

respondent with violating RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter); RPC 1.4(c) (failure to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 8.1(a) (knowingly make a false statement of material fact to disciplinary authorities); RPC 8.1(b) (failure to cooperate with disciplinary authorities); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons detailed below, we determine to impose a censure.

Respondent earned admission to the New Jersey bar in 1997. He is a sole practitioner, engaged in the practice of law in Jersey City, Hudson County, New Jersey. He has no prior discipline.

This matter originally was before us during our March 2015 session, on a recommendation for a reprimand filed by the DEC. We determined to remand the matter to the DEC for further investigation and the filing of either an amended or supplemental complaint, followed by a supplemental hearing.

On January 4, 2016, the DEC filed a supplemental complaint, and on March 26, 2018, a supplemental hearing was held. During the hearing, the DEC and respondent stipulated to the record and the exhibits from the original

matter and admitted additional exhibits, and respondent provided additional testimony. The matter was then returned to us.

In April 2012, the grievant, Y.B., retained respondent to represent her son, G.M., in obtaining an expungement of G.M.'s criminal arrest record. Although G.M. previously had filed a pro se expungement petition, it was dismissed by court order, on April 4, 2012, following an objection by the New Jersey State Police. G.M.'s criminal record consisted solely of an arrest on a drug charge, followed by his successful completion of the Pretrial Intervention program.

When Y.B. retained respondent, G.M. was not present at respondent's office. Y.B. signed a retainer agreement, which provided that respondent would draft and file the expungement petition for a \$750 fee. According to Y.B., respondent asserted that "he would take [her] on as a client." Respondent told Y.B. that he could not give her a copy of the retainer agreement during this initial meeting, because his copier was not working. He was unable to produce a copy of the retainer agreement during the ethics proceedings. It is undisputed that only Y.B. and respondent signed the retainer agreement, and that respondent never asked G.M. to sign it.

During their first meeting, Y.B. supplied respondent with her son's original expungement paperwork. Respondent promised to make copies and

bring them to Y.B.'s home. Y.B. testified that she never received the promised copies.

When Y.B. retained respondent, she expressly informed him that the purpose of the expungement was to permit G.M. to pursue his education toward a career as a physical therapist. Respondent was aware that the past drug arrest was hindering those endeavors, as it rendered G.M. ineligible for a required doctoral program. Indeed, respondent included those career aspirations in the affidavit he drafted for G.M.'s signature in support of the expungement petition. Pursuant to respondent's request, G.M. had submitted to respondent, through Y.B., a written explanation of his education and career goals. Respondent then used this information to draft the expungement petition, affidavit, and letter-brief in support of the petition.

After their initial meeting, respondent met with Y.B. at her home. On that occasion, respondent showed Y.B. the draft expungement petition, affidavit, and letter-brief that he had prepared on G.M.'s behalf. During this meeting, Y.B. paid respondent his full \$750 fee. On September 7, 2012, after multiple postponements of the matter, oral argument on the expungement petition was held, in Superior Court of New Jersey, Middlesex County. Because respondent had informed Y.B. that neither she nor G.M. needed to attend oral argument, they did not do so. On that same date, after the oral

argument concluded, respondent informed Y.B., via telephone, that the court had orally granted G.M.'s expungement; that his only remaining task was to obtain a signed expungement order from the court; and that he would send her a copy as soon as possible.

Y.B. did not speak to respondent again until the beginning of December 2012, about three months later, when she telephoned him and requested an update on the status of the final expungement order. She had not attempted to contact respondent previously because she assumed the receipt of the final order "would take some time." During that December 2012 telephone conversation, Y.B. reiterated to respondent that the expungement order was urgently needed for G.M.'s educational endeavors, as he wanted to return to school in January 2013. Respondent promised to provide the final order to Y.B. "A.S.A.P.," but she did not receive it. She received no further communication from respondent, until February 2013. Between December 2012 and February 2013, she made weekly attempts to contact respondent by telephone, to no avail. At some point, respondent's voicemail alerted her that his inbox was full.

In February 2013, Y.B. called the Superior Court herself, in an attempt to obtain the final expungement order for G.M. Unbeknownst to Y.B., on February 15, 2013, the court had dismissed the application for expungement,

without prejudice, for failure to prosecute. Court staff, thus, informed her that “there was no expungement.” Y.B. immediately telephoned respondent, who informed her that his wife had issues with a pregnancy and that he was “backed up,” but that there was an expungement order and he would provide a copy of it to her. Once again, Y.B. received neither a copy of the expungement order nor any communication from respondent, until June 2013, when she began texting him. On June 14, 2013, Y.B. sent a text to respondent as follows, in relevant part:

‘I have tried to reach you for several months regarding proof of the expungement but to no avail. I need final proof of expungement so my son can complete his degree. Please provide me with the proof due to the fact that New Brunswick Court had no record of said expungement I am in doubt that it was done. Please contact me with an explanation or reimbursement of my 750.00. In case of no response I must take legal action.’

[Ex.P11.]

Respondent testified that, in February 2013, after speaking with Y.B, he had contacted the court, both by telephone and by letter, seeking guidance on how to proceed. He produced no evidence, however, that any such correspondence had been sent to the court or that a copy had been sent to Y.B., despite acknowledging her repeated requests for the document. He conceded

that he should have gone to the court, in person, to rectify the expungement, but never did so.

On July 22, 2013, Y.B. sent a text to respondent, which stated, in its entirety:

‘Mr Smith I have not heard anything from you regarding my sin’s [sic] expungement in quite some time. I need an update and some solid answers as this is and [sic] important matter affecting my sons [sic] future. If you are not going to be serious as well as professional about this I am going to have to take this to the next level. Please give me an update that is useful to my sons [sic] advancement in his career plans as soon as possible.’

[Ex.P11.]

On July 31, 2013, Y.B. sent the following text to respondent:

‘Mr. Smith due to the fact that I have not heard from you I must move forward and contact the Ethics Committee in this matter. I must hear something immediately regarding some progress in my sons [sic] expungement’

[Ex.P11.]

Respondent testified that criminal law was his field of expertise, and that he previously had filed more than one hundred expungement applications. Although he knew that the verbal grant of the expungement did not complete the application, he claimed that the common practice is for the court to prepare the order. Respondent further admitted, however, that, even after the court

signs the expungement order, additional legal steps are necessary to perfect the expungement, including notice to the New Jersey State Police that its criminal records must be conformed to the order.

According to respondent, when he received the above texts from Y.B. threatening disciplinary action, as well as more aggressive texts that were not included in the record, he decided that any attorney-client relationship in the matter had ended, and, thus, took no further action with respect to the expungement.

Respondent acknowledged that, as of the date of the DEC hearing, he had not obtained the final expungement order. Despite these concessions at the hearing, in respondent's September 26, 2013 reply to the ethics grievance filed by Y.B., he had falsely claimed to the DEC investigator that "[I] have inquired as to the [expungement] Order, and have submitted an Order for the Court's (albeit) belated execution . . ." When cross-examined, respondent admitted that his statement to the DEC was false, because he had submitted no such order to the court.

Y.B. testified that respondent's failure to complete the expungement caused serious consequences for her son. Specifically, she claimed that he was unable to pursue his desired career as a physical therapist, because his drug arrest made him ineligible for the doctoral program he had intended to

complete. Y.B. asserted that, in her opinion, due to respondent's failure to complete the expungement, G.M. had settled for a career as an emergency medical technician.

At the first hearing, in response to the allegations concerning his conduct in communicating with Y.B., respondent raised the defense that G.M., not Y.B., was his client, and, thus, he had no duty to communicate with her. Respondent claimed that all communications with Y.B. were merely a courtesy and a reflection of how accessible he was to his clients and their families. During respondent's additional testimony, however, he conceded that he had spoken with G.M. only once, at the beginning of the representation, and that all other communications regarding the case were with Y.B. The presenter noted that respondent had not raised this defense in his answer or at the prehearing conference.

At the first hearing, prior to the presentation of the case against him, respondent had admitted that he failed to cooperate with the DEC investigator, both by refusing to produce the files that she demanded and by failing to communicate with her after their initial meeting, despite her numerous efforts. Respondent, thus, stipulated that he had violated RPC 8.1(b).

The DEC found that, as respondent had admitted, his failure to cooperate with the DEC investigator constituted a violation of RPC 8.1(b).

The panel further found that, after Y.B. retained respondent, he initially proceeded with the expungement action with appropriate diligence. The panel found the following facts to be undisputed: the court orally granted the expungement on September 7, 2012; respondent then volunteered to prepare and submit a final expungement order for the court's execution; respondent never submitted the final expungement order; and, as a result of respondent's inaction, the expungement petition eventually was dismissed, without prejudice, for failure to prosecute.

The DEC also found that respondent failed to correct the dismissal, which his inaction had caused. The DEC determined that respondent's conduct constituted gross neglect, in violation of RPC 1.1(a) and a lack of diligence, in violation of RPC 1.3.

As a threshold issue in analyzing the RPC 1.4 charges, the panel noted that, during the hearing, for the first time, respondent raised the defense that Y.B. was not his client, and he, thus, had no duty to communicate with her. Respondent claimed that his communication with Y.B. was merely a courtesy, since she was his client's mother.

Based on the circumstances of Y.B.'s retention of respondent, her payment of his fee, and the course of their communications during the expungement process, the panel rejected respondent's defense that no attorney-

client relationship existed between him and Y.B., finding that they related to each other as attorney and client.

The DEC, thus, determined that respondent violated both RPC 1.4(b) and (c) by failing to communicate with Y.B. or to keep her informed of the status of the expungement proceeding. The panel additionally found that, even if respondent were correct that no attorney-client relationship existed between Y.B. and him, respondent had still violated RPC 1.4(b) and (c) by failing to communicate with G.M. (the assumed client) or to inform him of the status of the expungement proceeding. Accordingly, the DEC concluded that, for the same reasons respondent violated both RPC 1.4(b) and (c) with respect to Y.B., he violated those same rules with respect to G.M.

Finally, the panel found that respondent made a misrepresentation to the DEC investigator when, in his September 26, 2013 reply to the grievance, he wrote “[I] have submitted an Order for the Court’s (albeit) belated execution” This statement was contrary to respondent’s admission, at both DEC hearings, that he had submitted no such order. Thus, the panel determined that respondent had violated RPC 8.1(a) and RPC 8.4(c).

Upon a de novo review of the record, we are satisfied that the DEC’s conclusion that respondent’s conduct was unethical was fully supported by clear and convincing evidence.

Specifically, in April 2012, Y.B. retained respondent to obtain an expungement of G.M.'s minor criminal arrest record. In furtherance of the representation, respondent received G.M.'s prior, pro se expungement petition, plus a written explanation of G.M.'s education and career goals. Respondent, thus, knew that G.M. desired a career as a physical therapist, and that his past drug arrest was hindering those endeavors. To that end, respondent included those career aspirations in the affidavit he drafted for G.M.'s signature in support of the expungement petition.

Respondent proceeded to draft the required expungement documents, and Y.B. paid his \$750 fee. On September 7, 2012, the Superior Court orally granted G.M.'s expungement petition, and respondent agreed to submit a corresponding order. He then telephoned Y.B. to inform her of his progress.

Rather than submit the required court order, however, respondent took no further action in respect of G.M.'s expungement. In February 2013, approximately six months after the oral grant of the expungement, and after respondent had ignored multiple requests for status updates, Y.B. informed respondent that the expungement petition had been dismissed, without prejudice, for lack of prosecution. Y.B. had discovered the dismissal by calling the court herself. Despite this revelation, respondent failed to take the necessary steps to cure the dismissal. Although he testified that he had sought

procedural guidance from the court, he failed to produce any evidence of such actions. He admitted that no copy of such correspondence was ever sent to Y.B., despite her repeated requests. Respondent also conceded that he should have personally gone to the court to rectify the expungement but failed to do so.

Respondent previously had filed over one hundred expungement applications. His inaction was alarming, given his experience with expungements and his knowledge of the specific motive behind the expungement application – G.M.’s desire to further his education and career. Y.B. repeatedly had reminded respondent of this motive, via text message, as she sought updates on the process. By allowing the expungement petition to be dismissed for lack of prosecution and by failing to take steps to promptly reinstate it after learning of the dismissal, respondent engaged in gross neglect, in violation of RPC 1.1(a), and a lack of diligence, in violation of RPC 1.3.

Further, the record supports the DEC’s conclusion that an attorney-client relationship existed between respondent and Y.B., and that he violated both RPC 1.4(b) and (c). “At its most basic, [the attorney-client relationship] begins with the reliance by a nonlawyer on the professional skills of a lawyer who is conscious of that reliance and, in some fashion, manifests an acceptance of responsibility for it.” Kevin H. Michels, New Jersey Attorney Ethics: The Law

of New Jersey Lawyering, 247 (2014), citing In re Palmieri, 76 N.J. 51, 58, 60 (1978). The relationship can begin absent an express agreement, a bill for services rendered, and the actual provision of legal services. Ibid. The relationship may be inferred from the conduct of the attorney and “client,” or by surrounding circumstances. Id. at 58-59.

Stated differently, when “the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case, then an attorney-client relationship is created.” Herbert v. Haytaian, 292 N.J. Super. 426, 436 (App. Div. 1996). It must, nonetheless, be “an aware, consensual relationship.” Palmieri, 76 N.J. at 58. On the attorney’s side, there must be a sign that the attorney is “affirmatively accepting a professional responsibility.” Id. at 58, 60. See also Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 146 (App. Div. 1988), certif. den. 113 N.J. 357 (1988) (a lawyer “must affirmatively accept a professional undertaking before the attorney-client relationship can attach.”)

Here, respondent’s hollow contention that no attorney-client relationship existed between Y.B. and him is without merit. The following facts are undisputed: Y.B. retained respondent, by written agreement, to represent G.M. in his expungement; Y.B., and G.M. by proxy, expressly relied on

respondent's professional skills, as set forth in the retainer agreement; respondent's retention occurred during a meeting at his office where Y.B. was present, but G.M. was not; respondent signed the retainer and required only Y.B., not G.M., to execute it; subsequent to the execution of the retainer agreement, respondent visited Y.B.'s home, where she paid his \$750 fee in full; once again, only respondent and Y.B. were present at this second meeting; during the entire representation by respondent, he communicated with G.M. only once, in order to gather background information in support of the expungement petition; and all communications and status updates regarding the expungement occurred between respondent and Y.B., including his telephone call informing her that the court had verbally granted the expungement application.

These undisputed facts lead to no other conclusion than that an aware, consensual, attorney-client relationship existed between respondent and Y.B. On respondent's side, he affirmatively accepted a professional responsibility by executing the retainer, proceeding with the expungement petition, and communicating directly with Y.B. but for one instance of communication with G.M. Respondent, thus, affirmatively accepted a professional responsibility with Y.B. and the attorney-client relationship clearly attached.

As to the RPC 1.4(b) and (c) charges, the evidence establishes that respondent failed to reply to Y.B.'s dogged requests for information during the representation and failed to provide her with the accurate information necessary to make informed decisions regarding G.M.'s expungement. Y.B. was forced to repeatedly follow up with respondent in a futile effort to seek the true status of the final expungement order. When respondent did reply, he led Y.B. to believe that, from September 7, 2012 forward, the matter was progressing; yet, he had neglected to file the final expungement order as the court had required. Until he determined to end the attorney-client relationship with Y.B., due to her threats of filing an ethics complaint, respondent failed to communicate with her or to explain to her the status of the expungement matter, in violation of RPC 1.4(b) and (c).

Assuming arguendo, as the hearing panel did, that the only attorney-client relationship in this matter was between respondent and G.M., his conduct still violated RPC 1.4(b) and (c), because, by his own admission and stipulation, he spoke to G.M. only once, at the beginning of the representation. In either scenario, respondent failed to fulfill his duties pursuant to these RPCs and his defense is without merit and directly contradicted by the evidence.

Respondent neither obtained the final expungement order nor took the additional steps necessary to perfect the expungement. In a September 26,

2013 reply to Y.B.'s grievance, however, he falsely claimed to the DEC investigator that "[I] have inquired as to the [expungement] Order, and have submitted an Order for the Court's (albeit) belated execution . . ." Under cross-examination, respondent admitted that his statement to the DEC was patently false. Respondent, thus, violated both RPC 8.1(a) and RPC 8.4(c).

Moreover, respondent admitted that he had failed to cooperate with the DEC investigator, both by refusing to produce the files that she demanded and by failing to communicate with her after their initial meeting, despite her numerous efforts. Respondent, thus, violated RPC 8.1(b).

In sum, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), RPC 8.1(a) and (b), and RPC 8.4(c). The only remaining issue is the appropriate quantum of discipline to be imposed for respondent's misconduct.

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 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 meeting them, particularly with the deadlines for filing an objection to the motion to dismiss the complaint, violations of RPC 1.4(b) and (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 based on 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, and RPC 1.4(b) and (c); although the attorney had been admonished previously, we noted that his conduct had 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 gross neglect, lack of diligence, 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).

Respondent also is guilty of violating RPC 8.1(a) (in conjunction with his violation of RPC 8.4(c)). A reprimand is typically imposed for a misrepresentation to disciplinary authorities, so long as the lie is not compounded by the fabrication of documents to conceal the misconduct. See, e.g., In re DeSeno, 205 N.J. 91 (2011) (attorney misrepresented to the district ethics committee the filing date of a complaint on the client's behalf; the attorney also failed to adequately communicate with the client and failed to

cooperate with the investigation of the grievance; prior reprimand); In re Sunberg, 156 N.J. 396 (1998) (attorney lied to the OAE during an ethics investigation of the attorney's fabrication of an arbitration award to mislead his partner and failed to consult with a client before permitting two matters to be dismissed; no prior discipline); and In re Powell, 148 N.J. 393 (1997) (attorney misrepresented to the district ethics committee, during its investigation of the client's grievance, that his associate had filed a motion to reinstate an appeal; the attorney's misrepresentation was based on an assumption, rather than an actual conversation with the associate about the status of the matter; the attorney also was guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior reprimand).

Finally, failure to cooperate with a DEC's investigation results in an admonition, if the attorney does not have an ethics history, even when accompanied by other, less serious, infractions. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (attorney failed to reply to repeated requests for information from the DEC investigator regarding his representation of a client in three criminal defense matters, a violation of RPC 8.1(b)) and In the Matter of Martin A. Gleason, 220 N.J. 350 (2015), DRB 14-139 (November 5, 2014) (attorney did not file an answer to the formal ethics complaint and ignored the DEC investigator's multiple attempts to obtain a

copy of his client's file, a violation of RPC 8.1(b); the attorney also failed to inform his client that a planning board had dismissed his land use application, a violation of RPC 1.4(b)).

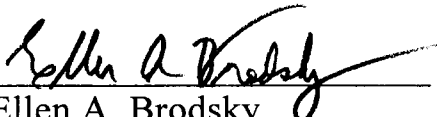
Here, in connection with a simple expungement matter, for which he claimed expertise and extensive experience, respondent embarked on a course of conduct that resulted in his commission of a series of ethics violations. In aggravation, we assign significant weight to the wholly avoidable harm respondent caused to G.M. In respect of mitigation, we considered respondent's lack of prior discipline, after more than twenty years at the bar. We determine that, on balance, a censure is the appropriate quantum of discipline necessary to protect the public and to preserve confidence in the bar.

Vice-Chair Gallipoli voted to impose a six-month suspension.

Members Petrou, Rivera, 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
Bruce W. Clark, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

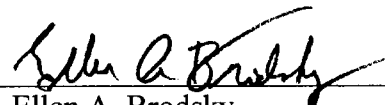
In the Matter of Darryl George Smith
Docket No. DRB 19-108

Argued: May 23, 2019

Decided: October 23, 2019

Disposition: Censure

<i>Members</i>	Censure	Six-Month Suspension	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman	X			
Joseph	X			
Petrou				X
Rivera				X
Singer				X
Zmirich	X			
Total:	5	1	0	3


Ellen A. Brodsky
Chief Counsel