Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-280
District Docket No. IV-2015-0058E

In the Matter of

David Ryan Nussey

An Attorney at Law

Decision

Argued: January 16, 2020

Decided: February 20, 2020

Matthew J. Gindele appeared on behalf of the District IV 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 a reprimand filed by the District IV Ethics Committee (DEC). The formal ethics complaint charged respondent with violations of RPC 1.1(a) (gross neglect); RPC 1.2(a) (failure to abide by the client's decisions regarding the scope of the representation); RPC 1.3 (lack of diligence); RPC 1.4, presumably subsection (b) (failure to comply

with a client's reasonable requests for information);[1] and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

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

Respondent gained admission to the New Jersey and Pennsylvania bars in 1999. He has no prior discipline. At all relevant times, respondent practiced law as a partner in the firm Klineburger & Nussey, in Haddonfield, New Jersey.

In 2011, BN, the grievant, retained respondent to represent him in connection with a divorce action. This matter focuses on respondent's handling of two issues that were of paramount importance to BN during the negotiation phase of the marital settlement agreement (MSA) and during the post-judgment motion practice: (1) "take-back time" as it related to the shared custody of the couple's two children, and (2) the division of the gas rights associated with a parcel of land in northern Pennsylvania that came into the marital estate through BN.[2]

Between June 10 and October 5, 2011, the parties entered into a series of agreements addressing numerous custody, parenting, and property distribution issues. The divorce was contentious, requiring respondent and his adversary,

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[1] Although the complaint refers only to RPC 1.4, it contains a parenthetical description of RPC 1.4(b).

[2] Take-back time was described as the right of BN's former wife, CN, to take the children back for several hours during respondent's five-day stretch of parenting time.

Lisa J. Moore, Esq., to exchange as many as ten letters per week. BN admitted that he had executed a June 10, 2011 custody consent order that specifically included the take-back time provision that CN sought for any final agreement. Although CN had claimed that she did not want to be away from their two young children for more than five nights in a row, BN contended that her actual motive was to interfere with retreats that he had planned for the children at his cabin on the Pennsylvania property, which was located several hours away from their former marital home in New Jersey.

On the October 5, 2011 trial date, the parties and their attorneys engaged in intense negotiations spanning hours, including conferences with the trial judge, the Honorable Charles M. Rand, P.J.F.P. Despite the take-back time provision included in the June 10, 2011 consent order, which was additionally incorporated into the handwritten MSA, BN asserted that he had opposed the take-back time provision, and claimed that it must have been added to the agreement, without his approval, sometime after he signed it. Nevertheless, he reviewed and signed the MSA, and left court that day with a copy of it and the final judgment of divorce, which included the take-back time provision.

At the ethics hearing, respondent adamantly denied that any provision had been added to the MSA, without BN's knowledge and approval, after BN had signed it. In support of his position, he entered into evidence a sworn affidavit

from his adversary, Moore, wherein she certified that the take-back provision had been inserted into the MSA during the October 5, 2011 negotiations, partly at BN's own request, in order to provide both parties with equal take-back time. Moore was unequivocal that the language had been drafted into the agreement before the parties signed it.

Ultimately, BN signed the MSA, rather than proceed to trial, to avoid certain potential negative outcomes. First, as an emergency room physician, he was required to work twenty-four-hour shifts, and was worried that his work schedule could interfere with his desire for equal custody of the children. Additionally, he was concerned that, if a July 2011 temporary restraining order that CN had obtained against him were to result in a final restraining order, his license to practice medicine could be impacted. Therefore, on July 21, 2011, the parties entered into a consent order for civil restraints, under which CN dismissed the domestic violence complaint, and BN paid $2,000 toward his alleged property damage.

In November 2011, BN reviewed the draft final settlement agreement (FSA). He remained dissatisfied with the inclusion of a take-back time provision and wanted respondent to remove it from the agreement. He also took issue with the wording of the gas rights provision, which differed slightly between the MSA and FSA. He contended that the FSA extended CN's gas rights beyond the

twenty years to which he had agreed. Therefore, on October 30, 2011, without signing the FSA, BN initiated a months-long attempt to discuss his concerns with respondent. He sent respondent a series of e-mails requesting information and a meeting to discuss filing a motion to settle those two issues. Although respondent replied to a December 13, 2011 e-mail, he did not address the take-back time and gas rights motion.

In a February 8, 2012 e-mail, respondent finally informed BN that he would file a motion, at the end of March 2012, addressing the take-back time and gas rights issues, but claimed that he needed BN to sign the FSA and immediately return it. According to respondent, when he had appeared before Judge Rand the previous day, he was told that the judge was retiring on March 31, 2012, and that, if the parties did not sign the FSA, Judge Rand was prepared to discard that agreement and try the case. Respondent then e-mailed the signature page of the agreement to BN for his signature.

BN immediately executed the signature page and returned it to respondent's office. BN, however, denied having been present when his signature was notarized. Respondent testified that he was away from the office that day and, because the notary was no longer employed in his office, he was unable to establish how the jurat had been handled. However, respondent

testified to his belief that no one "would Notarize it in the office without [BN's] consent." Respondent was not charged with having taken an improper jurat.

Thereafter, in a June 7, 2012 e-mail, respondent assured BN that he had drafted a motion, which BN assumed would address the take-back time and gas rights issues. In a July 3, 2012 e-mail, BN asked respondent for information about the court date for his motion, so that he could arrange his work schedule around it. On July 19, 2012, BN sent another e-mail asking respondent which issues were being argued and whether BN needed to prepare for the hearing. Respondent sent to BN a copy of a July 23, 2012 letter to the Honorable Kathleen M. Delaney, J.S.C., in which respondent requested an adjournment of a motion in the case. BN assumed that respondent's letter addressed an adjournment of his motion, but respondent failed to tell him that he was requesting an adjournment of a motion that Moore recently had filed to enforce litigant's rights. Respondent admitted having failed to tell BN that he had not yet filed a motion addressing BN's issues.

In an August 16, 2012 e-mail, respondent informed BN that a new judge had been assigned and a new hearing date was scheduled for September 14, 2012. In an August 22, 2012 e-mail, BN informed respondent that he wanted to review the "outstanding issues of the [FSA]" prior to the hearing. BN repeated his request in a September 10, 2012 e-mail. Respondent did not reply to either

e-mail. Moreover, at some point before the hearing, respondent told BN that his attendance was not necessary. Accordingly, BN did not attend the hearing.

After the September 14, 2012 hearing, BN heard nothing from respondent about the outcome. On September 26, 2012, however, BN received an e-mail from CN, stating her intention to pick up their children a few days later, and attaching a September 19, 2012 order granting her enforcement motion, which had addressed parenting rights and financial issues. BN had been unaware of CN's motion until he received her e-mail. He immediately sent an e-mail to respondent, claiming that he had been "blindsided" by the September 19, 2012 order. In a contemporaneous text to respondent, BN stated, "I need to speak to you as soon as possible."

In a text message to BN the following morning, respondent replied, "Saw email. Bogus. Am in Camden am and wi [sic] deal with it asap. Call you on way into court." The complaint charged respondent with having misrepresented to BN that the order was bogus. Respondent testified, however, that his use of the word "bogus" was inartful, but was a reference to CN's e-mail, not the court order, which had been validly obtained.

The complaint also alleged that "there were many times where the Respondent . . . misrepresented facts to [BN]," and that "representations made by Respondent were both dishonest and deceitful." According to BN, respondent

never told him that (1) he failed to file the June 2012 motion; (2) CN had filed a motion to enforce litigant's rights at about the same time; (3) respondent had not opposed CN's motion; and (4) CN had obtained the relief memorialized in the court's September 19, 2012 order.

For his part, respondent admitted that he had not clarified for BN that the only motion pending in summer 2012 was CN's enforcement motion, that he had requested several adjournments of that motion, and that he had failed to reply to it. At the ethics hearing, respondent conceded that he continued to represent BN throughout this time. He could not explain his failure to reply to the motion and claimed he did not recall whether he had attended the September 14, 2012 hearing.

Respondent conceded that, pursuant to the September 19, 2012 order, BN (1) lost parenting time with his children; (2) saw CN's take-back time expanded; and (3) was required to pay CN's attorney fees.[3] Respondent assured BN that the order contained errors that he would address in a motion. On that basis, BN continued to request respondent's assistance through October and November 2012. Respondent, however, did not file a motion until December 2012, when he filed a cross-motion in conjunction with a second motion by CN to enforce litigant's rights.

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[3] The record does not reveal whether BN had defenses to CN's requested relief.

On January 4, 2013, Judge Delaney entered an order requiring BN to comply with the terms of the FSA and the September 19, 2012 court order. In addition, BN's parenting time was affected. Despite those results, respondent texted BN that the hearing results had gone "fine." At the ethics hearing, respondent explained that it was "not a great order, but I don't think it was surprising, in light of some of the compliance issues [BN] had." Respondent further conceded that, despite BN's repeated requests for a copy of the January 4, 2013 order, respondent failed to provide one. As of February 12, 2013, six weeks after that order was entered, BN remained unaware of the court's ruling.

Shortly thereafter, BN terminated the representation and retained subsequent counsel, who filed an April 2013 motion for the relief that BN claimed he had retained respondent to seek in October 2011. An April 26, 2013 order denied BN's attempt to vacate the FSA, and the September 19, 2012 and January 4, 2013 orders.

The hearing panel found that respondent properly handled the representation through the October 5, 2011 final judgment of divorce. Thereafter, respondent continued to represent BN, but neither replied to CN's September 2012 enforcement motion nor appeared at the motion hearing, in violation of RPC 1.1(a) and RPC 1.3.

The DEC dismissed the RPC 1.2(a) charge, which alleged that respondent failed to abide by BN's decisions regarding the scope of the representation, concluding that, although BN disagreed with the MSA, he voluntarily signed it and knew that he was bound by it. He did so to avoid a trial on the merits of the case.

The panel also dismissed the RPC 1.4(b) charge for lack of clear and convincing evidence that respondent failed to communicate with BN. Rather, the panel found that respondent and BN communicated by e-mail, letter, telephone, and meetings. The report specifically faulted BN for failing to "clearly establish that he attempted to schedule any consultations with Respondent to address the post-judgment matters."

Finally, the DEC dismissed the RPC 8.4(c) charge that respondent had misrepresented to BN that the September 19, 2012 court order had been "bogus," concluding that respondent had been referring to CN's e-mail, not the court order. The hearing panel did not address the remaining RPC 8.4(c) charge that respondent had misrepresented facts and made dishonest and deceitful representations to the client.

The panel recommended the imposition of 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, we find that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 8.4(c).

Respondent diligently represented his client, BN, in a contentious divorce, through the October 2011 final judgment of divorce. Thereafter, respondent continued to represent BN, promising to file a post-judgment motion to address two issues that were of great importance to him: take-back time and the division of gas rights to the Pennsylvania property.

Between November 2011 and early February 2012, BN sent respondent several requests for information regarding the filing of his motion. On February 8, 2019, respondent obtained BN's signature on the FSA and promised to file a motion in March 2012. However, respondent failed to file that motion. Over the next several months, BN pressed respondent for action. On June 7, 2012, respondent told BN that he had drafted the motion. Despite that representation, respondent filed nothing.

Unbeknownst to BN, CN then filed a motion to enforce litigant's rights. Rather than tell BN about CN's motion, respondent sent him a copy of respondent's own July 23, 2012 request for an adjournment of a motion before

Judge Delaney, misleading BN into believing that it was an adjournment of his motion. It was not.

CN's motion was heard on September 14, 2012. Inexplicably, respondent neither replied to the motion nor attended the hearing. BN learned about that motion only when CN sent him a copy of the September 19, 2012 enforcement order. Blindsided by the court order, BN extracted a new promise of action from respondent. Once again, however, respondent took no action until December 2012, when he finally filed a cross-motion to CN's second enforcement motion, in which he requested that take-back time be eliminated.

On January 4, 2013, Judge Delaney entered an enforcement order denying BN's request, largely granting CN's requests for relief, and requiring BN to pay CN's attorney fees. Once again, respondent failed to tell his client the result of that hearing and failed to provide him with a copy of the court order. Moreover, for more than a year, from October 2011 to December 2012, respondent failed to file the motion or otherwise address the issues that he had promised to address. Therefore, respondent is guilty of gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3, respectively.

In respect of the charge that respondent failed to abide by his client's decisions regarding the scope of the representation, respondent's inaction appears to have been dilatory, rather than an intentional decision to defy his

client's wishes about the representation. That misconduct is adequately addressed by the gross neglect and lack of diligence findings, above. We, thus, dismiss the RPC 1.2(a) charge as inapplicable.

Respondent is guilty, however, of having failed to reply to BN's reasonable requests for information and to keep him informed about important events in the case, such as (1) his failure to file a motion addressing the two issues of paramount importance to BN; (2) the existence of CN's first enforcement motion, and the need to reply; and (3) the existence of September 2012 and January 2013 court orders that struck at the core of BN's custody and parenting rights. Thus, from October 2011 until February 12, 2013, respondent failed to keep BN adequately informed about the status of the case, a violation of RPC 1.4(b).

Finally, in respect of RPC 8.4(c), the DEC correctly found a lack of clear and convincing evidence in the record that respondent referred to Judge Delaney's enforcement order as bogus. However, the panel failed to explore respondent's misrepresentations by silence, which the complaint referred to as "many times where the Respondent . . . misrepresented facts" to BN that were both "dishonest and deceitful."

Specifically, in June 2012, respondent told BN that he had prepared the take-back time and gas rights motion. BN sent respondent e-mails seeking information about the hearing date, the issues to be discussed, and whether he needed to prepare for the hearing on their motion. Instead of telling BN the truth – that he had filed nothing – respondent sent him a copy of a July 23, 2012 letter to the court that appeared to adjourn his motion. Rather, it was his request to adjourn CN's enforcement motion. BN's subsequent communications clearly establish that he believed respondent had adjourned a motion filed in BN's behalf, but respondent did nothing to dispel that misapprehension. By his silence about failing to reply to CN's first enforcement motion and failing to file BN's motion, respondent misrepresented the status of the case, a violation of RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984).

In sum, in a single client matter, we determine that respondent is guilty of having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 8.4(c). We determine, however, to dismiss the RPC 1.2(a) charge as inapplicable. The sole issue left for us to determine is the appropriate quantum of discipline 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

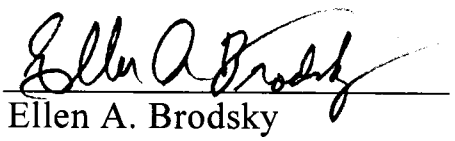
failing to promptly reply to the client's requests for status updates); and In re Falkenstein, 220 N.J. 110 (2014) (attorney led the client to believe that he had filed an appeal and concocted false stories to support his lies, a violation of RPC 8.4(c); he did so to conceal his failure to comply with 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)).

We find this case similar to the disciplinary precedent set forth above, where the attorneys received reprimands for misrepresentations, including by silence, about the status of their clients' cases, and were further guilty of gross neglect, lack of diligence, and failure to communicate with the client. There is no aggravation to consider. In mitigation, respondent has no prior discipline since his 1999 admission to the bar. We, thus, determine that a reprimand is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Vice-Chair Gallipoli and Members Joseph and Zmirich voted for a censure. 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 David Ryan Nussey
Docket No. DRB 19-280

Argued: January 16, 2020

Decided: February 20, 2020

Disposition: Reprimand

Members	Reprimand	Censure	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer				X
Hoberman	X			
Joseph		X		
Petrou	X			
Rivera	X			
Singer	X			
Zmirich		X		
Total:	5	3	0	1

Ellen A. Brodsky
Chief Counsel