SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-014
District Docket Nos. XIV-09-604E
and XII-10-901E

IN THE MATTER OF	:
STANLEY MARCUS	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 21, 2011

Decided: June 28, 2011

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a recommendation for discipline (reprimand) filed by the District XII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with a client), and R. 1:21-7(b) (failure to advise a client of alternate fee arrangements). The allegations arose out of respondent's handling of a personal injury claim on behalf of a minor against

handling of a personal injury claim on behalf of a minor against the Newark public school system. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1970. In 1991, he was reprimanded for a pattern of neglect and failure to communicate in six client matters. Respondent was ordered to practice under the supervision of a proctor for two years. In re Marcus, 126 N.J. 304 (1991). The proctorship was terminated in 1994. In re Marcus, 135 N.J. 471 (1994).

In 1995, respondent received a second reprimand for failure to maintain proper attorney trust and business account records and negligent misappropriation of client trust funds. In re Marcus, 140 N.J. 518 (1995).

In the current disciplinary matter, the parties entered into a stipulation of facts, dated July 21, 2010.

In March 2000, Michael Onyeagoro (Michael), a minor, was assaulted by a student, while attending a Newark, New Jersey, public school. The following month, his mother, Ellen Onyeagoro (Ellen) entered into a contingent fee agreement with respondent to represent Michael. Respondent did not advise Ellen that she could enter into an alternate fee arrangement with him, that is,

for an hourly fee.[1] Ellen testified that, even if she had known that she could have entered into a different arrangement with respondent, she would not have done so.

Respondent filed an administrative claim on behalf of Michael on May 1, 2000. The claim was denied by the Newark Public Schools, in November 2000. The denial was reconfirmed, in April 2002, on the basis that Michael's injuries did not meet the tort threshold of Title 59.

Ellen did not recall if she had received a copy of the April 2002 letter, denying Michael's claim. She did not believe that she had been notified of the November 2000 denial. According to Ellen, she did not know, until 2009, that the claim was not pending. Contrarily, respondent testified that he had notified Ellen that the claim had been rejected and that they needed additional proofs to proceed.

From 2002 to 2005, Ellen and respondent had "intermittent conferences" about Michael's medical condition. In addition, the record contains numerous letters from respondent's office to Michael's pediatrician, attempting to obtain his medical records and the doctor's report. The pediatrician ultimately sent the

[1] Respondent now utilizes a retainer agreement that sets out the option of retaining him on an hourly basis.

records for Michael's brother, Anthony, in error. Respondent did not notice the error.

In October 2005, respondent referred Michael to an orthopedic surgeon, Alan E. Schultz, who forwarded a report to respondent, in October 2005. Michael was also seen by an optometrist, Vairona Mikhail, O.D., whose report respondent received.[2]

At the DEC hearing, respondent called as his witness attorney Robert J. McKenna, whose practice focuses on personal injury matters and who is familiar with Title 59 claims. McKenna is of counsel to respondent's firm. McKenna testified that, in late 2005 or early 2006, he had reviewed Michael's file and had reported to respondent his conclusion that Michael's injuries would not meet the threshold for a claim under Title 59.[3]

Respondent testified that, after McKenna had reviewed the file, he had recommended that respondent close Michael's file. Respondent kept the file open, however, because he had time

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[2] Michael suffers from "blackouts" and vision problems that, Ellen believes, are rooted in the March 2000 school assault. Michael was seen by a retina specialist. Respondent testified that he did not see the doctor's report until after Ellen had filed her grievance against him.

[3] McKenna confirmed that the report from the retina specialist was not in Michael's file.

before the expiration of the statute of limitations. Therefore, additional information about Michael's condition could have come to light. According to respondent, he assumed that, if there was a change in Michael's condition, Ellen would let him know. Respondent stipulated that, from 2006 until January 2009, he did not communicate with Ellen.

In July 2007, Samuel J. Weinstein, counsel for Livingston Vitreo-Retinal Associates, P.A., obtained a judgment against Ellen and her husband for unpaid medical bills.[4] In October 2007, a writ of execution was served on respondent's office. In October 2008, Weinstein's office filed a notice of motion seeking to have respondent turn over funds recovered on Michael's behalf to him. That motion was denied in November 2008. In December 2008, Weinstein's office filed a motion for reconsideration.

In January 2009, McKenna filed a certification in opposition to the motion. In his certification, McKenna stated that respondent's office had ceased working on the file in 2005. McKenna represented that they had not filed a lawsuit and that

[4] Ellen's understanding was that respondent would pay the medical bills, when the case was completed. She did not know that she had to pay them, in the interim.

there had been no funds recovered. Weinstein then withdrew the motion, in January 2009.

Respondent testified that he had not told Ellen about the motion to turn over funds because she was not "directly affected by that turnover."

In January 2009, McKenna discussed Michael's case with respondent and again recommended that he close the file. At that point, there was no new information about Michael's neurological condition. Believing that he had "waited long enough," respondent closed the file. By letter dated January 23, 2009, respondent advised Ellen that he had closed the file and that she should seek other counsel, if she still wanted to pursue Michael's claim.[5] Ellen retrieved Michael's file in February 2009.

Count one of the complaint charged respondent with violating RPC 1.1(a), based on his reliance on the wrong medical records, his failure to advise Ellen of the administrative denials of Michael's claim, and his failure to communicate with her for over three years. The second count charged respondent with violating RPC 1.3, based on his failure to advise Ellen,

[5] In February 2009, Ellen retained other counsel. It appears from the stipulation that the matter was ongoing as of July 2010.

for over three years, that he had closed his file. Count three charged respondent with violating RPC 1.4(b) by failing to keep Ellen reasonably informed about the status of Michael's matter. Count four charged respondent with violating R. 1:21-7(b), based on his failure to advise Ellen that she could make alternate fee arrangements with him, when she entered into the contingent fee agreement.

As to count one, the DEC could not conclude by clear and convincing evidence that respondent had violated RPC 1.1(a) for having used the wrong medical records in evaluating Michael's claim. The DEC found no evidence that McKenna had relied on the medical records, in concluding that Michael's claim would not meet the threshold for Title 59 injuries. In addition, the DEC recalled respondent's testimony that, even with the correct records, respondent's opinion about the viability of the claim would not have changed.

Similarly, the DEC found no clear and convincing evidence that respondent had failed to inform Ellen that the Newark public schools had denied his administrative claim in 2000 and had reaffirmed that decision in 2002. The DEC could not conclude that respondent had failed to orally inform Ellen of the denial. The DEC pointed to Ellen's reply, when asked if she

recalled respondent's notice to her of the 2000 denial of the claim: "I can't recall if I was notified. I don't think I was."

As to the charge that respondent did not advise Ellen that his office had closed Michael's file in 2005, in violation of RPC 1.1(a), the DEC concluded that, although respondent was "sloppy" with respect to when and how the file had been closed, his conduct had not risen to the level of gross neglect. The DEC also found no violation of RPC 1.1(a) for respondent's stipulated failure to communicate with Ellen, from 2006 through early 2009.

With respect to the charged violations of RPC 1.3 and RPC 1.4(b), the DEC found that respondent (1) did not advise Ellen, in 2005 or 2006, of McKenna's conclusion that Michael (1) did not have an injury that could be connected to the assault, sufficient to reach the Title 59 threshold; (2) did not send a writing to Ellen to advise her of the school's denials of Michael's administrative claim, in 2000 and 2002; (3) never sent a writing to Ellen explaining the difficulty in supporting a Title 59 claim and his opinion that they could not meet that burden; (4) did not tell McKenna that the file had not been closed in 2005, thereby causing McKenna to send a certification to the court, in response to a motion for the turnover of funds, inaccurately stating that the file had been closed; (5) failed

to tell Ellen that he had received Weinstein's motion; (6) failed to communicate either orally or in writing with Ellen, from 2006 through January 2009; and (7) after 2005, sent no letters to Ellen, seeking additional information about Michael's medical condition or any additional medical consultations.

The DEC found that the above actions demonstrated that respondent had not acted with diligence in representing Ellen and had not kept her reasonably informed about the case, in violation of RPC 1.3 and RPC 1.4(b), respectively. The DEC noted that respondent's suggestion that it was Ellen's responsibility to communicate with him was "unreasonable and in derogation of his duties."

Finally, the DEC found clear and convincing evidence that respondent violated R. 1:21-7, when he did not afford Ellen the opportunity to compensate him for the reasonable value of his services, but found the violation to be de minimis.[6]

In recommending a reprimand, despite respondent's 1991 and 1995 reprimands, the DEC remarked that they were so remote in time that they did not constitute an aggravating factor.

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[6] The OAE filed a letter-brief with us, objecting to the DEC's characterization of respondent's violation of R. 1:21-7 as de minimis.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence. We also agree with the DEC's dismissal of the gross neglect charges. There is no indication in the record that respondent failed to take any action that could have moved Michael's claim forward. This is not a case where an attorney neglected a viable matter. Rather, Michael's claim against the public schools did not meet the Title 59 threshold. Moreover, respondent's failure to recognize that he had Michael's brother's medical records, according to his testimony, had no bearing on the case's viability and does not evidence gross neglect on respondent's part.

Respondent was derelict, however, in allowing the matter to linger inactive for three years. His contentions that the statute of limitations was not yet an issue and that, had there been a change in Michael's condition, Ellen would have so informed him are without merit. The onus was on respondent to pursue Michael's claim or to close his file. He did neither. He, therefore, violated RPC 1.3.

In addition, respondent violated RPC 1.4(b) by not adequately advising Ellen of the status of the case. Although respondent testified that he told Ellen that they needed

additional proofs to proceed, she thought they had a pending claim. Her belief that Michael's medical bills would be paid out of the award in the personal injury case makes clear that she did not understand that Michael's claim had been denied. Whatever communication there was between respondent and Ellen was not sufficient. Moreover, respondent should have told Ellen about the motion to compel the turnover of funds. His argument that it did not "directly affect her" is specious.

Respondent also violated R. 1:21-7(b) by failing to advise Ellen that she could retain him on an hourly basis. Nevertheless, not every violation of a Court rule is a violation of the Rules of Professional Conduct. We note also that Ellen testified that, even if she had known that she could have retained respondent on an hourly basis, she would not have done so. We, therefore, dismiss the charge that respondent's violation of R. 1:21.7(b) was unethical.

Generally, an admonition is the appropriate form of discipline for lack of diligence and failure to communicate with the client. See, e.g., 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); 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); and In the Matter of John F. Coffey, DRB 04-419 (January 21, 2005) (attorney did not file a bankruptcy petition until nine months after being retained and did not keep the client informed of the status of the case; only after the client contacted the court did she learn that the petition had not been filed).

The presence of a disciplinary record or other aggravating factors may serve to enhance the admonition to a reprimand. See, e.g., In re Carmen, 201 N.J. 141 (2010) (reprimand for attorney who, for a period of two years, failed to communicate with the clients in a breach-of-contract action and failed to diligently pursue it; aggravating factors were the attorney's failure to withdraw from the representation when his physical condition materially impaired his ability to properly represent the clients and a prior private reprimand for conflict of interest) and In re Oxfeld, 184 N.J. 431 (2005) (reprimand by consent for lack of diligence and failure to communicate with the client in a pension plan matter; two prior admonitions).

As mentioned previously, respondent has been twice reprimanded. True, as the DEC noted, his prior run-ins with the disciplinary system were remote in time (1991 and 1995), but they cannot be overlooked and do constitute aggravating factors. On the other hand, discipline higher than a reprimand is not warranted. Sixteen years have passed since respondent's last disciplinary infraction. In addition, one of respondent's prior reprimands was for unrelated conduct, recordkeeping violations. We, therefore, determine that a reprimand is adequate discipline in this case.

Member 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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Stanley E. Marcus
Docket No. DRB 11-014

Argued: April 21, 2011

Decided: June 28, 2011

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh						X
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Julianne K. DeCore
Chief Counsel