging that he did not sign the jurat to the Arleen Rubin Trust as an "Attorney at Law" but as a Notary Public. Respondent therefore maintains that the hearing panel did not have jurisdiction over his conduct as a Notary Public. However, as noted earlier, respondent clearly was acting in a legal capacity in assisting Arleen in the creation and execution of the Arleen Rubin Family Trust. She did not come to respondent solely for the purpose of witnessing signatures.

Furthermore, an attorney's conduct, even outside the practice of law, is subject to discipline. In re Kinnear, 105 N.J. 391 (1987). "It is well-established that private conduct of attorneys may be the subject of public discipline." In re Magid, 139 N.J. 449, 454 (1995).

We cannot agree with the DEC's conclusion that respondent was acting in his capacity as trustee by his advice to Arleen in respect of the Kinda Trust and thus did not violate RPC 1.9(a). Rather, the evidence clearly establishes that respondent represented Arleen for various transactions – even those unrelated to Jeffrey. Arleen herself indicated that she knew respondent for thirty years and would not call anyone else for legal advice. In this context, it is

not plausible to suggest that the attorney-client relationship simply can be "switched off."

Moreover, respondent clearly gave Arleen a legal opinion on his interpretation of the Kinda Trust documents and on the authority to appoint a co-trustee. Respondent's e-mail to Arleen indicated that he had reviewed the Kinda Trust document and reiterated specific language of the document. Respondent, as trustee of the Claire Trust, would not have been privy to this information. In his capacity as counsel to Arleen and Jeffrey, however, he did have access to these details. Further, the e-mail to Arleen indicated "THIS TRANSMISSION HAS BEEN SENT FROM THE LAW OFFICES OF WALTER D. LEVINE, ESQ., . . .," further supporting the conclusion that respondent was acting in a legal capacity.

RPC 1.9(a) prohibits an attorney who represented a client in a matter from thereafter representing another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client, except on the former client's informed written consent. Respondent represented Jeffrey for many years and, in 1996, at the request of his client, respondent prepared the documents to establish the Kinda Trust, naming Jeffrey as the sole trustee. In 2005, Jeffrey asked respondent to amend the Kinda Trust to add Arleen as co-trustee. Respondent drafted the amendment and sent it to Jeffrey. This was the last work

in respect of the Kinda Trust respondent performed on behalf of Jeffrey.

After Claire's death in 2013, the Claire Trust was required to make distributions to Steven and to the Kinda Trust. Respondent, as co-trustee of the Claire Trust, insisted that both Jeffrey and Arleen, as co-trustees of the Kinda Trust, execute a refunding bond and release for the distribution. Jeffrey refused, claiming that Arleen was not a proper trustee on the Kinda Trust. On November 26, 2013, Jeffrey sent a "Notice of Termination" to Arleen, stating she was not properly appointed as a trustee. Arleen forwarded Jeffrey's notice to respondent, who advised Arleen in an e-mail that the notice was "inaccurate" and that respondent disagreed with Jeffrey's position. In offering his opinion, he cited to specific language in the Kinda Trust document he previously had prepared and analyzed Jeffrey's position in the context of those provisions. His analysis led to the conclusion that Jeffrey was wrong.

There can be no doubt that respondent rendered a legal opinion and that his opinion was "materially adverse" to Jeffrey's interests. Thus, by rendering legal advice to Arleen in the same matter in which he had previously represented Jeffrey, respondent violated RPC 1.9(a).

We agree with the DEC's conclusion that respondent did not violate RPC 1.1(a) (gross neglect) by his failure to communicate with Jeffrey about the IRS subpoena and then by failing to provide

a copy of those same documents to Jeffrey. The evidence clearly establishes that respondent attempted to contact Jeffrey on multiple occasions at several different mailing addresses. Jeffrey offered no explanation for his failure to receive even the final letter, which was sent to a forwarding address provided by the United States Postal Service. However, even if we were to determine that respondent should have done more in that respect, his failure to do so, without more, would constitute merely a single act of simple neglect, which does not rise to a violation of RPC 1.1(a) (gross neglect). See, In the Matter of Donald M. Rohan, 184 N.J. 287 (2005). Similarly, respondent's failure to provide a copy of the documents that he sent to the IRS does not support a finding of gross neglect for the same reason.

We also agree with the DEC's conclusion that respondent did not violate RPC 1.6(a) (revealing confidential information) by providing the subpoenaed documents to the IRS, without Jeffrey's authorization, for two reasons.

First, like the hearing panel, we do not consider the documents provided by respondent to constitute confidential communications. "The major focus of the attorney-client privilege has historically and traditionally been upon the communications that occur or information that is exchanged between an attorney and his or her client relating to the special attorney-client relationship." In re Opinion 544, 103 N.J. 399, 405 (1986). The Court has noted that the

attorney-client privilege "is recognized as one of the oldest of the privileges for confidential communications," the dominant justification for which is to encourage free and full disclosure of information by the client to the attorney. Ibid. It is true that the Court acknowledged that RPC 1.6 expands the scope of protected information beyond the traditional attorney-client privilege to include all information relating to the representation, regardless of the source of that information. Thus, under a literal reading of the Court's opinion, anything in Jeffrey's client file was entitled to the protections set forth in RPC 1.6. However, the attorney-client privilege ordinarily is waived when a confidential communication between an attorney and a client is revealed to a third party "without coercion and with knowledge of his right or privilege." Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 323 (2010).

Here, the bulk of the documents identified in the IRS subpoena were tax forms and returns that had been filed with the IRS either by Jeffrey himself or in his behalf. Such clearly is the intention of any taxpayer who provides financial documentation to a preparer, be that person an accountant or an attorney – that ultimately, those forms and returns will be filed with the IRS. Indeed, the documentation supports, and is intended to support, the return that the taxpayer is required by law to file. The returns and supporting documents were knowingly and willingly filed with the IRS by or on

behalf of the taxpayer, Jeffrey, and thus should be accorded no expectation of privilege or confidentiality – and certainly not vis-à-vis the IRS. A similar analysis applies to the New Jersey Department of Labor materials. Respondent filed those documents with that agency with intent, for a specific purpose, and with no expectation of privilege or confidentiality.

We also agree with Stone's conclusion regarding the nature of the IRS subpoena in respect of the World Savings Bank and the communications attendant thereto. A review of the documents respondent provided pursuant to the instant subpoena discloses that they consist of nothing more than a copy of the previous subpoena, issued by the IRS itself, a short cover note from Jeffrey asking respondent to "reply" or "intercede" to stop the action, and a letter from respondent to Jeffrey declining to represent him in the matter. Clearly, no attorney-client relationship had been established and no substantive consultation had occurred that otherwise would be protected by RPC 1.18(a). Moreover, we also are cognizant of the fact that the previous subpoena had been issued by the very same entity that issued the instant subpoena. We simply cannot find any expectation of confidentiality under these circumstances – again, at least vis-à-vis the IRS.

We cannot reach the same conclusion in respect of the documents relating to the Kinda Trust, however, bringing us to the second reason we do not find that respondent violated RPC 1.6(a) by

providing all of the documents detailed above to the IRS pursuant to its subpoena.

Although RPC 1.6(a) generally prohibits a lawyer from revealing confidential information relating to the representation without the client's consent, the Rule also provides for certain exceptions. Specifically, RPC 1.6(d)(4) allows an attorney to reveal confidential information without the client's consent to the extent the lawyer reasonably believes necessary to comply with other law. Cases addressing this exception and identifying what might constitute "other law" are scarce. Clearly, a court order requiring disclosure of otherwise confidential information would satisfy that condition. See, e.g., Fellerman v. Bradley, 99 N.J. 493 (1985) (attorney must disclose his client's address pursuant to trial court's order compelling him to do so), and Horon Holding Corp. v. McKenzie, 341 N.J. Super. 117 (App. Div. 2001) (attorney required to disclose the current whereabouts of his former client, who had absconded to avoid paying a judgment). Beyond that specific exception, the guidance is limited. The Court has acknowledged, however, that if disclosure of confidential information were sought pursuant to a valid statute, rule, or regulation, disclosure without client consent well might be considered permissible. See, In re Opinion 544, 103 N.J. 399, 411 (1986). We believe such to be the case here.

As noted earlier, Section 7210 of the Code of the Internal Revenue Service subjects a person who does not comply with a valid IRS summons or subpoena to both criminal and civil penalties. Respondent attempted to communicate with Jeffrey to inform him of the subpoena and of his right to challenge it. Moreover, in light of the IRS third-party notification procedures, respondent reasonably could have assumed that Jeffrey also received notice from the IRS. Respondent received no communication back from Jeffrey in respect thereof. Although it is true that an attorney may not interpret his client's silence as consent, see, e.g. Advisory Committee of Professional Ethics Committee Opinion No. 145, 92 N.J.L.J. 97 (1969), under the circumstances, even if the documents respondent produced were protected or privileged, respondent had a reasonable belief that he was required to provide them to the IRS in compliance with the Internal Revenue Code. Thus, his conduct in releasing the documents pursuant to the IRS subpoena fell within the "other law" exception to client consent. Therefore, in our view, this charge should be dismissed as not clearly and convincingly established.[7]

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[7] It bears noting again that there is a paucity of case law in the ethics arena interpreting RPC 1.6(d)(4). Given that scarcity, we do not believe it appropriate to impose discipline on respondent, who otherwise acted in good faith. See, In re Seelig, 180 N.J. 234 (2004).

In sum, respondent is guilty of violations of both RPC 8.4(c) and RPC 1.9(a). The only issue remaining is the appropriate quantum of discipline for those violations.

Attorneys who have taken improper jurats or signed the names of others, with authorization, are guilty of misrepresentation, in violation of RPC 8.4(c). In re Hock, 172 N.J. 349 (2002). The sanction for the improper execution of jurats, without more, is ordinarily either an admonition or a reprimand. When the attorney witnesses and notarizes a document that has not been signed in the attorney's presence, but the document is signed by the legitimate party or the attorney reasonably believes it has been signed by the proper party, the discipline is usually an admonition. See In the Matter of William J. Begley, DRB 09-279 (December 1, 2009).

If there are aggravating factors, such as the attorney's direction that a secretary or another person sign the party's name on a document that the attorney then notarizes, harm to the parties, the attorney's personal stake in the transaction, or discipline for prior violations, then the appropriate discipline is a reprimand. See In re Russell, 201 N.J. 410 (2010).

In In re LaRussa, Jr., 188 N.J. 253 (2006), the Court imposed a reprimand on the attorney for permitting a client to sign her husband's name and then affixing his jurat. The attorney filed a complaint on behalf of a client involved in a personal injury matter and named the client's husband as a co-plaintiff for lack of

consortium. A settlement of $22,500 was proposed. The client's husband, however, failed to appear at the attorney's office to execute the release. The client stated that her husband "just didn't want to be bothered, but that she had his full permission to sign whatever forms were necessary to effectuate the settlement." The attorney permitted the client to sign her husband's name on the release. The husband later denied having authorized his wife to sign his name. The Court held that affixing a jurat to a document with an illegitimate signature warrants a reprimand.

Here, respondent permitted Arleen to sign, in his presence, on behalf of her daughters. The DEC found, in mitigation, that respondent appreciated the wrongfulness of his actions, notwithstanding respondent's position that he believed Arleen had the authority to sign her daughters' names. The record, however, does not support his contention that Arleen had such authority and testimony by the daughters suggested otherwise.

As to respondent's violations of RPC 1.9(c), it has been a well-established principle that a reprimand is the measure of discipline imposed on an attorney who engages in a conflict of interest. In re Berkowitz, 136 N.J. 148 (1994). Accord In re Mott, 186 N.J. 367 (2006) (reprimand for conflict of interest imposed on attorney who prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest

in the company to the buyers, the attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a written waiver of the conflict of interest from them); and In re Poling, 184 N.J. 297 (2005) (reprimand imposed on attorney who engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned – a fact that he did not disclose to the buyers, in addition to his failure to disclose that title insurance could be purchased elsewhere). But, see, In the Matter of Jeffrey E. Jenkins, DRB 97-384 (December 2, 1997) (admonition imposed on attorney who engaged in a concurrent conflict-of-interest by continuing to represent husband and wife in a bankruptcy matter after the parties had developed marital problems and had retained their own matrimonial lawyers).

The Court previously has imposed a reprimand on an attorney who was guilty of both a conflict of interest and a misrepresentation. In In re Kennedy, 174 N.J. 374 (2002), the attorney was reprimanded for a conflict of interest for representing buyers of real property in two transactions that also involved his wife as the real estate broker or agent, in violation of RPC 1.7(b) (concurrent conflict of interest), and for misrepresentation by silence, in violation of RPC 8.4(c). The attorney closed title without sufficient funds from the buyers and failed to inform the sellers' attorney of this

circumstance. He also gave the sellers' attorney inaccurate RESPA statements reflecting that sufficient settlement funds were provided to close title. We found in aggravation that respondent refused to acknowledge any wrongdoing, he benefitted personally through his wife's receipt of the real estate commissions, and he prematurely disbursed the sellers' funds to pay her commission. In mitigation, we considered that, prior to these incidents, the attorney's career of thirty-seven years had been unblemished.

Here, respondent violated RPC 1.9(a) by giving legal advice to Arleen in connection with the Kinda Trust dispute and RPC 8.4(c) for his misrepresentations in executing the jurat as it related to the signatures of Arleen's children.

There are, however, aggravating and mitigating factors to consider. In aggravation, respondent received a reprimand for entering into an improper business transaction with a client, commingling, and recordkeeping violations. That discipline, however, was imposed almost fourteen years ago, and was for unrelated violations. Respondent also refused to acknowledge the wrongful nature of his conduct in this matter. In mitigation, respondent was admitted to the bar in 1965 and has been practicing for fifty years. Although his record is not unblemished, on balance, we determined that a reprimand is the appropriate quantum of discipline.

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 Walter D. Levine
Docket No. DRB 15-082

Argued: May 21, 2015

Decided: December 14, 2015

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera			X			
Singer			X			
Zmirich			X			
Total:			8			

Ellen A. Brodsky
Chief Counsel