

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-415
District Docket No. IV-2017-0042E

In the Matter of
Joseph Peter Howard
An Attorney at Law

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Decision

Argued: March 19, 2020

Decided: September 16, 2020

Brian D. Pagano waived appearance on behalf of the District IV Ethics Committee.¹

Roy H. Gordon waived appearance 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 reprimand filed by the District IV Ethics Committee (DEC). The amended formal ethics complaint charged respondent with violations of RPC 1.1(a) (gross neglect); RPC 1.3 (lack

¹ Due to the COVID-19 pandemic, the Board approved the waiver of appearances in certain cases, if both parties agreed that oral argument was not necessary.

of diligence); RPC 1.4(b) (failure to communicate); RPC 1.16(d) (upon termination of the representation, failure to refund the unearned portion of the fee); and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

For the reasons set forth below, we determine to impose a reprimand.

Respondent was admitted to the New Jersey and Pennsylvania bars in 2010, and to the Michigan bar in 2008. At the relevant times, he maintained an office for the practice of law in Cherry Hill, New Jersey.

On December 6, 2017, respondent received a censure, in a default matter, for misconduct that occurred in 2013 to 2014, in three distinct matters for the same client. He was found guilty of a pattern of neglect; lack of diligence; failure to protect the client's interests upon termination of the representation; failure to expedite litigation; and failure to cooperate with disciplinary authorities. In re Howard, 231 N.J. 188 (2017).

On January 13, 2016, Kevin Peterson retained respondent to represent him in his attempts to obtain Social Security Administration (SSA) disability benefits. According to respondent, who was the only witness to testify at the ethics hearing, he had a prior attorney-client relationship with Peterson, having represented Peterson and his girlfriend in a number of traffic, family court, and criminal matters.

Respondent's written fee agreement, which Peterson signed on January 19, 2016, limited the scope of the representation as follows:

[t]his fee agreement is for the sole purpose of pursuing a claim for Disability Insurance Benefits and/or Supplemental Security Income, together with any auxiliary benefits, under the Social Security Act. The scope of this Fee Agreement is limited to representing claimant in administrative proceedings before the Social Security Administration, up to and including the Appeals Council. Any appeal to Federal Court by Attorney will require a separate contract.

[Ex.P-1 at 1.]²

On January 13, 2016, Peterson's mother, Jeannette Peterson, made an initial \$1,200 fee payment to respondent, by personal check. According to respondent, in 2013, Peterson had first approached him about an urgent social security issue and, on April 24, 2013, respondent sent a letter to SSA requesting a thirty-day extension of time in that matter. Peterson did not retain respondent to represent him at that time. Rather, Peterson retained the law firm of Eric Shore, Esq. The Shore law firm represented Peterson from 2013 until respondent's retention, in 2016.

Respondent testified that, when he agreed to take Peterson's case, he was unaware of Shore's representation, although he knew the Shore law firm to be "a very competent organization." Respondent stated that Peterson gave him little

² "Ex.P" refers to the presenter's exhibits admitted at the July 25, 2019 ethics hearing and "T" refers to the transcript of the ethics hearing.

information to start the case and led respondent to believe that he had been retained to file an initial appeal of a denial of benefits. However, when respondent received Shore's file, he realized that the case essentially had run its course:

[W]e determined that not only had an original application been filed, but there was a denial of the original application, and then an appeal had been filed of the original application. So in fact, Mr. Peterson was looking for an appeal of the denial of the appeal. Totally different process in that matter.

[T28.]

After accepting the initial \$1,200 payment for the representation, respondent elected not to file his fee agreement with SSA for payment, "because we found out that . . . we were not engaged for what we had originally been engaged for."

In the late summer of 2016, respondent traveled to Peterson's home to tell his client that he did not know how to move forward with the case "because it wasn't what [he] was hired for." Respondent noticed that Peterson's health had declined since his previous visit, including Peterson's visibly swollen legs and ankles.

At the ethics hearing, respondent conceded that he had been unsure how to proceed:

part of the problem with this case is me. I had a case on my desk, I had a guy who I worked with a long time, and I had a guy who I helped him in four or five situations. Him and his girlfriend. And I wanted to help him out, except at this point, I didn't see a clear path. I didn't see light at the end of the tunnel. A lot of times, you know, I tell my clients, you know, we can -- we might not make it, you know, the odds -- you've got odds of making it to the end. But I always can show a path for my clients as to how we might move forward. I had to admit to [Peterson] at that time that I wasn't clear how to move forward. I really felt that he needed a different type of firm, probably somebody that handled like appeals of appeals, essentially, that's kind of where we were at.

[T32-8 to 23.]

Respondent explained that, between 2016 and 2018, his law practice had evolved into a primarily criminal defense practice. He estimated that, in 2016, he had handled only three to five benefits cases, including SSA, workers' compensation, and long-term disability matters.

Although respondent knew that he could withdraw from the representation in Peterson's case because it was beyond the scope of the representation envisioned by the fee agreement, he did not do so. Respondent testified that he may have sent Peterson a letter in "the fall of probably 2016" memorializing their summer 2016 meeting, but he was unable to locate a copy of such a letter in his client file.

On an undisclosed date in early 2017, respondent traveled to Peterson's home for a final meeting. He told Peterson that he had contacted a Boston attorney, Martin Keane, Esq.,³ who specialized in SSA cases like Peterson's, but Keane had declined the referral. Respondent further testified that, during his final, March 2017 communication with Peterson, he indicated his intention to revisit the referral of the matter that upcoming summer.

In May 2017, Jeannette Peterson called respondent from her home in Tennessee, expressing frustration about the lack of progress in her son's case. Respondent did not testify whether he divulged the status of the case to Ms. Peterson, but recalled having tried to follow up thereafter with Peterson:

I did, at that time, try to follow-up with [Peterson], I don't know that I spoke to him. I certainly, at that point in time -- and let's be very clear. At that point in time, all logic says that that was the bow out moment. There's no question about it.

[T43-9 to 14.]

Nevertheless, respondent admittedly did not take this second opportunity to withdraw from the case and to refund the fee.

On May 30, 2017, Peterson, or his mother in his behalf, sent a three-page letter to the New Jersey Office of the Attorney General, signed by "Kevin M. Peterson, Senior," with his return address affixed, describing his SSA matter in

³ Also spelled "Keene" in the record.

detail and requesting assistance, particularly in respect of respondent, who had accepted a legal fee and “since then has done nothing.” On October 11, 2017, the informal grievance was forwarded to disciplinary authorities and was docketed shortly thereafter.

Respondent testified that, in December 2017, Peterson filed a request for fee arbitration.⁴ Shortly thereafter, on January 17, 2018, respondent purchased a \$1,250 cashier’s check, representing the refund of the retainer and \$50 filing fee. When he contacted the fee arbitration committee about the propriety of sending the check to Peterson, he was told that he could not do so until a hearing was scheduled.

On May 1, 2018, respondent sent Peterson the January 17, 2018 cashier’s check to resolve the matter. He admitted that he had kept the fee longer than he should have and that he refunded the fee “too late.” He was unsure whether Peterson retained subsequent counsel for his SSA matter.

In respect of communications over the course of the representation, respondent made generalized statements. He sometimes called and left messages for Peterson at his home. Other times, he called Peterson at a cell phone number that had been provided for that purpose or sent text messages to Peterson’s girlfriend’s cell phone. Respondent claimed that Peterson was difficult to reach

⁴ Although fee arbitration proceedings are confidential, pursuant to R. 1:20A-5, we deem that respondent waived confidentiality at the DEC hearing.

without traveling to meet with him at his home, but conceded that his own busy criminal law practice had negatively affected his availability to meet with Peterson.

Respondent admitted that, after reviewing his client file, he found no record of any calls or text messages to Peterson. Furthermore, respondent produced no letters to Peterson or other documentation of communications during the two-year representation.

Finally, at the ethics hearing, respondent, through counsel, stipulated to having violated RPC 8.1(b), admitting that he failed to reply to any of the four letters the investigator sent requesting a reply to the grievance.

The DEC found that respondent violated RPC 1.3; RPC 1.4(b); RPC 1.16(d); and RPC 8.1(b), but dismissed the RPC 1.1(a) charge.

In respect of gross neglect, the panel concluded that respondent's misconduct stemmed from his failure to "have a plan or method in which he would proceed," not from neglect.

The panel found that respondent lacked diligence, because he failed to promptly develop a plan for Peterson's application to the SSA and failed to seek help from a more experienced attorney or to refer the case to another attorney. The panel concluded that "an unreasonable amount of time" expired before

respondent told Peterson of his lack of knowledge in the area of SSA law, a violation of RPC 1.3.

The panel rejected respondent's explanation that his busy criminal law practice was responsible for his communication issues with his client, citing the lack of evidence of any communications with Peterson during the representation. The panel, thus, found that respondent's failure to keep Peterson adequately informed about the status of the case violated RPC 1.4(b).

On the basis of respondent's admission at the ethics hearing that he held Jeannette Peterson's \$1,200 retainer longer than he should have, and that he refunded it only after Peterson had filed a request for fee arbitration, the DEC found respondent guilty of a violation of RPC 1.16(d).

Based on respondent's stipulation that he failed to comply with the DEC's four requests for his written reply to the grievance, the panel found a violation of RPC 8.1(b).

In aggravation, the DEC considered respondent's prior discipline and failure to cooperate with disciplinary authorities, failure to seek advice from an experienced attorney, and failure to tell Peterson sooner about his shortcomings. In mitigation, the panel cited respondent's "ready admission of wrongdoing, contrition, and remorse."

The panel recommended a reprimand, primarily based on In re Yetman, 113 N.J. 556, 562 (1999), for respondent's "failure to obtain the needed competency to handle the matter" and failure to inform the client of the difficulties he experienced in the representation.

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.

In January 2016, respondent agreed to represent Peterson to appeal an SSA disability determination. Unbeknownst to respondent at the time, another attorney, Shore, had exhausted the standard appeal process during the preceding three years. Although respondent claimed to have spent time on Peterson's case, he provided no evidence that he had engaged in legal research, that he had prepared and filed pleadings, or that he had maintained time records for the matter. Moreover, respondent failed to produce a single document generated during the two-year representation, which spanned from January 2016 through December 2017.

Worse, respondent recognized that, on at least two occasions during the representation, he had failed to promptly act in his client's best interest: during a summer 2016 meeting with Peterson and during a May 2017 telephone conversation with Jeannette Peterson. Yet, respondent took no further action to

learn about SSA procedure or to withdraw from the case. Instead, he let it languish. Respondent's utter failure to prosecute his client's claim for those two years constituted gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3, respectively.

Likewise, respondent produced no evidence of communications with Peterson. Based on the record, he met with his client twice in two years. He faulted Peterson for being difficult to reach by phone and text, but provided no evidence of those attempts to reach Peterson. He could have sent Peterson letters communicating the status of the case, but elected not to do so. We, thus, conclude that respondent failed to keep his client reasonably informed about the status of the matter and to reply to reasonable requests for information, a violation of RPC 1.4(b).

Respondent did not stipulate to a violation of RPC 1.16(d) for failing to promptly refund the unearned portion of the fee. However, he twice admitted at the hearing that he should have returned the fee long before he did so. Ultimately, he refunded the fee only after the client was compelled to seek redress through fee arbitration. Respondent's failure to promptly refund the unearned portion of the fee violated RPC 1.16(d).

Finally, respondent failed to reply to the ethics investigator's four requests for a written reply to Peterson's grievance, for which he properly stipulated to having violated RPC 8.1(b).

In sum, we find that respondent violated RPC 1.1(a); RPC 1.3; RPC 1.4(b); RPC 1.16(d); and RPC 8.1(b). The sole issue left for us to determine is the appropriate quantum of discipline 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 gravity of the offenses, the harm to the clients, the presence of additional violations, and the seriousness of the attorney's disciplinary history. See, e.g., In the Matter of Esther Maria Alvarez, DRB 19-190 (September 20, 2019) (admonition for attorney who was retained to obtain a divorce for her client, but for the next nine months, failed to take any steps to pursue the matter, and failed to reply to all but one of the client's requests for information about the status of her case, violations of RPC 1.1(a) and RPC 1.4(b); in another matter, the attorney agreed to seek a default judgment, but waited more than a year-and-a-half to file the necessary papers with the court; although the attorney obtained a default judgment, the court later vacated it due to the passage of time, which precluded a determination of when the damage to the property actually had occurred,

violations of RPC 1.1(a) and RPC 1.3); In the Matter of Michael J. Pocchio, DRB 18-192 (October 1, 2018) (admonition for attorney who filed a divorce complaint and permitted it to be dismissed for failure to prosecute the action; he also failed to seek reinstatement of the complaint, and failed to communicate with the client; violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 3.2); In re Burro, 235 N.J. 591 (2019) (reprimand for attorney who grossly neglected and lacked diligence in an estate matter for ten years and failed to file New Jersey Inheritance Tax returns, resulting in the accrual of \$40,000 in interest and the imposition of a lien on property belonging to the executrix, in violation of RPC 1.1(a) and RPC 1.3; the attorney also failed to keep the client reasonably informed about events in the case (RPC 1.4(b)); failed to return the client file upon termination of the representation (RPC 1.16(d)); and failed to cooperate with the ethics investigation (RPC 8.1(b)); in aggravation, we considered the significant harm to the client and the attorney's prior private reprimand; in mitigation, the attorney expressed remorse and had suffered a stroke that forced him to cease practicing law); and In re Abasolo, 235 N.J. 326 (2018) (reprimand for attorney who grossly neglected and lacked diligence in a personal injury case for two years after filing the complaint; after successfully restoring the matter to the active trial list, the attorney failed to pay a \$300 filing fee, permitting the defendants' order of dismissal with prejudice to stand, in violation of RPC 1.1(a))

and RPC 1.3; in addition, for four years, the attorney failed to keep the client reasonably informed about the status of the case, in violation of RPC 1.4(b)).

Ordinarily, an admonition also is the appropriate sanction for an attorney's failure to promptly refund the unearned portion of a fee. See, e.g., In re Gourvitz, 200 N.J. 261 (2009); In the Matter of Larissa A. Pelc, DRB 05-165 (July 28, 2005); and In the Matter of Stephen D. Landfield, DRB 03-137 (July 3, 2003).

When an attorney fails to cooperate with disciplinary authorities, and previously has been disciplined, but the attorney's ethics record is not serious, reprimands have been imposed. See, e.g., In re Larkins, 217 N.J. 20 (2014) (default; attorney did not reply to the ethics investigator's attempts to obtain information about the grievance and failed to file an answer to the formal ethics complaint; although we noted that a single violation of RPC 8.1(b), in a default matter, does not necessitate enhancement of the discipline from an admonition to a reprimand, a reprimand was imposed based on a prior admonition and, more significantly, a 2013 censure, also in a default matter, in which the attorney had failed to cooperate with an ethics investigation); In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); and In re

Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

In mitigation, respondent ultimately retained ethics counsel, cooperated with the DEC, and stipulated to some of his misconduct. The DEC also cited respondent's contrition and remorse.

Finally, the record contains insufficient information for us to determine the extent to which Peterson may have been harmed by respondent's inaction. We, thus, make no finding in that regard.

Respondent's total misconduct in this single client matter, without more, ordinarily would warrant an admonition or a reprimand. His recent sanction was enhanced from a reprimand to a censure for his default, an element not present here. Moreover, respondent neglected three matters in the censure matter, and just one here. In light of respondent's prior censure for similar misconduct, accounting for the principle of progressive discipline, we determine that a reprimand is the level of discipline required to protect the public and preserve confidence in the bar.

Member Joseph voted to impose an admonition.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative 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: /s/ Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph Peter Howard
Docket No. DRB 19-415

Decided: September 16, 2020

Disposition: Reprimand

<i>Members</i>	Reprimand	Admonition	Recused	Did Not Participate
Clark	X			
Gallipoli	X			
Boyer	X			
Hoberman	X			
Joseph		X		
Petrou	X			
Rivera	X			
Singer	X			
Zmirich	X			
Total:	8	1	0	0

/s/ Ellen A. Brodsky

Ellen A. Brodsky
Chief Counsel