SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-112
District Docket No. IIB-2010-0019E

IN THE MATTER OF	:
JOHN L. WEICHSEL	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 19, 2012

Decided: September 6, 2012

Rebecca K. Spar appeared on behalf of the District IIB Ethics Committee.

Respondent appeared pro se.

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

This matter was originally before us on a recommendation for an admonition filed by the District IIB Ethics Committee (DEC), which we determined to treat as a recommendation for discipline greater than an admonition. R. 1:20-15(f)(4). The

DEC's recommendation was based on respondent's violation of RPC 1.1 (presumably (a)) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4 (presumably (b)) (failure to communicate with the client). Although respondent also was charged with having violated RPC 8.4(a), which makes it a violation of the RPCs to violate an RPC, the DEC made no determination with respect to this rule.

For the reasons set forth below, we determine to impose a reprimand on respondent for his misconduct.

Respondent was admitted to the New Jersey bar in 1972. At the relevant times, he maintained an office for the practice of law in Hackensack.

In April 2010, respondent received an admonition for unilaterally determining that a motion was without merit and failing to communicate that conclusion to the client.

The current charges are based on respondent's failure to follow through on the filing of a lis pendens and an order to show cause in an unfair competition matter, for which he had received a $6000 retainer.

The grievant, Richard Ford, owner of Win Win, LLC, testified that his company purchased "ugly houses," renovated them, and made them "pretty." At some point, Ford hired a

salesman named Jeff Otis. Otis's job was to locate distressed properties and "get [them] under contract."

On Wednesday, October 29, 2008, Otis sent Ford an email, stating that his father was unwell and that he would be out of the office until Friday of that week. By Tuesday, November 4, 2008, Otis still had not returned to the office. He informed Ford, in another email, that it was not realistic to think that he would be in at all that week.

Apparently, Otis kept in touch with Ford on business matters, while he was out of the office, but by November 13, 2008 he still had not returned to work. On that date, he informed Ford, by email, that he would not be back in the office until the following week.

Ford testified that he retained respondent after Otis had located a particular distressed property and "got it under contract to himself behind our backs." Otis was able do this, Ford testified, by sneaking into Ford's office (which happened to be in his home) in the middle of the night and downloading Win Win's entire database. The database included proprietary information, such as Win Win's contacts, personal identity information, including the social security numbers of Ford's family members, and bank account information. After Otis stole

the database, he began to communicate with the Win Win contacts he had acquired from it.

Ford and his real estate attorney, Michael Werner, first met with respondent in November 2008. On January 19, 2009, Ford and respondent entered into a retainer agreement. Ford paid respondent a $6000 retainer fee.

According to Ford, respondent agreed to have a lis pendens placed on the property acquired by Otis, so that it could not be sold without Ford's knowledge. In addition, Ford wanted to sue Otis for damages based on his theft of the database and the unlawful deal that he had made using that information.

On January 26, 2009, Ford forwarded to respondent the emails that he had received from Otis in the fall of 2008, while Otis was out of the office and purportedly taking care of his father. On February 24, 2009, Ford emailed respondent the name and number of a realtor, Monica Colaneri, whom Otis had contacted and with whom he had established a relationship to benefit himself. Respondent asked Ford if he could telephone Colaneri. Ford replied that he would let Colaneri know that respondent would be calling her.

The next day, Ford emailed respondent and asked "[h]ow are we doing." The question was followed by the statement "[i]t has

been a month." Ford testified that he was looking for an update from respondent on the matter.

On February 27, 2009, Ford sent another email to respondent, informing him that he had been in touch with Gregory Sokolovsky, a Chase Bank employee, who had told Ford that Otis had contacted the bank. Ford told respondent that Sokolovsky was willing to sign an affidavit in support of the order to show cause that respondent was supposed to file.

Ford also told respondent, in the February 27 email, that Otis had been in touch with Frank Barillari, one of Win Win's "main clients," who had the financial capability of closing on a deal quickly. Again, Ford asked respondent, in the email, how the case was proceeding.

On Tuesday, March 3, 2009, respondent emailed Ford and told him that a draft of an order to show cause was on his secretary's desk and that it should be typed by the end of the day on Wednesday of that week. Respondent told Ford that Ford would have to review the papers and provide additional information, so that the application would be as "detailed as possible." Respondent also stated, in the email, that he could "probably" file the notice of lis pendens, before he filed the order to show cause.

In reply to respondent's March 3 email, Ford wrote:

> Great. Lets [sic] get the ball rolling. I like the idea of filing the Lis Pendens first. Doesn't it hurt us to file five months after the event. Wouldn't the Judge think we don't care, so it can't be that important to us since we took so long to file?
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> [Ex. G-12.]

Ford testified that he preferred that the lis pendens be filed first "because the crux of the whole thing was to make sure that they couldn't sell the house and realize a profit prior to having to deal with us."

On March 6, 2009, Ford emailed respondent and informed him that Barillari, the former president of the Metropolitan Real Estate Investors Association, would sign an affidavit in support of the order to show cause. Ford provided respondent with Barillari's telephone numbers and email address and asked respondent to call him.

On March 19, 2009, Ford emailed respondent and reported that Barillari and Sokolovsky had informed him that respondent had not contacted either of them. Ford also told respondent that, based on a conversation with Werner, his real estate attorney, he, Ford, was to have "the papers . . . several days ago." He concluded: "How are we doing? My $6000 have been in

your hands for several months now." Ford testified that he never received confirmation from respondent that the lis pendens had been filed.

On March 20, 2009, at 3:55 p.m., respondent sent an email to Ford, attaching a draft verified complaint, and asking Ford to review the document and to make any changes or corrections to it. This was the last email that Ford would receive from respondent.

About a half-an-hour after Ford received respondent's email, Ford replied: "I almost fainted. Thanks for getting back to me. I added a couple things. You may cut them out. What ever you think." The changes that he made to the complaint were incorporated within the document that respondent had emailed to him.

Ford testified that, after he returned the complaint to respondent, he did not hear from him. His efforts to contact respondent were not successful. Moreover, sometime in April 2009, Ford learned from a realtor that Otis had sold the house, at which point Ford knew that respondent had not filed the lis pendens. Ford then called respondent, who said that he would "check into it" and get back to him.

Ford never heard from respondent again. He explained his efforts in trying to talk to respondent:

> I called at least three, four times. I even got to the point where I got my assistant to call, because I thought he's not picking up because he sees my name. So I had my assistant call as a different name. But of course, his assistant is a trained professional and got the gist of what's it in reference to. Of course, she was honest and mentioned my name, so I never heard back from him.
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> [T21-1 to 9.][1]

According to Ford, he did not send respondent any more emails because he knew that respondent would not reply to them. He did not send him a certified letter or visit him either. Instead, he telephoned respondent about four times, after he learned that the house had been sold. Thereafter, he telephoned respondent about once a month, throughout the summer.

As to getting a refund of the retainer, Ford testified that he worked through Werner, the real estate attorney, who said that he would call respondent and get Ford's money back.

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[1] "T" refers to November 22, 2011 transcript of the DEC hearing.

Although respondent produced a copy of an invoice for work that he performed on Ford's matter, Ford testified that he had never received an invoice from respondent. Ford also denied having seen the March 12, 2009 verified complaint for injunctive relief that was produced at the DEC hearing.

Respondent, in turn, testified that, after he was retained by Ford, they had "a number of conversations." Respondent asked Ford for documents and names of witnesses. He claimed that he had spoken with some of the witnesses.[2] He could not recall their names but, according to him, while some of them were willing to get involved, others were reluctant to sign an affidavit. All of them, however, were sympathetic to Ford.

Respondent testified that he also conducted research and drafted a complaint, which he emailed to Ford. He did not prepare a notice of lis pendens because he was concerned about whether it "would fly or not," as Ford did not have any ownership in the property that Otis had acquired. He acknowledged that he "probably did not communicate that to Mr.

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[2] According to respondent's invoice, he spoke to only one witness.

Ford." Similarly, although he concluded that a lis pendens would have to come after the filing of the complaint, he never conveyed this information to Ford.

Respondent speculated that the complaint was not filed between the date of his retention, in January 2009, and the date of his last communication with Ford, in March 2009, because, in part, Ford's emails always contained "additional information." He assumed that he had prepared the complaint after he "had as much information as [he] was going to get."

Respondent asserted that he never received a signed copy of the complaint from Ford. When asked whether he communicated with Ford to tell him that he needed to sign the complaint and return it, respondent replied "[p]robably not."

As to Ford's claim that he tried to communicate with respondent after March 2009, respondent's recollection was that "there wasn't any communication" from Ford. He claimed that he had received no emails from Ford after March 2009 and no messages that Ford had called, adding that his secretary was "very good" about giving messages to him. He maintained that his practice was to return telephone calls within twenty-four hours. He agreed that, after March 20, 2009, there were no communications with Ford.

Not having heard from Ford, respondent testified, he put the file "on the back burner." He did not look at it again until after he received the ethics grievance.

Respondent concluded:

> You know, I've been an attorney for 37 years, I guess, 38, and I think I have a pretty good reputation. And, you know, if I did anything wrong here, I apologize, but I think there was just a breakdown in communication between Mr. Ford and I [sic].
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> [T39-11 to 15.]

Respondent stated he has never refused to refund any portion of the retainer to Ford and that he is willing to do so.

During the representation of Ford, he never sent him an invoice. The invoice admitted into evidence was prepared after Ford had filed the grievance. Although the invoice reflected a refund of $2,156.25 due to Ford, it was never sent to him. Respondent conceded that it should have been sent to Ford, whether he had requested it or not.

The DEC found that respondent had violated RPC 1.1 (presumably (a)), RPC 1.3, and RPC 1.4 (presumably (b)). Its report made no reference to the RPC 8.4(a) charge. The DEC gave no explanation for its findings and recommended the imposition

of an admonition. The DEC also "respectfully suggested" that respondent return to Ford the entire $6000 retainer.

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. Like the DEC, we find that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and, therefore, RPC 8.4(a), in his representation of Ford.

RPC 1.1(a) prohibits an attorney from handling or neglecting a matter "in such manner that the lawyer's conduct constitutes gross negligence." RPC 1.3 requires an attorney to "act with reasonable diligence and promptness in representing a client." RPC 1.4(b) requires an attorney to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

Here, Ford retained respondent, in January 2009, to stop Otis from selling a property that Otis had unfairly acquired, through the use of confidential information that he had stolen from Win Win. This required immediate action, as respondent acknowledged. He recommended to Ford the filing of an order to show cause and the filing of a notice of lis pendens on the property. Yet, despite the information supplied by Ford to

respondent, as of March 20, 2009, respondent had not taken either action on his client's behalf. Although the record does not disclose when Otis sold the property, that date is not necessary to a determination on the gross-neglect and lack-of-diligence charges.

Otis was in possession of a piece of property that he had located and purchased utilizing Win Win's confidential information. He needed to be prevented from selling it immediately. Two months after respondent was retained, respondent still had not filed the order to show cause, which, by that point, existed only in draft form. Moreover, he had contacted only one of the witnesses whose names Ford had provided to him. As the result of respondent's inaction, Otis was never enjoined from selling the property, which, in fact, was sold. Thus, respondent violated RPC 1.1(a) and RPC 1.3.

Respondent also violated RPC 1.4(b). The documents clearly show that the only communications between respondent and Ford were via email and that Ford was the one who initiated most of the communications. Except for respondent's March 3, 2009 email to Ford stating that the draft order to show cause was on his secretary's desk, ready to be typed, and the March 20, 2009

email, stating that the draft order to show cause was ready for Ford's review, respondent provided no information to Ford.

In addition, respondent testified that, at some point, he determined not to file the notice of lis pendens because he was "not sure it would fly." However, he never shared his unilateral decision with Ford. His failure to keep Ford informed about the status of the matter, as well as his failure to reply to Ford's requests for updates, constituted a violation of RPC 1.4(b).

Finally, respondent's violation of RPC 1.1(a), RPC 1.3, and RPC 1.4(b) constitutes a violation of RPC 8.4(a), which deems a violation of the RPCs to be professional misconduct.

Admonitions are typically imposed for gross neglect, lack of diligence, and failure to communicate with the client. See, e.g., In the Matter of Ronald M. Thompson, DRB 10-148 (June 23, 2010) (attorney violated RPC 1.1(a), RPC 1.3, and RPC 1.4(b) when his inaction led to the dismissal of his minor client's complaint and the denial of his motion to restore; when the client turned eighteen, the attorney did not file a new lawsuit; the statute of limitations expired two years later; the attorney also failed to keep the client's parents informed of the status of the matter, including that the case had been dismissed and

that another lawsuit could be filed upon the child's eighteenth birthday); In the Matter of Daniel G. Larkins, DRB 09-155 (October 8, 2009) (attorney's gross neglect and lack of diligence resulted in the dismissal of his client's personal injury complaint and his failure to seek its reinstatement; the attorney also lost touch with his client and failed to turn over the file to his client because it was "lost for a time;" mitigating factors included personal problems at the time of the representation and the attorney's lack of disciplinary history since his 1983 admission to the bar); and In the Matter of Peggy O'Dowd, DRB 09-027 (June 3, 2009) (attorney did not adequately communicate with the client in three client matters; in one matter, she did not complete the administration of the estate, in violation of RPC 1.3; in a real estate matter, she failed to timely pay the condominium management company, to timely file certain documents and to provide copies of such documents to the client, in violation of RPC 1.1(a) and RPC 1.3; in mitigation, we considered the attorney's personal circumstances at the time of the misconduct, the fact that she ultimately completed the work for which she had been retained, the lack of permanent harm to her clients, and her recognition that she had to close her law practice and seek help from another law firm).

Based on the above precedent, an admonition would be the appropriate measure of discipline to impose on respondent, if he had a clean disciplinary record. He does not. Thus, we must consider whether his admonition, in 2010, for failure to communicate with a client justifies enhancing the discipline in this case to a reprimand.

In the matter leading to the 2010 admonition, respondent's then-client, Kevin A. Richards, filed a grievance against him, in June 2008. Thus, at the time that Ford retained respondent in this matter, in January 2009, respondent was well aware that his conduct was under scrutiny in the Richards matter. Clearly, the Richards ethics proceeding did not impel respondent to modify his behavior in terms of how he conducted himself in his representation of Ford. Indeed, as he did with Richards, respondent initially led Ford to believe that he would take legal action on his behalf, wound up doing nothing, and failed to communicate with Ford in any way, after he let the ball drop. Due to respondent's failure to modify his behavior after a grievance was filed against him in 2008, we choose to enhance what would have been the ordinary measure of discipline in this matter (an admonition) to a reprimand.

As to the DEC's recommendation that respondent refund the $6000 retainer to Ford, we refrain from making a determination in this regard. The fee arbitration system is the forum in which to address this issue.

Member Clark did not participate.

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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John L. Weichsel
Docket No. DRB 12-112

Argued: July 19, 2012

Decided: September 6, 2012

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark						X
Doremus			X			
Gallipoli			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Julianne K. DeCore
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Chief Counsel