SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 18-061 and
DRB 18-062
District Docket Nos. XIV-2016-
0248E, IX-2017-0901E, and IX-2017-
0003E

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

Decision

Argued: May 17, 2018

Decided: August 10, 2018

Reid Adler appeared on behalf of the Office of Attorney Ethics (DRB 18-061).

Claire Scully appeared on behalf of the District IX Ethics Committee (DRB 18-062).

Respondent appeared pro se.

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

These consolidated matters were before us on a recommendation for a one-year suspension, filed by the District IX Ethics Committee (DEC).

The complaint in DRB 18-061 charged respondent with violating RPC 1.8(a) (conflict of interest); RPC 1.15(d) (recordkeeping); RPC 5.5(a)(1) (unauthorized practice of law); RPC 8.1(b) (failure to cooperate with disciplinary officials); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The complaint in DRB 18-062 charged respondent with violating RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with the client); and RPC 8.1(b).

For the reasons stated below, we determine to impose a two-year suspension to run consecutively to the suspension respondent is currently serving.

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 8, 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).

On March 24, 2017, respondent was temporarily suspended for failing to cooperate in the investigation into DRB 18-061. In re Colby, 228 N.J. 236 (2017).

On March 14, 2018, the Court suspended respondent for one year for gross neglect; lack of diligence; failure to keep a client reasonably informed about the matter; knowingly disobeying the rules of a tribunal; practicing law while administratively ineligible; failure to cooperate with disciplinary authorities; and conduct involving dishonesty, fraud, deceit or misrepresentation. In re Colby, 232 N.J. 273 (2018). Respondent remains suspended to date.

In addition, since September 26, 2011, respondent has been ineligible to practice law for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection (the Fund). He also has been ineligible to practice law for failure to comply with the Interest on Lawyer Trust Account (IOLTA) requirements, since October 21, 2011, and for failure to comply with continuing legal education requirements, since November 17, 2014.

DRB 18-061 (District Docket Nos. XIV-2016-0248E and IX-2017-0901E)

At the DEC hearing in this matter, the parties agreed that the admissions contained in respondent's answer to the ethics

complaint would serve as a stipulation. The facts of the matter are as follows.

a. Practicing while ineligible

Respondent stopped paying his annual fee to the Fund in 2011 and remained ineligible to practice law through 2016, when he was temporarily suspended for his failure to cooperate with the Office of Attorney Ethics' (OAE) investigation in this matter. Respondent explained that he stopped paying his annual assessment because he did not have the funds to do so. Subsequently, in 2011, respondent also become ineligible for failure to comply with IOLTA. Despite his knowledge of his ineligibility to practice law in New Jersey, respondent actively represented clients between 2011 and 2016.

Specifically, respondent admitted that, between 2011 and 2016, he was the attorney of record in approximately twenty-five real estate transactions and that he was aware of his ineligibility at the time. Additionally, respondent admitted that, during the same period, he failed to report the completion of his continuing legal education requirements in 2014. He maintains, however, that he did complete the requirements and retained the certificates, but simply did not submit that information.

Respondent admitted that, on May 29, 2015, he appeared at the Monmouth County Surrogate's Office, presenting himself as the attorney for the Estate of Lavina Easton. Subsequently, he prepared and submitted the application for probate for the Easton Estate.

b. Business transaction with client

Over the course of thirty years, respondent regularly represented William Hanneman. Respondent admitted that, in 2000, he and Hanneman formed Wolverine Construction, LLC, as partners. Respondent continued to represent Hanneman and Wolverine in legal matters. Respondent, on his own, eventually formed Wolverine Management. Using his own funds, he would acquire properties through Wolverine Management, and then contract with Wolverine Construction to rehabilitate them. Respondent never informed Hanneman, in writing, about any of the potential conflicts arising from their business dealings.

c. Failure to cooperate with disciplinary investigation and recordkeeping violations

On July 12, 2016, the OAE notified respondent that a grievance had been filed against him, and requested a written response to the grievance by July 27, 2016. On July 25, 2016,

respondent provided his written response to the OAE. A demand audit took place on October 27, 2016, and revealed the following deficiencies:

> a) Improper ATA designation in that respondent's bank statements must indicate "Attorney Trust Account" in violation of R. 1:21-6(a)(2);
>
> b) Five client ledger cards with debit balances totaling ($165);
>
> c) Inactive balances totaling $890.03 for six clients, left in the ATA, in violation of R. 1:21-6(d);
>
> d) No individual ledger card for each client in violation of R. 1:21-6(c)(1);
>
> e) Failure to prepare monthly three-way ATA reconciliations in violation of R. 1:21-6(c)(1)(H);
>
> f) An outstanding check dated March 20, 2015, made payable to the State of New Jersey for $250 in violation of R. 1:21-6(d);
>
> g) Cash withdrawals from the ATA totaling $26,950, in violation of R. 1:21-6(c)(1)(A);
>
> h) Unidentified trust balances of $634.55, in violation of R. 1:21-6(d);
>
> i) Improper ABA designation in that respondent's bank statements, checks, and deposit slips must indicate "Attorney Business Account," "Attorney Professional Account," or "Attorney Office Account," in violation of R. 1:21-6(a)(2);
>
> j) Failure to maintain ABA cash receipts and disbursements journals, in violation of R. 1:21-6(b)(1)(A); and

k) All earned legal fees not deposited into the ABA in violation of R. 1:21-6(a)(2).

The demand audit also revealed that respondent had a shortage of $624.97 in unidentified trust funds from his attorney trust account. On October 28, 2016, after reviewing the results of the demand audit, the OAE asked for additional documents to be produced by November 21, 2016. Respondent failed to reply.

On December 15, 2016, the OAE sent a letter to respondent, memorializing a December 7, 2016 phone call with him, and reminding him that he had missed the November 21, 2016 deadline to produce the documents and information the OAE had requested. The letter extended the deadline until December 21, 2016. On January 13, 2017, the OAE's December 15, 2016 letter was returned as "unclaimed." The letter sent by regular mail was not returned. Respondent admitted having received the letter.

On February 14, 2017, the OAE left a voicemail message informing respondent that it was filing a motion for his temporary suspension, based on his failure to cooperate. Respondent admitted that he received the voicemail. Yet, he failed to reply and was subsequently temporarily suspended.

DRB 18-062 (District Docket No. IX-2017-0003E)

At the DEC hearing on this matter, respondent stipulated to the allegations of the complaint. Those allegations are as follows.

In November 2015, grievants, Jennifer and Kathleen Vitale, retained respondent to defend against a collection action regarding a delinquent student loan. The representation included timely filing an answer to a previously-filed complaint. Respondent was paid $500 as a retainer for his services, plus $175 for the filing fee. Respondent failed to timely file the answer.

Respondent failed to request an extension of time to answer, failed to file a motion to vacate the default that subsequently was entered, failed to appear at the default hearing, and took no other steps to remediate the situation. A default judgment was entered against the Vitales. Respondent admitted that his failures in this regard violated RPC 1.1(a) and RPC 1.3.

The Vitales attempted to obtain information from respondent about the status of their case for four months, to no avail. Respondent ignored all but two of the Vitales' attempts to reach him. Eventually, they hired counsel who was unable to obtain any information or contact from respondent regarding the matter.

Respondent admitted that his failures in this regard violated RPC 1.4(b).

On February 7, 2017, the DEC investigator sent a letter to respondent requesting a response to the Vitales' grievance. The letter was returned as "Unable to Forward". Hence, on February 16, 2017, the investigator sent a second letter to respondent at an updated address, requesting a response to the grievance. Respondent failed to reply. Then, on April 13, 2017, the investigator sent a final letter to respondent, again requesting a written response to the grievance. Respondent again failed to comply. Respondent admitted that his failure to respond to a lawful demand for information from a disciplinary authority violated RPC 8.1(b).

The DEC concluded that the factual allegations of each of the complaints were established by clear and convincing evidence. Respondent did not present any evidence in mitigation.

The DEC initially determined that the appropriate quantum of discipline was a nine-month suspension; that, prior to reinstatement, respondent be required to provide the OAE with all of the requested financial documents; and that, after reinstatement, respondent be required to practice under the supervision of a proctor for a minimum of six months. The DEC, however, regarded respondent's failure to cooperate with the

investigations in both cases to be a significant aggravating factor warranting enhanced discipline.

Moreover, in further aggravation, the DEC noted that, previously, respondent received reprimands on April 30, 2002, and February 8, 2008, for failing to maintain proper trust and business account records, as well as for negligently misappropriating funds from his attorney trust account. Thus, the instant matter represented respondent's third instance of failure to maintain proper trust and business account records, as required by R. 1:21-6. The DEC concluded that respondent's misconduct in the context of these prior disciplinary actions demonstrates his failure to remediate his recordkeeping violations and a failure to learn from his mistakes.

Accordingly, the DEC recommended a one-year suspension, along with the aforementioned conditions.

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.

Specifically, in DRB 18-062, respondent failed to timely file an answer on behalf of the Vitales, resulting in the entry of a default, and, subsequently, a default judgment. Respondent then failed to take any steps to remediate the situation, such as filing a motion to vacate either the default or the default

judgment. Respondent's conduct in this regard violated RPC 1.1(a) and RPC 1.3.

Further, despite the Vitales' repeated attempts to learn more about the status of their matter over the course of four months, respondent ignored them on all but two occasions. His failure to keep his clients informed or to respond to their requests for information violated RPC 1.4(b).

Finally, notwithstanding the DEC's repeated requests for information and for a written reply to the Vitales' ethics grievance against him, respondent remained silent and ignored his responsibilities to cooperate with disciplinary authorities, a violation of RPC 8.1(b).

In DRB 18-061, respondent admitted that he entered into a business partnership with his long-term client Hanneman. He then created a second business, of which he was the sole owner, to supplement that partnership. Throughout, respondent continued to provide legal services to Hanneman and to the partnership. Respondent further admitted that he entered into these business transactions without advising Hanneman in writing of the potential conflicts, in violation of RPC 1.8(a).

Respondent also conceded that he committed a multitude of recordkeeping violations, making it difficult for the OAE to understand the flow of money through his attorney trust account.

Ultimately, the OAE was able to determine, based on the partial records respondent provided, that his attorney trust account had an overall shortage of $624.97. Respondent's failure to maintain trust account records in accordance with the Rules, resulting in negligent misappropriation of client trust funds, violated RPC 1.15(d). Most disturbing about this particular violation is that it represents respondent's third instance of discipline involving the same recordkeeping issues, dating back to 2002.

Additionally, respondent is now before us on his second instance of practicing while ineligible. Between 2011 and 2016, respondent knowingly practiced while ineligible, and he has admitted that he handled up to twenty-five real estate matters during that time. We also found evidence of several estate matters respondent had handled during the same period - one estate matter here and two others in his previous disciplinary matter. The previous matter also included a third client matter concerning a mortgage foreclosure. Respondent has knowingly, consistently, and obstinately continued to practice law while ineligible for over five years, in violation of the Court's Order and RPC 5.5(a)(1).

Finally, as further evidence of his disdain for the disciplinary system, respondent ignored the OAE's requests for information, and eventually produced only partial records for

his audit, in violation of RPC 8.1(b). Although the complaint also charged respondent with a violation of RPC 8.4(d) in conjunction with his failure to cooperate, that misconduct is more properly addressed by the RPC 8.1(b) violation, and, therefore, a finding of conduct prejudicial to the administration of justice is unnecessary. We, therefore, dismiss that charge.

In sum, in DRB 18-061, respondent violated RPC 1.8(a), RPC 1.15(d), RPC 5.5(a)(1), and RPC 8.1(b). In DRB 18-062, he violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 8.1(b).

Practicing law while ineligible for failure to comply with IOLTA or Fund requirements, without more, is generally met with an admonition, if the attorney is 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 Fund 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 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).

When an attorney enters into a business transaction with a client, without observing the safeguards of RPC 1.8(a), ordinarily an admonition or a reprimand is imposed. See, e.g., In the Matter of George W. Johnson, DRB 12-012 (March 22, 2012) (admonition where the attorney, who was a trustee of a testamentary trust, made a loan from the trust to himself without seeking court approval, as required; extensive mitigation considered, including the fact that he issued a note and mortgage for the loan, which were recorded; informed the beneficiary's mother about the loan; had an otherwise unblemished record in his forty-four years at the bar; and took no commission or fees); In the Matter of Frank J. Shamy, DRB 07-346 (April 15, 2008) (admonition where the attorney made small interest-free loans to three clients, without advising them to obtain separate counsel, and completed an improper jurat;

significant mitigation considered); In re Futterweit, 217 N.J. 362 (2014) (reprimand for attorney who entered into a business transaction with a client, by agreeing to receive a share of the company's profits in return for legal advice, without complying with the requirements of RPC 1.8(a); the attorney also failed to prepare a writing setting forth the basis or rate of the fee; aggravating factors considered were the attorney's inconsistent statements made to ethics authorities, his prior admonition, and his failure to acknowledge any wrongdoing or remorse); and In re Cipriano, 195 N.J. 188 (2008) (reprimand for attorney who borrowed $735,000 from a client who was a friend for more than forty years, without regard to the requirements of RPC 1.8(a); he also negligently invaded $49,000 of client funds as a result of poor recordkeeping practices; ethics history included two prior reprimands).

If respondent's misconduct had been limited to one instance of knowingly practicing while ineligible, along with the additional violations of gross neglect, lack of diligence, failure to communicate, and improper recordkeeping, we likely would have voted to impose a reprimand. Because no evidence in the record established that his conflict of interest caused Hanneman injury, economic or otherwise, respondent's additional violation of RPC 1.8(a) would have enhanced the discipline to,

at most, a censure. Respondent's misconduct, however, particularly in the context of his prior discipline, is troubling.

Respondent recently was suspended for one year for practicing while ineligible, and for failing to cooperate with disciplinary authorities, among other things. That matter proceeded by way of default. We are aware that the period of respondent's misconduct in that matter overlapped, to some extent, with his misconduct now before us. Although such an overlap might otherwise serve to lessen the appropriate discipline to be imposed here, we choose not to extend that consideration in this case for several reasons.

First, respondent received discipline for four counts of practicing while ineligible in a previous matter. Here, he has admitted not only that he did so knowingly, but has shown no remorse or the slightest understanding of the severity of his misconduct. Worse still, he has admitted that, in addition to the several estate matters of which we are aware, he was the attorney of record in at least twenty-five real estate transactions during his period of ineligibility. Although we appreciate that respondent may have lacked sufficient funds to pay his annual registration fees, his financial difficulty did not excuse him from complying with the Court's Order declaring

him ineligible and prohibiting him from practicing based on that failure. Indeed, once again, respondent ignored the Court's Order and consistently and continuously practiced law throughout his several periods of ineligibility.

Second, in 2002, respondent received a reprimand for recordkeeping violations. He received another reprimand in 2008 for additional recordkeeping violations, some of which he had not corrected from his first matter. In that first matter, respondent admitted that he (1) kept one client ledger card with a debit balance; (2) maintained three inactive trust ledger balances in his trust account for an extended period of time; (3) failed to prepare a schedule of client ledger account balances and to reconcile them quarterly to his trust account bank statements; and (4) caused his trust account to be out of trust by $3,500 for one and one-half years. In the Matter of Maxwell X. Colby, DRB 01-030 (August 6, 2001) (slip op. at 10). When respondent was next before us, several of the same recordkeeping violations were once again at issue.

Thus, it is clear to us that respondent not only has failed to learn from his mistakes, but also has blatantly chosen to disregard the Court's Rules and Orders. Over the course of at least sixteen years, he has continued to manage client money in a remarkably irresponsible manner.

Third, respondent has repeatedly disregarded his responsibilities to cooperate with disciplinary authorities. He admitted receiving and ignoring requests for information. Then, when he finally did engage the investigative process, he made only a partial production of documents.

Our conclusion is simple. Respondent has displayed contempt for the disciplinary system. This is respondent's fourth disciplinary matter. Based on the record and the totality of his conduct in these matters, including the brazen manner in which he continued to practice law for five years while ineligible, and his utter refusal to learn from his mistakes, we determine to impose a two-year suspension, to begin at the expiration of the one-year suspension respondent is currently serving. In addition, prior to reinstatement, respondent must provide the OAE with all of the requested financial documents and otherwise fully cooperate with any outstanding requests. On reinstatement, respondent must practice under the supervision of a proctor for a minimum of six months.

Member Gallipoli recommends respondent's disbarment.

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

actual expenses incurred in the prosecution of these matters, 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 Maxwell X. Colby

Docket Nos. DRB 18-061 and 18-062

Argued: May 17, 2018

Decided: August 10, 2018

Disposition: Two-year Suspension

Members	Two-year Suspension	Disbar	Recused	Did not participate
Frost	X			
Clark	X			
Boyer	X			
Gallipoli		X		
Hoberman	X			
Joseph	X			
Rivera	X			
Singer	X			
Zmirich	X			
Total:	8	1	0	0

Ellen A. Brodsky
Chief Counsel