SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 24-012
District Docket No. IV-2019-0042E

In the Matter of Marc A. Weinberg
An Attorney at Law

Argued
May 24, 2024

Decided
July 8, 2024

Christopher L. Soriano appeared on behalf of the
District IV Ethics Committee.

Teri S. Lodge appeared on behalf of respondent.

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Introduction

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 censure filed by the District IV Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.1(a) (three instances – engaging in gross neglect); RPC 1.4(b) (five instances – failing to keep a client reasonably informed about the status of a matter and to comply with reasonable requests for information); RPC 1.4(c) (four instances – failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 1.5(b) (failing to set forth, in writing, the basis or rate of the legal fee); RPC 1.5(c) (failing to provide a written fee agreement in a contingent fee case); and RPC 8.1(a) (making a false statement of material fact in connection with a disciplinary matter).

For the reasons set forth below, we determine that a censure is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey and Pennsylvania bars in 1990. At the relevant times, he maintained a practice of law in Marlton, New Jersey, and Jenkintown, Pennsylvania. He has no prior discipline in New Jersey.

In 2011, in Pennsylvania, respondent was censured, on consent, for having violated Pa. RPC 1.3 (failing to act with diligence and promptness), Pa. RPC 3.2 (failing to expedite litigation), and Pa. RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Facts

The Personal Injury Action

On or around February 17, 2010, Alfred Ricco (Sharon)[1] retained respondent to represent her in connection with injuries allegedly sustained during a January 17, 2010 slip and fall accident at a Walmart store. At respondent's request, Sharon completed an information form, wherein she reported that she "fell on [her] left knee by slipping on wet striping in front of the store entrance/exit." Respondent accepted the representation on a contingent fee basis. Although his firm's policy purportedly required a written fee agreement in all matters prior to the filing of a complaint, he was unable to produce a written or signed retainer or fee agreement setting forth the method

[1] Although the complaint refers to respondent's client, whose legal name is Alfred Ricco, as "Alfred Ricco, a/k/a Sharon Paige ('Alfred')," Sharon confirmed at the hearing that she is a transgendered individual, and since the 1990s, she has used the name Sharon Paige. In our decision, we refer to her as Sharon, using she/her/hers pronouns. Any reference to Alfred or he/him is incidental to the record, because official correspondence was addressed to Alfred Ricco, and the parties used both names and genders during the hearing. To avoid any confusion, Alfred (he/him/his) and Sharon (she/her/hers) are the same person.

by which the fee would be determined. Sharon did not recall whether she signed a fee agreement, and respondent's file contained an unsigned, blank fee agreement that was identified as the version used in his Pennsylvania client matters.

On February 17, 2010, prior to filing the personal injury action, respondent sent Walmart a letter, attempting to settle Sharon's matter. Walmart, however, did not respond. On that same date, respondent sent Sharon a letter, advising her to not discuss the case with anyone, sign any "form, questionnaire, or document" related to her case, or "accept any offers of settlement or monies . . . from anyone involved in this accident or their insurance representative." Further, respondent advised her to follow her doctor's recommended treatment and to contact respondent immediately with any questions about her case.

Subsequently, respondent sent an investigator to photograph the scene of Sharon's fall. Respondent also obtained Sharon's medical records, which revealed that Sharon had a "chronic history of knee pain," "advanced degenerative joint disease," and "chronic arthritis," and that she had "undergone seven arthroscopies, the last in 2007."

On January 12, 2012, respondent filed a complaint against Walmart in the Superior Court of New Jersey, Camden County, alleging that Sharon "suffered severe and permanent personal injuries including severe shock and trauma to

[her] bones, muscles, nerves, tendons[,] and nervous system," and demanding "damages including past and future medical expenses, pain and humiliation, loss of earning capacity plus costs of suit with interest."

On January 31, 2012, Walmart's attorney notified respondent that she intended to remove the case to the United States District Court for the District of New Jersey (the DNJ) based on diversity jurisdiction. However, Walmart agreed it would not remove the case to the DNJ if respondent would stipulate, by February 9, 2012, that the damages he sought on Sharon's behalf did not exceed $75,000, the jurisdictional requirement for a federal court to exercise diversity jurisdiction. Respondent failed to respond to this letter.

Thereafter, in February 2012, Walmart's attorney sent respondent three more letters. Specifically on February 1 and February 22, 2012, Walmart's attorney again sought respondent's demand for damages, and, on February 23, 2012, she advised respondent that the notice of removal promptly would be filed if respondent would not stipulate that Sharon's damages did not exceed $75,000. Respondent failed to reply to any of the letters or to advise Sharon of Walmart's intended removal or the offered stipulation.

On February 24, 2012, Walmart removed the personal injury litigation to the DNJ. Respondent, however, failed to advise Sharon of this development. Three days later, on February 27, 2012, Walmart filed an answer denying all

liability and furnished a copy of its lease agreement with Audubon Adventures Limited Liability Company (Audubon), the owner of the property where Sharon sustained her injuries.

Further, on March 13, 2012, as part of its initial discovery disclosures, Walmart asserted that it was not the owner of the property where the fall had occurred and identified Audubon as the lessor and owner of the property. Pursuant to the terms of Walmart's lease agreement, Audubon was responsible for the maintenance of all common areas on the property, including snow and ice removal, and the paving and striping of the parking lots.

On April 16, 2012, Walmart sent respondent another letter, inviting respondent and Sharon to attend a mediation in June. In its letter, Walmart stated that, "[i]f the case is settled, [Walmart would] expedite the general release" and "process a settlement check within seven (7) business days of receipt of said documents." Respondent neither replied to Walmart's letter nor proffered any settlement demand. Further, he failed to discuss Walmart's offers with Sharon.

On June 7, 2012, Walmart sent respondent another letter, this time requesting that respondent provide a settlement demand and package on Sharon's behalf. Again, respondent failed to provide Walmart with the requested settlement demand or package, and he did not discuss the settlement negotiation opening with Sharon.

In September 2012, Walmart provided additional discovery, including a copy of a Subordination Non-Disturbance and Attornment Agreement, which again identified Audubon as the lessor of the property. Further, Walmart advised that Wilmington Trust of Pennsylvania (Wilmington Trust) held the mortgage on the property. Thus, on October 1, 2012, respondent filed a motion to amend the complaint to add Wilmington Trust, but not Audubon, as a defendant to the litigation. Accordingly, on October 24, 2012, Walmart filed a motion to amend its answer to include a third-party complaint to add Audubon as a third-party defendant.

On November 5, 2012, the DNJ granted respondent's motion to amend the complaint; however, respondent failed to file an amended complaint. On November 19, 2012, the DNJ granted Walmart's motion to file a third-party complaint and, the next day, Walmart filed a third-party complaint naming Audubon as a third-party defendant. Audubon entered an appearance on December 10, 2012.

Respondent never filed a motion to amend the complaint to pursue direct claims against Audubon on Sharon's behalf, despite Walmart's notice of the lease provisions and Walmart's own third-party claims.

On December 20, 2012, Walmart filed a motion for summary judgment as to plaintiff's direct claims against it, based primarily on the lease provisions

between Walmart and Audubon.

Five months later, on May 9, 2013, respondent sent Sharon's medical records to Audubon's insurance adjuster and asked that she "[p]lease see attached and call [respondent] regarding an amicable resolution."

On August 9 and September 9, 2013, despite its pending motion for summary judgment, Walmart wrote respondent two identical letters broaching the possibility of settlement. In its letters, Walmart stated that it had been informed that there had "been some recent settlement discussions" with Audubon and that there was an "issue as to the medical lien that may be difficult to resolve." Walmart advised, "If you are interested in a global settlement with all parties/claims and have a grasp of the medical lien issue, please contact me at your next opportunity." Walmart reminded respondent that there were two motions pending before the court and "if either of those [m]otions is granted, the case could be dismissed either in whole or in part" and, thus, "there is some time sensitivity to discussing settlement sooner rather than later."

The DEC alleged that respondent failed to discuss either of Walmart's final settlement proffers with Sharon. Further, during the approximately nine months that Walmart's motion for summary judgment was pending, respondent never informed Sharon that Walmart had filed the motion. Respondent failed to file any opposition to the summary judgment motion and, further, failed to reply

to Walmart's statement of material facts.

On September 13, 2013, the DNJ court granted Walmart's motion for summary judgment and dismissed Sharon's case in the entirety.

Sharon alleged that, over the course of two years, between fall 2013 and fall 2015, she made multiple attempts to speak with respondent, both by telephone and in person. However, she claimed that she was unable to make an appointment with him and, when she attempted to meet him without an appointment, she was unsuccessful. Respondent also failed to inform Sharon, in writing, that her case had been dismissed. Further, Sharon maintained that respondent did not discuss the dismissal with her until sometime in fall 2015, approximately two years after it had been dismissed.

The DEC's Investigation

On or around October 1, 2019, the DEC investigator sent a copy of Sharon's grievance to respondent and requested a written reply. On November 24, 2019, respondent, through his attorney, Teri S. Lodge, Esq., submitted a reply, asserting the various issues he had encountered with the case.

As a preliminary matter, respondent claimed that he had expressed concern about the viability of Sharon's claims because, in his view, "since the parking lot was wet and since there were no witnesses, there was no liability."

Second, given Sharon's prior knee surgeries and related medical conditions, along with the absence of any fracture, dislocation, deformity, or laceration, respondent believed there were "no damages attributable to the incident." Thus, respondent claimed that he had told Sharon that he would attempt to settle the matter for a "nuisance value" but, if unsuccessful, "the case would never survive a motion for summary judgment." Respondent claimed that he had sent Walmart the February 17, 2010 letter "in an attempt to settle without filing suit."

Next, respondent explained that, although he had filed a motion for leave to amend the complaint to add Wilmington Trust as a direct defendant, he did not believe it necessary to add Audubon, because Walmart had advised him that Audubon, who was "already in the case," was "the correct party," and "[u]ltimately, it would not make a difference because there was no liability and no damages."

Further, respondent initially told the DEC investigator that, after receiving Walmart's motion for summary judgment, he had met with Sharon and explained to her that "there was no plausible, non-frivolous, response to the motion [] and no purpose in amending the complaint." Respondent claimed that his office manager was present at this meeting. According to respondent, Sharon "understood that there were no legitimate claims to be made and authorized [respondent] to try again to settle for nuisance value." However, respondent

explained that Walmart declined to discuss settlement "until a medical lien had been investigated and resolved." Before respondent could resolve the lien, the DNJ granted Walmart's motion for summary judgment and dismissed the case.

In his written reply to the grievance, respondent maintained that Sharon was aware that her case had been dismissed and that they had no contact after 2013. Respondent denied that any incident occurred in September 2015, as Sharon had alleged in her grievance; instead, he believed Sharon was "making this up in an effort to place notice within the six-year statute of limitations to file a legal malpractice claim, which [s]he discusses in the grievance."

Respondent also denied Sharon's claim that he never met with her. Respondent estimated that Sharon came to his Jenkintown office "at least [fifteen] times on weekdays, when staff was there, and multiple other times on evening and weekends when [respondent] was alone." Respondent stated that "[t]hey frequently discussed the case against Walmart as well as a *pro-se* medical malpractice case that [Sharon] filed for his mother's estate." Finally, although respondent was confident there was a fee agreement, he was not able to locate it.

On January 25, 2020, respondent, with counsel, attended an interview with the DEC investigator.

Despite respondent's previous claims to the investigator that he had an in-

person meeting with Sharon, during which he had allegedly advised her that Walmart had filed a motion for summary judgment, and that he was not able to oppose that motion, respondent failed to produce any corroborating documentation. Respondent also maintained, during the investigation, that he had notified Sharon that her case had been dismissed and that he had provided her with a copy of the DNJ's opinion and order. Respondent also was unable to produce any corroborating documentation in this respect. Sharon, for her part, consistently denied that respondent provided her with this information or documentation.

Based on the foregoing, the presenter filed a formal ethics complaint, charging respondent with having violated RPC 1.1(a) (three instances); RPC 1.4(b) (five instances); RPC 1.4(c) (four instances); RPC 1.5(b) and (c); and RPC 8.1(a). Specifically, the complaint alleged that respondent violated RPC 1.1(a) by failing to (1) discuss with Sharon Walmart's settlement negotiation proffers and offer to participate in mediation, (2) name the responsible party (Audubon) as a defendant in the litigation, despite his awareness that Audubon was the owner of the premises, and (3) oppose Walmart's motion for summary judgment, resulting in the dismissal of Sharon's claims.

Next, the complaint alleged that respondent violated RPC 1.4(b) and RPC 1.4(c), by failing to (1) inform Sharon that, on January 31, 2012, Walmart had

notified respondent of its intent to remove the matter to federal court unless respondent stipulated that damages did not exceed $75,000; (2) inform Sharon of the eventual removal of the case to federal court; (3) keep Sharon apprised of Walmart's various settlement negotiation proffers and offer to participate in mediation; (4) inform or explain to Sharon that Walmart had filed a dispositive motion and the implications of same; and (5) inform Sharon that the DNJ had granted the motion for summary judgment and that her claims had been dismissed.

The complaint alleged that respondent separately violated RPC 1.4(b) by failing to respond to Sharon's repeated requests for meetings and information.

By failing to memorialize the basis of his rate or fee in a contingency matter, the complaint alleged that respondent violated RPC 1.5(b) and (c).

Last, the complaint alleged that respondent had violated RPC 8.1(a) by telling the DEC investigator that he had (1) notified Sharon, during an in-person meeting, that Walmart filed the summary judgment motion and that he was unable to oppose it, and (2) notified Sharon, during an in-person meeting, that the DNJ had granted the motion and dismissed her claims, and that he provided her with copies of the DNJ's order and opinion.

In his February 3, 2021 verified answer, respondent denied having violated the Rules of Professional Conduct. Respondent explained that he did

not oppose removal of the case to federal court because he did not want to stipulate that damages were less than $75,000 and, further, he preferred to litigate in federal court. However, respondent admitted that he did not advise Sharon of the offered stipulation or discuss the removal with her.

Next, respondent claimed that he did not respond to Walmart's request for mediation because they "wanted to conduct [p]laintiff's deposition first," and "there was no time for depositions between June 5 and June 12, 2012." Respondent admitted, however, that he did not discuss with Sharon Walmart's mediation proposal, settlement negotiation opening, or final settlement proffers.

Respondent claimed that he did not file an amended complaint naming Wilmington Trust as a defendant because he realized that "Wilmington Trust was not the appropriate party." Respondent believed it was "sufficient to attempt settlement" with Audubon, so he submitted the settlement package directly to Audubon's adjuster, rather than filing a motion to amend the complaint to add Audubon.

Respondent denied that he failed to discuss Walmart's motion for summary judgment with Sharon. Given that seven years had lapsed since the motion had been filed, respondent claimed that he could not recall when he had told Sharon about Walmart's motion for summary judgment, but he referred to a "handwritten notation" on a facsimile cover page dated August 9, 2013 stating,

"Send ltr advising Summ Judg." Additionally, respondent recalled telling Sharon "that there was no viable defense to summary judgment in this matter." Respondent admitted that he did not file any opposition to Walmart's motion for summary judgment.

Respondent denied that Sharon attempted to speak with him between fall 2013 and fall 2015, or that Sharon was unable to make appointments with him. Finally, respondent denied the allegation that there was "no documentation . . . memorializing any discussion with Sharon about a pending [m]otion for [s]ummary [j]udgment" or "any meeting following the dismissal of the action," based on the August 9, 2013 note in his records.

In proffering mitigation, respondent detailed significant health issues he suffered in 2011, as well as serious family issues he experienced from 2012 through 2013, relating to his eldest son's disability. In further mitigation, respondent described his work as a founder and chairman of a charitable organization that helped parents like himself assist their children with disabilities. Additionally, respondent coached youth basketball and soccer in his community and coordinated a food drive during the global pandemic.

The Ethics Proceeding

On May 12, 2022, prior to the commencement of the ethics hearing, the

parties entered into a joint stipulation in which respondent stipulated to the majority of the facts and allegations against him.

Ultimately, respondent disputed only three of the allegations. Specifically, he denied that his failure to discuss with Sharon the removal of the case to federal court constituted a violation of RPC 1.4(b) and (c). Second, he denied having failed to respond to Sharon's requests for meetings or information, between 2013 and 2015, as she had alleged. Last, he denied having intentionally made materially false statements to the DEC investigator regarding his communications with Sharon and, thus, asserted that he did not violate RPC 8.1(a).

Notably, the parties stipulated that, on or about August 9, 2013, respondent discussed the motion for summary judgment with his secretary, Kathy Ramsey (Kathy), and she wrote a note on the facsimile transmission sheet "Send ltr advising Summ Judg." However, no one sent such a letter to Sharon. Further, although respondent believed that he met with Sharon at some point to discuss the outcome of the summary judgment motion, he could not recall the date. He admitted, however, that he failed to inform Sharon, in writing, that the case had been dismissed and, therefore, admittedly violated RPC 1.4(b) and (c).

The Ethics Hearing

The ethics hearing took place on May 16 and 17, 2022, with the following witnesses presenting testimony: Sharon; respondent; respondent's receptionist Mary Fran Greene (Mary); Kathy; and respondent's wife, Barbi Weinberg (Barbi).

Sharon's Testimony

Sharon testified that, although her first meeting with respondent was by appointment, she routinely was able to talk with him any time she wanted. Between 2010 and 2012, Sharon estimated that she went to respondent's office approximately five times and that she never had a problem meeting with him. Sharon could not recall, however, making any telephone calls to respondent between 2010 and 2012.

Sharon testified that, between early 2012 and fall 2013, she did not have any in-person meetings with respondent and, by late 2013, she claimed that she began having problems getting in touch with him. She testified, "I would call, I would get put off," and despite "any text or calls or messages to his cell phone, [she] couldn't get an answer from [respondent]." She explained that she "finally began to drive into Jenkintown, which [was] about a half an hour ride [] and a bridge toll . . . and I started doing it pretty frequently because I was able to walk

in there, and I was able to meet with him. I could put my name on the walk-in list." Sharon claimed she drove to respondent's Jenkintown office "easily two times a week," throughout 2014 and 2015, but that she also had driven to the Marlton office. According to Sharon, respondent was often busy meeting with clients and, once, she waited until 10:00 p.m. to finally meet with respondent. Sharon continued:

> The days that I didn't drive up there, I would make a call. If I didn't make a call, I would at least text him. If I didn't text him, I would try to call him. It wasn't something that where I sat on my laurels and I did nothing. I was vigilant. I was constant[ly] trying to keep up with this case, what was going on with it, and I could not learn anything ever.
>
> [1T58.][2]

Sharon claimed that eventually she was told that respondent no longer was accepting "walk ins." She recalled that, in March 2014, she "finally got an answer" to a text message she had sent, and that respondent set up a meeting with her; however, he later cancelled it. Sharon produced several text messages, which she claimed were sent in March 2014; however, she had e-mailed them to herself in March 2015, so the dates could not be verified. Sharon admitted that respondent had replied to her "immediately after her text[s]," if not "within

[2] "1T" refers to the May 15, 2022 hearing transcript.
"2T" refers to the May 16, 2022 hearing transcript.

minutes or the next day or maybe hours," and had told her he was sorry, but he was in trial. Sharon offered no telephone records showing that she had tried to call respondent, and she admitted that she never e-mailed respondent.

Sharon recalled going to respondent's office at some point between 2012 and 2013 and speaking with him about her case in the conference room, but the update he provided was "very brief." She testified that respondent asked her what kind of settlement she was looking for and told her that none of Walmart's cameras were "operational." Sharon claimed, however, that she felt "completely in the dark about this case from day one" until December 2015, when she "Googled and found" the court's decision granting summary judgment and dismissing her case. Initially, Sharon claimed that respondent never told her that her case had been dismissed; however, she later conceded that they had discussed the case in September 2015. She testified that respondent told her he "came this close to winning [her] case," but he did not have time to discuss it, so he told her to make an appointment.

Sharon also explained that she had wanted to file a legal malpractice action against respondent, but no attorney "wanted to touch it" or "was interested." She admitted that she filed the ethics grievance against respondent because she had learned that any potential legal malpractice claims were barred by the six-year statute of limitations and, thus, viewed the ethics proceeding as

her "only recourse." Sharon claimed that she had incurred approximately $9,700 in out-of-pocket medical expenses stemming from her slip and fall accident, and that she wanted to recover those costs, along with compensation for her pain and suffering. In reply to the hearing panel's questioning, Sharon admitted that Medicare had reimbursed her medical expenses. Sharon also admitted that, at the time she sustained the injuries at Walmart in 2010, she was receiving social security disability because she had injured that same knee and had undergone two knee surgeries.

Testimony from Respondent's Staff

Respondent's longtime receptionist of nineteen years, Mary, also testified. She explained that she worked at the Jenkintown office but also answered telephone calls for the Marlton office. Since 2010, she kept a record of all calls that respondent or his secretary could not take (if he took the call, she would not include that call on her list). Mary testified that the only telephone calls from Sharon that she recorded were received on February 11, 2011 and January 6, 2012. Mary stated that she could not recall "any time ever that Sharon [] was calling repeatedly and trying to talk to [respondent] and she couldn't get to him." Mary also noted that clients usually called respondent on his cellular telephone.

Mary estimated that, between 2010 and 2012, Sharon came to the office "maybe ten to fourteen times." She explained that, when clients came in without an appointment, respondent would see them when he had finished with clients who had appointments, but "would not tell them to go away." Further, Mary denied that there ever came a time when respondent stopped accepting walk-in appointments. Whenever Sharon came in, respondent would see her if he was available. However, Mary explained that there were times when Sharon came in and respondent was not available, as "he might have been preparing for trial."

Respondent's secretary of fifteen years, Kathy, also testified. She explained that she scheduled some appointments for respondent but that, generally, he scheduled his own appointments for evenings and weekends. Further, she testified that respondent routinely would meet with "walk-in" clients. Kathy never met Sharon in person, could not recall ever speaking to her, and had no memory of receiving or ignoring a message to call Sharon back.

Kathy also testified about the handwritten notes on the August 9, 2013 facsimile cover sheet and letter from Walmart's counsel. She identified the writing, which stated, "Send ltr advising Summ Judg," as her own, and she explained that such notes indicated tasks she needed to complete. The handwritten note on the letter, which indicated "KR. Please speak to me !!! I

want to settle this case !!!" was written by respondent, and was a note intended for her.

Kathy wrote the note on the cover sheet, after meeting with respondent, to remind herself to send Sharon a letter, advising that the summary judgment motion had been granted. Kathy routinely sent similar "enclosed please find" letters to clients, as directed by respondent. The enclosure letters would "not include any explanation to the client" or "any discussion from [respondent] as to any planned response or strategy to deal with a dispositive motion against the client."

Typically, when she completed such a task, Kathy would "put a line through it" and, because this note had a line through it, Kathy assumed she prepared and sent Sharon the "enclosed please find" letter regarding summary judgment. Only later did Kathy discover that she had not sent the letter, since it was not in the file, and she realized that the line on the note was a part of the stationery. She confirmed that that line appeared not only on the August 9, 2013 facsimile cover page, it also appeared on the facsimile cover page for Walmart's September 9, 2013 letter to respondent.

Testimony from Respondent's Wife

Respondent's wife, Barbi, testified in mitigation. She explained that they have been married for twenty-eight years and have three children, the oldest of whom had a genetic anomaly which caused medical and behavioral issues.

Barbi testified about respondent's health issues and their son's life-long struggles. Barbi explained that they also had endured a prolonged legal dispute with their son's school district, which she described as an "emotionally difficult" experience that took a lot of their "time, energy, [and] money." Respondent was working a lot at the time because he was the only source of income. She explained that, during those three years, "the whole family was in a crisis mode."

Respondent's Testimony

Respondent testified that he had been a member of the New Jersey and Pennsylvania bars for thirty-two years, handling personal injury, employment, and real estate matters.

Respondent explained that, from the outset, he had concerns about Sharon's case, which he shared with her. Specifically, respondent explained that there was no defect where Sharon fell, her medical records indicated that her injuries from that fall were not significant, and she had prior injuries to her knee. In his view, "[i]t was a very difficult claim," but Sharon had told him that her

injury was extensive, and he wanted to help her. However, respondent explained that Sharon had "multiple issues regarding her knees, and she was on disability for her knee problem before the incident." Further, he claimed he had told Sharon that it would be difficult to defeat a motion for summary judgment and that he "needed to settle the case."

Respondent maintained that his lack of attentiveness to Sharon's case was due to distractions caused by his own health and family-related issues, and not the strength of her case. Nonetheless, respondent conceded that he owed Sharon "every duty of diligence and loyalty that [he] would any client." Despite the work he had performed on the case, respondent explained that he received no compensation because he had accepted the representation on a contingent fee basis. Respondent admitted that his failure to respond to Walmart's letters and oppose the motion for summary judgment constituted gross neglect; however, he explained that Walmart never actually offered a settlement amount and, in his view, there was no information in that respect to convey to Sharon.

Respondent explained that he did not object to Walmart's removal of the case to federal court because he practiced in federal court and believed that venue allowed for the same procedure and remedies as state court. Further, venue was not something he typically discussed with clients because, in his view, there was "no reason that a client would need to know which court [he/she]

was in in order to decide whether to settle" and, further, "from a client perspective," there is no "difference between being in state court and federal court."

Respondent explained that he thought Kathy had mailed Sharon a letter regarding the summary judgment motion because he had asked her to do so. When he reviewed is file, he admittedly was unable to locate a copy of the letter but found his handwritten note for Kathy to send the letter. Thus, he explained that he declined to stipulate to the allegation that there was no documentation of his communication with Sharon.

Respondent could not recall when he told Sharon that the DNJ had granted summary judgment and dismissed her case but testified that it was on an occasion where she had walked into his office without an appointment. He specifically recalled printing out the court's order and speaking with her about it in his conference room. He acknowledged that, during the investigation, he had told the DEC investigator that he had provided Sharon with a copy of the court's order but acknowledged that, "upon further reflection," he may not have given her a copy of the DNJ's decision or order. He explained that his misstatement during the investigation was due to his confusion about the timeline. He stipulated, however, that he did not timely advise Sharon regarding the dismissal of her case. Respondent also conceded that he had "dropped the

ball" and, although Sharon had not come to his office between December 2012 and September 2013 (while the motion for summary judgment was pending), he acknowledged he had an "affirmative duty to reach out to her."

Respondent admitted that, when he first received the grievance in October 2019, he conducted a "very cursory" review of Sharon's physical file. Respondent understood that he had a responsibility to review his file, produce responsive material, and be as thorough and truthful as possible in his reply to the DEC investigator. He admitted that he did not have anything in the file "memorializing potential settlement discussions directly between himself" and Sharon, or any "notes, logs, or memorand[a]" regarding calls or conversations with Audubon's insurance adjustor, Walmart's attorney, or Sharon. Respondent testified that he had no notes on "items such as calls on settlement or meeting[s] with client[s] . . . to document the actions he took in Sharon's case."

Ultimately, respondent admitted that he did not meet with Sharon between December 2012 and September 2013. He conceded that this contradicted what he had told the DEC investigator during the investigation and what he claimed in his November 24, 2019 reply letter to the grievance. He explained, however, that, "[a]fter a lot of insight," he realized that he had not met with Sharon during that period, because she stopped coming to the office after her fallout with a

friend who frequently brought her to respondent's law office. He candidly admitted "I dropped the ball."

Confronted with contradictions between statements during the investigation and his testimony, respondent maintained that he had corrected those statements in his verified answer and stipulation. Further, he explained that, during the investigation, he was "doing [his] best to piece it together." He "fully acknowledge[d that he] made mistakes" and he "want[ed] to own up to the mistakes."

> I was unsure as to many of the facts and more and more information came to light as this file went forward. Had I had all of the information that that time, I would have done the same thing and acknowledged all of the issues involved . . . I didn't have all that info – information at my disposal. As time went on, I was able to piece it together . . . I had documents, but counsel, I was unsure as to the issue of whether that motion for summary judgment notation from my assistant went out. There were still certain things that I couldn't piece together. I was doing my best after seven, eight, nine, ten years.
>
> [2T74-2T75.]

Respondent explained that, between 2010 and 2013, if he needed coverage for a client matter while handling family issues, he would "ask someone to cover a deposition periodically," but that no attorney had been formally assigned to handle his files. Respondent confirmed that his office did not have a standardized process for sending letters to clients regarding dispositive motions,

but rather handled each matter on a case-by-case basis. Regardless of the content of the communication, respondent would either dictate the letter or tell his assistant what he wanted to convey to the client. Further, he would meet periodically with Kathy and "tell her to put the dates in the book in terms of response dates, things like that." He represented that, following his receipt of the grievance in this matter, his office had improved their case management system.

The Parties' Written Summations

In his written summation, respondent urged the hearing panel to consider that Sharon's matter was a "single file in which, during a particularly tumultuous time in his personal life, [he] admittedly failed to provide the legal representation to which [his client] was entitled." He stressed that he had stipulated to most of the facts and legal conclusions, and there were "only a few issues about which he could not agree."

Respondent admitted that he had:

> (1) Failed to discuss Walmart's settlement invitations (request for mediation and a settlement demand) with Sharon, in violation of RPC 1.1(a) and RPC 1.4(b) and (c);
>
> (2) Failed to perfect any direct claim against Audubon, in violation of RPC 1.1(a);

(3) Failed to inform Sharon about Walmart's motion for summary judgment, in violation of RPC 1.4(b) and (c);

(4) Failed to oppose Walmart's motion for summary judgment, in violation of RPC 1.1(a);

(5) Failed to inform Sharon of the dismissal in a written letter or memorandum violated, and in a timely manner, in violation of RPC 1.4(b) and (c); and

(6) Failed to provide a written contingent fee agreement to Sharon, in violation of RPC 1.5(b) and (c).

Respondent argued, however, that his failure to oppose the removal of the litigation to federal court or to discuss the change of venue with Sharon was not violative of RPC 1.4(b) and (c), because there was no disadvantage to litigating in federal court and, because venue did not affect the claim, he did not typically discuss venue with clients. He emphasized that "lawyers are not required to discuss every issue with their clients" and, citing disciplinary precedent discussed below, maintained that there had not been a "single ethics decision wherein an attorney ha[d] been found to have a duty to discuss . . . venue or change of venue with a client."

Next, respondent disputed Sharon's allegations that she had attempted to speak with respondent for two years, between 2013 and 2015, and that he had failed to respond to reasonable requests for meetings or information. First,

respondent asserted that he routinely met with "walk-in" clients when they did not have appointments. Indeed, Sharon acknowledged that the only time she had an appointment with respondent was their first meeting; instead, she always met with him without appointments. Further, respondent's receptionist had maintained a record of all calls that were not forwarded to a secretary or attorney, and she had recorded only two calls from Sharon (on February 11, 2011 and January 6, 2012).

Moreover, respondent argued that Sharon had produced only six text messages and she admitted that he replied "immediately." Sharon did not produce any other text messages, e-mails, telephone records, or toll receipts. Respondent emphasized that, if Sharon went to his office "two times a week" "throughout 2014," that would have been hundreds of times. Given her inconsistent statements, he argued that Sharon's claims were unsupported. Respondent "acknowledge[d] that he failed to communicate with [Sharon] about many things. However, he could not agree that he failed to respond to requests for meetings or information for two years," and, thus, did not violate RPC 1.4(b) in this respect.

Finally, respondent disputed having made materially false statements to the DEC investigator regarding his communication with Sharon. Citing disciplinary precedent, he argued that such a finding would require clear and

convincing evidence that he had actual knowledge that his statement was false at the time he made it, and that burden had not been met.

Specifically, respondent admitted that he initially had told the investigator that he notified Sharon of Walmart's motion for summary judgment, but later admitted that he had failed to notify her of the pendency of the motion or its outcome. Respondent maintained, however, that he did not intentionally misrepresent anything to the DEC investigator during the course of the ethics investigation. Rather, respondent attributed his misstatement to the passage of time and his lack of memory, based on the fact his meeting with the investigator occurred in January 2020 – nearly seven years after the motion had been decided. Respondent later admitted that he was confused about the timeline, but that his misstatement had not been intentional; further, in his answer, respondent corrected the statement by admitting he had not notified Sharon of the summary judgment motion.

Additionally, respondent initially told the investigator that he gave Sharon a copy of the court order dismissing her case but, when Sharon disputed this, he conceded he might not have given her a copy despite having a copy when they met to discuss it. Ultimately, respondent stipulated that he met with Sharon at some point, but he could not recall the date. Respondent could not stipulate to the date of their discussion because he did not recall it, but he believed it was

significantly earlier than September 2015, which Sharon alleged.

Finally, respondent explained that he initially had denied the allegation that there was "no documentation in [his] file memorializing any discussion with [Sharon] about a pending motion for summary judgment, nor about any meeting following the dismissal of the action, nor proving [Sharon] a copy of the order and opinion." His denial was based on Kathy's handwritten note on the August 9, 2013 facsimile which indicated that he told her to send Sharon a letter advising of the dismissal. After learning that the letter had not been sent, respondent took "full responsibility for the lack of communication and [he] acknowledge[d] that[,] even if the motion had been sent, it was not timely." He maintained, however, that he did not intentionally misrepresent a material fact because, at the time of his statement to the DEC investigator, he believed the letter had been sent.

In conclusion, respondent argued that his misstatements were, at most "negligently inaccurate," and that he had been relying on his memory, nearly seven years after the case was dismissed. Thus, in the absence of evidence that respondent intended to mislead the investigator, respondent urged the dismissal of the charge pursuant to RPC 8.1(a).

In turn, the presenter argued that, notwithstanding respondent's attempt to downplay the severity of his mishandling of Sharon's matter, he had ignored his

obligations to his client. The presenter stressed that, during the investigation, respondent was not forthcoming and, at least initially, had denied all wrongdoing. "Unfortunately, even once litigation was filed on [Sharon's behalf], [respondent] continued to handle her file with a complete disregard for [Sharon's] right to be involved without any attention to detail." Respondent allowed his "own personal preference for litigating in federal court" to guide his strategy, rather than any discussions with Sharon. The presenter argued that "inherent in that trust [which the public places in attorneys] is the duty to advise the client fully, frankly, and truthfully of all of the material and significant information." In re Loring, 73 N.J. 282, 289-90 (1977). In the presenter's view, respondent's refusal to oppose removal was "a litigation tactic" that should have been discussed with the client.

Next, the presenter argued that respondent had failed to keep Sharon informed about Walmart's multiple attempts to "open up settlement discussions" and, during the ethics hearing, "continued to downplay the import of these letters."

Although the presenter acknowledged that Sharon had failed to produce documentation to substantiate her claims that she had tried, unsuccessfully, to contact respondent for two years, she argued that "regardless of whether [Sharon] over-estimated exactly how many times she went to respondent's

office," her six text messages established that she tried to set up a meeting with respondent in March 2014 or March 2015.

Next, the DEC presenter argued that respondent had told her, in her capacity as the DEC investigator, that he had informed Sharon that "a motion for summary judgment was pending and that he was unable to oppose it." Second, respondent told the investigator that he met with Sharon "after the dismissal of the suit and provided her with a copy of the summary judgment order and decision." She emphasized that it was respondent's "responsibility to review his file, provide his file to the investigator, and be as thorough and truthful as possible when responding to the investigation."

The presenter emphasized that Kathy's "check mark" and note on the August 9, 2013 facsimile cover sheet was eight months after the summary judgment motion was filed. The presenter stressed that respondent's initial reply to the grievance stated "definitively, and, without any documentation in the file," that he had met with Sharon after the motion for summary judgment was filed – a "definitive" declaration that was "clearly false" and that "respondent knew it was false."

Overall, the presenter criticized respondent's "very cursory" initial review of his files. "Surely, we expect more of attorneys in their involvement in the attorney ethics system. This cavalier handling of the investigation mirrors his

handling of [Sharon's] file." Finally, the presenter asserted that, since respondent's file contained "no logs or memos of any meetings," he had failed to comply with Sharon's reasonable requests for information and, thus, he violated RPC 8.1(a).

The DEC's Findings

In its initial hearing panel report, the DEC addressed only its findings related to violations of the Rules of Professional Conduct, concluding as follows:

> - Respondent violated RPC 1.1(a) (two instances), by failing to name the appropriate parties in the underlying suit and failing to oppose Walmart's motion for summary judgment.
>
> - Respondent violated RPC 1.1(a) and RPC 1.4(b) and (b) by failing to inform Sharon of Walmart's repeated requests to discuss settlement.
>
> - Respondent also violated RPC 1.4(b) and (b) by failing to discuss the motion for summary judgment with Sharon and failing to timely inform Sharon that the motion for summary judgment had been granted and that the underlying case had been dismissed.
>
> - Respondent violated RPC 1.5(b) and (c) by failing to have a signed retainer agreement in a contingency fee matter.
>
> - Respondent violated RPC 8.1(a) by failing "to be truthful to the investigator during the ethics investigation regarding lack of discussions with [Sharon] regarding the filing and granting of the motion

for summary judgment."

The panel determined to dismiss the charges that (1) respondent's failure to oppose the removal violated RPC 1.4(b) and (c), and (2) respondent failed to reply to Sharon's reasonable requests for meetings or information for two years, in violation of RPC 1.4(b).

Thereafter, the parties submitted supplemental briefs to the hearing panel addressing the appropriate quantum of discipline.

The presenter urged the hearing panel to impose a three-month suspension for respondent's misconduct. Citing disciplinary precedent, the presenter acknowledged that, in the absence of aggravating factors, gross neglect and failure to communicate in a single matter typically is met with a reprimand. Likewise, violations of RPC 1.5(b) and (c), where "no fee was improperly taken and kept from the client," result in an admonition.

However, the presenter argued that respondent's most serious misconduct were his misrepresentations to the DEC investigator, in violation of RPC 8.1(a), which typically are met with discipline ranging from a reprimand to a term of suspension, depending on the gravity of the offense, the presence of other unethical conduct, and aggravating and mitigating factors. Emphasizing respondent's prior discipline in Pennsylvania, the presenter stressed that, although his Pennsylvania misconduct did not involve dishonesty, "his handling

of the underlying matter shows a failure to have his office organized to handle the amount of cases in which he undertook client representation."

Additionally, the DEC presenter argued that respondent's "lack of candor with the disciplinary authorities is both an ethical violation on its own, as well as an aggravating factor." In Youmans, 118 N.J. 622, 637 (1990). Further, she argued that, while the events regarding respondent's son could be a mitigating factor, it only explained his failure to discuss the pending summary judgment motion. The presenter further, criticized respondent's failure to have any safeguards in place to ensure his "clients would not be harmed should he temporarily (or long term) need to place all of his attention on his family."

Finally, the presenter argued that, "while it is difficult to quantify the loss to [Sharon] as a result of respondent's failures . . . it is clear that the defendant in the underlying litigation had a continued willingness and motivation to engage in settlement as Walmart's attorney reached out to respondent even after its unopposed motion for summary judgment had been pending for nine months." Since respondent stipulated that "he did not fully take advantage of or discuss with [Sharon] these settlement overtures," he still had the "opportunity to recoup money" for her.

Respondent, on the other hand, urged the hearing panel to impose a reprimand or censure, and not the three-month suspension sought by the

presenter. He asserted, in mitigation, that he and his wife always struggled with his son's disability; however, his issues "crescendoed" while respondent was representing Sharon. Additionally, regarding the alleged misrepresentation, respondent reiterated that "the passage of many years between the representation and the investigation is another mitigating factor," because respondent understandably "lacked clarity as to some events," and, since nearly a decade had passed between the events and the investigation, and no other complaints or grievances had been filed, that time should be considered to mitigate his admitted errors. Further, respondent emphasized that he since had implemented new procedures and hired additional personnel to prevent the recurrence of similar issues.

Regarding his prior discipline in Pennsylvania, respondent explained that, in 2009 and 2010, he had been unable to attend a court ordered deposition that had been rescheduled many times, but that he failed to seek leave of court or to submit an affidavit regarding his unavailability and, subsequently, "when his adversary moved for sanctions [stemming from his failure to attend the deposition], he was unable to attend the hearing because he was in a criminal court on another matter." Respondent noted his Pennsylvania misconduct did not involve the same type of misconduct present in the instant matter.

Citing disciplinary precedent, respondent urged the hearing panel to

impose a reprimand or a censure. Respondent argued that his misconduct was most closely analogous to the attorney in In re Smith, 241 N.J. 250 (2020), who was censured for engaging in gross neglect, lacking diligence, failing to communicate, making misrepresentation to ethics authorities, and failing to cooperate with the disciplinary authorities.

In Smith, a client retained the attorney to seek the expungement of the criminal record of the client's son. Smith undertook the representation knowing that the expungement was necessary for the son to continue his educational endeavors. He filed the expungement petition with the Superior Court, which was orally granted following a hearing; however, he failed to submit to the Superior Court a proposed order, despite his representation that he would do so. Smith then failed to take any reasonable steps to ensure the expungement was completed. Instead, he assured his client that he would provide her with the order "A.S.A.P."

Five months after the hearing, the client, who was frustrated with Smith's lack of communication, contacted the Superior Court and learned that the expungement matter had been dismissed. When she confronted Smith, he continued to misrepresent to her that the expungement order had been entered and that he would provide her with a copy. Smith, however, failed to rectify the dismissal of the case, failed to obtain an expungement order, and stopped

communicating with his client. Smith also misrepresented to the ethics investigator that he had, in fact, submitted a proposed order to the court, and then ceased cooperating with the underlying investigation. We determined to impose a censure, assigning, in aggravation, "significant weight to the wholly avoidable harm respondent caused to [his client's son]," balanced against his lack of prior discipline in his twenty years at the bar. In the Matter of Darryl George Smith, DRB 19-108 (October 23, 2019) at 21.

Respondent urged that, despite the similarity in the misconduct in a single client matter, he did not make misrepresentations to the DEC, did not fail to cooperate with the disciplinary authorities, and did not allow this matter to proceed as a default. In these respects, respondent argued that his misconduct was less serious than the attorney in Smith, who was censured.

Respondent cited additional disciplinary precedent to support his argument that his misconduct, though serious, spanned one client matter and, thus, was deserving of a reprimand or censure, and not a term of suspension, which typically is imposed where more egregious facts or aggravating factors are present.

The hearing panel recommended that respondent be censured for his misconduct.

The Parties' Positions Before the Board

In his written submission and during oral argument, respondent, through counsel, admitted the majority of the charged misconduct and acknowledged that he did not properly handle the underlying case. Although he agreed with the DEC's recommendation that a censure was an appropriate quantum of discipline, he urged us to consider a lesser sanction.

Specifically, respondent admitted that he failed to provide Sharon with diligent representation and communication by failing to name the appropriate parties in the underlying litigation, failing to oppose the motion for summary judgment, and failing to discuss the summary judgment motion or disposition with Sharon. He also admittedly failed to memorialize, in writing, the basis or rate for his fee in a contingency matter.

He denied, however, having violated RPC 1.4(b) by not informing Sharon that Walmart had removed the lawsuit to federal court. He likewise denied that he failed to respond to her requests for meetings or information. He argued that it simply was "not possible," given his "open door" policy, and the fact that Sharon had his mobile telephone number. In fact, he emphasized, he "immediately" responded to her text messages.

Lastly, respondent adamantly denied having violated RPC 8.1(a). The DEC alleged he violated this Rule by making false statements to the DEC

investigator regarding communications with Sharon about the pendency of the summary judgment motion and its eventual dismissal. Respondent emphasized that the investigator did not testify, there was no corroborating evidence and, lastly, his interview with the investigator occurred seven years after the case had been dismissed and, thus, he did not have perfect recall at the time of his interview. Most importantly, he "corrected the record" at the hearing, and his credibility was "bolstered" by the fact that he admitted to the majority of the allegations.

In mitigation, respondent stressed that, although he handled Sharon's case "terribly," he was going through a "horrific time in his personal life," given his and his son's serious health issues. In further mitigation, respondent urged us to consider the ten-year passage of time since the misconduct occurred, along with his lack of prior discipline in New Jersey in his more than thirty-year-career at the bar. With respect to his 2011 discipline in Pennsylvania, respondent argued that the misconduct was dissimilar to the instant matter.

In the presenter's written submission and during oral argument, he[3] reiterated the arguments submitted to the DEC. Notably, the presenter agreed with the DEC's dismissal of the RPC 1.4(b) and (c) charges pertaining to

[3] Christopher L. Soriano, Esq., who was not the initial investigator or presenter, appeared before the Board on behalf of the DEC.

respondent's failure to (1) oppose the removal of the matter to federal court, and (2) meet with Sharon for approximately two years.

For respondent's misconduct and considering, in aggravation, the extinguishment of Sharon's claim, the presenter urged us to impose either a reprimand or a censure.

Analysis and Discipline

Violations of the Rules of Professional Conduct

Following a de novo review of the record, we find that the DEC's determination that respondent violated RPC 1.1(a) (three instances); RPC 1.4(b) (four instances); RPC 1.4(c) (four instances); RPC 1.5(b); and RPC 1.5(c) is supported by clear and convincing evidence. Further, we determine, in accord with the DEC, that there is insufficient evidence to establish that respondent violated RPC 1.4(b) by failing, for two years, to respond to Sharon's requests for meetings. However, contrary to the DEC, we determine that respondent's failure to oppose the removal did violate RPC 1.4(b) and (c). We also determine to dismiss the violation pursuant to RPC 8.1(a).

RPC 1.1(a) prohibits a lawyer from handling a client matter in a way that constitutes gross neglect. Respondent violated this Rule by failing to discuss with Sharon Walmart's repeated settlement negotiation proffers and offer to

participate in mediation, thereby depriving her of the opportunity to achieve a settlement. Respondent separately violated this Rule by failing to name the responsible party (Audubon) as a defendant in the litigation, despite his subsequent awareness that Audubon was the owner of the premises. Most alarming was respondent's failure to oppose Walmart's motion for summary judgment, resulting in the dismissal of Sharon's claims. In our view, if the case "had no value," as respondent had later claimed, he should not have agreed to represent Sharon in the first place. That was the anchor for the DEC's findings, and we agree.

Next, respondent violated RPC 1.4(b) and RPC 1.4(c). RPC 1.4(b) provides that an attorney "shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information," and RPC 1.4(c) requires a lawyer to explain a matter to the extent reasonably necessary to allow the client to make informed decisions concerning the representation. Respondent violated both Rules by altogether failing to communicate with Sharon regarding important developments in her personal injury action against Walmart. Specifically, as stated above, respondent failed to keep Sharon apprised of Walmart's numerous settlement proffers and offer to participate in mediation. He failed to inform or explain to Sharon that Walmart had filed a dispositive motion and the implications of that motion to her case, if

granted. He failed to tell Sharon that he did not intend to oppose the summary judgment motion and, worse, failed to inform her that her case had been dismissed and her claims extinguished.

Contrary to the DEC, however, we conclude that respondent separately violated RPC 1.4(b) and (c), by failing to inform Sharon of Walmart's intent to remove, and eventual removal, of the case from state court to federal court. In In re John A. Tunney, DRB 10-249 (December 21, 2011), we declined to find a violation pursuant to RPC 8.4(c) where the attorney failed to inform the client that the complaint had been filed in a different county than he had discussed with the client, reasoning that the failure to inform the client that her complaint would be filed in a different venue would not be a misrepresentation but, more properly, a failure to advise her of a litigation tactic.

Here, like in Tunney, respondent had a responsibility to inform Sharon that Walmart had filed the notice of removal and its offer to remain in state court if respondent stipulated that damages did not exceed the jurisdictional limit for removal. Standing alone, respondent's failure to inform his client that the matter had been removed to federal court may not have risen to an ethics violation; however, in view of his simultaneous failure to communicate to Sharon Walmart's request that he stipulate to damages not exceeding $75,000 or Walmart's settlement proffers, we conclude, on this record, that respondent

violated RPC 1.4(b) and (c) in this respect.

We decline to find, like the DEC, that respondent separately violated RPC 1.4(b) by failing to reply to Sharon's alleged attempts to reach him between 2013 and 2015, after her case had already been dismissed. The record lacks clear and convincing evidence that Sharon attempted to meet with respondent during this period or that respondent denied her any such requests to meet. In fact, as respondent testified, there was no reason to communicate after the 2013 dismissal of the litigation.

Next, respondent violated RPC 1.5(b) and RPC 1.5(c) by failing to set forth his contingent fee agreement with Sharon in a writing signed by him and Sharon. Specifically, RPC 1.5(b) provides that "when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation." Similarly, RPC 1.5(c) provides that a "contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined." Respondent stipulated that he was unable to locate a signed, finalized fee agreement and, thus, he admittedly violated RPC 1.5(b) and (c).

We decline to find, based on the lack of clear and convincing evidence, that respondent violated RPC 8.1(a), which prohibits a lawyer from knowingly

making a false statement of material fact in connection with a disciplinary matter.

Here, the DEC alleged that respondent made misrepresentations to the investigator by (1) claiming that he had met with Sharon after receiving Walmart's summary judgment motion, (2) claiming that Sharon knew the motion had been granted, and (3) denying that he refused to meet with Sharon between 2013 to 2015. However, respondent credibly explained that, at the outset of the investigation, he struggled to recall events that had occurred seven years prior. Further, once he had the opportunity to reflect on his representation of Sharon, he corrected his earlier misstatements, both in his verified answer, his stipulated facts, and his testimony before the DEC.

Consistently, we have found that not every misstatement to a disciplinary authority constitutes a violation of RPC 8.1(a). Indeed, the statement must be both material and intentional – or the charge will not be sustained. See, e.g., In re Arnold M. Abramowitz, DRB 18-420 (August 28, 2019) (where the attorney cleared up his "mistaken" statement at his ethics hearing, the violation of RPC 8.1(a) was dismissed for clear and convincing evidence of an intent to mislead); In re Michael David Lindner, Jr., DRB 18-254 (January 30, 2019) (the attorney made initial misstatements to the Office of Attorney Ethics; however, the record failed to support a finding that he knowingly made a misrepresentation; we

found that "even if he had done so, he attempted to correct what he believed to be a misstatement" and, thus, dismissed the charge); In re Cathleen J. Christie, DRB 16-171 (February 15, 2017) (we dismissed the RPC 8.1(a) violation because the attorney was "negligently mistaken" in her erroneous beliefs, and she did not fail to correct the misapprehension); In re Eryk Anthony Gazdzinski, DRB 14-104 (October 1, 2014) (we concluded that the attorney had not acted improperly by providing one set of billing records to the investigator and another to the fee arbitration committee, reasoning that his lack of billing records and a formal billing system contributed to the error; we found it highly unlikely that this was done with any deceptive intent and dismissed the RPC 8.1(a) charge).

In sum, we find that respondent violated RPC 1.1(a) (three instances); RPC 1.4(b) (four instances); RPC 1.4(c) (four instances); RPC 1.5(b); and RPC 1.5(c). We determine to dismiss the charge that respondent separately violated RPC 1.4(b) by failing to respond to Sharon's alleged requests to meet between 2013 and 2015. Further, we determine to dismiss the charge pursuant to RPC 8.1(a). The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

Quantum of Discipline

Conduct involving gross neglect, lack of diligence (a charge not present here), and failure to communicate with clients ordinarily results in 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 attorney's disciplinary history. See In the Matter of Mark A. Molz, DRB 22-102 (September 26, 2022) (admonition for an attorney whose failure to file a personal injury complaint allowed the applicable statute of limitations for his clients' cause of action to expire; approximately twenty months after the clients had approved the proposed complaint for filing, the attorney failed to reply to the clients' e-mail, which outlined the clients' unsuccessful efforts, spanning three months, to obtain an update on their case; the record lacked any proof that the attorney had advised his clients that he had failed to file their lawsuit prior to the expiration of the statute of limitations; in significant mitigation, the attorney had an otherwise unblemished career in more than thirty-five years at the bar), and In re Barron, __ N.J. __ (2022), 2022 N.J. LEXIS 660 (reprimand for an attorney who engaged in gross neglect in one client matter, lacked diligence in three client matters, failed to communicate in three client matters, and failed to set forth the basis or rate of his fee in one client matter (RPC 1.5(b)); in aggravation, we considered the quantity of the attorney's ethics violations and the harm to multiple clients (which included allowing a costly default judgment to be entered against two clients and failing to oppose summary judgment motions, resulting in the dismissal of a third client's case);

in mitigation, we considered the attorney's cooperation, his nearly unblemished career in more than forty years at the bar, and his testimony concerning his mental health condition).

Standing alone, conduct involving the failure to memorialize the basis or rate of a fee, as RPC 1.5(b) requires, typically results in an admonition. See e.g., In the Matter of John J. Pisano, DRB 21-217 (January 24, 2022) (admonition for an attorney who failed to set forth in writing the basis or rate of the legal fee and concurrently represented a driver and a passenger in an automobile accident matter, prior to when liability had been established); In the Matter of Peter M. Halden, DRB 19-382 (February 24, 2020) (admonition for an attorney who failed to set forth in writing the basis or rate of the legal fee and failed to abide by the client's decisions concerning the scope of the representation; in mitigation, the attorney had no prior discipline in his forty-four years at the bar); In the Matter of Kenyatta K. Stewart, DRB 19-228 (October 22, 2019) (admonition for an attorney who failed to set forth in writing the basis or rate of the legal fee, and engaged in a concurrent conflict of interest; in mitigation, the attorney had no prior discipline in his twelve years at the bar).

Based on the foregoing disciplinary precedent, we determine that a reprimand is the baseline discipline for respondent's misconduct. To craft the

appropriate discipline in this case, we also consider mitigating and aggravating factors.

In mitigation, respondent has no prior discipline in New Jersey in his thirty-four years at the bar, a consideration for which we typically accord significant weight.

Further, respondent presented compelling evidence of the significant personal and medical issues he was experiencing at the time of his representation of Sharon. In our view, however, these considerations do not excuse his gross mishandling of Sharon's case.

In aggravation, however, respondent allowed Sharon's claims to be dismissed when the court granted the motion for summary judgment which, unbeknownst to Sharon, he failed to oppose. Worse, by failing to inform Sharon that her case had been dismissed, he deprived her of any meaningful opportunity to appeal the dismissal and, thereby extinguished her claims. Further, he altogether deprived her any meaningful opportunity to participate in settlement discussions by failing to inform her that Walmart had proffered settlement discussions and suggested mediation. Respondent's actions deprived her of her day in court, notwithstanding his assertion that her claim lacked merit.

Conclusion

On balance, we determine that the significant harm respondent's misconduct caused the client by extinguishing her personal injury claim is sufficiently egregious to warrant enhancing the baseline discipline of a reprimand to a censure.

Member Campelo was absent.

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
Hon. Mary Catherine Cuff, P.J.A.D. (Ret.),
Chair

By: */s/ Timothy M. Ellis*
Timothy M. Ellis
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Marc A. Weinberg
Docket No. DRB 24-012

Argued: May 24, 2024

Decided: July 8, 2024

Disposition: Censure

Members	Censure	Absent
Cuff	X	
Boyer	X	
Campelo		X
Hoberman	X	
Menaker	X	
Petrou	X	
Rivera	X	
Rodriquez	X	
Spencer	X	
Total:	8	1

/s/ Timothy M. Ellis
Timothy M. Ellis
Chief Counsel