

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-269
District Docket No. IV-2014-0022E

IN THE MATTER OF
SUSAN A. LOWDEN
AN ATTORNEY AT LAW

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Decision

Argued: November 19, 2015

Decided: May 11, 2016

Maryann J. Rabkin appeared on behalf of the District IV Ethics Committee.

Respondent waived appearance.

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

This matter is before us on a recommendation for a censure filed by the District IV Ethics Committee (DEC). The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.2(a) (failure to abide by the client's decisions regarding the scope and objectives of the representation), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to inform a prospective client how, when and where the

client may communicate with the lawyer), RPC 1.4(b) (failure to keep a client reasonably informed and to promptly comply with the client's reasonable requests for information), RPC 3.2 (failure to expedite litigation), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). We determine to impose a censure.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1991. On September 5, 2014, she received a reprimand for gross neglect, lack of diligence, failure to communicate with the client, failure to prepare a written fee agreement, failure to cooperate with ethics authorities, and conduct involving dishonesty, fraud, deceit or misrepresentation. In re Lowden, 219 N.J. 129 (2014).

The DEC conducted three days of hearing in this matter. On the final day of hearing, the parties presented the hearing panel with a series of stipulations addressing all of the allegations of the complaint and waiving "the opportunity to complete the public hearing." Although the stipulation acknowledged that the matter would proceed directly to the Board for the imposition of discipline, the parties were invited to present evidence in respect of mitigation and aggravation and to give closing statements. They accepted that opportunity.

Following that final day of hearing, the DEC issued a hearing panel report, summarizing its findings in respect of the testimony previously offered and the stipulations and recommending the imposition of specific discipline – a censure. Thus, the matter was before us on the basis of the DEC hearing panel's recommendation and not as a disciplinary stipulation.

The salient facts are undisputed, respondent having admitted all of them in the aforementioned stipulations entered into during the course of these proceedings. In the stipulations, respondent also admitted all of the charged RPC violations in the complaint.

In December 2006, Marie Hutt, respondent's longtime client, met with her to discuss the possible "short sale" of the house that she had shared with her husband, Kareem Hutt, before his arrest and subsequent incarceration for a robbery conviction. Hutt also sought a divorce.

Respondent sent Hutt a December 26, 2006 letter confirming her retention for the divorce action and enclosing a draft divorce complaint for her review. Respondent then billed Hutt for legal work performed over the next several months, through August 2007. The charges pertained to both the short sale (completed on May 9, 2007) and the divorce matter. Hutt gave respondent "a chunk of money up front" for the divorce, and made

monthly payments thereafter. Respondent was not charged with any ethics infractions arising from her fee.

From late 2006 through 2012, Hutt frequently contacted respondent's office seeking the status of the divorce. Respondent would then send her new versions of the draft complaint and/or other forms to complete, which respondent told Hutt were necessary due to the passage of time.

At the DEC hearing, respondent conceded that, although she had received from Hutt sufficient information to immediately file a divorce complaint on Hutt's behalf, she failed to do so through all of 2007.

Along with the second fee agreement she sent under cover letter to Hutt dated May 6, 2008, respondent sent a new case information statement, an insurance disclosure certification, and a confidential litigant information sheet - documents that Hutt previously had provided to respondent in late 2006 and early 2007.

On May 9, 2008, respondent sent Hutt a letter with a stamped envelope to return the documents. Hutt returned the documents marked up with detailed, handwritten changes.

On June 19, 2008, Kareem Hutt wrote to respondent, stating that he was "under the impression" that she represented Hutt in a divorce matter and asking why he had received no "paper work"

in the matter. He asserted that: "I am ready to have this situation resolved as I have other matters to attend to that can't be resolved until the divorce is final." Respondent did not reply to Kareem's letter or file the complaint in 2008.

On January 12, 2009, respondent sent Hutt another letter stating that, because it had been "some time since you last filled out the papers," she was enclosing new "copies of the complaint for divorce," as well as the insurance disclosure statement and confidential litigation information sheet. Respondent requested that Hutt make any final changes to the documents and asserted that she would then have everything she needed to file the complaint. Hutt made changes to those documents and returned them to respondent.

On August 10, 2009, Hutt called respondent for a status update. Respondent's secretary apparently told Hutt that the complaint would be filed by the end of the week. Respondent acknowledged that the complaint was not filed that week or at any time during 2009.

On May 18, 2012, Hutt received another letter from respondent with a new set of "updated documents" that she was to review, sign, and return for filing with the complaint.

Hearing nothing from respondent thereafter, on August 10, 2012, Hutt sent respondent a detailed letter expressing her

frustration that five years had elapsed without having obtained a divorce. She asked respondent to contact her about filing the complaint or to refund her entire retainer.

Hutt then received a copy of respondent's September 11, 2012 letter to the Camden County Clerk purportedly enclosing the complaint for filing, along with a \$275 check for the filing fee. In a contemporaneous telephone conversation, respondent told Hutt that the complaint had been filed. As it turned out, that was not true.

On September 11, 2012, Hutt telephoned respondent and terminated the representation.¹ According to respondent, at the time, the complaint was ready to be filed and a check had been drafted for filing fees. The complaint "was pulled out of the mail" and the "check was never negotiated." Respondent believed that Hutt's copy of the correspondence to the clerk mistakenly was "not pulled out of the outgoing mail," leading Hutt to receive a copy of the letter indicating that the complaint had been sent for filing.

Respondent had not produced the September 2012 check that she claimed had been drafted for the filing fee. Therefore, the

¹ There is some confusion in the record about the date that Hutt terminated the representation, because the presenter alternately referred to it as September 2012 and September 2013.

hearing was adjourned to permit respondent and the presenter to review respondent's checking account records for September 2012. The review of respondent's checking account records revealed that no check had been drafted for the filing fee in Hutt's matter. Thus, when the hearing resumed the following day, respondent corrected her earlier testimony.

In her disciplinary stipulations, respondent admitted that her failure to file the complaint in Hutt's matter for more than five years amounted to gross neglect, lack of diligence, and a failure to expedite litigation, violations of RPC 1.1(a), RPC 1.3, and RPC 3.2, respectively. Respondent also stipulated that her inaction constituted a failure to abide by the client's decisions regarding the scope and objectives of the representation, in violation of RPC 1.2(a).

Regarding communications with Hutt, respondent stipulated that, despite Hutt's numerous requests for an "accurate status" of her matter over the years, she failed to keep Hutt adequately informed about the lack of progress and that no complaint was ever filed, violations of RPC 1.4(a) and (b).

Finally, respondent stipulated that she had acted in a "deceitful and dishonest" manner by falsely informing Hutt, sometime in September 2012, that the complaint had been sent for filing in Camden County, a violation of RPC 8.4(c).

The presenter advanced the following mitigating factors: respondent cooperated throughout the proceedings, even giving the presenter access to checking account records and computer files in her office during a break in the proceedings; entered into four separate stipulations encompassing all of the allegations of the ethics complaint; expressed her intention to immediately return \$1,000 to Hutt, almost double the \$505 that she was holding on account of the client; and expressed contrition and apologized to Hutt and the panel.

Respondent offered additional mitigation:

In the course of the last six to eight months, and there was a prior disciplinary issue, that I was required to take some continuing legal education imposing disciplinary cost [sic], but as a result of that and then of this matter, I've revamped a number of systems in my office. I've updated my computer system, which includes updating the accounting system, my document retention system, and I think those systems are working much better now than they were at the time that these issues arose.

In addition to trying to rectify some of those issues that I believe caused these problems, I'd also like the panel to know that I've been extensively involved with, or was extensively involved with the Rutgers program on domestic violence project. I was one of the initial attorneys that accepted cases in regard to that program and project, one that was a very satisfying experience in my behalf in being able to be involved in that program when it started. I also serve as an MESP² member in Gloucester County. I serve on a

² MESP refers to Matrimonial Early Settlement Panel, a procedure designed to encourage settlements in the early stages of divorce matters. R. 5:5-5.

number of organizations and committees in my community. It's not an excuse, but it hopefully gives you some indication of the type of person that I am and what my general involvement is.

[3T28-21 to 3T29-19).³

In aggravation, the presenter cited the extraordinary length of time – more than five years – during which respondent failed to file the divorce action.

The DEC found respondent guilty of some, but not all, of the violations to which she had stipulated. Specifically, the panel concluded that respondent's failure to file the complaint for more than five years amounted to gross neglect (RPC 1.1(a)); lack of diligence (RPC 1.3); and failure to expedite litigation (RPC 3.2).

Respondent also kept Hutt "starved for information" for many years, failing to keep her apprised of the status of the case, a violation of RPC 1.4(b).

The DEC further found an ongoing misrepresentation "for many years," in violation of RPC 8.4(c), resulting in anxiety on Hutt's part in that "she failed to understand why such a relatively simple divorce was taking over 7 years to complete."

The DEC dismissed the remaining charges: RPC 1.1(b) (pattern of neglect), for lack of three instances of neglect;

³ "3T" refers to the transcript of the May 4, 2015 DEC hearing.

RPC 1.2(a) (failure to abide by the client's decisions regarding the scope and objectives of the representation), for lack of clear and convincing evidence that respondent "overstepped" her bounds or made decisions that were the client's to make; and RPC 1.4(a) (failure to inform a prospective client how, when and where the client may communicate with the lawyer), because Hutt knew how, when and where she could contact respondent.

The DEC concluded that a censure is warranted, reasoning that a reprimand is the baseline sanction for misrepresentations to clients and citing In re Falkenstein, 220 N.J. 110 (2014), In re Singer, 200 N.J. 263 (2009), and In re Onorevole, 170 N.J. 64 (2001). In aggravation, the hearing panel considered respondent's prior reprimand for similar misconduct and the length of time – seven years – that the misconduct here spanned.

The DEC also recommended that respondent be required to "continue to upgrade and update her office procedures" to prevent future problems and that the Office of Attorney Ethics "audit respondent's pending matters" to ensure that nothing else "slipped through the cracks."

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.

Hutt retained respondent in late 2006 to file a fairly simple divorce. In fact, even Hutt's then-husband tried to hurry respondent along, to no avail. Inexplicably, respondent failed to file a complaint in late 2006 or early 2007, even though she already had all of the information necessary to file a complaint.

By all accounts, Hutt did what was expected of her, returning to respondent the multiple versions of the same unfiled documents that respondent periodically sent her for updates. Respondent, however, dropped the ball – not once, but numerous times over the six years from late 2006 until September 2012, when Hutt finally terminated the representation. Clearly, respondent was guilty of gross neglect and lack of diligence in the matter, violations of RPC 1.1(a) and RPC 1.3, respectively.

Respondent also failed to keep Hutt up to date about events in the case. Respondent stipulated that, despite Hutt's numerous attempts to obtain status updates about the case, she did not receive them. As the DEC found, Hutt was "starved" for information about her case, a violation of RPC 1.4(b).

Finally, with respect to RPC 8.4(c), the DEC was mistaken when concluding that the misrepresentation "was ongoing for many years." Hutt had not been kept in the dark for seven years about her matter, which would have implicated a misrepresentation by

silence. Hutt knew all along that the complaint had not yet been filed, through respondent's periodic requests for updated documents. The violation occurred when, in a September 2012 telephone conversation, respondent admittedly made the affirmative misrepresentation that the complaint had been filed. In so doing, respondent violated RPC 8.4(c).

The DEC was correct to dismiss the RPC 1.1(b), RPC 1.2(a) and RPC 1.4(a) charges for a lack of clear and convincing evidence. However, we also dismiss the RPC 3.2 charge as inapplicable. Because respondent never initiated litigation, "there was no litigation to expedite." In re Wargo, 194 N.J. 166 (2007), In the Matter of Kathleen D. Wargo, DRB 07-210 and DRB 07-217 (October 30, 2007) (slip op. at 8).

In summary, we find respondent guilty of gross neglect, lack of diligence, failure to communicate with the client, and misrepresentation in one matter.

A misrepresentation to a 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, non-serious ethics infractions. See, e.g., In re Ruffolo, 220 N.J. 353 (2015) (the attorney exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, neglecting 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, knowing that the complaint had been dismissed, and that he should expect a monetary award in the near future were false, thereby violating RPC 8.4(c)); In re Braverman, 220 N.J. 25 (2014) (attorney 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); we found that the attorney's unblemished thirty-four years at the bar were outweighed by his inaction, which left the client with no legal recourse); and In re Winston, 219 N.J. 426 (2014) (attorney failed to file a brief, resulting 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).

We also considered mitigation. Respondent cooperated with the investigation to the point of permitting the presenter to access her check registers and computer files, even as late as during the ethics proceedings; she entered into stipulations encompassing all of the alleged misconduct; she agreed to return \$1,000 to Hutt on the final hearing day; and she was sincerely apologetic to Hutt and to the panel, and was contrite; she updated her computer, accounting and document retention systems; she is involved in the Rutgers program on domestic violence project; and she is a member of the Gloucester County Matrimonial Early Settlement Panel.

In aggravation, respondent was on notice that her conduct was under scrutiny when, in April 2012, she received an ethics complaint in another matter, for which she would later be reprimanded. The complaint in that matter alleged that, for nine years, she made ongoing misrepresentations to the client that she had filed a motion and was awaiting a court decision. In June 2012, respondent answered the ethics complaint. Obviously, respondent was on notice at that time that such misconduct by an attorney was unethical. Yet, just a few months later, in September 2012, respondent took the low road here, too, lying to

Hutt that she had filed a divorce complaint when she had not. In further aggravation, there is the extraordinary length of time – almost six years – during which respondent neglected this matter.

In respondent's reprimand matter, we considered the nine-year period of deceit and financial harm to the client (a \$70,000 judgment) to be aggravating factors. In mitigation, she had an unblemished twenty-three year record and was swift to acknowledge wrongdoing. We concluded then, that the mitigating factors outweighed the aggravation, which militated against a harsher sanction.

In contrast to respondent's prior ethics matter, here, the aggravating factors outweigh the mitigation presented. This is respondent's second brush with disciplinary authorities, for identical misconduct. Moreover, she misrepresented the status of the case to Hutt in the midst of defending against the same charge in the other disciplinary matter. For these reasons, we determine that a censure is warranted.

Member Zmirich 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 Susan A. Lowden
Docket No. DRB 15-269

Argued: November 19, 2015

Decided: May 11, 2016

Disposition: Censure

Members	Disbar	Suspension	Censure	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