SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-383
District Docket No. VIII-2013-0041E

IN THE MATTER OF	:
GERALD GORDON	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 18, 2016

Decided: August 8, 2016

Timothy J. Little appeared on behalf of the District VIII Ethics Committee.

Respondent appeared pro se.

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 reprimand, filed by the District VIII Ethics Committee (DEC). The complaint charged respondent with violations of RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with the client); RPC 8.1(b) (failure to cooperate with disciplinary authorities); and RPC 8.4(a) (violating the Rules of Professional Conduct). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1971. He has no history of discipline as an attorney. However, on June 14, 2007, in a judicial disciplinary proceeding, the Supreme Court issued an admonition for respondent's behavior as a municipal court judge. In re Gordon, 191 N.J. 451 (2007). In issuing only an admonition, the Court recognized respondent's previously undiagnosed illness that affected his judgement. Id.

While sitting as a municipal court judge in New Brunswick, New Jersey, respondent violated the Judicial Code of Conduct when he sentenced a defendant he had found in contempt of court to incarceration, without advising him that he faced a consequence of that magnitude or that he had a right to counsel, questioned the immigration status of another defendant, used his judicial position to resolve his own driver's license suspension, and held another defendant in contempt when that defendant wrote an expletive on a check he used to pay a fine. In the Matter of Gerald Gordon, ACJC 2003-264 et al. (April 23, 2007).

We turn now to the facts of this matter. On December 7, 2012, grievant, WD,[1] retained respondent for an expungement

[1] The grievant's name is confidential, given the nature of the relief sought by the expungement application.

proceeding stemming from a thirty-nine year-old drug offense. Respondent prepared and filed an expungement petition, and served copies on the proper agencies. On March 19, 2013, respondent notified WD, by e-mail, that he had filed the petition and was waiting for the order fixing the hearing date. Respondent later informed WD that the hearing had been scheduled for May 17, 2013. There were no further communications between respondent and WD until late June 2013.

In a June 26, 2013 e-mail, WD asked respondent about the results of the May 17, 2013 hearing. Two days later, on Friday, June 28, 2013, respondent replied to WD by e-mail that he had followed up on the matter on Tuesday, June 25, 2013, before he left for a trip outside of the United States. He explained that, although the court was prepared to make a decision without the need for appearances, the prosecutor had objected to the petition and, therefore, additional papers were needed. He asked WD to send him his complete resume. WD immediately sent his resume to respondent by fax and regular mail.

Respondent did not further communicate with WD after the June 28, 2013 e-mail. On July 2, 2013, WD e-mailed respondent asking for a status update on his matter. He received no response. On July 8, 2013, he sent a follow up e-mail to respondent, complaining that he felt ignored, expressing regret

that he had hired such a "crummy" lawyer, and threatening to file a grievance if he did not get a response. The next day, on July 9, 2013, WD sent another e-mail to respondent, stating that this was his third attempt and again requested a response. On July 10, 2013, WD sent his fourth and final e-mail to respondent. On July 12, 2013, WD filed the grievance against respondent.

On September 17, 2013, WD successfully secured an expungement of his own accord. However, he did not receive notification that his petition had been granted. After spending a good deal of time working with court administration, he learned that all of his papers were still being sent to respondent as the attorney of record. WD satisfied the court that respondent was no longer his attorney and eventually received his paperwork.

Respondent did not deny the general facts of the matter, but maintained that he had not committed an ethics violation. Respondent explained to the DEC that he left for a twenty-one day European vacation on June 26, 2013. Unfortunately, he returned on July 6, 2013, due to severe illness.

Respondent asserted that, in preparation for his trip, he had reviewed his client files and followed up on WD's expungement. It was then that he learned of the prosecutor's

objection. Because he had not received a letter regarding the objection, he called the prosecutor and learned that more information was needed. He then left for his trip. He arrived in Europe late on June 27, 2013, and did not check his e-mail until the next day, when he replied to WD.

Respondent testified that, when traveling overseas, he generally receives e-mail only in his hotel room. His cellphone does not have access to the internet and he cannot receive e-mail. Typically, however, if clients need to contact him while he is away, they call his office and reach a voice-mail message, stating that respondent is traveling out of the country and suggesting that they call his cellphone in case of emergency. Respondent will then contact a colleague to assist his client. He admitted that he had not informed WD in advance that he would be traveling for twenty-one days. He further admitted that he had not arranged for anyone to retrieve or monitor his mail or fax communications.

Respondent's vacation was interrupted by his illness. He returned home on July 6, 2013, and spent one week recuperating at his girlfriend's house. He did not return to his home, where his office is located, until July 13, 2013. Respondent admitted however, that he checked his e-mail on the evening of July 8, 2013 and had read WD's correspondence. Respondent claimed that,

when he read WD's e-mail referring to him as a "crummy lawyer," stating that he regretted hiring respondent, and indicating that he was calling the ethics committee, he became upset and decided to terminate the relationship. On Monday, July 15, 2013, respondent returned to his office and retrieved his mail and faxes, including WD's resume.

One week later, respondent called then DEC Secretary Manny Gerstein and learned that WD had filed a grievance against him.[2] Respondent considered, at that point, that by filing the grievance, WD had terminated their attorney-client relationship and that he was not required to formally terminate the representation with WD. Respondent added that he did not attempt to contact WD thereafter because he did not want to create a perception that he was trying to manipulate him.

On July 22, 2013, the prosecutor sent correspondence to respondent formally objecting to WD's motion. Notwithstanding respondent's belief that WD had terminated the representation, respondent replied on August 21, 2013, indicating that he had received an order dismissing WD's expungement, and requesting

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[2] Respondent testified that he had served as a member of a District Ethics Committee at some point in the past.

that the order be vacated to allow him to apply for the public interest exception. Respondent did not copy WD on this letter.

Also on August 21, 2013, respondent sent a letter to Manny Gerstein, asserting that he had not received any of WD's e-mails until the previous week. He further indicated to Gerstein that he would be willing to complete the expungement on receipt of WD's "complete resume."

On November 8, 2013, the investigator for the DEC sent a letter to respondent informing him of the grievance and requesting his response, along with specific information. Respondent did not reply. Hence, on February 5, 2014, the investigator sent respondent an e-mail attaching his November 8, 2013 letter, again asking for a response. On the same day, respondent replied to the presenter by e-mail, explaining that, because of health issues concerning his eyesight, he had not seen the November 8, 2013 letter. Respondent, however, did not substantively reply to the grievance.

In August 2013, respondent's pre-existing eye condition flared up, leading to surgery in January 2014. Between August 2013 and January 2014, respondent continued to practice law. Nonetheless, he continued to claim that, because of his poor eye health, he had not seen the November 8, 2013 letter from the DEC investigator requesting a response to WD's grievance. Respondent

admitted, however, that he had failed to cooperate by failing to respond substantively to that letter, but that he had not done so knowingly. In this respect, respondent admitted that, although he had received the November 8, 2013 letter from the investigator, it had not entered his mind to respond to it because he was not well and he simply did not think about it. He noted, however, that he had responded to correspondence from the same investigator on another matter during the same period.

In mitigation, respondent maintained that he has suffered with bouts of severe depression his entire life. One such episode ended in an attempt to take his own life in 2004. In 2013, he realized that he was sinking deeper into depression and, recognizing that he was headed toward another potential attempt on his own life, on March 10, 2013, respondent admitted himself into Princeton-Plainsboro Hospital. On April 10, 2013, respondent was discharged from the hospital. During that time, his girlfriend, a paralegal, "covered" his client files by reviewing mail or other activity and by alerting him to matters requiring his immediate attention.

The DEC determined that respondent's failure to complete the expungement for which he had been retained was the result of his lack of diligence, a violation of RPC 1.3.

Additionally, the DEC found that, after June 28, 2013, respondent failed to communicate with his client, a violation of RPC 1.4(b). The panel noted that respondent had offered various reasons for failing to communicate with WD, including respondent's medical condition. Based on his medical condition, the panel believed that respondent had a duty to withdraw from the representation. The DEC further observed that, upon receipt of the "crummy lawyer" e-mail, respondent was not entitled to unilaterally terminate his representation, but rather had an obligation to comply with RPC 1.16(d) to properly withdraw from the representation. He did nothing, however, to notify WD, his adversary, or the Court that the representation had ended. Although the complaint did not charge a violation of RPC 1.16(d), the DEC determined that respondent's failure to comply with the requirements of that Rule provided a sufficient basis to find a violation of RPC 8.4(a).

Finally, the DEC found respondent guilty of violating RPC 8.1(b), based on his failure to respond to the DEC investigator's request for information.

The DEC recognized that respondent has no disciplinary history as an attorney since his admission in 1971, but determined that respondent's discipline as a municipal court judge negated his lack of attorney discipline, as a mitigating

factor. Conversely, the DEC believed that respondent's disciplinary history as a judge should not serve as an aggravating factor, because the conduct had occurred twelve years earlier, and was unrelated to the violations in the instant matter.

The hearing panel considered respondent's medical history as a mitigating factor, noting that a flare up of his condition had occurred during early July, when WD was attempting to contact him. Although the DEC was critical of respondent's decision to prioritize his medical issues above his duty to reply to ethics authorities, the panel still found his health to be a mitigating factor.

Additionally, the DEC gave weight to the fact that, although "too little, too late," respondent's correspondence with the prosecutor, on August 21, 2013, showed that he had attempted to resolve WD's expungement. Moreover, while WD was inconvenienced, he was not prejudiced because his expungement was ultimately granted.

In aggravation, the DEC found that respondent's failure to cooperate extended beyond the allegations in the complaint, because his testimony at the ethics hearing was evasive and contradictory. Specifically, the contents of his August 21, 2013 letter to Gerstein directly contradicted respondent's hearing

testimony in two important ways. First, at the hearing, respondent admitted that he had seen WD's "crummy lawyer" e-mail on July 8, 2013. Yet, he told Gerstein that he had not received any communications from WD since June 28, 2013.[3] Second, respondent testified that he received WD's resume when he returned home, on July 15, 2013. Yet, he told Gerstein on August 21, 2013, that he was still awaiting the resume. According to the panel, these irreconcilable inconsistencies cast serious doubt on respondent's credibility during the proceedings.

Had respondent's conduct been limited to lack of diligence and a failure to communicate with his client, the DEC would have recommended the imposition of an admonition. However, respondent's failure to cooperate with the investigation exacerbated his misconduct. Therefore, the DEC determined that a reprimand is appropriate.

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.

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[3] The DEC is mistaken. In his August 21, 2013 letter to Gerstein, respondent did not claim that he had not received communication from WD. Rather, respondent asserted that he had not seen the e-mail until the end of the week prior, presumably sometime after August 14, 2013.

The record contains clear and convincing evidence that respondent violated RPC 1.3 by failing to follow up on WD's expungement matter, at least between May 17, 2013, the date of the scheduled hearing, and June 25, 2013, the date on which respondent claims he reviewed WD's matter in preparation for his vacation. Additionally, respondent lacked diligence after he learned, on June 25, 2013, that there was an objection to the expungement petition, but took little to no action to assist his client to overcome it.

Respondent requested WD's resume and admitted receiving it. He took no further action on his behalf. Respondent's claim that the attorney-client relationship had been terminated is at odds with respondent's letters of August 21, 2013 to the prosecutor and to Gerstein. Specifically, in the letter to Gerstein, respondent represented that he had not received WD's e-mail until the previous week and that he would complete the expungement upon receipt of the resume. Based on his testimony before the DEC, both of these statements were untrue. Nonetheless, respondent still failed to work on WD's matter after his June 28, 2013 e-mail. Ultimately, WD completed his expungement on his own.

Further, respondent violated RPC 1.4(b) by failing to communicate with WD. Although respondent's failure to reply to

the e-mails that WD sent in quick succession, between July 2 and July 10, 2013, might not otherwise constitute a lack of communication, we do not view the e-mails in a vacuum. Respondent's failure to follow up with his client after May 17, 2013, the scheduled date of the hearing, amounted to a failure to keep his client informed about the status of his matter. Moreover, respondent followed up on the matter just days before he departed for his trip. It was then that he learned of the prosecutor's objection. Again, he chose not to inform his client of the status of the matter. Instead, WD was forced to reach out to him for a status update. Finally, after June 28, 2013, respondent ceased all communications with his client.

Respondent also violated RPC 8.1(b) by failing to reply to the investigator's November 8, 2013 letter, requesting a response to WD's grievance. Respondent had been aware of the grievance as early as July, when he called Gerstein's office to find out whether WD had indeed made good on his threat. Respondent subsequently failed to respond in any substantive manner to the grievance, or to the investigator's requests for information, even after he acknowledged receiving the investigator's February 5, 2014 follow up e-mail.

Moreover, respondent's answers to the DEC during the hearing were contradictory, evasive, and seemingly intentionally

vague and convoluted, as the DEC found in its report. We consider this additional lack of cooperation as an aggravating factor.

Finally, we can not agree with the DEC's determination that respondent violated RPC 8.4(a) by failing to properly withdraw from the representation of WD. In reaching this finding, the DEC reasoned that, although the complaint did not allege a violation of RPC 1.16(d), respondent's violation of that rule provided a sufficient basis to find a violation of RPC 8.4(a). Indeed, respondent failed to comply with the requirements of RPC 1.16(d) by unilaterally terminating his representation without notifying his client, his adversary, or the court. Nonetheless, this violation was neither charged nor litigated and, therefore, cannot form the basis for any violation of the RPCs.

In sum, respondent is guilty of violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b).

Generally, an admonition is the appropriate form of discipline for lack of diligence and failure to communicate with 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, the difficulties of the claim to enable the client to make an informed decision on whether to proceed, 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 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 and receiving a cross-motion from his adversary, failed to oppose the 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 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) and In re Carmen, 201 N.J. 141 (2010) (reprimand for attorney who, for a period of two years, failed to communicate with 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).

Similarly, an admonition generally 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, a violation of RPC 8.1(b)); In the Matter of Richard D. Koppenaal, 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, a violation of RPC 8.1(b)); 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, a violation of RPC 8.1(b)).

If the attorney has been disciplined before, but the attorney's ethics record is not serious, then reprimands have been imposed. See, e.g., In re Moses, 208 N.J. 361 (2011) (attorney violated RPC 1.3, RPC 1.4(b) and (c), and RPC 8.1(b); attorney was late for two DEC hearings, did not attend a pre-hearing conference, did not comply with discovery deadlines, and otherwise exhibited a "cavalier attitude toward the disciplinary system;" previous admonition for failure to cooperate with disciplinary authorities); In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); 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).

Much like respondent, the attorney in Moses violated RPC 1.3, RPC 1.4(b), and RPC 8.1(b). He received a reprimand for his conduct, based on his prior discipline. Moses' prior discipline resulted from having failed to cooperate with disciplinary authorities in a previous matter. Similarly, respondent does have an ethics history; however, his admonition in 2007, almost nine years ago, resulted from unrelated conduct committed as a judge between 2003 and 2004. Hence, it is counterbalanced by respondent's otherwise unblemished record as an attorney for almost forty-five years.

Nonetheless, we consider other significant mitigating and aggravating factors. It is clear from the record that, for some time, respondent has suffered, and continues to suffer, from several physical and mental health problems. Some of these problems surfaced during his representation of WD. In the context of the particular facts and based on respondent's explanation of his behavior, however, the effect of his medical conditions on his conduct is somewhat limited. Here, we note that respondent was discharged from the hospital in April 2013 - at least one month prior to the scheduled May 17 expungement hearing. Despite having been given the opportunity to present

medical documentation to support his claimed inability to effectively represent his client, respondent did not do so. Indeed, it is apparent that respondent's conduct vis-à-vis WD was not the result of illness. Rather, it appears to have been driven, in large measure, by the resentment and insult respondent suffered when WD expressed his disappointment at having retained such a "crummy lawyer." Still, we have taken into consideration respondent's asserted medical challenges in reaching our discipline determination.

In aggravation, we consider respondent's conduct as it relates to the investigation of the grievance. Respondent admitted at the hearing that he was a former member of an ethics committee. Although every attorney is expected to cooperate with disciplinary officials promptly and forthrightly, as a former DEC member, respondent should have been acutely aware of that responsibility. Respondent did not do so. Soon after reading WD's e-mails, respondent called Gerstein's office and learned that WD had filed a grievance against him. Thereafter, he sent a letter to Gerstein, on August 21, 2013, falsely claiming that he had only just seen WD's e-mails the week prior and that he was willing to finish the expungement, on receipt of WD's resume. He did not disclose that he already had received WD's resume two months earlier. Several months later, in November 2013,

respondent received the DEC investigator's letter, requesting his reply to the grievance. Respondent did nothing, prompting the DEC investigator to again communicate with him, in February 2014. Once again, respondent did nothing. This is unacceptable behavior for any attorney and especially for a former DEC member.

As previously discussed, the hearing panel found that respondent's failure to cooperate continued during the hearing, as many of his responses to the DEC's questioning regarding his interactions with the DEC investigator and the DEC secretary were evasive and contradictory. We consider the hearing panel's observations in this respect to carry great weight.

In our view, the aggravating factors in this matter outweigh the mitigation offered, including respondent's health issues and lengthy career. We, therefore, determine that a reprimand is the appropriate measure of discipline for respondent's misconduct. Additionally, in light of respondent's admitted health issues, we determine that respondent must submit to the Office of Attorney Ethics (OAE), within sixty days of the Court's Order, proof of fitness to practice law, as attested by a health practitioner approved by the OAE.

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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Gerald Gordon
Docket No. DRB 15-383

Argued: February 18, 2016

Decided: August 8, 2016

Disposition: Reprimand

MEMBERS	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Boyer			X			
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera			X			
Singer			X			
Zmirich			X			
Total:			9			

Ellen A. Brodsky
Chief Counsel