SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-113
District Docket No. XIV-2013-0408E

IN THE MATTER OF	:	
MICHAEL J. VOLLBRECHT	:	
AN ATTORNEY AT LAW	:	Decision

Argued: June 18, 2015

Decided: November 16, 2015

Timothy McNamara appeared on behalf of the Office of Attorney Ethics.

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 censure filed by the District XII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client), RPC 1.16(a) (failure to withdraw from the representation), RPC 3.2 (failure to expedite litigation), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the

administration of justice). The Office of Attorney Ethics (OAE) suggested a reprimand. For the reasons set forth below, we determined that a reprimand is the appropriate form of discipline in this case.

Respondent was admitted to the New Jersey bar in 2010. He was admitted to the District of Columbia Bar in 1981; the New York Bar in 1983; and the Minnesota and Pennsylvania Bars in 1992. Only the New York and New Jersey Bars are active admittances

During the applicable period of time, respondent was senior counsel at Gordon & Rees, LLP (G & R) in New York, New York. He is not currently practicing law. The OAE and respondent stipulated to the following facts:

On July 8, 2010, Michael Fogarty and Gary Kofman filed a wrongful termination suit against Premiere Global Services, Inc. (Premier) and Xpedite Systems, LLC (Xpedite) in Superior Court of New Jersey, Monmouth County. G & R, which represented Premiere and Xpedite, assigned the matter to respondent in 2011. On September 14, 2012, respondent filed a motion for summary judgment in that matter. At that time, however, a dispute over depositions and the production of certain documents had arisen

between respondent and counsel for plaintiffs. Respondent failed to notify his clients and G & R about the dispute.

Subsequently, on December 31, 2012, plaintiffs filed a motion to compel discovery, requesting an order dismissing defendants' answer, without prejudice, for failing to comply with discovery orders dated September 28 and November 16, 2012. The motion also requested that reinstatement of the answer be conditioned on respondent's compliance with the orders. Plaintiffs' co-counsel, Carmen M. Finegan, submitted a certification to the court in which she chronicled the various discovery orders with which respondent had failed to comply. Respondent neither submitted a brief in opposition nor informed his clients of the pending motion.

On February 8, 2013, Judge Perri denied the plaintiffs' motion because discovery had ended on December 31, 2012. Nonetheless, she dismissed defendant's answer, without prejudice, for "failure to properly respond to [p]laintiffs' discovery requests." The order stated that any reinstatement must be made by motion as set forth in R. 4:23-5. Respondent failed to inform his clients of the dismissal of their answer.

On February 28, 2013, at the request of plaintiffs' co-counsel, Jeffrey Downs, respondent consented to an adjournment

of the defendants' motion for summary judgment, to April 5, 2013, after all of the discovery was produced.

On April 10, 2013, plaintiffs filed a motion to dismiss defendant's answer, with prejudice, for their failure to comply with the court's orders dated September 28 and November 16, 2012, and for failure to properly reinstate the answer in accordance with R. 4:23-5. Downs' certification asserted that, "to date, Plaintiffs have not received any discovery and Defendants' counsel has failed to file the appropriate Motion with the Court to reinstate its Answer pursuant to R. 4:23-5(1). Over 60 days have passed since the [C]ourt's order." Respondent never attempted to obtain the pertinent discovery from his clients. He failed to inform them, or his firm, of the pending motion.

On May 17, 2013, the plaintiff's motion was heard before Judge Scully, who stated:

> I have read your summary judgment motion. I have read your arguments, but how do I get around the reality that there has been no order to restore [the Answer]? There has been no order to vacate? The order of Judge Perri as scholarly as your summary judgment motion appears to be, that the order of Judge Perri's has never been addressed. And we are sixty days beyond that.
>
> [Exhibit 10, p.4.]

Respondent argued that his "motion was filed before any of the other orders" and should be addressed. Judge Scully replied that, although he "under[stood] that equity . . . [dictated] . . . that the motion for summary judgment should be addressed. But procedurally there [was] not a mechanism by which to do so . . ."

On May 28, 2013, Judge Scully dismissed the answer, with prejudice. Yet again, respondent failed to inform his clients and G & R of the status of the matter.

On May 29 and June 12, 2013, plaintiffs filed requests for entry of default.[1] Again, respondent failed to notify his clients or his firm regarding the status of the matter. On June 11, 2013, respondent's clients requested a status update on the case, which respondent failed to answer. On June 20, 2013, the clients renewed their request for an update; however, this time, respondent falsely stated that the decision on the motion for summary judgment was pending and that, if it were denied, a trial would commence.

Several days later, on June 27, 2013, plaintiffs filed a motion for final judgment by default and demand for proof

---

[1] Because the clerk's office had not docketed the May 29, 2013 request for entry of default, plaintiffs submitted a second request on June 12, 2013.

hearing. They served this motion on both respondent and on defendants directly. Upon receipt of this motion, respondent's clients, Premiere and Xpedite, learned that the summary judgment motion was no longer pending and that a default judgment had been entered against them.

Soon thereafter, and effective July 15, 2013, G & R terminated respondent's employment, following an investigation into his conduct. When respondent spoke with Thomas Packer, Esq., G & R's general counsel, during its investigation, respondent did not explain his conduct. He simply stated that he did not know why he had failed to reply to client inquiries or why he had failed to inform the clients truthfully of the status of the litigation. Ultimately, respondent's conduct resulted in financial fallout for G & R. The firm waived approximately $135,000 in legal fees and paid $287,000 in settlement monies to resolve the case.

Because respondent had previously admitted to the facts and RPC violations of the complaint, the DEC hearing addressed only mitigating and aggravating factors. At the outset, respondent acknowledged his stipulation to the facts and violations and indicated that he is no longer practicing law. At the time of the hearing, he was employed by a CPA doing tax work.

Respondent conceded that his behavior was inexcusable. He theorized that his conduct stemmed from a combination of ego and his belief that the plaintiffs' claims should not have been allowed to go forward and cause great expense to his clients. He let this opinion cloud his judgment. Despite specific questions on the subject, respondent made clear that there was nothing in his personal life at the time that could have impacted his handling of the matter and nothing in particular done by his adversaries that contributed to his violations. Respondent had previously offered to the DEC investigator two explanations for his conduct. First, he claimed that, his head was "in the sand," and second, he was "hoping that somehow, despite what had happened, the judge could still grant the motion for summary judgment."

Respondent also indicated that, as a result of this incident, he is no longer pursuing a legal career, but may do so in the future. He acknowledged that any future practice would require less freedom and more supervision, so as to avoid making the same mistakes. He added that, although he believes that he would not commit similar violations, he could not guarantee he would not.

At the DEC hearing, the presenter recognized, in mitigation, that respondent fully cooperated with the disciplinary process, readily admitted his wrongdoing, accepted responsibility for his actions, was forthcoming, and expressed sincere contrition and remorse.

The panel chair concluded, on the record, that respondent was the most contrite attorney he had encountered in the numerous ethics hearings in which he had participated. Respondent stated that he would accept whatever discipline the committee determined was appropriate.

The DEC found by clear and convincing evidence that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.16(a), RPC 3.2, RPC 8.4(c), and RPC 8.4(d). Not only did respondent fail to communicate effectively with his clients, but he also made gross misrepresentations of fact to the clients, "exuded gross negligence and lack of diligence in prosecuting and defending their claims," and failed to follow the basic court rules. The DEC characterized respondent's actions as "gross misconduct" and concluded that his material misrepresentations to his clients constituted a clear breach of the ethics standards of a New Jersey attorney.

In aggravation, although the DEC observed that this case was an isolated incident, it determined that a continuing course of dishonesty and misrepresentation ran throughout respondent's representation of his clients. The DEC considered respondent's admission that he could not guarantee that this type of conduct would not reoccur and his suggestion of tighter controls, if he practiced law again.

In mitigation, the DEC considered respondent's clear sense of contrition and admission of wrongdoing from the outset of this matter, his cooperation with the OAE's investigation, and the fact that he voluntarily no longer practices law in New Jersey.

Erroneously believing that the presenter had recommended a censure, rather than reprimand, for respondent's violations, the DEC adopted that quantum of discipline. The DEC also recommended that respondent demonstrate proof of fitness to practice law, based on his testimony that he could not guarantee that similar misconduct would not occur in the future and his request for supervision.

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

amply supports a finding that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, RPC 8.4(c), and RPC 8.4(d) during his representation of Premiere and Xpedite. Respondent neglected his clients' matter and lacked diligence by failing to comply with court orders and other procedural requirements throughout the course of the litigation. He failed to provide discovery to plaintiffs' counsel, failed to reply to a motion to dismiss his clients' answer, and failed to take any steps to reinstate the answer, resulting in its dismissal, with prejudice. Respondent, thus, was guilty of gross neglect and lack of diligence.

Further, respondent failed to communicate with his clients. He did not inform them of important developments in their case and ignored their requests for information about the status of the matter. Respondent admitted that he "buried his head in the sand" and let his mistaken opinion of how the matter should proceed (that his summary judgment motion should be heard) interfere with the proper representation of the clients' interests. This same impairment resulted in respondent's failure to expedite the litigation and conduct prejudicial to the administration of justice, as respondent's adversary filed several motions to obtain compliance with discovery

requirements, culminating in the dismissal of respondent's clients' answer.

In addition, respondent made misrepresentations to his clients, both by silence, by failing to inform them of key events, and, ultimately, by affirmatively stating that the summary judgment motion was still pending, despite his knowledge that it was not.

The record, however, lacks clear and convincing evidence that respondent violated RPC 1.16(a). That rule provides:

> Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) the lawyer is discharged.

Here, respondent's strong but erroneous view of the case did not amount to a physical or mental condition that materially impaired his ability to represent his clients. Otherwise, every attorney who employs a failed strategy would be guilty of a violation of RPC 1.16(a). We, thus, dismissed that RPC.

In sum, respondent was guilty of violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, RPC 8.4(c), and RPC 8.4(d).

A misrepresentation to q client 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 ethics infractions, as are present in the instant case. See, e.g., In re Ruffolo, 220 N.J. 353 (2015) (respondent exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, not working on it after filing the initial claim, and failing to take any steps to prevent its dismissal or ensure its reinstatement thereafter, violations of RPC 1.1(a) and RPC 1.3; the attorney also violated RPC 1.4(b) by failing to promptly reply to the client's requests for status updates; finally, his assurances that the client's matter was proceeding apace and that the client should expect a monetary award in the near future, when the attorney knew that the complaint had been dismissed, were false and violated RPC 8.4(c)); In re Falkenstein, 220 N.J. 110 (2014) (reprimand imposed on attorney who did not comply with his client's request that he seek post-judgment relief, violations of RPC 1.1(a) and RPC 1.3; he also failed to inform the client that he had not complied with the client's request, choosing instead to lead the

client to believe that he had filed an appeal and concocting false stories to support his lies, a violation of RPC 8.4(c); because he did not believe the appeal had merit, the attorney's failure to withdraw from the case was a violation of RPC 1.16(b)(4); the attorney also practiced law while ineligible, although not knowingly, a violation of RPC 5.5(a)); In re Braverman, 220 N.J. 25 (2014) (reprimand imposed on attorney who failed to tell his client that the complaints filed on her behalf in two personal injury actions had been dismissed, thereby misleading her, by his silence, into believing that both cases remained pending, a violation of RPC 8.4(c); the attorney also violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, and RPC 8.1(b); the Board found that the attorney's unblemished thirty-four years at the bar was outweighed by his inaction, which left the client with no legal recourse); and In re Winston, 219 N.J. 426 (2014) (reprimand for attorney whose failure to file a brief resulted in the dismissal of the client's appeal; violations of RPC 1.1(a) and RPC 1.3; the attorney failed to notify his client of the expiration of the deadline for filing the brief and to keep him informed about the status of the matter, a violation of RPC 1.4(b); instead, the attorney misrepresented to the client that the brief had been timely filed and that the appeal was

proceeding apace, a violation of RPC 8.4(c); compelling mitigation).

The attorney in Falkenstein, supra, did not comply with his client's request that he seek post-judgment relief and failed to inform the client that he had not complied with the client's request, choosing instead to lead the client to believe that he had filed an appeal and concocting false stories to support his lies because he did not believe the appeal had merit. Like respondent, he was guilty of gross neglect, lack of diligence, and misrepresentations to the client. Falkenstein had the additional violations of practicing while ineligible, although not knowingly, and failing to withdraw from the representation.

Additionally, the attorney in Braverman, supra, like respondent, failed to inform his client of procedural issues that jeopardized the case, thereby misleading the client, by his silence, into believing that the matter was proceeding in the normal course. Like respondent, Braverman was guilty of gross neglect, lack of diligence, failure to communicate, failure to expedite the litigation, and misrepresentation. He also failed to cooperate with disciplinary authorities, a circumstance not present here. In that case, we found that Braverman's

unblemished thirty-four years at the bar was outweighed by his inaction, which left the client with no legal recourse.

Here, in addition to the above violations, respondent is also guilty of engaging in conduct prejudicial to the administration of justice. Violations of RPC 8.4(d) come in a variety of forms and the discipline imposed typically results in either a reprimand or a censure, depending on the presence of circumstances such as the existence of other violations, the attorney's ethics history, whether the matter proceeded as a default, the harm to others, and mitigating or aggravating factors. Reprimands resulted in In re Gellene, 203 N.J. 443 (2010) (attorney found guilty of conduct prejudicial to the administration of justice and knowingly disobeying an obligation under the rules of a tribunal for failing to appear on the return date of an appellate court's order to show cause and failing to notify the court that he would not appear; the attorney was also guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients; mitigating factors considered were the attorney's financial problems, his battle with depression and significant family problems; his ethics history included two private reprimands and an admonition); In re Geller, 177 N.J. 505 (2003) (attorney

failed to comply with court orders (at times defiantly) and the disciplinary special master's direction not to contact a judge; the attorney also filed baseless motions accusing judges of bias against him, failed to expedite litigation and to treat with courtesy judges, his adversary, the opposing party, an unrelated litigant, and a court-appointed custody evaluator, used means intended to delay, embarrass or burden third parties, made serious charges against two judges without any reasonable basis, made unprofessional and demeaning remarks toward the other party and opposing counsel, and made a discriminatory remark about a judge; in mitigation, the Board considered that the attorney's conduct occurred in the course of his own child custody case); and In re Hartmann, 142 N.J. 587 (1995) (attorney intentionally and repeatedly ignored four court orders to pay opposing counsel a fee, resulting in a warrant for the attorney's arrest; the attorney also displayed discourteous and abusive conduct toward a judge with intent to intimidate her).

Censures were imposed in In re D'Arienzo, 207 N.J. 31 (2011) (attorney failed to appear in municipal court for a scheduled criminal trial and thereafter failed to appear at two orders to show cause stemming from his failure to appear at the trial; by scheduling more than one matter for the trial date,

the attorney inconvenienced the court, the prosecutor, complaining witness, and two defendants; in addition, the failure to provide the court with advance notice of his conflicting calendar prevented the judge from scheduling other cases for that date; prior three-month suspension and two admonitions plus failure to learn from similar mistakes justified a censure) and In re LeBlanc, 188 N.J. 480 (2006) (attorney's misconduct in three client matters included conduct prejudicial to the administration of justice for failure to appear at a fee arbitration hearing, failure to abide by a court order requiring that he produce information; other ethics violations included gross neglect, pattern of neglect, lack of diligence, failure to communicate with client and failure to explain the matter to the extent necessary for the client to make informed decisions about the representation, receipt of an unreasonable fee, failure to promptly remit funds to a third party, failure to expedite litigation, failure to cooperate with ethics authorities, and failure to comply with the rule prohibiting non-refundable retainers in family law matters; mitigation included, among other things, the attorney's recognition and stipulation of his wrongdoing, his belief that his paralegal had handled post-closing steps, and a lack of

intent to disregard his obligation to cooperate with ethics authorities).

Here, respondent ignored orders of the court and continued to proceed in a manner he felt was equitable, despite the fact that the rules of court and the judges presiding over his matter provided otherwise. His failure to comply with these orders and the court rules caused great damage to his clients and, ultimately, to his firm, which waived fees and paid a settlement, for a total financial loss of $422,000.

In mitigation, respondent has had a lengthy legal career, having been a licensed attorney for thirty-four years with no known history of discipline in any state in which he has practiced, albeit having been admitted in New Jersey for only one year at the time of the misconduct. Further, both the DEC, in its decision, and the OAE presenter, at oral argument before us, went out of their way to highlight respondent's remorse and contrition throughout this matter. Additionally, respondent admitted his wrongdoing from the very beginning. Thus, notwithstanding the financial harm that respondent caused, on balance, we determine that a reprimand is the appropriate quantum of discipline for his misdeeds.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael J. Vollbrecht
Docket No. DRB 15-113

Argued: June 18, 2015

Decided: November 16, 2015

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera						X
Singer			X			
Zmirich			X			
Total:			7			1

Ellen A. Brodsky
Chief Counsel