SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-023

IN THE MATTER OF	
JEFFRY F. NIELSEN	
AN ATTORNEY AT LAW	

Decision

Argued: March 18, 2004

Decided: April 29, 2004

Eric Breslin appeared on behalf of the District VA Ethics Committee.

Michael Critchley appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us based on a recommendation for discipline (three-month suspension) filed by the District VA Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1990. On April 2, 2001, he received a reprimand in a default matter for gross neglect, lack of diligence, and

failure to communicate with the client in one matter and lack of diligence, and failure to communicate with the client in a second matter. In re Nielsen, 167 N.J. 54 (2001).

The Ware Matter - District Docket No. VA-02-019E

In August 2000, Earmer Ware retained respondent to represent his teenage son, Dashawn, who had been charged with criminal sexual assault. Dashawn was incarcerated in a detention center at the time. Ware paid respondent $750 toward a flat fee of $2,000 for the representation.

Respondent testified that Ware retained him on the eve of Dashawn's trial. Respondent met with the prosecutor and the judge assigned to the case to discuss "coming up to speed" in the matter and obtaining an adjournment of the trial date.

Through the third week of August 2000, Ware heard nothing from respondent. Moreover, respondent had not visited Dashawn at the detention center. For the next two weeks, Ware called respondent's office repeatedly, in an attempt to spur respondent to action. However, respondent failed to return his calls.

On September 6, 2000, Ware and respondent had a heated argument on the telephone, the topic of which is unknown. During the conversation, respondent terminated the representation and advised Ware to retain a new attorney.

Ware immediately retained substitute counsel, and the matter was concluded shortly thereafter.

On September 14, 2002, in a letter to Ware, respondent promised to refund the unearned portion of the $750 payment.

Hearing nothing from respondent on the issue of repayment, Ware wrote to him on November 17, 2000, requesting an itemized bill and the return of the unearned portion of the fee. Respondent did not reply, and never provided an itemization or a fee refund. Therefore, Ware filed for a fee arbitration.

On February 20, 2002, a fee arbitration panel awarded Ware the entire $750. Shortly thereafter, respondent sent Ware a check in that amount.

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(a) (unreasonable

fee), and RPC 1.16(d) (failure to return unearned fee upon termination of the representation).

The Veillard Matter District Docket No. VA-02-020E

On November 3, 2000, Maxime Veillard retained respondent in connection with three moving violations in municipal court. On the same date, Veillard paid respondent a flat fee of $500.

Respondent requested and received two adjournments for court dates due to scheduling conflicts. The matter was rescheduled for December 11, 2000. Veillard appeared that day, but respondent failed to appear. Veillard was excused from the courtroom to call respondent. Thereafter, Veillard was required to proceed pro se. Veillard's driver's license was then suspended for one year.

Veillard subsequently attempted to meet with respondent, and left numerous messages for him on his voicemail and with his secretary. Respondent failed to return those calls.

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(a) (unreasonable

fee), and RPC 1.16(d) (failure to return unearned fee upon termination of the representation).

The Wakefield Matter - District Docket No. VA-02-021E

On November 24, 2000, Katisha Wakefield retained respondent on behalf of her brother, Timajin, to defend a pending criminal charge. Timajin was incarcerated at the time. Respondent accepted a $750 flat fee to seek his release.

Before a fee arbitration panel, Katisha and Timajin testified that Timajin remained incarcerated while awaiting respondent's petition for his release. Respondent acknowledged that he never met with Timajin in jail, nor sought his release. Further, respondent failed to return Katisha's and Timajin's telephone calls regarding the status of the matter.

After several months, Timajin resorted to calling respondent's office on a daily basis, seeking to obtain a refund of the $750. Hearing nothing from respondent, the Wakefields filed a fee arbitration.

The fee arbitration panel directed respondent to return the entire $750.

For his part, respondent acknowledged the facts above, but sought to clarify that Timajin was serving a prison sentence for another crime at the time of the within representation. Therefore, according to respondent, his failure to act had no effect on the timing of Timajin's release from prison.

The complaint alleged that respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(a) (unreasonable fee), and RPC 1.16(d) (failure to return unearned fee upon termination of the representation).

The Funesti Matter - District Docket No. VA-02-022E

On May 29, 1999, William J. Funesti, Jr., retained respondent to represent him in connection with a marijuana possession charge, which arose out of a security check at Newark International Airport. Funesti, a Florida resident, had found respondent's name in the yellow pages.

Also on May 29, 1999, Funesti sent respondent $750, representing the entire fee. Funesti requested swift action on respondent's part, in hopes of disposing of the matter quickly. Respondent represented to him that the

matter might be concluded without the need for his return to New Jersey.

Between May 31, 1999 and August 28, 1999, respondent obtained several adjournments. In September 1999, the court set a December 8, 1999 trial date. Funesti called respondent on October 4 and 20, November 8, 11, 17, 29, and 30, 1999, attempting to obtain information about the case. However, respondent failed to reply to any of those requests for information.

On November 30, 1999, Funesti sent respondent a desperate letter stating his fear that respondent had abandoned the matter and would not appear at the December 8, 1999 trial.

On the trial date, respondent finally corresponded with his client, sending Funesti a letter advising him of a new trial date in April 2000. That trial date was rescheduled several more times, to July 13, 2000.

On July 4, 2000, respondent left a message on Funesti's answering machine, stating that he had spoken to both the prosecutor and police officer about the charges, and that respondent could send an affidavit for his signature, to prevent the need for his appearance in New Jersey. However, respondent never sent the affidavit.

On September 19, 2000, Funesti received a bench warrant for his arrest for his failure to answer the criminal complaint.

On September 22, 2000, Funesti called respondent for information about the warrant, but respondent failed to return the call.

Funesti traveled to New Jersey on October 7, 2000, hoping to meet with respondent to discuss the case. Apparently, it was a surprise visit. Respondent was in court and unavailable to meet with him that day. After returning to Florida, Funesti called respondent several more times to discuss the case, but respondent ignored those calls. Therefore, on October 25, 2000, he sent respondent a facsimile that read "Call ME!!!" He followed the facsimile with a letter to respondent of even date, pleading for a reply.

Finally, on November 20, 2000, Funesti sent respondent a certified letter advising respondent that he had retained another attorney to handle the case, and requesting the return of the fee. Respondent did not reply.

Funesti's new attorney ultimately obtained a dismissal of the marijuana possession charges and vacation

of the bench warrant, without the need for Funesti to travel to New Jersey.

A fee arbitration panel later awarded Funesti the full $750 fee, which respondent refunded to Funesti in the spring of 2002.

The complaint alleged that respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(a) (unreasonable fee), and RPC 1.16(d) (failure to return unearned fee upon termination of the representation).

The Bohler Matter - District Docket No. VA-02-023E

On December 5, 2000, Gene Bohler retained respondent to obtain an expungement, and paid him a $675. Respondent took no action in furtherance of his client's case.

On numerous occasions thereafter, Bohler telephoned respondent for information about the matter, but respondent did not reply to any of those inquiries.

Bohler also sent respondent a letter asking when to expect filed expungement papers. Respondent ignored that inquiry. Therefore, Bohler filed a request for fee arbitration.

The fee arbitration panel required respondent to return the entire $675 fee.

The complaint alleged that respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(a) (unreasonable fee), RPC 1.16(d) (failure to return unearned fee upon termination of the representation).

The complaint also alleged that respondent failed to cooperate with ethics authorities in the investigation of the five within ethics matters, in violation of RPC 8.1(b). Specifically, respondent failed to reply to the OAE's two written requests for information about the grievances, and from the OAE sent respondent copies of the five grievances. In addition, respondent requested, and then failed to meet, two extended deadlines for his replies to the grievances.

Respondent offered, in mitigation, that family pressures, including a difficult move to a new town, and a subsequent return to the family's prior neighborhood, distracted him from his law practice during the relevant times herein.

The DEC found violations of RPC 1.3, RPC 1.4(a), and RPC 8.1(b) in all five matters. However, it found gross

neglect in only Veillard and Wakefield. The DEC also found a pattern of neglect, in violation of RPC 1.1(a). The DEC dismissed the charges of violations of RPC 1.5(a) and 1.16(d), arising out of respondent's fees, noting that the fees charged were not unreasonable for the work to be performed. Finally, the DEC recommended the imposition of a three-month suspension for respondent's misconduct.

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

Respondent admitted that he lacked diligence, failed to communicate with the client, and failed to cooperate with ethics authorities in all five matters, in violation of RPC 1.3, RPC 1.4(a), and RPC 8.1(b), respectively.

Respondent contested two aspects of the complaints: the reasonableness of his fees and the allegations of gross neglect.

As previously noted, the DEC determined that the allegations of unreasonable fees, in violation of RPC 1.5(a), should be dismissed, on the basis that the fees were reasonable for the work to be performed. We find that the DEC was correct in this regard. There was no evidence

of overreaching in any of the matters. In fact, the fees were on the low end of the acceptable range for the matters involved. Therefore, we dismiss the charges of violations of RPC 1.5(a).

On the other hand, with regard to RPC 1.16(d), the DEC dismissed the allegations for lack of clear and convincing evidence that respondent "failed to protect his clients' interests upon termination" of the representations. However, the DEC should have focused on that aspect of the rule that requires attorneys to return any unearned portion of a fee for legal services. It is clear that respondent did not do so until after each of the five clients filed for fee arbitrations. Nevertheless, respondent ultimately returned the fees, upon his receipt of fee arbitration determinations in favor of his clients. Because respondent ultimately complied with the rule, we determine to dismiss the allegations of violations of RPC 1.16(d).

Respondent also took issue, albeit via bare denials, with the five charges of gross neglect, as discussed immediately below.

In Ware, respondent agreed to represent Ware's incarcerated son Dashawn, in August 2000. Yet, barely a

month later, on September 6, 2000, respondent terminated the representation during a heated telephone exchange with Ware.

Normally, a one-month representation would not implicate RPC 1.1(a). However, the record in Ware does not address respondent's retention in detail sufficient for us to determine if he was retained to gain Dashawn's release from jail, as well to as to represent him at trial. Had respondent been retained to obtain Dashawn's immediate release from jail, his failure to take action for a one-month period might have compelled a finding of gross neglect. Because the facts contained in the record do not support such a conclusion, however, we dismiss the alleged violation of RPC 1.1(a).

In Veillard, the representation spanned a two-month period from November to December 2000. During that short time frame, respondent received two adjournments and failed to appear at the adjourned date for Veillard's trial. Veillard was forced to proceed pro se, and had his license revoked for one year. We might have considered respondent's failure to appear in court that day as simple, not gross neglect, had respondent taken appropriate measures thereafter to correct the situation.

However, respondent did not, electing instead to ignore Veillard's "countless" messages left on respondent's voicemail and with his secretary. For this reason, we find that respondent's misconduct amounted to gross neglect, in violation of RPC 1.1(a).

In Wakefield, respondent accepted a $750 fee, and took no action to gain Timajin's release from jail, for several months. All the while, Timajin called respondent daily, presumably from jail, in an effort to move respondent to action. In his defense, respondent explained that Timajin was serving a sentence on a criminal conviction at the time, and that, therefore, Timajin's release was not at issue. The record is unclear on this point, and we note that neither Timajin nor Katisha could be located for their testimony. We find the evidence insufficient to support a finding of gross neglect by the clear and convincing standard, and, therefore, dismiss the alleged violation of RPC 1.1(a).

In Funesti, the representation involved a straightforward marijuana possession case. Although Funesti sought a swift resolution to that municipal court matter, respondent allowed it to drag on for over a year, without filing an answer to the complaint. Thereafter, a

bench warrant was issued for Funesti's arrest. Finally, Funesti retained another attorney to represent him, after numerous unsuccessful attempts to move respondent along. We find that respondent's failure to act, under these circumstances, while ignoring Funesti's constant barrage of long-distance pleas for action, amounted to gross neglect, in violation of RPC 1.1(a).

In Bohler, the facts are too sparse to form the basis for finding gross neglect. We know only that respondent was retained for an expungement and that, over an undisclosed period of time, he failed to take action. Without more, we determine to dismiss the alleged violation of RPC 1.1(a).

Finally, the complaint alleges a pattern of neglect, in violation of RPC 1.1(b). Normally, at least three instances of gross neglect are required to form the basis of a pattern. Only two instances are present here. However, respondent's 2001 reprimand matter included gross neglect. When the prior disciplinary matter is considered alongside the within neglect, a pattern emerges. We, therefore, find a pattern of neglect, in violation of RPC 1.1(b).

In all, respondent grossly neglected two of the five instant matters. He also lacked diligence, failed to communicate with the client, and failed to cooperate with ethics investigations in all five matters.

Ordinarily, conduct involving gross neglect in one or a few matters, with or without violations such as lack of diligence and failure to communicate with the client, warrants the imposition of an admonition or a reprimand. See, e.g., In the Matter of E. Steven Lustig, Docket No. DRB 00-003 (April 10, 2000) (admonition for attorney who grossly neglected a matrimonial matter and failed to adequately communicate with his client); In re Wildstein, 138 N.J. 48 (1994) (reprimand for gross neglect and lack of diligence in two matters and failure to communicate in a third matter); and In re Gordon, 121 N.J. 400 (1990) (reprimand for gross neglect and failure to communicate in two matters). In mitigation, respondent was forthright in his admission of wrongdoing, and offered that he is a sole practitioner with seven children between the ages of two and thirteen at the time. Respondent stated that resulting family pressures, including a divisive move to a new town, took a toll on his law practice during this time. In aggravation, respondent received a reprimand in 2001 for

similar misconduct. We were troubled that respondent did not learn from his prior mistakes, and here, we seriously considered more severe discipline than a reprimand. However, under all of the circumstances, we determine that a reprimand is sufficient discipline. Respondent is forewarned, however, that further ethics infractions on his part will be met with more severe discipline. Further, respondent is to be supervised by a proctor approved by the Office of Attorney Ethics ("OAE") for a period of one year from the date of this decision. Two members did not participate.

We also require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jeffry F. Nielsen
Docket No. DRB 04-023

Argued: March 18, 2004

Decided: April 29, 2004

Disposition: Reprimand

Members	***Disbar***	***Suspension***	***Reprimand***	***Admonition***	***Dismiss***	***Disqualified***	***Did not participate***
Maudsley			X				
O'Shaughnessy			X				
Boylan			X				
Holmes							X
Lolla			X				
Pashman			X				
Schwartz							X
Stanton			X				
Wissinger			X				
Total:			7				2

Julianne K. DeCore
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Chief Counsel