Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 23-065
District Docket No. IIA-2019-0018E

In the Matter of

Brian Francis Fowler

An Attorney at Law

Decision

Argued: April 20, 2023

Decided: August 11, 2023

Colleen L. Burden appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a reprimand filed by the District IIA Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.3 (lacking diligence in representing a client); RPC 4.1(a)(1) (making a false statement of material fact

or law to a third person while representing a client); and RPC 8.1(b) (failing to cooperate with disciplinary authorities).

For the reasons set forth below, we determine that a reprimand is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 1987 and to the Virginia bar in 1992. At the relevant times, he maintained a practice of law in Ridgewood, New Jersey. He has three prior admonitions in New Jersey.

On December 10, 2007, respondent received his first admonition in connection with two consolidated disciplinary matters. In the Matter of Brian Francis Fowler, DRB 07-212 and DRB 07-213 (December 10, 2007) (Fowler I).

In the first matter comprising Fowler I, respondent failed to record mortgages on behalf of two clients, in violation of RPC 1.3. Additionally, he failed to maintain client ledger cards and failed to conduct monthly three-way reconciliations of his attorney trust account (ATA), in violation of RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6). Finally, he failed to comply with requests by the Office of Attorney Ethics (the OAE) that he provide relevant ATA records, in violation of RPC 8.1(b).

In the second matter comprising Fowler I, a 2004 random audit revealed numerous recordkeeping deficiencies in respondent's attorney accounts, in violation of RPC 1.15(d). Thereafter, respondent failed to comply with the

OAE's repeated requests that he certify that he had corrected his recordkeeping infractions, in violation of RPC 8.1(b).

In imposing an admonition, we weighed, in mitigation, respondent's claim that he had corrected his recordkeeping infractions and that, during the timeframe underlying his misconduct, he had been suffering from clinical depression, which had impaired his judgment. We required respondent to submit to the OAE, within sixty days, proof of fitness to practice law, as attested to by a mental health professional approved by the OAE.

On November 30, 2011, respondent received his second admonition in connection with his mishandling of a client's employment matter. In the Matter of Brian Francis Fowler, DRB 11-234 (November 30, 2011) (Fowler II). In that matter, sometime in 2005, respondent allowed his client's lawsuit to be dismissed, without prejudice, based on his failure to provide discovery. Thereafter, in October 2005, respondent allowed his client's complaint to be dismissed, with prejudice, based also on his failure to comply with his discovery obligations.

In imposing an admonition, we again weighed, in mitigation, that, during the timeframe underlying his misconduct, respondent had been suffering from depression, which had impaired his ability to diligently represent his client.

On April 27, 2012, respondent received his third admonition in connection with his mishandling of an estate matter. In the Matter of Brian Francis Fowler, DRB 12-036 (April 27, 2012) (Fowler III). In that matter, between June 2006 and May 2009, respondent received funds on behalf of the estate but failed to provide an accounting of the estate to his clients. Moreover, respondent received at least nineteen checks in connection with the estate that he failed to deposit. Finally, respondent failed to reply to more than a dozen inquiries from one of his clients regarding the estate funds. We determined that respondent's conduct violated RPC 1.4(b) (failing to keep a client reasonably informed about the status of a matter) and RPC 1.15(b) (failing to promptly notify a client of receipt of funds in which the client has an interest). We observed, however, that the estate matter had since been "resolved" and that one of respondent's clients was to receive a "lump sum payment for the moneys owed."

In imposing only an admonition, we remained mindful of respondent's psychiatric difficulties, which had impeded his ability to represent his clients. We also noted that, despite respondent's disciplinary history, an admonition remained the appropriate quantum of discipline based on "the mitigating factors present."

We now turn to the facts of this matter, which are largely undisputed, although respondent denied having violated any of the charged RPCs.

On March 16, 2012, respondent's aunt, Anna Reid, passed away. Anna had two daughters, Catherine and Barbara Reid, who survived her, and a third daughter, Geraldine Reid, who predeceased her. Additionally, Anna had one surviving granddaughter, Celena DiLorenzo, who is Geraldine's daughter.

In Anna's last will and testament, she appointed Geraldine as the primary executor of her estate and respondent as the "alternate" executor of her estate, if Geraldine was unable to serve. Additionally, Anna provided that Celena receive a $20,000 specific cash bequest and that the remaining estate funds be divided equally between Catherine and Barbara, Anna's surviving children.

Following Anna's death, the Ocean County Surrogate's Court appointed respondent as executor, due to Geraldine's death. Shortly after his appointment as executor, respondent opened an estate account and met with Catherine, whom respondent claimed had provided significant care to Anna prior to her death. During their meeting, Catherine provided respondent with bank records indicating that Anna had various Wells Fargo bank accounts with a combined balance of $15,574.

In April or May 2012, respondent liquidated Anna's Wells Fargo accounts and deposited the $15,574 in the estate account. Thereafter, in February 2013, respondent sold Anna's residential duplex and deposited the net sales proceeds

of $23,205 in the estate account. Respondent made no further deposits in the estate account.

While administering Anna's estate, respondent became "very suspicious" of the amount of money that he had discovered in Anna's Wells Fargo accounts following a conversation he had with Celena, who claimed that Anna "had more money." Consequently, respondent made several inquiries to Wells Fargo and discovered that, in the months prior to Anna's death, Catherine had transferred $50,000 of Anna's Wells Fargo account funds to a joint account that she had maintained with Anna. Respondent further discovered that, a short time after Anna's death, Catherine had transferred the $50,000 in joint account funds to herself.

Respondent informed Barbara of his discovery and advised her that the joint account funds that Catherine had since transferred to herself were not part of Anna's estate. Nevertheless, respondent asked Barbara whether she wanted him to attempt to retrieve the funds from Catherine. Respondent claimed that Barbara was "insistent that [he] confront [Catherine] and demand [the] return of the money."

On July 24, 2013, after conducting legal research, respondent sent Catherine a letter, notifying her that he had discovered the joint account funds, claiming that the creation of the joint account in the months prior to Anna's

death created the presumption of undue influence,[1] and demanding that she immediately return the funds, plus interest, to Anna's estate within five days.

On July 25, 2013, Catherine sent respondent a reply e-mail, informing him that she would not return the joint account funds, which she claimed Anna had given to her. Catherine further alleged that Anna had decided to open the joint account within a week or two of a "very upsetting and frightening" September 2011 conversation she had with Barbara, during which Anna had advised Barbara "that she would no longer tolerate her threats." Catherine also told respondent that Anna:

> made the decision to [open the joint account] without informing me that it was her intention to do so. I was taken aback and asked her if she was certain this is what she really wanted to do. Her answer was yes and her reason was that she did not want Barbara to 'have enough money to kill herself.'
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> [J57.][2]

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[1] The Multiple-Party Deposit Account Act (the MPDA), N.J.S.A. 17:16I-1 to -17, creates a rebuttable presumption of a right of survivorship when a party to a joint account holder dies. In re Estate of DeFrank, 433 N.J. Super. 258, 267 (App. Div. 2013). However, that statutory presumption "may be overcome with evidence showing that undue influence was used in the creation of the joint accounts." Id. at 267-68. "A challenge based on undue influence may be made by showing that the survivor had a confidential relationship with the party who established the account." Id. at 268.

[2] "J1-J85" refers to the bates numbers of the parties' joint exhibits.

Catherine also advised respondent that, following Anna's death, she "wanted to return home as quickly as possible and at that time I did withdraw the money from the [joint] account. It was mine to do so and there are no Wells Fargo banks in the State of Maine."[3] Additionally, Catherine reminded respondent that he had spoken with Anna in December 2011, three months before her death, regarding an unrelated legal matter with a state agency in New York. Catherine alleged that, during that conversation, Anna's "state of mind" clearly "was not compromised." Finally, Catherine told respondent that, if he "believe[d] that legal action is necessary, well then, you must follow the dictates of your conscience."

Following Catherine's e-mail, respondent continued to "threaten legal action against" Catherine and drafted a proposed complaint, as a result of which Catherine agreed to provide the estate "at least half" of the $50,000 in joint account funds to avoid a protracted "legal battle."

On September 5, 2013, Barbara sent respondent an e-mail, requesting an update on his efforts to retrieve the joint account funds from Catherine. Later that same day, respondent sent Barbara a reply e-mail, claiming that Catherine had agreed "to pay the money back" and that he was "working on the final numbers and then checks will be sent (two weeks, at max)." During the ethics

[3] Catherine lives in Maine and Anna lived in New Jersey at the time of her death.

hearing, respondent claimed that, in September 2013, he was attempting to determine how much of the joint account funds he would credit to Catherine and provide to Barbara.[4]

Following his September 5th e-mail to Barbara, respondent received information from his mother and from Celena that corroborated Catherine's assertions regarding Barbara's behavior towards Anna. Respondent also alleged that his mother and another "trusted" family member had informed him that Anna had believed that Barbara was suffering from serious mental health issues and alcoholism. Respondent's mother and the other family member told respondent that Barbara had made numerous "harassing and abusive" telephone calls to Anna that left her feeling "extremely upset and depressed."

Based on the information provided by his family members, respondent began to "reconsider the situation" and "almost instantly regretted" his decision to pursue the joint account funds from Catherine. Respondent further claimed that he began receiving "threatening voicemail messages" from Barbara, during which she made "bizarre" and "absolutely untrue" claims about his mother, conduct which, in respondent's view, confirmed his family's descriptions of Barbara's behavior. Respondent, thus, became "increasingly concerned" that

[4] In his reply to the ethics grievance, respondent claimed that, at some point, he had agreed to provide Catherine a $10,000 credit from the joint account funds, in light of Anna's apparent intent to compensate Catherine for caring for her prior to her death.

recovering the joint account funds from Catherine would have been "exactly contrary to [Anna's] actual wishes regarding the distribution of the modest amount of money she possessed at the time of her death." Based on respondent's concerns regarding Barbara's mental health, he determined to delay his efforts to seek the return of the joint account funds from Catherine because he needed time to consider whether to take such action.

Following respondent's discussions with his family members, he did not inform Barbara that he had determined to delay his pursuit of the joint account funds. Additionally, although respondent received "numerous" e-mails and telephone calls from Barbara, he communicated with her only "sporadic[ally]" because he did not "know what [he] was going to do." When respondent did reply to Barbara, he conceded that, "on occasion," he advised her that he was "still working on the matter, mostly to delay her while he" contemplated his next "course of action."

Meanwhile, in or before January 2014, respondent paid the $20,000 specific bequest to Celena, in accordance with Anna's will, and paid all funerary expenses and debts on behalf of Anna's estate, which totaled more than $10,000. Thus, by January 2014, only $5,000 remained in the estate account, plus an undisclosed amount that respondent had disbursed to himself for "fees and out-

of-pocket expenses." The remaining estate funds did not include any funds from Anna and Catherine's joint account.

On January 30, 2014, respondent sent Barbara a letter enclosing a $5,000 estate account check, which constituted the last remaining funds in the estate account.[5] In his letter, respondent claimed that the $5,000[6] represented "a partial distribution of the residual estate due to you" and that he was "coordinating the payment of the remainder to you from . . . Catherine." Respondent advised Barbara that he would "be in touch within the next two weeks to finalize this matter."

In his reply to the ethics grievance, respondent claimed that, at the time he made the $5,000 "partial bequest" to Barbara, he was "continu[ing] to debate with myself as to whether I should pursue the return of any money from [Catherine]."

Following his $5,000 payment to Barbara, respondent claimed that Barbara appeared to be "satisfied" "for a while" and did not contact him "for a long time." However, on July 11, 2014, almost six months after respondent's

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[5] During the ethics hearing, respondent claimed that, at some point after his $5,000 payment to Barbara, he closed the estate account.

[6] Respondent decided not to provide any portion of the $5,000 to Catherine because of "all of the money that she had." Respondent also noted that, if he later decided to pursue the joint account funds from Catherine, he would provide her a $5,000 credit in connection with those funds.

$5,000 payment, Barbara sent respondent an e-mail, stating only that "you've given me NO CHOICE but to file a COMPLAINT with the Ethics Committee." Later that same day, respondent sent Barbara a reply e-mail, alleging that he would "have everything concluded next week. I will call you."

In his verified answer and during the ethics hearing, respondent claimed that, at the time he replied to Barbara's July 11 e-mail, he was still unsure of whether he "would pursue" the joint account funds from Catherine and that he "wanted to do some research on the matter." Respondent conceded, however, that he had "not gotten around to doing that, even though [he] fully intended to do it as soon as [he] could." Although respondent had not decided whether to pursue the joint account funds from Catherine, or what amount of those funds he would credit to Catherine and provide to Barbara, respondent maintained his view that the joint account funds "seemed to be outside of the estate due to" Anna's "specific wishes."

Months later, on April 9 and June 18, 2015, Barbara sent respondent e-mails in an apparent attempt to contact him regarding the joint account funds.[7] On June 18, 2015, respondent replied to Barbara that the "matter [would] be concluded next month and I will contact you within the next few weeks for final requirements." During the ethics hearing, respondent claimed that the "final

[7] The content of Barbara's e-mails is not included in the record before us.

requirements" involved determining what amount of the joint account funds he would provide to Barbara.

On September 25, 2015, Barbara sent respondent an e-mail inquiring whether "this matter will ever be concluded" and stating that it was "time to resubmit to the Ethics Comm." Later that same day, respondent replied to Barbara that the matter "will be concluded. I am expecting to have the final check to you very soon. Just please be a little more patient."

One month later, on October 29, 2015, Barbara sent respondent another e-mail stating, "making me resubmit my complaint. . . you should be strung up for what you've put me through. . . like I haven't been through enough. Three and a half years – three people in the will." Minutes later, in a reply e-mail to Barbara, respondent stated "you don't have to resubmit it. It's almost done. Give me two more weeks."

During the ethics hearing, respondent claimed that, in September or October 2015, he had "decided" that he would now provide Catherine a credit for a certain sum of the joint account funds and then request that Catherine pay the remainder of the funds to the estate to be paid to Barbara. Respondent noted that, "at that point, I had kind of made some decisions about what I was going to do, and I had intended to do that, but there were some outside things that became a distraction."

On November 19, 2015, in reply to another e-mail from Barbara, the content of which is not included in the record before us, respondent informed Barbara that he was "just putting the finishing touches on my accounting[8] so that I can close the estate out with finality. I was delayed a little bit due to a death in the family that required me to go down to Virginia for a while."

Meanwhile, sometime in or around November or December 2015, respondent discovered a "very old" judgment against Barbara and in favor of Geraldine for approximately $10,000. The judgment stemmed from Barbara's failure to pay child support to Geraldine, who, approximately twenty years earlier, had assumed custody of Barbara's son, who had since passed away. Following his discovery, respondent decided that, unless Barbara resolved the child support judgment, he would no longer pursue the joint account funds from Catherine to avoid having those funds be used to satisfy the judgment.

During the ethics hearing, respondent claimed that, in January or February 2016, he left Barbara a voicemail messaging regarding the judgment, in reply to which she left respondent "abusive" and "foul" voicemail messages.[9]

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[8] Respondent claimed that, at some point, he had completed his accounting of Anna's estate. Respondent, however, did not provide the accounting to the beneficiaries.

[9] Respondent submitted into evidence one such 2016 voicemail message from Barbara, during which she accused respondent of theft and spoke negatively about respondent's mother. The voicemail message is not transcribed, and a portion of the message is incomprehensible, as the DEC found.

On March 23, 2016, respondent sent Barbara an e-mail, reminding her of the judgment and stating that she would have to satisfy the judgment before she could receive any additional estate distributions. Respondent also inquired whether Barbara "dispute[d]" the judgment or had any proof that it had been satisfied.

On May 3, 2016, Barbara sent respondent a reply e-mail, claiming "you never discussed ANY of the above with me . . . you've left me in the dark since day one . . . . I have no knowledge of any judgments against me and have never heard such things before . . . . Show me proof of what you are talking about . . . this is the first damn time you said anything about this!!"

On May 24, 2016, respondent sent Barbara a letter, enclosing a copy of his judgment search and advising her that he was "not inclined to pursue" the joint account funds, on behalf of the estate, in order to satisfy her judgment. Finally, respondent stated that "such an outcome would not be consistent with [Anna's] intentions as to the distribution of her estate."

On February 9, 2017, respondent sent Barbara another letter, noting that he had not heard from her since 2016 in connection with her child support judgment. Respondent again advised Barbara that he was "not inclined to pursue" the joint account funds in order to satisfy her judgment.

On July 27, 2019, Barbara filed an ethics grievance against respondent. In her grievance, Barbara alleged that respondent failed to provide her with her inheritance, ignored "dozens" of her telephone calls, and made "many excuses" regarding why she would not receive her inheritance.

On November 7, 2019, the DEC sent respondent a letter, enclosing Barbara's grievance and requesting that he reply in writing, within ten days, to the allegations contained therein. The DEC also requested that respondent provided all relevant written records that could aid in its investigation.

On November 15, 2019, the DEC sent respondent another letter enclosing the grievance, based on respondent's claim that the DEC's November 7 letter did not contain a copy of the grievance. Respondent, however, failed to reply.

On December 20, 2019, the DEC sent respondent another letter, notifying him of his obligation to cooperate and requiring that he reply in writing, by January 3, 2020, to the allegations contained in the grievance. The DEC again requested that respondent provide all relevant written materials that could aid in its investigation. Respondent failed to reply by January 3, 2020 or to request an extension, claiming, during the ethics hearing, that it took him "longer than that to . . . draft something in response."

On March 17, 2020, respondent submitted to the DEC his written reply to the grievance along with his (1) correspondence to Catherine, (2) the first page

of his May 2012 estate account bank statement, and (3) his correspondence to Barbara in connection with his discovery of her child support judgment. In his reply to the grievance, respondent claimed that he did not act unethically in connection with his duties as executor to Anna's estate. Specifically, respondent maintained that there was no money left in the estate account and that he was within his rights as executor to decline to pursue the joint account funds from Catherine.

On June 23, 2020, the DEC sent respondent another letter, requesting that he provide, by July 1, 2020, his entire file relating to his duties as executor, including (1) all e-mail communications, (2) his draft complaint against Catherine, and (3) the accounting for the estate. The DEC also requested that respondent appear for a July 3, 2020 interview, via telephone.

On June 30, 2020, respondent sent the DEC a letter, requesting an extension until July 13, 2020 to provide the required written materials in light of his mother's recent death, his father's recent discharge from the hospital due to COVID-19, and other issues with his family. Respondent made no reference to the DEC's request for a July 3 interview in his letter.

On July 2, 2020, the DEC informed respondent, via telephone, that it had granted his extension request to provide the required written materials. The record is unclear, however, whether the DEC had rescheduled respondent's

interview scheduled for the next day. Nevertheless, respondent failed to provide any additional written materials to the DEC until a few weeks before the December 2021 ethics hearing.

In respondent's verified answer, he admitted that he failed to provide the DEC with his complete file in connection with his duties as executor but denied that he violated RPC 8.1(b).

During the ethics hearing, respondent claimed that, during the timeframe underlying the DEC's investigation, his mother had passed away due to COVID-19 and, following his father's discharge from the hospital, he was forced to live with his father for months to take care of him. Respondent also claimed that the COVID-19 pandemic resulted in a significant downturn in his legal practice, which forced him to relocate to a less expensive office, following which he was unable to locate his files in connection with his duties as executor until just a few months before the ethics hearing. However, respondent claimed that, a few weeks before the ethics hearing, he had provided the DEC with his complete file in connection with his duties as executor, following the DEC presenter's renewed requests for that material.[10] Respondent claimed that he had discovered the file following a thorough search of his storage unit.

[10] Although the DEC presenter noted that he had requested respondent's complete file "at least twice," the timing of those renewed requests is unclear. The record is also unclear whether the DEC presenter made such requests in writing.

Respondent also denied that he violated RPC 1.3 by lacking diligence in connection with his duties as executor. Specifically, respondent claimed that, within two years after Anna's death, he (1) submitted Anna's will to probate; (2) deposited all the estate funds in the estate account, including the proceeds from the sale of Anna's residential duplex; (3) paid all the estate's expenses and debts; and (4) disbursed to Celena the $20,000 specific bequest. Respondent also noted that he prepared Anna's residential duplex for sale, listed the property for sale, and paid the "carrying costs" for the property until it was sold. Additionally, after deducting his fees and expenses, he disbursed to Barbara the remaining $5,000 in the estate account. Finally, respondent argued that it was within his discretion as executor not to pursue the joint account funds held by Catherine.

Respondent further denied that he violated RPC 4.1(a)(1) by falsely informing Barbara, on multiple occasions, that he would be sending her additional estate distributions from Catherine's joint account funds, despite his continued reluctance to pursue such funds on behalf of the estate. Specifically, respondent claimed that his repeated statements to Barbara that he "was going to wrap . . . up" the estate were truthful because he did not want the matter "lingering for as long as it did." Respondent conceded, however, that he did not inform Barbara of his reservations regarding his pursuit of the joint account

funds because of his views regarding her mental health and his belief that Anna legitimately had intended for Catherine to inherit those funds. Respondent acknowledged, however, that he should have informed Barbara that, because the joint account funds were outside of the estate, she should have "pursue[d]" the matter herself.

The DEC found that respondent violated RPC 1.3 by failing, for almost three years, between July 2013 and May 2016, to resolve his dilemma regarding the joint account funds held by Catherine. The DEC observed that, between respondent's July 24, 2013 letter to Catherine demanding the return of the joint account funds and his May 24, 2016 letter to Barbara stating that he was no longer inclined to pursue those funds, respondent failed to conclude his administration of the estate, without a plausible explanation for the delay. The DEC also highlighted the fact that respondent had yet to provide an accounting to Barbara.

Additionally, the DEC found that respondent violated RPC 4.1(a)(1) by making numerous misrepresentations to Barbara that he was nearly finished with his administration of the estate and that an additional payment would be forthcoming. The DEC stressed that respondent made these misrepresentations to Barbara "mostly to delay her" while he attempted to determine what course of action he would take regarding the joint account funds. The DEC also

emphasized respondent's decision not to disclose to Barbara his concerns regarding her mental health and his views regarding Anna's intent in connection with the joint account funds.

Finally, the DEC found that respondent violated RPC 8.1(b) by failing to cooperate with the investigation of Barbara's ethics grievance. Specifically, the DEC found that respondent failed, for more than four months, to submit his reply to the ethics grievance, despite the DEC's two specific requests that he do so. The DEC also emphasized respondent's prolonged failure to comply with the DEC's June 23, 2020 letter, which required him to provide his entire file in connection with his duties as executor. The DEC noted that, although respondent provided the file approximately one month before the December 2021 ethics hearing, respondent should have conducted a diligent search for the file much earlier.

The DEC recommended the imposition of a reprimand based on respondent's prior admonitions, his failure to cooperate, his lack of diligence, and his misrepresentations to Barbara. In support of its recommendation, the DEC noted that misrepresentations to third parties generally result in a reprimand. Additionally, despite respondent's failure to cooperate, the DEC credited respondent for, eventually, filing his reply to the ethics grievance and

for producing his entire file in connection with his administration of Anna's estate.

At oral argument before us, the OAE, which had assumed responsibility for presenting this matter, urged us to adopt the findings of the DEC and to impose a reprimand. The OAE also noted that, despite the fact that respondent was serving as the executor of Anna's estate, he was still obligated to conform his behavior to the Rules of Professional Conduct. Finally, the OAE urged, as aggravation, respondent's failure to cooperate with the DEC and his disciplinary history consisting of three admonitions.

At oral argument and in his brief to us, respondent denied having violated RPC 1.3 and RPC 4.1(a) because the existence of an attorney-client relationship is a predicate element of both of those RPCs. Respondent emphasized that he served only as the executor of Anna's estate and that he never acted as counsel to any party in this matter.

Moreover, respondent stressed that, other than the issue regarding the joint account funds, he "promptly" and "expeditiously" administered Anna's estate by gathering the estate's assets; settling its debts; overseeing the sale of Anna's residential property; and paying the specific bequest to Celena. Respondent conceded, however, that he delayed his "determination" of "whether to pursue" the joint account funds because of Anna's apparent intent to shield those funds

from Barbara and his views regarding Barbara's mental health. Respondent, however, claimed that his delay was warranted "by the very unusual factual scenario and family dynamic of the situation." Respondent also argued that he properly had exercised his discretion as executor by, ultimately, declining to pursue the joint account funds from Catherine, in order to avoid those funds being used to satisfy Barbara's outstanding child support judgment.

Additionally, respondent argued that he did not engage in any misrepresentations because, until he discovered the child support judgment, he always had intended to fulfill his "promise of future action" to Barbara that the "matter would be concluded" and that she would be "paid some sum from the [e]state."

Finally, respondent apologized for his failure to promptly cooperate with the DEC's investigation. Respondent urged, as mitigation for his failure to promptly cooperate, the fact that the DEC's investigation occurred "on the very eve" of the COVID-19 pandemic, following which his mother passed away and his father required constant care after his discharge from the hospital. Respondent also claimed that, during the COVID-19 pandemic, he had "difficulty accessing" his storage facility and had changed his office location, which, in his view, created "huge obstacles in locating files."

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 in connection with only one of the charges.

RPC 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." In turn, RPC 4.1(a)(1) prohibits a lawyer from knowingly making "a false statement of material fact or law to a third person" while "representing a client." Because the existence of an attorney-client relationship is a predicate element of both RPC 1.3 and RPC 4.1(a)(1), we must determine, as a threshold matter, whether such a relationship existed in connection with respondent's duties as executor to Anna's estate.

An attorney-client relationship begins, at its most basic, "with the reliance by a nonlawyer on the professional skills of a lawyer who is conscious of that reliance and, in some fashion, manifests an acceptance of responsibility for it." Kevin H. Michels, New Jersey Attorney Ethics: The Law of New Jersey Lawyering, 257 (2018) (emphasis added) (citing In re Palmieri, 76 N.J. 51, 58, 60 (1978)). In that vein, "there must be some act, some word, some identifiable manifestation that the reliance on the attorney is in his professional capacity." Palmieri, 76 N.J. at 60.

Stated differently, an attorney-client relationship is formed when "the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so[,] and preliminary conversations are held between the attorney

and client regarding the case[.]" Herbert v. Haytaian, 292 N.J. Super. 426, 436 (App. Div. 1996). The relationship can begin absent an express agreement, a bill for services rendered, and the actual provision of legal services. Ibid. The relationship may be inferred from the conduct of the attorney and client or by surrounding circumstances. Palmieri, 76 N.J. at 58-59. It must, nonetheless, be "an aware, consensual relationship." Id. at 58.

In In the Matter of Harry J. Herz, DRB 18-413 (July 31, 2019), we determined to dismiss all charges of unethical conduct that required, as a predicate element of the offenses, the existence of an attorney-client relationship. Id. at 2-3, 33. In that matter, Herz, while serving as executor to his uncle's estate, managed a parcel of land that his uncle had owned, via a life estate, and which parcel Herz's cousin, the grievant, claimed an interest. Id. at 5, 30.

We found that the contentious facts set forth in record cut squarely against any notion of an "aware, consensual" attorney-client relationship between Herz and his cousin. Id. at 28. We noted that, prior to the filing of his cousin's grievance, the record was bereft of a single statement by the cousin claiming that he had relied on Herz as his lawyer in connection with a dispute regarding the disposition of the parcel of land. Id. at 29. The cousin and other family members demanded that Herz transfer title to the parcel to themselves and that,

if Herz refused, they would ask their lawyer to clear title through appropriate court action. Id. at 30. In communicating with others who had a potential interest in the parcel, the cousin, on at least one instance, claimed that he was representing himself. Id. at 31. We determined that, during the span of three decades, the cousin and others relied on outside counsel in connection with their ongoing dispute. Id. at 32. Based on those circumstances, we concluded that no attorney-client relationship existed between Herz and his cousin and dismissed all the charges of unethical conduct. Id. at 33. The Court agreed. In re Herz, 241 N.J. 76 (2020).

Here, like the attorney in Herz, respondent did not form any aware, consensual attorney-client relationships with any of his family members, including Barbara, while serving as executor to Anna's estate. Indeed, in her grievance to the DEC, Barbara referred to respondent only as the executor of her mother's estate. Although Barbara's e-mail communications with respondent demonstrate her frustration with him based on her view that he improperly had withheld her inheritance, nothing in the record suggests that she viewed respondent as her attorney. Rather, respondent's interactions with his family members demonstrate that his role in this matter was limited to that of executor, a position which he had assumed in accordance with the express terms of Anna's will.

In his capacity as executor, respondent, in the span of less than two years, (1) submitted Anna's will to probate; (2) deposited Anna's $15,574 in bank account funds in the estate account; (3) arranged for the sale of Anna's residential property and deposited the $23,205 in net sale proceeds in the estate account; (4) paid all the estate's debts and expenses, which totaled more than $10,000; (5) disbursed to Celena the $20,000 specific bequest from the estate funds; and (6) disbursed to Barbara the remaining $5,000 in estate funds, after deducting his own fees and expenses.

Although respondent arguably should have evenly divided the $5,000 in remaining estate funds between Barbara and Catherine, as Anna's will expressly required, the fact remains that respondent largely fulfilled his duties as executor to collect the estate's probate assets, settle the estate's debts, and distribute the remaining estate property to the beneficiaries. See N.J.S.A. 3B:10-23 (noting that an estate representative has a duty to "settle and distribute the assets of the decedent in accordance with the terms of any probated and effective will and applicable law . . . for the bests interests of successors to the estate), and In re Estate of Mild, 25 N.J. 467 (1957) (noting that an estate administrator has a non-delegable duty "to collect and preserve the estate assets").

Moreover, respondent, as the executor, was not required to pursue Anna and Catherine's $50,000 in joint account funds, which, as a non-probate asset,

automatically vested to Catherine upon Anna's death, unless clear and convincing evidence of undue influence existed in the creation of the joint account. See DeFrank, 433 N.J. Super. at 267-68 (noting that, under the MPDA, a rebuttable presumption exists that the sums held in a joint account belong to the surviving account holder, which presumption may be overcome with clear and convincing demonstrating, among other things, that undue influence was used in the creation of the joint account).

Accordingly, given the absence of any attorney-client relationships in this matter, the RPC 1.3 and RPC 4.1(a)(1) charges cannot be sustained as a matter of law.

Respondent, however, violated RPC 8.1(b) by failing to cooperate with DEC's investigation of Barbara's ethics grievance. Specifically, respondent failed to reply to the DEC's November 7 and 15, 2019 letters requiring that he provide, by November 17, his written reply to the ethics grievance and all relevant written records that could aid in its investigation.

On December 20, 2019, based on respondent's failure to reply to its prior letters, the DEC sent respondent another letter, reminding of his obligation to cooperate and again requiring that he provide his written reply to the grievance and the relevant written materials by January 3, 2020. Respondent, however, again failed to comply.

It was not until March 17, 2020 – more than four months after the DEC's initial November 7, 2019 letter – that respondent finally provided his written reply to the grievance and the relevant excerpts of correspondence and bank records in connection with his duties as executor.

On June 23, 2020, the DEC sent respondent another letter, requesting that he provide, by July 3, 2020, his entire executor file, including all e-mail communications, his draft complaint against Catherine, and the accounting for the estate. Although the DEC granted respondent's request for a ten-day extension to provide those materials, respondent, thereafter, failed to produce any additional materials to the DEC until just weeks before the December 2021 ethics hearing, following a thorough search of his storage unit. Respondent, thus, failed to prioritize his cooperation with disciplinary authorities until approximately sixteen months after the July 13, 2020 deadline to provide the required materials. As the DEC correctly observed, respondent should have conducted a diligent search for his executor file much earlier.

In sum, we find that respondent violated RPC 8.1(b). We dismiss the charges that respondent violated RPC 1.3 and RPC 4.1(a). The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

When an attorney fails to cooperate with disciplinary authorities, and previously has been disciplined, but the attorney's ethics record is not serious, reprimands or censures have been imposed. See In re Howard, 244 N.J. 411 (2020) (reprimand for attorney who altogether failed to respond to the DEC's four requests for a written reply to an ethics grievance; additionally, during a two-year period, the attorney grossly neglected his client's appeal of an adverse social security administration determination; the attorney also failed to communicate with his client and failed to promptly refund an unearned portion of his fee until the client was forced to seek redress through fee arbitration; however, the record contained insufficient information for us to determine the extent to which the client may have been harmed by the attorney's conduct; the attorney received a prior 2017 censure for similar misconduct in which he had also failed to cooperate with disciplinary authorities; in mitigation, the attorney ultimately retained ethics counsel and stipulated to some of his misconduct); In re Nussey, __ N.J. __ (2023), 2023 N.J. LEXIS 149 (censure for attorney who altogether ignored the DEC's October 2018 request for a reply to the ethics grievance; although the attorney eventually filed an answer to the formal ethics complaint, in August 2019, that answer came ten months after the DEC's initial request that he reply to the grievance; the attorney also failed to produce a copy of his client's file as directed until January 2020; moreover, the attorney

repeatedly failed to provide his client with a single invoice in a divorce matter, despite her dogged requests that he do so during an eighteen-month period; in aggravation, this matter represented the attorney's third disciplinary proceeding in less than four years; we also found that the attorney had a heighted awareness of his obligations to adhere to the RPCs considering the timing of his prior 2020 reprimand).

Here, like the censured attorney in Nussey, who failed to fully and promptly cooperate with a DEC investigation, respondent repeatedly ignored his obligations to cooperate with the DEC's investigation of Barbara's ethics grievance.

Specifically, despite the DEC's November 7 and December 20, 2019 letters requiring him to submit his written reply to the grievance within ten days, respondent failed, until March 17, 2020, to file his reply. Although respondent claimed, during the ethics hearing, that he needed additional time to submit his reply, respondent failed to request a reasonable extension from the DEC.

Following respondent's belated reply to the grievance, on June 23, 2020, the DEC sent respondent a letter requiring that he produce his entire executor file by July 3, 2020. Although the DEC granted respondent's request for a ten-day extension to provide his executor file, respondent failed to produce his file until just weeks before the December 2021 ethics hearing, approximately sixteen

months after the July 13, 2020 deadline. Moreover, respondent provided his entire executor file only after the DEC, at some point, renewed its requests for that material. Although respondent argued that his failure to cooperate with the DEC occurred in the context of personal hardships that he faced during the COVID-19 pandemic, respondent failed to explain his situation to the DEC and request an additional, reasonable extension. Rather, respondent failed to follow up with the DEC and allowed his non-cooperation to persist, for nearly a year and a half, until just weeks before the ethics hearing.

In aggravation, like Nussey, respondent had a heightened awareness of his obligation to cooperate with disciplinary authorities, in light of his prior experiences with the attorney disciplinary system. Specifically, between 2007 and 2012, respondent received three admonitions, the first of which involved two consolidated disciplinary matters in which respondent, in both cases, failed to cooperate with an OAE audit of his financial records. Despite respondent's heightened awareness of his obligation to cooperate, respondent failed to prioritize his search of his executor file until just weeks before the ethics hearing.

In mitigation, respondent's non-cooperation was arguably less severe than that of Howard and Nussey, both of whom altogether failed, at any juncture, to file their respective replies to the ethics grievances. By contrast, as the DEC

observed, although respondent engaged in a prolonged and inexcusable delay in connection with the DEC's investigation, respondent, eventually, submitted his written reply to the grievance and provided his complete executor file.

On balance, weighing respondent's inexcusable delay in connection with the DEC's investigation and his heightened awareness of his obligation to cooperate, we determine that a reprimand is the appropriate quantum of discipline necessary to protect the public and preserve confidence in the bar.

Members Campelo, Joseph, and Rodriguez voted to dismiss the complaint in its entirety based on the fact that respondent's conduct occurred in connection with an intra-family dispute, which, in their view, given the unique facts of this case, does not warrant the imposition of public discipline.

Members Petrou and Rivera were 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: *_/s/ Timothy M. Ellis_*
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Brian Francis Fowler
Docket No. DRB 23-065

Argued: April 20, 2023

Decided: August 11, 2023

Disposition: Reprimand

Members	Reprimand	Dismiss	Absent
Gallipoli	X		
Boyer	X		
Campelo		X	
Hoberman	X		
Joseph		X	
Menaker	X		
Petrou			X
Rivera			X
Rodriquez		X	
Total:	4	3	2

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel