SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-082
District Docket Nos. IX-2013-0018E (Caruso), IX-2015-0003E (Panayiotou), and IX-2015-0016E (Kinard/Bercik)

IN THE MATTER OF	:
MAXWELL X. COLBY	:
AN ATTORNEY AT LAW	:

Decision

Decided: August 29, 2017

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

This matter was before us on a certification of default filed by the District IX Ethics Committee (DEC), pursuant to R. 1:20-4(f). The complaint charged respondent with having violated RPC 1.1 (presumably (a)) (gross neglect) (three counts); RPC 1.3 (lack of diligence) (three counts); RPC 1.4 (presumably (b)) (failure to keep the client reasonably informed as to the status of the matter) (three counts); RPC 1.5(a) (unreasonable fee); RPC 1.5(b) (failure to communicate in writing the rate or basis of the fee); RPC 1.15(d) (recordkeeping); RPC 3.3(a)(5) (failure to disclose a

material fact to a tribunal) (two counts); RPC 3.4(c) (knowingly disobey the rules of a tribunal) (four counts); RPC 5.5(a)(1) (practicing while administratively ineligible) (four counts); RPC 8.1(b) (failure to cooperate with disciplinary authorities); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (four counts); and RPC 8.4(d) (conduct prejudicial to the administration of justice) (two counts). For the reasons detailed below, we determined to impose a one-year suspension.

Respondent was admitted to the New Jersey bar in 1975, and the New York bar in 1984.

On April 30, 2002, the Court reprimanded respondent for his negligent misappropriation of client trust funds due to improper trust and business accounting practices. In re Colby, 172 N.J. 37 (2002). On February 4, 2008, the Court again reprimanded respondent for recordkeeping violations, some of which continued from the time of his first reprimand. In re Colby, 193 N.J. 484 (2008).

Respondent was temporarily suspended on March 24, 2017, for failing to cooperate in an ethics investigation. He remains suspended.

On September 26, 2011, the Court entered an Order declaring respondent ineligible to practice law based on his failure to pay

the annual assessment to the New Jersey Lawyers' Fund for Client Protection (CPF). On October 21, 2011, the Court entered a second Order declaring respondent ineligible to practice law based on his failure to comply with IOLTA requirements. Finally, on November 17, 2014, the Court entered a third Order declaring respondent ineligible to practice, based on his failure to comply with continuing legal education requirements. Respondent remains ineligible to practice.

Service of process was proper in this case. On June 17, 2016, after having previously sent respondent an initial complaint and a first amended complaint, the DEC sent a copy of a second amended complaint, which encompassed District Docket Nos. IX-2013-0018E, IX-2015-0003E and IX-2015-0016E, to respondent at his home address, by both certified mail, return receipt requested, and by regular mail. Neither the return receipt for the certified mail nor the regular mail were returned. On November 10, 2016, the DEC sent a second copy of the second amended complaint to respondent at his home address, and at an Ocean, New Jersey address, by both certified mail, return receipt requested, and by regular mail. The certified mail to respondent's home address was delivered, but the signature is illegible. The regular mail to respondent's home address was not returned. The certified mail to the Ocean, New

Jersey address was returned and marked "unclaimed." The regular mail was not returned.

On November 12, 2016, respondent left a voicemail message for the DEC investigator, stating that he had received the second amended complaint and would be filing an answer in a timely fashion.

As of February 3, 2017, the date of the certification of the record, respondent had not filed an answer to the second amended complaint.

We now turn to the facts alleged in the complaint.

COUNT ONE (Caruso) (IX-2013-0018E)

Joseph Caruso served as long-standing Trustee of the Frank Caruso Irrevocable Trust (the Trust), established by Joseph Caruso's late uncle for the benefit of various relatives. For decades prior to 2010, respondent had provided legal advice and assistance to Caruso and the Caruso family regarding business matters and the trust.

In 2010, several beneficiaries of the Trust raised inquiries regarding the recipients and amounts of certain Trust disbursements that Caruso made as Trustee. Kerry Higgins, Esq., the attorney representing the beneficiaries, requested information

from Caruso related to the history and amount of disbursements made from the Trust. Caruso retained respondent, who memorialized the representation by written fee agreement, defining the subject of the representation as "Review of Trust documents, correspondence, accounting relative to Frank Caruso Irrevocable Trust; respond to request for distribution by beneficiaries; such other services as may be required for administration of the Trust."

In August 2012, after communications between respondent and Higgins regarding a possible settlement of the dispute failed to resolve the matter, Higgins filed a Verified Complaint and Order to Show Cause in the Superior Court of New Jersey, Chancery Division, Monmouth County, Probate Part, on behalf of the beneficiaries. That action sought various forms of relief, including a court-ordered accounting, removal of Caruso as Trustee, termination of the Trust, a final disbursement to all beneficiaries, and assessment of fees and costs against Caruso. In response, Caruso retained and paid respondent an additional $3,500 to handle the matter and to respond to the complaint. At that time, respondent was ineligible to practice law.

Despite taking an additional retainer from Caruso and having several informal discussions with Higgins, respondent did not file an answer to the Complaint or opposition to the Order to Show

Cause. Respondent also failed to remain in contact with Caruso, or to advise him of the status of the litigation, or of his failure to file an answer in Caruso's behalf. Respondent also failed to inform Caruso that:

a) he would not appear at a hearing scheduled for December 14, 2012, before the Honorable Patricia Del Bueno Cleary, J.S.C., on the Order to Show Cause;

b) he was barred from so appearing because the Supreme Court had entered an Order, declaring him ineligible; and

c) Caruso would need to seek other counsel.

On December 14, 2012, respondent appeared at the Monmouth County courthouse, and conveyed to Higgins a desire to resolve the matter. He did not, however, disclose to Caruso or Higgins that he was ineligible to practice and could not serve as Caruso's counsel. Respondent did not enter the courtroom.

Judge Cleary entered an Order (1) requiring Caruso to file an accounting with the court; (2) granting all disbursements to the beneficiaries to which they were entitled; (3) removing Caruso as trustee; (4) naming a substitute trustee; (5) granting to the beneficiaries all fees taken by Caruso as trustee; (6) granting to the beneficiaries attorney's fees and costs of suit; and (7) ordering final disbursement to all beneficiaries, along with the termination of the Trust. Respondent then failed to notify Caruso

of the outcome of the matter, including the fact that the court had ordered Caruso to conduct an accounting and to pay fees and costs. Respondent also failed to answer Caruso's several inquiries regarding the status of the matter. Caruso inadvertently learned of the outcome months later, through the Surrogate's Office.

In the spring of 2013, after learning of the adverse disposition of the litigation, Caruso retained new counsel, Suzana Hot, Esq., to assist him with the court-ordered accounting. Hot attempted to communicate with respondent, both in writing and by telephone, to gather information and secure a substitution of counsel. Other than leaving one telephone message after office hours, respondent did not reply to Hot's inquiries or otherwise assist in transferring the file to her.

COUNT TWO (Panayiotou) (IX-2015-0003E)

In July 2011, Anna and Andrea Panayiotou retained respondent in connection with foreclosure proceedings related to their property located on Ocean Avenue in Sea Bright, New Jersey. Anna made three fee payments totaling $3,000 to respondent. He did not provide a written retainer agreement or other writing defining the nature and scope of the representation.

The Panayiotous had fallen behind in their mortgage payments, which led to mounting interest payments and a foreclosure action. Anna suspected that her mortgage broker had committed fraud in filing her mortgage application, by falsely inflating her assets and failing to obtain her signature on the application. Respondent initially reviewed the matter and advised Anna to stop making mortgage payments so that he could establish that the mortgage broker had committed fraud and, accordingly, secure a "principal reduction" and "modification" for them. Respondent never took any action to negotiate or secure such a resolution, failed to institute any action against the mortgage broker, and eventually stopped communicating with the Panayiotous.

Subsequently, the Panayiotous made many attempts to reach respondent by telephone and e-mail, including at least twelve e-mails sent between June 25, 2012 and January 13, 2013. The Panayiotous took no action on their own behalf in connection with the foreclosure situation, relying on a mistaken belief that respondent was protecting their interests.

Finally, having received no communication from respondent by late 2012, the Panayiotous contacted another attorney. Respondent eventually contacted Anna, when he learned that she would be filing

a claim to have the fees returned. Respondent indicated that he would contact her, but never followed up.

Despite having been declared ineligible to practice law in New Jersey as of September 26, 2011, respondent neither informed the Panayiotous that he could not serve as their counsel nor took any steps to terminate the representation.

COUNT THREE (Kinard/Bercik) (IX-2015-0016E)

Rebecca Kinard died in November 2014. She had five children, one of whom pre-deceased her. Wanda Kinard, Rebecca's daughter, who had resided with her, was named Executrix of the estate (the Estate). In January 2015, Wanda contacted respondent for his assistance in probating Rebecca's will and settling her estate. Wanda met with respondent in his law office, where she signed a fee agreement and paid him a retainer. Respondent never advised Wanda that he was ineligible to practice law or that she should seek other counsel.

During their initial meeting, respondent represented that he would admit the will to probate in Monmouth County. Respondent also requested the names and addresses of Wanda's siblings, indicating that he would send letters to each. He sent no letters

and took no action to admit the will to probate or to settle the estate.

In February 2015, Wanda learned that her sister, Andrea Harrison, had hired her own attorney to assert an application to assume responsibility for the administration of the estate. On February 17, 2015, Lauren Bercik, Esq., attorney for Harrison, sent a letter to Wanda, requesting that she turn over the original will and sign a renunciation in favor of Harrison's appointment as administrator. On April 15, 2015, after receiving no response, Bercik filed a complaint, on behalf of Harrison, to admit a copy of the will to probate and to appoint Harrison as administrator.

Sometime thereafter, Wanda met with respondent at his law office, where he assured her that he would handle the matter. He then called Bercik, in Wanda's presence, to attempt to address Harrison's issues. Respondent informed Bercik that his client was not in possession of the original will, but claimed that he had drafted, and intended to file, a complaint to admit a copy of the will to probate. He further lamented that Bercik "beat him to it" before he could finish drafting his pleadings, adding that he planned to file his complaint, nevertheless, and to ask the court to consolidate the cases. Bercik suggested that, rather than filing a similar complaint, respondent file opposition to the complaint,

because the only issue was whether Wanda or Harrison would be appointed administrator. Although respondent pressed Bercik to agree to their clients' serving as co-administrators, Bercik would not consent.

After the call, Bercik consulted the Lawyer's Diary and the New Jersey Attorney Index and discovered respondent's ineligible status. She then telephoned respondent, suggesting that he call her when his client was no longer present. When he eventually returned her call, Bercik told respondent that she was aware of his ineligibility. Respondent "assured" her that he "was in the process of taking care of it" and that he expected it to be resolved "shortly." Bercik invited him to contact her once his status was restored, but respondent "immediately recommenced attempts to negotiate a deal to make [their] clients co-administrators." Bercik refused to entertain settlement discussions until he cured his ineligibility.

Respondent failed to inform his client of his ineligibility, to recommend that she engage new counsel, or to take any steps to cure his ineligibility. He also failed to file opposition to the complaint filed by Bercik. Hence, the matter was scheduled for June 19, 2015, to be decided on the papers.

On June 17, 2015, Bercik received an e-mail from respondent, asking her to call or meet him to discuss the case. Bercik did not respond to the e-mail. On June 19, 2015, respondent, who was wearing a suit and holding a file, approached Bercik while she was appearing at the Monmouth County Courthouse on another matter. Indicating that his file contained documents that Bercik should review, he began again to urge her to agree to a resolution of the dispute. Again, Bercik informed respondent that, due to his ineligibility, she would not discuss the matter with him. She suggested that he deliver the papers to her front desk, and agreed to review them. She remarked that the matter was to be resolved on the papers, as her complaint had proceeded unopposed. Respondent left the courtroom without appearing. He did not leave any documents for Bercik.

Respondent failed to inform Wanda of the adverse determination made in her matter. Upon learning of it, Wanda retained new counsel, Louis David Balk, Esq. Balk attempted to communicate with respondent by telephone and left a voice message, to which he received no response.

COUNT FOUR (Additional Unauthorized Practice of Law and Violation of Court Order)

Although respondent has remained ineligible from September 26, 2011, to the present, he has held himself out as an attorney engaged in the practice of law in these additional instances:

(a) September 17, 2013 letter to the DEC investigator on the letterhead of "Law Offices of [respondent], Member N.J. and N.Y. Bars;"

(b) November 17, 2014 letter to the DEC investigator, under the same letterhead;

(c) April 24, 2015 e-mail to the DEC investigator, under the same letterhead; and

(d) April 28, 2015 letter to the DEC investigator, under the same letterhead.

COUNT FIVE (Failure to Cooperate)

In a September 7, 2013 letter to the DEC investigator regarding the Caruso matter, respondent stated, "I do have an extensive file on this matter. Should you require additional information, please so advise me and I will comply as expeditiously as possible." Although the investigator sent three letters to respondent requesting additional information, respondent did not provide his file or any further records in the Caruso matter.

Further, respondent submitted no reply to the Kinard grievance, despite the DEC's specific request that he do so.

* * *

The facts recited in the formal ethics complaint support some of the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1). Notwithstanding that Rule, each charge in an ethics complaint must be supported by sufficient facts for us to determine that unethical conduct occurred.

In the Caruso matter, despite his ineligibility, in August 2012, respondent accepted a $3,500 fee from Caruso for representation regarding a complaint filed against him by the beneficiaries of the family trust.

Respondent then failed to answer the Complaint and Order to Show Cause filed against Caruso, and failed to communicate with Caruso regarding the status of his matter and the adverse resolution of his case. Respondent's conduct in this respect violated RPC 1.1(a), RPC 1.3, and RPC 1.4(b).

Further, by knowingly practicing law while ineligible, respondent violated RPC 3.4(c) and RPC 5.5(a)(1). By failing to

inform Caruso of his ineligibility and of the need for him to seek other counsel, respondent made a misrepresentation by silence, a violation of RPC 8.4(c). Although respondent's failure to inform Caruso of the outcome of the motion also constituted a misrepresentation by silence, the complaint did not charge respondent with a violation of RPC 8.4(c) in that regard. Thus, we make no finding in that respect. See Rule 1:20-4(b).

The facts alleged in the complaint, however, do not support the charged violations of RPC 3.3(a)(5) and RPC 8.4(d). Those charges were based on respondent's appearance at the courthouse on the return date of the Order to Show Cause. The complaint alleged that respondent did not enter the courtroom, but, instead, allowed the application to proceed unopposed, on the papers. The complaint further alleged that, by failing to inform the court that he was ineligible to practice and that his client was unrepresented, respondent withheld a material fact, knowing that its omission would likely mislead the court. In this context, however, the allegations of the complaint do not support the conclusion that respondent made any representations to the court in respect of his eligibility to practice or about the matter itself. Similarly, the complaint is devoid of any facts to support the conclusion that the administration of justice was prejudiced

by respondent's appearance at the courthouse, by his failure to oppose the application, or by his failure to enter the courtroom and inform the court that his client was not represented. Thus, we dismiss those charges.

In the Panayiotou matter, respondent failed to prepare a written retainer agreement defining the nature and scope of the representation. Moreover, shortly after initiating the representation, respondent stopped working on the matter. He took no action to secure resolution of the matter, instituted no claim against the mortgage broker suspected of fraud, and ceased all communication with his clients, despite their repeated attempts to communicate with him.

Respondent's failure to take any action on behalf of his clients to either contest their foreclosure matter or negotiate a resolution of it violated RPC 1.1(a) and RPC 1.3. His failure to communicate with his clients or respond to their repeated attempts to reach him violated RPC 1.4(b).

The facts alleged in the complaint, however, do not support violations of RPC 1.5(a) and (b). Specifically, although the complaint alleges that respondent's failure to act diligently or to communicate with his clients renders his $3,000 fee unreasonable, in violation of RPC 1.5(a), it contains no facts in

support of that allegation. To sustain that charge, the facts alleged must demonstrate why the amount charged is unreasonable in relation to the results achieved, the amount of work performed, and the usual and customary fee in the locality for similar services, among other things. See RPC 1.5(a)(1-8). The fact that respondent failed to perform the services for which he was retained does not, of itself, render the fee unreasonable. Rather, respondent's retention of the retainer, in the context of these facts, more properly is categorized as a failure to return an unearned retainer, a violation of RPC 1.16(d). Because the complaint did not charge a violation of that Rule, we make no finding in that respect. We, therefore, dismiss the RPC 1.5(a) charge.

The complaint also alleged that respondent violated RPC 1.5(b) by failing to provide a written retainer agreement or executing a writing defining the nature and scope of the representation. RPC 1.5(b) requires such a writing only when the attorney has not regularly represented the client in the past. The complaint, however, was devoid of any facts in that respect. Thus, we dismiss that charge as well.

Further, although respondent became ineligible to practice law during the course of the representation, the complaint lacks

any facts detailing how he continued to practice on behalf of the Panayiotous, after he was declared ineligible. To the contrary, the complaint establishes that he did nothing on their behalf. Thus, without more, we also dismiss the alleged violations of RPC 3.4(c) and RPC 5.5(a)(1).

However, respondent's failure to notify his clients that he had become ineligible to practice or to advise them to seek other counsel, constituted a misrepresentation by silence, a violation of RPC 8.4(c).

In the Kinard/Bercik matter, respondent agreed to the representation and accepted a retainer in January 2015, well after he had been declared ineligible to practice law in New Jersey. Thereafter, he did little to no work on the matter. He failed to communicate with Wanda's siblings concerning their mother's estate and took no action to probate the will or settle the estate. Respondent's inaction prompted Wanda's sister to retain her own attorney, who filed a complaint to admit a copy of the will to probate. Although respondent met with Wanda thereafter, assured her that he would handle the matter, and called Bercik in Wanda's presence, he did nothing more to protect her interests.

When Bercik learned of respondent's ineligibility and refused thereafter to deal with him until he resolved his status,

respondent assured her that he would address his ineligibility. He did not do so. Nonetheless, on June 19, 2015, the day Bercik's Order to Show Cause was returnable, respondent approached Bercik at the Monmouth County Courthouse and attempted to negotiate a resolution to the matter, despite his continuing ineligibility.

Eventually, Wanda learned of the adverse disposition of the matter and retained new counsel, who attempted to contact respondent, to no avail.

Respondent failed to perform any substantive work on Wanda's matter and allowed the complaint to remain unopposed, resulting in a negative outcome for his client. In so doing, respondent violated RPC 1.1(a) and RPC 1.3. He also failed to communicate with Wanda regarding the status of her matter and the adverse resolution thereof, a violation of RPC 1.4(b).

Further, by accepting and continuing the representation of Wanda, respondent practiced law while ineligible. He did so knowingly after Bercik had confronted him about his status, although it is clear that respondent was aware of his ineligibility prior to his engagement. In so doing, respondent violated both RPC 3.4(c) and RPC 5.5(a)(1). Moreover, by failing to inform his client of his ineligibility, respondent made a misrepresentation by silence, a violation of RPC 8.4(c).

However, for the reasons set forth in the Caruso matter, we determine that the facts alleged in the complaint do not support the charged violations of RPC 3.3(a)(5) and RPC 8.4(d). Thus, we dismiss those charges.

In addition to respondent's misconduct in the aforementioned client matters, the complaint cites four communications from respondent, to the DEC investigator, that contained his law firm's letterhead. On that basis, the complaint alleges that respondent practiced law while ineligible. We disagree.

In a 2014 matter, an attorney, during a period of ineligibility, sought to be relieved from previously imposed monitoring and reporting requirements. According to the complaint, the attorney had sent his January 12, 2012 petition to the Court on his attorney letterhead, which referenced him as an "Attorney at Law." Moreover, in his certification in support of the petition, he stated that he maintained an office for the practice of law in Newark. In re Al-Misri, 220 N.J. 352 (2015), In the Matter of Ousmane D. Al-Misri, DRB 14-097 (slip op. at 3) (October 3, 2014).

Al-Misri explained that he mistakenly believed that all dealings with the Court should be done on his attorney letterhead, because he is an attorney of this State. We determined that the attorney did not intend to practice law by the use of his attorney

letterhead, when petitioning the Court. We noted that no member of the public was misled by the attorney's use of his letterhead, as he was acting in a pro se capacity. Id. at 10.

Thus, we declined to find that Al-Misri "practiced law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction." Rather, at most, any misconduct in this regard was de minimis and, as such, did not warrant discipline. Al-Misri was also faulted for having stated, in his application to the Court, that he maintained an office for the practice of law. We noted, however, that there is no prohibition against an ineligible attorney maintaining an office for the practice of law, so long as the attorney does not actually practice law during a period of ineligibility, and, therefore, made no finding of unethical conduct in this context. Id.

Finally, we found Al-Misri guilty of a failure to cooperate with ethics authorities, a violation of RPC 8.1(b), by ignoring the investigator's requests for information on whether he had practiced law during his ineligibility period. Id. at 11. We recommended an admonition. Id. at 12.

The Court issued no discipline, holding Al-Misri's failure to cooperate to be de minimis, and did not disturb our dismissal of the charges of practicing while ineligible.

We consider respondent's use of his attorney letterhead in his communications to the DEC investigator to be similar to Al-Misri's use of his attorney letterhead in his pro se submissions to the Court. Thus, we dismiss the charged violations of RPC 3.4(c), RPC 5.5(a), and RPC 8.4(c) in this respect.

Finally as charged in Count Five of the complaint, respondent is guilty of a failure to cooperate with the DEC's investigation in the Caruso and Kinard/Bercik matters. In 2013, the DEC investigator made three requests of respondent for additional information in the Caruso matter. Despite respondent's having previously informed the investigator that he would provide any required information "expeditiously," he failed to respond to any of the requests. Further, respondent acknowledged service of the grievance against him in the Kinard/Bercik matter, but failed to submit a response, in writing. Respondent's conduct in this regard violated RPC 8.1(b).

However, we do not find that respondent's failure to provide the information requested violated RPC 1.15(d), as alleged in the complaint. That RPC refers to compliance with R. 1:21-6, the recordkeeping rule. Rule 1:21-6 places a clear obligation on an attorney to produce financial records on demand by the OAE. Although the complaint makes reference, by exhibit number, to the

DEC's requests for information, the record before us contains no such exhibits. Thus, it is not clear that respondent was asked to produce financial records, as opposed to a written response to the grievance or some other non-financial record, such as, for example, a client file. If he was directed to produce financial records and failed to do so, then he could be found to have violated RPC 1.15(d), based on that failure. But if he failed to submit a written response to the grievance (or some other non-financial document), then he may be found to have violated only RPC 8.1(b). For these reasons, we dismiss the alleged violation of RPC 1.15(d).

In sum, respondent violated RPC 1.1(a); RPC 1.3; and RPC 1.4(b) in three matters (Caruso, Panayiotou, and Kinard/Bercik); RPC 3.4(c) and RPC 5.5(a)(1) in two matters (Caruso and Kinard/Bercik); RPC 8.1(b) (count five); and RPC 8.4(c) in three matters (Caruso, Panayiotou, and Kinard/Bercik).

Practicing law while ineligible for failure to comply with IOLTA or CPF requirements, without more, is generally met with an admonition, if the attorney is either unaware of the ineligibility or advances compelling mitigating factors. See, e.g., In the Matter of Robert B. Blackman, DRB 10-137 (June 18, 2010) (attorney practiced law while ineligible for failure to file the annual

IOLTA registration statement for three years; the attorney did not know that he was ineligible).

A reprimand or greater discipline may be imposed when the attorney has an extensive ethics history, has been disciplined for conduct of the same sort, has committed other ethics improprieties, or is aware of the ineligibility and practices law nevertheless. See, e.g., In re Moskowitz, 215 N.J. 636 (2013) (reprimand; attorney practiced law knowing that he was ineligible to do so); In re Jay, 210 N.J. 214 (2012) (reprimand; attorney was aware of ineligibility and practiced law nevertheless; prior three-month suspension for possession of cocaine and marijuana); In re (Queen) Payton, 207 N.J. 31 (2011) (reprimand; attorney who practiced law while ineligible was aware of her ineligibility and had received an admonition for the same violation); In re D'Arienzo, 217 N.J. 151 (2014) (censure for attorney whose recklessness in not ensuring that payment was sent to the CPF was deemed "akin to knowledge on his part"; in aggravation, the attorney had an extensive disciplinary history, which included a 2013 reprimand for practicing while ineligible); In re Macchiaverna, 214 N.J. 517 (2013) (attorney censured for practicing law while ineligible, knowing that he was ineligible, and for recordkeeping violations; an aggravating factor was the attorney's prior reprimand for

recordkeeping violations that led to the negligent misappropriation of client funds; the attorney also did not appear on the return date of the Court's Order to show cause); In re Lynch, 186 N.J. 246 (2006) (censure for attorney who, aware of his ineligibility, practiced law during that period; the attorney had a prior admonition and a reprimand); In re Horowitz, 180 N.J. 520 (2004) (three-month suspension for attorney who practiced law while ineligible and failed to cooperate with disciplinary authorities during the investigation of the matter; the attorney also lacked diligence in the representation of the client and did not inform the client of the dismissal of the complaint; default matter); and In re Raines, 176 N.J. 424 (2003) (in a default case, three-month suspension for attorney who practiced law while ineligible and failed to cooperate with disciplinary authorities in the investigative stage of the matter; the attorney also lacked diligence in the client's case and failed to properly communicate with the client).

Here, much like the attorneys in Horowitz, supra, and Raines, supra, respondent knowingly practiced law while ineligible, failed to cooperate with disciplinary authorities, lacked diligence and neglected his client's matters, failed to communicate with his clients, failed to inform his clients of adverse outcomes in their

matters, and allowed the disciplinary matter against him to proceed by way of default. Those attorneys received a three-month suspension.

However, respondent is also guilty of making misrepresentations to clients.

A misrepresentation to a client requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand still may be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Dwyer, 223 N.J. 240 (2015) (attorney made a misrepresentation by silence to his client, by failing to inform her, despite ample opportunity to do so, that her complaint had been dismissed, a violation of RPC 8.4(c); the complaint was dismissed because the attorney had failed to serve interrogatory answers and ignored court orders compelling service of the answers, violations of RPC 1.1(a), RPC 1.3, and RPC 3.2; the attorney also violated RPC 1.4(b) by his complete failure to reply to his client's requests for information or to otherwise communicate with her for more than eighteen months, and his failure to communicate with her, except on occasion, during a subsequent three-year period, when the client filed a grievance; the attorney never informed his client that a motion to compel had been filed, that the court had entered an order granting the

motion, or that the court had dismissed her complaint for failure to serve the interrogatory answers and to comply with the court's order, violations of RPC 1.4(c)); In re Ruffolo, 220 N.J. 353 (2015) (attorney exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, not working on it after filing the initial claim, and failing to take any steps to prevent its dismissal or ensure its reinstatement thereafter, violations of RPC 1.1(a) and RPC 1.3; the attorney also violated RPC 1.4(b) by failing to promptly reply to the client's requests for status updates; finally, despite knowing that the complaint had been dismissed, he falsely assured the client that the matter was proceeding apace, and that he should expect a monetary award in the near future, a violation of RPC 8.4(c)); and In re Braverman, 220 N.J. 25 (2014) (attorney failed to tell his client that the complaints filed on her behalf in two personal injury actions had been dismissed, thereby misleading her, by his silence, into believing that both cases remained pending, a violation of RPC 8.4(c); the attorney also violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, and RPC 8.1(b); we found that the attorney's unblemished thirty-four years at the bar were outweighed by his inaction, which left the client with no legal recourse).

Based on Horowitz and Raines, and taking into consideration that respondent has allowed this matter to proceed by way of default, we view the starting point for respondent's misconduct to be a three-month suspension. These additional misrepresentations to his clients warrant a further enhancement to a six-month suspension.

In aggravation, respondent has two prior reprimands. Because they were imposed in 2002 and 2008, respectively, they carry considerably less weight than if they were more recent. Nonetheless, this is respondent's third encounter with the disciplinary system, this latest one based on an amended complaint that consolidates three individual disciplinary matters. Further, respondent committed gross neglect in three client matters, which establishes a pattern of neglect. Although not charged in the complaint, this misconduct may be considered in aggravation, especially since respondent not only neglected his clients but also, he did so when he was ineligible to practice and should not have taken on their representation in the first instance.

Moreover, respondent knowingly and brazenly practiced law while ineligible for a minimum of four years. His continued disregard of the Court's Order declaring him ineligible to practice, as well as his misconduct in these certified matters,

leave us with little confidence in his ability or willingness to conform his conduct to the Rules of Professional Conduct.

Thus, we view these aggravating factors to warrant a further enhancement of the otherwise appropriate quantum of discipline. Based on the foregoing case law, and the aggravating factors, we determine to impose a one-year suspension.[1]

Member Gallipoli would disbar. Vice-Chair Baugh and Members Rivera and Zmirich did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

[1] If respondent fails to cure his ineligibility by September 2018, his license will be revoked for failure to pay his annual assessment to the Fund for seven consecutive years. See R. 1:28-2(c).

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Maxwell X. Colby
Docket No. DRB 17-082

Decided: August 29, 2017

Members	One-year Suspension	Disbar	Did not participate
Frost	X		
Baugh			X
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman	X		
Rivera			X
Singer	X		
Zmirich			X
Total:	5	1	3

Ellen A. Brodsky
Chief Counsel