

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-368
District Docket No. IIA-2011-0010E

IN THE MATTER OF
NOAH M. BURSTEIN
AN ATTORNEY AT LAW

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Decision

Argued: February 21, 2013

Decided: April 29, 2013

Nancy Saccente appeared on behalf of the District IIA 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 discipline (reprimand) filed by the District IIA Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b) (failure to keep a client reasonably

informed about the status of a matter and failure to comply with a client's reasonable requests for information).¹

We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1975. He has no history of discipline.

Respondent and the presenter entered into the following stipulation of facts, prior to the DEC hearing:

Respondent represented the grievant, Samuel Rodriguez, in a personal injury action, following a multi-vehicle accident in 2005. According to respondent, Rodriguez' injuries were serious.² Respondent timely filed a suit against all appropriate parties, but not all parties were properly served, including the primarily liable party.

Respondent testified that the case "was probably just beyond [his] capacity." He did not realize the error in service until shortly before the trial date, in early 2009. He was ill

¹ No subsection of RPC 1.4 was specified, but (b) is clearly intended, as seen from the language of the complaint.

² In her closing statement, the presenter contended that Rodriguez' case could have been worth half a million dollars. There is no evidence in the record about the value of Rodriguez' injuries. Therefore, the presenter's statement has not been considered.

at the time and he engaged another attorney, who filed a motion for substituted service and for an extension of discovery time to allow service on the additional defendants. The motion was denied. Thereafter, the case was dismissed, although it is unclear in the record why that occurred.

In July 2009, respondent "filed an appeal of the denial." He attended an appellate settlement conference, in September 2009. His recollection was that he received a letter, directing him not to file a brief until he had received a scheduling order. He did not recall receiving a briefing schedule and never filed a brief.

In December 2009 or January 2010, respondent called the court, at which time he learned that the case had been dismissed. He did not recall having received a notice that the case was going to be dismissed. He did not know the basis for the dismissal.³ Respondent took no action to restore the appeal. Rodriguez then hired another attorney, who was unsuccessful in restoring the matter.

³ The presenter's understanding was that the case was dismissed for respondent's failure to file a brief. There is nothing in the record about the reason for the dismissal.

Although respondent and Rodriguez communicated during the course of the matter, respondent did not timely advise him that the complaint had been dismissed for lack of prosecution, that the appeal had been dismissed, and that he had taken no action to reinstate the appeal. Respondent testified that he "sugarcoated" his communication with Rodriguez because he was embarrassed and because he believed that he could have the case restored.

In October 2010, respondent contacted Rodriguez, explained that he had "made a mistake" in the case, turned over the file to him, and suggested that he retain another attorney.

Respondent testified that, when Rodriguez' case was coming to trial, he was suffering from depression, for which he did not seek treatment. He was also experiencing memory problems in 2008 and 2009.⁴ In addition, he was facing financial problems. During respondent's testimony, he apologized to Rodriguez (who was not present), the DEC, and the bar for his actions.

Respondent stipulated that he violated RPC 1.1(a), RPC 1.3, and RPC 1.4.

⁴ Respondent testified about a number of additional health problems that he experienced, but their onset post-dated his infractions in the Rodriguez case.

The presenter recommended an unspecified period of suspension.

The DEC found that respondent failed to ensure that all parties were timely served, failed to file a timely motion for substituted service and/or extension of discovery, and failed to pursue the appeal, in violation of RPC 1.1(a) and RPC 1.3.

The DEC also concluded that respondent violated RPC 1.4 by failing to timely advise Rodriguez that the complaint had been dismissed, that the appeal had been dismissed, and that no additional measures had been taken to re-open the appeal.

In determining a sanction, the DEC considered mitigating and aggravating factors. In mitigation, the DEC considered that respondent had no record of prior discipline, readily admitted his wrongdoing, was contrite and remorseful, and was not motivated by personal gain.

The DEC rejected respondent's testimony about his medical conditions, because they occurred after Rodriguez' case had been dismissed. Moreover, respondent did not offer expert testimony or medical documentation about his conditions. The DEC did, however, note that respondent had difficulty "recalling many basic factual details about the case and reasons for its dismissal" and that he indicated that his family had urged him

to consult with a neurologist or mental health professional for his memory problems. The DEC could not, without expert testimony, determine whether respondent was experiencing a medical condition that affected his memory at the time that Rodriguez' case was dismissed.

In aggravation, the DEC considered respondent's failure to remedy the dismissal of Rodriguez' case by appropriately pursuing an appeal or reinstatement of the appeal.

The DEC recommended that respondent be reprimanded. In addition, the DEC recommended that respondent practice under the supervision of a proctor for at least two years, provide proof of his fitness to practice law, submit periodic reports to the OAE evidencing his compliance with his treatment plan until discharged, be required to complete CLE classes in law practice management and in ethics, and whatever other conditions are deemed appropriate.

Following a de novo review, we are satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. Respondent failed to properly serve all appropriate parties in his client's lawsuit, failed to correct his error and, after filing an appeal on his client's behalf, allowed the appeal to

be dismissed, presumably as a result of his failure to file a brief. Moreover, he failed to be forthcoming with his client about his derelictions, choosing instead to "sugarcoat" his communications to keep the truth of the matter from the client. Respondent, thus, violated RPC 1.1(a), RPC 1.3, and RPC 1.4(b).⁵

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. See, e.g., In the Matter of Edward Benjamin Bush, DRB 12-073 (April 24, 2012) (admonition for attorney who failed to reply to his client's multiple telephone calls and letters over an eleven-month period and lacked diligence in handling the matter, as he failed to follow through on his agreement to file a complaint, an order to show cause, and other pleadings); In

⁵ Respondent's "sugarcoating" his communications with Rodriguez is tantamount to either affirmatively misrepresenting the status of the matter to his client or doing so by silence. In re Kasdan, 115 N.J. 472, 488 (1989), and In re Rifai, 206 N.J. 553 (2011). However, because respondent was not charged with misrepresentation, we make no finding in that regard. R. 1:20-4(b).

the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (admonition for attorney who grossly neglected a federal civil rights action and a chancery foreclosure matter and failed to communicate with the client; the attorney also failed to reply to the disciplinary investigator's requests for information about the grievance); In re Russell, 201 N.J. 409 (2009) (admonition for attorney whose failure to file answers to divorce complaints against her client caused 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 Rosalyn C. Charles DRB 08-290 (February 11, 2009) (attorney failed to respond to his client's attempts to communicate with him about the status of her divorce matter; his inaction led to the dismissal of the client's complaint for failure to prosecute; mitigating factors included the attorney's unsuccessful attempt to have the complaint reinstated and his admission of wrongdoing); In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (admonition imposed when 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) (admonition for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior admonition for similar conduct); In re Uffelman, 200 N.J. 260 (2009) (reprimand imposed where the attorney was found guilty of gross neglect, lack of diligence, and failure to communicate with a 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 Aranquren, 172 N.J. 236 (2002) (reprimand for attorney who 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) (reprimand for attorney guilty of lack of diligence and failure to communicate with clients; extensive ethics history); and In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure 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).

At first glance, this case would appear to merit an admonition. The attorney in Dargay was admonished for conduct similar to respondent's, even though she had been previously admonished. Here, respondent has not been previously disciplined. Thus, an admonition would appear to be sufficient discipline here.

There is, however, an additional factor to consider: the harm to the client in this case was significant. By respondent's own admission, Rodriguez' injuries were severe, necessitating back surgery and ten-to-twelve days in the hospital. He collected only \$35,000. In Uffelman, the attorney received a reprimand for misconduct that would ordinarily have warranted an admonition because of the harm to the client. In light of the severe harm to Rodriguez, a reprimand is appropriate here as well.

In addition, in view of respondent's testimony about his memory loss, the DEC's recommendation that he be required to submit proof of fitness is appropriate. To that end, within ninety days of the date of the Court order, respondent is to submit to the Office of Attorney Ethics (OAE) a report by a health professional approved by that office, attesting to his medical fitness to practice law. We find that the other


conditions suggested by the DEC, specifically, a proctor, periodic reports to the OAE, and CLE courses, are unnecessary, in light of the fact that respondent has not been disciplined since his 1975 bar admission and that his conduct appears to have been an aberration.

Member Baugh recused herself.

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

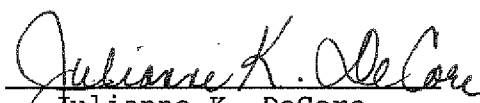
In the Matter of Noah M. Burstein
Docket No. DRB 12-368

Argued: February 21, 2013

Decided: April 29, 2013

Disposition: Reprimand

<i>Members</i>	Disbar	Suspension	Reprimand	Dismiss	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