

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-443
District Docket No. XIV-2018-0609E

In the Matter of :
Edward Harrington Heyburn :
An Attorney at Law :
:

Decision

Argued: May 21, 2020

Decided: September 18, 2020

Ryan J. Moriarty 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 disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent. Respondent stipulated to having violated RPC 1.15(b) (failure to promptly deliver funds to a third party), RPC

3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

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

Respondent was admitted to the New Jersey and Pennsylvania bars in 1997. He maintains an office for the practice of law in East Windsor, New Jersey.

On November 13, 2013, respondent received a censure for his combined misconduct in two defaults. One of the matters involved violations of the attorney advertising rules; the other involved a lack of diligence, failure to cooperate with ethics investigators, and misrepresentations by silence. In re Heyburn, 216 N.J. 161 (2013).

On June 18, 2015, respondent received a second censure for gross neglect, lack of diligence, failure to communicate, and misrepresentations to the client. In re Heyburn, 221 N.J. 631 (2015).

On July 9, 2018, respondent received a third censure for negligent misappropriation of client funds and recordkeeping violations. In re Heyburn, 234 N.J. 80 (2018).

Respondent and the OAE entered into a disciplinary stipulation, which sets forth the following facts in support of his admitted ethics violations.

In the fall of 2014, respondent represented Dublin Pub Group, LLC (Dublin), in the sale of a restaurant and bar to David Boyer, Esq. In connection with the transaction, Boyer gave respondent a \$25,000 deposit to hold, in escrow, pending the sale. Respondent deposited those funds in his PNC Bank attorney trust account (ATA).

Respondent sued Boyer, in Dublin's behalf, in the Superior Court of New Jersey, Burlington County, Law Division, alleging that Boyer had breached the terms of the contract. Because a third-party complaint named respondent as a defendant in that action, he withdrew from the representation of Dublin and was replaced by Joseph Consiglio, Esq. Respondent applied to the court for permission to deposit the \$25,000 in escrow funds with the Superior Court Trust Fund (SCTF). On January 9, 2015, the Honorable Marc M. Baldwin, J.S.C. signed respondent's proposed order granting that, and other, relief.

On January 28, 2015, respondent withdrew the \$25,000 in escrow funds from his ATA and purchased a cashier's check in that amount. However, the check mistakenly was issued to the "Treasurer of New Jersey." That error was corrected ten months later, on November 6, 2015, with the issuance of a second cashier's check, payable to the Superior Court of New Jersey. Respondent,

however, did not promptly deposit the second check with the court, as the January 9, 2015 court order required.

The stipulation is silent regarding whether, in January 2015, respondent had received a filed copy of Judge Baldwin's order. However, in his January 14, 2019 reply to the grievance, respondent stated that, when he withdrew as counsel for Dublin, he sent his file to Consiglio, without keeping a copy of Judge Baldwin's order. On several occasions thereafter, respondent requested a copy of the order from opposing counsel, William Tobolsky, Esq. Although Tobolsky promised to provide the order, he did not. The stipulation does not reveal whether respondent asked his successor, Consiglio, for a copy of Judge Baldwin's order.

In August 2018, John Shields, Esq. replaced Tobolsky as Boyer's attorney and, on August 29, 2018, provided respondent with a copy of Judge Baldwin's January 9, 2015 order, as well as materials explaining how to deposit funds with the SCTF. Thereafter, during a September 10, 2018 telephone status conference with the court, respondent represented to the court that he would remit the funds that day.

In September 12, 13, and 18, 2018 e-mails, Shields asked respondent to provide an update regarding the status of the funds, which had yet to be

deposited with the SCTF. On September 19, 2018, Shields sent a letter to the Honorable Susan L. Claypoole, J.S.C., requesting that respondent be directed to explain why he had not yet deposited the funds with the court.

On September 24, 2018, respondent sent an e-mail to Shields, stating that he needed to obtain a “fresh” cashier’s check, due to the age of the second check. That same date, respondent obtained from PNC Bank a third, \$25,000 cashier’s check. Through inadvertence, however, respondent sent that check to the OAE, not the SCTF, which caused further delay.¹ In September 26 and 27, 2018 e-mails, Shields again inquired regarding the status of the funds.

By letter dated September 27, 2018, Shields asked Judge Claypoole for a telephone conference in the matter, which was scheduled for October 17, 2018. According to the stipulation, respondent “indicated that he sent the trust check to the SCTF on October 2, 2018 and produced a shipping receipt confirming delivery of the trust check.” The SCTF then informed respondent that it had not received the check. Respondent stipulated that he did not participate in the October 17, 2018 telephone status conference.

¹ In respondent’s January 14, 2019 reply to the grievance, he acknowledged that the OAE had contacted him upon its receipt of the check, and that his wife retrieved it from the OAE’s office.

On December 20, 2018, respondent sent a letter to the Honorable Ronald E. Bookbinder, A.J.S.C., stating that he had cancelled the third, September 24, 2018 cashier's check and had "personally provided [to] the SCTF Unit" a fourth, December 20, 2018 cashier's check, in the amount of \$25,000, which the SCTF deposited on January 10, 2019.

Respondent acknowledged the resulting "gap" in time from the issuance of the court order to his ultimate deposit of the check with the SCTF, maintaining that he had "essentially waited" for Tobolsky to provide him with a copy of the order, "since 'technically' it was Tobolsky's client's money." Respondent stipulated that, by taking more than four years to facilitate the court-ordered deposit with the SCTF, he failed to promptly disburse funds to which a third party was entitled, a violation of RPC 1.15(b).

In respect of RPC 3.4(c), respondent stipulated that, by failing to comply with Judge Baldwin's order to promptly deposit the funds with the SCTF, he knowingly disobeyed an obligation under the rules of a tribunal, a violation of RPC 3.4(c).

Finally, respondent admitted that he had wasted judicial resources, requiring opposing counsel to petition the court, and requiring judges to make

efforts “to ascertain the status of the trust funds that were ordered and overdue to be deposited,” a violation of RPC 8.4(d).

The OAE asserted that attorneys who fail to promptly disburse funds to third parties ordinarily receive admonitions, even in the presence of other, less serious violations. In the Matter of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012) and In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004).

The OAE further argued that a reprimand is ordinarily appropriate for an attorney’s failure to obey a court order. In one of the cited cases, the attorney violated the same three RPCs at issue here. In re Cerza, 220 N.J. 215 (2015) (attorney knowingly disobeyed a bankruptcy court order requiring him to comply with a subpoena; engaged in conduct prejudicial to the administration of justice; and failed to promptly deliver funds to a client).

In respect of attorneys who engage in conduct prejudicial to the administration of justice, the OAE cited a three-month suspension case, In re Wysoker, 170 N.J. 7 (2001) (attorney filed more than 1,000 workers’ compensation petitions with incorrect addresses to obtain a more convenient venue; significant court resources were wasted in transferring those cases to

their proper venues). The OAE did not distinguish Wysoker from the present matter, but recommended a censure.

In aggravation, the parties cited respondent's three prior censures and, in mitigation, his cooperation with disciplinary authorities in this matter.

Following a review of the record, we are satisfied that the facts contained in the stipulation clearly and convincingly support the finding that respondent violated RPC 1.15(b), RPC 3.4(c), and RPC 8.4(d).

In 2014, respondent represented Dublin in the sale of a restaurant and bar to Boyer. In early 2015, respondent initiated an action in Superior Court, alleging Boyer's breach of contract. After respondent was named a third-party defendant in the action, he withdrew as Dublin's counsel.

By court order dated January 9, 2015, Judge Baldwin granted respondent's application to transfer the buyers' \$25,000 escrow funds from his ATA to the SCTF. For the next four years, however, respondent failed to deposit those funds with the SCTF.

On January 28, 2015, respondent made the first of several errors, when he disbursed a \$25,000 cashier's check to the Treasurer of New Jersey instead of to the SCTF. That error went unresolved for ten months. On November 6, 2015, respondent purchased a replacement cashier's check payable to the SCTF.

However, respondent failed to place those funds in court for the next three years, explaining that he had been awaiting a copy of Judge Baldwin's order from his adversary, Tobolsky. In his reply to the grievance, respondent claimed that Tobolsky had promised to provide that court order, but never did so.

The record contains no explanation for respondent's failure to request a copy of Judge Baldwin's order from the court or from Dublin's successor attorney, Consiglio, to whom respondent sent his original file when he withdrew from the representation. Instead, the second cashier's check remained with respondent for almost three years.

On August 29, 2018, immediately after he assumed the buyer's representation from Tobolsky, Shields sent respondent a copy of Judge Baldwin's order. Yet, respondent failed to place the buyer's \$25,000 with the SCTF for another four months. Indeed, respondent would have to retrieve a third cashier's check from the OAE, dated September 24, 2018, after mistakenly sending it to that office.

On December 20, 2018, respondent hand-delivered a fourth cashier's check to the SCTF, which finally was deposited with the court. For the lengthy delay in remitting the buyer's funds to the SCTF – January 9, 2015 to December 20, 2019 – respondent is guilty of failing to promptly disburse funds to a third

party, a violation of RPC 1.15(b). Moreover, respondent knowingly disobeyed Judge Baldwin's order by failing to promptly deposit the funds with the SCTF, a violation of RPC 3.4(c).

Finally, Shields provided respondent with Judge Baldwin's order on August 29, 2018 and, in a September 10, 2018 status conference with the court, respondent represented to the court that he would remit the funds to the SCTF that day. For the next two weeks, Shields pressed respondent for the funds and an explanation for his apparent inaction.

By letter dated September 27, 2018, Shields requested court intervention in his quest to secure the deposit of his clients' funds with the court. As detailed above, respondent did not accomplish that until December 20, 2018. Shields had been compelled to seek court assistance to bring respondent into compliance with Judge Baldwin's nearly four-year-old order. Respondent wasted judicial resources, constituting conduct prejudicial to the administration of justice, a violation of RPC 8.4(d).

In sum, respondent violated RPC 1.15(b), RPC 3.4(c), and RPC 8.4(d). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

In isolation, cases involving an attorney's failure to promptly deliver funds to clients or third persons, in violation of RPC 1.15(b), usually result in the imposition of an admonition or reprimand, depending on the circumstances. See, e.g., In the Matter of Jeffrey S. Lender, 11-368 (January 30, 2012) and In the Matter of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012).

Conduct prejudicial to the administration of justice comes in a variety of forms, and the discipline imposed for the misconduct typically results in discipline ranging from a reprimand to a suspension, 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 Ali, 231 N.J. 165 (2017) (reprimand for attorney who disobeyed court orders by failing to appear when ordered to do so and by failing to file a substitution of attorney, violations of RPC 3.4(c) and RPC 8.4(d); he also lacked diligence and failed to expedite litigation in one client matter and engaged in ex parte communications with a judge; in mitigation, we considered his inexperience, unblemished disciplinary history, and the fact that his conduct was limited to a single client matter); In re D'Arienzo, 207 N.J. 31 (2011) (censure for an attorney who failed to appear in

municipal court for a scheduled criminal trial, and thereafter failed to appear at two orders to show cause stemming from his failure to appear at the trial; by scheduling more than one matter for the trial date, the attorney inconvenienced the court, the prosecutor, the complaining witness, and two defendants; in addition, the attorney's failure to provide the court with advance notice of his conflicting calendar prevented the judge from scheduling other cases for that date; prior three-month suspension and two admonitions plus failure to learn from similar mistakes justified a censure); In re DeClemente, 201 N.J. 4 (2010) (three-month suspension for an attorney who arranged three loans to a judge in connection with his own business, failed either to disclose to opposing counsel his financial relationship with the judge or to ask the judge to recuse himself, made multiple misrepresentations to the client, engaged in an improper business transaction with the client, and engaged in a conflict of interest); In re Block, 201 N.J. 159 (2010) (six-month suspension where the attorney violated a court order that he had drafted by failing to transport his client from prison to a drug treatment facility, instead he left the client at a church while he made a court appearance in an unrelated case; the client fled and encountered more problems while on the run; the attorney also failed to file an affidavit in compliance with R. 1:20-20, failed to cooperate with disciplinary authorities, failed to provide

clients with writings setting forth the basis or rate of the fees, lacked diligence, engaged in gross neglect, and failed to turn over a client's file; prior reprimand and one-year suspension); and In re Bentivegna, 185 N.J. 244 (2005) (motion for reciprocal discipline; two-year suspension for an attorney who was guilty of making misrepresentations to an adversary, negotiating a settlement without authority, filing bankruptcy petitions without authority to do so and without notifying her clients, signing clients' names to documents, making misrepresentations in pleadings filed with the court, violating a bankruptcy rule prohibiting the payment of fees before paying filing fees; the attorney was guilty of conduct prejudicial to the administration of justice, gross neglect, failure to abide by the client's decision concerning the objectives of the representation, failure to communicate with clients, excessive fee, false statement of material fact to a tribunal, and misrepresentations).

Here, respondent's misconduct is similar to that of the attorney in Cerza, the reprimand case that the OAE cited. In that matter, the attorney represented the buyer and served as settlement agent in a real estate transaction. For about three years thereafter, he failed to promptly disburse to the seller \$464.24 returned to him post-closing for an over-disbursement of a mortgage payoff, as well as \$670 that had remained in escrow after all other disbursements were

complete, a violation of RPC 1.15(b). Once those errors were made known to him during the ethics proceedings, Cerza conceded that he had been negligent, and rectified the errors. In the Matter of John E. Cerza, DRB 14-102 (October 9, 2014) (slip op. at 4-6). After the real estate closing, the seller filed a bankruptcy petition. In an adversarial proceeding in the bankruptcy, Cerza failed to comply with a court order that he produce previously subpoenaed documents, violations of RPC 3.4(c) and RPC 8.4(d). In mitigation, Cerza cooperated with the OAE's investigation, acknowledged responsibility for his wrongdoing, and displayed remorse for his derelictions. Id. at 6-7.

Respondent's actions were more serious than that of the attorney in Cerza, who was unaware that he had failed to promptly disburse closing proceeds to the seller. Here, for four years, respondent failed to effect the transfer of a much larger amount, \$25,000, to the SCTF.

Respondent's underlying misconduct was not as serious as that of the attorney in Wysoker, which the OAE also cited, who received a three-month suspension. In that case, the attorney maintained a large-scale workers' compensation practice, and routinely filed workers' compensation petitions with incorrect addresses in order to obtain venues more convenient to his law firm and clients. As a result of those actions, significant court resources were required

to transfer more than 1,000 of the law firm's cases containing incorrect addresses to their proper venues. In the Matter of Jacob Wysoker, DRB 00-219 (April 3, 2001) (slip.op at 2-3). In mitigation, we considered that no client claims were adversely affected; Wysoker's actions occurred before the publication of a Notice to the Bar declaring the practice no longer acceptable; he apologized and expressed remorse; he cooperated fully with the OAE; he stipulated to his wrongdoing; and he had no other discipline during a forty-nine-year career. Id. at 5-6.

Based on disciplinary precedent, respondent's most serious infractions, disobeying a court order and conduct prejudicial to the administration of justice, warrant the imposition of at least a reprimand.

In aggravation, respondent failed to comply with a court order for nearly four years and has three prior censures, albeit for dissimilar misconduct. In mitigation, respondent cooperated with disciplinary authorities and stipulated to his misconduct, which preserved disciplinary resources.

Considering the unusual facts of this case, we determine that a censure is the appropriate sanction required to protect the public and preserve confidence in the bar.

Vice-Chair Gallipoli, and Members Hoberman, Rivera, and Zmirich voted to impose a three-month suspension.

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: /s/ Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Edward Harrington Heyburn
Docket No. DRB 19-443

Argued: May 21, 2020

Decided: September 18, 2020

Disposition: Censure

<i>Members</i>	Censure	Three-Month Suspension	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman		X		
Joseph	X			
Petrou	X			
Rivera		X		
Singer	X			
Zmirich		X		
Total:	5	4	0	0

/s/ Ellen A. Brodsky

Ellen A. Brodsky
Chief Counsel