SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-403
District Docket No. VC-2006-0038E

IN THE MATTER OF	:
EMIL T. RESTAINO	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 19, 2009

Decided: December 17, 2009

Nancy S. Feinberg appeared on behalf of the District VC 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 (six-month suspension) filed by the District VC Ethics Committee ("DEC"). The complaint alleged that respondent lacked diligence, failed to communicate with the client, and failed to set forth, in writing, the rate or basis of his fee in

two negligence matters that he handled for the same client. In one of the matters, respondent also misrepresented the status of case. We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1974. On April 1, 1991, he was privately reprimanded for lack of diligence, failure to communicate with the client, failure to utilize a written fee agreement, failure to promptly turn over the client file to subsequent counsel, and failure to cooperate with ethics authorities by not filing an answer. In the Matter of Emil T. Restaino, DRB Docket No. 91-045 (April 1, 1991).

On May 26, 1992, respondent was suspended for six months for gross neglect and misrepresentation to the client, for two years, about the status of the matter. In re Restaino, 127 N.J. 403 (1992).

Effective January 1, 1996, respondent was suspended for two years for misconduct that included gross neglect, pattern of neglect, recordkeeping violations, and failure to cooperate with ethics authorities. In re Restaino, 142 N.J. 615 (1995). Upon his reinstatement, on September 28, 1999, respondent was ordered to practice with a proctor for two years. After the proctor requirement was satisfied, respondent was released from the

obligation by order dated August 7, 2002. In re Restaino, 162 N.J. 1 (1999).

In this disciplinary matter, respondent unilaterally prepared a document titled "Admission and Stipulations," which he brought to the DEC hearing. After some discussion, the presenter agreed to accept it as a complete stipulation of facts, which was read into the record and became the factual basis upon which the parties proceeded. The presenter also agreed to waive any testimony from the grievant. Respondent took the stand solely for purposes of putting mitigating circumstances on the record. No other witnesses testified. The parties also waived opening statements and closing arguments.

The facts below came from the Admission and Stipulations document.

I. The Reyes v. Jauregui Matter

Count one of the complaint charged respondent with having violated RPC 1.3 (lack of diligence), RPC 1.4 (b) (failure to communicate with the client), RPC 1.5 (b) (failure to set forth,

in writing, the rate or basis of the fee),[1] and RPC 8.4(c) (misrepresentation).

On May 18, 1998, Stacey Reyes retained respondent's law partner, Dianne Penn Zusi, to handle an action against her landlord for a burn to her leg caused by an exposed heating pipe in the building.

On May 7, 2000, respondent, not Zusi, filed a complaint against the landlord. Thereafter, respondent had difficulty locating and, therefore, serving the landlord. Respondent admitted that there is no evidence that he followed up on leads for service given to him by Reyes.

Respondent stipulated that his "failure to perform a timely and thorough investigation of the whereabouts of the landlord" and the fact that "the case was dismissed and no effort had been made to locate the landlord for years" amounted to lack of diligence, a violation of RPC 1.3.

During the representation, Reyes made numerous inquiries of respondent about the status of her case, including by certified mail. On September 16, 2004, Reyes sent respondent another

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[1] It is not clear if respondent charged a flat fee or agreed to a contingent fee. If the latter, RPC 1.5(c) would have been the more appropriate subsection of the rule.

certified letter, inquiring about the landlord case (and also another case then pending in respondent's office, detailed below). On September 22, 2004, in reply to Reyes' certified letter, respondent sent her an "e-mail" stating that her complaint was "inactive," as the landlord could not be located. The e-mail further stated that the firm would continue with its efforts to secure service.

Respondent stipulated that "he misled his client by assuring Reyes that the case was proceeding property [sic] when in fact the case was dismissed and no effort had been made to locate the landlord for years." Respondent stipulated that his "misrepresentation of facts" constituted a violation of RPC 8.4(c). He further stipulated that he failed to "keep his client adequately and accurately informed" about the status of her matter, a violation of RPC 1.4(b).

Finally, respondent stipulated that, because he and Reyes did not have a prior attorney/client relationship and the matter was a "negligence" case, he had violated RPC 1.5(b) by not utilizing a written fee agreement.

II. The Reyes v. Jiminez Matter

Count two of the complaint charged respondent with having violated RPC 1.3 (lack of diligence), RPC 1.4 (b) (failure to communicate with the client), RPC 1.5 (b) (failure to set forth, in writing, the rate or basis of the fee), and RPC 8.4(c) (misrepresentation).

Respondent was retained to represent Reyes for injuries sustained in a July 11, 2000 three-vehicle automobile accident. Reyes was a passenger in a vehicle driven by "Berdicia," also referenced as driver two.

On December 28, 2001, the insurance carrier (State Farm) for driver three (Rodriguez) did not contest liability and offered to settle its portion of the case for $25,000. Reyes received her two-thirds share of the proceeds.[2]

On July 10, 2002, respondent filed suit against driver one (Jiminez). State Farm named an additional defendant, as it represented Berdicia with respect to a PIP claim.

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[2] It appears, that this matter was taken on a contingent fee basis, in which case RPC 1.5(c) would have been the more appropriate subsection of the rule.

Thereafter, the court issued a mediation notice. Respondent claimed that the parties had consented to an adjournment and that no one had appeared for the mediation session. The mediator then sent a report, erroneously stating that the matter had been settled. Thereafter, on January 6, 2003, the court dismissed the complaint.

The court sent respondent a notice of dismissal "for lack of prosecution," returnable on January 27, 2003. On February 6 and March 3, 2003, counsel for State Farm advised respondent that the case had been dismissed. Counsel for High Point, Jiminez' carrier, also advised respondent of the dismissal.

On April 3, 2003, State Farm filed a motion to dismiss Reyes' complaint for failure to answer interrogatories. The motion was returnable on May 9, 2003.[3]

On April 23, 2003, respondent filed a motion to restore the complaint. The motion was returnable on May 23, 2003. Respondent stipulated that, despite having been initially notified by the court of the dismissal, of the complaint and later by opposing

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[3] Presumably, the complaint had been restored by this time. However, respondent stipulated that the complaint had remained dismissed from January 6, 2003 until he took action in late April 2003.

counsel on at least four occasions, it was not until April 23, 2003 that he took action to revive Reyes' claim.

On May 1, 2003, respondent filed an opposition to State Farm's motion to dismiss the complaint. On May 23, 2003, the court entered orders partially dismissing and partially restoring the complaint. Respondent stipulated that he never advised Reyes about the motion to dismiss, as required by R. 4:23-5.

On September 2, 2003, State Farm filed a motion to dismiss the complaint with prejudice, based on plaintiff's failure to answer interrogatories or to restore the complaint. The motion was returnable October 10, 2003. Once again, respondent failed to notify his client about State Farm's motion.

On September 30, 2003, the court sent respondent a notice, advising him of his responsibility to notify his client, within five days, if the motion was to proceed unopposed.

When, on October 16, 2003, respondent finally answered State Farm's interrogatories, his adversary withdrew its motion to dismiss the complaint.

Counsel for State Farm then sent respondent a December 2, 2003 letter, requesting PIP-claim information. Hearing nothing, on March 14, 2004, counsel sent another written request for that

information. On June 24, 2004, State Farm's counsel wrote respondent a final letter and noted that the "Courts [sic] file indacted [sic] that the matter had been closed as of January 6, 2003, and that she was now closing her file." Respondent's file did not contain a copy of the letter.

Having heard nothing from respondent about the case for a year, Reyes sent him a certified letter, inquiring about the status of both Reyes v. Jaurequi and Reyes v. Jiminez. Respondent replied with a September 22, 2004 e-mail in which he stated that he had been negotiating with the insurance company for the remaining defendant, Rodriguez, that the carrier "had offered approximately $2,000, and that he was attempting to secure a reasonable settlement for her."

Respondent stipulated that he had not set forth the rate or basis of his fee for that matter, as required by RPC 1.5(b); that "his failure to communicate constituted a violation of RPC 1.4;" that "his failure to act with diligence constituted a violation of RPC 1.3;" and that "his conduct involving dishonesty, fraud, deceit or misrepresentation constitutes a violation of [RPC] 8.4(c)."

As indicated above, respondent testified, at the brief DEC hearing, solely for purposes of mitigation. Yet, after just a

few minutes of testimony, the hearing panel began asking him questions about the facts of the Reyes' cases. Primary among the questions were those regarding a June 19, 2008 letter from respondent in which he set forth "mitigating factors" that were at odds with the stipulated facts. For example, a section of the letter read, "the property where the event occurred burned down shortly after the incident and the Landlord literally disappeared. We made every attempt to locate the owner. We checked with the tax department, we went through the telephone book and ultimately utilized the services of an investigator to no avail."

When asked why, after going to those lengths to locate the landlord, he had stipulated that there was no evidence that he had acted on any of Reyes' leads about the landlord's whereabouts, respondent replied that, although he had acted on all of Reyes' leads, he had no documents to prove it, other than some file notes. He did not even have a bill from the investigator whom he had retained to locate the landlord, because the investigator had wanted his payment in cash.

Respondent then offered several documents in evidence, including Zusi's March 31, 2000 and May 30, 2000 letters to the Newark tax collector requesting information about the Jauregui

property; the Newark tax office reply, which showed Jauregui's address as the rental address; and several pages of handwritten file notes from Zusi and from him. The notes contained entries for activity on the file, between May 1998 and May 2001.

Respondent clarified that he was not offering any of the documents as a defense to the ethics charges, but solely for purposes of mitigation. The presenter agreed to their inclusion in the record, with that proviso.

With regard to mitigation, respondent's June 19, 2008 letter to the DEC investigator outlined a number of factors that, respondent claimed, had "contributed to the disjointed handling of these matters." Specifically, respondent's was a small office, consisting of only two attorneys (respondent and Zusi). In each of the years 2002, 2003, and 2004, the office had flooded, destroying numerous files and several computers. For a time thereafter, respondent was forced to operate out of the office basement, using a borrowed computer. During the winter of 2003, his secretary left the firm. He and Zusi were without secretarial services for several months.

In 2004, Zusi suffered injuries in a slip-and-fall that required three major spinal operations, over the next several years. She was, thereafter, "at best, a part-time worker."

Respondent, thus, struggled to maintain their two-attorney practice largely by himself.

Finally, respondent expressed deep remorse for his misconduct, both in his letter and testimony, going so far as to offer a written apology to Reyes for his behavior.

In Zusi's June 19, 2008 letter to the presenter, she spoke highly of respondent and stated that she had allowed communications between herself and Reyes to become casual, as she had befriended Reyes. Although she claimed that Reyes was generally informed about her matter, she explained that the communications were oral and conducted on Reyes' personal visits to the office and over the telephone.

Zusi also gave respondent high praise, stating that she began working for him almost twenty-five years earlier as a secretary for another lawyer, when she attended law school at night. Respondent was an associate attorney at the time. She said of respondent, "[d]espite what has occurred, [he] has a great love and profound respect for the law."

In the Jauregui matter, the DEC found respondent guilty of lack of diligence (RPC 1.3), failure to utilize a written fee agreement (RPC 1.5(b)), and failure to communicate with the client about important aspects of the case (RPC 1.4(b)).

In the Jiminez matter, the DEC found that respondent lacked diligence in pursuing Reyes' claim, resulting in the dismissal of the case (RPC 1.3). The DEC also found that respondent violated RPC 1.5(b) by failing to utilize a written fee agreement. Finally, the DEC found that respondent failed to communicate with Reyes about important aspects of the case, including its dismissal, a violation of RPC 1.4(b).

The DEC dismissed the charged violations of RPC 8.4(c) (misrepresentation). The only reason given was the lack of clear and convincing evidence.

After considering respondent's mitigating factors, the DEC found that respondent's "willful disregard of the [RPCs]," "pattern of neglect and a degree of negligence" and past discipline warranted a six-month suspension. The DEC also recommended a course in the RPCs and law firm management, as well as a proctor for two years.

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

It is clear from the stipulated facts that respondent lacked diligence, failed to communicate with the client, and

failed to reduce to writing the fee agreement in the two matters.

In Jauregui, respondent filed suit against the landlord in May 2000, but, after several unsuccessful attempts to locate the landlord, dropped the ball. It appears from the scanty record that the case against the landlord may not have been particularly strong. Nevertheless, respondent failed to diligently pursue it, a violation of RPC 1.3.

Respondent also ignored numerous inquiries from Reyes about the status of her case for about four years, from 2000 to September 2004, when he finally replied by e-mail. Respondent, thus, violated RPC 1.4(b).

Lastly, respondent was required to set forth, in writing, the basis or rate of his fee for Reyes, whom he did not regularly represent. Here, he violated RPC 1.5(b).

In Jiminez, respondent filed a complaint, but later lacked diligence by doing nothing for a period of months, after the court dismissed the complaint, in January 2003. He then failed to provide answers to interrogatories, failed to provide PIP claim information, and failed to advise Reyes of State Farm's motions to dismiss, as required of him under the court rules. In so doing, respondent violated RPC 1.3.

Respondent conceded that he failed to communicate important aspects of the case to Reyes, apparently for several years until his September 22, 2004 e-mail. He admitted a violation of RPC 1.4(b).

Finally, it appears from the facts that the Jiminez matter may have been a contingent fee case, as Reyes received her two-thirds share of the proceeds. If so, subsection (c) of RPC 1.5 would be applicable. That section deals specifically with the requirement that contingent fee arrangements be set forth in writing. Whether charged under subsection (b), because he did not regularly represent Reyes, or (c), because it was a contingent fee, respondent stipulated that he did not comply with the writing requirement of RPC 1.5.

Respondent also stipulated violations of RPC 8.4(c) (misrepresentation) in both matters, only one of which is supported by the record. Respondent replied to Reyes' inquiries about both cases by e-mail on September 22, 2004. It is unclear if respondent addressed both cases in one e-mail or sent separate ones for each matter. In any event, in the Jauregui matter, respondent conceded that his September 22, 2004 e-mail "misled his client by assuring Reyes that the case was preceding property [sic] when in fact the case was dismissed and no effort

had been made to locate the landlord for years." Respondent's stipulated conduct clearly and convincingly supports a finding of misrepresentation, a violation of RPC 8.4(c).

Respondent's admitted RPC 8.4(c) violation in the Jiminez matter is not so clearly sustainable. The stipulation contained a September 22, 2004 e-mail to Reyes, in which respondent advised her that he had been negotiating a settlement with the insurance company. We cannot tell if that information was untrue. The stipulation does not state that respondent misrepresented the truth about the status of the case. In fact, the stipulation does not point to facts that might have been misleading to Reyes. Moreover, the e-mail to Reyes was not made a part of the record below. For these reasons, we dismiss the charged violation of RPC 8.4(c) in the Jiminez matter.

In summary, respondent is guilty of lack of diligence, failure to communicate with the client and failure to utilize a writing for the rate or basis of his fee in the two matters, and misrepresentation to the client in one of the matters.

Misrepresentation to clients requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g.,

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).

Adding a violation of RPC 1.5(b) – failure to reduce to writing the basis or rate for the fee – should not serve to ratchet the discipline to a higher level. Admonitions have resulted for that misconduct, even when accompanied by other non-serious violations, such as, for instance, RPC 1.3 and RPC 1.4(b). See, e.g., In the Matter of Larry McClure, Docket DRB

98-430 (February 22, 1999) (in two matters, attorney failed to communicate with clients and failed to act with diligence; in one of those matters, the attorney also failed to execute a written retainer agreement; in the other matter, the attorney failed to cooperate with the DEC investigator); In the Matter of Steven M. Olitsky, DRB 95-358 (November 27, 1996) (attorney failed to communicate, in writing, the basis or rate of his fee and failed to inform the client that work would not be initiated in the matter until the fee was fully paid); and In the Matter of Steven M. Olitsky, DRB 93-391 (November 22, 1993) (attorney failed to reduce fee agreement to writing and failed to reply to the client's requests for information about the matter).

So, too, conduct involving failure to prepare the written fee agreement required by RPC 1.5(c) in contingent fee matters (which appears to be the case in the Jiminez matter), even when accompanied by other, non-serious ethics offenses, results in an admonition. See, e.g., In the Matter of Martin G. Margolis, DRB 02-166 (July 22, 2002) (attorney failed to prepare a written fee agreement, a violation of RPC 1.5(c), and took an improper jurat, a violation of RPC 8.4(c)); In the Matter of Alan D. Krauss, DRB 02-041 (May 23, 2002) (attorney failed to prepare a written retainer agreement, grossly neglected a matter, lacked

diligence in the representation of the client's interests, and failed to communicate with the client; violations of RPC 1.5(c), RPC 1.1(a), RPC 1.3, and RPC 1.4(a), respectively); and In the Matter of Seymour Wasserstrum, DRB 98-173 (August 5, 1998) (attorney failed to prepare a written retainer agreement covering a contingent fee, a violation of RPC 1.5(c)).

Absent the considerations detailed below and viewed in isolation, respondent's conduct in the two Reyes matters would deserve at least a reprimand, inasmuch as one instance of misrepresentation alone calls for that form of discipline. But there are mitigating and aggravating factors that we must consider in fashioning the right degree of discipline for this respondent.

In mitigation, we took into account that respondent was overwhelmed by the departure of his secretary, the period when he was left without any secretarial support, the three floods that occurred in his building, and the serious health problems that beset Zusi, who was forced to go on extended medical leave.

In aggravation, however, we considered that respondent had a disciplinary history (a 1991 private reprimand, a 1992 six-month suspension, and a 1996 two-year suspension). Moreover, his conduct in the Reyes matters took place after he was reinstated

from his two-year suspension and included the same infractions for which he had been disciplined. Respondent slipped into old, bad habits, including having made a misrepresentation to the client. Because it is obvious to us that respondent did not learn from his past mistakes, we determine that the otherwise appropriate level of discipline for the within transgressions – a reprimand – should be elevated to a censure.

Vice-Chair Frost and Member Baugh voted for a reprimand. Member Clark 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 Emil T. Restaino
Docket No. DRB 08-403

Argued: November 19, 2009

Decided: December 17, 2009

Disposition: Censure

Members	Disbar	Censure	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost			X			
Baugh			X			
Clark						X
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		6	2			1

Julianne K. DeCore
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Chief Counsel