SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-311
District Docket No. VIII-2010-0045E

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| IN THE MATTER OF | : |
| GERALD M. SALUTI | : |
| AN ATTORNEY AT LAW | : |

Decision

Argued: January 17, 2013

Decided: March 27, 2013

Glynn J. Dwyer, Jr. appeared on behalf of the District VIII Ethics Committee.

Thomas P. Scrivo appeared on behalf of respondent.

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 three-month suspension filed by the District VIII Ethics Committee (DEC). The complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter or to comply with reasonable requests for information), RPC 1.4(c) (failure to explain a matter to the

extent reasonably necessary to permit the client to make informed decisions about the representation), RPC 1.5(a) (charging an unreasonable fee), and RPC 8.1(b) (failure to comply with reasonable requests for information from a disciplinary authority). The charges arose in connection with respondent's conduct in a criminal matter. For the reasons expressed below, we determine that a reprimand is appropriate discipline.

Respondent was admitted to the New Jersey bar in 1992. At the relevant time, he maintained a law office in Newark, New Jersey.

In 2007, respondent was admonished for conduct spanning a two-year period. There, he had been retained, in September 2003, for a criminal matter. His communications with his client broke down, when his wife became seriously ill. In imposing only an admonition, we considered that respondent was "beset" by his wife's illness at the time, that he made restitution to his client, and that he had no disciplinary history. In the Matter of Gerald M. Saluti, Jr., DRB 07-117 (June 22, 2007).

In 2012, respondent was again admonished for his 2003 representation of a client in connection with a second post-conviction relief application and potential appeal of his conviction. Respondent violated RPC 1.5(b) by failing to

communicate the basis or rate of the fee to the client. There, too, we considered that respondent was experiencing personal problems at the time of his misconduct. In the Matter of Gerald M. Saluti, Jr., DRB 11-358 (June 22, 2007).

The DEC hearing in this matter was conducted at the Adult Diagnostic and Treatment Center in Avenel, New Jersey. Grievant Keith Brownstein's ex-wife, Michele, retained respondent to represent Keith in connection with his August 2005 arrest for first-degree aggravated sexual assault of a family member, his sister. Bail was set at $150,000. Keith confessed to the conduct. He was indicted in November 2005.

Respondent's oral fee agreement called for a $10,000 retainer and an additional $5,000, if the matter proceeded to trial. Respondent never provided the Brownsteins with a writing setting forth the basis for the fee, even though he had not previously represented them. Michele paid respondent $8,200 of the $10,000 fee. Respondent agreed to start working on the case and did not condition it on receiving the full retainer.

According to Michele, she spoke to respondent occasionally and met with him several times but, for the most part, her testimony did not elaborate on the substance of their conversations. Keith claimed the he met with respondent only twice: once at the prison, in September 2005, for no more than

five minutes, and once at a November 2005 Hunterdon County Superior Court appearance.[1] Respondent, however, claimed that he met with Keith on "multiple" occasions: at least twice at the jail, for more than five minutes, and at the January 6, 2006 arraignment/status conference. He later clarified that by multiple he meant more than one or two times, but could only recall specifically meeting with Keith three times.

During the first court appearance, respondent sought to be substituted in as Keith's counsel, in place of the public defender. The judge instructed respondent to file a notice of appearance on Keith's behalf, but Keith testified that he knew "for a fact" that it was never filed. Respondent, in turn, asserted that he had filed a substitution of attorney form and offered Exhibit R-4 as proof. The document contained the signatures of Peter Habapemarco, as the withdrawing public defender, and respondent, as the substituting attorney. The document was not dated. Respondent did not submit a copy of the document stamped "filed."

According to Keith, during their initial meeting, respondent told him that he did not trust the jail. He was concerned that their conversations were being monitored. Keith

[1] The presenter conceded that Keith was mistaken about the date; the court appearance was on January 6, 2006.

found respondent to be "very paranoid. Edgy." Respondent also told Keith that he was working to obtain discovery, but Keith never saw any of it. Respondent claimed that he told his sexual-assault clients housed in county jails that "they absolutely shouldn't keep any of their discovery with them. And they absolutely shouldn't talk about their case to anyone in the county jail" because they could be "raped or hurt," given the nature of the offenses they committed. Thus, he claimed that the reason he did not provide Keith with a copy of his discovery was that it would not be seen by others.

Keith further asserted that, at their initial meeting, respondent made an "off-the-wall statement" to him: "why didn't you just kill her? [presumably, Keith's sister] I could have gotten you off. That was his exact words. I'll never forget it." Respondent denied making that statement: "I don't want to answer that question. That's most ridiculous - - no. Answer is no. No. No."

Keith stated that, after the January 2006 court appearance, he had no further contact with respondent. He received no telephone calls, personal visits, or any correspondence from him. Keith sent letters to respondent with information that he deemed significant to his defense. He claimed that, because respondent had not filed a substitution of attorney, public

defenders were sent to represent him for subsequent court appearances. He refused their representation because Michele assured him that she had retained an attorney.

Michele terminated respondent's representation in February 2006. In March 2006, represented by Jeffrey Weinstein, Keith "bailed out." Keith ultimately entered a guilty plea and was sentenced to seven years' imprisonment at the Avenel Adult Diagnostic and Treatment Center, with the requirement that he serve eight-five percent of the sentence.

Respondent's version of his contacts with Keith differed. He claimed that, when he first met with Keith, Keith had not yet been indicted. The second time he saw Keith "was to go over the discovery with him and show him the indictment." He did not recall specifically when he received discovery. He stated that it was his general practice to review discovery with his clients but could not state "in this particular specific instance for a fact" that he had done so. He, nevertheless, reiterated that he had reviewed the discovery with Keith, while Keith was in jail.

At some point, respondent received a copy of an initial December 6, 2006 plea offer that had been submitted to the public defender, calling for a ten-year sentence and for Keith to serve eighty-five percent of the sentence. According to respondent, he discussed the plea offer with Keith and the

assistant prosecutor. His goal was to negotiate a lower sentence for Keith. He claimed that he had the discussion with Keith during their initial meeting, and "any subsequent meeting [he] would have had with him." He recalled that he had met with Michele, as well as Keith's father, and that, based on the nature of the charge, he did not think that they were "interested" in having Keith "come out of jail." Respondent added that, in New Jersey, with any first- or second-degree crime, there is no entitlement to a ten percent cash alternative for bail. One alternative is the use of a bail bondsman; another is to post a parcel of property in lieu of a bond. Respondent claimed that he discussed the alternatives with Keith. Later, however, respondent stated that he did not have a specific recollection of the discussion with Keith, although it was his general practice to do so.

Michele and Keith testified that respondent provided them with no advice about posting bail. He never advised them that he needed only to post ten percent of the bail for Keith to be released from jail. Keith testified that, because he had never been involved in a criminal matter before, he was not familiar with the bail process. He claimed that he could not post the entire bail amount, was not released from prison and, therefore, lost his job.

The Brownsteins had been experiencing financial problems, before Keith's incarceration, and had missed several mortgage payments. They were likewise unable to make the mortgage payments, after Keith's incarceration. As a result, Michele put their house up for sale. Although she admitted that respondent had been retained for the criminal matter, she testified that respondent had taken the house listing agreement to Keith for his signature.

On an unspecified date, the Brownsteins obtained a purchaser for their house. The sale would have netted them approximately $40,000. Keith was required to sign the paperwork for the sale. The Brownsteins assumed that, because respondent had taken the listing documents to Keith, he would do so for the sale papers as well. Respondent, however, ignored Micheles's telephone calls.

Michele believed that only an attorney could take those papers to the prison. She asserted that, because the papers were not timely signed, the sale fell through and the house went into foreclosure.

At one point, Michele became dissatisfied with respondent's services. She discharged him in February 2006. Respondent agreed to the termination of the representation because he was experiencing "family issues," he was going through a hard time

with his wife, and it was too much for him to handle. He told Michele that he would refund the $8,200 retainer and turn over Keith's file. She received neither. She tried to telephone respondent approximately five times, after he had agreed to return the money and papers, but he would not reply to her telephone calls, even though she left messages at his office. Keith's new attorney, Jeffrey Weinstein, also wrote to respondent to request the fee refund.

Keith stated that the purpose of his grievance was to see that respondent's pattern of practice did not continue and to obtain the return of some of the money (the fee) that was "wrongfully taken from them."

Because respondent failed to return the retainer, as promised, Keith filed for fee arbitration. Both Michele and Keith participated at the fee arbitration hearing. Respondent's failure to file an answer to the fee arbitration complaint barred him from participating at the hearing (held at the East Jersey State Prison). On March 6, 2009, the fee arbitration committee awarded the Brownsteins a full refund of the $8,200 retainer. As of the date of the DEC hearing, respondent had neither refunded any of the fee, nor contacted the Brownsteins about tendering any portion of their award. Although respondent

stated that he performed some services in Keith's matter, he admitted that some of the fee should have been returned.

Respondent claimed that it was probably an oversight that he did not file a response in the fee arbitration matter, as his wife was very sick. According to respondent, in 2004, about two weeks after their wedding, his wife was diagnosed with colo-rectal cancer. Since that time, she has had approximately seventeen surgeries. Respondent explained some of the problems and damage that his wife suffered: removal of the tumor, inability to "close the fistula," requiring a "diversion," and the need for a colostomy bag for four years, during which time she underwent additional surgeries to correct the problem. She still had the colostomy bag and was still undergoing surgeries at the time of the fee arbitration hearing (December 2008).

According to respondent if his wife was scheduled for surgery, he would miss two or three weeks of work at a time. In the midst of his wife's medical problems, they had two children: one in 2006 and the other in 2008. Respondent admitted that his office remained open during the periods of his wife's problems and that he continued to take on new cases, although at "a much slower pace." As his wife's condition improved he was able to build his practice back up.

Respondent admitted that he did not turn over Keith's file to Michele, but asserted that he did not have an attorney/client relationship with her and that Keith did not want her to know certain aspects of the case. Keith's file contained letters from Christie, a woman with whom he had had an affair, during his marriage. Keith's January 6, 2006 letter to respondent asked him not to discuss Christie with Michele. At the time that he wrote the letter, Keith was confident in respondent's ability to represent him, but conceded that his family was not informing him of certain aspects of his case because he was on suicide watch.

Respondent believed that his fee was reasonable and noted that it was the same amount charged by Weinstein. Because his office is in Newark and the case was in Hunterdon County, he felt that he could have charged more for his services. He noted further that he charges for his years of experience, as well as his professional name and reputation in the criminal courts.

As a result of his wife's illness, her inability to work, and her medical bills, respondent filed for bankruptcy. He testified that his wife's illness had a drastic effect on his practice and that he had been unable to satisfy several fee arbitration awards. The individuals to whom he owed fee arbitration awards filed proofs of claim against him. The

Supreme Court determined that the fee arbitration awards were not dischargeable in bankruptcy. Keith's fee arbitration award was listed as a debt on respondent's bankruptcy petition.

Respondent admitted that, during the course of his wife's illness, he became lax with the preparation of written retainer agreements. Currently, he is representing approximately 150 clients and is obtaining executed fee agreements. He could not find one in Keith's file, however, and acknowledged that he probably had not prepared one.

Respondent did not reply to the DEC's letters requesting a response to the ethics grievance dated August 4, 2010, October 15, 2010 and July 13, 2011. The first letter from the DEC referred to respondent's statement that a reply would be forthcoming.

As to respondent's lack of cooperation with disciplinary authorities, he stated that having a "sick spouse . . . drastically affects your practice". In addition, he claimed that he is responsible for three children from a prior marriage, aged 17, 14, and 11. He was basically "mom and dad" to all of the children. With his wife at home sick, he did not keep his "own eye on the ball" and did not participate as well as he should have, because he had "a lot of stuff going on."

Following the DEC hearing, the hearing panel's discussion of the matter was transcribed. The panel chair stated that she did not believe the grievant at all. Another panel member noted that there were credibility issues on both sides.

The DEC did not find clear and convincing evidence of gross neglect (RPC 1.1(a)). It was not convinced that respondent had failed to discuss bail options with Keith. In addition, the DEC did not find that respondent was retained as a real estate attorney for the Brownsteins and, therefore, did not find that he was responsible for their mortgage foreclosure, noting that the Brownsteins had become delinquent on their mortgage payments before Keith's incarceration. For the same reasons, the DEC did not find that respondent lacked diligence (RPC 1.3).

Similarly, the DEC did not find respondent guilty of violating RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter or to comply with reasonable requests for information). It concluded that respondent communicated with Keith about his case and met with him, immediately after being retained. The DEC remarked that, because Keith had not yet been indicted, there was little information respondent could convey to him.

The DEC found neither Keith nor respondent particularly credible and, because they disagreed about the information

respondent provided about bail options, it did not find clear and convincing evidence that respondent violated RPC 1.4(b) in that regard. Because the DEC rejected the claim that respondent was responsible for the foreclosure, it did not find a violation of RPC 1.4(b) as to that claim either.

The DEC also rejected "the notion that Grievant spent more time in jail because he did not have information regarding bail." There was no evidence presented that bail would have been posted with such information and there was no testimony that Keith had inquired about bail.

The DEC found no violation of RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation). It noted that respondent produced a letter from Keith directing respondent to refrain from discussing certain issues with Michele. The letter further referred to issues previously discussed between them and indicated that Keith was satisfied with the representation. The DEC again noted that the bail issue had no merit, finding no violation of RPC 1.4(c) in that regard.

As to the charged violation of RPC 1.5(a), the DEC found that respondent's initial $10,000 fee was reasonable, but agreed with the fee arbitration committee's decision on the refund of the entire $8,200. Although the DEC was troubled by respondent's

failure to return the money to the Brownsteins, it did not find that he violated RPC 1.5(a).

As to RPC 8.1(b) (failure to reply to reasonable requests for information from a disciplinary authority), the DEC found that respondent failed to reply to three requests for information during the ethics investigation and that he did not cooperate with the DEC until he filed an answer to the ethics complaint.

In mitigation, the DEC considered respondent's wife's illness, but it did not give it great weight, because respondent continued to practice law and to accept new clients. The DEC was concerned that respondent continued to accept retainers, despite his inability to adequately handle client matters.

The DEC considered the following as aggravating factors: 1) respondent had more than one year to reply to the DEC investigators, but did not do so and did not request an extension; 2) he failed to reply to other authorities (fee arbitration); and 3) he failed to pay the fee arbitration award. The DEC found that, because respondent was discharged from the representation a mere five months after he had been retained, he should have immediately returned at least a portion of the money. The DEC underscored the fact that respondent received $8,200 for visiting the jail on a few occasions and appearing in

court only once and that "at least four Fee Arbitration awards [were] granted against him due to his default." The DEC also considered respondent's prior two admonitions. Based on these factors, the DEC recommended a three-month suspension.

Respondent's counsel filed a brief with us, in which he argued that a three-month suspension for a sole violation of RPC 8.1(b) is not warranted. Respondent's counsel asserted, in the preliminary statement, that while, respondent's failure to cooperate was inexcusable, it was caused by "the distraction arising out of his wife's serious and prolonged illnesses." He cited respondent's testimony that "having a sick spouse is a difficult thing, It drastically affects your practice" and added that respondent's failure to cooperate was a direct result of the "extenuating personal circumstances surrounding his wife's illness at the time of the ethics investigation." Counsel asked for discipline less severe than a suspension and relied on case law to establish that a suspension is not warranted for a sole violation of RPC 8.1(b). Counsel also attached what he termed to be a true and accurate copy of a summary of respondent's wife's relevant medical history. He did not supply, however, any medical records to support the chronology and did not explain by whom or how that exhibit was created.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence.

The complaint alleged that respondent was guilty of violating RPC 1.1(a) because 1) he made only one appearance at the arraignment, 2) he did not file a notice of appearance, 3) he did not advise Keith about his ability to secure a bond for his release, and 4) Keith was incarcerated for a prolonged period, which resulted in financial hardship and the ultimate loss of his home, through foreclosure.

As the DEC noted, there was no evidence to clearly and convincingly establish that Keith's prolonged incarceration resulted in the foreclosure of his home. The Brownsteins were already facing financial difficulties before Keith's incarceration.

There is little proof of what services respondent provided on Keith's behalf. Other than his sole appearance at the arraignment, there is no evidence that he did much more. The amount of contact respondent had with Keith or other members of Keith's family is in dispute. Although respondent was discharged one month after the arraignment, as of Keith's January 6, 2006 letter, Keith had not expressed any dissatisfaction with respondent's services. Moreover, respondent's failure to file a

substitution of attorney in and of itself does not establish gross neglect.

As to the bail issue, the testimony of Keith and respondent differed considerably. Respondent insisted that he had advised Keith about the bail; it was his standard practice to advise all clients about their bail options and he probably did so here. He argued further, that because of the nature of Keith's crime, his family may not have wanted him released at the time. Keith and Michele, however, were equally adamant that respondent had failed to advise them on that issue. Moreover, on the very day that Weinstein took over the case, Keith "bailed out."

Clearly Keith's deprivation of freedom would constitute gross neglect on respondent's part. The factors suggesting that respondent did not tell Keith about bail options are Keith's immediate release, once Weinstein was retained, Keith's family's provision of the funds to hire respondent and for the bail, and respondent's admission that he was distracted by his wife's continuing health problems. However, because the standard of proof is clear and convincing and because the DEC found neither party particularly credible on this issue that turns on credibility, we dismiss this charged violation.

The complaint further charged respondent with having violated RPC 1.3 for similar reasons, as well as for failing to

refund the retainer and to return Brownstein's file. These later derelictions are more properly a violation of RPC 1.16(d), which requires, upon termination of the representation, that the attorney refund any advance fee that has not been earned and surrender papers or property to which the client is entitled. While respondent did neither, he was not charged with having violated this rule. RPC 1:20-4(b).[2]

As to the charged violation of RPC 1.5(a) (failing to charge a reasonable fee), there is no evidence that the fee was improper; only that respondent failed to earn the fee and failed to refund its unearned portion. Again, RPC 1.16(d) is the applicable rule, but it was not charged here. RPC 1.20-4(b)

The complaint also charged respondent with having violated RPC 1.4(b) and (c), based on his failure to inform Keith about his bail options and the Brownstein's inability to contact respondent, despite their numerous attempts to reach him. As previously explained, there is no clear and convincing evidence that respondent failed to notify Keith about the bail options. Moreover, Michele testified that she had a number of conversations with respondent, but that he would not return her

[2] This rule states that a complaint "shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated."

calls when she sought his assistance with regard to the sale of the property. The record does not clarify when those attempts were made. If Michele made the calls after she discharged him, he had no obligation to return them. We, therefore, dismiss these charges as well.

Respondent did, however, fail to cooperate with the DEC's investigation. He failed to reply to three letters from the DEC seeking a response to the grievance, even after advising the first investigator that a response was forthcoming. It was not until the DEC filed the formal ethics complaint that respondent retained counsel, filed an answer, and participated at the DEC hearing. In assessing discipline, we cannot ignore his ethics history. He is no stranger to the ethics system. He was twice previously admonished. Each time, we were sympathetic to his personal plight. As the DEC properly noted, however, his wife's predicament did not prevent him from practicing law or accepting additional cases. We, therefore, do not give great weight to his wife's condition as a mitigating factor, particularly because he could have requested an extension from the DEC.

Generally, failure to cooperate with a DEC's investigation results in an admonition, if the attorney does not have an ethics history. See, e.g., In the Matter of Lora M. Privetera, DRB 11-414 (February 21, 2012) (attorney submitted an inadequate

reply to an ethics grievance; thereafter, she failed to cooperate in the ethics investigation until finally retaining ethics counsel to assist her); In the Matter of Douglas Joseph Del Tufo, DRB 11-241 (October 28, 2011) (attorney did not reply to the DEC's investigation of the grievance and did not communicate with the client); In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (attorney failed to comply with DEC investigator's request for information about the grievance; the attorney also violated RPC 1.1(a) and RPC 1.4(b)); and In the Matter of Marvin Blakely, DRB 10-325 (January 28, 2011) (after his ex-wife filed a grievance against him, attorney ignored numerous letters from the district ethics committee seeking information about the matter; the attorney's lack of cooperation forced ethics authorities to obtain information from other sources, including the probation department, the ex-wife's former lawyer, and the attorney's mortgage company).

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) and In re DeBosh, 174 N.J.

336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension).

In light of respondent's ethics history, we determine that he deserves a reprimand for his failure to cooperate with the DEC investigator. Member Gallipoli voted to impose a censure. 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 Gerald M. Saluti
Docket No. DRB 12-311

Argued: January 17, 2013

Decided: March 27, 2013

Disposition: Reprimand

| ***Members*** | Disbar | Suspension | Reprimand | Censure | Disqualified | Did not participate |
|---|---|---|---|---|---|---|
| Pashman | | | X | | | |
| Frost | | | X | | | |
| Baugh | | | | | | X |
| Clark | | | X | | | |
| Doremus | | | X | | | |
| Gallipoli | | | | X | | |
| Wissinger | | | X | | | |
| Yamner | | | X | | | |
| Zmirich | | | X | | | |
| Total: | | | 7 | 1 | | 1 |

Julianne K. DeCore
Chief Counsel