SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 17-306 and 17-330
District Docket Nos. XIV-2016-0486E
and I-2015-0018E

IN THE MATTER OF	:
KEITH T. SMITH	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 16, 2017

Decided: February 6, 2018

HoeChin Kim appeared on behalf of the Office of Attorney Ethics for DRB 17-306.

Steven D. Scherzer appeared on behalf of District I for DRB 17-330.

Respondent appeared pro se.

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

These matters were before us on a disciplinary stipulation filed by the Office of Attorney Ethics (OAE) (DRB 17-306) and on a recommendation for a six-month suspension, filed by the District I Ethics Committee (DEC) (DRB 17-330). We consolidated them for disposition.

In DRB 17-306, respondent admitted having violated RPC 5.5(a)(1) and R. 1:28A-2(d) (unauthorized practice of law) for failure to comply with the requirements of the Interest on Lawyers Trust Accounts (IOLTA) program.

In 17-330, a two-count complaint charged respondent with violations of RPC 3.5, presumably (b) (a lawyer shall not have ex parte communications with a judge), and RPC 4.2 (improper communications about the subject of the representation with a person the lawyer knows to be represented by another lawyer).

We determine to impose a three-month suspension for the combined misconduct in the matters.

Respondent was admitted to the New Jersey bar in 1989. On October 1, 2008, he received an admonition for misconduct arising from a fee-sharing agreement with another attorney, which encompassed several matters. After allowing a complaint to be dismissed, respondent failed to take steps to have the complaint reinstated and to contact his client about the status of his case, violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b) and (c) (failure to communicate with a client). Additionally, respondent violated RPC 1.5(e), because the proportionality of fees shared with the other attorney was not reasonable. In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008). In a later disciplinary

matter, respondent was found guilty of additional violations in several of the client matters underlying the fee-sharing arrangement. No new discipline was imposed, however, because the second disciplinary matter was "inexorably intertwined" with the admonition matter. In re Smith, 2009 N.J. LEXIS 1408 (December 14, 2009).

On June 7, 2011, respondent was censured for misconduct in two client matters, including gross neglect, a pattern of neglect, lack of diligence, failure to expedite litigation, and failure to cooperate with disciplinary authorities. In addition, respondent practiced law while ineligible, based on his failure to pay the New Jersey Lawyers' Fund for Client Protection (CPF) annual attorney assessment. In re Smith, 206 N.J. 137 (2011).

The Court entered an Order, effective October 24, 2015, declaring respondent ineligible to practice law, based on his failure to comply with IOLTA requirements. He was returned to eligible status on December 11, 2015.

Respondent was temporarily suspended from the practice of law, effective February 28, 2017, for failing to comply with a fee arbitration committee determination. In re Smith, 228 N.J. 2 (2017). He was reinstated less than a month later, on March 27, 2017. In re Smith, 228 N.J. 308 (2017).

Most recently, on January 11, 2018, respondent, again, was censured in a default matter. There, respondent failed to comply with recordkeeping requirements, in violation of RPC 1.15(d) and R. 1:21-6, and failed to cooperate with the ethics investigation, in violation of RPC 8.1(b). In re Smith, ____ N.J. ____ (2018).

I. DRB 17-306 (District Docket No. XIV-2016-0486E)

The facts are contained in an August 22, 2017 stipulation between respondent and the OAE.

On October 21, 2015, the Court entered an Order, effective October 27, 2015, declaring respondent administratively ineligible to practice law, based on his failure to comply with IOLTA requirements. Respondent was returned to eligible status on December 11, 2015.

On November 12, 2015, during that ineligibility period, respondent filed a complaint in Superior Court of New Jersey, Atlantic County, in behalf of client William Lacovera. When respondent filed the complaint, he was unaware of his IOLTA ineligibility, having previously paid the annual CPF assessment on September 4, 2015. Indeed, respondent learned of his ineligibility only much later, during the summer of 2017.

Respondent stipulated that his actions in the Lacovera matter violated RPC 5.5(a)(1) and R. 1:28A-2(d).

The OAE recommended an admonition for respondent's misconduct, citing several admonition cases involving attorneys who, like respondent, were unaware of their ineligibility at the time that they violated the Rule.

* * *

II. DRB 17-330 (District Docket No. I-2015-0018E)

Respondent was socially friendly with a married couple whose names have been redacted in the record. Respondent represented the wife in respect of three domestic violence matters and a divorce.

According to respondent, on June 10, 2015, the day before a hearing on one of the domestic violence matters, the husband left a message on respondent's voicemail, upset that he could not reach his own attorney, Joseph Levin, Esq., the grievant. Respondent claimed to have been worried that the husband, who was "emotional," might harm himself. Aware that Levin represented the husband, and having settled one of the domestic violence matters with Levin that afternoon, respondent called Levin, but did not speak with him. Respondent then took matters into his own hands that evening, and sent the husband the following e-mail:

> I sent your attorney the proposed consent order that we agreed upon.
>
> [The wife] will assist in dismissing the charges against you.

> Do not respond to this e-mail, as you are represented [and] all communications should be through your counsel.
>
> I just wanted you to know this is resolved as you may have been worried.
>
> [Ex.J-1.]

Respondent admitted that he did not notify Levin about his client's voicemail to respondent or furnish Levin with a copy of his e-mail reply.

The panel chair asked respondent why he had not copied his adversary on the e-mail. Respondent reiterated that the communication had occurred after office hours, on the eve of a hearing, and that he had tried to reach Levin. Apparently frustrated by the panel chair's questions about copying his adversary, respondent continued:

> Cc, what method? I mean I didn't have carrier pigeon, I couldn't e-mail him because I didn't have an e-mail. I didn't have his fax. His fax is on here, though, but I didn't have a fax that I could get to him that would be effective because he's gone [for the day.]
>
> [T63-10 to 15.][1]

Respondent also had no explanation for his failure to locate Levin's address in the Lawyer's Diary, which he admittedly owned, or to send Levin a copy of the e-mail through

[1] T refers to the transcript of the June 21, 2017 DEC hearing.

the regular mail. Finally, respondent was also unsure why he had not called Levin's office the next morning, to alert his adversary about the communication.

Consistent with respondent's admission, Levin testified that he never received a copy of respondent's e-mail to his client. He learned of it six weeks later, on July 30, 2015, when preparing the husband for a hearing. Levin was uneasy with respondent's actions:

> I guess my concern was I don't know why this is being communicated to my client that we've resolved the case, because then it makes it -- it doesn't actually -- doesn't look good for me. I'm not communicating with my client that it's been resolved or maybe I hadn't communicated it yet, so I was a little concerned that my adversary was communicating that to my client before I had an opportunity to communicate it to my client. But again, I didn't learn of this in June. I don't believe I learned of this in June of 2015.
>
> [T46-15 to T47-1.]

Respondent also was charged with having had an ex parte communication with a Superior Court judge. On July 29, 2015, the eve of a hearing in Superior Court, Atlantic County, on the wife's application for a final restraining order, respondent realized that he had a scheduling conflict the next morning. In addition to the Superior Court hearing, respondent was scheduled

to appear at the same time in municipal court for a driving while intoxicated trial.

Respondent testified that he had called Levin on the evening of July 29, 2015, but "got a message," not "a person." Moreover, he stated that he "could not get Mr. Levin to call [him] back." Respondent did not explain what that meant or even whether he had left a message for Levin to return his call. The hearing panel noted that respondent had not left "a voicemail at Mr. Levin's office."

In a "panic," respondent once again took matters into his own hands. Because the Superior Court judge lived on the same street near respondent's house, respondent prepared a letter to the judge, and personally delivered it to the judge's home that evening, handing it to the judge's wife as she answered the door. Respondent did not speak with the judge. The letter explained the conflict, as well as respondent's assumption that, "because the DUI matter was quasi-criminal I should appear there first. I anticipate being in Atlantic City before your honor by 10 a.m."

The next morning, respondent appeared in the municipal court matter, whereupon the judge called him into chambers because the Superior Court judge was on the telephone. Apparently, respondent was placed on the telephone with the

Superior Court judge who, in respondent's words, had been in open court with Levin present, when he told respondent to "get your rear end over here to Atlantic City" because the Superior Court matter took precedence over the municipal court matter. Respondent immediately left for Atlantic City to attend the Superior Court hearing in the matter with Levin.

Levin did not receive a copy of respondent's letter to the judge. He learned about it later when, having arrived at Superior Court at 8:30 a.m. on July 30, 2015, he found that respondent was not present. At 9:00 a.m., he called respondent, who told him that he had sent a letter to the judge the day before requesting a "ready hold" for 10:00 a.m.

On cross-examination, respondent asked Levin about his claim to have always been accessible after office hours, to which Levin replied:

> My office is set up in a way where I'm accessible 24 hours a day. Because I have a criminal practice, I get calls [at] 1:00 in the morning, I get calls at 6:00 in the morning, I get calls, you know, so basically I can receive calls and e-mails, and I can receive information 24 hours a day because it has to be set up that day -- that way. And I do get information. . . . I -- if you call my office after hours, it bounces to my cell phone, right away. It's been that way since my office opened in 2002, so.
>
> [T43-5 to 17.]

* * *

The DEC concluded that, by sending the e-mail communication about the domestic violence matter to the husband, knowing that Levin represented him, respondent violated RPC 4.2. The DEC rejected respondent's argument that he had not breached the "spirit" of the Rule, "since he did not discuss the substance of the matter but rather he discussed the matter procedurally to assuage any concerns [the husband] had." The panel reasoned that, had respondent truly been concerned about the husband's safety, "he would have called the police," rather than send his adversary's client an e-mail. Moreover, the panel faulted respondent for failing to provide the e-mail immediately to Levin.

In respect of the ex parte communication with the Superior Court judge, the panel found that respondent's July 29, 2015 letter to the judge violated RPC 3.5(b), paraphrasing the Rule as follows: "a lawyer shall not communicate *ex parte* with [a judge] except as permitted by law."

In addition to respondent's failure to call police about the allegedly worrisome voicemail from the husband, the DEC found, as additional aggravation, that respondent failed to copy Levin on the letter to the Superior Court judge; to fax the letter to Levin's office; or to leave a message at Levin's office about his decision to appear for the municipal court

trial, rather than the Superior Court matter. In addition, his "repeated comments" that neither his e-mail nor letter to the judge went to the substance of the couple's matters, "underscored his lack of reverence for the RPCs."

According to the hearing panel, respondent "appeared annoyed" that the e-mail and letter resulted in a complaint against him. He "repeatedly commented about his social connection" to the litigants, "as though that familiarity would not make adhering to the RPCs that much more crucial."

Finally, when fashioning the appropriate sanction, the panel cited three additional aggravating factors. "First and foremost," the panel found respondent not credible when testifying that he could not reach Levin when he sent the e-mail to Levin's client or when he sent the letter to the Superior Court judge. "At the very least," respondent should have left a voicemail for Levin on both occasions and faxed the e-mail and letter the next day. Second, all three panel members believed that respondent had been annoyed at the disciplinary hearing, and presented a "forced incredulity." Third, respondent's disciplinary history "caused the Panel significant concern in light of his lack of credibility and attitude" during the hearing.

In mitigation, the panel considered that respondent's e-mail to the husband was not substantive and was not an attempt to undermine Levin's representation. Likewise, the letter to the court was not an attempt to gain an advantage in the domestic violence matter.

As previously stated, the DEC recommended the imposition of a six-month suspension for respondent's misconduct in the domestic violence/divorce matter.

* * *

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.

In DRB 17-306, respondent engaged in the unauthorized practice of law when, on November 12, 2015, he filed a complaint in Superior Court on behalf of his client, Lacovera. Although respondent was unaware of his ineligibility at the time, he, nevertheless, violated RPC 5.5(a). In DRB 17-330, respondent admittedly sent an e-mail to Levin's client, who had been charged with acts of domestic violence against respondent's client. RPC 4.2 states, in relevant part, as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows . . . to be represented . . . unless the lawyer has the consent of the other

> lawyer, or is authorized by law or court order to do so. . . .

Respondent knew that the husband was represented. In fact, he and Levin had arranged a settlement of at least one domestic violence matter in the afternoon, just before respondent sent the e-mail later that evening. It is also clear that respondent's communication involved "the subject of the representation" – the domestic violence action in which respondent represented the wife and Levin represented the husband. Clearly, respondent did not have Levin's consent to the contact, as he never notified Levin about the communication, even after the fact. He left no message for Levin; sent no fax to his office; and sent no copy of the e-mail to Levin by mail. Rather, Levin learned about the communication more than a month later, from his own client.

The DEC correctly rejected respondent's stated reason for the e-mail – that he was concerned that the husband might hurt himself. Obviously, in such a situation, respondent should have called the police. Even if true, that scenario would not have authorized respondent to communicate information directly related to the subject of the representation – a withdrawal by the wife of the domestic violence charges against him. Respondent's conduct in respect of this communication violated RPC 4.2.

The July 29, 2015 letter that respondent sent to a Superior Court judge also was improper. RPC 3.5 states, in relevant part, that a lawyer shall not, in relation to (a) "a judge, juror, prospective juror or other official . . .;" (b) "communicate ex parte with such a person except as permitted by law." Respondent claimed that he did not violate the "spirit" of the Rule because he never spoke with the judge, and the letter did not address the subject matter before the judge. Respondent is mistaken for two reasons. First, the communication did, indeed, address the subject matter before the judge. Second, a component of respondent's violation was his failure to take reasonable, contemporaneous steps, such as by hand-delivering a copy of the letter to Levin, thereby notifying his adversary that he had contacted the judge to seek a "ready-hold" for their matter early the next day. Had respondent done so, his visit to the judge's home would have been just as unseemly, but likely not an RPC violation. Because respondent took no action to inform his adversary of his request, we find a violation of RPC 3.5(b).

In sum, respondent is guilty of violating RPC 5.5(a) in DRB 17-306 and RPC 3.5(b) and RPC 4.2 in DRB 17-330.

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 Jonathan A. Goodman, DRB 16-436 (March 22, 2017) (attorney practiced law while ineligible for failure to file annual IOLTA registration statements during two periods of ineligibility; mitigation included the attorney's forty-year career without prior discipline, his lack of awareness of his ineligibility, the swift corrective measures he took to cure the deficiencies, and medical issues of his own and those of his parents) and 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).

Attorneys found guilty of communicating with represented persons have received discipline ranging from an admonition to a censure, depending on the presence of other violations, and/or aggravating and mitigating factors. See, e.g., In the Matter of Mitchell L. Mullen, DRB 14-287 (January 16, 2015) (admonition for attorney who, in the course of an e-mail chain, communicated directly with the grievant in at least three e-mails in the underlying matter, when he knew or should have known that the grievant was represented by counsel; the communications involved the subject of the representation; the attorney also sent a notice of deposition directly to the grievant and never attempted to notify the other attorney of the deposition date, in violation of RPC 4.2; in mitigation, we considered that the attorney's conduct was minor and caused no harm to the grievant, and that he had been a member of the bar for thirty-nine years, with no disciplinary record); In re Tyler, 204 N.J. 629 (2011) (reprimand for attorney who, in one of six bankruptcy matters, communicated directly with the client about a disgorgement order in the matter, although she knew or should have known that

subsequent counsel had been engaged, a violation of RPC 4.2; gross neglect and pattern of neglect, lack of diligence, and failure to communicate with the clients also found; in mitigation, the attorney had no prior discipline and was struggling with medical issues at the time of the misconduct); and In re Veitch, 216 N.J. 162 (2013) (censure for attorney who, in a criminal matter, communicated with his client's co-defendant, who had pleaded guilty, about the merits of the criminal case, even though counsel for the co-defendant had previously denied the attorney's request to talk to his client, a violation of RPC 4.2; the attorney's unblemished disciplinary history of thirty-eight years militated against a term of suspension, particularly because neither any party nor the judicial system had suffered any actual harm).

There are but a few cases involving attorneys who have engaged in ex parte communications with a tribunal. In In the Matter of Joseph J. LaRosa, DRB 03-339 (November 25, 2003), an admonition was imposed on an attorney retained to represent two individuals in connection with a personal injury action. The jury returned a confusing verdict in the clients' favor that, afterward, generated a parking lot discussion between the attorney and his clients, as they sought to discern the percentage of the award due each client. At that moment, two

jurors happened to walk by and one said either "hi" or "bye." The attorney, reacting instinctively, asked them if they knew the amount of the verdict. One of them replied, "When I go shopping, I don't know about coupons," at which point the attorney realized that he should not speak with them. As the jurors walked away, one or both said, "You're going to get your money anyway," and the attorney replied, "We'll have to file a motion anyway." The contact lasted between thirty seconds and one minute. The jurors then contacted the trial judge, because the attorney's communication had left them feeling "uncomfortable." We found a violation of RPC 3.5(b) and R. 1:16-1. In mitigation, we considered that the conduct was the result of a natural impulse and had not prejudiced the administration of justice. See, also, In the Matter of Thomas P. Foy, DRB 97-136 (July 28, 1997) (attorney admonished for communicating with a Superior Court judge who had entered a ruling unfavorable to the attorney's former employer; although the attorney did not intend to influence the judge, his conduct violated both RPC 3.5(b) and RPC 8.4(d); the judge then recused himself, requiring another judge to be assigned to the case) and In re Goldring, 178 N.J. 26 (2003) (reprimand imposed on attorney who sent six letters to a judge in a case in which the attorney formerly represented a client; in those letters, the attorney argued

facts to the benefit of his former client and was antagonistic to the court, causing the judge to transfer the case to another judge).

In fashioning the appropriate sanction, we considered respondent's combined misconduct in both the stipulation and presentment matters.

Respondent's conduct in respect of his improper e-mail communication with Levin's client is similar to that of the attorneys in Mullen (admonition) and Tyler (reprimand), both involving communication directly with represented persons in one matter, without informing their respective adversaries. Respondent's actions also occurred in a single matter. Respondent's conduct was not, however, as serious as that of the attorney in Veitch (censure), where the attorney spoke directly with his client's co-defendant, who had already pleaded guilty, about the merits of the criminal case, and where the co-defendant's attorney had previously refused Veitch's prior request that he be permitted to contact the co-defendant.

Respondent's conduct in respect of his ex parte communication with a Superior Court judge was certainly more egregious than that of the attorney in LaRosa, who acted impulsively.

In aggravation, respondent lacked remorse for his improper ex parte communication with a Superior Court judge and had little sense that he was guilty of an ethics infraction. We consider, as well, respondent's disciplinary history: a 2008 admonition; a 2011 censure that also included practicing law while ineligible; and a January 2018 censure.

In mitigation, the e-mail to the husband and letter to a Superior Court judge were not attempts to undermine or gain an advantage in the underlying litigation. Although a censure might otherwise be justified, it would constitute a third consecutive censure for an attorney who has demonstrated an inability or unwillingness to recognize wrongdoing before it occurs, and to conform his behavior to the standards required of all New Jersey attorneys. We, therefore, determine to impose a three-month suspension for the totality of respondent's misconduct in these two matters.

We also require respondent to take ten hours of continuing legal education courses in ethics, in addition to those mandated by the court rules, prior to his reinstatement.

Vice-Chair Baugh and Member Zmirich did not participate. Member Rivera abstained.

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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Keith T. Smith
Docket Nos. DRB 17-306 and 17-330

Argued: November 16, 2017

Decided: February 6, 2018

Disposition: Three-month Suspension

Members	Three-month Suspension	Did not participate	Abstain
Frost	X		
Baugh		X	
Boyer	X		
Clark	X		
Gallipoli	X		
Hoberman	X		
Rivera			X
Singer	X		
Zmirich		X	
Total:	6	2	1

Ellen A. Brodsky
Chief Counsel