Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-176
District Docket No. I-2018-0003E

In the Matter of	:
Thomas Carmen Rossell	:
An Attorney at Law	:

Decision

Argued: November 19, 2020

Decided: April 26, 2021

Matthew W. Ritter appeared on behalf of the District I Ethics Committee.

Robert E. Ramsey waived appearance for oral argument on behalf of respondent.

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

This matter was before us on a recommendation for an admonition filed by the District I Ethics Committee (DEC). We determined to treat the matter as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4). The formal ethics complaint charged respondent with having violated RPC 1.3 (lack

of diligence); RPC 1.4(b) (failure to communicate with the client); RPC 3.3(a)(1) (false statement of material fact to a tribunal); RPC 8.1(b) (failure to cooperate with disciplinary authorities); and RPC 8.4(c) (conduct involving dishonesty, deceit, fraud or misrepresentation).

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

Respondent was admitted to the New Jersey bar in 1995. At the relevant times, he maintained an office for the practice of law in Northfield, New Jersey. He has no disciplinary history.

At the disciplinary hearing below, respondent testified that, throughout his more than twenty-year career, he has practiced criminal law. He also had handled more than one hundred cases as an Office of Public Defender (OPD) pool attorney in Atlantic and Cape May counties and, thus, was familiar with the procedures in place for such cases.

On October 31, 2016, the grievant, Miguel A. Roman, filed a pro se motion to withdraw a guilty plea that he had entered in respect of certain indictments. The OPD assigned respondent to represent Roman, due to a conflict involving his prior counsel.

Respondent received and reviewed a January 31, 2017 letter from Roman to his former counsel, wherein Roman indicated that, by filing the motion to withdraw his pleas, he wanted a record created "for Appellate Division review."

During the ethics hearing, respondent described Roman's motion as frivolous, opining that there was no "color of innocence," which was one of the factors respondent maintained was required in such motions. Still, respondent understood that he had an obligation to zealously represent Roman.

Respondent did not communicate with Roman until more than three months later, during a May 18, 2017 video conference, during which they discussed the pending motion, and Roman agreed to waive his personal appearance at oral argument. During the video conference, respondent represented that he would send Roman correspondence on letterhead, so that Roman would have his contact information, and would attach a copy of the State's opposition to the motion. Respondent, however, failed to follow through on his pledges.

On May 24, 2017, respondent argued Roman's motion, which the court denied. Because Roman was not present, respondent could not ask Roman whether he wished to appeal the decision and could not review with him a related OPD form. Respondent closed his case and returned the file to the OPD's Trenton office.

Respondent failed to inform Roman of the outcome of the motion, although he understood that he had a duty to do so; failed to provide him with a copy of the court's order; failed to advise him of his appellate rights; and failed

to make any effort to preserve those rights. Indeed, respondent did not communicate with Roman at all, claiming that he could not do so by telephone and that he did not have Roman's address. He conceded, however, that he could have obtained Roman's address from the OPD. Thus, the parties stipulated that respondent failed to act with reasonable diligence in representing Roman.

On June 7, 2017, the court issued the order denying Roman's motion, commencing the forty-five-day period within which to file an appeal, which expired on July 22, 2017. Respondent was not served with the order. Instead, pursuant to the pool attorney procedures in place, the order was sent to the OPD's offices. According to respondent, the OPD did not inform him that the order had been received.

By letter dated June 5, 2017 to the OPD, Roman asked for the status of the motion. On July 5, 2017, having received no reply from the OPD, Roman made an inquiry of the Criminal Case Management Office, which informed Roman, on August 17, 2017, that the motion had been denied in May 2017 and provided him with respondent's office contact information.

On August 23, 2017, Roman wrote to respondent, "setting forth the foregoing facts in detail." Respondent explained that the OPD's office has bins for the pool attorneys, into which correspondence is placed, and that "it's up to

us to come in and see it." For his part, respondent did not go to the OPD office except to pick up files.

Respondent neither acknowledged nor replied to Roman's letter. By letter dated August 26, 2017, Roman asked the OPD to file a notice of appeal from the June 7, 2017 order, as within time. Respondent testified that, in August 2017, he went on vacation and, upon returning to the OPD's office after Labor Day, he found Roman's August 23 letter. By this point, the period for appeal had expired.

Respondent asked the OPD for Roman's file and completed a nunc pro tunc template that was given to him. According to respondent, "they printed out a copy for me and then I typed up the language as it referred to me." He then filed a motion for leave to appeal nunc pro tunc, which was handled by the appellate section of the OPD. On September 12, 2017, the OPD informed Roman that a Deputy Public Defender had been assigned to handle his appeal.

According to respondent, the Appellate Division affirmed the denial of Roman's motion to withdraw his pleas. Respondent asserted that, because the Appellate Division ruled on the merits of the motion, the court must have granted the motion to file the appeal as within time. Respondent, thus, asserted that Roman "still got his day in court."

The veracity of the following underlined statements in respondent's affidavit in support of the motion for leave to appeal were at issue in the ethics proceeding:

> On May 24, 2017 the defendant's post sentence motion to withdraw from his pleas of guilty was denied. After the motion was heard, the defendant indicated to me via letter that he wished to appeal his sentence.
>
> Although it was my intention to timely file the notice of appeal in this matter and I made efforts in that regard, this appeal and its notice are being filed past the 45 day deadline because not all of the written documents relevant to this appeal could be gathered and forwarded until now.
>
> The failure to meet the 45 day time limit is in no way attributable to the defendant who advised me within the 45 day deadline that he wanted to file an appeal. For this reason, in the interests of justice, I respectfully request that this Nunc Pro Tunc motion be granted.
>
> [S¶30; Ex.3T.][1]

Respondent denied that he had made a false statement to, or withheld information from, a tribunal. He claimed that he was "completely honest" in completing the OPD template of the affidavit and that every statement was true to the best of his knowledge and belief.

Respondent contended that Roman's August 23 letter, which he claimed had been written within the forty-five-day appeal period, expressed Roman's

[1] "S" refers to the parties' February 27, 2019 stipulation of facts.

instruction to file the appeal. According to respondent, this letter rendered accurate his statement that Roman notified him of the desire to appeal within the time permitted, even though respondent did not see the letter until September.

In respect of the words "[a]lthough it was my intention to timely file, and I made efforts in that regard," respondent testified that they were a part of the template. He stated multiple times that he knew that Roman wanted to preserve the record for appeal and, thus, "that stuck in [respondent's] mind that he did want to file an appeal." Although it had been respondent's intention to file a notice of appeal, he forgot to do so, because Roman did not complete the form after the motion was argued and denied, and respondent did not have a copy of the order. Respondent claimed that the August 26, 2017 letter refreshed his memory.

As to respondent's statement that "not all of the written documents relevant to this appeal could be gathered and forwarded until now," he testified that, once a file is closed and sent to the Trenton office of the OPD, there is a delay in the trial attorney's obtaining the file, because it could be with the OPD's appellate section or the post-conviction relief (PCR) unit. Respondent claimed that, in Roman's matter, "there was a delay in getting all the documents so I could file the appeal."

On March 26, 2018, the DEC investigator and presenter, Matthew W. Ritter, Esq., sent a copy of Roman's ethics grievance to respondent and requested a written reply within ten days. After an April 4, 2018 telephone conversation between Ritter and respondent, Ritter sent respondent copies of the materials that Roman had submitted to the DEC. Ritter granted respondent a two-week extension to reply to the grievance, but respondent failed to comply.

By letter dated April 30, 2018, Ritter set a deadline of May 10, 2018 for respondent to comply with the DEC's demand. On May 7, 2018, respondent submitted a written reply to the grievance.

On June 11, 2018, Ritter sent respondent a copy of Roman's response to respondent's reply to the grievance and directed respondent to submit his reply within ten days. On June 28, 2018, Ritter wrote to respondent, stated that he had not heard from him, and suggested that he was not cooperating with the investigation. The next day, respondent repeated the information that he had previously provided to Ritter and suggested that the matter be closed.

Respondent testified that, when he and Ritter discussed the case, Ritter stated that he wanted to interview respondent, that he would contact respondent with potential interview dates, and that he required respondent to produce Roman's file. Respondent did not have the file and learned from the OPD that it was with the PCR unit. Respondent instructed the OPD not to send the file to

him until after the investigator contacted him. Respondent claimed that, because Ritter never contacted him again, respondent believed that the case had been closed.

According to Ritter, he was able to proceed only because Roman had kept a file, which he provided to Ritter. After he interviewed Roman, Ritter realized that the matter was not simply one of "no harm, no foul." Finally, contrary to respondent's claim, Ritter asserted that it was respondent who failed to schedule an interview and failed to produce the file.

At the hearing, respondent's counsel questioned him about the affidavit that he had completed and attached to the nunc pro tunc motion. According to respondent, Roman's August 23, 2017 letter to respondent expressed his desire to file an appeal. Respondent acknowledged that the forty-five-day period within which to file an appeal would have commenced when the order was signed, in June.

In respect of respondent's statement that he intended to file a timely appeal and made efforts in that regard, he testified that, because Roman's matter was an assigned pool case, and he did not believe that eCourts was operational in Cape May County at that point, all court communications were sent to the OPD. He was not aware of the order, which likely arrived in the OPD office

three weeks later. Respondent did not learn of the order until three months later, when he went to the OPD office subsequent to Labor Day.

Respondent's counsel conceded that respondent violated RPC 1.3 and RPC 1.4(b) during his representation of Roman.

The DEC found that, despite respondent's representations to Roman during their May 18, 2017 video conference, he did not send Roman a letter reflecting his contact information, did not send him a copy of the State's written opposition to the motion, and did not correspond with him. He also failed to inform Roman of the outcome of the motion; provide Roman with a copy of the order; advise Roman of his appellate rights; or file Roman's appeal within forty-five days. The DEC described respondent's conduct as a failure to act with reasonable diligence and promptness and, thus, found that he violated RPC 1.3.

The DEC found that respondent violated RPC 1.4(b) based on the incidents demonstrating a lack of communication between respondent and Roman, as described above, as well as his failure to acknowledge Roman's August 23, 2017 letter.

In addition, the DEC determined that respondent violated RPC 8.1(b), remarking that his attorney, not respondent, eventually produced a copy of his file to the DEC investigator, and that respondent never scheduled an interview with the DEC investigator.

The DEC dismissed the RPC 3.3(a)(1) charge for lack of clear and convincing evidence that respondent "thought" that the information provided in his affidavit was "false and/or misleading." The DEC likewise dismissed the RPC 8.4(c) charge for lack of clear and convincing evidence. According to the DEC, respondent failed to inform Roman "of the status of this matter . . . due, in part, to an apparent glitch in Court Notifications." Further, "all notices from the Court were apparently delivered to the Office of Public Defender (this case predates E-Courts) when they should have been sent to his private law office."

The DEC found no aggravating factors. In mitigation, the DEC cited respondent's unblemished disciplinary history in his twenty-four years as an attorney; his full cooperation "with this proceeding;" his entry into a stipulation of facts; and the hearing panel's belief that the behavior was aberrational and that respondent's "intentions with regard to [Roman] were at all times noble." Finally, the DEC observed that "[t]he error in the Court Notification in terms of address is partially to blame, although Respondent should have kept a diary in order to follow up on the matters [with] which he was entrusted."

The DEC, thus, recommended the imposition of an admonition.

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.

As respondent admitted, he violated RPC 1.3. He failed to file Roman's notice of appeal within the forty-five-day period. Moreover, respondent's error was due to his failure simply to track the appeal deadline.

Respondent also violated RPC 1.4(b). After he met with Roman, prior to argument on the motion, he failed to follow through on his promise to send a letter to his client, along with a copy of the State's opposition to the motion. He also failed to inform Roman of the outcome of the motion, provide him with a copy of the order, or advise Roman of his appellate rights.

Further, respondent failed to cooperate with the DEC in its investigation of Roman's grievance. Although he testified that Ritter stated that he would contact respondent with proposed dates for an interview, the exhibits show the opposite – respondent was supposed to contact Ritter with dates but failed to do so.

Ritter also requested that respondent produce his file. Although respondent requested a copy from the OPD, he later directed the OPD to withhold the file until after he heard from Ritter. Thus, respondent failed to timely produce a copy of the file, and never made himself available for an interview with Ritter. He, therefore, violated RPC 8.1(b).

Finally, respondent violated RPC 3.3(a)(1) and RPC 8.4(c) by submitting to the Appellate Division an affidavit containing falsehoods. First, rather than

take full responsibility for the missed deadline, respondent claimed that Roman had instructed him, within the forty-five-day period, to file the notice of appeal. That was not true. More than a month after the deadline had expired, Roman instructed the OPD, not respondent, to file the appeal because, until August 17, 2017, when the Criminal Case Management Office informed Roman that the motion had been denied and provided him with respondent's office contact information, Roman neither knew that the motion had been denied nor how to contact respondent. Second, respondent ignored Roman's August 23, 2017 letter, in which Roman complained that respondent had not filed a notice of appeal in his behalf.

Third, despite respondent's stated intention to file a notice of appeal, he made no efforts in that regard within the forty-five-day period. After oral argument on Roman's motion, in May 2017, respondent returned the file to the OPD. Further, he made no effort to gather the documents, including the order, until he after he realized that he was required to file a motion for leave to appeal nunc pro tunc.

In sum, we find that respondent violated RPC 1.3, RPC 1.4(b), RPC 3.3(a)(1), RPC 8.1(b), and RPC 8.4(c). The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

Generally, an admonition is imposed for lack of diligence and failure to communicate with the client. See, e.g., In the Matter of Kyle G. Schwartz, DRB 19-222 (September 20, 2019) (after the attorney agreed to represent the executrix of an estate, for the purpose of filing tax returns and to assist in the sale of real estate, he neither communicated with the client nor completed the estate work; after the client threatened to file a grievance against the attorney, he apologized, promised to provide draft documents within days, but, once again, failed to communicate with her and failed to complete the documents; violations of RPC 1.3 and RPC 1.4(b)); In the Matter of Christopher G. Cappio, DRB 15-418 (March 24, 2016) (after the client retained the attorney to handle a bankruptcy matter, paid his fee, and signed the bankruptcy petition, the attorney failed to file the petition or to return his client's calls in a timely manner); and In the Matter of Charles M. Damian, DRB 15-107 (May 27, 2015) (attorney filed a defective foreclosure complaint and failed to correct the deficiencies, despite notice from the court that the complaint would be dismissed if they were not cured; after the complaint was dismissed, he took no action to vacate the dismissal, a violation of RPC 1.3; the attorney also failed to tell the clients that he had never amended the original complaint or filed a new one, that their complaint had been dismissed, and that it had not been reinstated, a violation of RPC 1.4(b); in mitigation, the attorney had no other discipline in thirty-five

years at the bar; staffing problems in his office negatively affected the handling of the foreclosure case; he was battling a serious illness during this time; and other family-related issues consumed his time and contributed to his inattention to the matter).

Admonitions likewise are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., 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, a violation of RPC 8.1(b)); In re Gleason, 220 N.J. 350 (2015) (attorney failed to file an answer to the formal ethics complaint and ignored the district ethics committee investigator's multiple attempts to obtain a copy of his client's file, violations of RPC 8.1(b); the attorney also failed to inform his client that a planning board had dismissed his land use application, a violation of RPC 1.4(b)); and In the Matter of Richard D. Koppenaal, DRB 13-164 (October 21, 2013) (attorney failed to cooperate with the district ethics committee's attempts to obtain information about his representation of a client in an expungement matter).

Generally, the discipline imposed on an attorney who makes misrepresentations to a court or exhibits a lack of candor to a tribunal, or both,

ranges from a reprimand to a long-term suspension. See, e.g., In re Marraccini, 221 N.J. 487 (2015) (reprimand imposed on attorney who attached to approximately fifty eviction complaints, filed on behalf of a property management company, verifications that had been pre-signed by the manager, who had since died; the attorney was unaware that the manager had died and, upon learning that information, withdrew all complaints; violations of RPC 3.3(a), RPC 8.4(c), and RPC 8.4(d); in mitigation, the attorney's actions were motivated by a misguided attempt at efficiency, rather than by dishonesty or personal gain); In re Monahan, 201 N.J. 2 (2010) (attorney censured for submitting two certifications to a federal district court in support of a motion to extend the time within which to file an appeal; the attorney misrepresented that, when the appeal was due to be filed, he was seriously ill and confined to his home on bed rest and, therefore, either unable to work or unable to prepare and file the appeal, a violation of RPC 3.3(a)(1); the attorney also practiced law while ineligible); In re Trustan, 202 N.J. 4 (2010) (three-month suspension for attorney who, among other things, submitted to the court a client's case information statement that falsely asserted that the client owned a home, and drafted a false certification for the client, which was submitted to the court in a domestic violence trial; violations of RPC 3.3(a)(1) and (4); other violations included RPC 1.8(a) and (e), RPC 1.9(c), and RPC 8.4(a), (c), and (d)); In re

Forrest, 158 N.J. 428 (1999) (six-month suspension imposed on attorney who, in connection with a personal injury action involving injured spouses, failed to disclose the death of one of his clients to the court, to his adversary, and to an arbitrator, and advised the surviving spouse not to voluntarily reveal the death; violation of RPC 3.3(a)(5), RPC 3.4(a), and RPC 8.4(c); the attorney's motive was to obtain a personal injury settlement); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve; violation of RPC 3.3(a)(1) and (2), RPC 3.5(b), and RPC 8.4(c) and (d); two prior private reprimands [now admonitions]); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney who had been involved in an automobile accident and then misrepresented to the police, to her lawyer, and to a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing; violations of RPC 3.3(a)(4), RPC 3.4(f), and RPC 8.4(b)-(d)).

That facts underlying respondent's misconduct case are similar to the facts of Monahan. There, the Court imposed a censure on an attorney who failed to meet a January 10, 2005 deadline for filing a notice of appeal after a bench trial decision. In the Matter of Thomas P. Monahan, DRB 09-039 (September 15, 2009) (slip op. at 4).

On January 20, 2005, Monahan filed a motion to extend the time to file an appeal. Ibid. In support of the motion, he submitted a certification, stating that, on January 3, 2005, he was diagnosed with severe pneumonia and placed on bed rest for a week and a half. Id. at 4-5. He returned to work on January 14, 2005. Id. at 5. He claimed that, prior to his diagnosis, he had prepared the notice of appeal and that, while he was home sick, the notice had been sent to the court. Ibid. It was not, however, and he did not learn of the oversight until January 14, 2004. Ibid.

Contrary to the certification, between January 4 and 13, 2005, Monahan had "performed substantial work on, and billed substantial time to, various client matters," including the case in which the notice of appeal was to be filed. Ibid. He also made four court appearances, attended four client meetings out of the office, and participated in two meetings at his firm's office. Id. at 6. Indeed, on January 10, 2005, Monahan billed one hour for finalizing the notice of appeal

and forwarding it to the court. Ibid. He mistakenly believed that it had been filed. Id. at 11.

In a reply certification, Monahan stated, among other things, that he did not know that he would be so affected during the time that he was ill. Id. at 7. Notably, respondent did not mention the time that he devoted to preparing the notice of appeal on the date that it was due to be filed. Id. at 8.

In mitigation, Monahan had practiced law for twenty-three years without incident; he suffered from pneumonia during the time in question; he cooperated with the DEC investigator; he did not act for pecuniary gain; his conduct was aberrational; and he was contrite and remorseful. Id. at 9-10.

According to Monahan, by stating in the certification that he was not in the office, he intended to convey that he was not in the office every day in the usual sense. Id. at 16. Monahan described the certification as "sloppy," explaining that, at the time, he had moved "too quickly," that he had "made a mistake," and that he "should have taken more care." Id. at 12. He also was under "a lot of stress" at the time. Id. at 14.

In mitigation, we noted that Monahan had practiced law for more than twenty years without incident. Id. at 29. Similar to respondent's "no harm, no foul" argument in this case, we rejected, as mitigation, Monahan's claim that the motion was denied for reasons other than his misrepresentations. Id. at 28.

Respondent's behavior was also similar to Monahan's because his misleading affidavit was born of panic at missing a deadline. Respondent's statements in that affidavit, however, were patently false. At no time, within the forty-five-day period, did he receive instruction from Roman to appeal. Indeed, Roman did not know that the decision had been rendered or that an order had been issued because respondent never told him. By the time Roman conducted his own investigation and notified the OPD that he wanted to appeal the order, the time within which to file the notice of appeal had long expired.

Further, respondent made no effort to appeal the decision until it was too late. It was only then that he attempted to gather documents and that was for the purpose of filing a motion for leave to appeal nunc pro tunc. Prior to that time, he had done nothing.

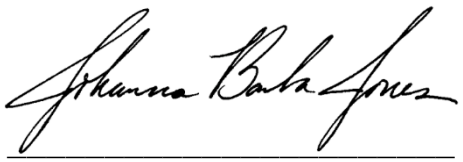
In our view, based on the precedent of Monahan, respondent's conduct warrants a censure. Although, at the time of the incident, respondent had practiced law for more than twenty years, without incident, this factor alone is insufficient to downgrade the appropriate quantum of discipline to a reprimand. Respondent did not cooperate with the DEC in its investigation, and the record lacks any evidence of contrition or remorse. Instead, in connection with a serious criminal matter, in which his client's liberty was at stake, respondent took a cavalier "no harm, no foul" approach to his behavior. He even attempted to

justify his lack of diligence by claiming that Roman's underlying motion was frivolous, and by noting that the Appellate Division affirmed the trial court's denial of that motion.

In addition, respondent committed other infractions. Although they do not serve to enhance the sanction, the totality of his misconduct precludes our determination that a quantum of discipline less than a censure would be appropriate.

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: 
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Thomas Carmen Rossell
Docket No. DRB 20-176

Argued: November 19, 2020

Decided: April 26, 2021

Disposition: Censure

Members	Censure	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer	X		
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0

Johanna Barba Jones
Chief Counsel