

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-195
District Docket No. VA-2014-0020E

In the Matter of :
:
Daryl Sarrell Pennington :
:
An Attorney at Law :
:
:

Decision

Argued: September 19, 2019

Decided: January 13, 2020

Gregory E. Reid appeared on behalf of the District VA Ethics Committee.

Bernard K. Freamon appeared on behalf of respondent.

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 three-month suspension filed by the District VA Ethics Committee (DEC). The formal ethics complaint charged respondent with violating RPC 1.1(a) (gross neglect); RPC

1.1(b) (pattern of neglect); RPC 1.3 (lacking diligence); and RPC 1.4(b) (failure to communicate with a client).

For the reasons detailed below, we determine to impose an admonition.

Respondent earned admission to the New Jersey bar in 2004 and has no history of discipline. During the relevant time frame, he maintained an office for the practice of law in Newark, New Jersey.

The parties entered into a stipulation of facts, dated February 28, 2018, wherein respondent admitted most of the facts alleged in the formal ethics complaint. Specifically, beginning in October 2007, respondent represented the grievant, Deborah Dixon, in an employment discrimination lawsuit filed in Superior Court of New Jersey, Union County, against the Elizabeth Board of Education and other, individual defendants. In connection with the representation, respondent provided Dixon with a written retainer agreement.

On September 22, 2008, respondent filed a complaint in behalf of Dixon, and, between March 2009 and December 2012, the parties commenced pre-trial proceedings, including extensive discovery, a mediation session, and settlement discussions. No resolution was reached, however, and, in late December 2012, the defendants filed a motion for summary judgment. Respondent neither opposed the summary judgment motion nor appeared at the February 1, 2013 motion hearing, despite (i) having been informed of the date and time of the

motion hearing by the law clerk to the assigned court; and (ii) knowing, based on his prior litigation experience, that his failure to oppose the motion would be adverse to Dixon. Consequently, the court granted the defendants' motion for summary judgment and dismissed Dixon's lawsuit, with prejudice.

Respondent asserted that, during this period of time, he suffered from pain due to untreated medical issues, such that he often was unable to go to his law office to attend to his law practice, including Dixon's case. Respondent acknowledged that two of his brothers are attorneys, and that one of them shared office space with him, but conceded that, despite his medical struggles, he had not asked either of them for direct assistance with Dixon's matter.

On February 3, 2013, respondent sought treatment at a hospital emergency department in Mount Holly, New Jersey, for abnormally high levels of blood sugar and hemoglobin A1C readings. He was diagnosed with hyperglycemia and discharged that same day, with the recommendation that he consult his primary care physician regarding a potential onset of diabetes.

More than two weeks later, on February 19, 2013, respondent filed a motion for reconsideration of the court's summary judgment decision in behalf of Dixon; in that filing, he cited various medical issues and maintained that he had not been provided notice that the court had adjourned the matter, and, thus, claimed that he "had not been afforded the opportunity to reply or appear." On

March 22, 2013, the court denied respondent's motion for reconsideration, finding that he had failed to timely submit opposition to the motion; that he had offered evidence of illness only after the return date of the motion; and that his motion for reconsideration did not include any substantive opposition to the points raised in the defendants' motion for summary judgment. Respondent informed Dixon of the trial court's denial of the motion for reconsideration.

In May 2013, respondent underwent multiple surgical procedures. According to respondent, after those surgeries, his medical condition improved "significantly," but he endured a long recovery period which, he maintained, still inhibited his ability to practice law. On June 17, 2013, respondent filed a Notice of Appeal in Dixon's case, which the Appellate Division rejected, on December 9, 2013, as "untimely and deficient." On August 20, 2013, respondent filed another Notice of Appeal, which the Appellate Division again denied. Respondent testified that he had filed these appeal notices late due to his ongoing medical issues. Respondent informed Dixon of the additional denials by the Appellate Division.

Almost a year later, in August and September 2014, respondent filed two additional Notices of Appeal, the latter accompanied by a letter brief. On January 5, 2015, the Appellate Division entered an order granting respondent's request to file an appeal "as unopposed." On January 21, 2015, however,

counsel for the defendants filed a motion to vacate the Appellate Division's order, and respondent failed to oppose that motion. Consequently, on February 12, 2015, the Appellate Division entered an order granting the defendants' motion, and once again dismissed respondent's appeal as untimely. The Appellate Division then rejected respondent's subsequent efforts to appeal the matter.

Respondent stipulated that he sent only four letters to Dixon in 2015, all addressing his efforts to appeal the trial court's 2013 summary judgment ruling. He argued that he had not violated RPC 1.4(b), however, asserting that he and Dixon were in consistent communication in 2015 regarding her case, via telephone, text, and e-mail, including in respect of the adverse court rulings, and his failed appeal attempts. Dixon did not testify at the hearing.

During the ethics hearing, respondent expressed culpability and remorse for his handling of Dixon's matter, stating that "I am embarrassed to be in this position . . . I don't like the idea that Miss Dixon is having to bear the brunt of some of the missteps that . . . I am responsible for." He admitted having violated RPC 1.1(a) and RPC 1.3, conceding that "I absolutely did not do some things that should have been done," and revealed that Dixon had sued him for malpractice. He denied, however, having violated either RPC 1.1(b) or RPC 1.4(b).

In support of mitigation, respondent asserted that his serious medical issues were the “driving force” behind his misconduct in this case. He requested that the hearing panel determine to impose an admonition for his ethics violations, because there were “no deliberate acts to conceal anything or deny my culpability” in respect of Dixon’s matter.

In his brief to us, dated August 2, 2019, and during oral argument, respondent expressed agreement with the DEC’s findings of fact, but disagreement with its recommended quantum of discipline. Specifically, respondent argued that disciplinary precedent supports no more than an admonition or a reprimand, and emphasized his acceptance of responsibility for his misconduct, his lack of prior discipline, and the remorse that he expressed during the ethics hearing.

The DEC found clear and convincing evidence that respondent violated all of the charged ethics violations – RPC 1.1(a), RPC 1.1(b), RPC 1.3, and RPC 1.4(b). Specifically, the DEC determined that respondent committed gross neglect and a pattern of neglect, in violation of RPC 1.1(a) and (b), by failing to oppose the defendants’ motion for summary judgment or to secure an adjournment of the motion hearing; failing to appear at the motion hearing; failing to set forth meritorious arguments in the request for reconsideration of the summary judgment ruling; failing to timely file appeals of the trial court’s

rulings with the Appellate Division; and failing to file opposition to the defendants' motion to vacate the Appellate Division order in favor of Dixon.

Next, based on the same facts underlying the RPC 1.1 charges, the DEC found that respondent lacked diligence, in violation of RPC 1.3.

Finally, the DEC found that, in 2015, during the pendency of the appellate efforts, respondent failed to adequately communicate with Dixon, in violation of RPC 1.4(b). The panel emphasized that respondent stipulated to having sent Dixon only four written communications in 2015, and that he did not send her, until November 16, 2015, a copy of the June 8, 2015 order denying respondent's motion for reconsideration.

The DEC found no aggravating factors, and cited, in mitigation, respondent's good reputation and character; lack of a disciplinary history; ready admission of wrongdoing; contrition and remorse; cooperation with disciplinary authorities; lack of personal gain; and the aberrational nature of the misconduct. Despite the absence of aggravation, the DEC recommended the imposition of a three-month suspension.

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.

Specifically, respondent admitted that, after filing the employment discrimination lawsuit in behalf of Dixon, he neither filed written opposition to the defendants' motion for summary judgment nor appeared at the motion hearing. Moreover, he conceded that he failed on both fronts, despite knowing, from prior litigation experience, that his inaction would have adverse consequences for his client. Predictably, the trial court granted the defendants' motion and dismissed Dixon's case, with prejudice. Respondent's conduct in respect of the summary judgment motion, standing alone, constituted gross neglect and lack of diligence, in violation of RPC 1.1(a) and RPC 1.3.

Unfortunately, respondent's derelict conduct in Dixon's matter only persisted following the botched summary judgment motion. First, respondent's motion seeking reconsideration of the trial court's summary judgment ruling was untimely and failed to set forth any substantive opposition to the points raised in the defendant's motion for summary judgment. It was, thus, summarily denied.

Next, respondent's first two Notices of Appeal in behalf of Dixon's case were filed extremely late, and, thus, the Appellate Division dismissed them as "untimely and deficient." After the passage of almost a year, respondent filed two additional Notices of Appeal, and finally submitted a letter brief in support of his arguments. The Appellate Division entered an order granting respondent's

request to file an appeal “as unopposed,” and, thus, respondent finally secured some measure of victory in Dixon’s case.

Soon thereafter, however, after counsel for the defendants filed a motion to vacate the Appellate Division’s favorable order, respondent failed to oppose that motion. As a consequence, the Appellate Division entered an order granting the defendants’ motion and once again dismissed respondent’s appeal as untimely. The Appellate Division further denied all of respondent’s subsequent efforts to appeal Dixon’s case.

Respondent’s conduct in respect of the reconsideration and appellate filings, thus, constituted additional instances of gross neglect and lack of diligence, in further violation of RPC 1.1(a) and RPC 1.3.

In respect of RPC 1.1(b), for us to find a pattern of neglect, at least three instances of neglect, in three distinct client matters, are required. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). Here, the allegations of neglect deal exclusively with Dixon’s matter. These instances, in this single client matter, are insufficient to support a finding that respondent engaged in a pattern of neglect, in violation of RPC 1.1(b).

Likewise, we determine that the evidence is insufficient to sustain the RPC 1.4(b) charge. Although respondent stipulated that, in 2015, he sent Dixon only four letters regarding his efforts to appeal her case, he testified that he

regularly communicated with her throughout the course of the representation, including by telephone, text, and e-mail. That testimony was neither disputed by Dixon, who did not testify, nor refuted by any other facts offered into evidence by the presenter. We, thus, find no clear and convincing evidence that respondent violated RPC 1.4(b).

In sum, in a single client matter, respondent is guilty of multiple instances of having violated RPC 1.1(a) and RPC 1.3. We determine, however, to dismiss the allegations that respondent violated RPC 1.1(b) and RPC 1.4(b). The sole issue left for determination is the appropriate discipline for respondent's misconduct. The DEC's determination that a three-month suspension is warranted is not supported by disciplinary precedent.

Conduct involving gross neglect and lack of diligence, even when accompanied by 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 return date, 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 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).


Like the attorneys in Stewart and Ungvary, who received admonitions for their misconduct, respondent failed to timely prosecute Dixon's case, and missed deadlines for both trial court motions and appeals. In contrast, respondent's misconduct is distinguishable from that of the attorneys in the Burstein and Kurts cases, where reprimands were imposed, as the record here is bereft of evidence of significant economic harm to the client, and respondent's misconduct touches upon only one client matter. Simply put, respondent's case presents no aggravating factors.

Moreover, in crafting the appropriate quantum of discipline, we also consider the effect of mitigating factors. We allocate significant weight to respondent's prior unblemished disciplinary history, since his 2004 admission to the bar. Likewise, we consider respondent's acceptance of responsibility and expression of sincere remorse during these proceedings. Finally, in light of the serious, documented medical issues respondent faced during the timeframe of his misconduct, we can reasonably conclude that his misconduct was aberrational. On balance, we determine that an admonition is an adequate quantum of discipline to protect the public and preserve confidence in the bar.

Vice-Chair Gallipoli and Member Zmirich voted to impose a reprimand. Member Joseph was recused. Member Boyer 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 Daryl Sarrell Pennington
Docket No. DRB 19-195

Argued: September 19, 2019

Decided: January 13, 2020

Disposition: Admonition

<i>Members</i>	Admonition	Reprimand	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer				X
Hoberman	X			
Joseph			X	
Petrou	X			
Rivera	X			
Singer	X			
Zmirich		X		
Total:	5	2	1	1


Ellen A. Brodsky
Chief Counsel