SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-072
District Docket No. IIIB-2011-0003E

IN THE MATTER OF

PETER JOSEPH BONFIGLIO III

AN ATTORNEY AT LAW

Decision

Argued: May 17, 2012

Decided: August 16, 2012

Cindy M. Perr appeared on behalf of the District IIIB Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a disciplinary stipulation between respondent and the District IIIB Ethics Committee (DEC). The DEC recommended the imposition of a reprimand for

respondent's violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information), RPC 1.16(d) ("[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled"), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation). Respondent urged us to impose an admonition.

For the reasons set forth below, we determine to impose a reprimand for respondent's violations of RPC 1.4(b) and RPC 8.4(c) only.

Respondent was admitted to the New Jersey bar in 1987. At the relevant times, he practiced law at the Turnersville office of Hoffman DiMuzio, a Woodbury law firm. Respondent has no disciplinary history.

According to the stipulation, in June 2001, grievant George M. Krumenacker's daughter Ashley had braces affixed to her teeth, at a cost of $4220. The braces were removed in October 2005 by a different dentist, as the original dentist had moved

away. The new dentist stated that there were "several problems" with Ashley's bite, which would require another set of braces and possible surgery. After a second opinion, Ashley's teeth were returned to braces, at a cost of $6000.

Krumenacker believed that Ashley might have either a malpractice or breach of contract claim against the original dentist. On June 6, 2006, Krumenacker sent an email to respondent, whom he knew through a school basketball program for which they were both coaches.

In the email, Krumenacker detailed the background underlying the potential claims and asked respondent if he handled malpractice claims or could refer him to another attorney who did. Respondent told Krumenacker that he did not handle malpractice matters, but that one of his colleagues did.

Thereafter, according to the stipulation, "[a] series of emails . . . ensued between [Krumenacker] and Respondent regarding [Krumenacker]'s potential malpractice claim, and [Krumenacker's] . . . efforts to obtain evidence of the alleged malpractice."

In February 2007, respondent and Krumenacker met to discuss the potential case. At the meeting, Krumenacker turned over to respondent the dental impressions demonstrating Ashley's

misaligned teeth, before-and-after photographs, and doctor's bills and notes. Respondent advised Krumenacker that the statute of limitations would expire two years after Ashley turned eighteen. The stipulation states that Krumenacker "left this meeting with the understanding that Respondent would consult with his colleague to determine if [Krumenacker] had a viable malpractice lawsuit."[1]

Between May 2007 and August 2008, Krumenacker sent eleven emails to respondent, none of which respondent denied having received. Respondent replied to only one of the emails. Each of the emails is set forth below:

> a. May 22, 2007: E-mail from Grievant to Respondent stating: "Pete, how have you been? we [sic] were wondering what the status is on Ashley braces [sic]. Has the malpractice attorney had a chance to review the case? Also, Eileen was wondering when she could have her color photos back? please [sic] give me an update. Thanks."

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[1] Although it was Ashley who had the potential claims against the dentist, the stipulation refers to Drumenacker as the potential plaintiff. For the sake of consistency, we refer to Krumenacker as the potential plaintiff.

b. June 6, 2007: E-mail from Grievant to Respondent stating: "Pete, You still alive?"

c. June 6, 2007: E-mail from Respondent to Grievant stating: "No. Just Kidding [sic], I am still alive. I will be seeing the attorney again in the beginning of next week. I have given him the file to review with an expert. I'll let you know Monday or Tuesday. Pete."

d. June 26, 2007: E-mail from Grievant to Respondent stating: "anything?"

e. August 1, 2007: E-mail from Grievant to Respondent stating: "Hi Pete, Talk to the malpractice attorney yet? Let me know. Thanks."

f. August 17, 2007: E-mail from Grievant to Respondent stating: "?"

g. September 27, 2007: E-mail from Grievant to Respondent stating: "Like to hear from you."

h. February 28, 2008: E-mail from Grievant to Respondent stating: "Hi! I was wondering what is the status? If not going anywhere, we'd like to pickup our pictures, the molds, and maybe a copy of the meeting notes. Let me know. Thanks."

i. March 25, 2008: E-mail from Grievant to Respondent stating: "Any word?"

j. April 1, 2008: E-mail from Grievant to Respondent stating: "Anything?"

k. August 13, 2008: E-mail from Grievant to Respondent stating in pertinent part: "Pete, Haven't heard from you. I wanted to tell you that my daughter Ashley's braces came off last Thursday. Please contact me so we can discuss the next step."

[S§B¶7a-S§B¶7k.][2]

After respondent received the August 2008 email from Krumenacker, he called Krumenacker and advised him, "for the first time," that Krumenacker "didn't have a case." Krumenacker asked respondent to return the impressions, photographs, bills, and notes that he had given him in February 2007, so that he could obtain a second opinion. Respondent did not return the materials. He also did not return Krumenacker's "several" telephone calls.

On November 24, 2008, Krumenacker sent a registered letter to respondent, which stated, in pertinent part:

> It has been almost two years since my wife Eileen and I met in your offices to discuss the orthopedic [sic] malpractice concerning my daughter Ashley. We have not spoken since meeting by chance in July of 2007 outside of Carmen's delicatessen. I have tried to contract [sic] you on numerous

[2] "S" refers to the stipulation, dated January 19, 2012.

> occasions by phone and email seeking an update on where we stand with the progress of Ashley's case. You have not returned by [sic] calls nor have you responded to my emails.
> At this time, I am requesting the return of my daughter [sic] pictures, impressions, doctor's notes and correspondence, and any notes you may have taken during our meeting which occurred on [sic] February 2007. I will gladly pay you for the notes.
>
> [S§B¶9.]

After respondent received that letter, he called Krumenacker and stated that he was looking for the requested materials.

In January 2009, Krumenacker left a voicemail message for respondent at his office, stating that he would be there the next day to pick up the materials. Respondent called Krumenacker and stated that he believed the materials were "packed away," but that he would retrieve them and drop them off at Krumenacker's home later in the week. He did not.

On February 9, 2009, Krumenacker sent respondent the following email, which contained his telephone numbers: "Pete, You were supposed to contact me last month. . . . Thanks." Krumenacker re-sent the email on March 10, 2009.

By July 30, 2009, Krumenacker still had not heard from respondent. On that date, he sent the following email to the Hoffman firm, via its website:

> In 2005 I contacted Pete Bonfiglio about a medical malpractice lawsuit. . . . At our first meeting with Pete we gave him a set of dental impressions and photos of my daughter's teeth. Peter said he would talk to a malpractice attorney to see if we had a case. After waiting years and years for an answer, Pete finally told me in the Fall of 2008 that we didn't have a case. I requested back from Pete the photos and dental molds so we could get another opinion on the matter. Pete refuses to give them back. He will not return my calls and seems to be avoiding me. Without the pictures and molds we cannot get another legal opinion.
>
> [S§B¶12.]

As a result of this email, respondent called Krumenacker and stated that he was still looking for the materials. Krumenacker did not hear from respondent again.

Ashley turned eighteen on September 14, 2009. Krumenacker filed a grievance against respondent on September 27, 2010.

On March 10, 2011, the DEC investigator interviewed respondent by telephone. Respondent told the investigator that he had spoken about the Krumenacker matter "generally" with two Hoffman firm attorneys, both of whom had informed him that they were not interested in taking on a potential dental malpractice

case. He further stated that he had talked to Hoffman firm attorney Scott McKinley "specifically" about the case and that he had talked to Hoffman firm attorney Michael Glaze "generally" about the matter. Respondent admitted that he did not have any attorney or "any other kind of 'expert'" conduct a formal review of the potential claim.

Respondent also told the investigator that, after his discussions with his colleagues, he verbally advised Krumenacker that the firm would not accept the case and that he should stop by the office and retrieve the materials that he had given to respondent. Respondent could not recall the date of that conversation.

On March 10, 2011, the investigator conducted a telephone interview with attorney McKinley, who stated that, whenever he was asked by a colleague to review a personal injury matter, it was his typical practice to open a file and discuss the matter with the prospective client. If he elected not to accept the representation, he would inform the client, in writing, advise the client of any applicable statute of limitations period, and request that the client retrieve his or her personal property from the firm. He also stated that the client's evidence, if any, would be maintained at the law firm "indefinitely."

With respect to this case in particular, McKinley stated that, although he could "vaguely recall" a general conversation with respondent about "dental malpractice," he never spoke to Krumenacker, reviewed the materials given to respondent, or opened a file.

At oral argument before us, respondent expressed remorse for his wrongdoing and pointed out several factors that he believed mitigated his misconduct. Among them were his admission of wrongdoing, his cooperation with the DEC, the isolated nature of this incident, and the length of his career, which is otherwise unblemished.

Following a review of the record, we are satisfied that the stipulation clearly and convincingly establishes that respondent's conduct was unethical.

This case is unusual, in that the stipulated facts demonstrate that Krumenacker and respondent (or anyone from the Hoffman firm) never entered into an attorney-client relationship and that Krumenacker understood that there was no such relationship.

In June 2006, Krumenacker approached respondent, an acquaintance, who was also an attorney, and asked him whether he handled medical malpractice claims or, if he did not, whether he

could recommend another attorney who did. Respondent informed Krumenacker that he did not handle such claims but that one of his colleagues at the Hoffman firm did.

After Krumenacker had gathered documentation and other evidence to support the potential claim, he and respondent had a meeting, in February 2007. Krumenacker did not leave the meeting with the understanding that either respondent or the Hoffman firm had agreed to represent him. However, Krumenacker did understand that respondent would consult with a colleague to determine whether there was a viable malpractice action.

For the next year-and-a-half, Krumenacker repeatedly asked respondent whether his Hoffman firm colleague was interested in taking on the case, until respondent finally told him that he had no case. At best, then, Krumenacker was nothing more than a prospective client, if that.

"It is clear that an attorney must affirmatively accept a professional undertaking before the attorney-client relationship can attach, whether his acceptance be by speech, writing, or inferred from conduct." Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 146 (App. Div.), certif. den. 113 N.J. 357 (1988) (finding that an attorney who declines a case and chooses to offer reasons for doing so need not "give his full, complete,

and informed judgment," but rather only say what is "professionally reasonable in the circumstances). This is not to say, however, that "threshold communications between attorney and prospective client do not impose certain obligations upon the attorney." Ibid.

In 1956, the Supreme Court declared:

> In addition to the duties and obligations of an attorney to his client, he is responsible to the courts, to the profession of the law, and to the public. He is bound even in the absence of the attorney-client relation to a more rigid standard of conduct than required of laymen. To the public he is a lawyer whether he acts in a representative capacity or otherwise.
>
> In re Gavel, 22 N.J. 248, 265 (1956) [citations omitted].

Thus, an attorney's fiduciary obligation "extends to 'persons who, although not strictly clients, he has or should have reason to believe rely on him.'" Ibid. Accord In re Schwartz, 99 N.J. 510, 517 (1985), and In re Hurd, 69 N.J. 316, 330 (1976).

An attorney's conduct that does not involve the practice of law or arise from a client relationship will not excuse an ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). Offenses that evidence ethical

shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995).

In this case, Krumenacker first contacted respondent in his capacity as an acquaintance, who happened to be an attorney. It would have been unreasonable, under those circumstances, to expect that respondent owed him any kind of duty or ethical obligation at that point. However, once respondent met with Krumenacker, took custody of the evidence that Krumenacker had collected for the very purpose of having it reviewed by an attorney to determine whether he had a viable malpractice claim, and led Krumenacker to believe that he would consult with another Hoffman firm attorney to obtain an answer, the relationship transitioned to the point where it was reasonable for Krumenacker to rely on respondent to follow through and consult with the colleague about the viability of a malpractice claim. As such, Krumenacker had a reasonable expectation that

respondent would keep him informed and deal with him truthfully. Respondent failed to do either.

A few months after their initial meeting, respondent expressly stated to Krumenacker that he had given the file to his colleague "to review with an expert." This was not true. Indeed, respondent later admitted that he "did not have the matter formally reviewed by any attorney or by any other kind of 'expert.'" Krumenacker, however, did not know of respondent's falsehood. As a consequence, Krumenacker spent more than a year asking respondent about his colleague's and the expert's conclusion, before respondent finally told him that he "didn't have a case."

Krumenacker's sole purpose in contacting respondent was to determine whether he had a case against the dentist. Respondent agreed to investigate and then get back to him with the results. Krumenacker had the right to rely on respondent to follow through with that undertaking and to tell him the truth with respect to the investigation. Respondent's false claim to Krumenacker that he had given the file to a colleague to review with an expert violated RPC 8.4(c).

In addition, respondent violated RPC 1.4(b), which requires a lawyer to "keep a client reasonably informed about the status

of a matter and promptly comply with reasonable requests for information." Admittedly, Krumenacker was not a client, but, as with RPC 8.4(c), the nature of the parties' relationship required that respondent, at the very least, reply to Krumenacker's inquiries about the review of his claim.

With respect to the remaining RPCs, that is RPC 1.1(a), RPC 1.3, and RPC 1.16(d), we are unable to find that respondent violated these rules.

RPC 1.1(a) prohibits an attorney from handling or neglecting a matter entrusted to the lawyer in a manner that constitutes gross negligence. RPC 1.3 requires an attorney to "act with reasonable diligence and promptness in representing a client."

These RPCs require an agreement between an attorney and a client that the attorney will represent the client with respect to the particular matter at issue. Such was not the case here. Nevertheless, Gavel and its progeny do not change the result because Krumenacker had no expectation that the firm was representing his interests and moving forward in asserting them in any way. Rather, Krumenacker was waiting for a determination as to whether a viable claim even existed.

RPC 1.16(d) is also inapplicable. That rule requires, among other things, that, "[u]pon termination of representation," an attorney must "surrender[] papers and property to which the client is entitled." As with RPC 1.1(a) and RPC 1.3, RPC 1.16(d) presumes an attorney-client relationship. Here, there was none. Moreover, even if there were such a relationship, it is not clear that respondent violated the rule.

Indeed, respondent did not refuse to surrender Krumenacker's property. Instead, he could not locate the materials that Krumenacker had turned over to him. Under the circumstances, the mere inability to locate property is not a violation of RPC 1.16(d).

There remains for determination the quantum of discipline to be imposed on respondent for his violations of RPC 8.4(c) and RPC 1.4(b).

A misrepresentation to a client requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Wiewiorka, 179 N.J. 225 (2004) (attorney misled the client that a complaint had been filed; in addition, the

attorney took no action on the client's behalf and did not inform the client about the status of the matter and the expiration of the statute of limitations); In re Onorevole, 170 N.J. 64 (2001) (attorney made misrepresentations about the status of the case; he also grossly neglected the case, failed to act with diligence, and failed to reasonably communicate with the client; prior admonition and reprimand); In re Till, 167 N.J. 276 (2001) (over a nine-month period, attorney lied to the client about the status of the case; the attorney also exhibited gross neglect; no prior discipline); and In re Riva, 157 N.J. 34 (1999) (attorney misrepresented the status of the case to his clients; he also grossly neglected the case, thereby causing a default judgment to be entered against the clients and failed to take steps to have the default vacated).

Notwithstanding the absence of an attorney-client relationship, the facts of this case imposed certain professional obligations upon respondent, which he did not fulfill. Instead, he lied to Krumenacker. He told him that an attorney was reviewing the file with an expert, knowing that was not true. He also failed to reply to Krumenacker's multiple requests to learn the status of the review. The previously cited cases establish that, for these infractions, respondent

should receive a reprimand, as he and the DEC have stipulated. The mitigating factors identified by respondent do not justify deviating from precedent.

Member Clark 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 Peter Joseph Bonfiglio, III
Docket No. DRB 12-072

Decided: May 17, 2012

Disposition: August 16, 2012

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

Julianne K. DeCore
Chief Counsel