SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-292
District Docket No. VII-2013-0038E

IN THE MATTER OF	:
ANTHONY J. FUSCO, JR.	:
AN ATTORNEY AT LAW	:

Corrected Decision

Argued: November 19, 2015

Decided: June 15, 2016

Andrea Dobin appeared on behalf of the District VII Ethics Committee.

Joseph J. Benedict appeared on behalf of respondent.

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

This matter was before us on a recommendation for a censure, filed by the District VII Ethics Committee (DEC). The complaint charged respondent with violations of RPC 1.4, presumably (b), (failure to keep a client reasonably informed about the status of the matter), RPC 1.5, presumably (b), (failure to provide a client with a writing setting forth the basis or rate of the fee), and two instances of RPC 1.16, presumably (d), (failure to take steps reasonably practicable to

protect a client's interests on termination of the representation, including giving the client reasonable notice of the intent to terminate the attorney-client relationship). For the reasons expressed below, we determine to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1972. He maintains a law office in Passaic, New Jersey.

In 1995, respondent was reprimanded for improperly delegating recordkeeping responsibilities for his law firm's trust account to an associate over whom he had direct supervisory authority, and failing to make reasonable efforts to ensure that the associate properly maintained the trust account books and records. Respondent's failure to properly supervise the associate resulted in the associate knowingly misappropriating client funds. In re Fusco, 142 N.J. 636 (1995).

On January 20, 2009, the Court reprimanded respondent in one matter (DRB 08-177) and suspended him for three months, effective February 20, 2009, in a second matter (DRB 07-386). In the reprimand matter, respondent signed the name of a law firm associate on a reply to a grievance, without receiving the associate's consent, and then denied that he had done so. He was guilty of knowingly making a false statement of fact to a tribunal, knowingly making a false statement of material fact in

connection with a disciplinary matter, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In re Fusco, 197 N.J. 117 (2009).

In the matter for which he received a three-month suspension, respondent was guilty of sharing fees with a non-lawyer; failing to ensure that the conduct of non-lawyers was compatible with the professional obligations of the lawyer, by creating a prohibited fee-sharing program and, as a lawyer with direct supervisory authority, by failing to take reasonable efforts to ensure that the non-lawyer's conduct was compatible with the lawyer's professional obligations; failing to report unethical conduct of an attorney to the ethics authorities; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, by attempting to conceal the payments made to a non-lawyer. In re Fusco, 197 N.J. 428 (2009).

Respondent was reinstated to practice law effective May 29, 2009. In re Fusco, 199 N.J. 117 (2009).

The charges in this matter stem from respondent's representation of Vincent Conte, following Conte's April 23, 2002 conviction for the heinous murder of his ex-girlfriend, aggravated assault on her then-boyfriend, and burglary and weapons offenses.

Prior to the commencement of trial, Conte became dissatisfied with the services of his court-appointed attorney, John Goins.[1] Conte, thus, asked a friend, Gerard Carbone, to find him a new attorney.[2]

Conte, who testified via telephone from prison, asserted that his dissatisfaction with Goins' services and desire for new counsel arose from Goins' failure to review the case with him before trial and his failure to adequately communicate with him. Goins, however, testified that he met with Conte perhaps twenty times before trial, that he provided him with discovery and experts' reports, and that he reviewed those documents with him. According to Goins, he also spent a great deal of time preparing Conte for trial in the event that Conte testified with regard to a dissociative disorder defense.

In early April 2002, Carbone, acting as Conte's agent, attended a meeting with respondent and his partner, Roy Macaluso. At that time, Conte's case was already at the jury selection stage. According to Carbone, they agreed to a $50,000 fee for Conte's representation at trial. Carbone maintained that he neither received nor signed a written agreement from respondent

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[1] Goins was misspelled as Gowens in the first transcript.

[2] Both Carbone and Conte filed grievances in this matter. Carbone, however, did not recall having done so. He later admitted that Conte had drafted the grievance, which he signed.

setting forth the basis or rate of the fee and that he was never asked to take a retainer agreement to Conte for his signature.

Respondent's witnesses testified extensively about the procedures for opening files in new cases and the requirement of having a signed retainer agreement. In fact, during the hearing before us, respondent's counsel explained that it was a procedure to which respondent's firm strictly adhered following a civil action brought against him in the early to mid-nineties. In that case, DeGraff v. Fusco, 282 N.J. Super 315, 319-321 (App. Div. 1995), respondent failed to provide a client with a writing setting forth the basis or rate of his fee. The Appellate Division warned him that the absence of such an agreement was a violation of RPC 1.5(b).

Macaluso, who was at the initial meeting with Carbone, recalled that respondent had brought "routine" papers to the meeting (the retainer agreement and the intake form) required to open all criminal cases. According to Macaluso, the fee agreement did not address whether the firm would pursue an appeal if the trial were not successful. Respondent claimed that he entered into a written fee agreement with Carbone for Conte's trial. As to the appeal, they later agreed that the same funds that Conte had paid in anticipation of being represented at trial would be used for his appeals. When respondent was asked whether a new retainer

agreement or an amended retainer agreement had been prepared for the appeals, he replied:

> No, it was done verbally with Mr. Carbone and -- I mean in person with Mr. Carbone, and then also Mr. Conte, and that would have been verbally.
>
> [2T102-23 to 102-25.][3]

Respondent's receptionist, Nancy Vasquez, testified about the standard procedures used to open criminal files at the Fusco and Macaluso law firm, as it was her responsibility to open all of the criminal files for the office. She maintained that she would not have opened the Conte file unless she had a signed retainer agreement, a receipt, and an intake form for it. Even though she opens "a couple hundred" criminal files per year, she specifically recalled opening the Conte file in 2002 (twelve to thirteen years before the DEC hearing), because, she reiterated, it was her job to open the files. She added that, in cases where clients did not leave a "deposit" for the fee, she would put the file "on hold" for approximately one month. If they did not provide the fee, she would "throw the paperwork away." Vasquez did not try to locate the fee agreement in the Conte matter for the DEC hearing.

Two additional attorneys from respondent's firm, Paulette Pitt and Peter Festa, also testified that it was mandatory to

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[3] 2T refers to the February 3, 2015 DEC transcript.

obtain a signed retainer agreement when opening a file for the Fusco and Macaluso firm.

On April 8 and August 16, 2002, Carbone gave respondent a $35,000 check and a $15,000 check, respectively. At the time of the first payment, Carbone understood that the fee was for Conte's representation at trial. Respondent never mentioned to him what would become of the fee if he were unable to substitute into the case. Carbone asserted that he never authorized respondent to use the $50,000 for Conte's appeal.

According to Conte, he met with respondent before respondent moved to substitute into the case. Conte denied that respondent had discussed the amount of the fee with him, that respondent asked him to sign a retainer agreement, and that Carbone presented him with a retainer agreement to sign.

On April 8, 2002, respondent moved to substitute into the case and to continue the trial for thirty days for time to prepare. The judge denied respondent's motion. Likewise, a motion for interlocutory appeal was denied. Conte's case, therefore, proceeded to trial. Without his choice of counsel, Conte refused to attend the trial and was convicted in absentia. Conte accused respondent of having advised him not to participate in the trial. In contrast, respondent and Goins testified that they each had

urged him to attend the trial and advised him that it would be detrimental to his case if he did not do so.

Following the guilty verdict, Conte filed a pro se motion for a new trial, asserting, among other things, that he had received ineffective assistance of counsel and that respondent had advised him not to attend his trial. His counsel also filed a motion for a new trial. Both motions were denied. On July 8, 2002, Conte received a life sentence with a thirty-year parole ineligibility period and a consecutive ten-year term with a five-year parole ineligibility period.

According to Conte, respondent told him that he would handle his appeal until his conviction was overturned "whatever it took," and that respondent would even seek habeas corpus relief if necessary. Respondent maintained that they agreed that the $50,000 fee would be used to represent Conte through the state court appellate process, but he was "definitely not" retained to pursue the matter through the federal courts.

As to the failure to communicate charge, respondent contended that he adequately communicated with Conte in order to prepare the appeal and brief, and later to file a petition for certification. He met with Conte on a couple of occasions and reviewed Conte's lengthy letter outlining his position. On a date not specified, respondent filed a notice of appeal of the conviction, a brief and

appendix, and argued the case before the Appellate Division. On March 26, 2004, the court affirmed the trial court's decision.

Respondent then filed a petition for certification with the Supreme Court of New Jersey, which was denied on October 10, 2004. Conte maintained that respondent had not informed him that the petition had been denied. Respondent testified to the contrary, claiming that both he and Pitt had told Conte about the outcome.

Conte admitted meeting with respondent and, as the case progressed, meeting and conferring with two or three attorneys from respondent's firm (Pitt, Saunders,[4] and another attorney). Respondent had hired Pitt, an experienced criminal attorney, in the summer of 2005, and assigned her the primary responsibility for Conte's case. Conte remarked that he spoke to respondent ninety percent of the time. He also admitted that he kept in touch with the other lawyers who handled his case through numerous phone calls, but complained that no one responded to any of the letters he had sent.

Conte testified that he spoke with Pitt and respondent "extensively" about the need to file a petition for post-conviction relief (PCR). Pitt confirmed that she had extensive contact with Conte and with Carbone. She also provided Carbone

[4] Saunders did per diem work for respondent's firm.

with copies of the documents prepared on Conte's behalf, with the expectation that he would turn them over to Conte.

On March 6, 2007, Conte filed a pro se petition for PCR. He claimed that he did so to prevent the statute of limitations from running on his claim. He, thereafter, filed a "variety" of pro se pleadings. Pitt recalled that, in 2007, Conte had filed two additional pro se petitions for PCR.

To prepare the PCR petition, Pitt often spoke with Conte to discuss the contents of his frequent letters. When Conte's input became too repetitive, she told him that she had had enough. Before Pitt filed the petition for PCR, Conte raised an issue about the State's psychiatrist having perjured himself at trial. Although Pitt raised the issue in the petition, she was unable to find support for Conte's claim in this regard.

Pitt filed the petition in February 2008, but did not file the brief until April 2010, more than two years later. She attributed the delay to the voluminous pages of transcripts that she had to review; Conte's frequent letters, telephone calls, and input in the matter; the various unsupportable issues that he raised but, nevertheless, had to be researched; and the repetitive nature of his communications.

The firm held weekly meetings to review the status of pending cases. According to respondent, he supervised Pitt as much as

possible, but trusted her to perform her responsibilities and comply with time deadlines because she was a seasoned, competent attorney. At the weekly meetings, Pitt informed respondent that she was working on Conte's case. Respondent recalled that, during the course of her efforts, she informed him about the difficulties she encountered as a result of Conte's intervention.

In December 2010, respondent appeared for argument on the petition for PCR. On December 21, 2010, the petition was denied.

At the DEC hearing, Pitt admitted that she had misinterpreted the case of U.S. v. Gonzalez-Lopez, 548 U.S. 140 (2006) (a trial court's erroneous deprivation of a criminal defendant's choice of counsel constitutes reversible error). She understood the case to represent a change in the law on a criminal defendant's right to counsel and did not know whether the case would be applied retroactively to Conte. At the time she was handling Conte's PCR, she believed that he had a constitutional issue that he could raise in federal court and that the time had not expired to raise the issue. However, she later learned that she was wrong and the time to raise the issue had expired.

After Pitt left respondent's firm in February 2010, Saunders took over the Conte matter and prepared the necessary documents (notice of appeal, case information statement, requests for transcripts, and a brief) to appeal the denial of PCR. Saunders

remarked that the Conte file was voluminous and took a long time to review. He recalled meeting with Conte on three occasions. He admitted that, although Conte called him frequently, several times per week, he was available for only some of Conte's calls. According to Saunders, Conte was pleased with the brief he had prepared.

On December 15, 2011, the appeal was denied. Respondent did not file a petition for certification from that decision. Conte claimed that he never received a letter from respondent informing him that respondent would no longer represent him. He conceded, however, that Saunders had instructed him to have Carbone contact respondent about additional payments to further pursue his claims. Conte asserted that it was not clear that respondent would no longer represent him if he did not pay additional fees.

Saunders testified that, before and after the appeal was denied, he informed Conte that respondent would require additional fees if the firm were to pursue a petition for certification with the Supreme Court of New Jersey. Although Saunders did not send Conte a letter to that effect, respondent did.

Respondent's November 18, 2011 letter to Conte stated simply, "Please have your friend Mr. Jerry Carbone call my office to discuss payments as [sic] earliest convenience." According to respondent, he, thereafter, met with Carbone and informed him that

he would charge an additional $50,000 fee to pursue Conte's matter through the federal courts. Carbone refused to provide him with any additional funds. Respondent understood that Saunders had informed Conte that the law firm was terminating its services and, thus, respondent believed that Conte was well aware of that fact.

Saunders also advised Conte that he would not likely succeed on a petition for certification. Conte, therefore, filed the petition himself, notwithstanding his alleged lack of understanding that respondent would no longer represent him. Conte filed pro se motions for leave to file a notice of petition for certification and for leave to proceed as an indigent, both of which were granted. He then filed a petition for certification, which the Court denied on June 8, 2012. On June 25, 2012, Conte filed a writ of habeas corpus in federal court, which was denied as untimely.

Conte admitted that he had filed the grievance against respondent to develop a perjury claim against the State psychiatrist. When Conte reviewed the transcripts from his trial, he discovered that the State psychiatrist had testified that he had conducted an hour-long interview of him. Conte contended that he had not. During the course of the DEC hearing, he claimed alternatively that he and the psychiatrist met for only eight minutes, twenty minutes, and, later, fifteen minutes. He believed

that the psychiatrist's perjury constituted reversible error, and was displeased with respondent's failure to contest the psychiatrist's testimony, asserting that respondent failed to pursue all available avenues to overturn his conviction. He believed that the appealable issues in his case were whether he was properly informed of his Miranda rights; whether the judge erred in denying him private counsel; and whether the State's psychiatrist perjured himself with regard to the length of time he spent examining him.

At the DEC hearing, Conte accused (1) respondent of engaging in a conflict of interest, (2) the judge of bias because his brother is a police officer, (3) a witness of being prejudiced against him, and (4) the sheriff's department attorney of obstructing justice and suppressing evidence.

The DEC found that the initial meeting between Carbone and respondent was impromptu and hurried, and that the parties were not certain whether respondent would even represent Conte at that time. Thus, the DEC found that respondent did not provide Carbone with a written retainer agreement at the initial meeting. The DEC pointed out that, nevertheless, a retainer agreement prepared at that time would have addressed Conte's trial, not the appeal, which respondent's firm ultimately undertook.

The DEC determined that, in August 2002, respondent orally agreed to represent Conte in his appeal. Noting that neither respondent, Carbone, nor Conte were able to produce any written documents concerning Conte's representation in the appeals, the DEC found clear and convincing evidence that respondent violated RPC 1.5(b).

The DEC did not find clear and convincing evidence that respondent violated RPC 1.4(b) by failing to keep Conte adequately apprised of the status of his appeals. Rather, the DEC determined that respondent and the attorneys from his law firm reasonably communicated with Conte. Specifically, respondent, Pitt, and Saunders each met with Conte on several occasions during his incarceration. The DEC pointed out that Conte acknowledged that he routinely called respondent's office and spoke to respondent, Pitt, and Saunders and that Pitt and Saunders timely notified him of the adverse appellate rulings.

The DEC noted that, although a deadline to file for relief in federal court was missed, respondent was not charged with gross neglect, lack of diligence, or failure to supervise Pitt, who was assigned to the case at the time and who had mistakenly believed that the time to file had been tolled.

As to the issue of properly terminating the representation, the DEC found that Conte's testimony was not credible and that

respondent's testimony that he had informed Carbone that the representation would not continue without additional fees was credible and was supported by his November 18, 2011 letter to Conte. The DEC also found credible Saunders' testimony that he had independently informed Conte that the representation would not continue without further funds. The DEC pointed out that RPC 1.16(d) does not require a writing to terminate the representation. It found further that the termination was sufficiently timely to protect Conte's interests. In fact, Conte filed a timely, albeit unsuccessful, pro se petition for certification.

The DEC weighed the mitigating factors ("the fluid and exceptional nature in which the representation began," as Conte's trial had already commenced; and the fact that the $50,000 retainer was more than earned over the nine years that respondent's firm represented Conte) and aggravating factors (respondent's disciplinary record, as well as a civil lawsuit against him for taking a retainer but failing to perform any work and failing to provide the client with a written retainer (DeGraff v. Fusco, supra, 282 N.J.Super, at 319-321 (App. Div. 1995)), and determined that the aggravating factors far outweighed the mitigating factors, warranting the imposition of a censure.

At the DEC hearing and at argument before us, the presenter conceded that Carbone may have signed a retainer agreement for respondent to represent Conte at trial, and that Vasquez, according to her policy, must have destroyed it when the "retention" did not go forward.

Following a de novo review of the record, we are unable to conclude that the record clearly and convincingly establishes that respondent was guilty of unethical conduct.

The undisputed facts are that neither respondent, Carbone, nor Conte was able to locate a written agreement setting forth the basis or rate of respondent's fee. Carbone and Conte both denied receiving such an agreement. However, respondent, Macaluso, Vasquez, Pitt, and Festa testified about the firm's procedures to open a criminal file. One critical step was to obtain a signed retainer. Respondent, Macaluso, and Vasquez were adamant that such an agreement existed in this case. However, it simply could not be found. One explanation could have been that it was misplaced as a result of the shuffling of the files among respondent, Pitt, and Saunders, all of whom had removed portions of the voluminous file to work on it outside of that office. We do not find clear and convincing evidence that respondent failed to provide Conte with a writing setting forth the basis or rate of the fee at the inception of the case. In part, this determination is based on

Conte's lack of credibility, given his fluctuating testimony and Carbone's faulty memory. We, thus, dismiss the charged violation of RPC 1.5(b).

We agree with the DEC that the record does not clearly and convincingly support the failure to communicate charge. The record established that Conte was quite knowledgeable about the legal process, filing pro se petitions and motions in different venues. He, thus, must have been aware of the status of his case in order to file various petitions in both state and federal court. In addition, Conte admitted meeting with each of the attorneys several times, having telephone conversation with them, and writing to them regularly. He complained only that they did not write to him.

Respondent and the other attorneys also testified about their frequent communications with Conte, both in person and by phone. Based on the foregoing, there is no clear and convincing evidence that respondent did not adequately communicate with Conte. We, therefore, also dismiss the RPC 1.4(b) charge.

On termination of the representation, RPC 1.16(d) requires a lawyer to "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client." Although the Rule does not require a written termination, respondent sent a November 2011 letter to Conte that

stated, "Please have your friend Mr. Jerry Carbone call my office to discuss payments as [sic] earliest convenience." According to respondent, as a result of this letter, Conte conveyed the information to Carbone, who, thereafter, met with him, but refused to provide additional funds to pursue Conte's federal claims. In addition, Saunders testified credibly that he had informed Conte that respondent would not continue to represent him unless he received additional funds and that, nevertheless, further action would be pointless. There is, therefore, no clear and convincing evidence of a violation of RPC 1.16(d).

The complaint also charged that Conte

> was prohibited from pursuing a petition for habeas corpus relief as a result of missing deadlines due, at least in part, to the uncertainty regarding his representation by Respondent and Respondent's failure to provide clear guidance as to same.
>
> [Complaint at ¶16.]

This charge appears to be a hybrid violation of RPC 1.4(b) and RPC 1.16(d). Pitt testified that she made a mistake regarding the import of the Gonzalez-Lopez case and whether it tolled the time to file a petition for post-conviction relief in federal court. Because Conte was still represented by respondent's firm at this time, RPC 1.16(d) is inapplicable in this regard. In addition, Pitt's mistake of law does not constitute a violation of RPC 1.4(b).

For these reasons, we determine to dismiss the complaint.

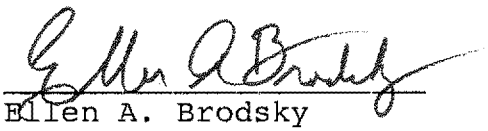
Vice-Chair Baugh and Member Gallipoli disagreed with the majority's determination. They would find that, even if an initial retainer agreement had been prepared, it related solely to respondent's representation of Conte at trial, not for post-conviction relief. Because respondent did not represent Conte at trial, an agreement relating to such a representation would have been irrelevant to the representation on the appeal. As respondent did not regularly represent Conte, he was required to communicate the basis or rate of the fee for any appeals or motions for post-conviction relief in writing "before or within a reasonable time after commencing representation." This did not occur. At best, respondent orally amended a written retainer agreement that was no longer valid and, nevertheless, could not be found. In the absence of such an agreement, there was no consensus between respondent and Conte about the scope of the services to be provided. Conte claimed that respondent had agreed to pursue his claims through the state and federal courts. Respondent testified that he had agreed to pursue only Conte's state court remedies. Thus, Vice-Chair Baugh and Member Gallipoli found that, absent such a writing, respondent violated RPC 1.5(b). These members concurred with the majority's other findings, however.

Taking into consideration the passage of time, that is, that respondent undertook to represent Conte approximately thirteen years earlier, Vice-Chair Baugh voted to impose only an admonition.

Because of respondent's ethics history, including discipline for conduct that included making false statements of material fact in connection with a disciplinary matter, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, Member Gallipoli voted to impose a reprimand.

Member Zmirich did not participate.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony J. Fusco, Jr.
Docket No. DRB 15-292

Argued: November 19, 2015

Decided: June 15, 2016

Disposition: Dismiss

Members	Disbar	Admonition	Reprimand	Dismiss	Disqualified	Did not participate
Frost				X		
Baugh		X				
Clark				X		
Gallipoli			X			
Hoberman				X		
Rivera				X		
Singer				X		
Zmirich						X
Total:		1	1	5		1

Ellen A. Brodsky
Chief Counsel