

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 10-361 and DRB 10-383
District Docket Nos. I-2009-0005E,
I-2009-0006E, and XIV-2010-0008E

IN THE MATTERS OF :
KEITH T. SMITH :
AN ATTORNEY AT LAW :
:

Decision

Argued: February 17, 2011

Decided: April 15, 2011

Jose Wilfrido Hernandez appeared on behalf of the District I Ethics Committee (DRB 10-361).

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics (DRB 10-383).

Respondent waived appearance for oral argument in both matters.

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

These matters were before us on separate recommendations for discipline. In the District I Ethics Committee (DEC) matter (DRB 10-361), two complaints were consolidated for hearing below. The complaints stemmed from respondent's conduct in two

client matters, Pasquale and O'Donnell. The Pasquale complaint charged respondent with failure to cooperate with an ethics investigation (RPC 8.1(b)), failure to communicate with the client (RPC 1.4(b) and (c)), gross neglect and pattern of neglect (RPC 1.1(a) and (b)), and lack of diligence (RPC 1.3). The O'Donnell complaint charged respondent with failure to cooperate with an ethics investigation (RPC 8.1(b)), gross neglect and pattern of neglect (RPC 1.1(a) and (b)), lack of diligence (RPC 1.3), failure to communicate with the client (RPC 1.4(b) and (c)), failure to expedite litigation (RPC 3.2), and conduct prejudicial to the administration of justice (RPC 8.4(d)). The DEC recommended a censure.

In the Office of Attorney Ethics (OAE) matter (DRB 10-383), a disciplinary stipulation, respondent stipulated that he practiced law, from September 2009 to March 2010, while on the New Jersey Lawyers' Fund for Client Protection (CPF) list of ineligible attorneys, a violation of RPC 5.5(a) (practicing law while ineligible to do so). The OAE recommended either an admonition or reprimand.

We determine to impose a censure for the totality of respondent's conduct in the DEC and the OAE matters.

Respondent was admitted to the New Jersey bar in 1989. On October 1, 2008, he received an admonition for misconduct arising out of a fee-sharing agreement (encompassing several matters) with another attorney. Respondent violated RPC 1.5(e), because the proportionality of fees shared with the other attorney was not reasonable. Also, after allowing a complaint to be dismissed, respondent failed to take steps to have the complaint reinstated and to contact his client about the status of his case, violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b) and (c). In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008).

In a later disciplinary matter, respondent was found guilty of additional violations, including gross neglect, in several of the client matters underlying the fee-sharing arrangement. No new discipline was imposed because the second disciplinary matter was "inexorably intertwined" with the admonition matter. In re Smith, 2009 N.J. LEXIS 1408 (December 14, 2009).

Respondent was placed on the ineligible list of attorneys four times, for failure to pay the annual assessment to the CPF: from September 27 to October 5, 2004; September 24 to December

24, 2007; from September 29 to October 8, 2008; and from September 28, 2009 to March 3, 2010.

I. DOCKET NO. DRB 10-361

A. The Pasquale Matter – Docket No. I-2009-0005E

This grievance arose out of respondent's February 2007 representation of Bonnie Pasquale, who retained him for representation in a consumer fraud claim. The presenter withdrew all of the charges related to the underlying representation (RPC 1.1(a), RPC 1.3, and RPC 1.4(a) and (b)) because Pasquale refused to cooperate with the ethics investigation. Even when served with a subpoena, Pasquale failed to appear at the hearing.

With regard to the single remaining charge (RPC 8.1(b)), at the DEC hearing respondent stipulated that he failed to cooperate with ethics authorities in the investigation of the grievance. Specifically, on May 13, 2009, the DEC investigator sent respondent a copy of the grievance and requested a written reply. Respondent did not submit a reply. Thereafter, the investigator made several attempts to reach respondent by telephone, to no avail.

On September 29, 2009, the investigator sent a second letter to respondent, to which he did not reply.

B. The O'Donnell Matter – Docket No. I-2009-0006E

On January 17, 2007, Michael J. O'Donnell retained respondent to represent him in connection with a home warranty claim against K. Hovnanian, the builder of O'Donnell's new home. Respondent was to pursue an action based on the New Home Warranty Act and the Consumer Fraud Act. Pursuant to a written fee agreement, O'Donnell gave respondent \$1,500 as a "retainer." Thereafter, respondent filed a complaint in Atlantic County Superior Court.

Soon after filing the complaint, respondent ceased communicating with O'Donnell, despite O'Donnell's many attempts to obtain information from him about his matter. On November 26, 2007, O'Donnell drove to respondent's office and asked him for an update, but respondent was "evasive" with his answer.

On July 22, 2008, O'Donnell wrote to respondent, complaining about all of the efforts that he had undertaken to obtain information about his case and to spur respondent to action, none of which had succeeded. He invited respondent to

contact him before he filed an ethics grievance, but respondent never replied to O'Donnell's letter.

According to the complaint, on April 25, 2008, as a direct result of respondent's failure to abide by discovery rules, the court dismissed O'Donnell's complaint without prejudice. Respondent took no action to reinstate the complaint, which led to an August 19, 2008 dismissal with prejudice.

The complaint also alleged that respondent violated a trial court order to appear on August 22, 2008 to "explain his conduct" in the O'Donnell matter. At the ethics hearing, prior to taking testimony on this issue, the presenter withdrew the charged violation of RPC 8.4(d), citing an inability to offer clear and convincing evidence of misconduct in this regard.

The complaint also alleged that, on April 15, 2009, a fee arbitration committee had ordered respondent to refund the \$1,350 retainer to O'Donnell within thirty days, unless respondent were to file an appeal. Respondent neither filed an appeal nor refunded the fee within thirty days. On July 16, 2009, the OAE sent respondent a letter, directing him to make the refund by no later than July 27, 2009, or face a possible motion for his temporary suspension. On July 25, 2009, two days

before the given deadline, respondent paid the award in full. The complaint charged that respondent's conduct, as described above, violated RPC 8.4(d).

Finally, the complaint alleged that respondent failed to reply to the ethics investigator's two letters asking him for information about the grievance and to reply to the investigator's several attempts to reach him by telephone, a violation of RPC 8.1(b).

At the DEC hearing, respondent stipulated that he violated the charged RPCs, admitting that he had "dropped the ball" in the O'Donnell matter. He apologized to O'Donnell who was present, but did not testify.

According to respondent, during O'Donnell's representation, he had become consumed by other litigation, including class action suits relating to tainted pet food. In addition, he was short-staffed. He explained that he had worked "for years and years" at a law firm with substantial support staff and that, once he left, he had to make do with less help. His stepdaughter worked for him briefly, but quit when she found a better-paying job. In addition, he had to discharge another employee, after

learning that she had regularly misfiled documents and ignored required office tasks.

The DEC found respondent guilty of failure to cooperate with the ethics investigation (RPC 8.1(b)) in the Pasquale matter. In the O'Donnell matter, the DEC found respondent guilty of gross neglect (RPC 1.1(a)), lack of diligence (RPC 1.3), failure to communicate with the client (RPC 1.4(b) and (c)), failure to expedite litigation (RPC 3.2), failure to cooperate with the ethics investigation (RPC 8.1(b)), and conduct prejudicial to the administration of justice (RPC 8.4(d)).

The DEC also found a pattern of neglect, a violation of RPC 1.1(b), by combining the gross neglect in the O'Donnell matter with the several instances of gross neglect found in respondent's prior disciplinary matters.

Citing two reprimand cases, In re Riva, 157 N.J. 34 (1999), and In re Zukowski, 152 N.J. 59 (1997), the DEC recommended a censure, enhancing the reprimand by two "aggravating factors," respondent's pattern of neglect and his failure to cooperate with ethics authorities.

II. DOCKET NO. DRB 10-383

During an audit of respondent's books and records in connection with an overdraft, the date of which is not cited in the stipulation, the OAE found that respondent had practiced law while ineligible to do so for failure to pay the CPF annual attorney assessment for 2009. Specifically, from September 28, 2009 until March 3, 2010, respondent was present in his office, answered telephones, reviewed correspondence, and used the trust account, as evidenced by a November 12, 2009 overdraft. The OAE investigation revealed no unethical conduct associated with the overdraft. Moreover, no clients were harmed or filed grievances due to respondent's practicing law during the period of ineligibility.

The parties stipulated that respondent was not aware of his placement on the list of ineligible attorneys until he was notified by the OAE, on February 22, 2010. Respondent then called the CPF, made the required payment, and was reinstated to eligible status on March 3, 2010. He stipulated that his conduct violated RPC 5.5(a).

Upon a full review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical and

that the facts and violations set forth in the disciplinary stipulation are fully supported by clear and convincing evidence.

In the Pasquale matter, by respondent's own admission, he failed to cooperate with ethics authorities in the initial phase of the investigation. He failed to reply to the investigator's repeated requests for information about the grievance. Eventually, respondent filed an answer to the formal ethics complaint and attended the DEC hearing. Nevertheless, his failure to reply to the grievance violated RPC 8.1(b). As indicated previously, the remaining charges were withdrawn, after Pasquale refused to appear and testify.

In the O'Donnell matter, respondent stipulated the facts recited in the complaint, as well as all of the charges, except conduct prejudicial to the administration of justice. Respondent admitted that he grossly neglected the case, failed to expedite the litigation by not complying with the discovery rules, and lacked diligence in O'Donnell's representation by allowing the complaint to be dismissed twice, the second time with prejudice. Through it all, respondent failed to keep his client apprised of the status of the case. He also failed to

reply to the DEC investigator's repeated requests for information about the grievance. Altogether, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, and RPC 8.1(b). We dismiss the charged violation of RPC 1.4(c) as inapplicable to the facts of this matter. Nothing in the record suggests that respondent should have discussed the matter with his client to permit the client to make informed decisions regarding the representation.

There were two RPC 8.4(d) charges. The presenter withdrew the first charge - - that respondent failed to obey a court order to appear to explain his failure to prosecute O'Donnell's claims. The second charge involved a fee arbitration award in O'Donnell's favor, with which respondent failed to comply within the thirty-day period required by R. 1:20A-3(e). The DEC found such conduct to be a violation of RPC 8.4(d).

To be sure, failure to abide by a fee committee's determination to return a fee may be a violation of RPC 8.4(d) (as well as RPC 3.4(c)). In re Harris, 182 N.J. 594, 604-05 (2005). Harris "steadfastly" refused to refund an unearned fee in two client matters. She was found guilty of violating RPC 8.4(d) and RPC 3.4(c). Ibid. Although, here, respondent did not

observe the thirty-day period provided by the rules, he nevertheless satisfied the fee award a few days before the new deadline given to him by the OAE. The OAE did not have to file a motion for his temporary suspension, as in Harris, who was, in fact, temporarily suspended. Because of respondent's compliance with the award, we determine to find no violation of RPC 8.4(d).

Finally, respondent was charged with a pattern of neglect (RPC 1.1(b)). For a finding of a pattern of neglect, at least three instances of neglect are required. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). When respondent's gross neglect in the O'Donnell matter is combined with prior instances of gross neglect found in each of his two earlier disciplinary matters, a pattern of neglect emerges.

In summary, in Pasquale, respondent violated RPC 8.1(b). In O'Donnell, he violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, and RPC 8.1(b). Respondent also engaged in a pattern of neglect, a violation of RPC 1.1(b).

In the second disciplinary matter before us, respondent entered into a disciplinary stipulation with the OAE, in which he admitted that he practiced law while ineligible from September 2009 to March 2010 for failure to pay the CPF annual

assessment for 2009. According to the stipulation, respondent was unaware of his ineligibility until it was pointed out to him. Nevertheless, his actions violated RPC 5.5(a).

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history.

Admonitions: In re Russell, 201 N.J. 409 (2009) (attorney failed to file answers to divorce complaints against her client, causing a default judgment to be entered against him; the attorney also failed to explain to the client the consequences flowing from her failure to file answers on his behalf); In the Matter of Keith T. Smith, supra, DRB 08-187 (October 1, 2008) (attorney's inaction in a personal injury action caused the dismissal of the client's complaint; the attorney took no steps to have it reinstated; also, the attorney did not communicate with the client about the status of the case); In re Dargay, 188 N.J. 273 (2006) (attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior

admonition for similar conduct); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (attorney did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court when, in fact, the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file; violations of RPC 1.4(a) and RPC 1.3 found); and In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (attorney's inaction caused a trademark application to be deemed abandoned on two occasions; the attorney also failed to comply with the client's requests for information about the case).

Reprimands: In re Uffelman, 200 N.J. 260 (2009) (attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; although the attorney had no disciplinary record, the reprimand was premised on the extensive harm caused to the client, who was forced to shut down his business for three months because of the attorney's failure to represent the client's interests diligently and responsibly); In re Aranguren, 172 N.J. 236 (2002) (attorney failed to act with diligence in a bankruptcy matter, failed to communicate with the

client, and failed to memorialize the basis of the fee; prior admonition and six-month suspension); In re Zeitler, 165 N.J. 503 (2000) (attorney lacked diligence and failed to communicate with clients; extensive ethics history); In re Gordon, 139 N.J. 606 (1995) (attorney lacked diligence and failed to communicate with the clients in two matters; in one of the matters, the attorney also failed to return the file to the client; prior reprimand); and In re Wildstein, 138 N.J. 48 (1994) (misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients).

If, as is the case here, the attorney displays a pattern of neglect, a reprimand ordinarily ensues. See, e.g., In re Weiss, 173 N.J. 323 (2002) (lack of diligence, gross neglect, and pattern of neglect); In re Balint, 170 N.J. 198 (2001) (in three matters, attorney engaged in lack of diligence, gross neglect, pattern of neglect, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (lack of diligence, failure to communicate in a number of cases handled on behalf of an insurance company, gross neglect, and pattern of neglect).

In addition to the above improprieties, respondent failed to cooperate with the investigation of the Pasquale and the O'Donnell grievances. Ordinarily, admonitions are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In re Ventura, 183 N.J. 226 (2005) (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the district ethics committee investigator's requests for information about the grievance); and In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to the district ethics committee's requests for information about two grievances. If the attorney has been disciplined before, but the attorney's ethics record is not serious, then reprimands have been imposed. See, e.g., In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate

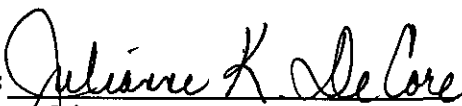
with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

In addition to the above violations, respondent practiced law while ineligible, which, without more, is generally met with an admonition if the attorney is unaware of the ineligibility, as in this case. See, e.g., In the Matter of Matthew George Connolly, DRB 08-419 (March 31, 2009) (attorney ineligible to practice law rendered legal services; the attorney's conduct was unintentional); In the Matter of William C. Brummel, DRB 06-031 (March 21, 2006) (attorney practiced law during a four-month period of ineligibility; the attorney was unaware of his ineligible status); and In the Matter of Richard J. Cohen, DRB 04-209 (July 16, 2004) (attorney practiced law during nineteen-month ineligibility; the attorney did not know that he was ineligible).

In aggravation, respondent has a prior admonition. We find that, when the respondent's ethics infractions in these three matters are combined with his prior admonition, a censure is the proper degree of discipline.

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
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

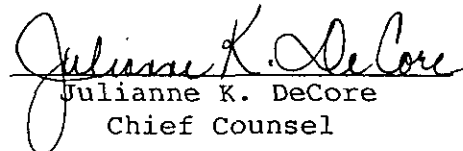
In the Matters of Keith T. Smith
Docket Nos. DRB 10-361 and DRB 10-383

Argued: February 17, 2011

Decided: April 15, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			


Julianne K. DeCore
Chief Counsel