SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-233
District Docket No. IV-2015-0023E

IN THE MATTER OF	:
BARRY J. BERAN	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 17, 2016

Decided: February 13, 2017

Elizabeth L. Laurenzano appeared on behalf of the District IV Ethics Committee.

David H. Dugan, III 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 pursuant to R. 1:20-6(c)(1). The District IV Ethics Committee (DEC) filed a complaint charging respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information), and RPC 3.2 (failure to expedite litigation).

By letter dated June 24, 2016, the Office of Attorney Ethics informed us that respondent admitted the allegations of the complaint, did not request a hearing on mitigation, and requested that the matter proceed directly to us for the imposition of a sanction, pursuant to R. 1:20-6(c)(1). The DEC did not object to proceeding in that fashion and did not request a hearing to present aggravating circumstances, noting that respondent's ethics history was the only aggravating circumstance.

For the reasons expressed below, we determine that a censure is warranted.

Respondent was admitted to the New Jersey bar in 1981 and the Pennsylvania bar in 1980. He maintains a law office in Cherry Hill, New Jersey.

In 2004, respondent was reprimanded for negligently misappropriating client trust funds, failing to comply with recordkeeping requirements, and advancing loans to clients while representing them in personal injury matters. In re Beran, 181 N.J. 535 (2004).

In 2009, respondent was admonished for failing to advise a client, for whom he was unable to negotiate a credit card pay-off, of possible avenues available and of consequences that could result from the actions the client had determined to take. He also failed to communicate with the client and failed to provide her with a writing

setting forth the basis or rate of the fee. In the Matter of Barry J. Beran, DRB 09-245 (November 25, 2009).

In 2016, respondent was censured, on a motion for discipline by consent, for advancing personal funds to three clients in connection with their pending or contemplated litigation, negligently misappropriating client funds due to his deficient recordkeeping, failing to promptly disburse client funds, and violating the recordkeeping rules. In re Beran, 224 N.J. 388 (2016).

* * *

In March 2006, Doris Lee retained respondent in connection with a March 12, 2006 motor vehicle accident. On January 26, 2007, Progressive Insurance Company (Progressive) offered Lee $1,500 to settle the case and, on November 28, 2007, increased the offer to $2,500. The parties were unable to agree on a settlement amount. Therefore, on March 10, 2008, respondent filed a complaint on Lee's behalf in Superior Court, Gloucester County.

On April 22, 2008, respondent demanded $35,000 to settle the case. On June 26, 2008, Progressive made a counter-offer of $22,500. Respondent, thereafter, attempted to negotiate a larger settlement, to no avail. On September 27, 2008, the court dismissed the complaint. Although the ethics complaint is silent about the reason for the dismissal, respondent's answer asserted that he did not pursue the lawsuit because the parties had agreed to settle the case.

On April 13, 2009, Lee executed "the first release," which respondent forwarded to Progressive on that date. According to the complaint, and as respondent admitted, he "communicated by telephone calls to the Progressive adjuster from before August 2008 through September 2011, and then in August 2012. On February 10, 2010, he also wrote to Progressive about the release."

Presumably, the first release was lost. Therefore, on August 29, 2014, more than five years after executing the first release, Lee executed an identical release, which respondent mailed to Progressive on that date. On October 17, 2014, Lee filed the underlying grievance. On December 22, 2014, the DEC secretary asked respondent to provide information on the status of Lee's case. Eight months later, in August 2015, Lee received her portion of the settlement and her claim was resolved.

Prior to the resolution of her case, Lee unsuccessfully attempted to obtain information from respondent about its status, by both telephone and letter. On the few occasions that respondent did reply, he informed her either that he was waiting to hear from Progressive or that Progressive had lost the executed release. Because Lee could not obtain information from respondent, on multiple occasions, she attempted to speak directly with the Progressive adjuster. She was informed, however, that "she had to communicate

through her attorney." It took respondent almost eight and one-half years to resolve Lee's matter.

Count one of the complaint charged respondent with failure to keep his client reasonably informed about the status of her case and to promptly comply with reasonable requests for information (RPC 1.4(b)).

Count two alleged that respondent failed to act with reasonable diligence and promptness (RPC 1.3) by taking eight and one-half years to resolve Lee's matter. Respondent failed to communicate with Progressive for lengthy periods of time: (1) eleven months, from September to August 2012; (2) two years, from August 2012 to August 2014; and (3) one year, from August 2014, presumably, until August 2015, when Lee received her settlement.

Based on similar allegations, count three charged respondent with failure to expedite litigation (RPC 3.2).

In his answer, respondent admitted the allegations of the complaint, but asserted that, because of the delays in obtaining a resolution of Lee's matter, he voluntarily reduced his contingent fee from one-third to one-quarter. He asserted further that the delays attributable to him totaled "only about four years." Finally, pointing out that the misconduct alleged in count two was identical to that alleged in count three, respondent contended that there was "no need" to charge violations of both RPCs.

In respondent's brief to us, his counsel asserted that, after respondent mailed Lee's release to Progressive, in April 2009, Progressive either lost or misplaced it. After one written communication and several telephone communications with Progressive "through September 2011" and again in August 2012, and August 2014, respondent submitted a second release and, finally, a year later, Progressive paid the settlement.

Counsel acknowledged that respondent was slow in acting to enforce the settlement, failed to keep his client reasonably informed and to promptly reply to her requests for information, and voluntarily reduced his fee. He argued that, for purposes of sanction, we should not consider the RPC 3.2 violation because it arises from the same factual allegations that support the RPC 1.3 violation.

Counsel conceded that respondent's ethics history is an aggravating factor, but contended that the prior three disciplinary matters involved relatively minor misconduct and that his misconduct here is, thus, mitigated by his thirty-five years at the bar, the $1,800 refund to Lee, and his full cooperation with disciplinary authorities. Counsel, therefore, urged us to impose a reprimand.

By letter dated October 28, 2016, the presenter agreed that a reprimand is the proper quantum of discipline.

* * *

Following a de novo review, we are satisfied that the record contains clear and convincing evidence that respondent's conduct was unethical.

Respondent lacked diligence and failed to properly communicate with his client. Respondent did not resolve Lee's case for almost eight and one-half years. During that period, she attempted to obtain information about the status of her matter, to no avail. Her multiple efforts to obtain information directly from Progressive's claims adjuster were thwarted because she was represented by counsel.

Respondent argues that we should not find a violation of RPC 3.2, because the facts underlying this violation are the same as those that form the basis for the RPC 1.3 violation. Although we determine to dismiss this violation, we do so because this Rule relates to an attorney's failure to expedite litigation. Here, respondent permitted the complaint to be dismissed because he settled Lee's case. Therefore, no litigation was pending for respondent to expedite. Instead, he lacked diligence in pursuing the settlement, a violation of RPC 1.3.

Generally, lack of diligence and failure to communicate with a client result in an admonition. See, e.g., In the Matter of Edward Benjamin Bush, DRB 12-073 (April 24, 2012) (attorney failed to reply to his client's multiple telephone calls and letters over an eleven-month period, and lacked diligence in handling the matter, as he

failed to follow through on his agreement to file a complaint, order to show cause, and other pleadings); In the Matter of Rosalyn C. Charles, DRB 08-290 (February 11, 2009) (attorney failed to reply to her client's attempts to communicate with her about the status of her divorce case and permitted the divorce complaint to be dismissed for failure to prosecute); and In the Matter of James C. Richardson, DRB 06-010 (February 23, 2006) (attorney lacked diligence in an estate matter and did not reply to the beneficiaries' requests for information about the estate).

When the attorney has an ethics history, the level of discipline may be enhanced. See, In re Shapiro, 220 N.J. (2015) (reprimand for attorney who lacked diligence when representing a client in the reduction of alimony obligations to his former wife; after filing a motion, the attorney failed to file opposition to a cross-motion; the attorney failed to inform the client about important aspects of the representation; his ethics history included an admonition and a reprimand for similar misconduct; in mitigation, the attorney accepted full responsibility for his conduct, obtained treatment for his depression and attention deficit disorder, and received counseling for his alcohol addiction); In re Marcus, 208 N.J. 178 (2011) (reprimand for engaging in a lack of diligence and failing to communicate; the attorney failed to inform a client that her minor son's personal injury claim against a public entity was no longer

pending and that a motion for turnover of funds had been filed in a related lawsuit by a medical provider, who had obtained a judgment for his medical bills; the attorney had two prior reprimands for unrelated conduct); and In re Oxfeld, 184 N.J. 431 (2005) (reprimand by consent for attorney who lacked diligence and failed to communicate with a client in a pension matter; the attorney had two prior admonitions).

But, see, In the Matter of John David DiCiurcio, DRB 12-405 (July 19, 2013) (admonition for attorney who was retained for a bankruptcy matter and did no work on the file other than to draft one letter to the client, asking for documentation; the attorney did not inform the client that his failure to file a bankruptcy petition was due to the client's non-payment of the filing fee; prior reprimand, which we did not view as an aggravating factor requiring enhancement of the discipline because the prior discipline was for unrelated conduct; we also considered, in mitigation, that the attorney was willing to permit the client to pay his fee over a period of time, because the client lived on a fixed income).

Here, although only one client matter was involved, the client waited six years after signing the release to receive her settlement. Respondent also has an ethics history to consider: a 2004 reprimand, a 2009 admonition, and a 2016 censure. The 2009 admonition involved similar misconduct. In that matter, respondent failed to communicate

with the client and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions about the representation. Based on the above precedent, respondent's ethics history, and, more importantly, his failure to learn from prior mistakes, we determine that a censure is warranted.

Members Boyer and Singer voted to impose a reprimand.

Vice-Chair Baugh 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

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Disposition: Censure

Members	Censure	Reprimand	Did not participate
Frost	X		
Baugh			X
Boyer		X	
Clark	X		
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer		X	
Zmirich	X		
Total:	6	2	1

Ellen A. Brodsky
Chief Counsel