

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-047
District Docket No. XI-2012-0002E

IN THE MATTER OF :
ERIC M. WINSTON :
AN ATTORNEY AT LAW : Decision

Argued: May 15, 2014

Decided: June 17, 2014

Joseph C. Perconti appeared on behalf of the District XI Ethics Committee.

Through counsel, 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 XI Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1(a) (gross neglect),¹ RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of

¹ The complaint mistakenly cited another RPC (3.2) to support the charge of gross neglect. That rule addresses an attorney's failure to treat with courtesy and consideration all
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diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the matter, mistakenly cited as RPC 1.4(a)), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). We agree with the DEC that a reprimand is the appropriate discipline in this matter.

Respondent was admitted to the New Jersey bar in 2002. He has no disciplinary history.

At the outset of the disciplinary hearing, the presenter withdrew count two of the complaint, which charged respondent with a pattern of neglect. At the ethics hearing, respondent admitted the balance of the charged violations.

Respondent was employed as an associate by the law firm of Fusco & Macaluso, LLC ("the firm") from 2006 through 2008. He was responsible for handling municipal court matters, departmental hearings, departmental interviews, civil and criminal Superior Court cases, and appeal hearings at the

(footnote cont'd)

persons involved in the legal process and to expedite litigation consistent with the interests of the client. As seen below, we dismissed the charged violation of RPC 3.2.

administrative level. Respondent met with and represented clients in nearly every county in the State of New Jersey.

The firm assigned respondent to represent John W. Kelly, the grievant, in an employment matter. Kelly was discharged from his employment as a county corrections officer with the County of Gloucester, because he failed a drug test. The purpose of the representation was to file an appeal, in the Appellate Division, from the Merit System Board's determination in the employment matter. The firm did not represent Kelly before the Merit System Board.

Respondent failed to file the required appellate brief in Kelly's matter, resulting in the appeal's dismissal. Nonetheless, respondent misrepresented to Kelly that the brief had been timely filed and that the appeal was proceeding apace. By way of explanation and not excuse, respondent testified that, at the time of the Kelly appeal, he was leaving the firm and was preparing a memorandum for the transition of his caseload. He discovered the completed brief in the Kelly file and realized that it had not been filed. He gave the brief to another associate, asking him to try to file it out of time. Respondent accepted responsibility for the failure to file the brief. He

stated that, although he had done the work, through his own neglect, the brief had not been filed.

Subsequently, Kelly filed a legal malpractice complaint against both respondent and the firm. Kelly settled the civil matter with the firm, which paid its share of the settlement. He also settled the matter with respondent for \$10,000, payable in monthly installments over two years. The first payment of \$1,000 was due sixty days from the date of the agreement. Respondent has failed to make any of the payments contemplated by the agreement.

In mitigation, respondent, through his attorney, explained that, at the time of the conduct, he was handling a large volume of work and was relatively inexperienced. During his testimony, respondent added that he was struggling to make the payments to Kelly because, at the time that he entered into the agreement, he was unemployed due to post-traumatic stress disorder and depression resulting from an accident in which he had killed a motorcycle driver. In addition, his wife was diagnosed with cancer, in August 2012. She quickly deteriorated and passed away several months later, in November. At that time, respondent became the sole caregiver to his two children. He has since moved in with his parents.

Respondent pledged to pay the settlement with Kelly, once he returns to work. Further, he consented to the filing of a judgment against him in the county and state, as a recorded lien that would not be dischargeable in bankruptcy.

The DEC determined that respondent's admissions to gross neglect, failure to communicate with the client, and conduct involving dishonesty and deceit were supported by the record.

In mitigation, the DEC considered all of the factors that respondent presented at the hearing, in addition to his acceptance of responsibility for his actions and the lack of a disciplinary history. The DEC recommended that respondent receive a reprimand and be required to pay any outstanding balance owed to Kelly in connection with the settlement of the related civil matter.

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

Respondent was responsible for filing an appellate brief on Kelly's behalf. Although he drafted the brief, it was never filed and the appeal was dismissed. During that time, however, he misrepresented to Kelly that the matter was proceeding and that the brief had been filed. At one point, respondent and his

former firm were sued for professional malpractice. Each of those suits was concluded by settlement agreement.

Respondent's failure to file the brief and subsequent failure to recognize that he had not filed the brief, before the time had expired for him to do so, constituted gross neglect and a lack of diligence, violations of RPC 1.1(a) and RPC 1.3. Further, his failure to notify Kelly that the time had expired and to keep Kelly informed about the status of his matter constituted a violation of RPC 1.4(b). Moreover, his subsequent misrepresentation as to the status of the matter, in particular, that the brief was filed, violated RPC 8.4(c). Respondent has admitted as much.

We are unable to find, however, that respondent violated RPC 3.2. That rule, which requires attorneys to treat all persons involved in the legal process with courtesy and consideration and to make reasonable efforts to expedite litigation in the interests of the client, is inapplicable in this matter. Nothing in the record suggests that respondent failed to treat anyone with courtesy or consideration. His failure to file a timely brief resulting in the dismissal of Kelly's appeal does not constitute a failure to expedite litigation. Instead, as already mentioned, the DEC mistakenly

referred to RPC 3.2 as the rule addressing an attorney's gross neglect. Hence, that charge is dismissed.

Were respondent's misconduct confined to gross neglect, lack of diligence, and failure to communicate with the client in one matter, an admonition would suffice. See, e.g., In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011); In re Russell, 201 N.J. 409 (2009); In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008); and In re Darqay, 188 N.J. 273 (2006). But respondent's misrepresentation that the brief had been filed and that the matter was progressing requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may result even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Singer, 200 N.J. 263 (2009) (attorney misrepresented to his client for a period of four years that he was working on the case; the attorney also exhibited gross neglect and lack of diligence and failed to communicate with the client; no ethics history); 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).

In mitigation, respondent accepted responsibility for his behavior by admitting his mistakes and he has no prior discipline. Further, significant events in his life have led to strains on him, emotionally, professionally, and financially. All of these unfortunate events occurred during the time that he entered into the settlement agreement, continued thereafter, and undoubtedly affected his ability to fulfill his obligations under the terms of the agreement. True, his failure to comply with the terms of the agreement, albeit not an ethics violation, has caused financial harm to Kelly. However, respondent

maintained, on the record, that he would consent to a judgment that would survive any potential bankruptcy filing.

After consideration of the above circumstances, we determine that a reprimand is the right level of discipline in this case.

Member Gallipoli 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
Bonnie C. Frost, Chair

By: 
Eileen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

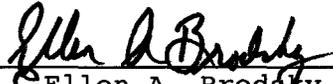
In the Matter of Eric M. Winston
Docket No. DRB 14-047

Argued: May 15, 2014

Decided: June 17, 2014

Disposition: Reprimand

| Members | Disbar | Suspension | Reprimand | Dismiss | Disqualified | Did not participate |
|----------------|---------------|-------------------|------------------|----------------|---------------------|----------------------------|
| Frost | | | X | | | |
| Baugh | | | X | | | |
| Clark | | | X | | | |
| Gallipoli | | | | | | X |
| Hoberman | | | X | | | |
| Singer | | | X | | | |
| Yamner | | | X | | | |
| Zmirich | | | X | | | |
| Total: | | | 7 | | | 1 |



Ellen A. Brodsky
Chief Counsel