

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-443
District Docket No. IV-2012-0034E

IN THE MATTER OF
JOHN ANDREW KLAMO
AN ATTORNEY AT LAW

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Decision

Decided: June 29, 2017

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 IV Ethics Committee (DEC), pursuant to R.
1:20-4(f). A six-count complaint charged respondent with
violations of RPC 1.1(a) and (b) (gross neglect and pattern of
neglect), RPC 1.2(a) (failure to abide by a client's decisions
concerning the scope and objectives of the representation), RPC
1.3 (lack of diligence), RPC 1.4(b), erroneously cited as RPC
1.4(a) (failure to keep a client reasonably informed about the
status of a matter), RPC 5.5(a) (unauthorized practice of law),

RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

We determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1982. In 1996, he was reprimanded for delegating his recordkeeping responsibilities to an employee whom he never supervised or instructed on recordkeeping practices. As a result, the employee misappropriated client funds. Respondent was found guilty of gross neglect, negligent misappropriation of client trust funds, commingling fees and trust account funds, recordkeeping violations, and failure to cooperate with ethics authorities. In re Klamo, 143 N.J. 386 (1996).

In May 2013, respondent was suspended for three months for charging improper expenses in contingent fee matters (photocopying, postage, and telephone calls); failing to promptly deliver funds belonging to clients and third parties (by amassing approximately \$100,000 in his trust account and failing to disburse deductibles and co-pays, in some instances for as long as thirteen years, until the Office of Attorney Ethics (OAE) began its investigation and instructed him to disburse the funds); recordkeeping violations; engaging in conduct involving dishonesty, fraud, deceit or

misrepresentation; making material misstatements of fact to ethics authorities; and failure to maintain malpractice insurance. In re Klamo, 213 N.J. 494 (2013).¹

Respondent was reinstated to the practice of law, effective September 25, 2013. The Court's reinstatement order required respondent to practice under the supervision of an OAE-approved proctor for a two-year period and to submit to the OAE, also for a two-year period, on a quarterly basis, monthly reconciliations of his attorney accounts, prepared by an accountant. In re Klamo, 215 N.J. 520 (2013).

Finally, on June 15, 2016, respondent received a censure for misconduct in two consolidated matters, for misconduct that included failure to abide by a client's decisions concerning the scope of the representation, lack of diligence, failure to communicate with the client, failure to expedite litigation, and misrepresentation by silence. We also found that respondent failed to maintain malpractice insurance, but declined to find a violation, noting both that respondent had been found guilty

¹ Respondent's conduct in this matter was also the subject of disciplinary proceedings in Pennsylvania. On November 5, 2009, the Office of Disciplinary Counsel, Disciplinary Board of the Supreme Court of Pennsylvania, issued an informal admonition for respondent's violations of Pennsylvania RPC 1.1, RPC 1.2(a), RPC 1.3, RPC 8.4(d), and RPC 1.4(a) and (b) in this matter.

of that infraction in his 2013 disciplinary matter and that the complaint did not charge a violation of RPC 5.5(a). In re Klamo, 225 N.J. 331 (2016).

Service of process was proper in this matter. On August 26, 2016, the DEC sent a copy of the complaint, by both certified and regular mail, in accordance with R. 1:20-4(d) and R. 1:20-7(h), to respondent's office address as listed in the attorney registration system. The certified mail was returned unclaimed. The regular mail was not returned.

On November 17, 2016, the DEC sent respondent a "five-day" letter at his office address, by regular mail, informing him that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record in the matter would be certified directly to us for imposition of a sanction, and the letter would serve as an amendment to the complaint to charge respondent with a violation of RPC 8.1(b) for his failure to answer. The regular mail was not returned.

On November 22, 2016, DEC Secretary John Palm received a letter from respondent, indicating that he had received the prior correspondence sent to him, but that exhibits to the complaint were missing. By letter of even date, Palm sent

respondent another copy of the complaint, along with the requested exhibits.

As of December 15, 2016, the date of the certification of the record, respondent had not filed an answer.

We now turn to the allegations of the complaint. In 2002, Jennifer Close and her husband, Samuel Agigian, retained respondent to commence an action for injuries that Close sustained in an April 3, 2002 motor vehicle accident, in Delaware County, Pennsylvania.

On March 26, 2004, respondent filed a civil action in Delaware County, Court of Common Pleas, against defendants Floyd Silver and the Silver Trucking Company.

On October 19, 2004, the defendants requested answers to interrogatories and discovery, within thirty days. Respondent, however, failed to comply with the discovery request in a timely manner. Therefore, in February 2005, the defendants filed a motion to compel answers to interrogatories and discovery, which the court granted on April 4, 2005.

Thereafter, respondent provided some of the requested discovery but failed to answer the interrogatories. On July 7, 2005, the defendants filed a second motion to compel discovery. On July 28 and August 7, 2005, respondent supplemented the previous discovery requests but failed to produce a recorded

statement from Close to her insurance carrier. He did not file a response to the defendants' second motion to compel discovery.

On August 10, 2005, the court scheduled Close's case for trial. At the time, the court also required respondent to file pre-trial papers at least sixty days prior to November 7, 2005. Respondent, however, failed to file those papers.

On August 15, 2005, the court granted the defendants' motion to compel discovery and set a deadline of twenty days for respondent to comply. He failed to do so. Therefore, in October 2005, defendants filed a motion for sanctions, to which respondent did not reply. Thus, on November 3, 2005, the court granted the motion and precluded the plaintiffs from offering evidence of damages at trial.

On November 8, 2005, respondent filed a belated answer to the defendants' motion for sanctions, as well as the overdue plaintiffs' pre-trial papers, and a motion for a continuance. On November 16, 2005, he filed a motion to vacate the November 3, 2005 order granting sanctions.

Prior to the trial date of November 22, 2005, respondent told Close and Agigian only that a hearing was scheduled in their case for that date. He did not disclose the order imposing sanctions and prior events. On the trial date, Agigian

and respondent appeared in court, at which time the Court entered a judgment of non pros - in effect, a judgment of dismissal for failure to prosecute. Respondent contemporaneously told Agigian and Close only that he intended to appeal the court's ruling, failing to reveal that the judgment was a dismissal of the case.

Thereafter, respondent took no action to file a petition for relief from the judgment. Instead, on December 20, 2005, he filed an appeal with the Superior Court of Pennsylvania. Because that appeal was premature and from a non-appealable order, on January 30, 2006, the Superior Court entered an order quashing it.

Seventy-five days after the trial court's November 22, 2005 order, on February 6, 2006, respondent finally filed a petition to open the judgment, which was denied weeks later, on February 28, 2006.

On March 27, 2006, respondent filed a second appeal in the Superior Court, but it, too, was dismissed on January 8, 2007. The appellate court quoted the trial court's finding that "[p]laintiffs had more than one chance over the course of a year to remedy the errors made and get their case back on track, but did not avail themselves of those opportunities. It

was not until the court granted sanctions that the court received any response from the plaintiffs."

Throughout the representation, respondent: (1) told Close and Agigian that their case was proceeding apace and that he would inform them of any new developments; (2) failed to keep them informed about the status of their matter and that the judgment of non pros acted as a dismissal of their complaint; (3) told them about the need for another attorney to prepare an appellate brief, but failed to obtain their consent to retain Wright Appellate Services (WAS) for that purpose; (4) failed to pay WAS for the appellate brief prepared in their behalf; and (5) failed to tell Close and Agigian that he did not maintain required professional liability insurance.

In November 2006, Benjamin G. Lipman, Esq., contacted Close and Agigian on behalf of WAS, seeking payment for its appellate brief. During that conversation, the couple learned, for the first time, that their case had been dismissed.

Respondent has practiced law, since 1998, as a personal corporation. Rule 1:21-1A(a)(3) requires attorneys who practice law as a corporation to maintain professional liability insurance for every year in which they practice law in that format. Respondent failed to file the required certificates of

insurance with the Clerk of the Supreme Court of New Jersey for the years 1999 to 2010.

Count one of the complaint charged that respondent violated RPC 1.1(a) and (b) by failing to answer the defendants' interrogatories and to file responsive pleadings to the motions to compel discovery. In addition, the complaint alleged, respondent filed a premature appeal of a non-appealable court order. Due to respondent's inaction, Close and Agigian were denied their opportunity to seek damages in court.

Count two of the complaint charged respondent with having violated RPC 1.2(a) by retaining WAS without the Closes' consent to incur that expense and, thereafter, failing to tell his clients that he had not paid WAS for the brief.

Count three alleged that respondent violated RPC 1.3 and RPC 8.4(d) by his failure to comply with the defendants' discovery requests and with two subsequent court orders compelling discovery; to timely file pre-trial statements and responsive pleadings to the defendants' sanctions motion; and to timely file a petition for relief from the judgment of non pros.

Count four of the complaint charged respondent with a violation of RPC 1.4(b) by failing to tell Close and Agigian that: his failure to comply with discovery demands led to the

dismissal and court sanctions; he had not maintained mandatory malpractice insurance; and that "he had to pay" WAS for an appellate brief. In addition to the imposition of discipline, the complaint sought respondent's reimbursement of the appeal expenses to Close and Agigian.

Count five alleged that respondent engaged in the unauthorized practice of law. Specifically, from 1999 to 2010, he failed to submit annual certificates of malpractice insurance, as required by R. 1:21-1A(a)(3).

Finally, count six of the complaint charged respondent with a violation of RPC 8.4(c) for his failure to inform Close and Agigian that he had failed to comply with discovery deadlines, resulting in sanctions, and for leading them to believe that their case was proceeding apace when it was not so.

* * *

On March 3, 2017, respondent's counsel, Steven Kudatzky, Esq., filed a letter-brief in support of a motion to vacate the default.

To successfully vacate a default, a respondent must meet a two-pronged test. First, a respondent must offer a reasonable explanation for his/her failure to answer the ethics complaint.

Second, a respondent must assert a meritorious defense to the underlying charges.

As to his failure to answer the ethics complaint, counsel states that respondent had cooperated fully with the DEC investigator in this matter until the filing of the complaint, but allowed the matter to "fall through the proverbial cracks" thereafter. Respondent was "inundated" at the time with other pending ethics matters, including another one involving the same investigator/presenter as in this matter. Further, respondent has dealt with the DEC and the OAE in a number of other ethics matters over the years, and has defended every other case. His failure to file an answer here "was an isolated and aberrational departure from his customary discharge of his professional obligations in disciplinary matters and was the product of neglect rather than a manifestation of disrespect for the disciplinary system."

In respect of prong two, meritorious defenses, counsel first focuses on the charges in counts one through four and six, all of which involve the Close and Agigian matter. According to counsel, because respondent has already been disciplined in Pennsylvania for mishandling that matter, the DEC is "improperly seeking to have Respondent punished twice for the same conduct." Counsel requests us to either dismiss

the charges in those counts or remand them to the OAE "for processing as a reciprocal discipline matter."

Counsel is mistaken in his belief that the DEC improperly seeks to punish respondent twice for his misconduct. Indeed, by virtue of his request that we remand this matter to the OAE to proceed by way of reciprocal discipline, counsel appears to recognize the Court's authority to impose discipline on an attorney licensed to practice in this state for the very misconduct committed and disciplined by a foreign licensing jurisdiction. In fact, motions for reciprocal discipline routinely yield discipline here, in addition to any discipline imposed in the originating jurisdiction.

Counsel also is mistaken in his conclusion that the DEC, which stands in the shoes of the OAE, was required to proceed not by way of complaint, but by a motion for reciprocal discipline.

Motions for reciprocal discipline in New Jersey are governed by R. 1:20-14. Subsection (d) of that Rule provides, in relevant part, as follows:

(d) Alternative Procedure; Complaint.

Nothing in this rule shall be construed to preclude the [OAE] Director from filing a complaint pursuant to R. 1:20-4 where the Director determines that procedure to be appropriate.

Here, the OAE permitted the DEC to file a formal ethics complaint, which was its prerogative, under R. 1:20-14(d).

Counsel also raised a partial defense to count four, which charged respondent with failing to communicate with Close and Agigian, stating that the representation pre-dated an amendment to Pennsylvania RPC 1.4, which added subsection (c), requiring attorneys to disclose to clients the absence of malpractice insurance. However, the Pennsylvania authorities did not find respondent guilty of violating Pennsylvania RPC 1.4(c) based on his failure to disclose the absence of professional liability insurance.

Moreover, counsel overlooks the gravamen of count four of the complaint, which details numerous other instances of critical events and information that respondent withheld from his clients, as explained below, and for which counsel raises no defense in his brief.

According to counsel, count five of the complaint should be dismissed. That count charged respondent with (1) having practiced law as a corporation without malpractice insurance, and (2) failing to submit mandatory annual certificates of professional liability insurance to the Supreme Court Clerk, both in violation of RPC 5.5(a). Counsel argues that respondent already has been disciplined in New Jersey for failing to

maintain malpractice insurance, and that he maintained malpractice insurance during much of the time in question (1999 to 2010). Counsel did not raise a defense to the charge that respondent failed to submit certificates of insurance to the Clerk. Counsel is correct – respondent was disciplined in 2013 for his failure to maintain malpractice insurance, but was not disciplined for a failure to submit certificates of insurance, a separate violation, as explained below.

In summary, respondent has failed to provide a reasonable explanation for his failure to answer the ethics complaint. His claim – that he allowed this matter "to slip through the cracks" while attending to other ethics matters – underscores his intimate familiarity with the disciplinary system over years of involvement, and renders him acutely aware of his duty to file answers to all ethics complaints, including this one. Moreover, respondent ignores the obvious fact that he was well aware of this complaint, having acknowledged to DEC Secretary Palm that he had received the complaint but not the exhibits. In this context, his claim of inadvertence appears questionable.

Furthermore, respondent has failed to advance meritorious defenses to all of the charges against him. In fact, he has offered a meritorious defense to only a portion of one of the

many charges set forth with the complaint. Specifically, he has offered a defense only in respect of prior discipline that was imposed for his failure to maintain professional liability insurance for the same time period as involved in this matter. He offers no similar defense for his failure to have filed the requisite certificate of insurance or to any of the other charges.

Thus, because respondent failed to satisfy the two prongs necessary to vacate a default, we determined to deny his motion.

* * *

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

Respondent was retained, in 2002, to represent Close and Agigian for damages arising out of injuries that Close sustained in an automobile accident. Although respondent filed a personal injury complaint, he promptly dropped the ball in the case.

Specifically, respondent failed to answer the defendants' interrogatories, failed to reply to two motions to compel

discovery, and ignored two court orders requiring him to provide discovery. Eventually, the court dismissed the complaint for failure to prosecute the clients' claims.

Respondent then failed to file a petition for relief from the default judgment. Instead, he filed a premature, faulty appeal from a non-appealable court order. That appeal was denied. A second appeal also failed for lack of sufficient grounds to overturn the trial court's dismissal. Respondent's conduct in this regard violated RPC 1.1(a) and RPC 1.3.

Although the complaint also charged respondent with a pattern of neglect, we discern only one instance of neglect here, and the complaint did not allege that a pattern emerged as a result of prior instances of neglect for which respondent previously was disciplined. Therefore, we dismiss the RPC 1.1(b) charge.

In respect of RPC 1.2(a), respondent told Close and Agigian that he would need to retain an outside firm to prepare an appellate brief, but, according to the complaint, he did not obtain his clients' consent before retaining WAS for that purpose. Presumably, expenses for post-dismissal appellate work were outside the scope of the fee agreement between the parties. Respondent, thus, violated RPC 1.2(a) by retaining WAS, without authorization to do so.

Respondent also failed to keep Close and Agigian informed about important aspects of the case. He neglected to tell them that he had not complied with discovery requests and two court orders compelling discovery. Likewise, he did not inform them that the complaint had been dismissed, or that the court had imposed sanctions. Finally, respondent did not inform his clients that he was retaining WAS to prepare an appellate brief, the fee for which they, not he, would be responsible. Respondent's conduct in this regard violated RPC 1.4(b).

To the extent that the complaint also charged respondent with misconduct that would fall under Pennsylvania's RPC 1.4(c) (addressing an attorney's obligation to inform clients when the attorney lacks malpractice insurance), the informal admonition issued by Pennsylvania did not include a violation of that rule, and New Jersey has no equivalent RPC. Thus, we dismiss the added charge in count four that respondent violated RPC 1.4 by failing to tell Close and Agigian about his lack of malpractice insurance.

We consider next the charge that respondent engaged in the unauthorized practice of law (RPC 5.5(a)) based on his failure to maintain malpractice insurance and to file annual certificates of malpractice insurance with the Clerk of the Supreme Court. It is true that respondent was found guilty of

failure to maintain malpractice insurance, in his 2013 disciplinary matter, for the same period as in this matter. Therefore, we dismiss that aspect of the RPC 5.5(a) charge in this matter as duplicative.

Nevertheless, respondent violated RPC 5.5(a) by his failure to submit certificates of insurance to the Clerk of the Court for the years 1998 to 2010, a requirement of R. 1:21-1A(b). Thus, we find a violation of RPC 5.5(a) for respondent's failure in this respect.

Respondent also misrepresented the status of the case to Close and Agigian by telling them that their matter was proceeding apace, when he had permitted its dismissal, prompting court-ordered sanctions, ultimately preventing them from quantifying and presenting their damages. In fact, Close and Agigian learned of the dismissal only when WAS sought payment from them for charges for an appellate brief. Clearly, respondent misled his clients, a violation of RPC 8.4(c).

In summary, respondent is guilty of having violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(b), RPC 5.5(a), RPC 8.4(c), and RPC 8.4(d). We dismiss the RPC 1.1(b) charge.

Attorneys who violate court orders generally have received reprimands, even if that infraction is accompanied by other, non-serious violations. See, e.g., In re Mason, 197 N.J. 1

(2008) (attorney engaged in conduct prejudicial to the administration of justice; with information gathered during the representation of Marx Toys, the attorney switched sides to represent a competing entity; the attorney was found guilty of having violated a court order entered after the switch, directing him "not [to] perform any legal work which involves Marx Toys and [not make] any disclosures regarding Marx;" conflict of interest also found); In re Gourvitz, 185 N.J. 243 (2005) (attorney engaged in conduct prejudicial to the administration of justice by repeatedly disregarding several court orders requiring him to satisfy financial obligations to his former secretary, an elderly cancer survivor who sued him successfully for employment discrimination); and In re Carlin, 176 N.J. 266 (2003) (attorney failed to comply with two court orders; he also failed to comply with mandatory trust and business recordkeeping requirements and was found guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to deliver funds to a third person).

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 Dwyer, 223 N.J. 240 (2015) (attorney made a

misrepresentation by silence to his client by failing to inform her, despite ample opportunity to do so, that her complaint had been dismissed, a violation of RPC 8.4(c); the client's complaint was dismissed because the attorney had failed to serve interrogatory answers and ignored court orders compelling service of the answers, violations of RPC 1.1(a), RPC 1.3, and RPC 3.2; the attorney also violated RPC 1.4(b) by his complete failure to reply to his client's requests for information or to otherwise communicate with her from June 2009 through January 2011, and his failure to communicate with her, except on occasion, between January 2011 and April 2014; the attorney never informed his client that a motion to compel discovery had been filed, that the court had entered an order granting the motion, or that the court had dismissed her complaint for failure to serve the interrogatory answers and to comply with the court's order, violations of RPC 1.4(c)); and In re Ruffolo, 220 N.J. 353 (2015) (attorney exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, and by 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 reply promptly 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)).

Lastly, an admonition would suffice for respondent's violation of RPC 5.5(a), were it found in isolation. In In the Matter of Gerald F. Fitzpatrick, 99-046 (April 21, 1999), we imposed an admonition on an attorney who failed to maintain professional liability insurance for a period of six years.

For the totality of respondent's misconduct, discipline greater than a reprimand is required because of the default nature of the proceedings. "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." In re Kivler, 193 N.J. 332, 342 (2008). Thus, we begin with a censure as the baseline sanction for respondent's misconduct.


There are additional aggravating factors to consider. Respondent has prior discipline, including a 1996 reprimand, a 2013 three-month suspension, and a 2016 censure. Those matters included some of the same misconduct found here, including gross neglect, failure to abide by the client's decisions regarding the scope of the representation, failure to communicate, and misrepresentations by silence. In addition,

respondent's misconduct harmed Close and Agigian, inasmuch as they lost the value of their claims. For the presence of these additional aggravating factors, we determine that a three-month suspension is in order.

Chair Frost, Member Gallipoli, and Member Zmirich voted for a six-month suspension.

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 John Andrew Klamo
Docket No. DRB 16-443

Decided: June 29, 2017

Members	Three-Month Suspension	Six-month Suspension
Frost		X
Baugh	X	
Boyer	X	
Clark	X	
Gallipoli		X
Hoberman	X	
Rivera	X	
Singer	X	
Zmirich		X
Total:	6	3


Ellen A. Brodsky
Chief Counsel