

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 20-034  
District Docket No. IV-2017-0046E

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In the Matter of :  
Thomas Martin Keeley-Cain :  
An Attorney at Law :  
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Decision

Argued: July 16, 2020

Decided: February 5, 2021

John J. Levy appeared in behalf of the District IV Ethics Committee.

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 recommendation for a reprimand filed by the District IV Ethics Committee (DEC). The formal ethics complaint charged respondent with having violated RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with the client); and RPC

1.16(d) (failure to protect the client's interests upon termination of the representation).

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

Respondent was admitted to the New Jersey and Pennsylvania bars in 1989. At the relevant times, he maintained an office for the practice of law in Cherry Hill, New Jersey.

On May 26, 2005, respondent received an admonition, by consent, for his violation of RPC 1.1(a), RPC 1.3, and RPC 1.4(a) (now RPC 1.4(b)), in connection with a civil matter, involving the defense of three clients, which resulted in the dismissal of one client's answer, without prejudice, for respondent's failure to answer interrogatories, and default judgments against the other two clients, for respondent's failure to file an answer. In the Matter of Thomas Martin Keeley-Cain, DRB 05-099 (May 26, 2005).

On November 19, 2019, the presenter and respondent entered into a stipulation of facts regarding respondent's misconduct, in which he admitted having violated RPC 1.3 and RPC 1.16(d). The ethics hearing proceeded on the remaining allegations that respondent violated RPC 1.1(a) and RPC 1.4(b).

In July 2015, Robert and Martha Dawson (the Dawsons), a married couple, retained respondent to defend them in a mortgage foreclosure matter that Wells Fargo Bank, N.A. (the Bank) had filed, in 2012, in the Superior Court of

New Jersey, Chancery Division, Camden County (the Chancery Court). Respondent was the second attorney the Dawsons had hired to represent them in the foreclosure matter; in 2013, they had terminated their prior attorney after the attorney failed to answer the complaint, resulting in a default judgment.

Respondent successfully negotiated a settlement with the prior attorney, resulting in the refund of all legal fees the Dawsons had paid, plus an additional \$2,000 toward respondent's legal fees. Respondent also prevailed on a motion to vacate the default judgment, which allowed the Dawsons to file an answer to the Bank's foreclosure complaint. In addition, the retainer agreement provided that respondent would file a consumer fraud counterclaim against the Bank.

In April 2016, respondent filed an answer and consumer fraud counterclaim in behalf of the Dawsons. In May 2016, the Bank served a lengthy set of interrogatories and a detailed request for production of documents. For the next four to five months, the discovery was not completed due to a variety of reasons, including the Dawsons' health issues.

In October 2016, the Bank filed a motion to dismiss the Dawsons' answer and counterclaim, without prejudice, for their failure to respond to the discovery requests. At some point, respondent informed Mr. Dawson that it would be advantageous for the Dawsons not to oppose the motion, because the dismissal

would provide them with additional time to prepare responses to the Bank's discovery requests.

On October 28, 2016, the Chancery Court entered an order granting the Bank's unopposed motion to dismiss the answer and counterclaim, without prejudice, and the order was served on respondent. Respondent testified that, at the time of the court's ruling on the motion, Mr. Dawson had the discovery in his possession, but had not delivered it to respondent, because Mr. Dawson was in the hospital. Although respondent previously had provided his adversary and the court with doctors' letters documenting Mr. Dawson's medical issues, he admittedly failed to provide them in connection with the Bank's dismissal motion. Respondent claimed to have verbally informed Mr. Dawson of the dismissal order, but failed to memorialize that conversation.

R. 4:23-5(a)(1) requires that, upon receipt of an order of dismissal without prejudice for failure to provide discovery, counsel for the delinquent party must:

forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II-A of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore

In turn, Appendix II-A provides:

This order can be vacated only by a formal motion. You must fully respond to demands for discovery made

pursuant to *R. 4:17*, *R. 4:18* or *R. 4:19* and served on behalf of [insert name] prior to the filing of such a motion, and you must pay a restoration fee of \$100.00 if the motion to vacate is made within 30 days after entry of this order and in the amount of \$300.00, if the motion is made thereafter. Failure to file such a motion within 60 days after the entry of this order may result in the imposition of counsel fees and the assessment of costs against you or may forever preclude the restoration of the pleading(s) filed on your behalf. Please be guided accordingly

R. 4:23-5(a)(1) further provides that, if a delinquent party files a motion to vacate within thirty days of the date of the order of dismissal, and meets the other requirements of the Rules (payment of a \$100 restoration fee and submission of an affidavit stating that the withheld discovery has been fully and responsively provided), the prior order will be vacated. If the motion is filed more than thirty days after entry of the order of dismissal, the restoration fee increases to \$300, and if the motion is filed more than ninety days after entry of the order, the court may additionally order the delinquent party to pay sanctions, attorney's fees, and costs.

Respondent failed to serve the Dawsons with a copy of the order of dismissal or the required notice in the form that Appendix II-A prescribes.

When respondent received the dismissal order, he was unaware of the requirements of R. 4:23-5, because he had not reviewed the then-current version of the Rule. Consequently, he believed that the prior version remained in effect,

which provided for a ninety-day period for filing a motion to dismiss. According to the stipulation, the Rule was amended in 2008, shortening the time period to file a motion to dismiss from ninety to sixty days. However, R. 4:23-5(a)(1) provides that the delinquent party may move on notice for vacation of the dismissal at any time prior to the entrance of an order of dismissal with prejudice.

As a result of his lack of familiarity with the applicable Rule, respondent calculated that the deadline for the Dawsons to provide the outstanding discovery to the Bank and to file a motion to restore the answer and counterclaim was January 30, 2017 (about ninety days from the entry of the order of dismissal without prejudice). Respondent's calculation was erroneous. At that time, R. 4:23-5(a)(2) provided that, after the expiration of sixty days from the entry of an order of dismissal without prejudice, if the order has not been vacated, the party entitled to the discovery may file a motion for an order for dismissal or suppression with prejudice. On January 3, 2017, about sixty days after the entry of the order of dismissal without prejudice, the Bank filed a motion to dismiss the Dawsons' answer and counterclaim with prejudice, returnable on January 20, 2017.

Pursuant to R. 4:23-5(a)(2), upon receipt of the Bank's motion to dismiss with prejudice, respondent was required to notify the Dawsons, in writing, that

the motion had been filed, using the form Appendix II-B prescribes, and, not later than seven days prior to the return date for the motion, to file an affidavit with the court “reciting that the client was previously served as required by subparagraph (a)(1) and has been served with an additional notification, in the form prescribed by Appendix II-B, of the pendency of the motion to dismiss or suppress with prejudice.” R. 4:23-5(a)(2) also mandated that respondent appear in court on the return date.

Respondent failed to provide the Dawsons with a copy of the Bank’s motion to dismiss with prejudice and the required Appendix II-B form; failed to submit the required affidavit to the Chancery Court; and failed to appear in court on the return date of the motion. Consequently, on January 20, 2017, the Chancery Court entered an order dismissing the Dawsons’ answer and counterclaim, with prejudice.

Later that same day, respondent served the Bank’s counsel with responses to its outstanding discovery requests and asked counsel to withdraw the motion to dismiss with prejudice. By letter dated January 27, 2017, the Bank’s counsel acknowledged that, late in the afternoon of January 20, 2017, she had received the Dawsons’ discovery responses, but objected and asserted that the discovery did not constitute complete or proper responses. The Bank’s counsel further noted that the motion, returnable at 9:00 a.m. on January 20, had been granted

by the time respondent's messenger delivered the Dawsons' discovery responses. Therefore, the Bank's counsel declined respondent's request to withdraw the motion to dismiss with prejudice.

On January 26, 2017, respondent submitted a motion to reinstate the Dawsons' answer and counterclaim. That motion should have been filed with the Chancery Court in Camden County, but respondent erroneously attempted to file it with the Office of Foreclosure in Trenton, which refused to accept the filing because the motion papers were deficient and contained neither the required R. 4:23-5(a)(2) affidavit nor the \$300 restoration fee. As a result, respondent's messenger returned the unfiled motion to him. Respondent stipulated that he was unfamiliar with the requirements of R. 4:23-5(a)(2), and had assumed the Clerk would deduct the restoration fee from his Attorney Collateral Account, as his cover letter had directed. Respondent failed to properly file a motion to reinstate the Dawsons' answer and counterclaim or to vacate the order of dismissal with prejudice in the Chancery Court.

Mr. Dawson signed a January 26, 2017 certification in support of the deficient motion to reinstate the complaint, and in opposition to the Bank's motion to dismiss his answer. The certification represented that the Bank had failed to reply to his requests for discovery. During the ethics investigation, however, the Bank denied that it had received such a request for discovery. In



addition, the DEC's investigation revealed only an unexecuted letter in respondent's file requesting discovery from the Bank, along with unexecuted discovery requests. The record contains no evidence that respondent served any discovery requests on the Bank. In any event, respondent failed to oppose the Bank's motions and failed to assert that the Bank had not complied with its own outstanding discovery obligations.

On February 1, 2017, respondent notified the Dawsons that the court had entered the January 20, 2017 order dismissing their answer and counterclaim with prejudice. On that same date, at a meeting, respondent informed Mr. Dawson that there was nothing more that could be done to reinstate the answer and counterclaim. Respondent stipulated that the advice he had given to Mr. Dawson was inaccurate, because respondent subsequently learned that he could have filed a motion for reconsideration, along with the required affidavit and fee. Further, he acknowledged that the motion to dismiss with prejudice should not have been granted, and had resulted from his failure, as the Dawsons' attorney, to comply with R. 4:23-5(a).

Shortly after the February 1, 2017 meeting, the Dawsons terminated respondent's representation and hired new counsel. By letter dated March 21, 2017, the Dawsons' new counsel requested that respondent execute a substitution of attorney form and transfer the Dawsons' file to the attorney's

firm. Mr. Dawson repeated the same requests to respondent. Respondent acknowledged that he was aware that, once the client or subsequent counsel requested the file, he was obligated to transfer it.

Respondent also failed to sign and return the substitution of attorney form until January 31, 2018, ten months after the request had been made. In addition, respondent never provided the Dawsons' file to their new counsel, although he belatedly offered, on August 9, 2018, approximately seventeen months after the request had been made, to copy any documents from the file they needed.

In 2017, the Dawsons' new counsel filed a motion to reinstate their answer and counterclaim, noting that their task was made difficult by respondent's lack of cooperation. That motion was denied. In 2018, the Dawsons' attorney filed a motion for reconsideration, arguing that, in granting the Bank's motion to dismiss with prejudice, the court had overlooked respondent's failure to comply with R. 4:23-5(a), thereby inadvertently punishing the Dawsons for respondent's failures. On May 11, 2018, the court granted the Dawsons' motion for reconsideration, vacated the January 20, 2017 order dismissing their answer and counterclaim, and reinstated their pleadings. Thus, counsel succeeded in reinstating the Dawsons' pleadings, despite respondent's failure to turn over their file.

Based on these facts, respondent stipulated that he had violated RPC 1.3 by failing to follow R. 4:23-5(a)(1) and (2), and by failing to surrender his file and promptly sign the substitution of attorney upon request; and RPC 1.16(d) by failing to turn over the Dawsons' file in March 2017, despite requests that he do so.

Respondent asserted, however, that his failure to review and apply R. 4:23-5(a), which resulted in the other events described above, constituted only simple, rather than gross, neglect. He noted that the court similarly erred, because it neither issued an order to show cause nor compelled him to appear. He also maintained that the Dawsons' new counsel erred, as the first motion for reconsideration was denied, and ultimately was granted only after counsel demonstrated that respondent had failed to comply with the Rule. Although respondent contended that these issues did not mitigate his misconduct, he remarked that it "was certainly a compounding factor to my underlying failure."

In addition, respondent denied having violated RPC 1.4(b). He conceded that he had not complied with the strict requirements of the Rule, by having failed to inform his clients, by written notice via certified mail, of the various motions and outcomes. He asserted, however, that Mr. Dawson was aware of these events, and that he and Mr. Dawson "were trying to get the discovery

together.” Respondent did not have any writings memorializing any of these conversations with Mr. Dawson.

In mitigation, respondent expressed remorse and contrition; he has been a member of the Matrimonial Early Settlement Panel since 1992; he has been a member of the Family Law and Public Benefits Committees of the Camden County Bar Association since 1989, in which he supports community service events; he serves on the South Jersey Regional Legal Services Panel, where he accepts four to six cases per year; he completed two terms on a Fee Arbitration Committee; he is a board member of Guadalupe Family Services, a Camden nonprofit social work organization; and he volunteers for other community service projects.

The DEC presenter recognized the following mitigation: the court and the Dawsons’ subsequent counsel also failed to follow R. 4:23-5(a); subsequent counsel successfully reinstated the Dawsons’ answer and counterclaim, despite respondent’s failure to turn over the file; respondent returned a portion of his fee to the Dawsons in connection with a fee arbitration determination; and respondent was fully open, honest, and cooperative with the investigation, and entered into the stipulation.

The DEC panel determined that respondent violated RPC 1.1(a) and RPC 1.3, by failing to review R. 4:23-5(a), instead improperly relying on his memory

and his one prior encounter with the Rule. The DEC noted that R. 4:23-5(a) had been revised approximately eight years prior to the inception of the Dawsons' matter. The DEC emphasized that respondent's failure to understand the Rule, coupled with the court's error in hearing and granting the Bank's motion, led to his mistaken conclusion that the outcome could not be changed. Moreover, although respondent could have filed a motion for reconsideration, he failed to do so, and the matter languished for two years before new counsel reinstated the Dawsons' answer and counterclaim.

Further, the panel found that respondent violated RPC 1.16(d), by failing to promptly execute and return the substitution of attorney form and by failing to turn over the Dawsons' file. As a result of these failures, new counsel filed two motions for reconsideration without the benefit of the file, which could have considerably lessened the time and effort expended.

Moreover, the DEC determined that, although respondent maintained some communication with the Dawsons via telephone calls and office visits, he failed to provide complete and accurate communication, and failed to comply with the Rules, in violation of RPC 1.4(b). The panel also determined that respondent's failure to communicate with the Dawsons' and new counsel's requests for the file and substitution of attorney form violated RPC 1.4(b).

In aggravation, the panel considered respondent's prior admonition. Also, the panel emphasized that respondent's failure to review the Rule caused the Dawsons' matter to languish for over two years, although it was ultimately reinstated due to the efforts of new counsel.

In mitigation, the DEC determined that respondent's misconduct was not for pecuniary gain, as he performed ninety-five hours of work for a net fee of \$3,500, paid by the Dawsons' prior attorney; there was no harm to the clients; respondent performs extensive volunteer work for the bar and community; he expressed contrition; and he cooperated with the DEC. In further mitigation, the panel noted that the misconduct stemmed from his singular failure to review one Rule that had changed, which led to a "cascade of issues," including his failure to recognize that the court also made an error. Respondent requested that the discipline imposed be no more than an admonition.

The DEC panel concluded that the mitigating factors outweighed the aggravating factors, and would have recommended an admonition, but due to respondent's prior admonition, recommended a reprimand.

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 violated RPC 1.1(a) and RPC 1.3 by repeatedly failing to review and apply the requirements set forth in R. 4:23-5(a), ultimately resulting in the dismissal of the Dawsons' answer and counterclaim, with prejudice. Respondent mistaken belief that the Rule allowed ninety days, rather than sixty days, to provide the outstanding discovery and to file a motion to restore the answer and counterclaim would have been cured had he simply dispatched most basic diligence expected of an attorney – a review of the applicable Rule. Although not squarely addressed in the stipulation, the Rule does not offer the delinquent party the option of responding up to sixty days after entry of the order of dismissal without prejudice. Rather, the Rule allows the party entitled to the discovery to file a motion to dismiss with prejudice no earlier than sixty days after the date of the order to dismiss without prejudice, and provides for increasing penalties to a party who does not promptly comply with the discovery Rules. Also, the delinquent party may file a motion to vacate the dismissal without prejudice at any time prior to the entry of an order of dismissal with prejudice.

At the very least, after the Bank filed its motion to dismiss with prejudice on January 3, 2017, which was approximately three weeks prior to the date respondent erroneously believed it could file that motion, respondent should have been alerted to the fact that his time calculations were incorrect.

Irrespective of any confused time constraints, respondent never filed a motion to vacate the dismissal without prejudice, although, on January 26, 2017, six days after the January 20, 2017 order for dismissal with prejudice was issued, he attempted to file a deficient motion to reinstate the answer and counterclaim in the wrong venue, and then never refiled it in the proper forum – the Chancery Court. Moreover, once the court erroneously entered the January 20, 2017 order, respondent failed to file a motion for reconsideration. Indeed, if respondent had taken affirmative steps to reverse the dismissal order with prejudice, he could have avoided this entire R. 4:23-5(a) scenario.

Respondent also neglected the requirements of R. 4:23-5(a) by failing to provide proper notice to the Dawsons; by failing to submit the required affidavit to the Chancery Court in response to the Bank's motion to dismiss with prejudice; and by failing to appear in court on the return date of the Bank's motion to dismiss with prejudice. These failures were unrelated to any mistaken interpretation of deadlines, and clearly constituted gross neglect.

Finally, respondent violated RPC 1.16(d) by failing to promptly execute the substitution of attorney, and by failing to turn over the Dawsons' file, despite multiple requests by the Dawsons and their new counsel.

We determine to dismiss the charge that respondent violated RPC 1.4(b). Respondent testified that the Dawsons were aware of the Bank's motions and



the resulting orders, and that throughout the relevant period of time, he and the Dawsons were completing the Bank's discovery requests. Although respondent admitted that he did not provide written notice pursuant to R. 4:23-5(a), he was in communication with the Dawsons via telephone calls and office visits. Thus, because respondent communicated with the Dawsons, the record does not support the RPC 1.4(b) charge. Finally, respondent's failure to remit the signed substitution of attorney until ten months after the request from the Dawsons and their new counsel, does not constitute a violation of RPC 1.4(b). Rather, the RPC 1.16(d) charge adequately addresses that misconduct.

In sum, we find that respondent violated RPC 1.1(a), RPC 1.3, and RPC 1.16(d). We determine to dismiss the charge that he violated RPC 1.4(b). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

Generally, admonitions have been imposed on attorneys who have failed to turn over their clients' files to new counsel, even when additional ethics violations, such as failure to cooperate, gross neglect, lack of diligence, and failure to communicate with a client, are found. See, e.g., In the Matter of Gary A. Kraemer, DRB 14-085 (June 24, 2014) (attorney failed to file his appearance for several months in two litigation matters and, in one of the matters, he also failed to take prompt action to compel an independent medical examination of

the plaintiff; violations of RPC 1.3; in addition, throughout the representation, the attorney repeatedly failed to reply to his client's numerous requests for information about the two matters; violations of RPC 1.4(b); finally, several months after final judgment was entered against his client, the attorney failed to turn over the file to appellate counsel, a violation of RPC 1.16(d); we considered his unblemished record of thirty-five years at the bar); In the Matter of Robert A. Ungvary, DRB 10-004 (March 31, 2010) (attorney lacked diligence in the representation of his clients in two matters and failed to promptly deliver to their new counsel portions of their file); In the Matter of Brian J. Muhlbaier, DRB 08-165 (October 1, 2008) (upon termination of representation, attorney ignored, over a period of months, several requests of client's new counsel to turn over his files); and In the Matter of Anthony J. Giampapa, DRB 07-178 (November 15, 2007) (upon termination of representation, attorney failed to turn over his former client's file to new counsel, despite his many requests; attorney also violated RPC 1.4(b) and RPC 1.15(b)).

Here, an admonition is the baseline quantum of discipline for respondent's violations of RPC 1.1(a), RPC 1.3, and RPC 1.16(d). In crafting the appropriate sanction in this case, we also considered aggravating and mitigating factors. In aggravation, over the course of more than one year, respondent did not once review R. 4:23-5(a), and his gross neglect resulted in the undue delay of the


Dawsons' matter for over two years. We couple that misconduct with his apparent refusal to sign the substitution of attorney until ten months after the request, and his failure to ever provide the Dawsons' file to their new counsel. Fortunately, solely through the efforts of their new counsel, the Dawsons' answer and counterclaim were ultimately reinstated. Although respondent received an admonition, in 2005, for similar misconduct, given the passage of time, that prior misconduct does not serve to enhance the discipline.

In mitigation, respondent expressed remorse and contrition; entered into the stipulation; and has performed extensive and exemplary service to the community, including as a member of the bar.

On balance, we determine that the aggravation significantly outweighs the mitigation, and that a reprimand is warranted for respondent's misconduct.

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:   
Johanna Barba Jones  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Thomas Martin Keeley-Cain  
Docket No. DRB 20-034

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Argued: July 16, 2020

Decided: February 5, 2021

Disposition: Reprimand

<i>Members</i>	Reprimand	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer	X		
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0



Johanna Barba Jones  
Chief Counsel