

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 19-124  
District Docket No. XIV-2017-0297E

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In the Matter of  
Guy W. Killen  
An Attorney at Law

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Decision

Argued: June 20, 2019

Decided: December 5, 2019

Amanda Wyeth Figland appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a censure filed by the District IV Ethics Committee (DEC). The formal ethics complaint charged respondent with violating RPC 5.5(a)(1) (unauthorized practice of law) and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

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

Respondent was admitted to the New Jersey bar in 1981. At the relevant times, he maintained an office for the practice of law in Woodbury, which operated under the name Guy W. Killen, P.C., a professional corporation. He has no prior discipline.

On March 29, 2018, the Office of Attorney Ethics (OAE) filed a formal ethics complaint against respondent, charging him with practicing law while ineligible, a violation of RPC 5.5(a)(1), based on his failure to either maintain professional liability insurance, as R. 1:21-1A(a)(3) requires, or, if insurance was maintained, to file a certificate of insurance with the Office of the Clerk of the Supreme Court of New Jersey (the Clerk), as R. 1:21-1A(b) requires. The complaint also charged respondent with having violated RPC 8.1(b), based on his failure to (1) reply to letters and a voice mail message from the Clerk seeking a copy of the certificate of insurance; (2) reply to the OAE's requests for a written reply to the Clerk's referral; and (3) appear for a demand interview.

Although the ethics complaint also alleged that, as of October 17, 2017, respondent was administratively ineligible to practice law due to his failure to comply with the requirements of the Interest on Lawyers Trust Account (IOLTA) program, the complaint did not charge him with having violated RPC 5.5(a)(1) due to his IOLTA ineligibility, a fact that the OAE acknowledged at

the disciplinary hearing.<sup>1</sup> Further, on June 14, 2019, the Advisory Committee on Judicial Conduct (ACJC) filed a formal complaint against respondent, charging him with having violated various provisions of the Code of Judicial Conduct, based on his continued practice of law and service as a municipal court judge while administratively ineligible to practice law due to his failure to comply with IOLTA requirements, and his failure to obtain and maintain in good standing a policy of lawyers' professional liability insurance. We, thus, limit our review of the record to the professional liability insurance issue.

In his answer to the formal ethics complaint, respondent admitted all of the allegations, asserted mitigating circumstances, and requested a hearing on the issue of discipline. In a statement of mitigation attached to his answer, respondent asserted that he had been "in denial with regard to certain aspects of his personal and professional responsibilities," and, that, during a period of time, he did not open his mail and, thus, did not reply to correspondence. Respondent claimed that a death in his family, in combination with his divorce after a lengthy marriage, had triggered his "situation," that he sought help, and that he was being treated for mild depression.

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<sup>1</sup> On April 3, 2018, the Court removed respondent from the IOLTA ineligibility list.

Respondent denied having misrepresented that he maintained professional liability insurance. He attributed the lack of insurance, “at least in part, to failure to be reappointed as legal counsel to a government entity.”

At the DEC hearing, respondent acknowledged that the Clerk’s office had contacted him several times, in writing and by telephone, seeking the certificate of insurance, and had cautioned him that his failure to produce the certificate would result in the Clerk’s notifying the OAE of his non-compliance. Respondent also admitted his receipt of the OAE’s letters informing him of the Clerk’s referral, his receipt of the OAE’s letter scheduling a demand interview, and his receipt of the OAE’s letter requesting a written reply to the grievance. Respondent acknowledged his failure to reply to the above communications.

According to respondent, during that time, he was not opening mail that appeared to be “adverse,” telling himself he would “do it tomorrow.” This included mail from the OAE, “or anyone else,” on the issue of his ineligibility. Although respondent had read the first letter from the Clerk, he did not reply to that letter or subsequent letters, because he was not in compliance with R. 1:21-1A(a)(3), could not bring himself into compliance, and did not want to admit his noncompliance.

Respondent admitted that his failure to maintain professional liability insurance, or to file a certificate of insurance with the Clerk’s Office, violated

RPC 5.5(a)(1). He also admitted that he had violated RPC 8.1(b) by failing to reply to the Clerk's notices, by failing to submit to the OAE a written reply to the grievance, and by failing to appear at the demand interview.

Respondent testified that, at the end of 2013, he canceled his professional liability insurance because it had become unaffordable. At the time, the premium was about \$1,000 per month. Thereafter, he claimed he had stopped holding himself out as a professional corporation because he knew that he was required to have the insurance in order to do so. Specifically, he testified that he has held himself out as a sole practitioner since 2014 or 2015, and, in that regard, has identified himself on letterhead and pleadings as Guy W. Killen, Attorney at Law. As of the date of the DEC hearing, December 5, 2018, however, respondent had not yet formally dissolved the professional corporation.

In mitigation, respondent incorporated the statement in mitigation attached to his answer. For "personal and private" reasons, he did not substantiate his claim of depression.

As respondent admitted, the DEC found that he had violated RPC 5.5(a)(1), by failing to maintain professional liability insurance, and RPC 8.1(b), by ignoring communications from the Clerk, and by failing to cooperate with the OAE in its investigation.

In its hearing panel report, the DEC acknowledged that the complaint's RPC 5.5(a)(1) charge was based solely on respondent's failure to maintain required liability insurance. Yet, the DEC's RPC 5.5(a)(1) analysis focused exclusively on respondent's IOLTA ineligibility, as well as his failure to pay his 2017 attorney fee.<sup>2</sup> The DEC also found that, consistent with respondent's testimony, he practiced law and served as a municipal court judge during this period.

According to the DEC, respondent was aware of his ineligibility, based on his signed receipt of several letters informing him of his ineligible status. Although the hearing panel report identified those letters as exhibits J-1a through g, the record does not contain exhibits identified as such. Presumably, the DEC intended to cite exhibits J-4 through J-10, which are copies of the OAE's June 1, July 7, October 2, and October 12, 2017 letters and corresponding receipts. These letters, however, did not inform respondent that he was ineligible to practice law. Rather, they stated that a grievance had been filed against him, and that he was required to submit a written reply and, later, to appear for a demand interview. Nonetheless, the DEC concluded that respondent had violated RPC 5.5(a)(1).

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<sup>2</sup> By "attorney fee," the DEC presumably meant the annual attorney assessment due to the New Jersey Lawyers' Fund for Client Protection (CPF). The record before us contains no evidence that respondent had failed to pay this fee.

In aggravation, the DEC cited respondent's failure to cooperate with both the Clerk and the OAE, the "lengthy period of time" during which the OAE had tried to discuss the matter with him, and his decision to ignore the OAE. Further, according to the DEC, respondent "knowingly sat as a municipal court judge while he was ineligible to practice law," which "severely undermine[d] public confidence in the integrity of the system."

In mitigation, the DEC considered respondent's admission of wrongdoing; his contrition and remorse; his unblemished disciplinary history; and his "efforts to correct the issue involving the sole proprietorship versus corporation." The DEC rejected respondent's claimed medical condition, however, due to his failure to submit evidence corroborating his testimony.

The DEC determined that, because respondent was aware of his ineligibility, a reprimand ordinarily would be in order, but recommended enhancement of the sanction to a censure, in light of his service as a municipal court judge and his failure to reply to the Clerk. The DEC also recommended referral of the matter to the ACJC.

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, RPC 5.5(a)(1) prohibits a lawyer from practicing law in this State while ineligible to do so. The record clearly and convincingly establishes that respondent violated RPC 5.5(a)(1), by failing to comply with R. 1:21-1A(a)(3), which requires an attorney who practices law as a professional corporation to maintain professional liability insurance. Further, respondent's inability and, therefore, failure to file a certificate of insurance with the Clerk violated R. 1:21-1A(b) and, thus, rendered him unauthorized to practice law.

Further, although respondent was asked whether he represented clients during his period of IOLTA ineligibility, he was not asked whether he represented clients during the time that he was not maintaining professional liability insurance. To the extent that respondent's period of IOLTA ineligibility overlapped with his ineligibility for not having insurance, he certainly practiced while he was ineligible for failure to maintain insurance. Thus, as the DEC found, respondent also violated RPC 5.5(a)(1) in that respect.

The DEC erred, however, in finding that respondent had violated RPC 5.5(a)(1) by practicing law while he was administratively ineligible. As the OAE acknowledged, the complaint failed to charge respondent with a violation of that Rule based on the administrative ineligibility, and the OAE did not amend the complaint to charge that violation.



In respect of the RPC 8.1(b) charge, although respondent admitted that he had ignored the communications from the Clerk, the DEC erred in finding that this conduct violated the Rule. The Clerk is not a disciplinary authority. In re Lindner, \_\_\_ N.J. \_\_\_ (2019). Moreover, the Clerk's requests that respondent produce the certificate of insurance were not made in connection with a disciplinary matter. Thus, we dismiss the RPC 8.1(b) charge as it pertains to the Clerk.

The OAE is a disciplinary authority, however, and its communications to respondent were in connection with the Clerk's referral of respondent's failure to comply with R. 1:21-1A, which was a disciplinary matter. By refusing to reply to the OAE's communications and by failing to appear for the demand interview, respondent violated RPC 8.1(b).

In sum, respondent violated RPC 5.5(a)(1), by practicing as a professional corporation without professional liability insurance, and RPC 8.1(b), by ignoring the OAE's requests for information in that regard. The only remaining issue is the appropriate quantum of discipline to impose on respondent for these infractions.

The baseline discipline for practicing law without maintaining required insurance is an admonition. In re Lindner, \_\_\_ N.J. \_\_\_ (default; for a three-year period, attorney practiced law as a limited liability corporation without

maintaining professional liability insurance) and In the Matter of F. Gerald Fitzpatrick, DRB 99-046 (April 21, 1999) (for a six-year period, attorney practiced law in a professional corporation without maintaining liability insurance).

Generally, reprimands are imposed on attorneys who are aware of their ineligibility to practice law, but do so nevertheless. See, e.g., In re Moskowitz, 215 N.J. 636 (2013) (attorney practiced law knowing that he had been declared ineligible for nonpayment of the annual attorney assessment to the CPF) and In re (Queen) Payton, 207 N.J. 31 (2011) (reprimand; attorney who practiced law while ineligible was aware of her ineligibility and previously had received an admonition for the same misconduct).

Here, respondent knew that he was not authorized to practice law. Indeed, he had made a conscious decision not to renew his professional liability insurance policy based on financial considerations, demonstrating that his own monetary interests were more important than the interests of his clients.<sup>3</sup> His intentional violation of RPC 5.5(a)(1), thus, requires the imposition of a reprimand. There is, additionally, respondent's RPC 8.1(b) violation to consider.

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<sup>3</sup> Neither the Lindner decision nor the letter of admonition issued in Fitzpatrick mention whether the lack of insurance was intentional or an oversight.

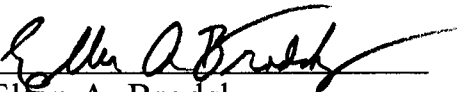
We determine that respondent's RPC 8.1(b) violation does not warrant enhancement of the appropriate quantum of discipline beyond a reprimand, because, ordinarily, an admonition is imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In the Matter of Carl G. Zoecklein, DRB 16-167 (September 22, 2016) (attorney ignored three letters from a district ethics committee investigator seeking information about a grievance; he also lacked diligence in the representation of his client and failed to communicate with him) and In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (attorney failed to reply to repeated requests for information from the District Ethics Committee investigator regarding his representation of a client in three criminal defense matters).

In mitigation, we considered respondent's admission of wrongdoing and his unblemished disciplinary record during thirty-plus years at the bar. In our view, however, these factors do not warrant a downgrade of the appropriate sanction to an admonition, given respondent's conscious decision to engage in the unauthorized practice of law, combined with his subsequent failures to cooperate with disciplinary authorities. We, thus, determine that a reprimand is the required quantum of discipline to protect the public and preserve confidence in the bar.

Member 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  
Bruce W. Clark, Chair

By:   
Ellen A. Brodsky  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Guy W. Killen  
Docket No. DRB 19-124

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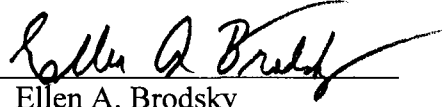
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Argued: June 20, 2019

Decided: December 5, 2019

Disposition: Reprimand

<i>Members</i>	Reprimand	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer	X		
Hoberman	X		
Joseph			X
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8	0	1

  
Ellen A. Brodsky  
Chief Counsel