SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-274
District Docket Nos. XIV-2013-0502E
and VB-2017-0900E

IN THE MATTER OF :
DIEGO P. MILARA :
AN ATTORNEY AT LAW :

Decision

Argued: October 19, 2017

Decided: January 22, 2018

Al Garcia appeared on behalf of the Office of Attorney Ethics.

Gerard E. Hanlon 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 censure filed by the District VB Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to keep the client reasonably informed and failure to comply with reasonable requests for information); RPC 1.15(d) (recordkeeping); RPC 5.5(a)(presumably (1)) (practicing law while ineligible); RPC 8.4(b) (presumably RPC 8.1(b)) (failure to

cooperate); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice). For the reasons stated below, we determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1991. He has no history of final discipline. However, respondent has been ineligible to practice law in New Jersey since September 24, 2012, for his failure to pay his annual assessment to the New Jersey Lawyers' Fund for Client Protection (the Fund). In addition, respondent was temporarily suspended on January 22, 2015, for failure to cooperate with the Office of Attorney Ethics (OAE). In re Milara, 220 N.J. 341 (2015). He was temporarily suspended again, on June 12, 2017, for failure to comply with a fee arbitration determination. In re Milara, 229 N.J. 262 (2017). Respondent remains suspended to date.

At the outset of the hearing before the DEC, counsel for respondent stipulated to the facts of the complaint. The panel determined to hear arguments only regarding aggravating and mitigating factors, as well as the appropriate quantum of discipline. Therefore, the following recitation of facts comes directly from the formal ethics complaint. Respondent did not appear or otherwise directly participate in the DEC hearing, as R. 1:20-6(c)(2)(D) requires.

Josephine Carbone (Carbone), grievant, is the managing member of Carbone Developments, LLC. Respondent represented Carbone in a real estate transaction involving property in Bridgewater, New Jersey (the property). Jane Kourakos managed PanHellenic, LLC (PanHellenic). Carbone was also an owner/member of PanHellenic. PanHellenic and Kourakos also were involved in the purchase of the Bridgewater property.

Prior to the purchase, Kourakos and PanHellenic had engaged the legal services of Christopher Hyde, for matters related to the property, but not for the purchase. Kourakos and PanHellenic owed Hyde over $27,000 in legal fees. Pursuant to an agreement, $15,750 was placed in escrow to satisfy Hyde's legal fees. The escrowed funds were held in respondent's attorney trust account (ATA); however, Kourakos, Hyde, and Carbone could not resolve how the escrowed funds were to be distributed.

On August 18, 2012, Carbone requested that respondent send her a copy of her client file. After several months of delay, on November 6, 2012, respondent informed Carbone that he had sent part of the file. In fact, he had not.

Previously, on September 10, 2012, because the parties could not resolve the distribution of escrow funds issue, Hyde had suggested that respondent file an interpleader complaint, to which respondent agreed. Soon thereafter, on September 19, 2012, the

Court issued an Order declaring respondent administratively ineligible to practice law for failing to pay his annual assessment to the Fund, effective September 24, 2012.

Over the course of the following month, Hyde sent several e-mails to respondent inquiring as to the status of the interpleader. On October 26, 2012, notwithstanding his ineligible status, respondent assured Hyde that he would file the interpleader "shortly." Respondent separately informed Kourakos that he would file the interpleader by November 30, 2012.

On December 21, 2012, respondent notified Hyde and Kourakos by way of e-mail, that he had filed the interpleader complaint with the Superior Court of New Jersey, Hudson County, Civil Division on that same day. Throughout this time, beginning in November 2012 and continuing through January 2013, Carbone attempted to contact respondent, presumably about her file.

Eventually, on January 29, 2013, respondent told Carbone he would be sending the file to her the next day. He did not. On February 11, 2013, respondent once again informed Carbone that he had located her entire file and would be sending it. Once again, he sent nothing. Three days earlier, on February 8, 2013, the court scheduled a hearing on the interpleader for March 7, 2013 and denied respondent's request to deposit the escrow funds into the court's account.

Respondent was required to serve the order on all parties within five days of its receipt. Thereafter, the court was unable to contact respondent during the week leading up to the hearing; however, on March 6, 2013, respondent contacted the court and explained that he had failed to serve the order on any of the parties. Hence, on March 22, 2013, the court denied respondent's complaint.

On August 14, 2013, Carbone filed an ethics grievance against respondent, alleging that he had failed to account for the escrow funds related to her real estate transaction or to respond to numerous requests for information regarding the status of those funds. On October 22, 2013, the OAE wrote to respondent, requesting that he provide a written response to the grievance by November 1, 2013. Respondent failed to reply.

On November 22, 2013, the OAE sent a letter to respondent scheduling a demand audit for December 10, 2013, at the OAE, and requesting that respondent provide the OAE with his client files for Carbone, by November 26, 2013. Respondent failed to provide the OAE with his files by November 26, 2013; however, on December 10, 2013, he appeared for the demand audit.

At the audit, respondent explained that he still held the escrow funds in his ATA. He failed, however, to provide the OAE with documents and trust account records that demonstrated that

the escrowed funds remained intact. Specifically, respondent failed to provide the OAE with monthly three-way reconciliations or cash receipts and disbursements journals.

On March 31, 2014, the OAE sent a letter to respondent, by certified mail, return receipt requested, identifying all of the deficiencies discovered during the December 10, 2013 demand audit, and directing him to submit the missing trust account records, to the OAE, by April 25, 2014. Respondent signed for the certified mail, but the signature card lacks a date of delivery. Respondent failed to reply or to submit the missing trust account records to the OAE by April 25, 2014.

On May 23, 2014, respondent requested an extension to respond to the March 31, 2014 letter. On the same day, in a letter sent by certified mail, return receipt requested, the OAE granted respondent's request for an extension until June 2, 2014. Although respondent signed for the May 23, 2014 letter, he failed to provide the OAE with the documents by the extension date of June 2, 2014.

Eventually, respondent explained to the OAE that he had failed to provide the requested trust account records because he was unable to retrieve the records from his QuickBooks program. On July 8, 2014, the OAE informed him that an OAE investigator would come to his office on July 22, 2014, to review his QuickBooks, and directed that he have his computer and his QuickBooks accessible.

On July 21, 2014, respondent told the OAE that he would not be available on July 22, 2014, but would produce the records by July 31, 2014. Still, however, respondent failed to provide the OAE with the requested documents.

On August 14, 2014, the OAE sent a letter to respondent by certified mail, return receipt requested, instructing respondent to provide the requested documents by August 25, 2014. Once again, respondent signed the return receipt, but failed to provide the OAE with the documents by the August 25, 2014 deadline and, to date, has continued in that failure.

At the outset of the DEC hearing, counsel for respondent, in addition to stipulating to the facts of the complaint, admitted that, ultimately, respondent was unable to find his client file for Carbone.

In aggravation, the OAE pointed out that respondent failed to participate or even appear for the hearing and argued that his failure to participate in the hearing should be considered an extension of his failure to cooperate in the investigation of the matter. The OAE also acknowledged, in mitigation, that respondent has no history of discipline. Therefore, on balance, it recommended discipline in the range of a censure to a one-year suspension.

Counsel for respondent, in turn, argued that respondent had neither made an affirmative misrepresentation nor intended to

misrepresent anything to his client, to other parties to the transaction, to the court, or to the OAE. Therefore, without that intent, the DEC could not find that respondent violated RPC 8.4(c). Further, counsel argued, respondent was seemingly unaware that he was ineligible to practice.

Counsel stated that he had spoken to respondent's former law clerk, as well as respondent's former partner. Both asserted that respondent has a good reputation within the legal community. Counsel also explained that, when he met with respondent initially, he learned that, in 2013, respondent, then about fifty-nine years old, had moved in with his parents to care for them. His father was diagnosed with dementia and his mother was wheel-chair bound. They both passed away in 2014. These events, he argued, seemingly overlap with respondent's misconduct. Counsel observed that all of respondent's problems started during this period of time. Finally, he argued that any term of suspension would be excessive, but did not specify the appropriate level of discipline.

At the conclusion of argument, the DEC issued its decision on the record, rather than in a written report. The panel noted that, in his answer, respondent had admitted all of the factual allegations set forth in the complaint. Hence, the DEC considered the mitigating and aggravating factors presented, in determining the appropriate quantum of discipline.

Specifically, in mitigation, the DEC considered the difficult health circumstances confronting respondent's parents at the time of his misconduct, and the impact that it had on him; the additional responsibilities he had for his parents at the time; and his otherwise unblemished ethics history.

The panel also considered respondent's counsel's contention that, although the facts of the matter were admitted, no misrepresentation occurred because the proofs did not support, clearly and convincingly, respondent's intent to deceive. Conversely, the DEC noted that it was troubled by the fact that respondent did not appear at the hearing and that it felt hampered by the fact that it could not hear directly from respondent his version of events.

The DEC determined that the OAE had established that respondent violated all of the RPCs asserted in the complaint. Based on the foregoing, the DEC recommended a censure.

* * *

Following a de novo review of the record, we determine that the record clearly and convincingly establishes that respondent was guilty of unethical conduct – specifically, he violated RPC 1.3, RPC 5.5(a)(1), RPC 8.1(b), and RPC 8.4(c). We determine to dismiss the charged violations of RPC 1.4(b), RPC 1.15(d), and RPC 8.4(d).

In September 2012, respondent agreed to file a complaint for interpleader to resolve the distribution issue regarding the escrow funds he held in his ATA. He eventually filed that action in December 2012. Although the delay in filing the complaint does not equate to lack of diligence because several legitimate reasons may have existed for the delay, including strategic decisions on behalf of his client, respondent thereafter violated RPC 1.3. Specifically, once respondent filed the action, the court issued an order on February 8, 2012, denying his motion to transfer the funds to the Superior Court, and scheduling the interpleader hearing for March 7, 2013. Respondent was required to serve the order on the parties within five days of its receipt. On March 6, 2013, almost one month later, and only one day before the scheduled hearing, respondent informed the court that he had not served the order on the parties. His failure to do so violated RPC 1.3.[1]

We decline, however, to find respondent guilty of violating RPC 1.4(b). According to the complaint, respondent violated this Rule when, beginning in August 2012, Carbone requested that respondent send her a copy of her entire client file. Despite saying

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[1] Respondent's failure to serve the order on the parties also violated RPC 3.4(c) (failure to obey an obligation under the rules of a tribunal), which, alone, typically would be met with a censure. See, e.g., In re Powell, 212 N.J. 557 (2013). Because respondent was not charged with a violation of this particular RPC, we make no such finding.

that he would or had done so on multiple occasions, respondent never provided the file to Carbone. In fact, respondent eventually admitted that he has not been able to locate the entire file. Nonetheless, the allegations of the complaint do not support a finding of a failure to keep Carbone reasonably informed about the status of the matter or to promptly comply with reasonable requests for information. Respondent seemingly did communicate with Carbone; he simply did not send her the requested file. This conduct certainly violated RPC 1.16(d) (failure to turn over file to client), but that RPC was not charged. Thus, we make no finding in that regard. The record, however, lacks clear and convincing evidence supporting the finding that respondent violated RPC 1.4(b). Therefore, we determine to dismiss that alleged violation.

Effective September 24, 2012, respondent was administratively ineligible to practice, for failure to pay his assessment to the Fund. Respondent was still representing Carbone's interest thereafter, culminating with his filing of the interpleader complaint on December 21, 2012, a violation of RPC 5.5(a)(1). In conjunction with this allegation, the OAE charged that respondent violated RPC 8.4(d). Without more detail as to how respondent's conduct affected the court's process, or was otherwise prejudicial to the administration of justice, we determine to dismiss that alleged violation.

Respondent failed to provide the documents requested by the OAE or otherwise meaningfully cooperate in the investigation. He eventually appeared at the OAE for the scheduled demand audit, during which he claimed to be holding Carbone's funds, inviolate, in his ATA. Yet, he failed to provide any documentation to support that claim. Further, the OAE repeatedly asked for documents and records after the demand audit, all to no avail. After respondent claimed an inability to retrieve the records from his QuickBooks, the OAE arranged a visit to his office to review his QuickBooks and his computer. A day prior to that scheduled meeting, respondent informed the OAE that he would not be available for the meeting, and that he would produce the records within ten days. Again, he failed to do so. Clearly, respondent violated RPC 8.1(b). We are particularly troubled by respondent's failure to cooperate, as that failure easily might be construed as a strategic violation to avoid allegations that are more serious, such as knowing misappropriation. Hence, we consider his failure to cooperate to be significantly more serious than that of an attorney who simply "buries his head in the sand."

Respondent's failure to provide recordkeeping documents is not sufficient, on its own, to support a claim that he violated RPC 1.15(d). However, the OAE requested that respondent provide grievant's client file by November 26, 2013. He failed to do so.

Moreover, counsel for respondent admits that, as of the date of the DEC hearing, respondent still could not locate his file for Carbone. R. 1:21-6(c)(1)(I) requires attorneys to maintain, for seven years, financial records pertaining to a client's matter. Hence, in this regard, respondent has violated RPC 1.15(d).

Finally, the complaint alleges several instances of misrepresentation. Count II of the complaint alleges that respondent made misrepresentations to Carbone regarding her file. First, on November 6, 2012, respondent told Carbone that he had sent her a partial file. In fact, he had sent her nothing and telling her otherwise violated RPC 8.4(c).

Next, respondent told Carbone he would be sending her file on January 30, 2013. He did not. Perhaps standing alone, this statement would not have been a misrepresentation, since it arguably lacks proof of intent. When taken into consideration with the third instance of misrepresentation, however, the intent is evident.

The third alleged misrepresentation occurred on February 11, 2013, when respondent told Carbone that he had located her file and would be sending it. He never sent the file. By telling Carbone that he had located her file, respondent implied that he previously had lost it. If that is the case, respondent made a misrepresentation on January 29, 2013, when he assured Carbone he would be sending her file the next day. Respondent's counsel

admitted to the DEC that, as of the date of the hearing, respondent still had not located Carbone's file. Therefore, he made a further misrepresentation to her on February 11, 2013. Hence, respondent made multiple misrepresentations to his client, establishing a pattern of deceit, all in violation of RPC 8.4(c).

Count III of the complaint alleges that respondent made misrepresentations to third parties. On September 11, 2012, respondent agreed to file an interpleader complaint at Hyde's suggestion. On October 26, 2012, after Hyde had made several inquiries on the status of that complaint, respondent stated that he would be filing the complaint shortly. Later, he assured Kourakos that he would file the complaint by November 30, 2012. Respondent did not file the complaint until December 21, 2012. However, in our view, these allegations of misrepresentation lack clear and convincing evidence of an intent to deceive. Certainly, respondent could have been lying and may not have had the intent to file the complaint when he said he would. But he equally could have believed he was going to file it "shortly" or "by November 30, 2012." Circumstances could have prevented him from doing so or he could have changed his mind. In short, respondent's statements represented merely a statement of intent. Therefore, without more, we determine to dismiss the alleged violation of RPC 8.4(c), based on these particular facts.

In sum, respondent violated RPC 1.3, RPC 1.15(d), RPC 5.5(a)(1), RPC 8.1(b), and RPC 8.4(c). We now address the appropriate quantum of discipline.

Misrepresentation to clients requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still 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); In re Singer, 200 N.J. 263 (2009); In re Wiewiorka, 179 N.J. 225 (2004); In re Onorevole, 170 N.J. 64 (2001); and In re Till, 167 N.J. 276 (2001).

In In re Lowden, 219 N.J. 129 (2014), a reprimand was imposed on an attorney who, for nine years, led her client to believe that she had filed a motion on his behalf and was awaiting a determination, a violation of RPC 8.4(c). In the Matter of Susan A. Lowden, DRB 13-387 (May 21, 2014) (slip op. at 3). She also was guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to provide a written fee agreement, violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 1.5(b). Id. at 5. Additionally, Lowden failed to reply to the DEC investigator's repeated requests for a written reply to the grievance and a copy of her file and billing records, a violation of RPC 8.1(b). Id. at 4.

In aggravation, we considered the nine-year period that

Lowden had allowed her client to believe that she was pursuing the matter on his behalf, in addition to the serious harm caused by her inaction – that is, the entry of a $70,000 judgment against him. Id. at 7. The aggravating factors, however, were outweighed by the attorney's impeccable professional record of twenty-three years and her quick acknowledgment of wrongdoing.

Like the attorney in Lowden, respondent made misrepresentations to his client and failed to cooperate with ethics authorities. Lowden eventually stipulated to her misconduct. Although respondent did not stipulate to the misconduct, he did hire counsel and submit a verified answer to the complaint admitting the facts therein. Both respondent and Lowden also lacked diligence, while Lowden also stipulated to gross neglect, failure to communicate with her client, and a failure to memorialize, in writing, the rate or basis for her fee. Although those violations are not present here, respondent did lack diligence, failed to meet his recordkeeping requirements, and practiced while administratively ineligible.

Practicing law while ineligible is generally met with an admonition if the attorney is either unaware of the ineligibility or advances compelling mitigating factors. An admonition may be sufficient even if the attorney displays other, non-serious conduct. See, e.g., In the Matter of John L. Conroy, Jr., DRB 15-

248 (October 16, 2015) (attorney practiced law while administratively ineligible to do so for failure to submit the required IOLTA forms, a violation of RPC 5.5(a); the attorney also violated RPC 1.5(b) when he agreed to draft a will, living will and power of attorney, and to process a disability claim, for a new client but failed to provide the client with a writing setting forth the basis or rate of his fee; thereafter, the attorney was lax in keeping his client and the client's sister informed about the matter, which resulted in the client's filing the claim, a violation of RPC 1.3 and RPC 1.4(b); finally, the attorney failed to reply to the ethics investigator's three requests for information, a violation of RPC 8.1(b); we considered that, ultimately, the attorney had cooperated fully with the investigation by entering into a disciplinary stipulation, that he agreed to return the entire $2,500 fee to help compensate the client for lost retroactive benefits, and that he had an otherwise unblemished record in his forty years at the bar); and In the Matter of Stephen William Edwards, DRB 12-319 (January 25, 2013) (attorney represented one client in one matter while ineligible for failure to pay the annual assessment to the Fund and for failure to comply with the mandatory IOLTA program; attorney was also guilty of violations of RPC 1.15(d) and RPC 8.4(a)).

Based on the foregoing, the starting point in assessing the

appropriate quantum of discipline for respondent's misconduct is a reprimand. The fact that respondent also practiced while ineligible tips the scale toward a censure.

In mitigation, like the DEC, we considered respondent's parents' health and the responsibilities he took on toward the end of their lives when their health apparently deteriorated rapidly and contemporaneously with his misconduct. Additionally, respondent had an unblemished record for more than twenty years at the time this misconduct occurred.

In our view, however, the aggravation counter balances the mitigation and, perhaps, even outweighs it. Respondent engaged in a pattern of misrepresentations – not only to his client about sending her file, but also to the OAE about his client file and his trust account records. Moreover, nothing in the record establishes that respondent has accounted for Carbone's money or that he has distributed the escrowed funds to the rightful owner.

At the hearing before us, the OAE suggested that respondent's accounts had been frozen and currently contain over $300,000. The OAE also revealed that some of those funds have been disbursed upon application. Nonetheless, there was no information offered in respect of the funds related to this particular grievance. Clearly, however, the delay in disbursement alone represents harm to the rightful owner of the funds.

Finally, like the DEC, we are disturbed by respondent's failure to appear at the hearing to address these issues himself, as required by R. 1:20-6(c)(2)(D). Although his attorney appeared before the panel and before us to represent respondent's interests, he did so based on having discussed the matter with respondent some time ago. In fact, counsel represented that respondent's immediate whereabouts were unknown even to him. Thus, counsel for respondent admitted that he could provide no information regarding Carbone's funds or respondent's whereabouts. Nor was counsel able to communicate with respondent to discuss his appearance on respondent's behalf before the DEC and before us.

Although we are concerned that respondent's failure to cooperate might have been a strategy to avoid a deeper investigation into his records and the more serious charges that might result, his temporary suspension pending his compliance with the OAE's demand for his records serves to protect the public.

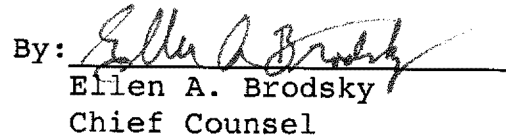
Therefore, on balance, considering all of the facts and the mitigating and aggravating factors, especially the harm to the client and the troublesome nature of respondent's conduct toward the OAE during its investigation, we determine to impose a censure.

Vice-Chair Baugh and Member Boyer did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and

actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

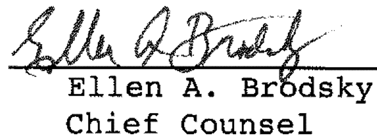
In the Matter of Diego P. Milara
Docket No. DRB 17-274

Argued: October 19, 2017

Decided: January 22, 2018

Disposition: Censure

Members	Censure	Did not participate
Frost	X	
Baugh		X
Boyer		X
Clark	X	
Gallipoli	X	
Hoberman	X	
Rivera	X	
Singer	X	
Zmirich	X	
Total:	7	2



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