

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-121
District Docket No. XIV-2018-0446E

In the Matter of :
:
Aaron David Frishberg :
:
An Attorney at Law :
:
:

Decision

Argued: June 20, 2019

Decided: November 1, 2019

Amanda Figland appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a motion for reciprocal discipline, pursuant to R. 1:20-14(a), filed by the Office of Attorney Ethics (OAE). The motion is based on respondent's six-month suspension in New York, for the New Jersey equivalents of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC

1.3 (lack of diligence), and RPC 1.4(b) (failure to communicate with a client). The OAE recommends a censure and conditions on respondent's practice. For the reasons set forth below, we agree with the recommendation.

Respondent was admitted to the New Jersey and New York bars in 1987. He maintains a law office in New York, New York. He has no history of discipline in New Jersey.

On October 12, 2016, the Departmental Disciplinary Committee for the Appellate Division of the Supreme Court, State of New York, First Judicial Department (the Committee), filed a notice and statement of charges against respondent, alleging that he failed to provide competent representation (NY RPC 1.1(a)), failed to act with reasonable diligence and promptness in representing a client (NY RPC 1.3(a)), neglected a legal matter (NY RPC 1.3(b)), failed to keep a client reasonably informed (NY RPC 1.4(a)(3)), failed to promptly comply with a client's reasonable requests for information (NY RPC 1.4(a)(4)), and engaged in conduct that adversely reflects on the lawyer's fitness as a lawyer (NY RPC 8.4(h)).¹ On January 17, 2017, after respondent replied to the charges, and prior to a hearing, the parties filed a stipulation of facts and charges.

¹ There is no New Jersey equivalent for NY RPC 8.4(h).

Respondent stipulated that, by failing to comply with three deadlines to perfect an appeal, he failed to provide competent representation to a client; failed to act with reasonable diligence and promptness in representing a client; neglected a legal matter entrusted to him; and engaged in other conduct that adversely reflected on his fitness as a lawyer. He denied that he failed to keep the client reasonably informed about the status of the case or that he failed to promptly comply with the client's reasonable requests for information.

A disciplinary hearing took place on February 7 and April 5, 2017. On November 24, 2017, the referee issued a report on liability and sanction, relying heavily on the stipulation, as well as mitigating and aggravating factors. The referee found that respondent violated all of the charges, including failure to communicate, and determined that a one-year suspension was appropriate discipline because of respondent's "serious and extensive neglect of several client matters, most notably the virtual abandonment of [LL]." ²

On June 28, 2018, the Appellate Division of the Supreme Court of New York, First Department (Appellate Division) affirmed the referee's findings of

² Although the client's name appears in many of the documents in the record, the court decision refers to the client as LL. Because of the nature of this client's claims, we, too, use initials to identify him.

fact and conclusions of law, but imposed a six-month suspension, ordered respondent to successfully complete the Lawyer's Assistance Program (LAP) for one year, and directed respondent's LAP monitor to submit a report to the Committee every six months during respondent's one-year program.

The ethics charges in this matter stem from respondent's conduct in connection with an appeal. He previously had been admonished for misconduct relating to the same client, in the underlying matter. In that matter, on May 8, 2006, LL had retained respondent in a tort/civil rights action for wrongful imprisonment. The retainer agreement specified that respondent would file a motion for leave to file a late notice of claim.

LL alleged that, on May 27, 2005, his sister, JL, members of the New York City police department, and employees of a New York hospital had conspired to have him involuntarily committed and detained, in a psychiatric hospital, for seven days, even though he was not a danger to himself or others.

In May 2006, respondent filed a lawsuit in the Supreme Court, New York County, which the court dismissed as untimely. Thereafter, in January 2009, respondent filed federal litigation, in the United States District Court, Southern District of New York (SDNY), based on the same allegations, against the same defendants. Respondent alleged that LL's civil rights had been violated and

raised related state law claims. On February 16, 2010, the SDNY dismissed LL's claims as time-barred, and declined to exercise supplemental jurisdiction over the state law claims.

In 2010, LL filed a disciplinary complaint against respondent. In October 2011, the Committee admonished respondent for neglecting LL's state and federal court actions.

In respect of respondent's conduct in the present matter, in September 2011, he filed a notice of appeal from the New York Supreme Court's dismissal of LL's lawsuit. Respondent neither perfected the appeal nor sought an enlargement of time before the time to do so expired on June 22, 2012.

On September 4, 2012, more than two months after the June 22, 2012 deadline, respondent moved before the Appellate Division for an enlargement of time within which to perfect the appeal, relying on (1) his ignorance of a filing fee requirement; (2) his negotiation with his client for reimbursement of the filing fee; and (3) his absence from his office for several weeks due to his wife's shoulder surgery. Defendants JL and the hospital filed a cross-motion for the appeal's dismissal, based on LL's failure to timely perfect it.

By order dated October 9, 2012, the Appellate Division granted respondent's motion for additional time to perfect the appeal to the February

2013 term, with a filing deadline of December 3, 2012, and granted the defendants' cross-motion to dismiss the appeal, unless it was perfected for the February 2013 term.

Because respondent again failed to perfect the appeal or to seek enlargement before the filing deadline, the defendants moved to dismiss the appeal. On the return date of the motion, respondent belatedly served the defendants with a motion for an order granting a nunc pro tunc extension to permit the filing of the appellant's brief and appendix. The court granted the motion to enlarge the time in which to perfect the appeal to March 19, 2013, for the June 2013 term with no further enlargements, and granted the motion to dismiss, unless respondent perfected the appeal. Once again, respondent neither perfected the appeal nor sought a further enlargement.

Respondent obtained yet another enlargement of time, despite the defendants' objections, but, once again, failed to perfect the appeal. No further enlargements were granted.

On January 28, 2013, LL filed a second complaint with the Committee, alleging that, after respondent had been admonished in 2011 for neglecting his case at the trial level, he was responsive for a short period, but afterward, there were long periods during which respondent did not reply to requests for

information about the appeal, and he failed to inform LL about the dismissal of his appeal. Respondent denied the allegation. Although respondent had offered to produce physical evidence to document his communications with LL in 2012 and 2013, he failed to do so. Respondent also had alleged that, after making extensive revisions, he had successfully filed a brief and appendix with the court.

Thereafter, on January 6, 2014, ten months after the March 18, 2013 final filing deadline had expired, respondent filed a motion to reinstate LL's appeal and for leave to perfect an untimely appeal. On March 25, 2014, the Appellate Division denied respondent's motion to reinstate the appeal, deemed it a motion to enlarge the time to perfect the appeal, granted the defendants' cross-motion, and dismissed LL's appeal.

In March 2016, LL filed for fee arbitration. Despite proper notice, respondent failed to appear. In August 2016, the fee arbitrator awarded LL \$4,385, which, as of the date of the court's decision, had not been satisfied. At the hearing before the referee, respondent had denied knowledge of the award until learning about it at that disciplinary hearing.

As to mitigation, respondent maintained that, during the relevant time, he experienced various "life stressors" that impaired his ability to represent LL. He

suffered from "a lasting medical condition" and his psychiatrist, with whom he had treated for forty years, had retired. Therefore, respondent received treatment from his primary physician, who did not monitor his condition as closely as his psychiatrist had. In addition, in 2016, respondent's mother passed away.

Respondent began treating with another psychiatrist in December 2014. That psychiatrist observed respondent's considerable improvement. A forensic psychiatrist, who had conducted an evaluation of respondent for the disciplinary proceeding, opined that respondent's prognosis was good, that he is "now back in consistent and appropriate psychopharmacological treatment," and that the fact that he "feels comfortable to seek out help is a good sign for his continued well-being."

The Appellate Division considered, as aggravating factors, respondent's two 2011 admonitions in New York: one for failing to timely file LL's state and federal court actions; the other for neglecting a client's tax matter, by failing to appear at the client's hearing. The Appellate Division also considered a non-disciplinary matter where, in September 2016, a court dismissed a case when respondent failed to file a complaint prior to the expiration of the statute of limitations.

Although the Appellate Division affirmed the referee's finding that respondent violated all of the charges, including failure to communicate, it disagreed with the referee's recommendation for a one-year suspension. Rather, the Appellate Division determined that the mitigating factors and the fact that only one client matter was involved warranted a six-month suspension, participation in the LAP program, and monitoring.

Respondent did not report his New York discipline to the OAE as R. 1:20-14(a)(1) requires.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), "a final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3). In New York, "[i]t has consistently been held by the Appellate Divisions that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence." In re Capoccia, 453 N.E.2d 497, 498 (N.Y. 1983). In this matter, respondent stipulated to most of the underlying conduct.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-

14(a)(4), which provides in pertinent part:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

Subsection (E) applies in this matter because the unethical conduct warrants substantially different discipline.

According to the OAE, respondent's New York violations are equivalent to New Jersey RPC 1.1(a) and (b), RPC 1.3, and RPC 1.4(b) and (c). Relying on R. 1:20-14(a)(4)(E), the OAE argued that respondent's conduct warrants substantially different discipline, noting that, when only one client matter is

involved with this combination of RPC violations, the discipline ordinarily is either an admonition or a reprimand. The OAE cited, in aggravation, respondent's previous two admonitions and his failure to report his New York discipline to the OAE. The OAE did not consider respondent's failure to attend the fee arbitration hearing to be an aggravating factor, reasoning that, in New Jersey, fee matters are handled separately from ethics matters, and that non-payment of an award could lead to a separate enforcement action, which, if not satisfied, could result in a temporary suspension. The OAE further noted that the New York court had considered, in aggravation, that in an unrelated matter, respondent had failed to file a complaint prior to the expiration of the statute of limitations in May 2010, which resulted in the 2016 dismissal of the client's claims. The OAE contended that the dismissal of that case was not an aggravating factor because of the timing of its resolution and because the matter had not been adjudicated by a disciplinary tribunal.

As to mitigation, the OAE asserted that, although respondent's mental health condition did not excuse his misconduct, his mental health providers had established a relationship between his mental health and his ethics infractions. The OAE considered that respondent had practiced law for twenty-four years

before he was twice admonished in 2011, and that he cooperated with the Committee during its investigation.

The OAE compared this matter to In the Matter of Robert A. Ungvary, DRB 13-099 (September 30, 2013) (admonition for lack of diligence, failure to communicate, and failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation). According to the OAE, this matter is more serious than Ungvary because of respondent's disciplinary history - he had been admonished twice before, yet failed to change his practices. The OAE also found this case more serious than In re Shapiro, 220 N.J. 216 (2015) (reprimand for lack of diligence and failure to communicate with a client). In Shapiro, the attorney's prior unethical misconduct had occurred earlier in his career, while respondent's misconduct occurred in 2010 and 2013. Further, the OAE cited In re Oxfeld, 231 N.J. 5 (2017) (three-month suspension for failure to respond to summary judgment motions, resulting in the dismissal of two actions; failure to inform the client of the dismissals; and failure to reinstate either matter). The OAE contended, however, that Oxfeld's conduct was more serious than respondent's, based on Oxfeld's history of neglecting client matters and failing to communicate with clients. The OAE emphasized that Oxfeld lacked any mitigating circumstances,

while here, respondent had a well-documented mental health condition that was being treated and was under control. In addition, respondent had only two prior disciplinary matters while Oxfeld had five ethics matters, three of which involved similar misconduct.

The OAE, thus, argued that respondent's conduct warranted lesser discipline than Oxfeld's and recommended a censure, along with the conditions that he provide the OAE with proof of fitness to practice and with copies of all reports that the New York LAP monitor had submitted to the Committee.

Our review of the record establishes that respondent failed to comply with three deadlines to perfect the appeal of the dismissal of his client's state claims. Respondent admitted, and the New York disciplinary authorities found, that he was guilty of failing to provide competent representation to a client, failing to act with reasonable diligence and promptness in representing a client, and neglecting a legal matter entrusted to him, violations comparable to New Jersey RPC 1.1(a) and RPC 1.3. Respondent is also guilty of a pattern of neglect. An attorney's prior discipline can establish a pattern of neglect. In re Kivler, 193 N.J. 332, 340 (2008). To find a pattern of neglect at least three instances of neglect must have occurred. In the Matter of Donald M. Rohan, DRB 05-062

(June 8, 2005) (slip op. at 12-16). Here, respondent neglected this matter, LL's prior matter, and the unrelated 2011 matter.

Respondent also is guilty of failing to keep a client reasonably informed about the status of the matter and failing to comply with reasonable requests for information. Although respondent was given the opportunity to provide evidence of his communications with LL, he failed to do so.

The OAE argued that respondent's conduct also violated RPC 1.4(c). However, we do not find sufficient evidence in the record to sustain this charge. Thus, the only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.1(a), RPC 1.1(b), RPC 1.3, and RPC 1.4(b).

Admonitions typically are imposed for gross neglect, lack of diligence, and failure to communicate with the client. See, e.g., In the Matter of Kendall S. Murphy, DRB 14-274 (November 24, 2014) (attorney was retained in 2005 to file three expungement petitions on behalf of his client; the first two, which were filed in 2005 and 2009, were dismissed, without prejudice, for procedural defects; the third, filed in August 2010, failed to include three of the client's arrests, but was amended on April 7, 2011, and an order of expungement was entered four days later, which the attorney sent to his client with the advice that he could now represent that he had not been convicted of a crime; however, on

June 28, 2011, the court sua sponte entered an amended order of expungement, excluding a disorderly persons offense, which the attorney sent to his client, without cautioning him that the disorderly persons offense had not been expunged; violations of RPC 1.3 and RPC 1.4(b); we considered that the client eventually received the only relief available to him under the law, and that the attorney's nineteen-year career previously was unblemished); In the Matter of Frances Ann Hartman, DRB 14-138 (July 22, 2014) (despite the attorney's initial zealous representation of a client in a medical malpractice action, thereafter, the attorney failed to act with diligence after the client's complaint was dismissed, a violation of RPC 1.3; failed to return the client's repeated telephone calls and e-mails for almost an entire year, a violation of RPC 1.4(b); and failed to explain the matter to the extent necessary to permit the client to make an informed decision on whether to proceed with the client's claim, a violation of RPC 1.4(c)); In the Matter of Clifford Gregory Stewart, DRB 14-014 (April 22, 2014) (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, on behalf of his client, and obtained local counsel to assist him in handling the matter; after the defendant had filed a motion to dismiss the complaint, 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; the attorney also failed to keep his client informed about various filing deadlines and about the difficulty he was having with meeting them, particularly with the deadlines for filing an objection to the motion to dismiss the complaint, a violation of RPC 1.4(b) and RPC 1.4(c); we considered the attorney's exemplary, unblemished career of twenty-eight years at the time of the incident); and Ungvary, DRB 13-099 (September 30, 2013) (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 for 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, RPC 1.4(b), and RPC 1.4(c); although the attorney had been admonished previously, we noted that his conduct in the present matter predated the conduct in that matter, and that the client and his family had continued to retain the attorney, despite the dismissal of the civil rights matter).

When an attorney displays a pattern of neglect, even if that offense is combined with other non-serious violations, a reprimand may be imposed. See,

e.g., In re Gellene, 203 N.J. 443 (2010) (attorney guilty of gross neglect, pattern of neglect, and lack of diligence for failing to timely file three appellate briefs); In re Weiss, 173 N.J. 323 (2002) (attorney engaged in gross neglect, pattern of neglect, and lack of diligence); In re Balint, 170 N.J. 198 (2001) (in three client matters, attorney engaged in gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (attorney guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate in a number of cases handled on behalf of an insurance company).


Here, the New York authorities did not charge respondent with abandonment. Yet, the referee found that he had virtually abandoned LL and had engaged in the serious and extensive neglect of several client matters. For that, the referee determined that a one-year suspension was warranted. The Appellate Division disagreed and imposed a six-month suspension. As the above New Jersey cases demonstrate, when an attorney engages in a pattern of neglect and failure to communicate in two or three matters, a reprimand is the appropriate discipline. Because respondent failed to notify the OAE of his New York discipline, we determine that the discipline should be enhanced, and that a censure is warranted here.

Because the primary purpose of discipline is to protect the public, we require further that respondent provide to the OAE, within sixty days of the date of the Court's order, proof of fitness to practice law by an OAE-approved mental health professional and copies of all New York LAP monitoring reports.

Vice-Chair Gallipoli and Member Zmirich voted to impose the same discipline imposed in New York, a six-month suspension. Member Joseph 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 Aaron David Frishberg
Docket No. DRB 19-121

Argued: June 20, 2019

Decided: November 1, 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:	6	2	0	1


Ellen A. Brodsky
Chief Counsel