

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-430
District Docket No. XIV-2015-0166E

IN THE MATTER OF
THOMAS E. DOWNS, IV
AN ATTORNEY AT LAW

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Decision

Argued: April 19, 2018

Decided: June 26, 2018

HoeChin Kim 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 disciplinary recommendation
for an admonition filed by the District VIII Ethics Committee
(DEC). We determined to treat the matter as a recommendation for
greater discipline, in accordance with R. 1:20-15(f)(4). The
formal ethics complaint charged respondent with violating RPC
1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC
1.4(b) (failure to keep the client reasonably informed).

For the reasons set forth below, we determine to impose a reprimand.

Respondent earned admission to the New Jersey bar in 1975. On April 19, 2013, he received an admonition for failure to communicate with a client and failure to cooperate with an ethics investigation. In the Matter of Thomas E. Downs, IV, DRB 12-407 (April 19, 2013). On March 9, 2016, in a default matter, respondent received a censure for his second instance of failure to communicate with a client, failure to provide in writing the rate or basis of his fee, failure to return the unearned portion of a retainer, and failure to cooperate with disciplinary authorities. In re Downs, 224 N.J. 272 (2016).

We turn to the facts of this case. Joseph Makara died on March 5, 2013. His Last Will and Testament, which respondent had prepared, was executed on June 22, 2012, and appointed Joseph's sister, Letitia Makara (the grievant), to three roles: Executrix, Testamentary Trustee, and Guardian to any minor heir of his estate. Joseph bequeathed his residuary estate as follows: 50% to his son, Andrew R. Makara (Andrew R.); 25% to his minor grandson, Andrew J. Makara (Andrew J.); and 25% to his adult grandson, Michael C. Smith. The estate comprised three assets: a joint bank account with Andrew R., at Amboy Bank, in the amount of \$88,261.49; an ING insurance policy valued at

\$100,000; and real estate located in Parlin, Middlesex County, New Jersey. Upon Joseph's death, Andrew R. became the sole holder of the account with Amboy Bank.

On March 21, 2013, Letitia retained respondent to represent the estate. Pursuant to a written fee agreement, the estate was to pay respondent a \$2,500 retainer and \$300 per hour for legal services rendered. Respondent maintains that Letitia was aware that Andrew R. paid the retainer, on March 22, 2013, by a check drawn on the Amboy Bank account he had shared with Joseph.

Joseph's ING insurance policy beneficiaries mirrored the division of the estate set forth in his will. The insurance proceeds, thus, were to be disbursed as follows: 50% to Andrew R.; 25% to Andrew J.; and 25% to Michael. Accordingly, after the Middlesex County Surrogate's Office issued Letters of Guardianship to Letitia, respondent provided them to ING, requesting disbursement of Andrew J.'s 25% share of the insurance proceeds to Letitia, as the Testamentary Guardian. ~~ING, however, disbursed the insurance proceeds directly to~~ Andrew J., pursuant to the express provisions of the insurance policy. Because Andrew J. was a minor, his father, Andrew R., received the \$25,000 in insurance proceeds earmarked for Andrew J.

On September 27, 2013, a closing for the sale of Joseph's Parlin property was held at the law office of Terry J. Finkelstein, the buyer's attorney. Letitia signed the HUD-1 settlement statement, as Executrix and Trustee of the estate. Respondent was paid a \$1,100 legal fee for services rendered in respect of the transaction. At Letitia's request, respondent deposited the \$252,051.93 in sale proceeds from the transaction into his attorney trust account, as Letitia desired neither to open an estate account nor to be responsible for that sum of money.

Following the sale of Joseph's property, minimal communication took place between Letitia and respondent. Respondent asserted that he had a very busy trial schedule in the spring and summer of 2014, but maintained that "his office was always available" to Letitia. Despite the minimal communication, respondent disbursed \$11,250 in legal fees to himself, via six trust account checks, between September 27, 2013 and February 13, 2014, purportedly for services rendered. In June 2014, Letitia requested and received a \$1,485 trust account check from respondent, reimbursing her for funds she had advanced for Joseph's memorial and the interment of his ashes.

Thereafter, Letitia intermittently called respondent's office seeking updates on the status of the administration of

the estate and the disbursement of estate funds. Respondent repeatedly failed to reply to Letitia's inquiries, yet, testified again that "his office was always available" to her. Consequently, in November 2014, Letitia retained attorney Avram Segall to "obtain information concerning the status of [Joseph's estate] and an accounting" of the estate's funds. By letter dated November 13, 2014, Segall requested that respondent promptly contact him to discuss "whether inheritance tax waivers have been received, the status of the accounting and other issues in an amicable fashion to preclude further action." Respondent failed to reply to Segall's letter.

By letter dated December 3, 2014, Segall again contacted respondent, stating "I am disturbed by the failure to communicate," citing RPCs 1.3 and 1.4(b), and warning that, if respondent again failed to reply, Letitia would seek "all other remedies and relief which may be available to her." Respondent did not reply, in writing, to Segall's second letter, "but believes he spoke with him."

On February 15, 2015, Letitia completed an attorney ethics grievance form, citing respondent's evasion of her attempts to contact him, his failure to provide an accounting of the estate, and his failure to complete the administration of the estate. On

February 18, 2015, Segall filed the grievance in Letitia's behalf, and provided a courtesy copy to respondent.

On March 24, 2015, in response to Letitia's grievance, respondent provided to Segall (1) his complete file for Joseph's estate; and (2) a trust account check, in the amount of \$249,621.60, representing the entirety of the estate funds. Notably, the check included the disgorgement of the \$11,250 in legal fees previously taken by respondent, who stated, in his verified answer, that "because he knew the Makara family for such a long time, he thought it was best to return those monies." Respondent's cover letter to Segall stated that he had filed neither an accounting of the estate nor the Inheritance Tax Return in respect of Joseph's estate, but had prepared drafts of both. By November 2015, Segall had completed the administration of Joseph's estate.

In his verified answer to the complaint, by way of defenses, respondent described his administration of the estate as "bogged down" but denied having committed ethics infractions. During the ethics hearing, however, respondent conceded that he should have handled the administration of the estate in a more timely fashion.

* * *

The DEC determined that respondent violated RPC 1.3. Specifically, the DEC found that respondent, by his own admission, lacked diligence, was overburdened and overextended with unrelated trial work, and had delegated much of the work on Joseph's estate to his non-attorney staff. Moreover, despite having been retained on March 21, 2013, respondent had not completed the administration of the estate, almost two years later, when he provided his file to Segall.

Next, the DEC determined that respondent violated RPC 1.4(b), noting that respondent admitted that he neither reasonably communicated with Letitia nor complied with her repeated requests for information. Moreover, despite Letitia's retention of Segall, who twice wrote to respondent regarding the estate, respondent still failed to communicate, ultimately resulting in the filing of the ethics grievance.

The DEC concluded, however, that the evidence did not support a finding that respondent violated RPC 1.1(a). Specifically, the DEC determined that respondent "did properly handle the bulk of the Estate work . . . albeit over a protracted period of time." Moreover, the DEC found that, aside from finalizing and filing the inheritance tax returns and the accounting, respondent had properly handled every other facet of the estate work, including his interaction with the Surrogate's

Office, the sale of Joseph's property, and the marshalling of the estate funds into his trust account.

The DEC made no findings of aggravating or mitigating factors, and did not consider respondent's disciplinary history or applicable precedent in crafting the appropriate quantum of discipline. Nonetheless, the DEC recommended that respondent receive an admonition.

* * *

Following a de novo review, we are satisfied that the record clearly and convincingly establishes that respondent was guilty of unethical conduct. Specifically, we determine that respondent violated RPC 1.3 and RPC 1.4(b). We conclude, however, that the DEC's determination as to the quantum of discipline to be imposed - an admonition - is insufficient.

First, in respect of the RPC 1.3 allegation, the record contains clear and convincing evidence that respondent did not diligently administer Joseph's estate. Respondent failed to finalize the estate, requiring Letitia to hire Segall, approximately two years later, to assume the representation. Once Segall had the file, he was able to finalize the estate and disburse all funds in fewer than eight months. Although respondent performed some work on the matter, at least initially, he then failed to complete the estate in a timely

fashion. In his verified answer, respondent admitted that, due to his work on other client matters, he was overextended and his administration of the estate became "bogged down." He conceded that the estate should have been handled in a more timely fashion. Respondent, thus, violated RPC 1.3.

Next, in respect of the RPC 1.4(b) allegation, respondent admitted that, following the sale of Joseph's property, he had minimal communication with Letitia. Although he averred that "his office was always available" to her, he repeatedly failed to reply to her status inquiries, leaving her in the dark for almost one year. When Letitia finally grew frustrated and retained Segall, respondent failed to reply to two strongly-worded requests for information, and provided a meaningful response only after his client had filed an ethics grievance against him. Respondent, thus, violated RPC 1.4(b).

Finally, we determine to dismiss the RPC 1.1(a) charge for the same reasons set forth by the DEC. Specifically, respondent ~~performed substantial work on the Joseph estate, before allowing~~ it to languish, short of completion. Although he clearly lacked diligence in completing the estate work, his misconduct did not rise to the level of gross neglect.

The sole issue left for determination is the appropriate quantum of discipline for respondent's violations of RPC 1.3 and

RPC 1.4(b). An admonition typically results for lack of diligence and failure to communicate with a client. See, e.g., In the Matter of Fred Braverman, DRB 17-015 (April 25, 2017) (attorney permitted the client's personal injury case to be dismissed for lack of prosecution and failed to reply to her multiple attempts to contact him for information about the status of the matter; mitigation included the attorney's full cooperation with the investigation, his decision to no longer accept personal injury cases, and his untreated illnesses at the time of the representation); In the Matter of Sergei Orel, DRB 16-407 (February 23, 2017) (attorney lacked diligence in the appeal of a possible immigration removal determination and failed to communicate important aspects of the case to the client; aggravating factors included the attorney's delay in surrendering the client's file to subsequent counsel and to the ethics investigator; a mitigating factor was the attorney's otherwise unblemished fifteen years at the bar); In the Matter of John Joseph Hutt, DRB 15-037 (May 27, 2015) (after the attorney settled his client's personal injury claim, he failed to resolve outstanding medical liens for more than one year and failed to reply to the client's inquiries about the status of the liens; the attorney had no history of final discipline in his sixteen years at the bar and cooperated with the Office of

Attorney Ethics by readily admitting his wrongdoing and consenting to discipline); and In the Matter of Ronald L. Lueddeke, DRB 15-018 (March 25, 2015) (attorney did not file a complaint on his client's behalf until four years after he was retained, and then only after the client filed a grievance; although the delay did not bar the client's claim, the attorney's inaction constituted a lack of diligence; he also failed to keep his client reasonably informed about the status of the matter and failed to promptly comply with his requests for information; mitigation included the attorney's unblemished record in his nearly forty years at the bar, steps he had taken to improve his practice, and his contrition and remorse).

We consider, in aggravation, respondent's disciplinary history and his failure to learn from similar mistakes. Specifically, in 2013, respondent received an admonition for failure to communicate with the client and failure to cooperate with an ethics investigation. Then, in 2016, in a default matter, he received a censure for another failure to communicate with a client, failure to provide in writing the rate or basis of his fee, failure to return the unearned portion of a retainer, and failure to cooperate with disciplinary authorities. This case, thus, marks the third occasion in four years where respondent failed to communicate with a client. The concept of progressive


discipline mandates imposition of a sanction harsher than an admonition. See, e.g., In re Tyler, 217 N.J. 525 (2014) (attorney reprimanded, rather than admonished, for violation of RPC 1.4(b), due to prior failure to communicate with a client) and In re Wolfe, 170 N.J. 71 (2001) (failure to communicate with client; reprimand imposed due to ethics history).

There is no mitigation for us to consider. On balance, considering disciplinary precedent, as exacerbated by respondent's disciplinary history, we determine that a reprimand is the appropriate discipline for respondent's misconduct.

Members Boyer and Joseph 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 Thomas E. Downs, IV
Docket No. DRB 17-430

Argued: April 19, 2018

Decided: June 26, 2018

Disposition: Reprimand

<i>Members</i>	Reprimand	Recused	Did Not Participate
Frost	X		
Clark	X		
Boyer			X
Gallipoli	X		
Hoberman	X		
Joseph			X
Rivera	X		
Singer	X		
Zmirich	X		
Total:	7	0	2


Ellen A. Brodsky
Chief Counsel