

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 18-344
District Docket No. XIV-2017-0599E

In the Matter of :
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: :
Ousmane Dhu'l-Nun Al-Misri :
: :
An Attorney At Law :
: :
:

Decision

Decided: April 25, 2019

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

This matter was before us on a certification of the record filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep the client reasonably informed about a matter and to reply to the client's reasonable requests for information), RPC 5.3(a) (failure to adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer is

compatible with the professional obligations of the lawyer), RPC 5.3(b) (failure, by a lawyer having direct supervisory authority over a nonlawyer, to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer), RPC 5.3(c) (a lawyer shall be responsible for conduct of a nonlawyer employee that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer under certain circumstances), RPC 5.5(a)(2) (assisting a person who is not a member of the bar in the unauthorized practice of law), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to impose a three-month suspension.

Respondent was admitted to the Pennsylvania bar in 1978 and the New Jersey bar in 1979. On September 30, 1996, he received an admonition (when he was known as Ronald A. Davis) for failing to communicate with a client and improperly depositing a former client's check into his trust account as a favor to the client, even though the check did not bear on a client matter. In the Matter of Ronald A. Davis, DRB 96-271 (September 30, 1996).

On December 20, 2002, respondent received a second admonition for gross neglect, lack of diligence, failure to prepare a written fee agreement, and

failure to communicate with the client in a real estate matter. In the Matter of Ousmane D. Al-Misri, DRB 02-351 (December 20, 2002).

On February 13, 2009, respondent received a censure for grossly neglecting a real estate matter, commingling personal and trust account funds, recordkeeping violations, practicing law while ineligible for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection, and for conduct involving dishonesty, fraud, deceit or misrepresentation, after placing personal funds in his attorney trust account to prevent a levy by a personal creditor. In re Al-Misri, 197 N.J. 503 (2009).

Service of process was proper in this matter. On August 23, 2018, the OAE sent a copy of the complaint, by certified and regular mail, to respondent's office. United States Postal Service tracking information indicated delivery of the certified mail on August 29, 2018. The regular mail was not returned.

On September 14, 2018, the OAE sent a letter to respondent, at the same office address, also by regular and certified mail, informing him that, if he failed to file a verified answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the entire record would be certified directly to us for the imposition of discipline, and the complaint would be amended to include a charge of a violation of RPC

8.1(b). The certified mail return receipt card was returned signed on September 18, 2018, but the signature is illegible. The regular mail was not returned.

The time within which respondent may answer the complaint has expired. As of the date of the certification of the record, respondent had not filed an answer.

In March 2014, respondent employed Ian Z. Winograd, Esq., to handle Pennsylvania cases in respondent's office, and as a paralegal for New Jersey matters. At that time, Winograd was not admitted to the practice of law in New Jersey.¹

On July 9, 2014, Roberto Barnes retained respondent to file a civil complaint. Barnes met with both respondent and Winograd, who told him that he "had a good case." Thereafter, respondent assigned the case to Winograd, despite the fact that he was not a licensed New Jersey attorney. All of Barnes' communications were with Winograd, including e-mails, which were signed, "Ian Z. Winograd, Esq." Respondent was copied on all of this correspondence. Winograd also provided Barnes with his law firm business card, which read, "The Law Office of Ousmane D. Al-Misri, LLC, Ian Z. Winograd, Esq., Attorney at Law." The business card contained the address and telephone

¹ Winograd was subsequently admitted to the New Jersey bar in 2016.

numbers for Al-Misri's Newark, New Jersey office, but failed to indicate the jurisdiction in which Winograd was licensed to practice law.

Several of Winograd's communications led Barnes to believe that Winograd was a licensed New Jersey attorney. For example, on April 16, 2015, Barnes sent an e-mail to respondent and Winograd, requesting to "speak with the head attorney." Winograd replied that same day, as follows:

Mr. Al-Misri has told me to inform you that I am still the one handling your case thus your communications will be with me until a time where he is not as busy . . . however [sic], we have many cases going on.

I will continue to work on your complaint for your signature.

Very truly yours,

Ian Z. Winograd, Esq.

[1C¶11;Ex.2.]²

According to the complaint, under "Joint Opinion 720 (ACPE) and 46 (CUPL), dated April 4, 2011," paralegals are permitted to sign routine, non-substantive correspondence to clients, adverse attorneys, or courts, so long as (1) a supervising attorney is aware of the exact nature of the correspondence; (2) the paralegal's identity and non-attorney status is noted; and (3) the name of the responsible attorney is set forth in the correspondence.

² 1C refers to count one of the August 21, 2018 ethics complaint.

The complaint alleged that Winograd's correspondence to Barnes failed to identify Winograd as a paralegal or respondent as the responsible attorney for the case. Respondent also failed to supervise Winograd's communications with Barnes.

According to count one of the complaint, respondent violated RPC 5.3(a) through (c) by failing to supervise Winograd, his "nonlawyer staff"; RPC 5.5(a)(2) by permitting Winograd to communicate with Barnes without disclosing that he was acting as a paralegal under respondent's supervision, thereby assisting Winograd in the unauthorized practice of law; and RPC 8.4(c) by allowing Winograd's communications to mislead Barnes into believing that Winograd was a licensed New Jersey attorney.

Winograd left respondent's employ in February 2016, before a complaint had been filed on Barnes' behalf, which respondent filed on April 6, 2016. Respondent never communicated with Barnes during the representation, even after Barnes sent him a July 14, 2015 e-mail requesting a status update for his case. At one point, Barnes traveled to respondent's office to discuss his case, only to have respondent turn him away for lack of an appointment. When Barnes returned for his appointment, in summer 2016, he found the office closed. Thereafter, respondent failed to return Barnes' subsequent telephone calls seeking information.

Ultimately, Barnes contacted the court in Essex County where his matter was venued and was told that his complaint had been dismissed on October 28, 2016, with prejudice, for failure to serve the defendants.

According to count two of the complaint, respondent's inaction in the case amounted to gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3, respectively. His failure to keep Barnes reasonably informed about the status of the matter and to comply with his client's reasonable requests for information violated RPC 1.4(b).

Following a review of the record, we find that the facts recited in the complaint support most, but not all, of the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1). Notwithstanding that Rule, each charge must be supported by sufficient facts for us to determine that unethical conduct has occurred.

In July 2014, Barnes retained respondent's law firm to represent him in a civil lawsuit. Respondent assigned the case to Winograd, a Pennsylvania attorney whom he had employed a few months earlier. Winograd, however, was not licensed to practice law in New Jersey. As evidenced by e-mails,

Winograd actively engaged in the practice of law, and told Barnes that he was handling the case, and that he was preparing a complaint on Barnes' behalf.

By assigning Barnes' New Jersey case to Winograd, an attorney not licensed to practice law in New Jersey, who thereafter engaged in the practice of law in Barnes' case, respondent assisted Winograd in the unauthorized practice of law, a violation of RPC 5.5(a)(2).

Parenthetically, RPC 7.5(b) required respondent to "indicate the jurisdictional limitations on those not licensed to practice in New Jersey," which respondent failed to do. The complaint, however, did not charge respondent with a violation of RPC 7.5. Therefore, we make no finding in that respect.

In addition to assigning Barnes' New Jersey case to Winograd, respondent furnished him with a law firm business card that failed to indicate the jurisdiction in which Winograd was admitted to the practice of law. Likewise, Winograd's e-mail communications with Barnes were signed "Ian Z. Winograd, Esq.," with no indication of his status as a Pennsylvania-only attorney. Therefore, respondent and Winograd misrepresented to Barnes that Winograd was an attorney duly licensed to practice law in New Jersey, in violation of RPC 8.4(c).

Winograd left the firm in February 2016 without filing Barnes' complaint. On April 6, 2016, respondent filed a complaint, but took no action thereafter to prosecute Barnes' claim. Barnes later learned that, on October 28, 2016, his case had been dismissed, with prejudice, for failure to serve the defendants. By permitting Barnes' complaint to be dismissed with prejudice, respondent grossly neglected and lacked diligence in the handling of Barnes' matter, in violation of RPC 1.1(a) and RPC 1.3.

Respondent also failed to communicate important events in the case to Barnes. During Winograd's handling of the case, respondent never communicated with Barnes. After Winograd left the law firm, too, respondent ignored Barnes' pleas for information about his case. On one occasion, Barnes traveled to respondent's office for a status update, but respondent turned him away for lack of an appointment. Barnes secured an appointment, returned on that date, and found the office closed. Although respondent appears to have abandoned Barnes, the complaint did not charge him with any ethics violations in that regard. Thereafter, respondent ignored his calls for information about the case. Barnes learned about the dismissal of his case when he contacted the court directly. Respondent's utter lack of communication with his client over the entire representation violated RPC 1.4(b).

Although the complaint also charged respondent with violations of RPC 5.3(a) through (c), that Rule governs an attorney's responsibility for nonlawyer employees who assist an attorney in a law practice. Here, respondent did not assist a non-attorney, but, rather, a Pennsylvania attorney, in respondent's employ, in the unauthorized practice of law, a violation of RPC 5.5(a)(2). Thus, we dismiss the RPC 5.3 charge.

In summary, in a single client matter, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(c), RPC 5.5(a)(2), and RPC 8.4(c).

When an attorney assists a nonlawyer or unlicensed lawyer in the unauthorized practice of law and commits other ethics violations, the discipline ranges from a reprimand to a lengthy suspension. See, e.g., In re Bevacqua, 174 N.J. 296 (2002) (reprimand for attorney who assigned an employee, whom he thought had been admitted to practice law in another state, to prepare a client for a deposition and to appear on the client's behalf; the employee, however, had not yet been admitted to practice law in any jurisdiction at that time; the attorney committed other violations, including gross neglect, pattern of neglect, and lack of diligence; multiple mitigating factors, including lack of disciplinary history, his inexperience as an attorney, and conduct resulting from poor judgment, rather than venality); In re Silber, 100 N.J. 517 (1985) (reprimand for attorney who failed to inform the court that

his law clerk had made an ultra vires appearance; contrary to the attorney's instructions, the law clerk took it upon herself to represent a client at a hearing; although the attorney chastised the law clerk, he failed to inform the court of the incident and, later, when the attorney received a proposed form of order showing the law clerk as the appearing attorney, he failed to contact the court to correct the misrepresentation); In re Chulak, 152 N.J. 443 (1998) (three-month suspension for attorney who allowed a nonlawyer to prepare and sign pleadings in the attorney's name and to be designated as "Esq." on his attorney business account; the attorney then misrepresented to the court his knowledge of these facts); In re Cermack, 174 N.J. 560 (2003) (on motion for discipline by consent, six-month suspension for attorney who entered into an agreement with a suspended lawyer that allowed him to continue to represent clients, although the attorney appeared as the attorney of record and handled court appearances; in some cases, the attorney took over the suspended lawyer's cases with the clients' consent and with the understanding that the cases would be returned to the suspended lawyer upon his reinstatement); and In re Hecker, 205 N.J. 263 (2011) (one-year suspension for attorney who violated RPC 5.5(a) when he assisted a collection agency in the unauthorized practice of law; the attorney lent his name to the company so that it could avoid the proscription against impliedly representing to the debtor that an

attorney is involved in the debtor's account; moreover, by lending his name to the collection agency and permitting it to send collection letters on his stationery, the attorney violated RPC 8.4(c); a serious aggravating factor was the attorney's failure to take responsibility for his obligations as a lawyer, as demonstrated by a prior disciplinary matter in which his failure to maintain his attorney checkbooks in a safe place led to the theft of client funds by an employee who previously had stolen monies from the attorney; other aggravating factors were the attorney's disciplinary history (a six-month suspension and a three-month suspension) and his failure to learn from past mistakes).

Most of the above cases involve attorneys having assisted nonlawyers in the unauthorized practice of law, arguably a more serious violation of RPC 5.5(a)(2) than is presented here, where respondent assisted another lawyer, who was admitted to practice law in Pennsylvania, but not New Jersey. This case is similar to the reprimand case, Bevacqua, above, inasmuch as both respondent and Bevacqua assisted a non-admitted lawyer in the unauthorized practice of law in New Jersey. Like Bevacqua, respondent also grossly neglected and lacked diligence in the case. For these reasons, standing alone, a reprimand might suffice for respondent's misconduct.

Although respondent also misrepresented to Barnes that Winograd was a New Jersey attorney, the attorney in Silber still received a reprimand for misconduct that also included a misrepresentation by silence. Silber failed to inform the court that his law clerk had made an improper court appearance and, later, he failed to correct a proposed form of order identifying the law clerk as the appearing attorney.


This case, however, requires discipline greater than a reprimand, because of the default nature of the proceedings. "[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." In re Kivler, 193 N.J. 332, 342 (2008). Thus, at least a censure is warranted.

We further consider respondent's prior discipline for some of the same violations presented here: a 1996 admonition for misconduct that included failure to communicate with the client; a 2002 admonition for misconduct that included gross neglect, lack of diligence, and failure to communicate with the client; and a 2009 censure for gross neglect, engaging in the unauthorized practice of law (practicing while ineligible), and conduct involving dishonesty, fraud, deceit or misrepresentation. Based on this aggravating factor, we determine to impose a three-month suspension.

Vice-Chair Clark, Member Boyer, and Member Joseph voted to impose a
censure.

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 Ousmane Dhu'l-Nun Al-Misri
Docket No. DRB 18-344

Decided: April 25, 2019

Disposition: Three-Month Suspension

<i>Members</i>	Three-Month Suspension	Censure	Recused	Did Not Participate
Frost	X			
Clark		X		
Boyer		X		
Gallipoli	X			
Hoberman	X			
Joseph		X		
Rivera	X			
Singer	X			
Zmirich	X			
Total:	6	3	0	0


Ellen A. Brodsky
Chief Counsel