

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-084
District Docket No. X-06-058E

IN THE MATTER OF :
:
ANDREW M. KIMMEL :
:
AN ATTORNEY AT LAW :
:
:

Decision

Argued: July 17, 2008

Decided: September 25, 2008

Robert W. McAndrew appeared on behalf of the District X 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 recommendation for discipline (suspension of "an indeterminate period") by the District X Ethics Committee ("DEC"). The complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b) (failure to communicate

with the client) in a family court matter. We determine to reprimand respondent.

Respondent was admitted to the New Jersey bar in 1968. He has no prior final discipline. However, the Supreme Court temporarily suspended him, on May 23, 2006, for failure to cooperate with the Office of Attorney Ethics ("OAE") and failure to appear before the Court on its order to show cause associated with the OAE's motion for his temporary suspension. He remains suspended to date.

At our March 20, 2008 session, we voted to censure respondent for his combined misconduct in two matters, which included failing to return a file upon termination of the representation and practicing law while ineligible for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection. In the Matters of Andrew M. Kimmel, DRB 07-341 and DRB 07-342 (May 8, 2008). These matters are pending with the Court.

At our July 17, 2008 session, we considered another matter (DRB 08-170) against respondent. The complaint alleged knowing misappropriation of estate trust funds, as well as other less serious misconduct, including gross neglect, lack of diligence, and charging an excessive fee. By a vote of five to four, we recommended disbarment.

Alan March, the grievant, retained respondent, in September 2004, to obtain a post-judgment modification of an alimony award to his ex-wife, Mindy. Respondent conceded, in his answer to the complaint, that he had been retained for that purpose and countered that he had filed a motion that same month. As seen below, that motion was later denied.

Respondent's answer denied the remainder of the allegations in the complaint. Although respondent was properly notified of the date of the DEC hearing, he failed to appear, prompting the hearing panel chair to place the following statement on the record:

I did hear from [respondent]. He indicated to me that he did not recall receiving this notice, that he was focused on other ethics matters. He asked me specifically what matter this was, and I indicated to him that this was the March matter. He indicated that he was under treatment for psychiatric problems and that he was requesting an adjournment for medical reasons. I told him that I would get back to him, and he told me not to call him back. In reviewing my file, it appears that there was a letter from Caroline Record [the DEC. Secretary] to me dated September 19, 2007, which was marked C16 for identification. And that letter indicates that [respondent] was copied with that correspondence, and within the body of that correspondence it states that this matter is scheduled preliminarily for today. . . . And as I noted, [respondent] did not deny receiving the correspondence. He said he simply did not recall. [The presenter] is

here. He's ready to proceed, and we will resume.

[T8-13 to T9-11.]¹

As a result of respondent's failure to appear at the DEC hearing, the only information from him appears in his answer to the complaint.

March testified that respondent had filed the motion in September 2004 and that oral argument was held in November 2004. Thereafter, in July 2005, a five-day plenary hearing took place. The court decided the matter in favor of March's ex-wife, in November 2005.

March also stated that, after the January 13, 2006 oral argument, on March's motion for reconsideration, he and respondent went to lunch. They discussed their strategy going forward, which included an appeal:

It was because my motion was denied in full. And so I asked him to take the appeal for this, and not only did I ask him, he actually almost beat me to the draw and said we will appeal this, and as far as to say, and I won't charge you for this. And so that's why I knew right from - I knew right from November of '05, that there would be an appeal, and that he would take that appeal. And he said but the first thing we needed to do was this motion for reconsideration, that

¹ "T" refers to the transcript of the November 5, 2007 DEC hearing.

it was procedural that you would do that first before you filed an appeal.

[T15-3 to 15.]

Shortly thereafter, on February 1, 2006, the court entered an order awarding attorney fees to Mindy (\$4,153) for the matter.

Unbeknownst to March, in February 2006, Mindy's attorney filed a motion to increase March's child support obligations. March denied that respondent ever told him about that aspect of the matter or that his ex-wife sought attorney fees for her filings. On June 6, 2006, March learned of the motions on his own:

I received a call from the probation office, and they wanted to know why I had not complied with Judge Gannon's order of March 6, 2006, and I had to say to this woman that called me, that I had no knowledge that there was even an order by Judge Gannon, let alone why I didn't comply to it. I had no knowledge of its existence.

[T17-12 to 19.]

According to March, the probation department then faxed him several orders from early 2006 pertaining to his matter, none of which respondent had given him. March also testified that respondent had ample opportunity to advise him about the award and other aspects of the case, because they had "two actual

face-to-face meetings" about his appeal, shortly after the fee award.

The first such meeting took place in March 2006, at which time respondent advised March that he had recently been "in the hospital for a little bit." According to March, respondent did not disclose the nature of the hospitalization, but reassured him that he was ready to go back to work on his matter and "was looking forward to it as his first priority."

The second meeting took place in late April 2006. March had been approached by both his daughter and ex-wife about a sum that respondent owed Mindy. Mindy referred to that sum as the "Gannon money."² Therefore, March asked respondent, at their meeting, if there had been any developments in the case that might explain those references. Respondent assured March that he had checked, and was sure that he had not been served with any recent motions. As previously noted, March learned about Judge Gannon's order from the probation department several months later.

In contrast, respondent stated in his answer:

Within the time period for appeal of the lower court's orders in the March matter,

² Judge Gannon had entered a March 7, 2006 order, requiring March to reimburse his ex-wife for various child support expenses totaling over \$12,000 and attorney fees of \$2,500.

Respondent advised Alan March that he was in the hospital during the period commencing February 7, 2006 and ending February 21, 2006, that after such hospitalization Respondent was still ill, that Respondent was not in his office for the most part during the weeks following his hospitalization, and because of his continuing illness, Respondent was not able to handle Mr. March's Appeal.

[A19.]³

With regard to the allegation that respondent failed to communicate with his client, March testified that, after their April meeting, he tried daily and sometimes twice a day, to contact respondent about the status of his appeal, to no avail. He also left numerous telephone messages with respondent's secretary and on respondent's answering machine. There is no evidence that respondent replied to any of those requests for information.

March stated that, in June 2006, the lack of information from respondent led him to retain a new attorney, Frank Donahue, to represent him. According to March, Donahue contacted Mindy's attorney, Ann Pompelio, and learned that, in February 2006, she had used a courier to serve respondent with a motion to increase March's child support obligations. Pompelio provided Donahue with a copy of the courier receipt.

³ "A" refers to respondent's answer to the complaint.

Pompelio also gave Donahue copies of two letters that she had sent to respondent, dated February 17 and February 26, 2006, asking if respondent intended to file a response to her motion or to request an adjournment of the March 3, 2006 return date. There is no evidence that respondent ever replied to those letters.

On March 1, 2006, two days prior to the return date of the motion, Pompelio wrote to the court, explaining that, although she had received nothing from respondent, she had spoken with him by telephone on February 22, 2006, when he had indicated his intention to request an adjournment. There is no evidence that respondent ever did so.

March further testified that, once Donahue obtained his file, in late September 2006, he discovered that respondent's motion had been to terminate March's alimony obligation, even though March had only sought to reduce it. March believed that respondent's error played a role in the court's adverse determination; rather than reduce his alimony obligation, the court actually increased it.

Moreover, the file that Donahue obtained from respondent contained no documents showing that respondent had done any legal work on the appeal.

Lynn Varisano, an associate attorney in Donahue's office, also testified briefly about the case. According to Varisano, from June 2006 until September 2006, she had attempted to obtain March's file from respondent. Only after March filed his ethics grievance, did respondent finally release the file, on September 28, 2006. Varisano, too, recalled that respondent's file contained no evidence of legal work on an appeal of the alimony issue.

Finally, the presenter argued that respondent had violated RPC 1.16(a)(2) (failure to withdraw from the representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client) and RPC 1.16(d) (failure to turn over client file upon termination of the representation). Those RPCs were not charged in the complaint.

The DEC found that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.16(a)(2), and RPC 1.16(d).

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

The proofs in this case comes entirely from March. They establish that he retained respondent to represent him to handle a post-judgment motion to reduce alimony to March's ex-wife.

Instead, respondent filed a motion to terminate alimony, which was denied.

March testified convincingly that respondent promised to appeal the denial of the motion, but decided to first file a motion for reconsideration with the trial judge. When that motion, too, was denied, respondent took no further action.

In his answer, respondent denied having agreed to file an appeal. He furnished nothing, however, to refute March's testimony on this issue. We find, as the DEC did, that respondent agreed to file an appeal, but failed to do so or to request additional time within which to do so. Instead, he allowed the time for the filing of an appeal to lapse. We, thus, find respondent guilty of gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3.

March also testified about numerous attempts to contact respondent to obtain information about his case, during those critical months immediately after the initial motion was denied. He had questions about his alimony motion, as well as his ex-wife's motion. He testified that respondent did not reply to his pleas for information, forcing him to retain a new attorney. Indeed, the record contains no evidence that respondent communicated the status of March's matter to him. By failing to

reply to March's reasonable requests for information about his case, respondent violated RPC 1.4(b).

We cannot find, however, that respondent violated RPC 1.16(a)(2) and RPC 1.16(d). Those RPCs were not charged in the complaint, but raised by the presenter, for the first time, at the DEC hearing. Under R. 1:20-4(b), we are precluded from considering them.

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 attorney's disciplinary history. See, e.g., 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); In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (admonition for attorney whose inaction caused a trademark application to be deemed abandoned on two occasions; the attorney also failed to comply with the client's requests for information about the case; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(a)); In the Matter of Vincenza Leonelli-Spina, DRB 02-433 (February 14, 2003) (admonition for gross neglect, lack of diligence, and failure to communicate with the client); In the Matter of Jeri L. Sayer, DRB 99-238

(January 11, 2001) (admonition for attorney who displayed gross neglect, lack of diligence, and failure to communicate with the client; a workers' compensation claim was dismissed twice because of the attorney's failure to appear in court; thereafter, the attorney filed an appeal, which was dismissed for her failure to timely file a brief); In the Matter of Jonathan H. Lesnik, DRB 02-120 (May 22, 2000) (admonition for failure to file an answer in a divorce matter, resulting in a final judgment of default against the client; the attorney also failed to keep the client informed about the status of the case); In the Matter of Paul Paskey, DRB 98-244 (October 23, 1998) (admonition for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client); In the Matter of Ben Payton, DRB 97-247 (October 27, 1997) (admonition for attorney found guilty of gross neglect, lack of diligence, and failure to communicate with the client; the attorney filed a complaint four days after the expiration of the statute of limitations, and then allowed it to be dismissed for lack of prosecution; the attorney never informed the client of the dismissal; the attorney also failed to reply to the client's numerous requests for information about the case); In re Garbin, 182 N.J. 432 (2005) (reprimand by consent for attorney who failed to send her client a copy of a motion to enforce

litigant's rights filed in his divorce action and failed to inform him of the filing of the motion, which proceeded unopposed; the court then found her client in violation of the final judgment of divorce; the attorney also failed to return the file to either her client or new counsel; prior admonition); In re Aranguren, 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); In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with the clients in two matters; the attorney also failed to return the file to a client; prior reprimand); 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).

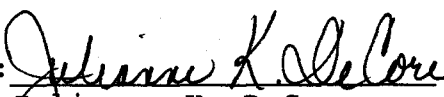
In mitigation, respondent furnished the DEC with documentation about his mental condition and hospitalization, during the time that he was supposed to file the within appeal. Their importance is somewhat muted, however, by the two face-to-face meetings that respondent held with March, in late February

and April 2006, just after his release from the hospital. Apparently, respondent was well enough to see clients on those occasions. He had at least those two opportunities to advise March about the status of and events in the case. The credible evidence shows that he did not do so.

In aggravation, we recently voted to censure respondent in a matter pending the Court's review. The precedent for a reprimand in Garbin and Gordon, where the attorneys had one prior instance of discipline of a less than severe nature, shows that a reprimand is appropriate for respondent's infractions.

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

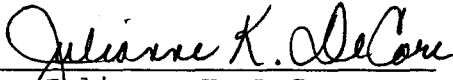
In the Matter of Andrew M. Kimmel
Docket No. DRB 08-084

Argued: July 17, 2008

Decided: September 25, 2008

Disposition: Reprimand

<i>Members</i>	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Boylan			X			
Clark			X			
Doremus			X			
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			9			


Julianne K. DeCore
Chief Counsel