Supreme Court of New Jersey
Disciplinary Review Board
Docket Nos. DRB 20-044 and 20-045
District Docket Nos. XA-2016-0031E and
XA-2016-0032E

In the Matters of Aaron Scott Gilbert and Stephen C. Gilbert Attorneys at Law	:

Decision

Argued: September 17, 2020

Decided: February 10, 2021

Eric L. Probst appeared on behalf of the District XA Ethics Committee.

Donald R. Belsole appeared on behalf of respondents.

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

These matters were before us on a recommendation for a three-month suspension for respondent Stephen Gilbert (Stephen), and a recommendation for a reprimand for respondent Aaron Gilbert (Aaron), both filed by the District XA Ethics Committee (DEC). The formal ethics complaint charged both respondents

with having violated RPC 1.7(a)(1) and (2) (concurrent conflict of interest) and RPC 1.16(a)(1) (representation of a client in violation of the Rules of Professional Conduct).

The complaint also charged Stephen, individually, with having violated RPC 1.5(a) (unreasonable fee); RPC 1.5(b) (failure to communicate in writing the basis or rate of a fee); RPC 5.1(b) (failure to make reasonable efforts to ensure that a lawyer, over whom the lawyer has direct supervisory authority, conforms to the Rules of Professional Conduct); and RPC 5.1(c)(1) and (2) (holding a lawyer responsible for another lawyer's violations of the Rules of Professional Conduct if the lawyer orders or ratifies the conduct or the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action).

The complaint further charged Aaron, individually, with having violated RPC 5.2(a) (a lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person).

For the reasons set forth below, we determine to impose an admonition on Aaron. Because we are equally divided on the quantum of discipline to be imposed on Stephen (censure and three-month suspension), we submit this decision to the Court without a final determination in this regard.

Stephen was admitted to the New Jersey and Massachusetts bars in 1972, and to the New York bar in 1982. At the relevant times, he maintained a law office in Morristown, New Jersey, known as "Stephen C. Gilbert, A Professional Corporation" (the firm). In 1996, Stephen received a reprimand for negligently misappropriating $10,303.23 in client funds, committing recordkeeping violations (including commingling personal and trust funds and depositing earned fees in the trust account), and failing to supervise firm employees in respect of the maintenance of the firm's attorney business and trust accounts. In re Gilbert, 144 N.J. 583 (1996).

Aaron was admitted to the New Jersey bar in 2008 and to the New York bar in 2006. At the relevant times, he practiced law at the firm. He has no disciplinary history.

The firm represents individuals and entities in a variety of matters, including, but not limited to, estate administration; trust and estate work; formation of corporate entities; tax return preparation; and representation of individuals and entities before state and federal tax authorities. Stephen is the supervising attorney for all firm clients and matters. During the relevant timeframe, he also supervised Aaron, his son.

These matters arise from a failed, 2011 transaction involving the purchase and sale of the Bird & Bottle Inn (the Inn), an historic bed and breakfast in

Garrison, New York. The Inn featured a wine cellar with an award-winning wine collection; a pub; a restaurant; a party tent and patio area, and held a liquor license.

In addition to the grievance filed in New Jersey, the buyer in the failed transaction, Michael Jones, filed a grievance against Stephen with the State of New York, Supreme Court, Appellate Division, Third Judicial Department, Attorney Grievance Committee (the New York Committee). On March 21, 2018, the New York Committee imposed an admonition on Stephen, based on his violation of New York RPC 1.7(a)(1), RPC 5.7(a)(2) and (4), and RPC 8.4(c).[1] In respect of the conflict of interest charge, the New York Committee found that Stephen engaged in unethical conduct by representing both Jones, as buyer, and Michael and Elaine Margolies, as sellers, in the failed Inn transaction, without first obtaining each client's informed consent. The New York Committee rejected Stephen's defense that his role in the transaction had been ministerial, and that he merely had typed documents for both parties. In this New Jersey disciplinary matter, Stephen admits, and does not dispute, the New York Committee's findings.

[1] New York RPC 1.7(a)(1) is similar to New Jersey's corresponding RPC, although the New York Rule defines the conflict in terms of the clients having "differing interests." New York RPC 5.7 governs a lawyer's "responsibilities regarding nonlegal services." New York RPC 8.4(c) is the same as New Jersey's corresponding Rule.

In this case, Stephen stipulated to having violated the following RPCs: RPC 1.5(b), by failing to secure a written engagement letter for the legal services provided to Jones and the Elaine Margolies Trust (Trust); RPC 1.7(a)(1) and 1.7(b), by representing both Jones (the buyer) and the Trust (the seller) in the failed commercial transaction involving the purchase and sale of the Inn; RPC 1.16(a)(1); and RPC 5.1(b) and (c).[2]

Aaron did not stipulate to any RPC violations. Thus, his misconduct was the subject of a disciplinary hearing before the DEC.

Jones testified that, prior to 2011, the firm, including Aaron and Stephen, had represented him in tax lien issues, collection matters, and the sale of one of his businesses to Jones's associate, Sean Canavan.[3]

Prior to 2011, Stephen and the firm also had represented Michael Margolies (Michael), in some unidentified matters, which generated approximately $200,000 in unpaid fees. Elaine Margolies (Elaine) had never been a client of the firm, Stephen, or Aaron.

[2] The stipulation omitted a violation of RPC 1.5(a), which was charged in the complaint.

[3] On Jones's referral, Stephen formed an LLC for Canavan. Thereafter, Stephen represented both Jones and Canavan in the purchase and sale of one of Jones's businesses to Canavan, with whom Jones still works. The transaction did not involve real estate. Stephen handled the transaction after Jones and Canavan signed a five-page waiver of conflict.

Aaron testified that he has known Jones since high school. As a firm attorney, Aaron "came into contact with Mr. Jones regarding refinancing and helping out with this tax debt situation."

Jones is a caterer and restaurateur, who owned Club House Caterers, Picnics Unlimited, and Sandwiches Unlimited Lunchbox. He related that Stephen had been his attorney since 1993, but from 2005 to 2010, Jones did not require Stephen's legal services. Then, "out of the blue," in July 2010, Stephen called Jones and requested that he make an appointment, as Stephen wanted to discuss something with him. Jones complied.

Stephen told Jones that he had a client who owned the Inn, which the client's wife was operating. They were trying, without success, to sell the Inn. Stephen suggested that Jones take a "drive-by and see what [he] thought."

In August 2010, Jones drove by the Inn and, thereafter, he and Stephen had another meeting at the firm. Stephen told Jones that the client was a motivated seller who required someone who could run both the restaurant and the catering operation. Over time, Stephen and Jones continued to talk about the Inn. Stephen, who was fond of both Michael and Jones, then arranged a meeting between the parties at Stephen's office. Michael provided a "very interested" Jones with information about the Inn.

On an unidentified Thursday afternoon, Michael gave Jones and "chef Sean" – Sean Canavan – a tour of the Inn. On October 1, 2010, Jones treated his staff to a ten-course dinner there. Jones did not talk to Michael again until the spring of 2011, when Michael asked whether he remained interested. In the summer of 2011, Jones told Michael that he was committed to purchasing the Inn. The parties stipulated that Michael served as the "go-between" for the Trust. Michael and Jones met at the firm, where they worked out the details of the agreement.

Jones testified that Stephen represented both him and Michael in the purchase and sale of the Inn and that Aaron represented the Margolieses. Neither Michael nor Elaine testified.

Regarding the Inn transaction, Jones testified that he did not receive any document pertaining to the firm's fees. Instead, according to an informal, unspoken agreement, he would pay the firm's fees for the Inn matter, in addition to $100,000 in outstanding legal fees he owed to the firm. Stephen testified that he liked Michael and Jones and "was looking to help." Stephen asserted that both parties owed him a lot of money. Stephen claimed that he, Aaron, and the firm did not represent Jones, the Margolieses, or the Trust, but merely provided typing services and the use of his office for their meetings. Stephen maintained he merely supplied Jones and Michael with standard form documents to use as

templates, which, according to Jones, included a purchase and sale agreement, a guaranty agreement, a promissory note, and a collateral mortgage.

Stephen stated that his role in the Inn transaction was limited to periodically answering questions. Later, he acknowledged that Michael and Jones were looking for advice regarding some of the terms and conditions of the transaction. Aaron "was looking to put their desires down on paper." Stephen acknowledged that neither party had the ability to retain "big firms" and, in hindsight, it was "silly" for him to try to help them. He regretted that he had not "sent them to [independent] lawyers from the very beginning."

In respect of the revisions to the transaction documents, the parties stipulated that Stephen directed and supervised Aaron's typing and revising the various documents, which Stephen had ordered Aaron to perform. The revisions were those of Jones and Michael, however, which Aaron merely incorporated into subsequent drafts of the documents that Aaron "typed and retyped."

Aaron testified that he understood, both at the time of the ethics hearing and in 2011, that the same attorney cannot represent the buyer and the seller in a commercial transaction. He acknowledged that he testified, in litigation between Elaine and Jones, that he had represented both of the parties in the Inn transaction. However, he claimed that his representation was limited to serving as scrivener, that is, typing documents, including deleting and adding language.

Aaron admitted that, during the course of the preliminary work on the transaction, he sent e-mails to Jones and to Michael. Aaron described his "function" as "editing the documents from the comments that both Mr. Jones and Mr. Margolies would have." Jones and Michael asked Aaron questions about the transaction, and he placed in the documents the terms and conditions that they communicated to him.

Aaron denied that he had edited a document to reflect Michael's suggestions without sharing those edits with Jones, and vice versa. If, for example, Jones requested a change but Michael did not agree, Aaron would inform Jones and ask if there was "something else" that he wanted.

Aaron estimated that, within the two-month period, the documents were revised about four or five times. He claimed that he had resolved every issue raised by Jones and Michael.

Jones testified that, between July 2011 and September 16, 2011, when the parties executed the transaction documents, he had seen "working papers," which he described as draft versions of the agreements. Jones believed that the Inn transaction would be "relatively" simple, as the Canavan transaction had been and, thus, would mirror the Canavan contract "[i]n structure." Jones conceded, however, that the purchase of the Inn was "a massive deal," involving real estate and a liquor license.

According to Jones, while the parties were working through the draft versions of the agreement, he did "[n]ot necessarily" work "directly" with Michael. Jones viewed Stephen and Aaron as his lawyers for the transaction. Thus, if he had questions, he asked either Stephen and Aaron or the firm's paralegal, Nicole Peaks. For example, if Jones had an issue with a particular term, he made notes in the margin, told "the law office," and "they would get a hold of Margolies and negotiate it for me."

When Jones called the firm's office, he spoke to Stephen. Although he did not call Aaron, he relied on Stephen and Aaron to correct the matters with which he had an issue.

Jones testified further that he exchanged e-mails with Stephen and Aaron concerning his comments about the drafts; that he might have received e-mails from Stephen and Aaron regarding his comments and concerns about the drafts; and that the mark-ups and re-drafts continued from July 2011 through the night of the closing, in October 2011.

During this time, Jones also went to the firm to discuss his comments regarding the drafts. He met with Stephen and Aaron. During the discussions, Jones sought their legal advice, as he needed their assistance with the drafts, which he could not have done by himself.

Much of the DEC's case against Stephen and Aaron focused on documents that they generated or reviewed. For example, the parties stipulated that, during a February 15, 2011 meeting, Jones and either Aaron or Stephen, or both of them, discussed the purchase price of the Inn, how the purchase price would be funded, and problems and opportunities associated with the purchase. Stephen, Aaron, or an employee of the firm prepared a memorandum of the meeting. Among other things, the memorandum provided: "Discuss plans with [Jones] regarding purchasing Margolies' Inn. Terms of deal; problems/opportunities associated with deal."

Jones testified that, in early July 2011, he asked Stephen about undertaking "due diligence." Stephen told Jones not to worry, that he had it "under control." Thus, Jones believed that Stephen would handle the due diligence, and he relied on Stephen to do so. The record does not identify or describe exactly what the scope of that "due diligence" would entail.

On July 8, 2011, Aaron and Stephen met with Michael. As the parties stipulated, and Aaron testified, the purpose of the meeting was "to review details of Purchase and Sale Agreement." Indeed, Aaron wrote a July 8, 2011 memorandum to the file, regarding the meeting "to review details of Purchase and Sale Agreement."

Stephen and Aaron stipulated that, at the July 8, 2011 meeting, either or both of them discussed with Michael the impact that the deaths of Jones and/or Elaine would have on the transaction post-closing; the holding of business assets in escrow; and a personal guaranty for Jones's purchase. The memorandum confirms that this issue was raised and discussed at the meeting. Yet, Aaron testified that Michael did not raise the issue pertaining to the parties' incapacity or death; rather, Aaron simply addressed it in the memo. He and Stephen denied that Jones was not a party to this discussion.

In further contradiction of what transpired at the meeting, in Stephen and Aaron's stipulation and verified answers to the formal ethics complaint, they denied that the purpose of the July 8, 2011 meeting was to review details of the purchase and sale agreement. Rather, they stipulated that "[t]he purpose of the meeting [w]as to discuss the joint representation and execution of a Waiver of Conflict of Interest." Yet, the memorandum does not mention any such waiver.

In addition to the impact of incapacity or death on the transaction, the July 8 memo mentions a concern that Michael raised regarding the avoidance of "judicial intervention" in the event of Jones's default. The last two sentences of the memo provide: "It does not give Mr. Jones a way of backing out. Mr. Jones will be held to [sic]."

Aaron had not previously handled a commercial transaction or the closing of a transfer of title to property. Thus, on occasion, at Stephen's request, Aaron would join meetings regarding the Inn transaction and later draft a memorandum regarding the issues that were discussed, adding his thoughts, and would review the memorandum with Stephen in order to learn more about the transaction. Indeed, this is how the July 8, 2011 memorandum came to be. At the time of the transaction, Aaron's practice concentrated on estate administration and, thus, "[d]eath and incapacity" was what he "focused on." Thus, "[a] lot of these were internal thoughts about what would happen." Aaron did not share those thoughts with Stephen because he "moved on to the next file."

On July 15, 2011, Aaron sent an e-mail to Michael, with a copy to Stephen. Jones was not copied on the e-mail. Aaron attached to the e-mail a promissory note, pledge and escrow agreement, and agreement of guaranty. He also stated that he had added language "to reflect what happens in the event of default." Aaron concluded the e-mail by asking Michael to review the documents and to contact him.

On July 16, 2011, Jones wrote a letter to Michael, Elaine, Stephen, and Aaron about available financing options. Jones mentioned that his "past tax bills are holding up conventional funding, Period." Jones also stated that "Steve is

attempting to put lending in place to cover all these issues in one feel [sic] swoop."

On July 18, 2011, Michael sent transaction documents, via e-mail, to Aaron, copying Stephen. In the e-mail, Michael asked Aaron to include provisions requiring Jones to put working capital of $50,000 into the transaction, to be repaid only when the Note had been paid in full. Michael also asked what Elaine's role would be, after the closing. Finally, Michael wrote:

> I liked your concept of 'holding everything' until final payment (which could be 7 ½ years from now). It protects everything from anyone until final payment, and makes it easier for Elaine to step back into the Bird & Bottle and assume control over the collateral should there be a default, until she has liquidated enough to pay herself all unpaid principal, interest and expenses.
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> [S§1¶31;Ex.J8.][4]

In the same e-mail, Michael asked Aaron to review e-mails that he had sent to Stephen and "make sure that all the terms are incorporated in the documents." Aaron acknowledged that Michael had stated in the e-mail that he liked Aaron's idea that the deed be placed in escrow until Jones had made payment in full for the Inn. Aaron also acknowledged Michael's comment in the

[4] "S" refers to the unsigned and undated stipulation of facts entered into by the parties and sent to the hearing panel by cover letter dated April 9, 2019. "T" refers to the transcript of the April 9, 2019 hearing before the DEC.

e-mail that "it's all in your hands," which Aaron knew meant that Michael was looking to him as his lawyer to complete the transaction.

On July 19, 2011, Michael sent an e-mail reply to Jones's July 16, 2011 letter, and copied Stephen and Aaron. The e-mail to Jones stated, in part, that, if Stephen could "come through with a loan for you to pay your federal and state tax bills," Jones's monthly payment would be reduced by approximately $3,000.

On July 21, 2011, Aaron sent Michael, via e-mail, updated versions of the promissory note, guaranty, purchase and sale agreement, and the pledge and escrow agreement, with revisions based on Michael's July 18 e-mail. The e-mail also discussed Michael's other demands and questions. Of note is the following paragraph:

> I believe that everything you had previously requested has been included in these agreements. The only item that has not been included is the $50,000.00 working capital contribution. Upon signing, Mike Jones will give you a check in the amount of $50,000.00. Is this the same $50,000.00 that you want classified as "Working Capital" or do you want an additional $50,000.00 to be deposited into the Bird and Bottle checking account? That would mean Mr. Jones would need $100,000.00 upon signing and I believe he is only aware of the $50,000.00 payment. If you want that money to be placed into the Bird and Bottle, although not touched, I am not sure what that accomplishes. Let me know what you were thinking and perhaps we can add some language.
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> [Ex.J18.]

Michael replied that he wanted Jones to pay $100,000: a $50,000 down payment to Elaine and a $50,000 working capital loan to the Inn. At the hearing, Aaron acknowledged that he knew the amount that Michael wanted Jones to pay, and he also knew that Jones could not afford to pay that sum. On this basis alone, he agreed that the interests of Jones and Michael were in conflict.

On July 25, 2011, Michael sent an e-mail to Stephen and Aaron raising concerns about Elaine's ability to re-assume control of the Inn in the event of Jones's default and questioning whether the deal could be restructured to protect their interests.

On August 15, 2011, Michael sent an e-mail to Stephen and Aaron, with a copy to Jones, requesting Jones's financial information and the scheduling of a closing date. On August 16, 2011, Aaron sent an e-mail to Jones, with a copy to Stephen, attaching the purchase and sale agreement, the promissory note, the guaranty, and the pledge and escrow agreement, and asked Jones to review the documents and to inform Aaron whether he had any questions or concerns.

On August 18, 2011, Michael sent an e-mail to Stephen and Aaron, with a copy to Jones and Elaine, stating that he and Jones had agreed to an August 30, 2011 closing date, with the transaction taking place at the firm. However, Michael still had not received Jones's financial information. In connection with

these disciplinary proceedings, Aaron conceded that Michael "was looking to the law firm to provide that" information.

On August 22, 2011, Michael sent an e-mail to Jones, with a copy to Stephen, Aaron, and Elaine, and informed him that Stephen had agreed to the August 30, 2011 closing date. Michael also informed Jones that Stephen wanted Jones to call him that day about his "comments, questions, etc." regarding the documents.

On August 29, 2011, Michael canceled the closing because he and Elaine had received neither the exhibits nor the financial information.

On September 8, 2011, Stephen provided Michael with certain financial information regarding Jones. Aaron did not know why Jones's financial information had not been provided earlier. He explained that the firm had been Jones's tax preparer "for a long time" and, "for the most part," had Jones's financials, although "there was an interim period of time where he used another CPA, . . . [s]o there might have been some missing holes." Regardless, Aaron testified, "for the most part, we had all of the financials already before the deal."

The terms of the transaction provided that Jones would pay the Trust $1.65 million for the purchase of the Inn. Stephen had structured the sale as a stock sale, rather than an outright purchase, which required Jones to take ownership of the Inn's assets and liabilities. When asked about the impact of ownership of

the Inn versus a stock sale, Jones replied that, instead of $1.65 million, the purchase price would have been almost $3 million, plus liability for all unpaid taxes.

According to Jones, the firm was to hold the deed for the property in escrow, as further collateral, until he made the final payment for the Inn. Other collateral included Jones's Stanhope condominium, his Roxbury home, his businesses, and the promissory note from Canavan. Yet, the purchase and sale agreement contained no due date for the final payment. "Someone in the law firm" put together the documents pertaining to the collateral, although Jones could not identify the individual. Jones did not draft the documents, and neither he nor Michael made revisions.

Jones testified that Stephen suggested that he finance the purchase of the Inn via a bootstrapping mechanism, which entailed using the proceeds of the business to buy the business. Prior to Stephen's suggestion, Jones had not been aware of such an arrangement.

Ultimately, Jones purchased the Inn using the "bootstrap method" suggested by Stephen. He was required to clear tax liens on two properties for which Stephen arranged a loan from a bank in Morris County. Jones was to use the loan proceeds to pay the Internal Revenue Service and clear the title so that the properties could form "part of the collateral" for the purchase. The financing

also was to include $50,000 in cash that Jones could deposit in the Inn's checking account. Apparently, this financing was "Part A," which "never came to pass." Jones stated that, although Stephen said he was "still working on it," "he wasn't going to have it before the closing." According to Jones, Aaron did not assist him with the financing.

In September 2011, in view of what Stephen believed to be a conflict of interest, he prepared a four-page acknowledgement and waiver of conflict of interest agreement (the waiver) for Jones and Elaine to sign. The waiver acknowledged, among other things, that the parties sought representation from the firm. Aaron was not involved in the waiver. Although Stephen stipulated that the parties signed the waiver, he learned later that that was not the case. No signed copy of the waiver was produced during the DEC investigation.

On September 16, 2011, Nicole Peaks, the firm's paralegal and notary, signed and notarized the purchase and sale agreement, escrow agreement, agreement of guaranty, and promissory note. The record contains a signed copy of only the pledge and escrow agreement.

On that same date, Stephen presented a modification letter to Jones and Elaine on firm letterhead, which they signed. Jones denied that Michael had created the document.

The first paragraph of the modification letter provided, in part: "I have prepared this Letter of Modification which will serve as the changes to the original Agreements, where applicable and supersede the terms that are expressed in the Agreements." The closing, which was scheduled to take place on October 17, 2011, with Jones taking possession that evening, did not occur. According to Jones, Michael stated that he "was not allowed to transfer his license to [Jones] as he had planned," and, in the absence of a liquor license, Jones could not use the wine cellar.

On October 17, 2011, the parties signed a letter of modification to the agreement, which was prepared on the firm's letterhead. The record does not reflect whether the document was signed before or after the closing was postponed.

The purpose of the second modification letter was to supersede all marked-up copies of the agreement and, thus, constitute "the final document." Jones testified that he did "not necessarily" know about the changes made to the agreement, despite having signed the letter. He explained:

> Some of the things that came up after the fact were things that – that Mike Margolies and Aaron Gilbert put in. Mike Margolies visited Aaron Gilbert to change some of the wording in some of the documents outside my knowledge.
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> [T127-1 to 5.]

The changes were not insignificant. For example, section three, entitled "seller's assistance," originally required the seller to assist the buyer, as needed, for three years, but was changed to require the seller's assistance for six months at a rate of $500 per week for eight to ten hours per week.

The closing took place on October 18, 2011. It appears that Jones did not go to the property until the following day. Jones testified that, although, prior to October 18, 2011, the property was clean, pristine, gorgeous, and "just very, very nice," on the day after closing, "the place was dingy, dirty," and the carpets were matted with mud. The damage had been caused by Hurricane Irene, which also had washed out the tent area and ruined the wine cellar.[5] Jones described the wine cellar as "the prestige of the place." He said: "[Y]ou're not going to sell a prix fixed ninety-eight-dollar meal without a great wine cellar."

Jones further discovered that two individuals, who were the Margolies' domestic help, were living, rent-free, in the attic of the Inn.

Jones also learned some disturbing information during a meeting with an Inn employee, who explained to him that the Inn paid sales tax only on credit card sales, and not on cash or check sales. He also learned that he would be required to pay amounts the sellers owed to the food vendor and gas company,

[5] Hurricane Irene took place on August 28, 2011.

despite his belief that, when he took over the Inn, there would be no outstanding accounts payable.

On October 20, 2011, Jones returned to the Inn and inspected the wine cellar, which was now "filled with crap," and discovered that the vintage wines were missing. Although the racks had been rebuilt, they were filled "with whatever they could put in the racks." On that date, he sought to cancel the deal.

On October 22, 2011, Elaine declared Jones in default. The next day, Jones sent her what he described as the "shame-on-you" letter. He sent a copy of the letter to Stephen. Thus, Jones considered the deal to be dead on October 23, 2011.

Jones testified that, after the deal collapsed, he did not talk to Stephen about what had happened until November 2011, when Stephen invited Jones to the office for a late night "off-the-record" meeting. According to Jones, during the first five minutes, Stephen yelled at him. He spent the rest of the meeting trying to convince Jones to "go back up there and make it work." Jones told Stephen that there was "no way to go back because of all the problems that existed. . . . It was impossible."

On an unknown date, Elaine sued Jones in New York, seeking $3 million in damages, based on his alleged default. During the litigation, Jones learned of other issues, such as an undisclosed loan of nearly $900,000; inaccuracies in the

Inn's books, which reflected only two employees, because the others were paid in cash; and the underreporting of sales, and, thus, the underpayment of state and federal taxes. Meanwhile, the Inn had "puff[ed] up" its sales to Jones. Jones acknowledged that all the tax and debt issues, the squatters, and the damage from the hurricane had existed prior to execution of the agreements.

The case settled for a $120,000 payment from Jones to Elaine, plus $12,000 in interest. He paid the funds on an installment basis, making the last payment on July 23, 2018. Jones also incurred more than $300,000 in attorneys' fees as a direct result of the lawsuit.

Aaron agreed that he did not know "enough about anything" to give advice to either Jones or Michael. At his deposition in the civil case, Aaron testified that he believed that he had represented both parties, but again raised his mere "scrivener" defense, and included typing as one of his skills.

Aaron testified that he last performed any tasks in respect of the Inn transaction on August 30, 2011, the date on which he prepared the final documents. He did not know that the Inn transaction had collapsed until approximately December 2011, when Elaine came to the firm to retrieve a box of documents.

Jones testified that, in addition to the financial harm resulting from the failed transaction, his marriage suffered. His described his Picnics Unlimited

business as "almost nonexistent," maintaining that his marketing budget was diverted to pay his legal bills. Jones stated that, if he had known about the tax issues, the squatters, the bad debt, and the hurricane damage, particularly to the wine cellar, he would not have signed the agreement. As of the date of the ethics hearing, Jones had a pending civil lawsuit against Stephen and Aaron.

Without discussion, the DEC found that the clear and convincing evidence supported Stephen's admitted violation of RPC 1.5(b), RPC 1.7(a)(1) and (2), RPC 1.16(a)(1), and RPC 5.1(b) and (c). The panel recommended a three-month suspension because Jones "suffered serious economic injury as a result of the conflict of interest."

The DEC criticized Stephen's handling of the transaction, citing his lack of competence to "ably represent" either party. The DEC emphasized Stephen's improper delegation of his duties to Aaron, who negotiated each party's requested modifications to the terms of the agreement. The DEC also weighed Stephen's his failure to conduct due diligence in Jones's behalf, as promised. The DEC accepted Jones's testimony that, had known of the property damage and other issues, he would not have signed "the transaction documents." Although the DEC was aware of Stephen's disciplinary history, the report does not state whether the 1996 reprimand factored into the recommended discipline.

The DEC found that Aaron violated RPC1.7(a)(1) and (2), as he admitted that he had represented both parties to a commercial transaction, and, further, that Jones viewed Aaron and Stephen as his attorneys. The DEC rejected Aaron's contention that he had acted only as a scrivener, stating that the record contained clear and convincing evidence that his role "included much more than typing, that he was acting as an attorney for both [Jones] and [Elaine]." Specifically, Jones exchanged e-mails with Aaron and Stephen regarding concerns with the various draft agreements and discussed the comments with them. Jones relied on Aaron and Stephen to negotiate the changes with Michael. Aaron also resolved the parties' issues regarding certain language in the documents. Notably, Aaron "conceived and designed the legal solution sought by [Michael] to ensure that, in the event of a default by [Jones], [Elaine] readily could resume control of the . . . Inn."

The DEC also found that Aaron violated RPC 1.16(a)(1) because the record lacked any evidence that he had attempted to withdraw from the prohibited representation of Jones and Elaine. Finally, the panel found that Aaron violated RPC 5.2(a), because he was required to withdraw from the representation, notwithstanding the direction of his supervising attorney, Stephen.

For Aaron's ethics infractions, the DEC recommended a reprimand. Although Aaron "also played a causal role in the fall-out from the conflicted, concurrent representation . . . it is the panel's view that the primary responsibility rests with . . . Stephen." Moreover, Aaron had been an attorney for only three years when the conduct took place and, thus, "naturally would be hesitant to question directives given by a seasoned supervising attorney who also is his father."

In a July 15, 2020 brief to us, the presenter asserted that the DEC's recommendations for discipline were correct and justified, given the blatant conflict of interest in this matter, and Stephen's utter failure to conduct reasonable due diligence in behalf of Jones. As a result, Jones attempted to cancel the purchase agreement and, subsequently, suffered significant economic harm. Moreover, the presenter refuted Stephen's purported lack of pecuniary motive, highlighting Stephen's own testimony that Michael and Jones both owed him "tons of money."

In respondents' July 17, 2020 brief to us, they denied, through counsel, having engaged in a conflict of interest exhibiting egregious circumstances, asserting that they simply were attempting to serve as a "conduit" between the buyer and the seller. Although respondents recognized that Jones suffered economic harm from the fallout of the collapse of the Inn transaction, they

blamed him for both the unraveling of the transaction and the $120,000 settlement and attorneys' fees he incurred in the resulting litigation by alleging that Jones, alone, determined to default on the purchase contract and suffer the consequences.

In mitigation, Stephen emphasized his forty-seven years in practice with only a 1996 reprimand; the passage of time (nine years) since the infractions; his acceptance of responsibility; and the absence of motivation for personal gain. Aaron cited his unblemished disciplinary record; his relative inexperience at the time of the infractions; and the passage of time since the infractions.

Following a de novo review of the record, we are satisfied that the DEC's finding that both respondents committed unethical conduct is fully supported by clear and convincing evidence.

When a lawyer has not regularly represented a client, the lawyer must communicate to the client, in writing, the basis or rate of the fee, before or within a reasonable time after commencing the representation. RPC 1.5(b). In this case, Stephen had represented Jones in the past. When the opportunity to purchase the Inn arose in 2010, however, Stephen had not represented Jones in any matter for at least the prior five years. Moreover, Stephen had not represented Jones in the complex purchase and sale of a business, which included the transfer of real estate and a liquor license. According to Jones, although he and Stephen had an

informal, unspoken agreement that Jones would pay the firm for its services in the Inn matter, Stephen did not provide him with any document setting forth the services that would be performed or the fees that would be charged in respect of the Inn matter. Stephen, thus, violated RPC 1.5(b).

The clear and convincing evidence also supports Stephen's and Aaron's violation of RPC 1.7(a)(1). That Rule prohibits an attorney from representing two clients if the representation of one client will be directly adverse to another client, unless the attorney complies with RPC 1.7(b), which requires, among other things, that the attorney procure informed, written consent from all clients involved. RPC 1.7(b)(1).

In 2015, we recognized that "[t]he interests of the buyer and the seller in a real estate transaction are diametrically opposed, presenting an obvious conflict of interest, at early stages of the transaction." In the Matter of Maria J. Rivero, DRB 14-310 (June 9, 2015) (slip op. at 25); In re Rivero, 222 N.J. 573 (2015). Although it is not clear whether Stephen or Aaron, or both of them, represented Jones and the Trust at the closing of title to the Inn, both of them participated in the negotiation and drafting of the purchase and sale agreement, among other documents, in clear violation of RPC 1.7(a)(1). Under such circumstances, the conflict is nonwaivable. Id. at 26.

In Rivero, we explained that, in Advisory Comm. on Professional Ethics Op. 243, 95 N.J.L.J. 1145 (1972), the Advisory Committee on Professional Ethics concluded that the same attorney cannot represent both parties in connection with the preparation and execution of a contract of sale, because, the opinion states, "it is at this negotiation phase that a buyer's and seller's interests are at greatest variance. The buyer wants the property for as little money as possible and the seller wants to maximize the sale price." Ibid.

In a footnote, we observed that, although Opinion 243 does not directly address the issue, "its language indicates that the consent of the parties will not cure the conflict." Id. at 26, n.5 (citing Michels, New Jersey Attorney Ethics, 519:2-2 at 425 (Gann 2015)).

Although neither Michael nor Elaine testified at the hearing, Jones testified, unequivocally, that Stephen and Aaron represented both parties to the transaction, during negotiations. Ultimately, both Stephen and Aaron admitted that they represented both parties, although they each still labored to argue that they did not violate RPC 1.7(a)(1).

For his part, Stephen stipulated and testified that he had merely provided the parties with (1) office space where they could meet and negotiate the terms; (2) standard form documents to use as templates; and (3) typing services for the purpose of revising the documents to reflect the parties' ongoing revisions.

Aaron claimed that his representation was limited to facilitating the revision of transaction documents.

Respondents' attempts to describe their roles as something less than the concurrent, improper representation of Jones and Michael and/or the Trust are disingenuous. Stephen and Aaron met with Jones and Michael, separately, to discuss terms, and they engaged with them separately in the revision of those terms. Stephen structured the transaction as a stock sale and obtained financing for Jones.

Similarly, Aaron's attempts to minimize his role in the representation rings hollow. He clearly served as a junior attorney doing the legwork at the direction and under the supervision of his father. Moreover, Aaron was very much involved in the evolution of the terms. He suggested that Michael consider the implication of the parties' incapacity and death. He also suggested that the firm hold the deed to the Inn in escrow until Jones had fully complied with his payment obligations. These are the actions of an attorney actively providing representation.

The evidence in the record demonstrates that Stephen and Aaron were intimately involved with the parties during the negotiation of terms of the agreements. Thus, they both violated RPC 1.7(a)(1).

The interests of Jones and Michael and/or the Trust were directly adverse; it follows that there was "a significant risk" that the representation of Jones would be "materially limited" by the respondents' representation of Michael and/or the Trust and vice versa. Thus, both respondents violated RPC 1.7(a)(2).

Although RPC 1.16(a)(1) requires a lawyer to withdraw from the representation of a client if the representation will violate the Rules of Professional Conduct or other law, we have routinely dismissed RPC 1.16(a)(1) charges in matters where RPC 1.7 was properly charged and found, determining that they were duplicative of the conflict of interest violation. In the Matter of Mark R. Silber, DRB 19-381 (August 5, 2020) (slip op. at 12); In the Matter of Robert S. Miller, DRB 00-118 (March 26, 2001) (slip op. at 21). For this reason, we determine to dismiss the RPC 1.16(a)(1) charges against both respondents.

RPC 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. Stephen had direct supervisory authority over Aaron. Yet, he failed to make any effort to ensure that Aaron conformed to RPC 1.7(a)(1). Indeed, he directed Aaron to violate the Rule, by allowing him to participate in the review and revision of the documents.

RPC 5.1(c) imposes responsibility on a lawyer for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or ratifies

the conduct involved; or (2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. In this case, Stephen did both. He ordered Aaron to participate in the illicit representation, and he took no action to put an end to it.

Finally, RPC 5.2(a) requires a lawyer to be bound by the Rules of Professional Conduct notwithstanding the fact that the lawyer acted at the direction of another person. Aaron violated this Rule, by abiding by Stephen's direction that he participate in the conflict of interest.

In sum, we find that Stephen violated RPC 1.5(b), RPC 1.7(a)(1) and (2), and RPC 5.1(b) and (c). We determine to dismiss the charge that Stephen further violated RPC 1.5(a). We find that Aaron violated RPC 1.7(a)(1) and RPC 5.2(a). Finally, we determine to dismiss the RPC 1.16(a)(1) charges against both respondents.

The sole issue left for our determination is the appropriate quantum of discipline for respondents' respective misconduct.

Conduct involving the failure to memorialize the basis or rate of a fee, as RPC 1.5(b) requires, typically results in an admonition, even if accompanied by other, non-serious ethics offenses. See, e.g., In the Matter of Peter M. Halden, DRB 19-382 (February 24, 2020) (attorney failed to set forth in writing the basis

or rate of the legal fee, a violation of RPC 1.5(b); he also failed to abide by the client's decisions concerning the scope of the representation; no prior discipline); In the Matter of Kenyatta K. Stewart, DRB 19-228 (October 22, 2019) (attorney failed to set forth in writing the basis or rate of the legal fee, a violation of RPC 1.5(b); concurrent conflict of interest also found; no prior discipline); and In the Matter of Alan Monte Kamel, DRB 19-086 (May 30, 2019) (attorney failed to provide the client with a writing setting forth the basis or rate of his fee in a collection action, a violation of RPC 1.5(b); he also failed to communicate with the client and failed to explain the method by which a contingent fee would be determined; no prior discipline).

It is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). See also In re Rajan, 237 N.J. 434 (2019) (the attorney engaged in a conflict of interest and an improper business transaction with a client by investing in a hotel development project spearheaded by an existing client; no prior discipline); In re Drachman, 239 N.J. 3 (2019) (the attorney engaged in a conflict of interest by recommending that his clients use a title insurance company in eight, distinct real estate transactions, without disclosing that he was a salaried employee of that company; no evidence of serious economic injury to the clients; the attorney also violated RPC 5.5(a)(1)

by practicing law while ineligible to do so; no prior discipline); and In re Allegra, 229 N.J. 227 (2017) (the attorney engaged in a conflict of interest by engaging in a sexual relationship with an emotionally vulnerable client; the attorney also engaged in an improper business transaction with the same client by borrowing money from her; he promptly repaid all the funds and had no prior discipline).

Harsher discipline, including periods of suspension, have been imposed when an attorney's conflict of interest has caused serious economic injury or egregious circumstances exist. See, e.g., In re Agrait, 207 N.J. 33 (2011) (censure for attorney who represented a buyer and seller in a real estate transaction without obtaining informed, written consent from the clients; subsequently, he represented the seller in litigation instituted against the buyer; the discipline was enhanced based on the attorney's ethics history, which included an admonition and a reprimand, and based on the attorney's failure to either notice, or disclose to the buyer, the existence of a lien, which resulted in serious financial injury to the buyer, who had to satisfy a $7,000 lien against the property); In re Turco, 196 N.J. 154 (2008) (censure imposed on attorney who represented both the passenger and the driver of a car that was involved in an automobile accident, a violation of RPC 1.7(b)(4); although he filed a civil complaint on behalf of both parties, he never told the passenger that her

complaint had been dismissed; after the client sued the attorney for malpractice, they settled the case for $15,000; because the attorney never paid, the passenger sued him and obtained a default judgment, which the attorney never satisfied; the attorney also failed to communicate with the client, in violation of RPC 1.4(b) and (c); extensive disciplinary history); In re Warren, 227 N.J. 226 (2016) (three-month suspension imposed on attorney who, while dating the mother of the beneficiary of a $300,000 life insurance policy, suggested that he be the trustee; instead of depositing the monies in an investment account until the beneficiary reached age twenty-five, the attorney used $110,000 to extend a mortgage to a third party, secured by a residence; the third party later declared bankruptcy and stopped making payments; the attorney purchased the property at auction, with the stated intention of selling it to recoup some of the money, but, due to the condition of the property, the attorney was unable to give any money to the beneficiary; he kept the house and made no effort to sell it; violations of RPC 1.7(a)(2) and RPC 1.8(a); the attorney also violated RPC 1.1(a), RPC 1.3, and RPC 1.15(d)); In re DeClemente, 201 N.J. 4 (2010) (three-month suspension for attorney's misconduct in two matters; the attorney created a conflict of interest by negotiating a real estate contract on behalf of the buyer and seller and engaged in a business transaction with clients by purchasing two condominium units without disclosing his role in the transaction as lender and

landlord; the attorney also made misrepresentations by silence to the clients and made affirmative representations by actively misleading them about his role; in the second matter, he made misrepresentations and was guilty of conduct prejudicial to the administration of justice; aggravating and mitigating factors were considered); In re Fitchett, 184 N.J. 289 (2005) (three-month suspension for attorney who represented a public entity, incapable of consenting to the conflict, and then accepted a position with a firm that represented the entity's adversary; the attorney was guilty of switching sides; aggravating factors included the entity's loss of over $1 million, its responsibility for repayment of outstanding loans, and the attorney's prior reprimand); In re Guidone, 139 N.J. 272 (1994) (three-month suspension; the attorney, who was a member of the Lions Club and represented the Club in the sale of a tract of land, engaged in a conflict of interest when he acquired, but failed to disclose to the Club, a financial interest in the entity that purchased the land, and then failed to fully explain to the Club the various risks involved with the representation and to obtain the Club's consent to the representation; a three-month suspension was imposed because the conflict of interest "was both pecuniary and undisclosed"); and In re Swidler, 205 N.J. 260 (2011) (six-month suspension, in a default matter; the attorney was guilty of engaging in a conflict of interest in a real estate matter by representing the buyer and seller without obtaining their informed

written consent, grossly neglecting the matter by failing to file the seller's mortgage, failing to comply with recordkeeping rules by depositing the seller's check for realty transfer fees in his business account, perpetrating a fraud by subsequently representing the buyer in the sale of the same property to the buyer's father, failing to disclose to the father's title company that there was an open mortgage on the property, and failing to cooperate with disciplinary authorities; the attorney's ethics history included a reprimand and a three-month suspension).

Cases involving violations of RPC 5.1(c)(1) (failure to supervise junior attorneys) are often combined with other violations, such as gross neglect, lack of diligence, and failure to communicate with clients, and ordinarily result in a reprimand. See, e.g., In re Diaz, 209 N.J. 89 (2012) (reprimand imposed on managing attorney in the New Jersey office of a national law firm that processed mortgage loan defaults through foreclosures and related bankruptcy matters; the firm used pre-signed certifications in support of ex parte applications for relief or motions for relief in bankruptcy court, even after the attorney who signed them had left the firm; attorney failed to supervise a junior attorney and a nonlawyer employee; violated the RPCs through the acts of another; engaged in conduct involving dishonesty, fraud, deceit and misrepresentation; and engaged in conduct prejudicial to the administration of justice; mitigating factors

included the absence of a disciplinary history, the discontinued use of the certifications six years prior to the referral to the Office of Attorney Ethics, and the attorney's full cooperation with disciplinary authorities); In re DeZao, 170 N.J. 199 (2001) (reprimand for failure to supervise an attorney; the attorney's associate sent a letter to the court indicating that he would not oppose a motion to dismiss the client's complaint; the attorney also was guilty of gross neglect, pattern of neglect, lack of diligence, failure to communicate with a client, and failure to explain a matter to the extent necessary to permit the client to make an informed decision about the representation); In re Rovner, 164 N.J. 616 (2000) (reprimand imposed on both a law firm and the partner in charge for failure to supervise attorneys; in one matter, the Appellate Division characterized the neglect of a matter as "blatant and totally unprofessional;" in another matter, a client, whose complaint was dismissed, successfully sued the firm for malpractice; the court also found gross neglect, lack of diligence, and failure to communicate with a client); and In re Daniel, 146 N.J. 490 (1996) (reprimand imposed for failure to supervise an attorney employee; the attorney did not monitor an inexperienced associate's handling of a litigation matter, resulting in an order granting summary judgment against the client based on a failure to reply to discovery requests; the Court also found a lack of diligence and failure to communicate with the client). But see In re Macias, 159 N.J. 516

(1999) (three-month suspension imposed on attorney who failed to supervise a junior attorney assigned to a personal injury case; the junior attorney neglected the matter, resulting in the dismissal of the client's complaint for failure to serve two of the defendants and for failure to pursue a judgment against a third defendant; we found that, because the attorney had failed to take any remedial action to correct the junior attorney's mistakes, the attorney violated RPC 5.1(c)(2); the attorney had received two prior reprimands).

Members Hoberman, Petrou, and Zmirich vote for a three-month suspension for Stephen. In their view, the totality of Stephen's misconduct clearly warrants a three-month suspension. Stephen engaged in a known conflict to further his pecuniary interest, as both Jones and Michael owed him outstanding fees.

In addition, Stephen encouraged Jones to continue with the transaction, after it became clear, early in the negotiations, that Jones could not obtain conventional financing. These members are troubled by Stephen's suggestion that, instead of a traditional purchase and sale of the Inn, the transaction should take place as a stock sale, with bootstrap financing. Although this method of financing purportedly reduced the purchase price of the Inn, it leveraged every asset that Jones owned and imposed on him responsibility for the Inn's financial liabilities. In addition, Stephen arranged for Jones to obtain yet another loan to

satisfy his tax liens as part of the deal. Finally, even after the transaction collapsed, Stephen called Jones to his office for the purpose of trying to persuade him to go through with the transaction.

These members also recognize that Stephen did not neglect Aaron's handling of the Inn transaction. Rather, he directed Aaron to work on the matter, thus embroiling his son in the conflict.

These members recognize that, with one exception nearly twenty-five years ago, Stephen has enjoyed an unblemished disciplinary history in his almost fifty years as a New Jersey attorney. However, given the totality of the numerous ethics infractions and the egregious circumstances, which led to the serious economic injury suffered by Jones, these three members determine that a three-month suspension should be imposed.

Chair Clark and Members Boyer and Singer vote for a censure. The Chair and these members agree that Stephen engaged in a conflict of interest. Nevertheless, these members believed that a censure is sufficient discipline, given his long history as a member of the bar, with barely a blemish; the passage of nine years between 2011, when the conduct took place, and 2020, when the matter was argued before us; and, finally, what appears to be aberrant behavior on his part.

* * *

For Aaron's conflict of interest, we unanimously determine to impose an admonition. In a similar situation, an admonition was imposed on an attorney, who, like, Aaron, was clearly in a junior position, having been admitted to the bar only a few years. See In re Gilman, 184 N.J. 298 (2005) (among other infractions, the attorney violated RPC 1.10(a) (imputed conflict of interest), based on his preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; in imposing only an admonition, we noted the absence of egregious circumstances of harm to the clients; we also considered the fact that it was the attorney's first brush with the ethics system; that he had cooperated fully with the disciplinary investigation; "and, more importantly, that he was a new attorney at the time (three years at the bar) and only an associate").

Although the case now before us involves egregious circumstances and serious economic harm, Stephen, not Aaron, was responsible for the outcome. Aaron, like Gilman, had been a member of the New Jersey bar for just three years and was an associate acting at the direction of a senior attorney. In this case, that senior attorney was Aaron's father.

To conclude, we determine to impose an admonition on Aaron. As set forth above, we are divided in respect of the discipline to impose on Stephen.

Vice-Chair Gallipoli was recused. Members Joseph and Rivera did not participate.

We further determine to require respondents 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: 
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Aaron Scott Gilbert
Docket No. DRB 20-044

Argued: September 17, 2020

Decided: February 10, 2021

Disposition: Admonition

Members	Admonition	Recused	Did Not Participate
Clark	X		
Gallipoli		X	
Boyer	X		
Hoberman	X		
Joseph			X
Petrou	X		
Rivera			X
Singer	X		
Zmirich	X		
Total:	6	1	2

Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Stephen C. Gilbert
Docket No. DRB 20-045

Argued: September 17, 2020

Decided: February 10, 2021

Disposition: Other

Members	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:	3	3	1	2

Johanna Barba Jones
Chief Counsel