SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-237
District Docket No. VIII-2008-0009E

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| IN THE MATTER OF | : |
| RICHARD S. PANITCH | : |
| AN ATTORNEY AT LAW | : |

Decision

Argued: October 15, 2009

Decided: November 24, 2009

Peter J. Hendricks appeared on behalf of the District VIII Ethics Committee.

Arthur H. Miller appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us at our July 16, 2009 session, at which time we determined to treat the District VIII Ethics Committee's ("DEC") recommendation for an admonition as a recommendation for greater discipline, R. 1:20-15((f)(4), and to hear oral argument.

The formal ethics complaint charged respondent with

violations of RPC 1.1(a) (gross neglect), RPC 1.4(b) (failure to communicate with the client), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The charges arose out of respondent's representation of a client in connection with a claim for wrongful termination of employment. We determine to censure respondent.

Respondent was admitted to the New Jersey bar in 1989. He has no history of discipline. He maintains an office in East Brunswick, Middlesex County, New Jersey.

In September 2004, Rosa Szulewski retained respondent to represent her in a wrongful termination of employment claim against Bloomingdale's (a/k/a Federated Department Stores, Inc.). The claim was based on a violation of the Law Against Discrimination. In that same month, Szulewski gave respondent $2,500 toward a $5,000 retainer.

One of the charges in the complaint is that respondent misrepresented to Szulewski, in late 2004, that the complaint had been filed. Szulewski testified that, just before Christmas 2004, respondent had told her that her "case" had been filed. She denied having received a December 22, 2004 email from respondent, enclosing a copy of a draft complaint and asking her to review it so that it could be filed. She pointed to a typographical error in the address listed in the email.

Respondent acknowledged the possibility that he may have misaddressed the email enclosing a draft complaint for Szulewski's review. He denied, however, having misrepresented to her that the complaint had been filed, maintaining that he would not have filed it without having Szulewski review it first. He testified that the complaint had been finalized in January 2005 and filed in September 2005. He explained that, during that eight-month gap, he was trying to "find someone that had some sort of decision-making ability at Bloomingdale's to talk about trying to settle the case without litigating it. I was reaching out and not getting any feedback."

On January 3, 2005, Szulewski paid respondent the remaining $2,500. One month later, on February 8, 2005, she signed the retainer agreement, a contingency/hourly rate hybrid.

Szulewski testified that she did not hear from respondent for the entire 2005 year. She did, however, call him three times during that year. In one of her phone calls, in May 2005, she asked respondent about the status of her case. According to Szulewski, his reply was, "[T]his is Essex County. Cases take a lot of time. Your case was recently filed." As indicated above, however, by that time respondent had not yet filed a complaint.

On January 12, 2006, the lawyer for Bloomingdale's, Jeffrey Siegel, with offices in Boston, served respondent with a notice

to produce documents. Neither side propounded interrogatories. Szulewski testified that, between January and April 2006, she sent all the documents she had to respondent and that respondent acknowledged having "everything." Respondent, in turn, testified that Szulewski first gave him documents in April 2006, minus her tax returns.

Szulewski's deposition was scheduled for March 7, 2006. After several postponements, it was re-scheduled for May 3, 2006. Siegel reminded respondent, in a letter dated April 18, 2006, that he had agreed to postpone a previously-scheduled deposition

> until after [Szulewski] responded to defendant's request for production of documents. Specifically, after failing to respond to our requests in advance of her deposition date on March 22, 2006, you stated that your client would provide defendant with her responses to its requests for production of documents on or before April 7, 2006, the date you would leave on vacation. To date, I have not received any such responses.
>
> Your client's refusal to respond to our discovery requests and repeated failure to meet the deadlines would make mediation a useless endeavor. That said, my client does not want this case to linger any more than it already has. Given the multiple schedules involved, I would propose that we reschedule Ms. Szulewski's deposition for May 3 or May 5, 2006, provided that she responds to the requests for production of documents no later than April 21, 2006 . . . .
>
> [Ex.C-6].

On April 20, 2006, Siegel wrote a letter to respondent confirming their conversation on that date about the re-scheduling of Szulewski's deposition for May 3, 2006, at 10:00 a.m., and also confirming respondent's agreement to "transmit Ms. Szulewski's discovery responses to me by overnight mail tonight. I will expect them no later than April 21st, 2006. If you anticipate missing this deadline, please let me know."

Respondent testified, however, that, notwithstanding his adversary's demand that the documents be provided by April 21, 2006, the adversary was willing to go forward with the May 3, 2006 deposition without the requested documents:

> In fact, I had spoken to Mr. Siegel, and as attorneys we have schedules and things happen. Generally you talk to a colleague and you engage in courtesies to one another. I said we have a problem with regard to our office computers having crashed, that we had a problem with our server, that my secretary was having heart attack-related symptoms and she had been in and out of the office and we were delayed in getting him the documents, and he understood and he was working with us in regard to the documents.
>
> [T201-4 to 16.]

On Friday, April 28, 2006, a few days before the May 3, 2006 deposition date, Szulewski learned that her grandfather, who lived in Nicaragua, had passed away. On Saturday, April 29, 2006, she and her husband left for Nicaragua. She returned in the afternoon of May 3, 2006. She immediately called respondent

because she learned that, during her absence, he had called her mother-in-law, asking for her whereabouts. Szulewski testified that respondent had conveyed his sympathy "for her loss" and had told her that they would "talk about [her missed May 3rd deposition] later." "That was it," according to Szulewski.

Szulewski testified that respondent never notified her of the May 3, 2006 deposition date, despite having had a phone conversation with him, on April 25, 2006, about the cancellation of a deposition scheduled for April 26, 2006. Although respondent had no specific recollection of that phone conversation with Szulewski, he stated that "[t]here [was] no reason in the world that we wouldn't tell her that there was a deposition for May 3rd. . . . If she had asked me, I would have told her it was on for May 3rd, because we got that letter." By "that letter" respondent meant his adversary's letter of April 20, 2006, confirming the re-scheduling of the deposition from April 26, 2006 to May 3, 2006.

In evidence is a letter from respondent to Szulewski, dated April 25, 2006, notifying her of the May 3, 2006 deposition date and instructing her (1) to contact his office upon her receipt of that letter "so that I may discuss this matter with you," (2) to call his office again the day before the deposition "to confirm this date and time if you have not already heard from my office,"

and (3) to contact either him or his secretary to set up an appointment to prepare her for the deposition.

At the ethics hearing, respondent's counsel pointed to an entry in respondent's records that read: "4/25/2006 . . . Prepare correspondence to client regarding deposition . . . " (Ex. R-33). Respondent described that exhibit as a "prebill work sheet," or the recording of time spent on a particular case, in that event of a fee application to the court. According to respondent, either he or his secretary records the entries, based on information that he gives to the secretary. Asked by his counsel if the entries are recorded contemporaneously with the service provided, respondent replied, "We try to." Asked if he had made any changes to Ex.R-33 since the initial entries, he answered that, if he had seen a mistake when reviewing it, he might very well have made changes in the entries.

Contrary to respondent's testimony, Szulewski maintained that she never received an April 25, 2006 letter. In fact, in a letter to respondent, dated October 16, 2006, Szulewski denied having received notice of the deposition: "I do not understand this, because I never received a deposition letter from you on this day. I have all the letters that you have mailed me. You never gave me a copy of the letter that there was a deposition on May 3, 2006."

On Monday, May 2, 2006, Siegel, who was traveling from Boston to New Jersey, called respondent to confirm that the deposition would take place on the following day, as scheduled. Without consulting with Szulewski, respondent confirmed the date. According to respondent, he then attempted to reach Szulewski, without success.

Szulewski's mother-in-law, Gloria Szulewski ("Gloria"), testified that, on Saturday, April 29, 2006, she received a phone call from respondent, asking for Szulewski. Gloria told him that she was in Nicaragua for her grandfather's funeral; respondent then conveyed his condolences and told her that he would get in touch with Szulewski. Gloria was certain that respondent's call had taken place on Saturday, April 29, 2006, because, she remembered, April 29th was the day after Szulewski's birthday and the same day that Szulewski had left for Nicaragua. According to Gloria, respondent never mentioned that Szulewski had a deposition scheduled for May 3, 2006.

John Rachinsky, respondent's law partner, testified at the DEC hearing. According to Rachinsky, on May 2, 2006, as he was leaving for the day, he saw respondent on the phone, trying to call counsel for Bloomingdale's because he had not heard from Szulewski. The next morning, respondent told Rachinsky that he had been able to locate a relative of Szulewski by conducting a

computer search and that the relative had informed him that Szulewski was out of the country.

At the DEC hearing, respondent described his efforts to reach Szulewski on May 2, 2006, the day before the deposition:

> I was calling repeatedly every single number that I had for [Szulewski] . . . . I do have a recollection of being very frantic about the fact that -- quite frankly, I thought something had happened to her because she and I had had a bunch of conversations before. She wanted to have her deposition done; she knew we were trying to reschedule it. I knew that she knew about the deposition. The fact that I couldn't get hold of her, I thought that something, God forbid, had happened to her.
>
> . . . .
>
> I am sure that I would not have confirmed with the other side the deposition if, in fact -- if I did not believe 100 percent that she was going to be appearing. I am sure we had told her.
>
> [T193-1 to T194-14.][1]

Respondent claimed that, after he was unable to reach Szulewski, he began to call Alison Greenberg, the New Jersey attorney at whose office (McCarter English), the deposition was to take place. He could not reach her. It is not clear whether he also attempted to reach counsel for Bloomingdale's in Boston.

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[1] T denotes the transcript of the DEC hearing on January 14, 2009.

At the DEC hearing, the panel chair asked respondent if, before scheduling Szulewski's deposition, he had asked her if she was available on the intended date. Respondent replied:

> [A]: Yes. Don't forget, it had been rescheduled a bunch of times before, and she said basically whenever you can do it.
>
> [Q]: She said you can do it anytime?
>
> [A]: At your convenience.
>
> [Q]: But when Siegel [defense counsel] called you up [on April 20, 2006 (Ex.R-11)] to reschedule the dep --
>
> [A]: There was a phone conversation, yes.
>
> [Q]: -- you agreed to the date without consulting with her? You had carte blanche from her to do it at any date?
>
> [A]: If there was a problem, I would have gotten back to her and said -- the intent was to notify her. If there was any particular problem, I would have said, Mr. Siegel, we have a problem. But she had given me carte blanche.
>
> [Q]: This was ten days before the scheduled deposition?
>
> [A]: Right.
>
> [Q]: Did you call her up after talking to Mr. Siegel and say, Rosa, is May 3rd okay with you?
>
> [A]: I wrote her the letter asking her to contact me. I believe I spoke to her on April 25th and told her about the date, and there was no objection. If she called our office that day, there is no way we didn't tell her about the date.

[Q]: She called because her deposition was scheduled on the 26th?

[A]: Right.

[Q]: And at that time she was told that the deposition was cancelled?

[A]: Right. I am saying by 3:30 in the afternoon, since I had a conference with Mr. Siegel on the 20th. I already knew the deposition was changed to another days' date. If she called at that time, she would have been given the new date.

[Q]: At some point after the deposition is scheduled, I assume -- tell me if I am wrong -- that Mr. Siegel's office called your office to confirm the deposition?

[A]: Yes.

[Q]: When did he do that?

[A]: I don't recall. I'm sure that it was the day before.

[Q]: And you confirmed it?

[A]: Yes.

[Q]: without having talked to your client?

[A]: I did not talk to my client because I already sent her a letter. I already talked to her on the 25th confirming the date with her. The problem became later on when I couldn't reach her at night or during the afternoon to discuss her case with her.

[Q]: Does your letter say, this will confirm our conversation?

[A]: No, because it is a standard letter.

[Q]: And Mr. Siegel also in that letter confirming the deposition, the April 20th letter to you [Ex.R-11], says, I will expect to receive the discovery no later than April 21st?

[A]: Correct, but he was willing to go forward without that.

. . . .

[Q]: After you spoke to him [on April 20, 2006], did you call Rosa up and tell her you needed discovery?

[A]: You are asking me about events. I wish I could tell you better, but that happened a long time ago.

. . . .

I am telling you our normal practice. If we didn't talk to her about the deposition date, someone would have called her. That is just what the normal practice is. When you have a deposition date, we call and we write a letter.

[Q]: But isn't it normal practice before you physically confirm a deposition to call your client to make sure she is coming?

[A]: Not if the client has already told you that it is not a problem and -- listen, if you want to find fault with me for that, I am telling you the truth.

[T245-18 to T250-15.]

Later, too, respondent testified that he would have never confirmed a deposition if he had not believed that the client was aware of it and was available to attend it. He added:

> I had written a letter. There was no problem. It appeared that she wanted to go forward. Any date was okay. I believe back then I recall I had spoken to her. I don't have that recollection now so many years behind and I am not going to lie to you and say I have a specific recollection I told her about the date because I don't.
>
> [T265-25 to T266-7.]

According to respondent, having been unable to contact Szulewski on May 2, 2006, on the morning of May 3, 2006, through a search device, he obtained a phone number for her mother-in-law, who informed him that Szulewski was attending a funeral out of the country. He denied that the conversation had taken place on April 29, 2006, as claimed by the mother-in-law. Had that been the case, respondent stated,

> [t]here is no reason in the world that I wouldn't call off the deposition and tell people that Ms. Szulewski was at a funeral and we need to reschedule.
>
> . . . .
>
> I would not have called my adversary the morning of [sic].
>
> [T197-23 to T198-8.]

In the morning of May 3, 2006, respondent called Siegel, who had already traveled from Boston to New Jersey, and explained the situation to him. Siegel then asked the court reporter present at the deposition site to place on the record

the contents of his telephone conversation with respondent.

Szulewski testified about the next time that she heard from respondent, after their May 3, 2006 phone conversation:

> Well, normally, like I said, I would get a letter, deposition in May. There was a deposition in June, August. There were other ones. He kept canceling. Then we had a -- actually, one of the meetings that we did have, it was August 30th.
>
> [T36-8 to 13.]

On May 17, 2006, Siegel filed a motion to compel discovery, dismiss the complaint without prejudice, and receive payment for attorney's fees and expenses "associated with scheduling, attending, and conducting the deposition of plaintiff on May 3, 2006, which she did not attend." Respondent did not oppose the motion. He testified:

> [T]here was no opposition. [Szulewski] had not appeared for her deposition. We had not provided the documents yet. She had not -- we had not yet produced her for a deposition. I didn't see how we could meaningfully oppose the motion.
>
> Just so you know, the motion to dismiss without prejudice, even if it is entered, is not an uncommon thing. Basically you comply with whatever it is that is missing and you have 90 days to do that. If you do it within the first 30 days you pay a $100 restoration fine; 90 days, $300.
>
> [T203-13 to 25.]

Respondent added that, if discovery is provided before the

motion is heard, "[g]enerally the motion is withdrawn. The problem here was the fact that [Szulewski] hadn't appeared for a deposition and they wanted costs for all these people coming down. The thrust of that motion was about the missed deposition."

On June 9, 2006, the court entered an order giving respondent twenty days to "provide full and complete written responses to Demand for Production of Documents, and Demand for Statement of Damages," provide "full and complete written responses to Bloomingdale's First Request for Production of Documents," and produce to Bloomingdale's counsel "all documents responsive to said discovery requests." The order also provided that, "[o]n failure to comply [p]laintiff and/or plaintiff's counsel shall pay defendants the reasonable expenses incurred in obtaining this order, including attorney's fees." The order further provided that "[p]laintiff and/or plaintiff's counsel shall pay defendants the reasonable expenses incurred associated with scheduling, attending, and conducting the deposition of plaintiff on May 3, 2006, which she did not attend."[2] The court did not dismiss the complaint.

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[2] Although, throughout the record, there are references to court-imposed sanctions, the amounts assessed by the court consisted of reimbursement for attorney's fees and costs associated with "scheduling, attending, and conducting the deposition of plaintiff on May 3, 2005." Therefore, this decision will refer to the court-ordered payments as fees and costs, rather than sanctions.

Although respondent had in his possession, for about one month, all the documents requested by his adversary (except for Szulewski's tax returns), he did not provide them to his adversary because, he claimed, his office was in the midst of a computer crash.

At the DEC hearing, one of the panel members asked respondent what possible effect a computer crash would have on his production of documents:

> [Q]: I am puzzled by a question about this computer crash or whatnot. How did that impact you producing documents?
>
> [A]: It basically creates a gigantic drag with everything we do in our practice. On a daily basis you do motions, complaints. You rely on things you did in the past and access it off your computers. We maintain our central calendar, which there was a whole corruption of data.
>
> [Q]: But the documents to be produced, you didn't scan them into your server, did you?
>
> [A]: Ms. Szulewski did not, according to her, provide me with the documents until April. They were already overdue by the time she got them to me. We were trying to put them in an attorney form, so to speak. But when she supplied them to me, it still had to be responded to in terms of going through it.
>
> We have one secretary, a major computer crash. In terms of the scheduling, this was not the only case going on in the office, so it created a big problem.
>
> [Q]: Are you saying it was a distraction?
>
> [A]: It was more than a distraction. It was

> something that hampered our ability to function on a daily basis.
>
> [Q]: It wasn't necessarily specific to this case, but sort of systematic practice wise it was a weight upon your ability to conduct business?
>
> [A]: It is kind of a snowballing effect. You are trying to work on all these cases. Thankfully we had an attorney on the other side that was understanding.
>
> [T240-19 to T242-8.]

Szulewski testified that she did not know about the May 2006 motion and that she has never seen the court order of June 9, 2006. As to whether he had given Szulewski a copy of the motion, respondent told the hearing panel:

> I can't tell you whether or not. I looked in my correspondence. She is not CCed on anything that I see. I do know that we talked about it with her.
>
> . . . .
>
> And we certainly talked with her about it after the fact. These discovery motions are fairly easy for counsel to do on their own, so it was not that we really needed her input on it. I am sure we talked to her about it, but it was certainly not something we got input from her on.
>
> I looked real hard. I don't recall the exact transmittal date to her of that. I certainly know that well before the settlement took place, before November 15th she was in our office a number of times. We gave her the whole file.
>
> [T242-20 to T243-16.]

Later, when respondent was asked again if he had given Szulewski a copy of the pending motion, he replied that he "may or may not have."

At the DEC hearing, one of the panel members questioned the propriety of respondent's lack of opposition to the motion:

> [Q]: The other thing I am shaking my head about is you said you didn't oppose the first motion that they filed. Your response was basically there wasn't any defense. Wasn't there some defense of, hey, she had an emergency in the family and I don't want to expose my client to sanctions because it wasn't an intentional act?
>
> [A]: The sanctions were going to be imposed regardless for not appearing at a deposition when people were from out of town. The only sanction was the reinstatement fee. Our firm would have fronted that.
>
> The only sanction you're talking about is the motion to reinstate, if that motion was granted. The order was just compelling discovery. It was not a serious motion in terms of someone's case being dismissed with prejudice.
>
> [T243-22 to T244-16.]

In July 2006, Siegel filed another motion. This time respondent filed an objection. According to respondent,

> we disclosed to the judge the circumstances about why she was not at the deposition and that it was no fault of hers. When something is our fault, we admit it . . . . We told the judge about the computer problem we were having and our secretary situation with our office. So, there was nothing done to hide

> the ball, whatsoever. We were honest and forthright with the court.
>
> [T209-17 to T210-5.]

Following oral argument on August 4, 2006, at which Rachinsky, not respondent, appeared, the court dismissed the complaint without prejudice and ordered respondent to provide written responses to Bloomingdale's request for the production of documents and to produce to Bloomingdale's counsel all documents responsive to their discovery requests, all within ten days of service of the order. The court order, filed on August 18, 2006, also provided that

> 3. Plaintiff and/or plaintiff's counsel shall pay defendants, no later than September 22, 2006, the reasonable expenses incurred in obtaining this order, including attorney's fees, subject to submission by Defendants's counsel of a certification of costs and attorney's fees.
>
> 4. Plaintiff and/or plaintiff's counsel shall pay defendants $3,670.45, representing the reasonable expenses incurred associated [sic] with scheduling, attending, and conducting the deposition of plaintiff on May 3, 2006 . . . as ordered by this Court on June 9, 2006. Arrangements for payment shall be submitted by Plaintiff's counsel to Defendants' counsel within 10 days hereof. Final payment shall be made not later than November 24, 2006.
>
> 5. Plaintiff and Panitch & Rachinsky, LLC shall be held jointly and severally liable for all amounts owed to defendants for costs incurred, including attorneys' fees.

[Ex.C-9.]

Respondent testified that he was "surprised" by the result, which he characterized as punitive:

> The amount of the sanctions was the surprise, because while I can understand there being a sanction for counsel having to appear, there was not a reason under the circumstances to have an order requiring my client to pay for their client to come, to eat meals, to fly in from out of town, especially when their client is not required to begin with. If they want to engage in that expense -- they have a right to be there. But there was no need for us to pay, and I thought that was especially punitive.
>
> [T210-9 to 20.]

After defense counsel submitted a certification of fees and costs, the court fixed the amounts assessed against Szulewski and respondent at $6,036.26.

With respect to the documents requested in the January 2006 notice to produce, respondent told the hearing panel that he had supplied them to his adversary before the second motion had been decided. According to respondent, "[t]he only issue after that second motion and that second order was the sanctions with regard to [Szulewski's] deposition." Contrarily, the court order that resulted from that second motion suggests that the production of documents was still an outstanding issue. Paragraph 2 of the court order directed respondent to comply

with, among other things, defense counsel's "First Request for Production of Documents to Plaintiff." In that respect, paragraph 2 of the second order, dated August 18, 2006, mirrored paragraphs 1, 2, and 3 of the prior court order, dated June 9, 2006, also compelling respondent to produce the requested documents. The preamble of that second order made it clear that one of the forms of relief requested by defense counsel was to "Compel Discovery."

Maintaining that the documents had been produced before the return date of the motion, respondent speculated that the discovery language in the second order was a remnant from the proposed form of order submitted by defense counsel along with his motion. He testified that "[t]he issue was not with regard to these documents. The issue -- all of this happened because the deposition was missed. The deposition was missed because she was out of the country. We didn't have anything to do with that."

When he was asked if he had informed Szulewski of that second motion, respondent answered somewhat equivocally: "I am sure that I did . . . We had also talked about the motion and the fact that she didn't appear. And I asked her about specific details about the trip, I think." Later, he became less equivocal and testified that Szulewski was "absolutely informed

about [this motion]." Asked by the presenter to reference the time when that discussion would have taken place, respondent stated,

> I honestly can't tell because there is, for example, a reference to July 26th. Telephone call to client regarding same.[3] I don't know if that means that I spoke to her or tried to reach her, I don't have a specific recollection about that. But I do know that -- as I said to you before, we are not perfect. But I do know that we spoke with her about the fact that we are opposing the motion.
>
> [T211-10 to 19.]
>
> I would certainly make the client aware of [the motion], but the fact is there is no opportunity in discovery motions for the client to participate. We put forth a certification by me as to what occurred . . . . This was not something that I needed active participation in by the client.
>
> [T212-11 to 20.]

The panel chair asked respondent if Szulewski had "signed an affidavit saying, I was out of the country, my grandfather died, and here are the airline tickets?" Respondent answered, "No, because she had spoken to me. Frankly, I did not believe that that was required because I was setting forth in the certification exactly what my client told me with regard to opposing the motion."

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[3] "Same," according to respondent, meant "document request."

Contrary to respondent's testimony, Szulewski denied having been informed of this or any other motion that resulted in court orders. She claimed that respondent did not disclose to her that the lawyer for Bloomingdale's had filed two motions to dismiss her complaint. She added that she learned about them later, through the internet, sometime between October 10 and October 13, 2006. Szulewski testified about her discovery:

> I went to the internet. I went to the website they have for the court. I put my docket number and it shows up there, that at that time I only knew it was a motion to dismiss forever. I didn't know anything about the first motion, second motion.
>
> [T40-21 to T42-1.]

Indeed, respondent acknowledged to the hearing panel that he did not "know if he had physically sent [a copy of the second motion] to [Szulewski]." As noted earlier, he was also unsure as to whether he had given her a copy of the first motion or notified her of the pendency of that motion. He recalled that the first time that he had discussed the court orders with Szulewski was August 30, 2006. That was also Szulewski's testimony.

On August 30, 2006, respondent and his partner, Rachinsky, met with Szulewski and her husband. After respondent disclosed the entry of the August 18, 2006 court order to Szulewski, he told her that she was responsible for the counsel fees/costs

because she had missed the May 3, 2006 deposition. Although respondent did not have a specific recollection of the discussions that took place on that day, Rachinsky testified that Szulewski was informed that the court had held both her and his firm jointly and severally liable for the fees and costs.

Szulewski detailed what transpired at that August 30, 2006 meeting:

> [Respondent] called me. We had a talk about the judge order. He explain [sic] to me there was a sanction and because the reason I did not show up [sic]. I said to him, I did not show up because you never send [sic] me the letter and I spoke to you around that week, April 25th. He said, you have to pay if you want to go forward with your case.
>
> He started telling me that Judge Giles would not give me ten minutes of his time, that my case will be discussed right on the spot and that wouldn't be too smart because my husband had a blood pressure problem. Why do you want to go through that. I said I was not buying his story. I did not believe a judge would give me a sanction of $6,000 because I didn't show up, that it had to be more than that. It was. I never got a copy of a judge order. He just told me about it.
>
> [T37-8 to T38-2.]

When Szulewski asked respondent for a copy of the order, he told her that he would fax it to her later. She did not receive it until October 9, 2006, when she went to his office to demand a copy. After reading the order, Szulewski called respondent:

> I said, Richard, you know what -- I says [sic], you didn't hand in some paper on time. He said, don't worry about that part because that is normal from attorney to attorney, to hand in paper late.
>
> [T43-23 to T44-3.]

Respondent, too, testified about his conversation with the Szulewskis at the August 30, 2006 meeting:

> I do recall there being a conference with Mr. and Mrs. Szulewski to explain the sanctions, why the judge did what he did, the fact that we didn't think that it was right, what he did. We told her that these needed to be paid for her case to go on. It was part of the order . . . . [Szulewski] was mystified that the judge would order that amount of money to be paid.
>
> [T215-13 to T216-2.]

Later on, respondent acknowledged that he did not have "a specific recollection of the actual meetings [with Szulewski], other than that they occurred and that there was a long meeting about it."

After the August 30, 2006 meeting, respondent continued to insist, in his letters to Szulewski, that she was responsible for the payment of the $6,000.

On October 4, 2006, Siegel filed a third motion, this time asking for the dismissal of the complaint with prejudice because the fees/costs had not been paid. According to respondent, Szulewski did not have the funds to pay them. The motion was

adjourned to give the parties an opportunity to negotiate a settlement. This time, Szulewski was aware of the motion.

The payment or waiver of the fees/costs was a topic of discussion during the settlement negotiations. In a letter to Szulewski, dated October 12, 2006, respondent repeatedly alluded to her obligation to pay the court-ordered fees/costs, in an effort to convince her to settle the case. The letter stated:

> I want to relay to you the substance of my conversation with defense counsel and impress upon you why I think it is imperative that you settle your case.
>
> Yesterday, I spoke with [the attorney for Bloomingdale's] and he offered the sum of $9,000 to settle your case plus he advised his client was willing to waive any and all sanctions imposed by the Court for your non-appearance at your deposition. Those sanctions are now at $6,036.26 and I expect that after the next motion the judge will award additional sanctions for your not paying this amount to date and for them having to file this current motion to compel your payment. When we spoke some time ago when the Order was first entered, my partner and I both advised you that this amount had to be paid as a condition for your case to continue. You advised me that you did not have the funds to pay this amount.
>
> . . . .
>
> In addition, by going forward, you would have certain costs. There would be depositions for which you would have to pay a Court Reporter, there would be trial preparation costs for exhibits, etc. assuming you got to a trial and there would be other miscellaneous costs as well. In addition, you would have to pay as a prerequisite to going forward the sanction

amounts I discussed with you previously.

. . . .

Moreover, a settlement would eliminate the order to pay the Court awarded costs now in excess of $6,000.

. . . .

Moreover, the Judge will require you to pay the amounts discussed as a condition of going forward. I think it would be foolish for you to pay these amounts as I do not realistically think you would benefit from a trial as the calculations above demonstrate. Finally, you have told me how this case is taking a toll on your husband's blood pressure. That toll would only get worse if he was forced to endure days of his and your deposition, depositions of other witnesses, taking large amounts of time to work with me to oppose their subsequent summary judgment motion, and then taking off 3 weeks to a month from school and work to attend trial every day which will be required assuming your case gets to trial.

. . . .

[Ex.C-10.]

Respondent ended the letter with the following admonishment to Szulewski:

If you decide to proceed you must immediately provide us with the $6,034.26 to pay the defendants for the sanctions before the motion currently scheduled for next week. If you do not provide same the Judge will likely dismiss your case for good and you will still be obligated to pay the current sanctions as well as any other expenses awarded for the current motion. Accordingly, instead of getting $10,000 you could potentially have to pay that amount.

[Ex.C-10.]

On October 16, 2006, Szulewski replied to the above letter. Essentially, Szulewski renewed her requests for copies of the orders, motions papers, and "case file," informed respondent that she would consider settling the case if she received the above documents, which, she stated, she had been requesting for a long time, and expressed her opinion that respondent, not she, was responsible for the fees/costs because "it was due to your fault, not mine." She closed the letter by saying, "Lastly, I believe that you should pay the sanctions, if you do not pay, I am going to appear on Friday, October 20, 2006, at the motion and I will explain to the [sic] Judge Ryan everything what [sic] is happening with my case."

Respondent did not give Szulewski a copy of her file until late October 2006. Szulewski testified that, in reviewing her file, she became aware of motions filed by counsel for Bloomingdale's: "I started seeing all the motions. I couldn't believe it."

On October 17, 2006, respondent again warned Szulewski that, if she did not pay the amounts ordered by the court, there would be adverse consequences to her:

> Plus the sanctions must be paid before the motion date of November 3, 2006 because then they will likely withdraw their motion. You cannot pay the sanctions the day of the motion because it will be too late, the other attorney will have flown in from Boston and you will be assessed not

> only the existing sanctions but the cost of this motion as well. Also, the Judge in my professional opinion will simply ask "was [sic] the sanctions paid?" If we say no, the Judge won't care about all the other arguments and will dismiss your case with prejudice (forever) right there and then. Then you will have no case and you will owe the defendants even more money. This simply doesn't make sense when there is an offer to settle the case now that will result in the sanctions going away and you getting money.
>
> [Ex.C-12.]

On November 15, 2006, respondent, Szulewski, and counsel for Bloomingdale's appeared for a settlement conference before the Honorable Peter V. Ryan, J.S.C.[4] The parties appeared before Judge Ryan once again, on December 1, 2006, at which time the terms of a settlement were placed on the record. Rachinsky, not respondent, appeared on that day. The settlement provided for the waiver of the counsel fees/costs owed to defense counsel. The waiver of the fees/costs was a factor that Szulewski took into consideration in agreeing to settle her case. She indicated

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[4] According to respondent, as part of the settlement, Szulewski agreed to withdraw a fee arbitration request that she had filed against him. Respondent told the hearing panel that "[p]art of the resolution was she signed the form saying I am withdrawing my fee arbitration request and I am satisfied with the amount that was charged by counsel." Respondent charged Szulewski a $2,000 fee.

By the time of the settlement, Szulewski had already filed an ethics grievance against respondent (October 30, 2006). Respondent denied knowing of the grievance. The Office of Attorney Ethics' records indicate that an investigator was not assigned to the grievance until after the settlement.

to Judge Ryan that she was voluntarily waiving her right to a trial and accepting the sum of $10,000 in settlement of her claim, but added that she "had no choice."

At the close of his direct examination, respondent denied any wrongdoing, but acknowledged that he could have given the requested documents to his adversary sooner:

> I certainly didn't do anything unethically wrong. Could we have gotten the documents to the defense counsel sooner? Yes. I disclosed it to the court that was our office's fault, that we were having problems with our computer system, my secretary. Could I have gotten them the documents quicker? Absolutely.
>
> By the same token, defense counsel was working with us. They understood the problem. This is something that frequently happens with attorneys. But for this deposition which caused this whole cascading effect, we wouldn't be here today.
>
> [T235-7 to 20.]

The hearing panel report summarized the presenter's and respondent's positions on the allegations of the formal ethics complaint. The presenter's position was that respondent had not kept Szulewski informed of significant developments in the case, including the scheduling of her deposition for May 3, 2008. The presenter maintained that "it was grossly negligent for Respondent to confirm a deposition without talking to his client and . . . it was improper for Respondent to then tell his client

that she was responsible for the sanctions imposed by the court." At the hearing, the presenter conceded that respondent's conduct was not fraudulent, but maintained that it constituted deceit and misrepresentation.

Respondent, in turn, took the position that he had done nothing unethical. He maintained that he had handled the file in a proper manner and had achieved a favorable result for his client. He added that he had performed an "enormous amount of work for a minimal fee." He claimed that he had notified Szulewski of the May 3, 2006 deposition by letter dated April 26, 2006, and that he had reached out to confirm it by phone on May 2, 2006. He admitted that he had confirmed the deposition with defense counsel without consulting with Szulewski. His position was that Szulewski alone was responsible for the payment of the counsel fees/costs because she had failed to attend the deposition.

The DEC found that respondent "did not act in a manner that constituted gross neglect, and thereafter [sic] did not violate RPC 1.1(a)." The DEC noted that, although respondent had waited nine months to file the complaint, he had done so within the statute of limitations. Similarly, although the DEC remarked that respondent did not comply with discovery requests "as quickly as he should have and he did not respond to the first

motion at all," the DEC concluded that his "inaction at that point did not rise to the level of gross neglect. While the panel is concerned with Respondent's failure to respond to the first motion, he did provide a plausible explanation and we cannot find that his action rose to the level of gross neglect." Additionally, even though the DEC characterized as "careless" respondent's scheduling of the deposition without discussing it with his client, it did not equate it to gross neglect.

On the other hand, the DEC found that respondent violated RPC 1.4(b) when he did not advise Szulewski of two of the motions that led to the dismissal of her complaint and to the award of counsel fees/costs; did not inform her of the June 6, 2009 court order (the DEC remarked that the order "should have been provided to the client who had an absolute right to know what had happened and who could have assisted in the making [sic] sure that the Discovery demands were satisfied within the twenty days ordered by the court"); and when he replied to the second motion to dismiss without involving his client (the DEC labeled that action "puzzling" and respondent's explanation "unacceptable").

The DEC concluded that respondent did not involve Szulewski in his reply to the second motion because

> he was purposely keeping his client uninformed in the expectation that he would be able to resolve the problem without his client ever learning that there was a problem. This was

> wrong. Respondent should have involved his client in the process and kept her informed as to what was going on, and his failure to do so was a violation of RPC 8.4.
>
> [HPR13].[5]

The DEC found nothing wrong, however, with respondent's decision to personally discuss the August 18, 2006 order with Szulewski and her husband at a meeting on August 30, 2006. In the DEC's view, "this appear[ed] to be a reasonable method of dealing with a difficult situation." But the DEC faulted respondent for not having given Szulewski a copy of the order at that time. It found that "[r]espondent did not give his client a copy of the Order of August 18, 2006 (and the Order of June [9], 2006) because he did not want her to know that the Order said the 'Plaintiff and/or Plaintiff's counsel' shall be responsible for the payment of counsel fees/sanctions."

As to RPC 8.4(c), the DEC found that, "[i]n particular, the Committee maintains that Respondent committed an ethical violation by insisting that the Orders of June [9], 2006 (C-8) and August 18, 2006 (C-9) required [Szulewski] alone, and not Respondent himself or the two of them jointly, to pay the counsel fees and expenses." The DEC concluded that respondent's conduct after his receipt of the court orders constituted deceit and misrepresentation. Specifically, the DEC noted that

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[5] HPR denotes the hearing panel report.

> [t]hroughout his letters to [Szulewski], Respondent insisted that his client was responsible for the payment of this $6,000, when in fact, both orders said that the "Plaintiff and/or Plaintiff's counsel" will be responsible for payment. This was Respondent's position when he met with his client, and that was his position when he testified before the panel. [Szulewski] maintains that although the Order was discussed at the August 30, 2006 meeting, Respondent did not give her a copy of the order of August 18, 2006 until October 9, 2006. Without showing her the Order of August 18, 2006 (or the order of June [9], 2006), the only information that [Szulewski] had was that she had to pay the sanctions and counsel fees. There is no good explanation as to why he did not give her a copy of these orders other than he wanted his opinion as to who should pay the sanctions to prevail. Although Respondent ultimately gave his client a copy of the Order of August 18, 2006, he did so only after repeated requests.
>
> [HPR14-HPR15.]

The DEC concluded that respondent's "insistence that his client alone was responsible for the payment of the $6,000 sanction" was a violation of RPC 8.4(c). The DEC noted:

> [Respondent] simply does not see how he is responsible for the payment of those fees, when in the opinion of the panel, he was responsible for those fees because he confirmed the deposition without talking to his client, and after receiving the Order of June [9], 2006, he did not provide the Discovery within twenty days as required. At the very least, Respondent should have explained to his client that he and she were both potentially responsible for payment of that amount.
>
> Once the counsel fees/sanctions were imposed and payment made a condition of the case continuing, settlement negotiations included the additional

> factor of whether the payment of this $6,000 was going to be forgiven as a condition of settlement. At this point, Respondent had a personal interest in the case, and his failure to disclose this to his client when they met on August 30, 2006 was dishonest. Although Respondent maintains that this was not an issue in the ultimate outcome of the case, his position cannot be accepted. The court-ordered sanctions most certainly were a factor in the negotiations that led to the settlement of the case, and certainly were a factor in Respondent's interest in settling the case.
>
> The Panel notes that [Szulewski] accepted the settlement and testified that she considered the settlement to be fair and equitable, and her testimony cannot be ignored, but throughout these negotiations, Respondent consistently told his client that she would have to pay any sanctions . . . . [I]t was Respondent's duty to point out to his client that the court had imposed a joint responsibility to pay this sanction.
>
> [HPR15-HPR16.]

As mentioned above, the DEC recommended an admonition.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. We find that all of the charges of the complaint have been proven, with the exception of the allegation that respondent misrepresented to Szulewski, in late 2004, that the complaint had already been filed when, in fact, it was not filed until September 2005. Szulewski testified that respondent had told her, before Christmas 2004, that "her case had been filed." She

also testified, however, that her fee agreement with respondent called for the payment of the second $2,500 installment when the final draft of the complaint was ready. She did not pay the second installment until January 2005. Therefore, she could not have understood that the complaint had been filed in December 2004, before her payment of the balance of the retainer.

The remaining charges have been proven by clear and convincing evidence.

Unquestionably, respondent violated RPC 1.4(b). As found by the DEC, he did not inform Szulewski of the pendency of the first motion, did not inform her of its outcome, and did not give her a copy of the court order. Specifically, as found by the DEC, respondent "did not advise his client that counsel fees would be awarded if Discovery demands were not satisfied within twenty days, and he did not advise his client that the 'Plaintiff and/or Plaintiff's counsel' were to pay the costs of the missed deposition." Those were important directions by the court, which Szulewski had the right to know and which had a significant impact on her decision to settle the case, as seen by her statement to the court that she had no choice but to accept a $10,000 settlement. That her case might not have great merit, as respondent contended, is irrelevant to Szulewski's perception that she was forced to accept the settlement to avoid

the payment of $6,000 in fees and costs.

Likewise, respondent did not disclose the second motion to Szulewski. It was not until August 30, 2006 that he revealed to her that the court had ordered the payment of attorney's fees and costs (which he termed "sanctions") to the lawyers for Bloomingdale's because she had missed her deposition on May 3, 2006. Despite Szulewski's request, respondent did not give her a copy of the order at that time. He told her that he would fax it to her later. He did not. Szulewski did not see the order until October 9, 2006, when she went to respondent's office and demanded a copy.

But respondent's conduct regarding the two motions went beyond simply failing to apprise Szulewski of critical decisions made by the court. It was fraught with deceit and dishonesty, a violation of RPC 8.4(c), and the DEC so found. We agree with the DEC's finding that respondent did not give a copy of the court orders to Szulewski because he did not want her to know that the court had made him, too, responsible for the payment of fees and costs.

We are aware that Rachinsky testified that Szulewski was informed, at the August 30, 2006 meeting, that respondent, too, had been held responsible for the payment of fees and costs. The weight of the evidence, however, establishes otherwise.

Szulewski's testimony, respondent's failure to promptly apprise Szulewski of the motions and court orders and to seek her participation in such motions, his lack of specific recollection of the discussions that took place at their August 30, 2006 meeting, his failure to comply with Szulewski's requests for a copy of the August 18, 2006 order, and, significantly, the DEC's finding, after having observed the demeanor of the witnesses and assessed their credibility, that respondent had deliberately concealed the court orders from Szulewski "because he did not want her to know that the Order said the 'Plaintiff and/or Plaintiff's counsel' shall be responsible for the payment of counsel fees/sanctions" all convince us that respondent did not disclose his joint and several liability to Szulewski.

Egregious, too, was respondent's statement to Szulewski, at the August 30, 2006 meeting, that Szulewski was solely responsible for the payment of the $6,000 counsel fees/costs imposed by the court. He never disclosed to her that the motions were partially based on his failure to comply with his adversary's notice to produce.

Incidentally, we note that the first court order, dated June 9, 2006, did not award legal fees to defense counsel for Szulewski's failure to appear for her deposition. The legal fees were to be awarded only if respondent did not, within twenty

days, comply with the discovery requests set out in the court order. The order provided that, "[o]n failure to comply [with discovery requests within twenty days of the order] Plaintiff and/or plaintiff's counsel shall pay defendants the reasonable expenses incurred in obtaining this order, including attorney's fees" [emphasis added]. It was by way of its next order, filed on August 18, 2006, that the court awarded legal fees to defense counsel because of respondent's failure to provide discovery within the twenty days previously set by the court.

All in all, we find that respondent's premeditated course to shift the blame from him to Szulewski was driven by dishonesty and self-interest.

Respondent's handling of the motions, also, was improper and violative of RPC 1.1(a). He would have us believe that such motions are not an "uncommon thing;" that they do not require the client's involvement; and that they are not "serious" motions. On the one hand, in attempting to justify not having filed an opposition to the first motion, respondent explained to the inquiring panel member that no opposition was necessary because the motion was all about discovery and "basically you comply with whatever it is that is missing and you have 90 days to do that. If you do it within the first 30 days you pay a $100 restoration fine; 90 days, $300;" On the other hand, he told the

hearing panel that he did not file an opposition to that motion because he "did not see how [he] could meaningfully oppose [it]," given that Szulewski had missed her deposition. In other words, to justify not having told his client about the motion and not having presented to the court a certification or affidavit from her explaining the emergent circumstances that led to her non-appearance at the deposition, respondent trivialized the significance of the motion by labeling it a discovery motion that did not require an opposition. In the same breath, however, he states that the "thrust" of the first motion was not discovery, but the missed deposition; as such, any opposition would have been pointless because the truth of the matter was that Szulewski had not shown up for her deposition.

That the motions were indeed serious is unquestionable. Both brought serious financial consequences to Szulewski. The second motion resulted in the dismissal of her complaint, albeit without prejudice. Even so, such motions are not to be taken lightly, as respondent obviously did. Had he given them the attention that they deserved, had he explained to the court the dire circumstances that led Szulewski to leave the country suddenly and unexpectedly, and had he supplied all the necessary documents to Siegel, it is possible that the court would not

have ordered the payment of fees and costs. In fact, Rachinsky testified that, when he argued the motion on August 4, 2006, the judge wanted to know why Szulewski's airline tickets had not been attached to the response to the motion.

It is also unquestionable that, despite respondent's assertions to the contrary, the motions were very much about his failure to comply with defense counsel's January 2006 notice to produce and not only about the missed deposition. The first court order required him to provide the documents requested by his adversary within twenty days. If he failed to do so, either he or Szulewski would have to pay attorney's fees to the adversary. Why respondent did not provide the documents in April 2006, when he had them in his possession, or at the least after the motion was filed is not plausibly explained. That the tax returns were missing should not have precluded him from providing what he already had. Presumably, the court would have viewed such action as a ready willingness or good faith effort to comply with the adversary's discovery requests.

Discovery was at the heart of the second motion as well. The court order that ensued directed respondent to comply with the notice to produce within ten days. It also dismissed the complaint and assessed attorney's fees for respondent's failure to abide by the first discovery order. Respondent's attempted

explanation that the provision for the production of documents within ten days was a remnant from the proposed form of order submitted by the adversary when the motion was filed defies logic and reason. It is incomprehensible that the court would have overlooked crossing out the relevant paragraphs of the order, that the adversary would not have brought this circumstance to the court's attention, and, moreover, that respondent would not have complained that those provisions were now moot because he had already given the requested documents to his adversary. It follows, then, that respondent's testimony that he had given the documents to defense counsel before the return date of the motion must not have been credible.

That the submission of documents listed in the notice to produce was considered essential by Siegel is evident from the record. He conditioned his agreement to schedule Szulewski's deposition for May 3, 2006 on respondent's submission of the documents by April 21, 2006. His two motions asked the court to compel respondent to comply with his notice to produce. In the first motion, he asked for attorney's fees if respondent failed to comply with the twenty-day deadline; in the second motion, he asked for and was granted attorney's fees for respondent's failure to comply with the discovery provisions of the first order. Those actions were not consistent with respondent's

assertion that his adversary had agreed to proceed with the deposition without the documents and that the adversary was being very understanding about his computer problems, problems that, incidentally, should not have had any effect on respondent's ability to mail to his adversary the documents supplied by Szulewski.

Respondent's failure to involve Szulewski in the reply to the second motion constituted gross neglect as well. As noted above, if respondent had obtained a certification from Szulewski, supported by relevant documents, stating that she was attending her grandfather's funeral in Nicaragua at the time of her deposition, the court might have understood the emergency of the situation and might have vacated its prior provision for the payment of fees and costs. The inevitable inference is that respondent did not apprise Szulewski of the motion because he did not want her to be aware that he had not complied with defense counsel's requests for discovery. In any event, his failure to properly respond to the motion amounted to gross neglect.

We now turn to the issue of Szulewski's knowledge of the May 3, 2006 deposition.

It is undisputed that respondent scheduled the deposition without first consulting with Szulewski to determine whether she was available on that date. According to respondent, Szulewski

had given him "carte blanche" to schedule the deposition. Nothing contradicted respondent's assertion in this regard.

Respondent testified, however, that he had sent Szulewski a letter, on April 25, 2006, notifying her of the new May 3, 2006 date. He also pointed to his "prebill work sheet," which contains an entry for the preparation of "correspondence to client regarding deposition," on April 25, 2006. Although the reliability of that record has not been duly established -- respondent testified that the entries are not always made contemporaneously with the service rendered and that he makes changes to the entries if he sees a mistake during his review -- we are unable to conclude to a clear and convincing standard that Szulewski was not aware of the May 3, 2006 date. Why, for instance, would respondent have a phone conversation with her, on April 25, 2006, about the cancellation of a scheduled deposition for April 26, 2006, and not inform her of the new May 3, 2006 date, when that date had been set five days before, on April 20, 2006? Altogether, the proofs do not clearly and convincingly demonstrate that respondent did not notify Szulewski of the May 3, 2006 date.

It was respondent's conduct after Szulewski missed the deposition that was unethical. His most grievous act was his concealment from Szulewski that the court had held him jointly

responsible for the fees and costs granted to defense counsel. The pattern of deceit that followed was aimed at self-benefit and became even more obvious when respondent pressed Szulewski to settle the case. The record is replete with his attempts to coerce Szulewski into a settlement and his forecasts of doom for her, should she not heed his advice to accept the defendant's settlement offer. Having developed a personal interest in avoiding responsibility for the payment of $6,000 to the adversary, respondent's duty was to withdraw from the case because, at that moment, his own interests and those of his client were on a collision course. His protestations that he had advised Szulewski to obtain another attorney, if she was dissatisfied with his representation, fell miles short of explaining to her, in detail, that their interests were conflicting and that, as a result, he might not be able to represent her with the highest degree of fidelity.

Respondent insists that he did no wrong. As the DEC properly pointed out,

> [r]espondent's position as to who should pay the counsel fees did not vary from the time the order was entered through the time that he testified at the ethics hearing. He simply does not see how he is responsible for the payment of those fees, when in the opinion of the panel, he was responsible for those fees because he confirmed the deposition without talking to his client, and after receiving the Order of June [9],

> 2006, he did not provide Discovery within twenty days as required.
>
> [HPR15.]

In his brief to us, too, respondent continued to insist that "it was [Szulewski's] responsibility to pay the sanctions as it was her failure to show up for the deposition which caused the problem in the first instance." He showed no introspection, no recognition of wrongdoing, no contrition.

What discipline, thus, is appropriate for respondent's ethics wrongs? A reprimand is required for a single instance of misrepresentation, In re Kasdan, 115 N.J. 472, 488 (1989), let alone a pattern of concealment, as in this case. Furthermore, respondent's actions were aggravated by selfish motives, giving rise to a conflict between the interests of his client and his own and causing him to breach his duty to look after his client's well-being. Troubling also was his refusal to acknowledge any improprieties on his part. The only mitigating factor here is respondent's clean disciplinary record.

Albeit in another context, two lawyers who engaged in a pattern of deception received a six-month suspension. In In re Fink, 141 N.J. 231 (1995), the attorney provided false information in five real estate closings, made a false statement to a prosecutor in the course of an investigation, and took an improper jurat. The attorney derived no personal benefit from

the transactions, other than his fees. Other mitigating factors were the attorney's loss of a lucrative position with his corporation-employer and the absence of a disciplinary history. In In re Guilday, 134 N.J. 219 (1993), too, the attorney was suspended for six months for displaying a pattern of deceit by failing to disclose quasi-criminal arrest records in his application for admission to the bar. When he was given an opportunity to rectify his offenses, he chose to perpetuate them.

In In re Dykstra, 181 N.J. 345 (2004), an attorney was suspended for three months for engaging in a pattern of misrepresentation in a real estate transaction, including lying in a certification to the court and altering the designation of the payee on a check, after it had been negotiated, in order to avoid a malpractice suit against him. The attorney had received an admonition and a three-month suspension.

But see In re Becker, 181, N.J. 297 (2004) (attorney reprimanded for engaging in a pattern of deceit to circumvent rent control procedures by attempting to collect higher rents than those to which he was entitled; the attorney also failed to file the required documentation to obtain approval from the Rent Control Office for an increase in the rents; seven strong mitigating factors, including the lack of an ethics history, justified keeping the sanction at the reprimand level).

Guided by the above cases, we find that a reprimand would be insufficient because one instance of misrepresentation alone requires a reprimand. In re Kasdan, supra, 115 N.J. 472. Here, respondent displayed a pattern. Although the attorney in Becker also engaged in a pattern of deceit and was moved by self-benefit, multiple, compelling mitigating factors justified only a reprimand. Except for respondent's lack of prior discipline, no such mitigation is found in this case.

On the other hand, we believe that a term of suspension, the discipline meted out in Fink (six months), Guilday (six months), and Dykstra (three months), would be excessive in this case. Fink's conduct also included lying to a prosecutor in the course of a criminal investigation; Guilday's included lying under oath to bar admission officials; and Dykstra's included lying in a certification to the court and altering the designation of the payee on a check.

We are mindful that the lack of a disciplinary record in respondent's twenty-year legal career is a strong factor in his favor. We cannot, however, overlook the seriousness of his ethics offenses, aggravated by his failure to recognize his errors and his lack of regret for his conduct. We, therefore, determine that a censure is the appropriate degree of discipline for respondent.

Vice-Chair Frost dissented, believing that, notwithstanding the absence of a disciplinary record, respondent's pattern of deceit, obvious aim at self-benefit, refusal to concede that he acted wrongfully, and total lack of remorse warrant no less than a three-month suspension.

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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard S. Panitch
Docket No. DRB 09237

Argued: October 15, 2009

Decided: November 24, 2009

Disposition: Censure

| ***Members*** | Disbar | Three-month Suspension | Censure | Dismiss | Disqualified | Did not participate |
|---|---|---|---|---|---|---|
| Pashman | | | X | | | |
| Frost | | X | | | | |
| Baugh | | | X | | | |
| Clark | | | X | | | |
| Doremus | | | X | | | |
| Stanton | | | X | | | |
| Wissinger | | | X | | | |
| Yamner | | | X | | | |
| Zmirich | | | X | | | |
| Total: | | 1 | 8 | | | |

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel