SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-024
District Docket No. XII-2012-0051E

IN THE MATTER OF	:
MARK D. BOGARD	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 15, 2014

Decided: August 21, 2014

Ruth V. Simon appeared on behalf of the District XII Ethics Committee.

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 a reprimand, filed by the District XII Ethics Committee (DEC). The four-count 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 promptly 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 5.1(b) (failure to ensure that another lawyer over whom the lawyer has supervisory authority conforms to the Rules of Professional Conduct), and RPC 5.3 (a) and (b) (failure to ensure that the conduct of non-lawyers is compatible with the professional obligations of the lawyer). For the reasons expressed below, we agree with the DEC's recommendation for a reprimand.

Respondent was admitted to the New Jersey bar in 2008. At the relevant time, he practiced law as an associate at the New York office of PLC Law Group, LLP (PLC).[1] The firm's main office was located in Pembroke Pines, Florida. Respondent has no history of discipline.

On March 26, 2010, grievant Dominica Urbaez and her husband, Victor Herrera[2] met with two non-lawyer employees of PLC (one of whom spoke Spanish), at the New York office, for assistance with a loan modification in connection with their Union County property. Their mortgage payments were in arrears

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[1] As of date of the DEC hearing, respondent was no longer working at PLC.

[2] Even though Urbaez is listed as the grievant, for ease of reference, Urbaez and Herrera are referred to collectively as the grievants.

and they hoped that PLC would help them reduce their monthly payments. Herrera understood that PLC would represent them in obtaining a loan modification, as well as defend them against a pending sheriff's sale on their property.[3] Urbaez claimed that, at that March 26, 2010 meeting, they had informed the PLC representatives that they had been served with a foreclosure complaint.[4]

Herrera signed a retainer agreement quoting a $3,495 fee, to be paid in three installments, within sixty days. Respondent executed the agreement on behalf of PLC. At that time, he was the only attorney at PLC's New York office licensed to practice law in New Jersey.

Herrera claimed that he was not given an opportunity to read the fee agreement; that he was handed several documents, which he was told to sign; that everything "was going fast;" that they had relied on the information provided by PLC because they trusted them; and that he did not ask any questions.

Herrera paid PLC the initial $1,000 installment and provided the firm with documentation that had been requested

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[3] The grievants had not yet been served with the notice of the sheriff's sale.

[4] The complaint, however, was not served on them until April 26, 2010, after their meeting.

when he had called to schedule the initial appointment. At the meeting, PLC requested additional documentation, which Herrera hand-delivered, several days later. He and Urbaez later faxed more documents to the firm's Florida office, after he tried to hand-deliver the documentation but discovered that the New York firm had moved to another location. Urbaez remarked that PLC had neither notified them of the move nor provided them with the firm's new address.[5]

On September 14, 2010, three and one-half months after the final fee payment was due, Herrera paid the firm the $2,495 balance and received a receipt signed by respondent. Thereafter, by letter dated October 7, 2010, PLC notified Urbaez that, among other things, she still owed the outstanding balance of $2,495; that the balance was more than 165 days past due; that the "file is currently SUSPENDED due to non-payment;" and that their services would terminate within ten days of the date of the letter, unless she submitted the payment.

Upon receipt of the letter, Urbaez called PLC and was informed that the check had been lost and that she had to issue another check, which she did, on October 27, 2010.

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[5] PLC's records showed that a notice of the relocation had been sent to the grievants in September 2010.

Herrera noted that, even though he had been to PLC four or five times, he had met with respondent only once, in 2012, at PLC's new offices. Respondent testified, however, that he met with Herrera "several times," when Herrera came in to make payments to the firm. The loan modification never occurred. Respondent explained that, even though he had signed the retainer agreement, the loan modification was handled through the firm's main office in Florida. He was not the "boss," did not supervise the Florida staff, and there were other attorneys and support staff at the Florida office. He claimed that his "domain" was to provide legal advice, but he did not have the day-to-day responsibility for the loan modification process; rather, he ensured that the numbers and the procedures followed were accurate and in compliance with the "Making Homes Affordable Program," a federal program. He added that he was available, as were other PLC attorneys, for consulting, reviewing documentation, and ensuring that the process was completed properly.

Respondent maintained that he had not been specifically assigned to represent the grievants in their loan modification and that he had signed the retainer agreement because he was in the office, when the grievants had come in. According to

respondent, it was not the PLC's practice to assign anyone to a modification:

> The practice of the firm was that the support staff would be assigned to the opening of the file, sending out collections letters for both documents and for monthly payments. They were then to take the documents and put them in our loan modification software . . . .
>
> That was done by the support staff because those were things that, you know, they were qualified to do[.]
>
> [2T51.][6]

Respondent testified about the procedure that PLC followed. Specifically, the firm maintained a database to memorialize actions taken on the firm's files. The support staff was charged with entering the data. He was not able to make entries in the database, because he was located in New York. If he wanted a note entered on a file, he had to email the entry to the Florida data entry staff. All PLC members, regardless of their location, could log into the database to review the status of a file to determine what still needed to be accomplished. Whoever worked on a file, made a phone call, or sent a "fax," was required to memorialize that action. The entries should have been made

[6] 2T refers to the October 1, 2013 DEC hearing transcript.

contemporaneously with the action.[7] Each entry was "time stamped . . . to the second," creating a record of when the entry was made and the name of the individual inputting the information.

PLC's database entries showed that, on September 3, 2010, the documents for the grievants' loan modification were complete. However, another entry showed that, in April 2011, the lender notified PLC that it had closed its file, due to a lack of documentation. The PLC staff member informed the lender that everything had been sent. Notwithstanding, the lender claimed that it had only partial information and wanted another package for the "HAMP" (presumably the federal program). PLC staff, therefore, requested additional documents from the grievants. Previously, in October 2010, PLC had closed the grievants' file because of missing documents. The database did not show that any of this information had been conveyed to the grievants. Urbaez' testimony confirmed that no one had informed her about the above activity on her file. The database notes also showed that PLC staff had made repeated requests for additional documents from the grievants, through 2012.

On May 24, 2011, PLC learned that Urbaez' file had mistakenly been archived. That fact was not communicated to her.

[7] PLC's database entries in this matter show, however, that not all of the entries were made contemporaneously.

Respondent's May 1, 2013 answer to the ethics complaint provided an outline of PLC's efforts on the grievants' loan modification:

- PLC received the first batch of documents from the grievants on April 6, 2010. However, certain information was missing. Additional documentation was received on April 19, 2010. A required document was not properly prepared and Herrera was informed about it that day. On May 14, 2010, PLC requested a hardship affidavit from the grievants and requested it again on May 19, 2010. PLC submitted an incomplete application to the lender on May 28, 2010, hoping to supplement it later, when the grievants submitted additional information. PLC did not receive the requested documents until June 10, 2010, after a third request had been made. On September 3, 2010, the lender confirmed that there were no outstanding documents.

- On October 13, 2010, despite prior communications with the lender, it denied the application because of missing documents. The lender did not send a missing document letter or call PLC to request information, however.

- On that same day, PLC called the grievants to request updated documents to "reapply" on the grievants' behalf. A new modification application was submitted that same day, in anticipation that the grievants would supply the required

documents to supplement the application. On January 6, 2011, the lender informed PLC of deficiencies with the new application. Two messages were left for the grievants, requesting the missing information. PLC called a third time and spoke to Urbaez.

- The grievants eventually sent the information directly to the lender, rather than to PLC, in contravention of their retainer agreement. According to respondent's answer:

> After putting the clients' file on hold for a few months – as was required by the lender themselves before a resubmission would be entertained – our firm contacted the [grievants] on June 15, 2011 and requested necessary documents. The first batch were [sic] received on July 26, 2011, but were, again, incomplete. [PLC] contacted the client on the same day to request missing information. By August 22, 2011, our firm had yet to receive the requested documents and sent a letter requesting [same].
>
> [A¶19.][8]

- Problems with the documentation continued from September 2011 through May 2012, until one of PLC's paralegals asked respondent to meet with the grievants to discuss the status of their loan application and the need to comply with document requests in a timely and accurate manner.

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[8] A refers to respondent's answer to the formal ethics complaint.

On July 27, 2012, a final judgment of foreclosure was served on the grievants. Urbanez claimed that, as soon as she received the documentation, she faxed it to PLC's Florida office and that her husband dropped off copies of the documentation with respondent. Thereafter, on August 31, 2012, respondent met with the grievants to discuss the loan modification. At that time, they informed respondent that a sheriff's sale was scheduled for September 12, 2012.

According to respondent, at that meeting they discussed the loan modification, the details of compliance with the federal guidelines required by the lenders, the status of the process, the reason for the delays, and how to move forward. Respondent attributed part of the delay in the loan modification process to his belief that, during the process, the loan had been transferred to another lender, who required the assembly of a new loan modification packet. Respondent added that there was a three or four-month period where no submissions were made to the loan servicer, either because PLC received the documents piecemeal from the grievants, or the documents they received were incorrect or incomplete, or certain information was missing.

As to respondent's strategy for the sheriff's sale, according to Urbaez, respondent simply had told the grievants

that he would stop the sale, that he had "some days to do that," but that he first had to be paid. Respondent told them that, because the loan modification was different from the foreclosure action, they needed to execute a new fee agreement. According to respondent, he discussed available strategies with the grievants; that is, to seek an adjournment of the sale, rather than file an order to show cause, and, in the interim, have the firm continue to work on the loan modification.

Respondent conceded that it was his duty to call the sheriff's office "to get that in motion." He asserted that, up until that point, he had always been able to call a sheriff's office to get a thirty-day adjournment, but could not recall if he had previously obtained such an adjournment from the Union County Sheriff. He told the hearing panel that each county had different procedures for requesting adjournments, but admitted that he did not call the Union County Sheriff's office to confirm whether he could obtain an adjournment over the phone.

By September 4, 2012, the grievants had executed another retainer agreement and had paid the firm an additional $2,135 for the foreclosure defense. The agreement stated, "CLIENT does hereby give to said ATTORNEYS, the exclusive right to take all legal steps to represent CLIENT'S interests."

As the attorney representing the grievants in their foreclosure matter, respondent took no action, from September 4, through September 11, 2012, the day before the sale. He claimed that he wanted to maximize the thirty-day adjournment, rather than have it run from an earlier date, and wanted to have enough of "a window of opportunity to try to get our modification in to the lender in time."

According to respondent, in the early morning of September 11, 2012, he called the Union County Sheriff's Office and spoke to someone who informed him that only the homeowner could apply for an adjournment. The homeowner would have to provide identification, proof of residence, and submit payment of a fee. Respondent claimed that, although he pleaded with the person, that person would not agree to grant him an adjournment if he appeared, even though he represented the homeowners. Respondent admitted that he neither asked to speak to a supervisor or to the sheriff, nor submitted anything in writing to the sheriff's office. He did not memorialize the call in the firm's database. Neither respondent nor anyone from his office attended the sheriff's sale because, he asserted, someone from the sheriff's office told him it would not help.

Lt. Kara Davis, who supervised the business office of the Union County Sheriff's Department, testified to the contrary.

She asserted that a homeowner's attorney could request an adjournment by submitting either a retainer agreement or written instructions from the homeowner, authorizing the attorney to request an adjournment of a sheriff's sale. In addition to such written authorization, the attorney would also have to produce proof of identity and the required fee. Two-week adjournments would be granted with a proper submission. A copy of the Union County Sheriff's procedures from the Union County website confirmed that two two-week adjournments could be obtained.

Davis remarked that, if respondent had appeared with the retainer agreement, the fee, and proof of his identity, she would have granted the adjournment request. She conceded that the website provided only a guideline and that retainer agreements had to be reviewed, before a decision on an adjournment request could be made. She added that, during the relevant time period, there were two other clerks at the sheriff's office that were authorized to answer questions about procedures. If one of the clerks questioned whether the paperwork was acceptable, however, they would present it to her for her review. Davis' testimony was unequivocal that a retainer agreement was sufficient, but she added that, if the application were made too close to the sale, the individual requesting the

adjournment would be required to appear personally to ensure that the required fee was received in time.

Respondent testified that, prior to the sheriff's sale, on September 11, 2012, he tried to reach the grievants at three different numbers, to no avail. At 1:30 p.m., he also sent Urbaez an email. Unbeknownst to respondent, the grievants were on vacation. Urbaez admitted receiving the email that evening, while vacationing in Mexico.

Respondent's email to Urbaez stated that he had been trying to reach her all morning, that to stop the sheriff's sale, she had to go in person that day, as the sale was set for the next day and, "[i]f it was done any sooner, you would not have maximized your time to delay the sale." The email added that pushing the sale back one month would give them more time to file a motion for a longer delay, which would give them ample time to "modify the mortgage." Urbaez testified that, upon receiving that email, she tried to call respondent on his direct line, which he had provided in his email, but he neither answered nor returned her calls.

Respondent had not known in advance that the grievants planned to take a vacation. Indeed, Urbaez admitted that she never informed respondent about her trip, but stated that she had tried to call respondent five or six times before she left

for vacation and also tried to call the Florida PLC office to inquire about the status of the sheriff's sale and whether it was alright for them to leave for vacation on September 10, 2012. Respondent did not reply to her messages.

Because no one appeared at the sheriff's sale on the grievants' behalf, their house was sold. According to respondent's answer, at that time, PLC was continuing to work on the loan modification, but the grievants still had not submitted all of the required information to PLC.

Respondent's notes reflected that it was only after the sale, on September 14, 2012, that he first learned that Urbaez was out of town and that her daughter was the emergency contact. On that same day, he left a message with Urbaez' daughter that he would call her, once he had information about the sale. Also on that day, respondent learned from the lender that Urbaez had ten days to redeem the property.

When Urbaez returned from vacation, she tried to call respondent, to no avail. She then went to the sheriff's office and discovered that no one had entered an appearance on her behalf. On September 19, 2012, respondent informed her about the sale and told her that her only options were to redeem the property or to wait to be evicted.

Respondent testified that he considered himself to be the attorney for the foreclosure matter only, not for the loan modification. He stated that it was clear to the grievants that he was not involved in the day-to-day operations of the loan modification, which was the support staff's responsibility. He reiterated that he was available to speak with PLC staff, if necessary, but did not directly supervise them.

The DEC found that all of the witnesses' testimony was credible, even though some of Urbaez' testimony was inconsistent. The DEC deemed the inconsistencies "largely irrelevant."

The DEC found no ethics violations in connection with the grievants' loan modification, in that respondent had no control over the file or over the Florida staff that was processing the loan modification. The DEC found that, instead, PLC appeared to have mishandled the loan modification, even inadvertently closing and archiving the file on two occasions.

As to the sheriff's sale of the property, the DEC found that respondent should have made more of an effort to stop the sale. Specifically, he should have (1) insisted on speaking with a supervisor or even the sheriff himself to explain that he was not familiar with the type of procedure they employed; (2) informed the person with whom he spoke that Urbaez' retainer

agreement gave him the "exclusive right to take all legal steps to represent [Urbaez'] interests;" (3) submitted a fax or email to the sheriff's office to "plead a case that he be permitted to obtain the mandatory adjournment" on behalf of his client, as he was authorized to represent Urbaez' interests; or (4) appeared at the September 12, 2012 sheriff's sale to try to stop it.

The DEC found that respondent's failure to take these measures violated RPC 1.1(a) and RPC 1.3. The DEC rejected respondent's defense of "impossibility," based on Urbaez' failure to inform him that she was going on vacation. The DEC pointed out that respondent acknowledged that it was his responsibility to stop the sale. It noted that respondent failed to ascertain, before Urbaez left for vacation, whether she had to be available.

The DEC did not find clear and convincing evidence that respondent did not communicate the results of the sale to Urbaez.

The DEC noted that respondent had no ethics history and that there were no aggravating factors, such as, a pattern of neglect. As indicated previously, the DEC recommended a reprimand.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of

unethical conduct was fully supported by clear and convincing evidence.

As to the loan modification, the DEC correctly found that, even though respondent executed the retainer agreement, there was no clear and convincing evidence that he supervised the staff responsible for gathering and submitting the information to the lender. The manner in which PLC handled the loan modification process, if flawed, was more a failure of PLC's procedures in handling the modifications, than respondent's failure to supervise the staff. Respondent's testimony was unequivocal and unchallenged - he did not supervise the staff and he was not their "boss." We, thus, find no clear and convincing evidence that respondent violated RPC 5.1(b) or RPC 5.3 and dismiss these charges.

Furthermore, the evidence was not clear and convincing that the PLC staff grossly neglected or lacked diligence in its handling of the grievants' loan modification. PLC's database notes, the chronology set forth in respondent's answer, and respondent's testimony all established that PLC had difficulty obtaining sufficient documentation from the grievants and twice had sent packages to the lender with the intent to later supplement those submissions. Notwithstanding PLC's numerous and repeated requests for documentation from the grievants, the

process spanned from April 2010 through May 2012. They did not even submit the balance of the retainer for the loan modification to PLC until three and a half months after it was due. Because the grievants were partly responsible for the delays with the application, we cannot find that respondent violated RPC 1.1(a) and RPC 1.3 as to the loan modification.

The complaint also charged respondent with having violated RPC 1.4(b) for not informing the grievants that, in October 2010, the lender had denied the loan modification application and that, as a result, he would wait to resubmit the application. The complaint further alleged that, in so doing, respondent did not allow the grievants to make informed decisions about the representation (RPC 1.4(c)). Because respondent was not involved with the day-to-day aspects of the loan modification process and his function was simply to ensure that the application conformed to the requirements of the federal program, we cannot find him guilty of violating RPC 1.4(b) or (c) in this regard and dismiss those charges as well.

Respondent, however, admittedly was responsible for representing the grievants in the foreclosure defense. The DEC found that all of the testimony given below was credible. According to respondent, after he called the Union County Sheriff's office, he attempted to contact the grievants at

several different numbers, to no avail. Thus, at 1:30 p.m., the day before the sale, he sent an email to Urbaez, informing her that she had to appear in person the next day to stop the sale and "[i]f it was done any sooner, you would not have maximized your time to delay the sale." Respondent's email seemed more designed to diminish the impact of his failure to act timely, than to give advice to his client. When he called the Union County Sheriff's Office, he should have demanded to speak to a supervisor or someone with more authority or he should have personally gone to Union County to attempt to have the sale adjourned. We, therefore, find that his failure to take even minimally appropriate action with regard to the sheriff's sale amounted to gross neglect and lack of diligence.

In addition, Urbaez testified that, even though respondent's email included his private line, he did not return her calls to that number, while she was on vacation, or the many calls she had made before she left for vacation. We find that respondent's failure to adequately communicate with the grievants violated RPC 1.4(b).

On the other hand, we find no clear and convincing evidence that respondent violated RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions about the representation). The testimony

below pointed to the inevitability of a sheriff's sale because the loan modification was not imminent. In addition, respondent testified unequivocally that he discussed with the grievants available strategies to forestall the sale and that they concluded that seeking an adjournment was preferable to filing an order to show cause. We, therefore, dismiss the RPC 1.4(c) charge.

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 Robert A. Ungvary, DRB 13-099 (September 30, 2013) (admonition for attorney who, in a civil rights action, permitted the complaint to be dismissed for failure to comply with discovery, then failed to timely prosecute an appeal, resulting in the appeal's dismissal, and failed to inform the client of his decision not to pursue the appeal or of the appeal's dismissal); In the Matter of James E. Young, DRB 12-362 (March 28, 2013) (admonition imposed on attorney who failed to file any pleadings in a workers' compensation claim and failed to appear at court-ordered hearings, resulting in the petition's dismissal with prejudice

for lack of prosecution; for the next five or six years, the attorney failed to advise the client of the dismissal and failed to reply to the client's repeated requests for information; the attorney later paid the client the amount he estimated the claim was worth ($8,500)); In the Matter of James Edward Burden, DRB 10-189 (July 28, 2010) (admonition for attorney who, after obtaining a default judgment in a personal injury matter, failed to have the judgment recorded; afterwards, the defendant filed for bankruptcy; the attorney failed to inform the client that he had not recorded the judgment or filed a proof of claim; the client's attempts to contact the attorney were to no avail until the client threatened to report him to the Bar Association; compelling mitigating factors were considered); 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 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 Calpin, 217

N.J. 617 (2014) (reprimand for attorney who failed to oppose the plaintiff's motion to strike his client's answer, resulting in the entry of a final judgment against his client; the attorney never informed his client of the judgment; notwithstanding the presence of some mitigation in the attorney's favor, he received a reprimand, given the "obvious, significant harm to the client," that is, the judgment); In re Uffelman, 200 N.J. 260 (2009) (reprimand for attorney 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); and In re Wildstein, 138 N.J. 48 (1994) (reprimand for misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients).

Here, because of the significant harm to the clients - the sale of their house - we find that respondent's violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b) require the imposition of a reprimand, as in Calpin and Uffelman.

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: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Mark D. Bogard
Docket No. DRB 14-024

Argued: May 15, 2014

Decided: August 21, 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