

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-231
District Docket No. VC-2014-0026E

IN THE MATTER OF
JOSEPH P. KELLY
AN ATTORNEY AT LAW

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Decision

Decided: April 29, 2016

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

This matter was before us on a certification of default
filed by the District VC Ethics Committee (DEC), pursuant to R.
1:20-4(f). The complaint charged respondent with having violated
RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to
communicate with the client), and RPC 8.1(b) and R. 1:20-3(g)(3)
(failure to cooperate with a disciplinary investigation). For

the reasons set forth below, we determine to reprimand respondent for his violation of the above RPCs.

Respondent was admitted to the New Jersey bar in 1967. At the relevant times, he was of counsel to the law firm of Nitti & Nitti, in Roseland.

In 1993, respondent received a private reprimand. In the Matter of Joseph P. Kelly, DRB 93-074 (May 14, 1993). Specifically, he violated RPC 1.1(a) (gross neglect) when he allowed his client's complaint to be dismissed, due to his failure to answer interrogatories, and took no action to have the action reinstated.

From September 2006 through September 2012, respondent was ineligible to practice law for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection (CPF). On September 24, 2012, his license to practice law was administratively revoked because he had been ineligible to practice for a period of seven years, due to his failure to pay the annual fee. R. 1:28-2(c).¹

¹ An attorney who has been declared ineligible for a period of seven consecutive years "shall have his or her license to practice law in this State administratively revoked by Order of the Supreme Court." R. 1:28-2(c).

Service of process was proper in this matter. On February 19, 2015, the DEC sent a copy of the formal ethics complaint to respondent's last known home address, by regular and certified mail, return receipt requested. The letter sent by certified mail was returned as "unclaimed." The letter sent by regular mail was not returned.

On March 16, 2015, the DEC sent a letter to respondent at the same address, by regular mail. The letter directed respondent to file an answer within five days and informed him that, if he failed to do so, the allegations of the complaint would be deemed admitted, the record would be certified directly to us for the imposition of a sanction, and the complaint would be deemed amended to include a charge of a violation of RPC 8.1(b).

As of June 2, 2015, the letter sent by regular mail was not returned. Moreover, as of that date, respondent had not filed an answer to the complaint. Accordingly, the DEC certified the record to us as a default. Attached to the certification of the record are exhibits "that would have been introduced into evidence had a hearing been held."

The first count of the formal ethics complaint alleged that grievant, Melina Sylvestro, retained respondent to represent her in a personal injury action arising out of a December 24, 2008

slip and fall accident in the parking lot of an Applebee's restaurant. Respondent took over the representation of Sylvestro from a prior attorney, who had retired. The ethics complaint does not identify the date on which Sylvestro retained respondent.

At some point, likely in 2010, though not specifically identified in the ethics complaint, a law suit was filed on Sylvestro's behalf, presumably in Morris County, under Docket No. MRS-L-4071-10. On March 14, 2012, Sylvestro's complaint was dismissed, without prejudice, for plaintiff's failure to answer interrogatories. On May 20, 2012, the complaint was dismissed, with prejudice, for plaintiff's continuing failure to answer interrogatories and to seek reinstatement.

According to the ethics complaint, "[a]t all relevant times," Sylvestro was incapacitated and, thus, had executed a power of attorney appointing her daughter, Debra Sylvestro (Debra), as her agent. The power of attorney, executed on December 22, 2010, was in effect for a "substantial amount of time" prior to the dismissal of Sylvestro's complaint. Moreover, respondent knew of Sylvestro's incapacity and Debra's status as her agent.

Because the ethics complaint does not identify the date on which respondent's representation of Sylvestro commenced, it is

not clear, based on the allegations, whether respondent represented her at the time the complaint was dismissed, with and without prejudice. Nevertheless, among the exhibits is an e-mail from respondent to Debra, sent on August 8, 2011, in reply to her request for information about the status of the case. Because respondent represented Sylvestro in August 2011, the dismissals of the complaint, in March and May of 2012, likely occurred while he was Sylvestro's attorney of record.

Likewise, although the ethics complaint does not identify which attorney failed to serve the answers to interrogatories, respondent's August 8, 2011 e-mail to Debra stated, in pertinent part, that "[i]nterrogatories are being exchanged." Thus, he is the attorney who neglected to complete that task.

Neither Sylvestro nor Debra were aware that Sylvestro's complaint had been dismissed. Rather, after "fruitless attempts" to contact respondent, presumably to learn the status of the case, Debra conducted an investigation of her own and learned that the complaint had been dismissed. The formal ethics complaint alleged that, given the "substantial" amount of time that had passed between the dismissal of Sylvestro's civil action complaint and Debra's discovery of it, "it is likely that the law suit cannot now be reinstated to the detriment of [Sylvestro]." Indeed, inasmuch as Sylvestro's accident occurred

on December 24, 2008, the statute of limitations expired on that same date in 2010.

Based on these facts, the ethics complaint alleged that respondent's "failure to communicate with the client and to keep the client adequately informed, his failure to attempt to contact [Sylvestro] and/or her attorney-in-fact [Debra] prior to the dismissal of the law suit, and his unavailability to [Debra] when she attempted to contact him," constituted violations of RPC 1.3 and RPC 1.4, presumably (b).

The second count of the formal ethics complaint alleged that, on September 8, 2014, the DEC investigator sent a copy of the grievance to respondent and requested a reply. Respondent did not comply with the investigator's request. Thus, on October 2, 2014, the investigator sent another letter to respondent, reminding him of his duty to cooperate with the investigation.

Presumably, respondent still did not submit a reply to the grievance because, on November 12, 2014, the DEC sent him another copy of the October 2, 2014 letter, via certified mail, return receipt requested. The letter was delivered, and the return receipt appears to bear respondent's signature.

As of the date of the ethics complaint, February 19, 2015, respondent had not submitted a reply to the grievance. Further, "[a]ttempts to contact [him] via e-mail and . . . a cell phone

number obtained from his previous law firm were also made to no avail."

Based on these facts, the second count of the complaint charged respondent with having violated RPC 8.1(b) and R. 1:20-3(g)(3).

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer to the complaint is deemed an admission that the allegations are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Respondent's failure to obtain and serve answers to interrogatories, both before and after the motion to dismiss the complaint, without prejudice, was filed, constituted a lack of diligence. Respondent further exhibited a lack of diligence by failing to obtain and serve answers to interrogatories after Sylvestro's complaint had been dismissed, without prejudice, thereby averting the dismissal with prejudice. Accordingly, he violated RPC 1.3.

RPC 1.4(b) requires an attorney to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information. Respondent violated this RPC when he failed to keep either Sylvestro or Debra informed about the status of the litigation, including the

filing and granting of the motions to dismiss the complaint, and when he failed to reply to Debra's attempts to learn the status of the case.

From the time respondent commenced the representation of Sylvestro, in approximately August 2011, through the dismissal of the complaint, with and without prejudice, in March and May 2012, respectively, he was ineligible to practice law, due to his failure to pay the annual attorney assessment to the CPF. The complaint did not charge him with practicing law while ineligible (RPC 5.5(a)(1)), however.

Respondent also violated RPC 8.1(b) when he ignored the DEC's requests that he submit a written reply to the grievance.²

Generally, an admonition is the appropriate form of discipline for lack of diligence and failure to communicate with

² Although respondent's failure to cooperate post-dated his administrative revocation, in our view, logic dictates that any discipline imposed on respondent should include this violation. This is not a case where the pre-revocation and post-revocation conduct occurred in unrelated matters. Rather, respondent was served with a grievance in a matter alleging that he lacked diligence in the representation of his client and failed to communicate with her; he then failed to cooperate in the investigation of that very grievance. An interpretation of R. 1:28-2 that precludes the Court's exercise of jurisdiction over the failure to cooperate charge in this case not only would result in the imposition of piecemeal discipline, but also would unduly constrict the Court's authority over the practice of law and its mission to protect the public.

the client. See, e.g., In the Matter of Frances Ann Hartman, DRB 14-138 (July 22, 2014) (despite zealous representation at the beginning of a medical malpractice action, the attorney failed to act with diligence after the client's complaint was dismissed, a violation of RPC 1.3; the attorney also failed to return the client's repeated phone calls and e-mails for almost an entire year, a violation of RPC 1.4(b), and failed to explain to the client, in detail, problems that the attorney viewed about the claim, so that the client could make an informed decision on whether to proceed with it, a violation of RPC 1.4(c)) and In the Matter of Stephen A. Traylor, DRB 13-166 (April 22, 2014) (attorney was retained to represent a Venezuelan native in pending deportation proceedings instituted after he had overstayed his visa; although the attorney and his client had appeared before the immigration court on three separate occasions, the attorney failed to file a Petition for Alien Relative Form (I-130) until several days after his client was ordered deported; the appeal from that order was denied, which the attorney did not disclose to the client, but the petition was granted months later; violations of RPC 1.3 and RPC 1.4(b)).

The presence of a disciplinary record or other aggravating factors may serve to enhance the admonition to a reprimand.

See, e.g., In re Shapiro, 220 N.J. 216 (2015) (reprimand for attorney who, after filing a motion in a matrimonial matter, failed to oppose a cross-motion, a violation of RPC 1.3; the attorney also violated RPC 1.4(b) when he failed to inform the client about important aspects of the representation, including the former wife's cross-motion, despite the client's attempts to obtain information about his matter; prior admonition for failure to return a client file or to recommend to his superiors that the file be turned over to the client, and prior reprimand for gross neglect, lack of diligence, failure to communicate with the client, and failure to set forth, in writing, the rate or basis of his legal fee); In the Matter of Stanley Marcus, DRB 11-014 (June 28, 2011) (reprimand for attorney who allowed a matter to linger inactive for three years and who failed to adequately advise the client of the status of the case; although attorney had two prior reprimands, sixteen years had passed since the last infraction, and one of those reprimands was for unrelated conduct, that is, recordkeeping violations); In re Carmen, 201 N.J. 141 (2010) (reprimand for attorney who, for a period of two years, failed to communicate with the clients in a breach-of-contract action and failed to diligently pursue it; aggravating factors were the attorney's failure to withdraw from the representation when his physical condition materially

impaired his ability to properly represent the clients and a prior private reprimand for conflict of interest); and In re Oxfeld, 184 N.J. 431 (2005) (reprimand by consent for lack of diligence and failure to communicate with the client in a pension plan matter; two prior admonitions).

Similarly, an admonition is imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In the Matter of Jeffrey M. Adams, DRB 14-243 (November 25, 2014) (attorney failed to cooperate with the district ethics committee's attempts to obtain information from him about his representation of a client in connection with the sale of a house); In the Matter of Richard D. Koppenaar, DRB 13-164 (October 21, 2013) (the attorney admittedly failed to cooperate with the district ethics committee's attempts to obtain information about his representation of a client in an expungement matter); and In the Matter of Raymond Oliver, DRB 12-232 (November 27, 2012) (attorney failed to submit a written, formal reply to the grievance and a copy of the filed pleadings in the underlying case, despite repeated assurances that he would do so).

If the attorney has been disciplined previously, but the attorney's ethics record is not serious, reprimands have been imposed. See, e.g., In re Wood, 175 N.J. 586 (2003) (attorney


failed to cooperate with disciplinary authorities; prior admonition for similar conduct) and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

Based on the above cases, ordinarily, an admonition would be the appropriate measure of discipline for respondent's violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b). Although respondent has an ethics history, consisting of a private reprimand (now, an admonition) issued in 1993, given his unblemished disciplinary record in the twenty-three years since then, enhancement of the admonition to a reprimand is not warranted in our view. There is, however, the default status of this matter, which necessitates enhancement of the discipline to a reprimand. In re Kivler, 193 N.J. 332, 342 (2008) ("a respondent's default or failure to cooperate with the investigative authorities operates as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced"). Thus, we determined to impose a reprimand for respondent's violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b), in this default matter.

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

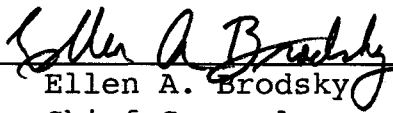
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph P. Kelly
Docket No. DRB 15-231

Decided: April 29, 2016

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:			5			3


Ellen A. Brodsky
Chief Counsel