SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 00-327

IN THE MATTER OF

ANTHONY BAIAMONTE, III

AN ATTORNEY AT LAW

Decision

Argued: December 21, 2000

Decided: June 20, 2001

Valter H. Must appeared on behalf of the District IIA Ethics Committee

Dominic J. Aprile 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 filed by the District IIIA Ethics Committee ("DEC"). The complaint charged respondent with misconduct in three matters, one of which, the Vesey matter, was dismissed by the DEC after the grievant failed to appear at the hearing. Respondent was charged in both the Poretskin and Beeh matters with a violation of RPC 1.1(b) [pattern of neglect, mistakenly cited as section (e)], RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 1.16(d) (failure to turn over a client's file after termination of the representation) and RPC 3.2

(failure to expedite litigation). The Poretskin matter arose from respondent's handling of a legal malpractice claim. The Beeh matter arose from a matrimonial proceeding.

Respondent was admitted to the New Jersey bar in 1990. He is engaged in the practice of law in Toms River, Ocean County. He has no history of discipline.

The Poretskin Matter (District Docket No. IIIA-97-030E)

Harvey Poretskin was involved in litigation in Florida, arising out of his father's testamentary trust. His mother, Sophie Poretskin, apparently sued him – and others – both in his capacity as beneficiary of the trust and in connection with his role in the preparation of the trust. The 1992 trial produced a thirty-two-page court decision that concluded, among other things, that Poretskin was guilty of undue influence. After the court's decision, Poretskin developed a belief that Michael Rifkin, the attorney who had prepared the trust document, had perjured himself during the trial and that the decision was the product of that perjured testimony.

The disciplinary charges against respondent stem from a malpractice complaint that respondent filed against Rifkin.

* * *

In 1990 Poretskin and respondent began a series of discussions, during which respondent helped Poretskin understand the Florida proceedings. Respondent did not charge Poretskin for these discussions. In 1990 or 1991 Poretskin, who had Florida counsel, asked

respondent to go to Florida to attend a court conference and ascertain what was going on in the matter.[1] Poretskin agreed to pay respondent's expenses in connection with the trip. When respondent returned, he gave Poretskin a report on the proceedings. There are no allegations of misconduct by respondent up to this point.

In 1995, several years after the Florida litigation was completed, Poretskin engaged respondent to sue Rifkin for malpractice. They did not sign a retainer agreement. Poretskin believed that they had a contingent fee agreement and that he would be responsible for all costs.

By letter dated October 18, 1995 respondent contacted Charles D. Franken, Rifkin's attorney, advised him of his representation of Poretskin's interests and expressed a desire to discuss the matter with Franken. Respondent sent a similar letter to Rifkin on December 21, 1995, advising him that he represented Poretskin and asking Rifkin to contact him.[2] By letter dated March 5, 1996 Franken advised respondent of his position on Poretskin's claims against Rifkin.

On May 2, 1996 respondent filed a complaint against Rifkin in United States District Court, District of New Jersey. Poretskin gave respondent $120 for the filing fee and paid

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[1]Respondent told Poretskin that he was not a member of the Florida bar and, therefore, could not participate in the court proceedings.

[2]The record does not reveal why respondent wrote to Rifkin, knowing that he was represented by Franken.

him for drafting the complaint.[3] According to Poretskin, respondent told him that the complaint had been served in July 1996, a statement that respondent denied making.

Respondent testified that he and Poretskin had an ongoing professional relationship, having "counseled" Poretskin from 1990 through 1997. According to respondent, "it was just come over and chat. I never did any of the legal work for him." Respondent stated that Poretskin did not want him to go through the record "line by line."

Although respondent knew there was a court opinion in the underlying Florida action, he failed to review it prior to his filing the malpractice complaint against Rifkin. According to respondent, he told Poretskin that, although he could not guarantee that Poretskin had a viable claim against Rifkin, he would file a complaint nevertheless. Respondent testified that he would

> [e]ssentially have to draft the complaint to stay the action, to hold it until either my office or another firm comes in to actually go through the boxes of information and the time and expense in order to figure out what was going on. So I said fine. I said, let me file the complaint. At least that will get us a foot hold in there and see how the case develops after the complaint was filed.
> [T6/13/00 at 122-123]

According to respondent, in the summer of 1996 Poretskin brought him "boxes of information," including transcripts and a portion of the court order. Respondent testified that, after he skimmed through the material, he concluded that the facts did not support a malpractice claim against Rifkin. Respondent testified that, on a number of occasions, he

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[3]Respondent did not bill Poretskin for any additional work.

orally advised Poretskin of his opinion. Respondent did not reduce his advice to writing. Also, he took no steps to withdraw the complaint. Respondent explained that he

> was under the impression or under the assumption that maybe there's something in the records that he hasn't furnished me with that would allow us to continue to go forward. It didn't make any sense to withdraw and have him give us more information that would change and then refile it, so we left it there pending.
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> [T6/13/00 at 143]

Contrary to respondent's testimony that he was only supposed to file the complaint to preserve the cause of action, Poretskin testified that he thought that respondent would see the matter through to the end. According to Poretskin, respondent did not tell him that he could not move the case forward.

By letter dated November 8, 1996, Poretskin advised respondent that Richard J. Hays, a Florida attorney, had offered to help by filing the complaint in Florida. One week later, Hays personally wrote to respondent and offered his assistance in the matter. The record does not reveal if respondent replied to Hays' letter.

Poretskin testified that, after the district court complaint was filed, he called respondent "a few times a week" to inquire about the status of his case. He added that "[m]aybe one out of 100 that I called he got back to me, but nothing came of it." Poretskin also testified that he made two or three appointments to meet with respondent and that, when he went to respondent's office, no one was present. Contrarily, respondent testified that he spoke with Poretskin "at length all the time," both by phone and in person. Indeed, Poretskin

and respondent agreed that, between August 1996 and March 1997, they met about ten times. Poretskin testified that they very seldom discussed the case because respondent was busy. Respondent, in turn, stated that they spoke "less and less about the case because there was not much of a case to talk about."

In or about March 1997 Poretskin called the district court in Trenton to find out the status of his complaint. He was advised that respondent had been notified that the complaint would be dismissed in thirty days for lack of service. By certified letter to respondent dated March 28, 1997, Poretskin requested information about the case. Respondent did not reply, according to Poretskin. For his part, respondent testified that he might have spoken with Poretskin after he received the notice from the court. Respondent did not think it odd that Poretskin was inquiring about the status of the case, even though they had been in touch "every 10 days." Respondent testified that, in hindsight, he should have written a letter to Poretskin.

The court dismissed the complaint on April 9, 1997.

By certified letter dated May 3, 1997, Poretskin requested that respondent return his file. Respondent did not comply with Poretskin's request. On May 21, 1997 Poretskin retained new counsel, Robert Levinson. By letter of even date, Poretskin directed respondent to send his file to Levinson. Again, respondent disregarded Poretskin's request.

In October 1997 Levinson filed a verified complaint and order to show cause seeking the file from respondent, along with fees and costs. The order to show cause was signed with

a return date of November 21, 1997. Respondent delivered the file to Levinson a day or two before the return date. According to Levinson, respondent's file contained no correspondence from respondent to Poretskin about the status of the complaint against Rifkin. In addition, there was nothing in the file reflecting any efforts to serve the complaint.

Respondent admitted that he had ignored the requests for the file for many months.

Respondent was charged with a violation of RPC 1.1(b), RPC 1.3, RPC 1.4(a), RPC 1.16(d) and RPC 3.2.

In the DEC's view, respondent's testimony "provided no defense to the allegations of the complaint or to the testimony of Poretskin and Levinson." The DEC concluded that respondent had violated RPC 1.4 by his failure to communicate with Poretskin about the status of his case, to define the scope of the representation and to confirm conversations he had with Poretskin. The DEC noted that Poretskin's requests for information and expectations of respondent were reasonable.

The DEC also found that respondent had violated RPC 1.3 and RPC 3.2. The DEC pointed to the letters among respondent, Rifkin and Rifkin's attorney (Franken), which pre-dated the filing of the complaint, and to the court's thirty-two page opinion in the underlying litigation. Respondent admitted that he never reviewed the opinion prior to filing the malpractice complaint. As noted above, respondent stated that he filed the complaint without investigating the facts and that, after he later concluded that there was no viable claim against Rifkin, he did not withdraw the complaint because "something could have come up in the

future" supporting their cause of action. However, respondent made no further investigation. In the DEC's view, respondent failed to expedite the litigation and, in fact, did nothing but file the complaint to toll the statute of limitations.

The DEC also found that respondent violated RPC 1.16(d) by failing to turn over Poretskin's file, when requested by the client and by Levinson, forcing Levinson to file an order to show cause. The DEC noted that respondent waited until just prior to the return date to surrender the file.

Lastly, the DEC concluded that respondent demonstrated a pattern of neglect in his representation of Poretskin. In its report, the DEC pointed out that

> [i]t is incumbent upon an attorney to properly represent a client and to take control of the terms of his representation. He must communicate with his client so as to assure the client understands what is transpiring in his case. Baiamonte did none of this. Even his earlier representation of Poretskin, which is not a subject of this Ethics Complaint, was not clarified by Baiamonte to his client. Baiamonte's testimony clearly reflects that he did not understand his role as an attorney. Most troubling is that he may still not understand his role.
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> [Hearing panel report at 10]

The Beeh Matter (District Docket No. IIIA-97-031E)

Gene Beeh retained respondent in October 1995 to represent him in a divorce proceeding. Beeh could not remember if he had signed a fee agreement, although he recalled giving respondent a $1,000 retainer. Beeh paid respondent a total of $3,680 during the course of the representation, although he never received a bill. Respondent filed a divorce

complaint and defended Beeh in several domestic violence matters.

By letter dated September 26, 1996, Elaine Zamula, who represented Beeh's then-wife, advised respondent that a motion for pendente lite relief was scheduled for October 3, 1996. Apparently, a second letter was later sent to respondent, advising him that the matter had been carried to October 24, 1996. Neither respondent nor Beeh were present at oral argument on the motion. On October 24, 1996 the court entered an order indicating that Beeh had not filed any opposition to the motion and granting pendente lite relief to the wife.

In a certification attached to a later motion in the case (exhibit 20), Beeh stated that he had given respondent relevant information to file an opposition to the motion. It was Beeh's understanding, however, that respondent had traveled to Florida, rather than appear in court for oral argument.

Bartholomew G. Babiak, who later represented Beeh in the matrimonial proceeding, testified about his understanding of what had occurred in connection with the October 24, 1996 proceeding:

> [The judge] received a call from Mr. Baiamonte a couple days before the motion date asking for an adjournment. His response was to get a consent from the other side. Elaine Zamula refused to send consent and Mr. Baiamonte's response to [the judge] said, well, I'm going to Florida and went to Florida. And as a result no papers were filed in opposition to my motion [sic] to the pending motion.
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> [T6/13/00 at 211]

For his part, respondent testified that he did not appear on October 24, 1996 because he thought that the matter had been adjourned. He claimed that, although he was unable to

recall with specificity, he thought that he had requested an adjournment and that miscommunication with the court had caused his absence. The DEC focused on a December 1996 affidavit that respondent filed with the court - see below - stating that he and Beeh had failed to appear on October 24, 1996 because of "defective Notice." Respondent was unable to explain why he had used the words "defective notice."

Beeh testified that he was taken aback when he saw the October 24, 1996 order requiring that he pay $200 per week in support and one hundred percent of the medical expenses for his children and his then-wife, in addition to attorney's fees. He stated that he earned slightly more than $300 net per week and that it was impossible for him to comply with the requirements of the order. According to Beeh, respondent told him not to comply with the order, assuring him that he would "fix" it. Respondent also asked Beeh's employer not to withhold Beeh's pay.[4]

Respondent did not take any steps to correct the October 24, 1996 order until December of that year. He was unable to explain the delay. The record contains a letter from respondent to the court, dated December 17, 1996, with an attached order to show cause, seeking relief from the October 24, 1996 order. Respondent appeared before the court on December 24, 1996, at which time the court advised him that the order to show cause was

[4]Beeh's employer was subsequently given legal notice to either comply with the order or face a fine.

procedurally improper and that the matter had to be raised by way of a motion.[5] It does not appear that respondent filed the necessary motion.

Although the surrounding circumstances are unclear, on March 6, 1997 respondent advised Beeh that he could no longer represent him. Beeh then retained Babiak later that day. By letters dated March 7 and 14, 1997, Babiak requested that respondent sign a substitution of attorney. Both requests went unanswered, as did several phone messages.

On or about March 10, 1997 respondent called either Babiak or Beeh – the record is unclear – and advised him that he was going to Florida and would take care of the matter when he returned. On April 8, 1997 Babiak filed a motion seeking a substitution of attorney and counsel fees. Respondent sent the file to Babiak via overnight mail on May 2, 1997, the return date of the motion. On July 18, 1997 the court signed an order granting the substitution of attorney and awarding attorney's fees to Babiak.

Ultimately, Beeh received primary custody of his children and received financial relief retroactive to the October 24, 1996 court order.[6]

Beeh testified that, during the two-year course of his relationship with respondent, he

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[5]There was a great deal of discussion during the DEC hearing about whether respondent had actually filed the December 17, 1996 order to show cause. According to Babiak, the court had no record of its filing and Beeh was apparently unaware that it had been filed. After the hearing, respondent provided the panel chair with a copy of the court's audio tape. The tape indicated that respondent had, in fact, appeared before the court on December 24, 1996.

[6]Supplemental proceedings in this matter resulted in a September 24, 1998 order finding respondent in contempt and ordering him to pay a $100 sanction and $750 to Babiak.

had difficulty reaching him. He testified about the number of phone messages that he left for respondent and about three or so occasions that respondent could not attend to his case because he was in Florida.

With regard to his failure to timely turn over the file, respondent acknowledged that he had made a mistake in judgment and that he should have turned it over in a more timely fashion.

The complaint charged respondent with a violation of RPC 1.1(b), RPC 1.3, RPC 1.4(a), RPC 1.16(d) and RPC 3.2.

The DEC report set out the basis for its determination that respondent had violated each of the charged rules:

> It is clear that Mr. Baiamonte violated the above Rules of Professional Conduct. Baiamonte failed to respond on behalf of Mr. Beeh to a motion for pendente lite relief. He exhibited a pattern of neglect and failed to act with reasonable diligence or promptness in both not responding initially to the pendente lite motion and then not appropriately responding after the October 24, 1996 Order was entered against his client. Baiamonte knew there was a motion scheduled. **Exhibit 19** reflects that he must have known. Baiamonte's own testimony admits he knew of the motion per **Exhibit 19**. Yet, Baiamonte testified that he thought the matter was adjourned or thought there was defective notice, etc. He clearly does not testify truthfully regarding this issue.
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> Subsequent to the October 24, 1996 order, Baiamonte violated RPC 3.2 and 1.4(a) by not immediately taking action to correct or have the Court reconsider the October 24, 1996 order. The December 17/December 24 Order to Show Cause was inappropriately brought and was not a 'reasonable effort to expedite litigation'. Baiamonte did not communicate with Beeh about the October 24 motion; nor did he keep Beeh reasonably informed about the status of the matter before or after October 24, 1996. Baiamonte failed to return phone calls per Beeh's testimony.
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> Baiamonte's advice to Beeh not to comply with the October 24, 1996

order is a far cry from compliance with RPC 1.4(a); rather it seems to be an avoidance technique so he does not have to deal directly with Beeh's legal problems.

Baiamonte allows six months to pass after the October 24, 1996 order is entered, even though he admittedly knows that his client is in dire financial straits. Then in March, 1996, it is Baiamonte who tells Beeh in Court that he can no longer represent him.

Baiamonte violates RPC 1.16(d) in that he again fails to surrender the file for nearly two months after a new attorney contacts him and only after a motion is filed and about to be heard. Baiamonte does absolutely nothing to protect Beeh's interests. Baiamonte's actions delay Beeh's case for months causing him further time away from his children and deeper financial problems.

[Hearing panel report at 14-15]

The DEC recommended that respondent be suspended for his misconduct in the Beeh and Poretskin matters.

* * *

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

The DEC's findings are, for the most part, supported by the record. We did not find a pattern of neglect: only two matters are at issue and we ordinarily require at least three matters to find a violation of RPC 1.1(b).

The balance of the DEC's findings - in Poretskin, lack of diligence, failure to communicate, failure to expedite litigation and failure to turn over the file - and in Beeh lack of diligence, failure to expedite litigation, failure to communicate and failure to turn over the file - is well-founded. Indeed, in Beeh respondent was well-aware that the support issue had

still not been resolved and that his client was sinking further into debt. Under those circumstances, the above findings are appropriate.

As noted above, the hearing panel expressed its concern that respondent lacked an appropriate understanding of his role as an attorney. Those concerns are not without basis. Particularly in Poretskin, respondent failed to make it clear to his client precisely what he intended to do for him. Indeed, most troubling was respondent's lack of comprehension of the importance of written communication with his client. Had he sent a letter to Poretskin confirming their alleged conversations, he might not have been facing ethics charges. If he did tell Poretskin that he could no longer pursue the case against Rifkin, that was not made clear to Poretskin. Otherwise, Poretskin would not have continued to call and write to respondent. Indeed, Hays, Poretskin's counsel in Florida, would not have written to respondent offering assistance in the case months after respondent decided to allow the complaint to be dismissed.

Similarly, in Beeh, respondent contended that he failed to appear for the October 24, 1996 hearing because he thought that it had been adjourned. Again, respondent should have sent a confirming letter to the court and to his adversary. The letter not only would have cleared up any misunderstanding, but also buttressed respondent's claim that he reasonably believed the proceeding had been adjourned.

This matter is similar to In re Lewinson, 162 N.J. 4 (1999). There, a three-month suspension was imposed where the attorney displayed gross neglect, lack of diligence, failure

to expedite litigation and failure to communicate with her clients in two matters. The attorney failed timely to file expert reports and motions for appeal in one matter and failed to appear at pre-trial conferences. In another case, the attorney failed to timely file an expert report – thereby causing the dismissal of her client's case - failed to order a transcript of trial court proceedings – thus losing the chance to appeal a trial court dismissal – and failed to communicate with her client about the status of the case. The level of discipline for Lewinson was elevated because of her ethics history. She had received a prior reprimand and, in yet another matter, we had voted several months earlier to impose a six-month suspension.

Unlike Lewinson, however, this respondent has no disciplinary history. We, therefore, do not believe that a suspension is warranted at this time. A reprimand more properly reflects the level of discipline required for respondent's ethics infractions. We unanimously voted to impose a reprimand. See, e.g., In re Zukowski, 152 N.J. 59 (1997) (attorney was reprimanded after he failed to diligently pursue a workers' compensation claim and failed to communicate with the client; in a second matter, the attorney grossly neglected a personal injury case) and In re Caruso, 151 N.J. 316 (1997) (attorney was reprimanded for lack of diligence in two matters and failure to expedite litigation in a third matter).

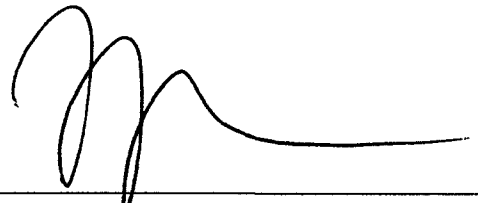
One more point warrants mention. At the DEC hearing, respondent asserted that he wanted to preserve, as a basis for "appeal," his contention that the hearing process at the DEC level was improperly delayed. At oral argument we allowed respondent's counsel to

supplement the record with a certification in which respondent again mentioned the delay in the disposition of these matters. Respondent's counsel argued that, due to this delay, the imposition of a suspension at this time would "unfairly impact upon respondent's new employment." Inasmuch as we have voted not to suspend respondent, there was no need for us to consider the passage of time as a mitigating factor.

One member recused himself. Two members did not participate.

We further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/20/01

By: 

MARY J. MAUDSLEY
Vice Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony Baiamonte
Docket No. DRB 00-327

Argued: December 21, 2000

Decided: June 20, 2001

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson						X	
Boylan			X				
Brody			X				
Lolla			X				
Maudsley							X
O'Shaughnessy			X				
Schwartz							X
Wissinger			X				
Total:			7			1	2

Robyn M. Hill 7/31/01

Robyn M. Hill
Chief Counsel