SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-225
District Docket No. VA-2013-0003E

IN THE MATTER OF

GERALD M. SALUTI, JR.

AN ATTORNEY AT LAW

Decision

Argued: October 15, 2015

Decided: April 18, 2016

David M. Dugan appeared on behalf of the District VA Ethics Committee.

Respondent's counsel 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 one-year suspension filed by the District VA Ethics Committee (DEC). The formal ethics complaint charged respondent with violations of RPC 1.1(a) (gross neglect); RPC 1.2 (presumably, subsection (a), failure to abide by a client's decisions concerning the scope and objectives of representation); RPC 1.3 (lack of

diligence); RPC 1.4 (presumably, subsection (b), failure to keep a client reasonably informed about the status of a matter); RPC 1.5 (presumably, subsection (b), failure to provide a client with a writing setting forth the basis or rate of the fee); RPC 3.2 (failure to expedite litigation); RPC 8.4(a) (violating or attempting to violate the RPCs by assisting or inducing the acts of another); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 8.4(d) (conduct prejudicial to the administration of justice); and RPC 8.4(e) (stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law).

For the reasons detailed below, we determine to impose a one-year suspension on respondent, with conditions.

Respondent was admitted to the New Jersey bar in 1992. At the relevant time, he maintained a law office in Newark, New Jersey.

Respondent has an extensive disciplinary history. In 2007, he was admonished for misconduct spanning a two-year period. He had been retained, in September 2003, for a criminal matter. His communications with his client broke down when respondent's wife became seriously ill. In imposing only an admonition, we considered that, at the time, respondent was "beset" by his

wife's illness, had made restitution to his client, and had no disciplinary history. In the Matter of Gerald M. Saluti, Jr., DRB 07-117 (June 22, 2007).

In 2012, respondent was admonished again for his 2003 representation of a client in connection with a post-conviction relief application and potential appeal of a conviction. He violated RPC 1.5(b) by failing to communicate in writing the basis or rate of the fee to the client. There, too, we considered that respondent was experiencing personal problems at the time of his misconduct. In the Matter of Gerald M. Saluti, Jr., DRB 11-358 (January 20, 2012).

In 2013, respondent was reprimanded for failure to cooperate with an ethics investigation after he had ignored three letters, demanding a reply to a grievance. It was not until a formal ethics complaint was filed that he retained counsel, filed an answer, and participated at the hearing. We did not find his wife's health issues as mitigation in this matter, as respondent was continuing to practice law and was accepting new cases. In re Saluti, 214 N.J. 6 (2013).

Effective February 28, 2014, the Court suspended respondent from the practice of law for three months for failing to provide a client with a writing setting forth the basis or rate of the fee; failing to disclose a material fact to a tribunal; making

false or misleading communications about his services; failure to cooperate with disciplinary authorities; violating or attempting to violate the RPCs; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct prejudicial to the administration of justice. In re Saluti, 216 N.J. 549 (2014). Respondent remains suspended to date.

We now turn to the facts in the instant matter. On April 13, 2010, as part of a domestic violence investigation, the Roselle Park Police Department executed a search warrant on grievant David C. Borges' residence in Roselle Park, New Jersey. After the search was completed, Borges was arrested and charged with a domestic violence offense and multiple controlled dangerous substance offenses. The domestic violence charge stemmed from an allegation that Borges had harassed a former paramour, L.V., who had been granted a temporary restraining order (TRO) against him. The controlled dangerous substance charges were a result of illegal drugs seized from Borges' residence.

Later that month, Borges retained respondent to defend him against all of the criminal charges relating to his arrest (the Criminal Case) and to represent him at a pending hearing in the TRO matter (the TRO Case). Borges claimed that, during their

initial meeting, respondent also agreed to represent him in an action to recoup money that the police had seized from him in connection with the Criminal Case (the Forfeiture Case). Borges expressly informed respondent that he needed the seized funds to avoid breaching a pending contract he had entered into for the purchase of a home. In his answer to the formal ethics complaint, respondent denied that he had agreed to represent Borges in the Forfeiture Case. However, during the disciplinary hearing, respondent's counsel stipulated that the denial was erroneous and conceded that respondent had advised Borges regarding the Forfeiture Case.

During their initial meeting, Borges also informed respondent that he wanted to file a civil rights action against the Roselle Park Police Department, based on the theory that his arrest was improper and was part of a larger conspiracy between the department and his former girlfriend (the Civil Rights Case). Respondent and Borges engaged in at least one additional face-to-face meeting about the potential for such a claim, in February of 2012. Borges claimed that respondent told him on multiple occasions that he intended to obtain police records, audio and video recordings, and other records related to L.V. in order to pursue the Civil Rights Case.

On May 4, 2010, respondent appeared on Borges' behalf at the hearing in the TRO Case. The court determined that the allegations of domestic violence against Borges had not been substantiated and, therefore, vacated the TRO and denied the imposition of any civil restraints.

On June 5, 2010, after he had retained respondent, Borges was issued multiple motor vehicle summonses in the municipality of Sea Girt for driving while intoxicated, refusal to submit to the Alcotest examination, reckless driving, and speeding (the DWI Case). Borges conceded that respondent successfully represented him in the DWI Case, although he claimed he had been promised a three-month driver's license suspension, rather than the seven-month suspension imposed as part of his August 2010 guilty plea. Borges claimed that, for this reason, respondent had promised him a refund of $1,500, which respondent never paid to him.

On July 1, 2010, in the Forfeiture Case, the Union County Prosecutor's Office filed a formal complaint and demand for the forfeiture of approximately $50,000 seized in conjunction with Borges' arrest and the search of his home. Borges was served with a summons and complaint on August 2, 2010. Borges claimed that he promptly informed respondent of this development and provided him with a copy of the complaint. According to Borges,

respondent told him not to worry and promised to take the necessary steps to resolve the Forfeiture Case. During the disciplinary hearing, Garret Fruchtman, respondent's associate at the time of these events, admitted that he was aware of the Forfeiture Case, because the prosecutor had given him a courtesy copy of the forfeiture complaint during a court appearance in which he had represented Borges.

In summary, Borges believed that respondent represented him in the Criminal Case, the TRO case, the Forfeiture Case, the DWI Case, and the Civil Rights Case. This belief was grounded both in discussions with respondent regarding each matter and the agreement that Borges pay respondent a flat fee of $10,000 for all of the matters, except the DWI case, which was subject to a separate fee; Borges paid respondent $5,000 shortly after their initial meeting and paid the remaining $5,000 to respondent prior to the hearing in the TRO Case. Respondent failed to provide a retainer agreement to Borges in any of the matters.

On November 12, 2010, Borges was served with a default judgment that had been entered in the Forfeiture Case. He contacted respondent, expressing his alarm and concern about the loss of his seized funds. Respondent told Borges that, because the Criminal Case was not yet final, he could not yet respond to the Forfeiture Case. Respondent told Borges that to do otherwise

could compromise Borges' Fifth Amendment privilege against self-incrimination.

On February 7, 2011, Borges again contacted respondent about the Forfeiture Case and asked about the impact of his guilty plea in the Criminal Case on the Civil Rights Case. Respondent replied that he expected that the Forfeiture Case would be successfully resolved and that, in two weeks, Borges would get his money back. Additionally, respondent assured Borges that, despite his guilty plea, he could still sue the police department and that respondent "[had] the perfect guy for it." Borges testified that he was unsure, based on this reply, whether respondent intended, at that time, to refer the Civil Rights Case to another attorney. Based on subsequent discussions, however, Borges' belief that respondent was handling the Forfeiture Case, the Civil Rights Case, and the Criminal Case, was solidified. Despite his promises to get Borges' money back, respondent never filed a motion to vacate the default judgment in the Forfeiture Case.

In August 2010, in the Criminal Case, Borges was indicted by the Union County Grand Jury for seven crimes, including third-degree possession of a controlled dangerous substance with the intent to distribute. On October 31, 2011, Borges entered a guilty plea, pursuant to a negotiated plea agreement with the

State, to count one of that indictment, charging only third-degree possession of a controlled dangerous substance. Fruchtman, respondent's associate at the time, helped negotiate the plea agreement and appeared in court for both Borges' guilty plea and his February 10, 2012 sentencing.

Although the State's initial plea offer included a term of incarceration in state prison, Borges was sentenced, in accordance with the final plea agreement, to a three-year term of supervised probation, and sixty days in the Sheriff's Labor Assistance Program, and was ordered to submit to random drug testing. The State dismissed the remaining counts of the indictment, including the most serious charge, which alleged possession with intent to distribute. Borges testified that he was generally satisfied with respondent's representation in the Criminal Case, because he ultimately avoided a state prison sentence.

At the DEC hearing, Jillian Reyes, the assistant prosecutor who handled the Criminal Case on behalf of the State, confirmed that, although forfeiture of Borges' seized money was a condition of the initial plea offer, the final negotiated plea did not compel forfeiture of the seized funds. Reyes explained that she agreed to remove the forfeiture requirement from the final plea agreement after learning that a default judgment had

already been entered against Borges in the Forfeiture Case. Finally, Reyes stated that, had respondent or Borges sought to vacate the default judgment after the guilty plea had been entered, but prior to sentencing, it would have had no effect on the negotiated plea or ultimate sentence.

Borges testified that, during the course of the representation, he had difficulty communicating with respondent, summarizing:

> [b]asically, I could never get a hold of [respondent] . . . I would send text messages, phone calls, no replies, no answers. I'd be sitting in court for hours not knowing what's going on, where — where's my counsel.
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> [1T83-84].[1]

Borges recounted numerous texts and calls to respondent's cell phone that were never returned, including messages left while he waited, in court, on scheduled hearing dates. On those occasions, respondent either failed to appear, appeared late, or sent an associate late. To support this claim, Borges produced both telephone and text records of his attempts to communicate with respondent about the status of his pending matters. These records established that, from November 3, 2010 through February 2012, there were a total of fifty-four calls of short duration

[1] "IT" refers to the transcript of the July 23, 2014 DEC hearing.

between Borges and respondent, the vast majority of which were initiated by Borges. Borges testified that he made these calls in an attempt to contact respondent about his legal matters, including on those occasions when he was in court and respondent failed to appear or send an associate.

In February 2012, Borges began recording his attempts to contact respondent. Borges stated that he engaged in the recording because:

> [he] felt [respondent] had "just abandoned everything, all my cases, my [Forfeiture Case], my [Civil Rights Case] . . . I even thought he abandoned the [Criminal Case] at one point . . . there would be months that went by that I'd never be able to get in contact with him . . . my life was in shambles at that point . . . So I was trying my best to smooth things out and make contact and just pick up, you know, get it over with.
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> [1T113].

Included in the recordings are calls Borges made to respondent's office, on February 1, 2012, wherein Borges expresses his frustration about respondent's lack of communication over the course of months, stating that he had left numerous messages for respondent, but had received no return calls. Borges called respondent's office again on February 9, 2012, the day before his scheduled sentencing, in an

attempt to speak with respondent. Respondent never returned these calls.

On February 11, 2012, the day after Borges was sentenced, he and respondent met in respondent's office. This meeting occurred only because Borges, on the advice of one of respondent's employees, appeared unannounced at respondent's office on a Saturday morning. Borges used a hidden device to create a digital video recording of the meeting. During the meeting, Borges expressed frustration at the potential loss of the money in the Forfeiture Case, which, he reminded respondent, had been earmarked as a down payment for the purchase of a home. Respondent replied:

> Well, now that your criminal case is over, we can – we can vacate the default on the [Forfeiture Case] – you can actually answer . . . you can get the money back.
>
> [Ex.P15(d), part 2, minute 11:54].[2]

Borges asked respondent why a default judgment had been entered, when respondent purportedly was handling the matter. According to respondent, his decision to file no answer in the Forfeiture Case had been strategic, in order to preserve Borges'

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[2] Exhibit P15(d) is a three-part video of Borges' February 2012 meeting with respondent at his office. Citations to this exhibit reference the relevant part of the video footage and the time-stamp on the video where the applicable portion may be found.

Fifth Amendment privilege against self-incrimination, pending resolution of the Criminal Case.[3] He told Borges:

> [The State] can't do that (forfeit Borges' money) . . . the only basis they can move to take your money is if you pled guilty to possession with intent to distribute . . . What did I make sure you didn't plead guilty to . . . Possession with intent to distribute.
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> [Ex.P15(d), part 2, minute 11:56].

Respondent further assured Borges about the pending Forfeiture Case, stating, "[i]t's fine, relax. We'll file a motion to vacate and . . . [the Forfeiture Case] will go on." Respondent also told Borges, "[w]e'll have some answers on [the Forfeiture Case] run down and we'll make our motion [to vacate the default judgment] the week next."

During the recorded meeting, respondent and Borges also spoke at length about the Civil Rights Case. Borges complained that respondent never issued subpoenas for reports and other evidence that respondent previously identified as relevant to his claims that his arrest was improper. In turn, respondent assured Borges that all of the evidence would be obtained so that a lawsuit could be filed against the Roselle Park Police

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[3] During the disciplinary hearing, Borges conceded that, hypothetically, he would have forfeited the seized money if necessary to avoid a prison sentence, but denied that the funds were proceeds from illicit drug distribution, as had been alleged by the State.

Department and all other appropriate parties. Respondent assured Borges that the Civil Rights Case was a "cognizable lawsuit" that, due to the burden such litigation would place on all of the named defendants, could be worth $200,000 to $300,000 on "nuisance value" alone. Later during the meeting, respondent stated that he was "totally able to handle [a significant civil suit]" and that, in order to obtain an even larger settlement for Borges, he would seek discovery from the police department, including audio recordings, dispatch reports, and other records, and would file the suit in federal court, rather than state court. Respondent assured Borges that he would work on his behalf so they could both profit in the Civil Rights Case.

During their discussion of the Civil Rights Case, respondent suggested that, if Borges wanted "to make more money," he should go to a psychologist and claim that he is "unbelievably depressed, cannot sleep, can't eat, and [is] losing weight . . . this whole thing has overwhelmed me." Respondent cautioned Borges that the suggestion that Borges manipulate a psychologist to support additional damages is "between, you know, me and you, no taped conversation. I'll deny it to the end of my fucking life if it ever comes up."

Borges testified that, after this meeting with respondent, he was convinced that respondent would pursue the Civil Rights

Case and move to vacate the default judgment in the Forfeiture Case. Borges also believed that he and respondent would meet weekly, as a "standing appointment," to discuss his matters, as respondent had promised during their meeting. Borges stated, however, that despite the promises made at the meeting, respondent took no further action with respect to the Forfeiture Case and the Civil Rights Case. Borges further claimed that, after the meeting, respondent once again did not communicate with him for months, despite Borges' numerous telephone calls and text messages to respondent's cell phone. Additionally, Borges claimed that respondent did not appear for a subsequent meeting scheduled on March 20, 2012. To verify this claim, Borges presented a recorded call to respondent's office on that date that confirmed, from Borges' perspective, the missed meeting.

At the DEC hearing, Borges also submitted a series of text messages he had sent to respondent, in March 2012, conveying his anger at the breakdown in the representation by respondent. Borges continued trying to contact respondent through April 2012, but stopped after respondent's office staff threatened harassment charges if he kept calling.

Although respondent did not testify at the DEC hearing, his former associate, Fruchtman, explained that, toward the end of

2011, he became aware that respondent's wife was very ill, due to a cancer relapse. Respondent became less available, requiring Fruchtman to cover many of his matters. According to Fruchtman, "[respondent] was out of the picture for extended periods of time, two to three weeks at a time. . . And I did my best to [keep the law firm] afloat I guess."

On February 20, 2013, Borges filed a pro se motion to vacate the default judgment in the Forfeiture Case. Borges' motion was denied due to the length of time, more than one year, that had passed since the judgment had been entered, without a showing of excusable neglect.

The DEC determined that respondent represented Borges in the Forfeiture Case, made multiple promises to pursue the return of over $50,000 seized from Borges by law enforcement, and eventually abandoned the matter. The DEC concluded that, once Borges entered into a negotiated plea agreement that did not include forfeiture of the funds as a condition of the plea, respondent promptly should have sought to vacate the default judgment that had been entered. The DEC noted that, during their February 2012 meeting, respondent not only promised to take the necessary steps to vacate the default judgment, but actually boasted that he made sure Borges had not entered a guilty plea to a charge that would have precluded the return of the seized

monies. The DEC found that, contrary to his promises to act, respondent took no steps to advance Borges' interests in the Forfeiture Case and, thus, was guilty of gross neglect, in violation of RPC 1.1(a).

With respect to the Civil Rights Case, the DEC determined that respondent failed to abide by Borges' decisions concerning the scope and objectives of the representation, in violation of RPC 1.2(a). Specifically, the DEC found that, from the outset of the representation, respondent told Borges that he would gather evidence and pursue a claim that the Roselle Park Police Department had engaged in a conspiracy with Borges' ex-girlfriend, culminating in the search of his home and his alleged unlawful arrest. Respondent confirmed those promises during his meeting with Borges, on February 11, 2012. Despite this encouragement and these promises to Borges, respondent did nothing to advance the Civil Rights Case.[4]

Next, relying on the analysis supporting the violations of RPC 1.1(a) and RPC 1.2(a) in the Forfeiture Case and the Civil Rights Case, respectively, the DEC determined that respondent lacked diligence in his representation of Borges in both of

[4] The complaint did not charge respondent with violating RPC 1.1(a) (gross neglect) in connection with the Civil Rights Case.

those matters, and, thus, was guilty of two violations of RPC 1.3.

In addition, the DEC determined that respondent failed to return "dozens upon dozens" of Borges' telephone calls, failed to appear in court to represent Borges on multiple occasions, and failed to fulfill his promise, made during the February 2012 meeting, to commence weekly meetings with Borges. The DEC found that respondent had little or no contact with Borges following the February 2012 meeting, coinciding with the time frame that his then associate, Fruchtman, recalled marked the recurrence of respondent's wife's cancer. The DEC determined that respondent failed to communicate with Borges, in violation of RPC 1.4(b).

The DEC further determined that respondent violated RPC 3.2 with respect to the Forfeiture Case and the Civil Rights Case. Specifically, the DEC found that respondent did not expedite the litigation in these matters, but, rather, did the opposite. Additionally, the DEC found that respondent's failure to communicate with his client in those matters was discourteous, in violation of RPC 3.2.

The DEC also determined that respondent committed four violations of RPC 1.5(b) during his representation of Borges, for all of the matters, except the DWI Case, by failing to prepare written fee agreements for Borges, whom he had not

previously represented. The DEC excluded the DWI Case from the finding, reasoning that respondent provided Borges with a receipt for legal fees for that matter, thus satisfying the RPC's mandate. The DEC noted that respondent had admitted, in his verified answer, that no retainer agreement had been executed with Borges for any matter.

The DEC dismissed the charges that respondent violated RPC 8.4(a), RPC 8.4(c), RPC 8.4(d), and RPC 8.4(e). Specifically, the DEC concluded that these allegations all stemmed from the February 2012 meeting where, among other statements, respondent suggested that Borges consult a psychologist and make various claims about his health in order to bolster his damages in the Civil Rights Case. The DEC acknowledged being "deeply troubled" by respondent's behavior, but concluded that although respondent's conduct was certainly "ill-advised," it did not violate any RPCs to a clear and convincing standard. Additionally, the DEC declined to find violations of RPC 8.4(a) and (c), RPC 3.3, and RPC 3.4. Those charges had been based on the premise that, by encouraging Borges to fabricate psychological symptoms in connection with the Civil Rights Case, respondent lacked candor toward a tribunal and lacked fairness to the opposing party and counsel. The DEC reasoned that no litigation was ever commenced and, thus, there was no tribunal

or opposing party or counsel. The DEC was further swayed by Borges' testimony that he had, indeed, suffered various health problems as a result of the arrest and actions of the Roselle police.

The DEC found no mitigating factors. In aggravation, the DEC considered respondent's disciplinary history and, as previously noted, recommended the imposition of a one-year prospective suspension.

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.

Respondent agreed to represent Borges in the Forfeiture Case. After taking on that representation, respondent allowed a default judgment to be entered against his client, claiming later that it had been a strategic decision. After Borges entered a guilty plea that did not compel the forfeiture of more than $50,000 seized by law enforcement, respondent failed to vacate the default judgment, despite subsequent promises to do so. Simply put, besides hollow promises and boastful claims about his expert negotiation of the plea agreement, respondent took no action to advance Borges' interests in the Forfeiture Case. Once the guilty plea was entered, there were no longer any strategic concerns to excuse respondent's inaction. By his

complete failure to take any action in the Forfeiture Case, respondent violated RPC 1.1(a).

From the onset of the representation, Borges expressed a clear desire to sue the Roselle Park Police Department, based on the theory that it had engaged in a conspiracy with his ex-girlfriend and had subjected him to an improper search and arrest. On multiple occasions, respondent promised that he would gather evidence to support such a claim, going so far as to claim that both Borges and respondent would be "eating off" the proceeds of a settlement with the police department. During their February 2012 meeting, respondent purposely fueled Borges' desire to sue, telling him that the lawsuit was worth $200,000 to $300,000 on "nuisance value" alone and that he had the ability to prosecute such a claim. Nevertheless, and following the same pattern he exhibited in the Forfeiture Case, respondent did absolutely nothing to advance the Civil Rights Case. Respondent, thus, failed to abide by Borges' decisions concerning the scope and objectives of the representation in the Civil Rights Case, in violation of RPC 1.2(a).

We agree with the DEC's determination that respondent violated RPC 1.3 twice, in the Forfeiture Case and in the Civil Rights Case. In both of these components of the representation, respondent failed to advance Borges' interests, despite taking

on the representation and promising to pursue beneficial outcomes on his behalf. Respondent's inaction prejudiced Borges, especially with regard to the Forfeiture Case, which ended in a default judgment against him and the loss of over $50,000. For these reasons, respondent is guilty of two instances of lack of diligence, in violation of RPC 1.3. However, we do not agree with the DEC's conclusion that respondent violated RPC 3.2 in both the Forfeiture Case and the Civil Rights Case. RPC 3.2 (failure to expedite litigation) applies to pending litigation. If litigation is not pending, the rule does not apply. See, e.g., In the Matter of David S. Rochman, DRB 09-307 (April 20, 2010) (slip op. at 49); In the Matter of Thomas DeSeno, DRB 08-367 (May 12, 2009) (slip op. at 21). Due to respondent's failure to advance Borges' interests, there was no litigation commenced in these matters. Moreover, respondent's ethics transgressions with respect to his inaction are more appropriately captured by the gross neglect and lack of diligence charges detailed above.

As illustrated by the text and phone records submitted by Borges, respondent was difficult, and, at times, impossible to reach. During a February 2012 meeting, respondent acknowledged Borges' concerns over their communication and, in an effort to keep Borges as his client, promised to commence weekly meetings to discuss the Civil Rights Case and the Forfeiture Case.

Following that meeting, however, respondent had little or no contact with Borges, essentially abandoning his pending matters.

Although Fruchtman's testimony suggests that respondent's wife was suffering from a relapse of cancer, that fact does not excuse respondent's lack of communication, which was pervasive from the onset of his representation of Borges. Thus, the DEC correctly concluded that respondent failed to communicate with Borges, in violation of RPC 1.4(b). However, we do not agree with the DEC's conclusion that respondent's failure to communicate with Borges in these matters violated RPC 3.2. Although we agree with the DEC's characterization of that conduct as "discourteous," it is duplicative of the DEC's more appropriate finding of a violation of RPC 1.4(b).

We also find clear and convincing evidence to support the DEC's conclusion that respondent violated RPC 1.5(b). That rule requires a lawyer who has not regularly represented a client to communicate, in writing, the basis or rate of the fee within a reasonable time after the commencement of the representation. There is no evidence in the record that respondent previously represented Borges. In his verified answer to the complaint, respondent admitted that he did not present Borges with a retainer agreement. Accordingly, respondent violated RPC 1.5(b). Although the DEC determined that respondent committed four

separate violations of this ethics rule, such an analysis is not supported by the formal ethics complaint, which charged only one violation; by the language of the rule; or by applicable precedent. Thus, we find only a single violation of RPC 1.5(b).

Finally, notwithstanding the DEC's dismissal of all of the RPC 8.4 charges, we find that the record contains clear and convincing evidence to support those violations, with the exception of RPC 8.4(a).[5] Respondent's conduct during the February 2012 meeting with Borges constitutes clear and convincing evidence that he violated RPC 8.4(c), (d) and (e). Respondent suggested that, to bolster the claim for damages in the Civil Rights Case, Borges should fabricate various health issues and consult a psychologist about them. Respondent knew he was wrong to make such a suggestion, telling Borges that he would deny that such a conversation between them ever occurred, conduct that violated RPC 8.4(c). For the same reasons, we find that respondent's conduct is prejudicial to the administration of justice, in violation of RPC 8.4(d). Finally, respondent

[5] In our view, RPC 8.4(c) and RPC 1.2(d) more appropriately apply to respondent's conduct in counseling his client to fabricate a psychological component to his claim. Thus, we would dismiss the RPC 8.4(a) charge in favor of a finding of a violation of RPC 8.4(c) (the complaint did not charge respondent with a violation of RPC 1.2(d) in this regard). Our analysis in respect of the appropriate quantum of discipline is not affected by the dismissal of the RPC 8.4(a) charge.

violated RPC 8.4(e) by stating an ability to achieve results by means that violate the RPCs – specifically by manipulating a psychologist into creating false evidence to be used to enhance the damages claim in the Civil Rights Case.

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the harm to the clients, the attorney's disciplinary history, and the presence of aggravating or mitigating factors. See, e.g., In the Matter of Clifford Gregory Stewart, DRB 14-014 (April 22, 2014) (admonition; attorney who was not licensed to practice law in Washington, D.C. filed an employment discrimination case in the United States District Court for the District of Columbia and obtained local counsel to assist him in handling the matter; after the defendant filed a motion to dismiss the complaint, however, the attorney failed to provide local counsel with a written opposition to the motion until after the deadline for doing so had expired, resulting in the granting of the motion as unopposed; violations of RPC 1.1(a) and RPC 1.3; in addition, the attorney failed to keep his client informed about various filing deadlines and about the difficulty he was having with meeting them, particularly with the deadlines for filing an

objection to the motion to dismiss the complaint, violations of RPC 1.4(b) and RPC 1.4(c); we considered the attorney's exemplary, unblemished career of twenty-eight years at the time of the incident); In the Matter of Robert A. Ungvary, DRB 13-099 (September 30, 2013) (admonition; due to the attorney's failure to comply with discovery, his client's civil rights complaint was dismissed; the attorney's motion to vacate the default was denied and a subsequent appeal was dismissed for his failure to timely prosecute it; the attorney neither informed the client of the dismissal of the appeal nor discussed with him his decision not to pursue it; violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 1.4(c); although the attorney had been admonished previously, we noted that his conduct in the present matter predated the conduct in the prior matter and that the client and his family had continued to use the attorney's legal services, despite his shortcomings in the civil rights matter); In re Burstein, 214 N.J. 46 (2013) (reprimand for attorney guilty of lack of diligence, gross neglect, and failure to communicate with the client; although the attorney had no disciplinary record, the significant economic harm to the client justified a reprimand); and In re Kurts, 206 N.J. 558 (2011) (attorney reprimanded for mishandling two client matters; in one matter, he failed to complete the administration of an estate, causing

penalties to be assessed against it; in the other, he was retained to obtain a reduction in child support payments but at some point ceased working on the case and closed his office; the client, who was unemployed, was forced to attend the hearing pro se, at which time he obtained a favorable result; in both matters, the attorney was found guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to memorialize the basis or rate of his fee; mental illness considered in mitigation; no prior discipline).

Failure to prepare a written fee agreement, as required by RPC 1.5(b), even where accompanied by other infractions, typically results in an admonition. See, e.g., In the Matter of Osualdo Gonzalez, DRB 14-042 (May 21, 2014) (the attorney failed to communicate to the client, in writing, the basis or rate of the fee, a violation of RPC 1.5(b); he also failed to communicate with the client, in violation of RPC 1.4(b); in addition, at some point, the attorney caused his client's complaint to be withdrawn based only on a statement from his prior lawyer that the client no longer wished to pursue the claim, in violation of RPC 1.2(a); we considered the attorney's unblemished disciplinary record in twenty-seven years at the bar and several letters attesting to the attorney's good moral character); In the Matter of A. B. Steig a/k/a A. Brett Steig,

DRB 13-127 (October 25, 2013) (the attorney failed to communicate in writing the basis or rate of the fee to the client in a landlord-tenant dispute, in violation of RPC 1.5(b); although the attorney had received an admonition in 2011 for the negligent misappropriation of client funds, the conduct in that matter was unrelated to the infraction before us and, therefore, was not an indication of the attorney's failure to learn from his prior mistakes); and In the Matter of Linda M. Smink, DRB 13-115 (October 23, 2013) (the attorney violated RPC 1.5(b) by failing to communicate, in writing, the basis or rate of the fee with her client or the client's mother, who had paid the legal fee for the appeal of a criminal conviction; the attorney also failed to inform her client that the time to file the notice of appeal had expired, as had the time to file an appeal out of time, for good cause, in violation of RPC 1.4(b); the attorney also failed to retain hard copies of her client files at her office, in violation of RPC 1.15(d); in mitigation, the attorney had an unblemished disciplinary history in her twenty-four years at the bar).

By far, respondent's most serious misconduct consists of his violations of RPC 8.4(c), (d), and (e). Attorneys who have displayed conduct similar to respondent's, either to benefit clients or themselves, have received discipline ranging from a

censure to a term of suspension. See, e.g., In re Clayman, 186 N.J. 73 (2006) (censure imposed on attorney who knowingly misrepresented the financial condition of a bankruptcy client in filings with the United States Bankruptcy Court in order to conceal information detrimental to his client's Chapter 13 bankruptcy petition; we considered, in mitigation, that the attorney appeared to have been among the first attorneys in the local bankruptcy bar to experience changes in the U.S. Trustee's Office and the resultant strict requirements of a new Chapter 13 trustee and that the attorney did not act of venality); In re Trustan, 202 N.J. 4 (2010) (three-month suspension imposed on attorney who, among other things, submitted to the court a case information statement falsely asserting that the client owned a home, and drafted a false certification for the client, which was submitted to the court in a domestic violence trial); In re Vella, 180 N.J. 170 (2004) (three-month suspension imposed on attorney who, at the time of the entry of a judgment of divorce that incorporated a property settlement agreement, failed to disclose to her adversary and to the court that her client had died two weeks earlier; mitigating circumstances considered); In re Coffee, 174 N.J. 292 (2002) (on motion for reciprocal discipline following a one-month suspension in Arizona, three-month suspension imposed for attorney's submission of a false

affidavit of financial information in his own divorce case and subsequent misrepresentation under oath that he had no assets other than those identified in the affidavit); In re Kernan, 118 N.J. 361 (1990) (three-month suspension for attorney who, in his own divorce matter, submitted to the court a case information statement with a list of his assets and one day before the hearing transferred to his mother one of those assets, an unimproved 11.5 acre lot, for no consideration; the attorney's intent was to exclude the asset from marital property subject to equitable distribution; the attorney did not initially disclose the conveyance at the settlement conference held immediately prior to the court hearing and did so only when directly questioned by the court; the attorney also failed to amend the certification of his assets to disclose the transfer of the lot ownership; prior private reprimand (now an admonition)); In re Lawrence, 185 N.J. 272 (2005) (six-month suspension imposed on attorney who, in his own bankruptcy and divorce matters, failed to disclose several assets and the payment of a pre-petition debt; mitigation included the attorney's consent to the denial of his discharge; prior private reprimand); In re Forrest, 158 N.J. 428 (1999) (attorney suspended for six months after he failed to disclose the death of his client to the court, to his adversary, and to an arbitrator and advised the surviving

spouse, who was also a plaintiff, not to voluntarily reveal the death; the attorney's explanation was that "the only way that the defendant would put a fair value on the claim was to have the defendant evaluate it without considering the [co-plaintiff's] death" and that upon receiving the settlement offer he would have informed the defendant of the client's death); In re Telson, 138 N.J. 47 (1994) (six-month suspension imposed on attorney who concealed a judge's docket entry dismissing his client's divorce complaint and then obtained a divorce judgment from another judge without disclosing that the first judge had denied the request; the attorney later denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was afraid); In re Lowell, 178 N.J. 111 (2003) (three-year suspension for attorney who committed multiple ethics infractions in several matrimonial actions, including directing her client to sign fraudulent promissory notes and false certifications claiming that gifts from her father were actually loans; the attorney also elicited false testimony at the divorce hearing from the father, stating that the gifts were loans; other violations included submitting an order to the court without first notifying her adversary of its terms, adding a sentence to a stipulation without the adversary's knowledge, having a secretary sign a name to a

certification filed with the court without certifying the party's consent, drafting a motion on behalf of a client after the client had terminated her representation, and making misrepresentations in client bills); In re Yamada, 142 N.J. 473 (1995) (three-year suspension for attorney who assisted a client in evading federal income taxes, in violation of 26 U.S.C. §7201); and In re Lunn, 118 N.J. 163 (1990) (three-year suspension imposed on attorney who misrepresented to the court allegations in his own personal injury suit).

Here, respondent's conduct arguably was not as egregious as the behavior of the attorneys who received three-year suspensions for their transgressions. Although respondent's suggestion that he and Borges conspire to fabricate evidence of physical and psychological damages was never consummated, the failure to complete the ruse was due, in part, to respondent's related ethics transgression in failing to prosecute Borges' remaining pending matters. Respondent should not escape discipline for unethical behavior by virtue of his corollary misconduct, the commission of gross neglect and lack of diligence. What damage to the integrity of the legal profession might result when an officer of the court counsels his client to commit such a deceitful act to artificially inflate damages in a lawsuit? While never coming to fruition, respondent's actions

were more than "deeply troubling," they were dishonest, deceitful, and in violation of the RPCs. Respondent knew as much, telling Borges that he would deny that he ever made such a suggestion.

In our view, respondent abandoned his ethics responsibilities and exposed the bar to the serious potential for loss of confidence in the eyes of the public. His conduct was deplorable and demands discipline that protects the public.

Qualitatively, respondent's unethical conduct is most akin to that of the attorneys who received three or six-month suspensions for their misconduct. However, there is aggravation to consider. Specifically, respondent has been admonished previously, in 2007, for his failure to communicate with a client. His failure to communicate with Borges in this matter demonstrates a failure to learn from past mistakes and beckons progressive discipline.[6] See, e.g., In re Shapiro, 212 N.J. 561 (2013). Respondent's conduct in the instant case, however, predates the serious sanctions imposed on him in 2013 and 2014

[6] Although respondent was admonished in January 2012 for violating RPC 1.5(b) by failing to communicate in writing the basis or rate of the fee to the client, the timing of that discipline is such that it cannot be used to show that respondent failed to learn from his past mistakes in the instant matter.

and, thus, the unethical conduct in those cases is not germane to the quantum of discipline to be crafted here.

There is no mitigation to consider. Although there is no reason to doubt that respondent's wife was once again battling cancer during his representation of Borges, he has been given the benefit of the doubt for such tragic circumstances in other disciplinary matters and, yet continued to practice law, take on new cases, and commit new and diverse violations of the RPCs.

The facts of this case lead to the inevitable conclusion that respondent has lost his moral compass. The public must be protected from respondent, and the integrity of the bar must be preserved. Accordingly, we determine that the appropriate quantum of discipline for respondent's serious misconduct is a one-year suspension, consecutive to the term of suspension imposed by the Court, effective February 28, 2014. In addition, prior to reinstatement, respondent must complete at least eight additional credit hours in ethics, above and beyond any continuing legal education credits he will be required to complete on reinstatement. Moreover, on reinstatement, respondent must practice under the supervision of a proctor approved by the OAE, for a period of two years.

Member Gallipoli voted to recommend respondent's disbarment. Vice-Chair Baugh and Members Hoberman and Singer 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Gerald M. Saluti, Jr.
Docket No. DRB 15-225

Argued: October 15, 2015

Decided: April 18, 2016

Disposition: One-year Suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh						X
Clark		X				
Gallipoli	X					
Hoberman						X
Rivera		X				
Singer						X
Zmirich		X				
Total:	1	4				3

Ellen A. Brodsky
Chief Counsel