SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 24-187
District Docket No. IIA-2020-0022E

In the Matter of Howard A. Miller
An Attorney at Law

Argued
October 17, 2024

Decided
February 5, 2025

Nylema Nabbie appeared on behalf of the
District IIA Ethics Committee.

Respondent waived appearance for oral argument.

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Introduction

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 three-month suspension filed by the District IIA Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.16(d) (failing to protect a client's interest upon termination of the representation) and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

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

Ethics History

Respondent earned admission to the New Jersey bar in 1987. At the relevant times, he maintained a practice of law in Hackensack, New Jersey.

On April 8, 2020, the Court reprimanded respondent, in a default matter, for his violations of RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6) and RPC 8.1(b) (failing to cooperate with disciplinary authorities). In re Miller, 241 N.J. 548 (2020) (Miller I). In that matter, which stemmed from an overdraft of his attorney trust account (ATA),

respondent failed to conduct monthly three-way reconciliations, resulting in multiple, negative ATA balances. He also failed to deposit all earned legal fees in his attorney business account, and, further, made improper electronic transfers. Respondent failed to cooperate with the Office of Attorney Ethics' (the OAE) investigation and failed to file an answer to the formal ethics complaint.

On January 28, 2022, the Court again reprimanded respondent for his violations of RPC 1.15(d) and RPC 8.1(b). In re Miller, 249 N.J. 466 (2022) (Miller II). In that matter, respondent failed to (i) rectify recordkeeping deficiencies, (ii) comply with the OAE's demands for financial documents, and (iii) complete the requirements of an agreement in lieu of discipline.

Facts

On January 22, 2018, Shatoyia Crawford retained respondent to file suit against the commercial landlord of her beauty salon business, located in Newark, New Jersey. Subsequently, between January 25 and August 5, 2018, she paid him $3,800 in legal fees toward the representation.

Respondent worked on Crawford's matter until September 2018. Around that time, after meeting with the landlord's counsel and conferencing the matter in court, he concluded that it would not be in Crawford's best interests to pursue

a lawsuit. He advised her accordingly and did not further represent her in her matter.

According to respondent, at the time he advised Crawford against filing the landlord-tenant lawsuit, he promised to refund half of the legal fee, or $1,600.[1] According to Crawford, he made this promise at a later date and did not specify the amount that he would refund her.

In November 2020, because respondent still had not reimbursed Crawford, she filed an ethics grievance against him. Thereafter, the DEC docketed the matter for investigation. According to the investigator, respondent was cooperative and "frank and open" during their exchanges.

On April 5, 2021, in reply to the investigator's request for information about his representation of Crawford, respondent provided an "itemization of services" that detailed the work he had performed and reflected a $3,092.65 total for the period January through September 2018. He did not provide this document to Crawford, having already promised to reimburse her. Based on the total set forth in this document, he later conceded that, upon termination of the representation, he owed her $707.35 in unearned fees.

[1] The record does not provide an explanation for statements, made throughout the proceedings by respondent and incorporated by the DEC, that $1,600 (rather than $1,900) equaled half the $3,800 legal fee.

In the formal ethics complaint, filed in January 2022, the DEC alleged that respondent violated the RPC 1.16(d) requirement that, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned or incurred," by failing to refund to Crawford $707.35 in unearned fees and, instead, kept those funds for more than three years. Moreover, the DEC alleged that respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of RPC 8.4(c), when he "promised to return [$1,600] to [Crawford]" and "violated this duty by failing to return the money as promised."

In his February 2022 answer to the complaint, respondent again acknowledged that he had promised to refund half of the legal fee, or $1,600. However, he denied that his failure to reimburse Crawford violated RPC 1.16(d) or RPC 8.4(c).

As an affirmative defense, he asserted the following:

> I have not yet paid Ms. Shatoyia Crawford the $1,600.00 promised as after Ms. Crawford filed her grievance, I put it aside upon confirmation from [the DEC investigator] that this matter would be resolved upon payment of same as direct communication with Ms. Crawford would be improper. The $1,600.00 remains in my trust account and I will pay it over to Ms. Crawford in care of the [DEC] or directly.

[A at p.2.[2]]

The Ethics Hearing

Both Crawford and respondent testified at the December 1, 2022 ethics hearing.

Crawford described her surprise when respondent told her she "didn't have a case," but stated that she had accepted his professional advice. Moreover, she acknowledged the work he had done on her matter. After he told her "he [did]n't believe [she] ha[d] a case," she attempted to contact him again on multiple occasions, without success. Eventually (in or about summer 2020, to the best of her recollection), he answered one of her telephone calls and, during the ensuing conversation, promised he would "give . . . [her] money back." She had not requested a refund before he made this promise. He did not specify how much he would reimburse her, she did not ask, and the two did not agree on an amount. However, she assumed he would reimburse the $3,800 legal fee in full, because he had not filed the lawsuit that she had retained him to file.

Crawford further testified that respondent stated he would repay her "within a couple of days to a week or something to that effect." After this time

[2] "A" refers to respondent's verified answer to the formal ethics complaint, dated February 24, 2022.

elapsed, she tried to reach him again by telephone and also left him a voicemail message but did not hear back from him. She explained that she had hoped he would "honor his word;" however, given "his track record," she "didn't expect him to" do so.

For his part, during his testimony, respondent spoke highly of Crawford; described her success in a prior, related matter, in which she had represented herself; and explained his work on her case and the reasons he ultimately advised against filing suit. He reiterated that, when the representation concluded, he promised to return half of the fee, but he could not recall if he told her how long it would take him to get the funds to her. He asserted that, subsequently, he "los[t] contact with her," although he "did try to get in . . . touch with her;" learned she had moved out of state; and became busy with his own medical issues. He clarified, however, that he referred to his health difficulties as "only an explanation, not an excuse." Moreover, he conceded that he "should have made better efforts to get in touch with [Crawford]."

In addition, respondent testified that, after he became aware of Crawford's ethics grievance, he thought it would be improper for him to send her the refund directly. He, thus, placed $1,600 for her in his ATA, mistakenly anticipating that the DEC investigator could assist in getting those funds to her. However, by the

hearing, he no longer retained the funds in his ATA. Nevertheless, he asserted that he could and would repay Crawford, although he might need time to do so.

Finally, respondent testified that he thought he should return the $3,800 retainer fee in full, "based on everything that happened and seeing [her] again and [the] time value" of her money.

The parties waived post-hearing submissions.

The Hearing Panel's Findings

The DEC found that, in September 2018, respondent's representation of Crawford had ended and, thereafter, he agreed to refund monies owed her. However, he admittedly failed to do so.

The DEC observed that "[t]he quality or amount of work performed . . . by [respondent] is not at issue" but "[t]he amount to be repaid is in dispute." The DEC determined that he owed Crawford $1,600, "based on [his] admission . . . and in light of the fact that he did provide legal services for which he was to be compensated."

Turning to the charged violations of the Rules of Professional Conduct, the DEC concluded that respondent violated RPC 1.16(d) by failing to refund the unearned portion of the retainer fee. Moreover, the DEC found that he violated RPC 8.4(c) by failing "to refund monies due and owing [Crawford],

despite his representation that he would do so on more than on[]e occasion," which constituted "misrepresentations made to [Crawford]."

In mitigation, the DEC weighed that respondent cooperated with the disciplinary investigation, admitted his wrongdoing, and demonstrated remorse.

In aggravation, the DEC weighed that although, initially, respondent "took the appropriate steps to place the $1,600.00 that he intended to refund . . . Crawford in his trust account," he then "closed out the account." The DEC also weighed his prior reprimands in Miller I and Miller II.

The DEC recommended a three-month suspension for respondent's misconduct. Moreover, as a condition of discipline, the DEC recommended that he be required to reimburse Crawford $1,600, "as previously agreed."

The Parties' Positions Before the Board

Neither the presenter nor respondent submitted a brief for our consideration.

Respondent waived his appearance before us but stated that he did not agree with the conclusions and recommendations of the DEC. Moreover, by letter dated October 8, 2024, he informed the Office of Board Counsel (the OBC) that, on that date or the day before, he had refunded Crawford $2,000. On or

about October 11, 2024, Crawford confirmed to the OBC that she had received these funds.

For her part, at oral argument, the presenter credited respondent with being conciliatory, remorseful, and cooperative during the hearing process. She emphasized, however, that at the time of the hearing, he still had not refunded the unearned portion of the retainer.

Analysis and Discipline

Violations of the Rules of Professional Conduct

Following our de novo review of the record, we are satisfied that the DEC's conclusion that respondent committed unethical conduct is fully supported by clear and convincing evidence.

RPC 1.16(d) provides that, upon termination of representation, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned or incurred." Here, respondent admittedly failed to refund the unearned portion of Crawford's advanced legal fee after the representation ended in September 2018.

In contrast, in our view, the evidence does not demonstrate that respondent violated RPC 8.4(c), which prohibits conduct "involving dishonesty, fraud, deceit or misrepresentation." The DEC alleged that respondent violated this

Rule by promising Crawford that he would reimburse her funds, then failing to do so. However, a violation of RPC 8.4(c) requires intent. See In the Matter of Evan Jay Krame, DRB 23-145 (December 19, 2023), and In the Matter of Ty Hyderally, DRB 11-016 (July 12, 2011). Respondent's failure to provide the promised refund does not evidence intent, absent corroboration.

In sum, we find that respondent violated RPC 1.16(d). We determine to dismiss, for lack of clear and convincing evidence, the charge that respondent violated RPC 8.4(c). The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

Quantum of Discipline

Attorneys who violate RPC 1.16(d), even when accompanied by other, non-serious ethics infractions, receive admonitions. See In the Matter of Karim K. Arzadi, DRB 23-169 (October 26, 2023) (the attorney, whose representation was terminated by the client, thereafter failed to file either a substitution of counsel or a motion to be relieved as counsel; during the next several months, while the attorney remained counsel of record, the client, who wished to proceed pro se, was unable to pursue settlement negotiations with the opposing party, and the client's lawsuit ultimately was dismissed for failure to prosecute; violations of RPC 1.16(a)(3) (failing to withdraw from the representation despite

being discharged by the client) and RPC 1.16(d)), and In the Matter of Gary S. Lewis, DRB 21-247 (February 18, 2022) (the attorney failed to notify his clients of the sale of his law practice to another attorney, thereby depriving his clients of the opportunity to retain other counsel and to retrieve their property and files; violations of RPC 1.16(d) and RPC 1.17(c) (improperly selling a law practice); among other mitigating factors, we weighed that the attorney's sale of his law practice may have resulted from his spouse's emergent medical situation, he cooperated with disciplinary authorities by stipulating to the facts underlying his misconduct, and, in forty-six years at the bar, he had only one prior admonition, twelve years earlier, for unrelated misconduct).

Based on the foregoing precedent, we conclude that an admonition is the baseline level of discipline for respondent's misconduct. To craft the appropriate discipline in this case, however, we also consider mitigating and aggravating factors.

In mitigation, respondent accepted responsibility for his misconduct and expressed remorse. Moreover, he ultimately disgorged $2,000 of his legal fee to Crawford.

In aggravation, significant time passed while respondent continued to hold an unearned portion of Crawford's retainer fee. Specifically, more than two years passed between September 2018, when he last worked on Crawford's

matter, and November 2020, when she filed her ethics grievance. Although, thereafter, he apparently hoped (mistakenly) that he could reimburse her through the DEC as "intermediary," and believed that reimbursing her directly would be inappropriate while the disciplinary matter remained pending, these later circumstances do not explain his prolonged failure to return her funds before she filed her grievance.

Turning to respondent's disciplinary history, we weigh, in aggravation, his reprimand in Miller I. However, we do not similarly weigh his reprimand in Miller II, which post-dated the conduct at issue here.

More specifically, the Court entered its Order in Miller I in April 2020. Respondent's misconduct in retaining Crawford's funds persisted long after this. Nevertheless, Miller I involved dissimilar misconduct, with respondent committing recordkeeping violations and, later, failing to file an answer to the formal ethics complaint. Thus, we cannot say that respondent's misconduct here signaled a failure to learn from his past mistakes. However, following Miller I, respondent should have had heightened awareness of his obligations pursuant to the Rules of Professional Conduct.

We note that the hearing panel also weighed, in aggravation, that respondent "took the appropriate steps to place the $1,600.00 that he intended to refund . . . Crawford in his trust account but thereafter he closed out the

account." Without more, however, this circumstance alone does not rise to the level of an aggravating factor.[3]

Conclusion

On balance, we determine that the aggravating factors outweigh the mitigating factors and, thus, conclude that a reprimand is the appropriate quantum of discipline necessary to protect the public and preserve confidence in the bar.

Vice-Chair Boyer and Member Menaker were absent.

[3] Notably, the retainer agreement did not include a requirement that respondent keep Crawford's retainer fee in his ATA. Moreover, respondent made his statement regarding the funds' placement in his ATA as part of a longer statement, indicating he planned to repay her; specifically, under affirmative defenses in his answer to the complaint, he wrote that "[t]he $1,600 remains in my trust account and I will pay it over to Ms. Crawford in care of the [DEC] or directly." By the date of the hearing, the funds no longer remained in his ATA, but he consistently testified that he would repay her and, further, explained that he had not thought he could do so directly while the disciplinary matter remained pending and also had misunderstood that the DEC could serve as intermediary for this purpose. It is unclear from the record before us whether the DEC ever addressed his apparent confusion regarding how he could provide the funds to Crawford during the pendency of the disciplinary matter.

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. Mary Catherine Cuff, P.J.A.D. (Ret.),
Chair

By: */s/ Timothy M. Ellis*
Timothy M. Ellis
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Howard A. Miller
Docket No. DRB 24-187

Argued: October 17, 2024

Decided: February 5, 2025

Disposition: Reprimand

Members	Reprimand	Absent
Cuff	X	
Boyer		X
Campelo	X	
Hoberman	X	
Menaker		X
Petrou	X	
Rodriguez	X	
Spencer	X	
Total:	6	2

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