SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-270
District Docket No. XIII-03-032E

IN THE MATTER OF
RUSSELL T. KIVLER
AN ATTORNEY AT LAW

Decision

Argued: October 21, 2004

Decided: December 21, 2004

Bruce W. Clark appeared on behalf of the District XIII 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 discipline (reprimand) filed by the District XIII Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1973. He has no prior discipline.

The complaint alleged violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of

diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.4(b) (failure to explain matter to extent reasonably necessary for client to make informed decisions about the representation), RPC 3.2 (failure to expedite litigation), RPC 5.1(b) (failure to supervise junior attorney), RPC 8.4(a) (violation or attempt to violate the Rules of Professional Conduct), RPC 8.4(b) (commission of a criminal act), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.1(b) (failure to cooperate with ethics authorities).[1]

On March 26, 1998, Robert and Lorraine Stemmer retained respondent, via a written retainer agreement, to represent them in an action by Lorraine's brother, Arthur Kearns. Kearns sought to obtain $4,901.59 from the Stemmers, representing the balance due on a credit card. In addition, respondent was to file a counterclaim, as seen below.

Initially, respondent took appropriate steps to protect the Stemmers' interests, filing an answer and counterclaim for his clients. The Stemmers' answer claimed that Kearns had breached an oral agreement whereby the Stemmers would pay for charges to a credit card account, as long as they received the items

[1] There is no support in the record for findings of violations of RPC 8.4 (a) and (b). Presumably, between the complaint and hearing stage, the DEC dismissed these allegations.

purchased on the account. The counterclaim sought the return of approximately $80,000 that the Stemmers allegedly gave Kearns toward the purchase of a house.

According to the Stemmers, by oral agreement in 1989, they and Kearns decided to live together in Kearns' house, so long as household expenses were shared. Pursuant to that agreement, the Stemmers were to purchase the house from Kearns, through several cash payments. To that end, in or about 1989, the Stemmers gave Kearns $35,000 from the sale of their former house. That payment was to be credited toward their purchase of Kearns' house.

In April 1992, Lorraine received a $45,000 lump sum settlement from her employer of many years, General Motors Corporation. In January 1995, she gave those funds to Kearns to be credited toward the house purchase. Thereafter, Kearns deeded the property to Lorraine.

Lorraine testified that the disruptive behavior of Kearns' daughter, who also lived in the house, drove the Stemmers to move out of the house. According to Lorraine, her high blood pressure and her husband's "muscle sclerosis" required that they find a quieter living arrangement.

Robert testified that the family lived in the house for about eight years before the situation became unbearable, and that, in addition to the cash payments to Kearns, he had given

Kearns $900 per month from 1989 to 1997, in order to remain in the house.

On February 4, 1997, the Stemmers moved out. According to Lorraine, Kearns forced her to sign a deed that day conveying the property back to him.

Lorraine testified about her contacts with respondent over the course of the representation. After retaining respondent, in March 1998, to recover ownership of the house from Kearns, she contacted him every month or two for information about the case. According to Lorraine, respondent told her on numerous occasions that the case was proceeding apace and that the process through the courts was very slow. Lorraine recalled meeting with respondent three or four times in 2000, when he told her that the matter was slowly making its way through the court system.

On February 19, 1999, respondent voluntarily dismissed the complaint. Lorraine testified that respondent never informed her of the dismissal, of which she was unaware until 2003.

For his part, respondent testified that he filed an application in the special civil part to have the matter removed to the law division, because of the large amount in controversy. According to respondent, he had been told by the special civil court clerk to first take a voluntary dismissal, and then to make his application in the law division.

Respondent admitted that no action was taken thereafter to move the case along. For example, he admitted that the stipulation of dismissal was his final action taken in the case, and that he never sent the Stemmers a copy of that document. Respondent initially blamed associate attorneys in his employ for mistakes in the case, explaining that, at the time that the Stemmers came to him, he had 1,200 to 1,300 active cases in the office, and that he depended on his associates to move the cases along for him. Respondent acknowledged that the matter had "slipped through the cracks" in the office, again blaming associate attorneys for not taking action in the case.

When asked if he had reviewed the file before advising the Stemmers of its status, respondent replied, "It appeared to me from the file when I looked at it just briefly that the matter was waiting for the availability in the law division." Respondent also testified that he understood from an associate attorney that "the matter was moving forward in the law division." Respondent further claimed that his belief was reasonable because many cases in Mercer County were five or six years old; therefore, at the time, he saw no cause for alarm.

Lorraine testified also that she met with respondent about the case in April 2003. At that time, almost seven years after

his retention, respondent returned the retainer without acknowledging any wrongdoing.

Lorraine also hired respondent to file a workers' compensation claim against her employer and a separate personal injury action against the owner of the building where she worked, as the result of injuries to her arm from a January 2001 slip-and-fall.

A retainer agreement was signed. According to Lorraine, she kept respondent informed, over the next several years, about her injuries and progress in recovery. Respondent, however, never sent her correspondence regarding the matters.

Two years later, at an April 2003 meeting about the real estate matter, respondent told Lorraine that he had high blood pressure and that he was transferring both the personal injury and workers' compensation matters to another attorney.

According to Lorraine, at meetings with the new attorney, she learned for the first time that respondent had never filed a workers' compensation claim against her employer or a personal injury suit against the building owners.

Respondent did not deny that he had done nothing to protect Lorraine's workers' compensation and personal injury claims. Rather, he offered mitigation for his misconduct. According to respondent, in 2002 he recognized that he needed psychological

help to deal with the pressures of his law practice; he was no longer performing to his capabilities and was missing court appearances. He sought help because he had become "so burnt out."

In 2003, a fellow attorney suggested that respondent seek help for his situation, because he had so many cases backed up in the Mercer County court system. In May 2003, still overwhelmed by his caseload, respondent sought the guidance of the Mercer County assignment judge.

On May 19, 2003, respondent received a blanket stay in all of his Mercer County matters, while the court determined how to reduce his active caseload. On May 29, 2003, the assignment judge ordered a mass transfer of respondent's pending matters to other attorneys.

Finally, respondent admitted to the DEC that, although he considered himself to be a good attorney, the Stemmers did not receive his best efforts. For that, respondent apologized. He also advised the DEC that he continues to practice law, but on a self-imposed, limited basis. Respondent was unsure if he was still subject to the May 2003 court order disposing of his cases.

With regard to alleged misrepresentations to the Stemmers, the DEC found incredible respondent's "defense that he thought

the case had been transferred and that when he reviewed the file it appeared to him that it was simply a matter of the courts being backlogged . . . ." The DEC concluded that "all of the allegations contained in Counts [sic] I and Count II of the complaint were proven by clear and convincing evidence." The DEC dismissed the allegation that respondent failed to cooperate with ethics authorities.

The DEC recommended the imposition of a reprimand.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

Respondent had no defense to the majority of the alleged misconduct. With regard to RPC 1.1(a), respondent initiated only one of three matters for the Stemmers – the real estate matter against Kearns. Respondent's excuse that he had delegated responsibility for the matter to associates in the office is without merit, as respondent was always the attorney of record in the case. He remained responsible for the Stemmers' matter, but "dropped the ball" upon the 1999 failed transfer to the law division.

Thereafter, respondent took no corrective action, leaving the Stemmers to complain, in 2003, that he had lost their $80,000 claim against Kearns. Respondent's failings constituted

gross neglect, lack of diligence, and failure to expedite litigation, in violation of RPC 1.1(a), RPC 1.3, and RPC 3.2, respectively.

With regard to Lorraine's 2001 workers' compensation and personal injury claims, respondent never put pen to paper. He grossly neglected these matters as well, violating RPC 1.1(a) and RPC 1.3. We also find that respondent's gross neglect of the three matters constitutes a pattern of neglect, a violation of RPC 1.1(b).

As to the allegation that respondent failed to communicate with the Stemmers, it is uncontroverted that respondent rarely sent the Stemmers information, and then only in the initial stages of the real estate case. He sent Lorraine nothing in either of her two other matters. Had respondent explained the status of the matters to the extent reasonably necessary for his clients to make informed decisions about the three claims, they might have taken other measures to protect their interests. We find, thus, that respondent violated both RPC 1.4(a) and (b).

With regard to the charge that respondent failed to supervise junior attorneys, respondent admitted as much. He testified that he had delegated full responsibility for the Stemmers' matters to different associates in the office, over the course of the representation. He also conceded that he had

the ultimate responsibility for all cases in the office, and that he had no case-tracking system in place to monitor their activity. Instead, he reacted to complaints from clients and others. Had respondent properly supervised the attorneys working for him, he could have avoided much of his misconduct. Respondent's conduct in this regard violated RPC 5.1(b).

Replying to the RPC 8.4(c) charge, respondent argued that he was unaware that no work had been done in the Stemmer matter after the 1999 stipulation of dismissal. He admitted telling the Stemmers through early 2003 that their matter was proceeding, but claimed that he had relied on the word of his associate and his own recollection of the transfer of the case to the law division. Respondent's reliance on his recollection and the associate's word was careless, however. He should have investigated the status of the case, with the court if necessary, before communicating with the Stemmers. Because, however, there is no clear and convincing evidence that respondent knew that his statements were untrue, we decline to find that he intentionally misled his clients, in violation of RPC 8.4(c). We, therefore, dismiss that charge.

With regard to RPC 8.1(b), there is no evidence in the record to support a finding that respondent failed to cooperate with ethics authorities. Therefore, as recommended by the DEC,

we dismiss that charge. Likewise, as mentioned above, we find no support in the record for violations of RPC 8.4(a) and (b).

Cases involving failure to supervise junior attorneys, coupled with other violations, such as gross neglect, lack of diligence, and failure to communicate with the client, have resulted in reprimands. In re Riedl, 172 N.J. 646 (2002) (reprimand for gross neglect, pattern of neglect, recordkeeping violations, and failure to supervise non-lawyer assistant; the latter violation caused numerous mistakes in real estate transactions); In re Daniel, 146 N.J. 491 (1996) (reprimand imposed for lack of diligence, failure to communicate with the client, and failure to supervise junior attorney); In re Libretti, 134 N.J. 123 (1993) (public reprimand imposed where the attorney exhibited gross neglect, lack of diligence, failure to expedite litigation, failure to communicate with the client, failure to withdraw from the representation, and failure to supervise junior attorney). Here, too, we are persuaded that a reprimand is the appropriate quantum of discipline for respondent's transgressions. Because of respondent's admitted psychological problems, within ninety days from the date of this decision, he should submit proof of fitness to practice law, attested by a mental health expert approved by the OAE. We

further require respondent to take OAE-approved courses in office management.

Vice-Chair William J. O'Shaughnessy and Members Matthew P. Boylan, Esq. and Barbara F. Schwartz did not participate.

We also require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Isabel Frank
Isabel Frank
Deputy Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Russell T. Kivler
Docket No. DRB 04-270

Argued: October 21, 2004

Decided: December 21, 2004

Disposition: Reprimand

Members	Suspension	Reprimand	Admonition	Disqualified	Did not participate
Maudsley		X			
O'Shaughnessy					X
Boylan					X
Holmes		X			
Lolla		X			
Pashman		X			
Schwartz					X
Stanton		X			
Wissinger		X			
Total:		6			3

Isabel Frank
Deputy Chief Counsel