

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 18-198
District Docket No. XIV-2018-0030E

In The Matter Of

Frederick S. Lowenberg

An Attorney At Law

Decision

Argued: September 20, 2018

Decided: December 12, 2018

Johanna Barba Jones appeared on behalf of the Office of Attorney Ethics.

Respondent failed to appear, despite proper notice.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), following respondent's suspension for one year and one day in Pennsylvania, for his violation of the Pennsylvania equivalents of New Jersey RPC 1.1 (presumably (a) (gross neglect)); RPC 1.3

(lack of diligence); RPC 1.16(d) (failure to refund an unearned fee); RPC 8.1(b) (failure to cooperate); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The OAE seeks either a reprimand or censure. For the reasons set forth below, we determined to grant the motion for reciprocal discipline and impose a censure.

Respondent was admitted to the Pennsylvania Bar in 2009 and the New Jersey bar in 2010. He has no history of discipline in New Jersey.

On August 28, 2017, the Court administratively revoked respondent's New Jersey law license for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection for seven consecutive years. R. 1:28-2(c) provides that a revocation order does not preclude the disciplinary system's exercise of jurisdiction over pre-revocation order misconduct.

On January 23, 2017, the Pennsylvania Office of Disciplinary Counsel (ODC) filed a Petition for Discipline charging respondent with failing to appear, on December 13, 2016, for an informal admonition, and for failing to provide documentation that he refunded an unearned fee of \$500 to his client, William H. Bowens.

The petition alleged that respondent's conduct violated Pennsylvania Rule

of Disciplinary Enforcement (P.R.D.E.) 203(b)(2) (willful failure to appear before the Supreme Court, the Board, or Disciplinary Counsel for censure, public or private reprimand, or informal admonition, shall be grounds for discipline), Pa.R.D.E. 203(b)(7) (failure to respond to Disciplinary Counsel's request for a statement of position shall be grounds for discipline), Pennsylvania RPC 1.1 (competence); RPC 1.3 (diligence); RPC 1.16(d) (failure to protect client's interest after termination of representation), and RPC 8.4(d) (conduct prejudicial to the administration of justice) (two counts).

At an unspecified time, Bowens sought respondent's representation to appeal a decision of the Department of Health and Human Services (the Department) to list Bowens' name on the Department's child abuse registry. Respondent neither filed the appeal nor refunded Bowens' \$500 fee within the time required by the informal admonition.

On April 21, 2017, respondent failed to appear for a disciplinary hearing regarding his misconduct in the Bowens matter, which proceeded in his absence. Pennsylvania Disciplinary Counsel Harriet Brumberg, Esq. related to the District I Hearing Committee (the Committee) the steps taken in order to obtain service on respondent. Brumberg also discussed the facts of the case, informed the Committee that respondent failed to file an answer, and asked that the facts

as alleged in the complaint be deemed admitted.

On July 17, 2017, the Committee issued a report, finding that, during the course of respondent's representation of Bowens, he committed all of the misconduct alleged in the complaint. The Committee also found that respondent failed to answer the Petition for Discipline, failed to appear at the prehearing conference, and failed to appear at the disciplinary hearing. The Committee concluded that respondent demonstrated disrespect for the disciplinary process, and a complete lack of remorse or recognition of his wrongdoing. It recommended that respondent be suspended from the practice of law in Pennsylvania for one year and one day.

On November 1, 2017, the Disciplinary Board for the Supreme Court of Pennsylvania (PADB) recommended a one-year-and-one-day suspension for respondent. The PADB agreed with the determinations of the Committee, and noted that respondent ignored the ODC's efforts to investigate and prosecute the matter; "continued to mishandle his involvement in the disciplinary process;" did not request formal proceedings; did not refund \$500 to Bowens; and did not appear for the informal admonition, the prehearing conference, or the disciplinary hearing. The PADB concluded that, "[t]he evidence of record leaves no doubt that Respondent was aware of the disciplinary proceedings and

Petitioner's efforts to contact him." He kept his "head in the sand," ignoring "the harm he inflicted on his client" and "the disciplinary process. Respondent forfeited any meaningful opportunity to make his client whole and to accept responsibility and express remorse."

On December 26, 2017, the Supreme Court of Pennsylvania suspended respondent for one year and one day.

Respondent's unethical conduct in Pennsylvania equates to violations of New Jersey RPC 1.1(a), RPC 1.3, RPC 1.16(d), RPC 8.1(b), and RPC 8.4(d).

Respondent's misconduct, although serious, involved only one client matter, but was compounded when, instead of participating in the ethics process, he willfully failed to appear at the initial informal admonition, and then continued to ignore the Pennsylvania ethics authorities as the case progressed through the system. He neither filed the appeal for which Bowens had retained him nor refunded Bowens' \$500 retainer, even after the repayment had been ordered as a condition of his informal admonition.

Respondent showed no interest in his privilege to practice in Pennsylvania, and continued his pattern by failing to reply to the OAE's motion for reciprocal discipline. Respondent has yet to notify the OAE of his Pennsylvania discipline, as R. 1:20-14(a)(1) requires, and failed to reply to the

OAE's general correspondence. Therefore, the OAE recommends either a reprimand or a censure.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

Subsection (E) applies in this matter because the unethical conduct

warrants substantially different discipline.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3). In Pennsylvania, the standard of proof in attorney disciplinary matters is the "evidence is sufficient to prove ethical misconduct if a preponderance of that evidence establishes the charged violation and the proof is clear and satisfactory." See Office of Disciplinary Counsel v. Kissel, 497 Pa. 467, 442 A.2d 217 (1982); Office of Disciplinary Counsel v. Duffield, 537 Pa. 485, 644 A.2d 1186 (1994); and Office of Disciplinary Counsel v. Surrick, 561 Pa. 167, 749 A.2d 441 (2000).

Accordingly, we adopt the findings made by the Pennsylvania Disciplinary Board, and determine that respondent's conduct violated New Jersey RPC 1.1(a), RPC 1.3, RPC 1.16(d), RPC 8.1(b), and RPC 8.4(d).

Specifically, respondent accepted a \$500 fee for providing legal services, including the filing of an appeal on behalf of his client, Bowens, with the

Department of Health and Human Services. He did not file the appeal and seemingly did no work in his client's behalf. Respondent's conduct in this regard violated RPC 1.1(a) and RPC 1.3.

Subsequently, respondent failed to refund the unearned legal fee to Bowens, a violation of RPC 1.16(d). Respondent was required to do so as a condition of his informal admonition in Pennsylvania. Hence, his failure to refund \$500 to Bowens also violated RPC 8.4(d).

Finally, respondent failed to participate or cooperate at any stage of the disciplinary process in Pennsylvania, a violation of RPC 8.1(b).

Ordinarily, an admonition is the appropriate sanction for an attorney's failure to promptly return the unearned portion of a fee. See, e.g., In re Gourvitz, 200 N.J. 261 (2009), In the Matter of Larissa A. Pelc, DRB 05-165 (July 28, 2005), and In the Matter of Stephen D. Landfield, DRB 03-137 (July 3, 2003).

As to the violation of RPC 8.4(d), conduct prejudicial to the administration of justice comes in a variety of forms, and the discipline imposed for the misconduct typically results in either a reprimand or a censure, depending on other factors present, including the existence of other violations, the attorney's ethics history, whether the matter proceeded as a default, the harm to others, and mitigating or aggravating factors. See, e.g., In re Gellene, 203 N.J.

443 (2010).

In Gellene, a case involving similar RPC violations, the attorney received a reprimand for conduct prejudicial to the administration of justice and knowingly disobeying an obligation under the rules of a tribunal by failing to appear on the return date of an appellate court's order to show cause and failing to notify the court that he would not appear; the attorney was also guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients. In mitigation, we considered the attorney's financial problems, his battle with depression, and significant family problems. His ethics history included two private reprimands and an admonition. In the Matter of Alfred V. Gellene, DRB 10-026 (May 26, 2010) (slip op. at 15-16).

Respondent's misconduct is not as severe as the misconduct in Gellene, and he lacks the ethics history of that attorney. However, he carries the added violation of failing to return an unearned fee, which, standing alone would result in an admonition. Therefore, on balance, the baseline discipline for respondent is a reprimand.

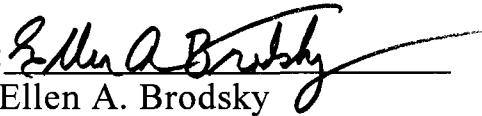
In aggravation, respondent has not reported his Pennsylvania discipline to the OAE, and so far, has ignored that office's attempts to communicate with him. No mitigation was offered.

Hence, based on the foregoing, we determine to impose a censure. This determination takes into consideration respondent's misconduct and his failure to report his Pennsylvania discipline to the OAE, and includes an additional enhancement, based on his failure to cooperate with disciplinary authorities in Pennsylvania, a violation of RPC 8.1(b). See, In re Kivler, 193 N.J. 332, 342 (2008) ("a respondent's default or failure to cooperate with the investigative authorities operates as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced").

Chair Frost and Member Gallipoli voted for a three-month suspension. Member Hoberman 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

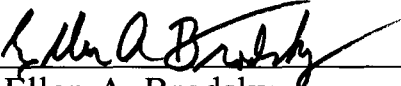
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Disposition: Censure

<i>Members</i>	Censure	Three-Month Suspension	Recused	Did Not Participate
Frost		X		
Clark	X			
Boyer	X			
Gallipoli		X		
Hoberman				X
Joseph	X			
Rivera	X			
Singer	X			
Zmirich	X			
Total:	6	2	0	1


Ellen A. Brodsky
Chief Counsel