

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 19-192  
District Docket No. IIB-2016-0021E

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In the Matter of :  
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Richard David Koppenaal :  
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An Attorney at Law :  
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Decision

Argued: September 19, 2019

Decided: January 14, 2020

Mark Francis Heinze 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 before us on a recommendation for reprimand filed by the District IIB Ethics Committee (DEC). The formal ethics complaint charged respondent with having violated RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with the client); RPC 1.16(c) (failure to comply with applicable law requiring notice to or permission of a

tribunal when terminating a representation); RPC 1.16(d) (failure to protect the client's interests upon termination of the representation and to return an unearned retainer); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to reprimand respondent.

Respondent was admitted to the New Jersey bar in 1983. On October 21, 2013 he received an admonition for failing to cooperate with disciplinary authorities' efforts to obtain information about a client matter. In the Matter of Richard D. Koppenaal, DRB 13-164 (October 21, 2013).

At the inception of the December 3, 2018 ethics hearing in this matter, respondent stipulated to having violated all of the charges against him, except the charge that, during a recorded telephone conversation, he made a misrepresentation to the client.

Respondent and Gregory Restaino, the grievant, had an attorney-client relationship dating back to the 1980s. Pursuant to a March 23, 2010 contingent fee agreement, Restaino retained respondent to represent him in a discrimination matter against a restaurant where he had been employed as a chef. Restaino gave respondent a \$5,000 retainer to be credited against any fee earned in the matter.

Almost four months later, on July 12, 2010, Restaino retained respondent for a second matter involving a claim for overtime wages. The complaint did not

charge respondent with unethical conduct arising from the overtime matter, but, during the hearing, the panel heard testimony about the wage claim that is relevant to the RPC 1.4(b) charge.

On April 20, 2010, respondent filed a complaint, in the discrimination matter, in the Superior Court of New Jersey, Bergen County. However, for reasons not addressed in the record, respondent never served the defendants with the complaint. Respondent conceded that, on November 5, 2010, the complaint was dismissed for lack of prosecution, for which he accepted responsibility. He further admitted that he had taken no action to restore the matter after its dismissal, and that his inaction constituted gross neglect and lack of diligence, in violation of RPC 1.1(a) and RPC 1.3.

On March 23, 2010, the first day of the representation, Restaino began sending respondent e-mails. In the first e-mail, Restaino provided respondent with his home and e-mail addresses. Other e-mails that Restaino sent in April, June, and August 2010 contained detailed descriptions of the events forming the basis of his discrimination claim, per respondent's request, and provided to respondent the name of Restaino's witness in the overtime matter. Respondent failed to reply to any of the e-mails.

Respondent claimed that he had not received Restaino's e-mails, asserting that they had been sent to an AOL<sup>1</sup> address that respondent had abandoned in the early 1990s. Respondent maintained that he used a Google Mail account for e-mail.

Restaino also placed frequent telephone calls to respondent's office, but claimed that respondent's secretary gave him the "runaround." Consequently, he demanded respondent's cell phone number. Restaino estimated that, between August 23, 2010 and the end of that year, he made about forty calls to respondent's office and cell phone.

Respondent claimed to have sent four letters to Restaino during the course of the representation. Specifically, a September 8, 2010 letter requested that Restaino contact respondent, who had not been able to reach Restaino by telephone; an October 11, 2010 letter informed Restaino that the complaint had been scheduled for dismissal on November 5, 2010, and that they must "meet and discuss this matter asap otherwise the case will be dismissed;" a November 8, 2010 letter informed Restaino that the case had been dismissed, without prejudice, on November 5, 2010, and urged Restaino to contact respondent if he sought to reinstate the complaint, otherwise, his claim may be "forever barred

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<sup>1</sup> Formerly, America Online.

by the Court;” and an April 15, 2011 letter, which enclosed copies of Restaino’s files for the discrimination and overtime cases, and advised Restaino to retain new legal counsel for the two cases.

In turn, Restaino denied having received the first three letters described above; could not recall whether he had received the fourth letter, although he received his files at some point; and further denied that anyone at respondent’s law office had told him that his case was in danger of being dismissed.

Respondent prepared a January 17, 2014 certification of services for the discrimination matter, but was unsure who had requested that he do so. When asked why it lacked entries for telephone calls with Restaino, respondent replied that the document was incomplete, that he was only trying to show that he had performed \$5,000 worth of legal work in the case, and that he had not charged Restaino for or tracked their telephone communications.

Despite the letters to Restaino, respondent stipulated that he failed to keep Restaino “reasonably informed about the status of the subject lawsuit, including about the fact that the case had been dismissed, and the time to restore it had elapsed, and that the Statute of Limitations would expire on the underlying claims,” in violation of RPC 1.4(b).

In respect of RPC 1.16, respondent admitted that he ceased providing legal services to Restaino, but had taken no steps to be relieved as counsel. He also

failed to give Restaino reasonable notice of termination of the representation and failed to take any other action to protect the client's claims. Although respondent previously had failed to return the unearned portion of the retainer, before the start of the ethics hearing, he refunded the entire \$5,000 retainer to Restaino. Nevertheless, respondent admitted that his conduct violated RPC 1.16(c) and (d).

The final charge concerns respondent's alleged misrepresentations to Restaino in a telephone call to respondent that Restaino had placed and recorded. The exact date of that call is not known, but the authenticity of the recording and the transcript of it are uncontested.

On a date in April or May 2011, Restaino placed a call from his cell phone to respondent's cell phone. Using a portable tape recorder, he recorded the following exchange with respondent:

(Cell phone ringing.)

MR. KOPPENAAL: Hold on. Go ahead.

MR. RESTAINO: Hey Mr. Koppenaar, how are you?

MR. KOPPENAAL: I'm fine, sir. What's going on? I'm in my car right now.

MR. RESTAINO: I know. I'm just, uh, calling because you never called me back. You're supposed to get

back to me wh -- uh, when  
your secretary got in?

MR. KOPPENAAL: What do you mean? What are  
you talking about?

MR. RESTAINO: We're talking about  
the, uh, sexual harassment  
discrimination case that, uh --

MR. KOPPENAAL: That's -- that's in the system.  
Uh, what do you need from  
me?

MR. RESTAINO: Well, I -- I -- it's been a while.  
I just wanted to know what's  
going on with that. Last time -  
-

MR. KOPPENAAL: I'm not in the office now. I  
know it's in litigation for sure.  
In fact, definitely, that was  
filed right away.

MR. RESTAINO: Yeah, it's been --

MR. KOPPENAAL: They've been served. I -- I  
have a feeling they probably  
defaulted by now, but I'm not  
in the office, I can't tell you  
that. I'm sure they must have  
by now.

MR. RESTAINO: It's been a year -- it's been  
over a year now, I haven't  
heard anything about it. Have  
you heard anything from their  
attorneys or a court date or  
anything?

MR. KOPPENAAL: At this point I -- I'm not in the office right now, but I'll check that out, I'll call you later on. I'm actually on the road.

MR. RESTAINO: Okay.

MR. KOPPENAAL: I'll call you later on.

MR. RESTAINO: All right. Thank you.

MR. KOPPENAAL: Bye-bye.

MR. RESTAINO: Bye, now.

(Cell phone conversation ended.)

[Ex.P-14.]

Respondent admitted that his statement that the defendants had been served was objectively untrue. Yet, he denied any intention to misrepresent the status of the case to Restaino. Rather, he maintained that he had been "running from one place to the next. I gave quick, short answers."

When respondent was asked how he could have forgotten that the case had been dismissed, after having sent Restaino the October 11 and November 8, 2010 letters regarding the dismissal, respondent answered

I don't know. All I know is at that time I know I was very flustered and running from one place to the next and didn't recall specifically when that conversation took place and the specifics of it. I -- no way would



I mislead -- there's no reason to do that, to mislead a client. Absolutely not.

[T92-18 to 24.]<sup>2</sup>

I looked at the transcript, I listened to the phone call. It's clear what was going on with me; it's -- that's what I was like, just responding and giving someone a quick answer and moving on. Because I didn't really know. I mean, I would just try to respond.

[T116-17 to 23.]

In mitigation, respondent asserted that, from 2010 through 2012, he was involved in his own highly contested divorce. In 2010, respondent moved all three of his children to his one-bedroom apartment from his former wife's custody. He also recounted that his support obligation had been \$7,000 per month, based on his income stream before a business slowdown in 2008-2009. Respondent claimed that his life was "in disarray." Ultimately, he gained full custody of the children and his support obligations were reduced.

In addition, respondent was trying to operate two law offices at the time, one in Hackensack and the other at a new office, in Garfield. Although respondent anticipated that another attorney would run one of the offices, with respondent moving between the two locations as needed, the arrangement with

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<sup>2</sup> "T" refers to the transcript of the December 3, 2018 ethics hearing.

the other attorney failed to materialize, leaving respondent to run both offices alone. He had part-time help in one office, but claimed that employee was not giving him clients' messages. Respondent, thus, explained that he was running everywhere, "like a mad hatter."

In 2018, respondent learned that he had high blood pressure and congestive heart failure. He spent more than two weeks in the hospital and underwent surgery. Because he was without health insurance, the cost of his care has been great.

Finally, respondent urged the panel to consider that, before the ethics hearing, he had apologized to Restaino and returned the entire \$5,000 fee.

The panel found respondent guilty of the violations to which he had stipulated at the hearing: gross neglect; lack of diligence; failure to communicate with the client; failure to properly terminate the representation; and failure to protect the client's interests upon termination of the representation. Additionally, the panel found respondent guilty of misrepresentations to the client, as follows:

Based upon the Grievant's testimony that he received none of the communications purportedly sent to him by the Respondent, the recorded telephone conversation in which Respondent represented that the defendants had been served and Respondent's failure to thereafter clear up any error in his statements, we conclude that clear and convincing evidence has been shown that

Respondent violated RPC 8.4(c) by making false statements to the Grievant.<sup>3</sup>

[HPR¶11.]<sup>4</sup>

In aggravation, the panel considered respondent's prior admonition and "his failure to remediate despite opportunities to do so – he did not refund the retainer until the date of the hearing." In mitigation, the panel considered respondent's personal problems at the time of the representation, and his acceptance of responsibility for four of the five violations alleged in the complaint. The panel, thus, recommended a reprimand.

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.

Specifically, respondent accepted from Restaino a \$5,000 retainer against his contingent fee in the discrimination case, then filed a complaint, but failed to serve the defendants. Ultimately, the complaint was dismissed for lack of prosecution. Thereafter, respondent took no action to reinstate the complaint.

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<sup>3</sup> Although the complaint also charged misrepresentation by silence, based on respondent's failure to inform Restaino about the complaint's dismissal, that allegation was not pursued at the hearing. Moreover, the hearing panel report is silent on that issue, perhaps because respondent produced letters to the client in which the dismissal was discussed.

<sup>4</sup> "HPR" refers to the February 15, 2019 hearing panel report.

He stipulated that his inaction constituted gross neglect and lack of diligence, in violation of RPC 1.1(a) and RPC 1.3.

During the course of the representation, respondent also failed to reply to his client's reasonable requests for information about the case. Restaino testified that he placed as many as forty calls with respondent's office and to respondent's cell phone, yet, shortly after retaining respondent, he began to get the "runaround." He sent respondent several e-mails, which respondent claimed not to have received.

Respondent produced four letters that he sent to Restaino, at least three of which were never received. Those letters sought to alert his client to important events in the case, including the dismissal of the complaint. Yet, respondent apparently took no other contemporaneous measures to reach out to Restaino, such as an e-mail or a telephone call, to ensure that Restaino was aware of the developments in his case. As a result, Restaino was unaware of the important events occurring in his case, including its dismissal. Respondent stipulated that his failure to keep Restaino adequately informed about the status of the case and to reply to reasonable requests for information violated RPC 1.4(b).

In respect of RPC 1.16, respondent failed to seek to be relieved as counsel. Rather, he unilaterally terminated the representation. He, thus, failed to give Restaino time to retain subsequent counsel and failed to otherwise protect his

client's claims. Eight years after the inception of the representation, on the date of the ethics hearing, he refunded Restaino's entire \$5,000 retainer. Nevertheless, respondent's actions in this regard violated RPC 1.16(c) and (d).

Finally, respondent misrepresented the status of the case in an April or May 2011 telephone conversation with the client. Restaino initiated and recorded that call, under the suspicion that his case may already have been dismissed. The call caught respondent when he was out of the office. Rather than tell his client that his case had been dismissed in November, or that he could not discuss the case until he returned to his office, respondent misrepresented that the case was proceeding apace, that he had served the defendants, and that the defendants had likely defaulted. All three of those representations were untrue.

Respondent sought to explain his behavior as a mix of confusion, haste, and forgetfulness, claiming that his life was in disarray and that, when he listened to the recording of the phone call, it became clear to him that he had been "just responding and giving someone a quick answer and moving on. Because I didn't really know. I mean, I would just try to respond."

We conclude that respondent knew exactly what had happened in the case, but found it more expedient to tell Restaino that the case was on track, rather than tell him the truth about the dismissal. For respondent, it was quicker to tell

the lie and, thus, he falsely represented that the case was progressing. Moreover, respondent promised to check the status of the case when he returned to the office, and then report back to Restaino. He never did so – because he already knew the outcome. Therefore, we find respondent guilty of misrepresentations to the client, in violation of RPC 8.4(c). The misrepresentation by silence charge was not pursued at the hearing. For lack of clear and convincing evidence, we dismiss that additional RPC 8.4(c) charge.

In sum, respondent is guilty of having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.16(c) and (d), and RPC 8.4(c). We, however, determine to dismiss the additional RPC 8.4(c) charge. The only remaining issue is the appropriate quantum of discipline to be imposed for respondent's misconduct.

Misrepresentations to clients require the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand still may be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Dwyer, 223 N.J. 240 (2015) (attorney made a misrepresentation by silence to his client, by failing to inform her, despite ample opportunity to do so, that her complaint had been dismissed, a violation of RPC 8.4(c); the complaint was dismissed because the attorney had failed to serve interrogatory answers and ignored court orders compelling service of the answers, violations of RPC 1.1(a), RPC 1.3, and RPC 3.2; the attorney also violated RPC 1.4(b) by

his complete failure to reply to his client's requests for information or to otherwise communicate with her; the attorney never informed his client that a motion to compel discovery had been filed, that the court had entered an order granting the motion, or that the court had dismissed her complaint for failure to serve the interrogatory answers and to comply with the court's order, violations of RPC 1.4(c)); In re Ruffolo, 220 N.J. 353 (2015) (knowing that the complaint had been dismissed, the attorney assured the client that his matter was proceeding apace, and that he should expect a monetary award in the near future; both statements were false, in violation of RPC 8.4(c)); the attorney also exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, not working on it after filing the initial claim, and failing to take any steps to prevent its dismissal or ensure its reinstatement thereafter, violations of RPC 1.1(a) and RPC 1.3; the attorney also violated RPC 1.4(b) by failing to promptly reply to the client's requests for status updates); and In re Falkenstein, 220 N.J. 110 (2014) (attorney led the client to believe that he had filed an appeal and concocted false stories to support his lies, a violation of RPC 8.4(c)); he did so to conceal his failure to comply with his client's request that he seek post-judgment relief, violations of RPC 1.1(a) and RPC 1.3; because he did not believe the appeal had merit, the attorney's failure to withdraw from the

case was a violation of RPC 1.16(b)(4); the attorney also practiced law while ineligible, although not knowingly, a violation of RPC 5.5(a)).

Here, in mild aggravation, respondent received an admonition, in 2013, for failing to cooperate with an ethics investigation into his handling of a client matter. Although the DEC further weighed, in aggravation, respondent's failure to return the unearned retainer in this matter until the date of the ethics hearing, we decline to do so. Respondent's failure to return the fee is addressed by the finding that he violated RPC 1.16(d), and, thus, enhancing the otherwise appropriate discipline based on that fact is unwarranted.

In mitigation, respondent was under a great deal of stress during the Restaino representation, caused by his divorce, his substantial parenting duties after gaining full custody of his children, his \$7,000 per month support obligation, and his efforts to operate two law offices with little assistance. In respect of respondent's discussion of his own 2018 health concerns, however, we determine that they had no bearing on the misconduct underlying this matter, which took place in 2010 and 2011.

This case is similar to Dwyer and Falkenstein, wherein the attorneys received reprimands for similar violations. We did not assign significant weight to respondent's prior admonition, as that misconduct took place in 2009 and 2010, roughly the same time frame as the within matter. On balance, thus, we




determine that a reprimand is the quantum of discipline necessary to protect the public and preserve public confidence in the bar.

Member Boyer 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  
Bruce W. Clark, Chair

By:   
Ellen A. Brodsky  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

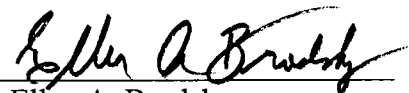
In the Matter of Richard David Koppenaal  
Docket No. DRB 19-192

Argued: September 19, 2019

Decided: January 14, 2020

Disposition: Reprimand

<i>Members</i>	Reprimand	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer			X
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8	0	1



Ellen A. Brodsky  
Chief Counsel