

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

2017-OLR-3

Matthew T. Luening
Attorney at Law

The Respondent, Attorney Matthew T. Luening (“Luening”), age 44, was admitted to the practice of law in Wisconsin on May 24, 2010, and practices in Milwaukee, Wisconsin. This reprimand is based on Luening’s conduct in four separate matters.

First Matter

In or around August 2011, a client hired Luening to represent him in removal proceedings. In a Notice of Hearing in Removal Proceedings to the client, dated June 16, 2010, the Immigration Court stated that the case had been scheduled for a “MASTER” hearing before the Immigration Court on September 22, 2011. On September 22, 2011, the client attended the master hearing with Luening.

At the master hearing, the Immigration Judge set the client’s individual merits hearing date for July 2, 2014, and set the due date for filing an application for relief for June 18, 2014.

In a Notice of Hearing in Removal Proceedings to Luening, dated October 21, 2011, the Immigration Court stated that the case had been scheduled for an “INDIVIDUAL” hearing before the Immigration Court on July 2, 2014. On July 2, 2014, Luening and the client appeared at the individual hearing.

Luening had not filed the client's application for relief by June 18, 2014, or at the individual hearing on July 2, 2014. Luening's explanation was that he had mistakenly thought that the individual hearing on July 2, 2014, was a master hearing.

Luening stated, "Because of my mistake and my lack of diligence in ensuring I had calendared [the client's] next hearing type in Immigration Court, I thought that his July 2014 date was a 'reset' master calendar hearing."

At the individual hearing, the Immigration Judge considered Luening's explanation to be insufficient, denied a request for a further continuance, and ordered the client removed.

In an unfiled copy of an Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents ("Form EOIR-42B"), the Part 9 – Signature section stated, "APPLICATION NOT TO BE SIGNED BELOW UNTIL APPLICANT APPEARS BEFORE AN IMMIGRATION JUDGE."

The client's signature appeared in the Part 9 – Signature section, but the client signed the Form EOIR-42B prior to appearing before the Immigration Judge.

With respect to the client signing the Form EOIR-42B without appearing before an Immigration Judge, Luening stated that he had the client sign the Form EOIR-42B prior to the client appearing before the Immigration Judge, contrary to the Immigration Court's rule, in order to file it with the client's application for a work permit.

At the individual hearing on July 2, 2014, while addressing the Immigration Judge, Luening stated, "I admitted to him [the client] that I obviously made a huge mistake in not having filed that with the Court and having erroneously thought that this date was not for merits. I explained to him that he'll probably have to file a complaint against me because most likely the Court will dismiss the case today. And he'll have to do that in order to try and reopen it."

In an Oral Decision, the Immigration Judge stated, “The respondent, on July 2, 2014, through counsel, appeared without having submitted any documents in support of his request for cancellation of removal or any and all forms of relief, and indicates through counsel that there had been a mistake in calendaring this matter as an individual calendar case.”

In the Oral Decision, the Immigration Judge ordered that the client’s motion to continue was denied, that the request for non-LPR [non-lawful permanent resident] cancellation of removal was dismissed, and that the client was to be removed and deported from the United States to Mexico.

With respect to his error, Luening stated, “I told him [the client] that I would take full responsibility for my mistake, help him file a grievance with the OLR, help him file an appeal with the Immigration Court based on ineffective assistance of counsel.” The client accepted Luening’s assistance with the appeal and grievance.

In a Board of Immigration Appeals Decision and Order dated September 29, 2015, the Board stated, “In any event, based on the circumstances presented, for the sake of fundamental fairness, and in the interest of justice in light of ineffective assistance of counsel, the respondent’s motion is granted. Accordingly, the record will be remanded to the Immigration Judge for further proceedings to afford the respondent an opportunity to apply for relief from removal.”

In the Board of Immigration Appeals Decision and Order dated September 29, 2015, the client was listed as pro se on his appeal.

By failing to file the Form EOIR-42B or any other form of relief by the June 18, 2014 due date, resulting in the Immigration Court dismissing the client’s request for non-LPR cancellation of removal, and the Court ordering the removal and deportation of the client, and by

otherwise failing to act in furtherance of the client's interests, Luening violated SCR 20:1.3, which states, "A lawyer shall act with reasonable diligence and promptness in representing a client."

By having the client sign the Form EOIR-42B prior to the client appearing before an Immigration Judge in order to file it with the client's application for a work permit, rather than having the client sign the Form EOIR-42-B before the Immigration Judge as required, Luening violated SCR 20:3.4(c), which states, "A lawyer shall not:...(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."

Second Matter

In 1996, a man unlawfully entered the United States. On January 31, 2005, the man was found guilty of one count of possession of cocaine. The court sentenced the man to 30 days in jail.

On July 19, 2013, the man was arrested for Operating While Under the Influence of an Intoxicant ("OWI") (3rd). On July 25, 2014, the man was found guilty of OWI (3rd). The court sentenced the man to 120 days in jail.

The Department of Homeland Security ("DHS") learned of the cocaine conviction when the man was arrested for OWI (3rd). DHS detained the man in early 2014 and initiated removal proceedings against him with the filing of a Notice to Appear with the Chicago Immigration Court in removal proceedings.

On or about February 25, 2014, the man (hereinafter, "the client") hired Luening to represent him in the removal proceedings. On March 18, 2014, Luening filed, on behalf of the client, a Petition for a Writ of Habeas Corpus in federal court.

On April 29, 2014, Luening filed, on behalf of the client, a Motion to Withdraw Guilty Plea regarding the client's cocaine conviction. On May 13, 2014, the court denied the Motion to Withdraw Guilty Plea. On May 20, 2014, Luening filed, on behalf of the client, a second Motion to Withdraw Guilty Plea regarding the client's cocaine conviction.

In a Decision and Order dated May 27, 2014, the federal court denied the client's Petition for a Writ of Habeas Corpus. On June 2, 2014, the court denied the second Motion to Withdraw Guilty Plea. In the Decision and Order, the court stated, "The court's prior decision is fully responsive to the arguments raised in the defendant's second motion, and therefore, the court denies the defendant's second motion for the same reasons set forth in the prior decision."

On June 9, 2014, at a hearing in the removal proceedings before the Immigration Judge, Luening made a motion for continuance, which the Immigration Court denied. In an Oral Decision on June 9, 2014, the Immigration Judge stated, "On June 9, 2014, the Court was informed that the respondent's motion to withdraw his plea of guilty in that case had been denied. The Court inquired of respondent's counsel as to whether there is presently any Immigration relief that the respondent might qualify for. The Court was informed that there is not."

In an Order dated June 9, 2014, the Immigration Judge ordered that the client be removed from the United States to Mexico. Luening did not explain to the client the several forms of relief from removal the client could apply for in the removal proceedings.

The client terminated Luening's representation and hired successor counsel in the immigration proceedings. In an affidavit dated January 13, 2015, the client stated, "I don't know why Attorney Luening told the judge at my last hearing that there were no other kinds of relief available in my case. Based on my conversations with my new attorney, I know now that I was

eligible to apply for asylum, withholding of removal, and relief under the Convention against Torture, and voluntary departure when I was before the immigration judge.”

Successor counsel filed with the Board of Immigration Appeals the client’s appeal brief and motion to remand with his Form I-589, application for asylum, withholding of removal, and relief under the Convention against Torture along with supporting documentation alleging ineffective assistance of counsel by Luening.

In a Decision dated February 27, 2015, the Board of Immigration Appeals found, “The determination whether the respondent received ineffective assistance of counsel, and, if so, whether he was prejudiced, involves findings of fact. Therefore, we will remand the record to the Immigration Judge to address the respondent’s ineffective assistance of counsel claim and to decide whether further proceedings are warranted to allow the respondent an opportunity to apply for asylum or other forms of relief from removal. By remanding the record, we are not suggesting a desired outcome.”

On May 5, 2015, with the court’s approval, Luening formally withdrew from representing the client.

In a Decision dated September 3, 2015, the Immigration Judge found, “that the respondent was prejudiced by his former attorney’s ineffective assistance of counsel. Thus, the Court reopened the respondent’s case and moved forward on his applications for relief.”

In an Order dated September 3, 2015, the Immigration Judge denied the client’s application for asylum; withholding of removal; protection under the Convention Against Torture; and voluntary departure. The Immigration Judge further ordered that the client be removed to Mexico on the charges contained in the Notice to Appear. The Notice to Appear

charged him with removability for having been convicted of a controlled-substance offense and for being present in the United States unlawfully.

On October 2, 2015, successor counsel, on behalf of the client, filed an appeal of the Immigration Court's Decision and Order dated September 3, 2015. In a Decision and Order dated March 3, 2016, the Board of Immigration Appeals discussed each of the applications the client made to the Immigration Court, and then dismissed the appeal.

On March 10, 2016, successor counsel, on behalf of the client, filed a Petition for Review in the United States Court of Appeals for the Seventh Circuit.

The client moved for a stay of removal and it was denied. The client was removed to Mexico in early May 2016.

In a Decision dated August 24, 2016, the United States Court of Appeals for the Seventh Circuit found, "the Board of Immigration Appeals later remanded the case so that the immigration court could address [the client's] claim that his lawyer had provided ineffective assistance by neglecting to seek relief from removal. On remand the IJ concluded that [the client] had been prejudiced by his first lawyer's ineffective assistance and permitted him to apply for relief."

In the Decision dated August 24, 2016, the United States Court of Appeals for the Seventh Circuit dismissed in part and denied in part the client's petition for review.

By failing to prepare and file an application for asylum; withholding of removal; relief under the Convention against Torture; and voluntary departure, resulting in the court finding that the client was prejudiced by his ineffective assistance of counsel, and by otherwise failing to act in furtherance of the client's interests, Luening violated SCR 20:1.3, which states, "A lawyer shall act with reasonable diligence and promptness in representing a client."

By failing to explain to the client the several forms of relief from removal to the extent reasonably necessary to permit the client to make an informed decision in the removal proceedings, Luening violated SCR 20:1.4(b), which states, “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Third Matter

On or about April 11, 2015, a client hired Luening to represent him in a child custody and placement matter. Luening informed the client that he would file a petition for child custody and then provide the client with a copy of the petition.

At some point prior to August 4, 2015, Luening submitted a petition and other supporting documents to the Clerk of Circuit Court for filing.

On August 4, 2015, the Clerk of Circuit Court office returned the documents to Luening because certain documents were not notarized and payment for the filing fee had not been included with the petition. Luening admitted that he did not notarize necessary documents prior to submitting them to the Clerk of Circuit Court for filing and that he had not included a payment for the filing fee.

In August 2015, Luening wrongly informed the client that there was a court hearing scheduled for August 16, 2015, when in fact a petition had not yet been properly filed with the Clerk of Circuit Court.

After Luening mistakenly informed the client that there was a court hearing scheduled for August 16, 2015, the client informed him that August 16, 2015, was on a Sunday. Thereafter Luening assumed that the court hearing must be on Friday August 14, 2015, and then wrongly informed the client that the court hearing was on August 14, 2015. Eventually, Luening

informed the client that there was in fact no scheduled court hearing because the petition had not been filed. Luening's earlier representations regarding a court date occurred because Luening confused the client's matter with another client's matter.

Luening did not promptly respond to the client's text messages and telephone calls requesting information regarding the status of the case.

Ultimately, on September 23, 2015, Luening properly filed a petition; supporting documents; and a request for a waiver of fees and costs based on the client being indigent. On September 23, 2015, a Circuit Court Commissioner found that the client was indigent and granted a waiver of fees and costs in the case.

Luening admitted that his communication with the client could have been much better and that he understood the client's frustration. At a November 19, 2015 meeting with the client, Luening refunded the entire \$1,500 advanced fee that he had received from the client and offered to continue the representation pro bono. The client decided that he wanted Luening to continue to represent him in the case.

By failing to keep the client reasonably and accurately informed regarding the status of the case, and by failing to promptly respond to the client's text messages and telephone calls requesting information, Luening violated SCR 20:1.4(a)(3) and (4), which state, "A lawyer shall...(3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests by the client for information..."

Fourth Matter

In or around June 2015, a client hired Luening to represent him in a postconviction relief matter and an immigration matter. Luening stated the flat fee for his representation of the client was \$3,600. On June 30, 2015, the client's mother, on behalf of the client, made an advanced fee

cash payment to Luening in the amount of \$1,800, which Luening deposited directly into his business account. On August 5, 2015, the client's mother made another advanced fee cash payment to Luening in the amount of \$1,800, which Luening again deposited directly into his business account.

There was no written fee agreement for Luening's representation of the client. Luening did not communicate to the client in writing the scope of his representation or the basis or rate of his fee or expenses for which the client would be responsible. Luening did not communicate to the client in writing the purpose and effect of the advanced fees that were paid to him.

On July 10, 2015, Luening, on behalf of the client, filed a Motion for Postconviction Relief requesting that the court vacate the client's plea and reopen the criminal case. On February 19, 1998, the client had been found guilty of False Imprisonment, a class E felony, and sentenced to 18 months in state prison.

On August 3, 2015, Luening filed a Stay of Deportation or Removal in the immigration proceedings. On August 27, 2015, the court denied the client's motion for postconviction relief.

Luening had requested the 45-day stay of removal in order to give himself time to file a motion for postconviction relief and get a hearing in the criminal case. According to the DHS website, to date the client is still in custody at an Immigration and Customs Enforcement Detention Facility.

By failing to communicate to the client in writing the scope of his representation or the basis or rate of his fee or expenses for which the client would be responsible; and by failing to communicate to the client in writing the purpose and effect of the advanced fees that were paid to him, Luening violated SCR 20:1.5(b)(1), which states:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to

