Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-245
District Docket No. IV-2018-0042E

In the Matter of	:
David Ryan Nussey	:
An Attorney at Law	:

Decision

Argued: February 17, 2022

Decided: May 18, 2022

Matthew J. Gindele appeared on behalf of the District IV Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a censure filed by the District IV Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.4(b) (failure to comply with a client's

reasonable requests for information) and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

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

Respondent earned admission to the New Jersey and Pennsylvania bars in 1999. At all relevant times, he was a partner at the law firm of Klineburger & Nussey, located in Haddonfield, New Jersey.

In June 2020, respondent received a reprimand for his violations of RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). In re Nussey, 242 N.J. 153 (2020) (Nussey I).

Less than two years later, in November 2021, we censured respondent for his violations of RPC 1.15(a) (negligent misappropriation of client funds), RPC 1.15(d) (failure to comply with the recordkeeping requirements of R. 1:21-6), and RPC 8.1(b), for misconduct that occurred between August 2018 and July 2019. In the Matter of David Ryan Nussey, DRB 21-065 (November 8, 2021) (Nussey II). Our decision in Nussey II remains pending with the Court.

We now turn to the facts of this matter.

On August 22, 2016, the grievant, Patricia Sweeney, retained respondent in connection with her divorce proceedings. Five months later, in January 2017, Sweeney's divorce was finalized. Respondent continued to represent her in

connection with several post-judgment matters, including finalizing the qualified domestic relations order (QDRO)[1] and the parties' life insurance policies.

The retainer agreement memorialized respondent's hourly rate of $285 and Sweeney's initial $2,500 retainer fee. Sweeney testified that she paid an additional $5,000 to respondent for his legal services. The retainer agreement provided that "[t]he Law Firm will send you itemized bills no less frequently than once every one-hundred-and-twenty days. However, upon request your bill may be sent to you within a seventy-two hour time frame."[2] However, Sweeney testified that she never received a single invoice from respondent, despite the language of the retainer agreement and her numerous requests. Instead, Sweeney claimed that she made twenty-two requests for an itemized bill and that respondent failed to provide the requested invoice.[3]

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[1] A QDRO is required to transfer funds from one individual's retirement account to another individual's account, the marital portion of which is typically divided as part of the equitable division of assets in a divorce proceeding.

[2] R. 5:3-5(a)(5), governing civil family actions, provides that "bills are to be rendered . . . no less frequently than once every ninety days, provided that services are rendered during that period . . . ." Thus, respondent's retainer agreement violated that Rule.

[3] Sweeney's grievance was strictly limited to respondent having failed to provide her with an invoice, as requested. However, the presenter's exhibits arguably demonstrated that, from February 2017 through November 2018, Sweeney repeatedly requested that respondent provide her with information and assistance related to her matter, an uncharged theory which could have independently and sufficiently supported a finding that he violated of RPC 1.4(b). However, Similarly, respondent was not charged with having violated RPC 1.1(a) (gross neglect) or RPC 1.3 (lack of diligence).

Sweeney provided copies of e-mails corroborating her numerous requests for an invoice. Specifically, in a May 5, 2017 e-mail, Sweeney requested that respondent provide her with an invoice, and she subsequently followed up with him on May 17 and May 23, 2017. In his May 24, 2017 e-mail reply, respondent claimed to Sweeney that he would "follow up today." After respondent failed to provide the requested invoice, Sweeney again followed up with a June 1, 2017 e-mail, to no avail. In an August 26, 2017 e-mail, Sweeney yet again requested that respondent provide her with an invoice, and she followed up on that request in a September 11, 2017 e-mail. Later, on September 22, 2017, Sweeney sent an e-mail to respondent which stated "[j]ust wanted to remind you to send my statement." On September 28, 2017, after respondent again failed to provide the requested invoice, Sweeney sent another e-mail which stated "[p]lease don't forget to send me my statement of charges." On October 4, 2017, respondent replied "[d]on't worry I haven't." Notwithstanding his assurances, on October 16, 2017, Sweeney again requested, via e-mail, that respondent provide her with an invoice. Later, in her October 25, 2017 e-mail, Sweeney explained:

> This is the 4th request for the statement since the last time we met over a month ago. I appreciate you are very busy, but you are causing me extreme anxiety and nightmares. As you know, [my ex-husband] will not release my portion of the savings until I get your bill. Furthermore, over the summer you informed me that I was an "easy case" and that you would be returning money to me [. . . .]

[P.Ex3.][4]

Again, in a November 6, 2017 e-mail, Sweeney requested that respondent provide her with an invoice. That same date, respondent replied, "[o]n it." After respondent again failed to provide the requested invoice, on November 20, 2017, Sweeney sent respondent an e-mail entreating:

> PLEASE PLEASE PLEASE address my concerns! I have the utmost respect for you and think you are a great guy, but I cannot believe I have to beg you for assistance. I feel as though I have been beyond patient. I understand I am an old case (ALMOST A YEAR SINCE DIVORCE FINAL) and not a priority to you now, but if you could just provide me with the information that is rightfully due to me, I promise not to bother you.
>
> [P.Ex3.]

Three months later, on February 16, 2018, Sweeney again requested an invoice via e-mail. Later, in a March 8, 2018 letter to respondent, which she sent via certified mail and received proof of receipt, Sweeney stated:

> Since my divorce was official on 1.3.2017, I have requested an itemized statement of your charges no less than thirteen times. Via email, I made a request to you on 5.5.17, 8.26.17, 9.22.17, 9.28.16 [sic], 10.04.17, 10.16.17, 10.25.17, 12.01.17, 12.17.17, 2.14.18,

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[4] "P.Ex" refers to the presenter's exhibits.
"C" refers to the formal ethics complaint, dated November 13, 2019.
"T" refers to the transcript of the November 18, 2020 ethics hearing.

> 2.26.18, 2.27.18, and 3.7.18. I have also called your office several times and left my request with your assistant . . . . I hope that this demand letter will be enough for you to send to me what is rightfully due to me.
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> Please provide me with an itemized bill of your charges within ten days of receiving this letter.
>
> [C¶¶6-7; P.Ex9; T24-T25 (emphasis in original).]

Sweeney testified that, on March 27, 2018, respondent sent her an e-mail stating that an invoice would be provided by the end of that day. Nevertheless, respondent again failed to provide the requested invoice. In response, she called his office and left two telephone messages. Thereafter, on May 17, 2018, Sweeney sent a final e-mail to respondent, informing him of her intention to file an ethics grievance against him if he failed to provide the requested invoice. Respondent again assured Sweeney that an invoice would be forthcoming but, again, failed to follow through. Consequently, Sweeney filed the grievance underlying this matter.

On October 18, 2018, the DEC provided respondent with a copy of Sweeney's grievance. Thereafter, on October 31, 2018, respondent sent Sweeney an e-mail stating "I am so sorry. I got a contact letter and thought we had sent out your bill. [My assistant] will forward tomorrow." Notwithstanding that assurance, respondent again failed to provide Sweeney with the requested

invoice. On November 9, 2018, Sweeney sent another e-mail to respondent, copying his assistant, which stated:

> I waited a week to receive your bill to no avail.
>
> Here is what I need:
>
> 1. A bill of your charges and a refund of any of my retainer which was not utilized.
>
> 2. Sean's life insurance policy information that he had to take out of my alimony.
>
> 3. Anything else that I would need that I am not aware of.
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> [C¶12; P.Ex5; T35.]

A week later, on November 16, 2018, respondent, for the fifth time, informed Sweeney that her invoice would be sent on Monday, by his assistant, who was copied on his e-mail. Yet again, and despite his repeated assurances, respondent failed to provide Sweeney with the requested invoice.

In summary, for more than one year, from May 2017 through November 2018, respondent repeatedly failed to provide Sweeney with an invoice for his legal services, despite the requirements of R. 5:3-5(a)(5), the terms of their retainer agreement, and her numerous requests that he do so. As of the date of the ethics hearing – more than three years after Sweeney's first documented request for an invoice – respondent still had failed to provide Sweeney with a single invoice.

Despite the foregoing facts, respondent denied having violated RPC 1.4(b). Regarding Sweeney's request for an invoice, respondent's answer repeated, without further detail, that "[a] final bill was prepared. There were overage costs beyond the retainer and one other payment that was waived as a courtesy."

During the ethics hearing, respondent testified that, at some time in 2018, prior to March 27, 2018, his office changed billing systems from Time Matters to Clio, which he asserted caused a problem with Sweeney's bill. Respondent did not elaborate on what the "problem" was with Sweeney's bill; instead, he conceded that he had no record of a Time Matters invoice being sent to Sweeney. At the ethics hearing, respondent produced a single Clio invoice, dated March 27, 2018, which consisted of five pages detailing his legal services to Sweeney from August 24, 2016 through January 18, 2018. Respondent, however, admitted that he had not provided the March 27, 2018 invoice to Sweeney. Additionally, the March 27, 2018 invoice erroneously showed that Sweeney made a $5,000 payment on November 17, 2018 – one day before the ethics hearing. Respondent claimed that the error occurred because, although the bill was finalized on March 27, 2018, it was not printed until November 17, 2018; he further testified that,

although the $5,000 payment was made earlier, those funds "apparently were held in trust."[5]

Moreover, respondent did not deny that he had failed to provide Sweeney with an invoice; indeed, he testified that he was unsure why an invoice was not sent to her. He acknowledged that Sweeney made numerous requests for an invoice but was unable to produce proof that Sweeney was provided same. Respondent testified that he had approved Sweeney's bill, his assistant handled billing, and that he had assumed that Sweeney's bill was sent; however, he also acknowledged that nothing had prevented him from directly providing Sweeney with an invoice.

At the ethics hearing, respondent questioned Sweeney about the reasonableness of his legal fee, inquiring "from the time that the divorce started to the time that the divorce ended all that was paid to our office was the $7,500. Correct?" Respondent appeared to theorize, as an excuse for his repeated failure to provide Sweeney with an invoice, that the amount billed was reasonable, in consideration of the work performed on her case; specifically, that (1) there were substantial difficulties in dealing with her ex-husband and his attorney, (2) it took approximately ten months after the entry of the final judgment of divorce

[5] The DEC did not charge respondent with having violated RPC 1.15(a) (commingling) in connection with this misconduct.

to finalize the parties' financial accounts, and (3) he did not charge Sweeney for some of the work performed. In response, Sweeney testified that she did not dispute the quality of respondent's legal services, but that she simply had wanted an invoice.

As detailed above, on October 18, 2018, the DEC provided Sweeney's grievance to respondent and requested his reply within ten days. Respondent did not submit a reply. Therefore, on May 13, 2019, the DEC charged respondent with having violated RPC 1.4(b) by repeatedly failing to provide Sweeney with an invoice as she requested and RPC 8.1(b) by failing to reply to the grievance.

At the ethics hearing, respondent also denied having violated RPC 8.1(b). Respondent acknowledged having received the DEC's October 18, 2018 letter enclosing Sweeney's grievance and requesting his reply, but maintained that his answer to the complaint met his obligation to cooperate with the disciplinary authorities. He also testified to having provided Sweeney's file to the DEC, in response to its October 18, 2018 correspondence, but could not recall the date of his compliance with that request.[6]

[6] Respondent provided the DEC with an electronic copy of his file for Sweeney on January 23, 2020, more than one year after the DEC's request and five months after having submitted his answer to the complaint. Attorneys have a duty to produce for inspection "the original of any client or relevant law office file for inspection and review" within 10 days. R. 1:20-3(g)(3).

In mitigation, respondent asserted that (1) Sweeney's retainer and subsequent payment were exhausted by his work on her matter; (2) as a courtesy, he waived costs beyond those payments; (3) he diligently had performed work in her matter and the Marital Settlement Agreement was fair and reasonable; and (4) on January 3, 2017, when Sweeney's divorce was concluded on the record, she testified that she was satisfied with his services.

The DEC granted respondent's request to provide written a written summation and afforded the same opportunity to the presenter. The hearing panel also required respondent to submit an updated, corrected exhibit list by November 25, 2020, and afforded the presenter the opportunity to respond. The DEC followed up, via e-mail, regarding the updated exhibit list and written summations on December 1 and December 15, 2020. On December 15, 2020, respondent replied "[c]hecking as soon as done my ZOOM." Thereafter, the hearing panel again followed up, via e-mail, on December 16, 2020 and January 6, 2021. Respondent's January 8, 2021 e-mail stated "[u]nfortunately I have been on trial all week and just finished up. I will email by Monday." On February 11, 2021, after having received no updated, corrected exhibit list from respondent, the hearing panel closed the record. The panel also extended the time for written summations, but it received none from either party.

In its November 3, 2021 report, the hearing panel found that clear and convincing evidence supported its conclusion that respondent had violated RPC 1.4(b) and RPC 8.1(b). Specifically, the panel found that respondent admitted that he failed to respond to Sweeney's multiple requests for an invoice, in violation of RPC 1.4(b). The panel noted that, over the course of the extensive representation, respondent did not provide Sweeney with a single invoice. The panel further found that (1) the DEC sent its October 18, 2018 letter to respondent, enclosing a copy of Sweeney's grievance and requesting his reply within ten days, as R. 1:20-3(g)(3) requires, (2) respondent testified to having received that correspondence, and (3) there was no evidence in the record that respondent replied to the DEC until after the filing of the formal complaint. Thus, the panel found that respondent also violated RPC 8.1(b). Notably, the panel found that, although respondent filed an answer to the formal complaint and subsequently produced Sweeney's file, his late compliance did not cure his initial failure to reply to the underlying ethics grievance.

The panel determined that the record contained no mitigation for its consideration. However, in aggravation, the panel concluded that respondent had not accepted responsibility and expressed no remorse for his misconduct. The panel also considered respondent's disciplinary history.

In support of a censure, the DEC cited disciplinary precedent which is discussed below.

At oral argument before us, respondent again admitted that he had received Sweeney's numerous requests for an invoice and acknowledged that nothing had prevented him from directly providing her with a bill. Although he continued to blame his failure to provide Sweeney with an invoice on his billing system and office staff, respondent acknowledged that it was his responsibility. He also conceded that he had initially failed to reply to the ethics grievance and emphasized his later cooperation. He apologized for his misconduct, noting that he had not intended to disregard the disciplinary system.

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.

RPC 1.4(b) states, "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." (Emphasis added). The record clearly demonstrates that, throughout his representation of Sweeney, respondent repeatedly failed to provide her with a single invoice, despite her dogged requests that he do so. Sweeney testified that she requested an invoice from respondent twenty-two times – a claim which respondent did not dispute – and the record contained

documentary proof of sixteen such requests, spanning from May 5, 2017 through November 9, 2018.

Pursuant to their retainer agreement, Sweeney should have been provided with an invoice within seventy-two hours of each request. The retainer agreement also stated that Sweeney would receive a minimum of one bill every one hundred and twenty days. Indeed, pursuant to R. 5:3-5(a)(5), which governs all retainer agreements of this type, respondent was required to provide Sweeney with an invoice at least every ninety days. Nonetheless, respondent conceded that he failed to provide Sweeney with a single invoice, despite his continued work on her matter. Respondent, thus, violated RPC 1.4(b).

By contrast, we deem respondent's excuses for his failure to provide Sweeney with the requested invoice unpersuasive. First, respondent's claim that his firm's billing system was changed at some point in 2018 does not excuse his misconduct, considering: (1) his R. 5:3-5(a)(5) billing obligations; (2) the commitments made in the retainer agreement; and (3) the fact that Sweeney's first documented request for an invoice was on May 5, 2017 – at least seven months before the modification of the billing system. Next, respondent's testimony that he assumed that Sweeney's bill was sent is incredible and, even if it were credible, would be indefensible. Sweeney clearly and repeatedly expressed that she had not received the invoice when following up on her

unsatisfied requests. Last, the reasonableness of respondent's fee and Sweeney's satisfaction with his legal services are wholly irrelevant to respondent's repeated failure to provide her with an invoice, in violation of RPC 1.4(b).

Respondent also failed to cooperate with disciplinary authorities by ignoring the DEC's October 18, 2018 written request for a reply to Sweeney's grievance. Although he eventually filed an answer to the complaint, that answer came in August 2019 – ten months after the DEC's initial request that he reply to the grievance. Similarly, respondent failed to produce a copy of Sweeney's file as directed until January 2020 – another five months later. The fact that respondent's answer ultimately was provided, fifteen months later, does not cure his initial failures to cooperate and to respond, in writing, to requests for information "within ten days of receipt," as R. 1:20-3(g)(3) requires. See In re Bronson, 204 N.J. 76 (2010) (the attorney violated RPC 8.1(b) by failing to promptly comply with three written requests for information from the OAE; he also failed to comply with the OAE's efforts to schedule a demand audit); In re Higgins, 247 N.J. 20 (2021) (the attorney, who ultimately filed a reply to the ethics grievance, violated RPC 8.1(b) by failing, for a lengthy period of time, to comply with the OAE's numerous requests for information and written responses to the matters under investigation). Respondent's belated and partial cooperation, thus, violated RPC 8.1(b).

In sum, we find that respondent violated RPC 1.4(b) and RPC 8.1(b). The sole issue left for us determine is the appropriate quantum of discipline for respondent's misconduct.

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Cynthia A. Matheke, DRB 13-353 (April 29, 2014) (attorney violated RPC 1.4(b) and (c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions) by failing to advise her client about "virtually every important event" in the client's malpractice case between 2006 and 2010, including the dismissal of her complaint), so ordered, __ N.J. __, 2014 N.J. LEXIS 784 (2014); In the Matter of Sean Lawrence Branigan, DRB 14-088 (June 23, 2014) (attorney failed to send the client an invoice for the time spent on her matrimonial case and ignored her e-mail and telephone calls seeking an accounting of the work he had performed and the amount she owed; a violation of RPC 1.4(b); we considered that the attorney had an unblemished record in fourteen years at the bar and that the matter seemed to be an isolated event that may have been exacerbated by the confluence of several random events, including the flooding to his office, in the wake of hurricane Irene, the hacking of his e-mail system, and the fact that his firm was undergoing a change of the program and process to track and bill for time).

However, if the attorney has a disciplinary record, a reprimand may result. See In re Levasseur, 244 N.J. 410 (2020) (attorney violated RPC 1.4(b), in a default matter, by failing to return a client's multiple telephone calls, e-mails, and text messages; he also violated RPC 8.1(b) by ignoring the DEC's request that he submit a written reply to the grievance; prior reprimand); In re Tyler, 217 N.J. 525 (2014) (attorney violated RPC 1.4(b) when, after a client had retained her to re-open a Chapter 7 bankruptcy to add a previously omitted creditor and to discharge that particular debt, she ceased communicating with him and never informed him that the creditor had been added to the bankruptcy schedules, the debt had been discharged, and the bankruptcy closed; prior reprimand for, among other things, failure to communicate in six bankruptcy cases); In re Tan, 217 N.J. 149 (2014) (attorney violated RPC 1.4(b) by failing to return approximately twenty calls from his client; also, due to his disciplinary history, which included, among other things, a censure for failure to communicate with a client, a reprimand was imposed for his failure to learn from his prior mistakes).

Similarly, when an attorney fails to cooperate with disciplinary authorities, and previously has been disciplined, but the attorney's ethics record is not serious, reprimands have been imposed. See, e.g., In re Larkins, 217 N.J. 20 (2014) (default; attorney did not reply to the ethics investigator's attempts to

obtain information about the grievance and failed to file an answer to the formal ethics complaint; although we noted that a single violation of RPC 8.1(b), in a default matter, does not necessitate enhancement of the discipline from an admonition to a reprimand, a reprimand was imposed based on a prior admonition and, more significantly, a 2013 censure, also in a default matter, in which the attorney had failed to cooperate with an ethics investigation); In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

Like the attorney in Branigan, respondent repeatedly failed to provide his client with an invoice, despite her repeated requests. Just like the attorneys in Tyler and Tan, who received reprimands for their RPC 1.4(b) violations, respondent also violated that Rule and has a disciplinary history. Like the attorneys in Larkin, Wood, and Williamson, who received reprimands for their RPC 8.1(b) violations, respondent also violated that Rule and has a disciplinary history. Most like the attorney in Levasseur, respondent violated RPC 1.4(b) and

RPC 8.1(b), and his disciplinary history includes a reprimand.

Thus, the totality of respondent's misconduct warrants at least a reprimand. In crafting the appropriate discipline, however, we also consider aggravating and mitigating factors. There is no mitigation to consider.

In aggravation, this matter represents respondent's third disciplinary proceeding in less than four years. Specifically, the Nussey I complaint was filed in March 2017 and resulted in the Court's June 2020 disciplinary Order imposing a reprimand (DRB 19-280). Respondent participated in those proceedings by filing an answer, on April 26, 2017, attending the ethics hearing, in February 2019, and participating in oral argument before us, in January 2020. Thereafter, in Nussey II, respondent again participated in the second disciplinary proceeding by executing a disciplinary stipulation, in March 2021, and attending oral argument before us, in September 2021.

Respondent's answer in Nussey I pre-dated his acknowledged receipt of the grievance in the instant matter, which he ignored. Considering the timeline of respondent's participation in the disciplinary process, he had a heightened awareness of his obligations under the RPCs, yet, he failed to cooperate with the DEC regarding the grievance underpinning the instant matter. Indeed, it took the filing of the formal complaint to secure respondent's compliance, which was not complete until fifteen months after the DEC's initial communication to him.

Notably, our recommendation of a censure in Nussey II has not yet been the subject of a final disciplinary Order and, therefore, we have not considered it as aggravation.

Finally, it is clear from respondent's testimony before the DEC and his statements to us that he fails to appreciate the gravity of his misconduct, despite his prior contacts with the disciplinary system. Based on these aggravating factors we determine that his conduct warrants progressive, enhanced discipline.

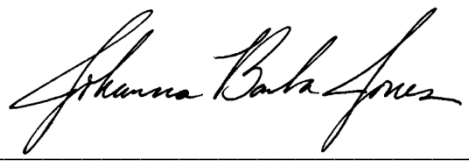
On balance, we determine that a censure is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Member Campelo did not participate.

Member Hoberman was absent.

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
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
Chair

By: 

Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David Ryan Nussey
Docket No. DRB 21-245

Argued: February 17, 2022

Decided: May 18, 2022

Disposition: Censure

Members	Censure	Did Not Participate	Absent
Gallipoli	X		
Singer	X		
Boyer	X		
Campelo		X	
Hoberman			X
Joseph	X		
Menaker	X		
Petrou	X		
Rivera	X		
Total:	7	1	1

Johanna Barba Jones
Chief Counsel