SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-467

IN THE MATTER OF

PAUL A. DYKSTRA

AN ATTORNEY AT LAW

Decision

Argued: March 19, 1998

Decided:

Gregory J. Irwin appeared on behalf of the District IIB Ethics Committee.

Respondent waived appearance.

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

This matter was before the Board based on a recommendation for discipline filed by the District IIB Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1973 and maintains a law office in Hasbrouck Heights, Bergen County. Respondent has no prior ethics history.

The ten-count complaint alleged various acts of misconduct arising out of three separate real estate matters.

The Petruzelli Matter - District Docket No. IIB-95-034E

The amended complaint alleged violations of RPC 1.3(lack of diligence), RPC 1.4(a)(failure to communicate) and RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation).

In or about October 1989 Joseph and Marybeth Petruzelli retained respondent to represent them in the purchase of a house in Wallington, New Jersey. Having lived in the house as renters for some time prior to the purchase, the Petruzellis were aware of an easement granting certain neighbors the use of a driveway on the property. However, within months of the purchase, the use of the driveway changed substantially. Mr. Petruzelli testified that his next door neighbor, Walter Wargacki,

> was driving trucks, and his tenants were using the driveway, even though they had their own. I was having lots of traffic. We just paved the driveway and it was being abused. I had some confrontations with the tenants. Mr. Wargacki had put his children in the extra house that was using the driveway, and there was a lot of verbal conflict going on. I had tried to ask him to stop. It did not happen.

Mr. Wargacki also set about acquiring other neighboring properties. Increasingly concerned about the use of the driveway, Mr. Petruzelli retained respondent to negotiate a possible sale of the house to Mr. Wargacki.

Over the course of the next year, after Mr. Wargacki apparently expressed interest in purchasing the Petruzellis' house, respondent negotiated on the Petruzellis' behalf. By early 1991 it was apparent that Mr. Wargacki was stalling. Mr. Petruzelli testified that he had authorized respondent to initiate litigation, recalling a February 12, 1991 letter from respondent requesting a $400 retainer to "initiate litigation against Mr. Wargacki for purposes of requiring that he cease his excesive[sic] use of your driveway easement". Mr. Petruzelli made that payment on February 21, 1991. Over the course of the case, he paid respondent a total of $1,500.

Mr. Petruzelli testified that respondent prepared a certification to be used in the litigation. From February 1991 through September 1991 respondent continued to pursue a sale of the property to Mr. Wargacki and, according to Mr. Petruzelli, also moved forward with the litigation. Indeed, the record shows that respondent prepared a complaint and supporting certification and sent them to Mr. Wargacki's attorney, Richard S. Cedzidlo, as a "pre-filing courtesy." Mr. Cedzidlo confirmed the receipt of the yet unfiled complaint on June 4, 1991.

In a total of twelve letters to the Petruzellis over the ensuing three years, respondent led them to believe that a court action was pending. For example, in a September 16, 1991 letter to the Petruzellis respondent confirmed his intention to file suit:

> Pursuant to our discussions, it has become increasingly obvious that we will not be dealing with Mr. Wargacki as he is more intent on delaying this matter possibly based upon his pending local election. We have agreed that we will no longer afford to

> him an opportunity to delay this case. As I discussed with Mrs. Petruzelli, I am slightly revising your certification so we can show the Court that we have made every effort to resolve this matter.
>
> I am enclosing an original and one copy of the revised certification and ask that you review it and if acceptable, sign and return the original as soon as possible so that I may furnish it to the Court.

Another letter, dated October 10, 1991, read as follows:

> With regard to the above matter and in response to your questions, we have not received a trial date and I am not in a position to project when the judge will actually schedule a date for us.

Mr. Petruzelli testified that, during that period, he had numerous conversations with respondent about the matter and that respondent assured him that the case was proceeding apace. According to Mr. Petruzelli,

> the excuse was that the courts are backed up. There were numbers given to me where we stood in the Court's list of cases. Forty-two was the number used . . . I can't give you the exact date. It was somewhere in that vicinity of time. I don't have that information exactly. But I did at work the following year of June 6, 1994, I had a calendar hanging up in my office, and we went from forty-two to number nineteen of that period. . . I called Paul and I would ask him, Paul, where am I? How come it's taking so long? What number was I? And he would throw a number out to me. Number nineteen was given to me, and I scribbled it on my calendar at work on June 6, 1994.

In October 1994, three years after he authorized respondent to sue Mr. Wargacki, Mr. Petruzelli reviewed the court records and found out, for the first time, that respondent had never filed suit. On November 2, 1994 Mr. Petruzelli called respondent and asked him for

the docket number, knowing that none existed; respondent allegedly told Mr. Petruzelli that he could not find the file. According to Mr. Petruzelli, from then until early 1995 respondent made a number of excuses for not having information about the case and never told the Petruzellis that he had not filed suit. Finally, on December 30, 1994, the Petruzellis retained a new attorney, John L. Blunt. Mr. Blunt sent a series of letters to respondent over the next four months requesting information about the case. Respondent replied by letter dated March 22, 1995. In that letter respondent requested a meeting to discuss the case. By letter dated March 27, 1995 Mr. Blunt indicated his willingness to meet with respondent and asked respondent to advise him of his availability for the meeting. Respondent never replied to that letter. On May 18, 1995, Mr. Petruzelli filed a grievance against respondent.

Mrs. Petruzelli also testified at the hearing. She confirmed her husband's version of events:

> It was always - [respondent] would always make us believe that we were going to court.... We would go there every time and he'd give us the same answer, I can't find it right now, I'll have my secretary call you back. We'd never get these telephone calls back, never.

For his own part, respondent testified that he had been retained to resolve the easement problem at the least possible expense to the Petruzellis. He cited his February 28, 1991 letter to the Petruzellis, in which he characterized the Petruzellis' desire to minimize expenses. That, respondent argued, excluded litigation as an option. He admitted, however, receiving $1,500 in fees from the Petruzellis, explaining that the fees were for the amicable

settlement of the matter. He also admitted that, although he had drafted a complaint, he had not filed it for two reasons; 1) there was no written retainer agreement and 2) Mr. Petruzelli wanted respondent to minimize costs. He remembered telling Mr. Petruzelli at some point in the case that the matter was number nineteen on the court list. Respondent conceded that his comments about the court list and the references in numerous letters to the Petruzellis about the court and trial dates would lead anyone to believe that he had filed suit. Although respondent acknowledged never telling the Petruzellis that he had not filed suit, inexplicably he stopped short of admitting that this conduct amounted to misrepresentation of the status of the case.

The Morano Matter

The amended complaint alleged violations of RPC 1.3(lack of diligence), RPC 1.4(a)(failure to communicate) and RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation).

In or about 1986 Gerard and Frances Morano retained respondent to represent them in the sale of their residence to another couple, the Sermabeikians, and the purchase of a newly constructed house. The building code required that certain violations in the new house be corrected before the closing. Apparently some, but not all, of those repairs were made prior to the closing, which took place in March 1986. According to Mr. Morano, respondent was retained to close title first and then to file suit against the builder. Mr. Morano testified

that in December 1986 he gave respondent a $425 retainer to initiate litigation against the builder. According to Mr. Morano, respondent accepted the check and said nothing about using the $425 for legal fees owed for the sale of the Moranos' old house, as respondent later claimed. Mr. Morano testified that he worked in the same town as respondent and that he often saw him on the street over the following years:

> I saw him in August two years later, '86 [sic], outside of Fisher's Luncheonette, he was getting his coffee in the morning, and I said to him, Paul, what's happening in the case? He said, Gerry, I think we're going to go to court in October. So I said, will you let me know, because my wife has to put in for a personal day and I will take a day off. Okay. So that went by the wayside. Never heard from him again.
>
> And I saw him again on the Boulevard. We conversed a lot on the Boulevard. I saw him again and I asked him what happened about the case. He informed me that the Bergen County court system was so overcrowded that they took a lot of judges off my kind of case and put them on domestic violence cases, so that's why it's a backlog for my kind of case. He said, but we are pursuing it. Okay?
>
> And then during the course of the years, I called him and I got the same responses from his secretary saying that he's not in. He's sick, he's this, he's that, I'll have him return your call. Never returned my call.

Mr. Morano testified that, over the next ten years, he called respondent approximately twenty times and saw him in person ten or more times. On those occasions, respondent would always assure him that the case was progressing.

Mrs. Morano also testified. She claimed that she discussed the case with respondent some four years after Mr. Morano delivered the retainer; respondent told her that the case

was pending and counseled her to be patient. According to Mrs. Morano, approximately two years later, she spoke to respondent's secretary and requested that respondent call her back with information about the case; respondent never returned her call. Finally, in the summer of 1996, Mrs. Morano researched the case through the court system and found out that no docket number existed.

As to respondent's use of the $425, the Moranos denied receiving a bill from respondent about outstanding fees for the sale of their old house, as respondent alleged. They recalled receiving a letter from respondent, dated December 3, 1986, requiring a retainer to be paid before the filing of a complaint against the builders.

For his part, respondent testified that he never filed suit against the builder because the Moranos never paid him the retainer. Respondent pointed to his December 3, 1986 letter to the Moranos, which stated as follows:

> Additionally, would please[sic] forward a retainer in the amount of $300 so that I may commence additional work. Upon receipt of such amount, we shall file your complaint and process your case.

Respondent acknowledged that Mr. Morano had brought him a check in December 1986, but stated that it was in the amount of $350, not $425, as the Moranos contended. Respondent claimed that the $350 related to legal fees in connection with the sale of the Moranos' house to the Sermabeikians. Respondent insisted that he had told Mr. Morano that he required an additional retainer before starting litigation against the builder.

Respondent produced two ledger cards in an effort to shed light on the purpose of the $350 payment. The first ledger card was entitled Sermabeikian; the second was entitled West End Plaza and Sermabeikian. West End Plaza was the builder of the new house. Respondent explained that he maintained a separate ledger card for the sale and purchase aspects of the transaction and that he had applied the Moranos' $350 payment to old fees in Sermabeikian. Yet, the Sermabeikian ledger shows only a $450 fee received on January 31, 1986, some eleven months prior to the Moranos' December 1986 payment. That ledger card shows no $350 entry. Likewise, the ledger card in West End Plaza and Sermabeikian shows a $350 receipt for fees on December 9, 1986, six days after the Moranos' payment.[1]

Respondent denied telling the Moranos that their case was pending or that it would go to trial "in October," as the Moranos alleged. Respondent remembered telling the Moranos, however, that the court had a backlog. He qualified this admission, though, by adding that he had no reason to make that statement to the Moranos because there was no case pending.

Respondent was adamant that on December 3, 1986 he had sent a bill to the Moranos for the old case in the same envelope as his request of even date for a retainer in the West End Plaza matter. Finally, respondent denied ever discussing the case with Mr. Morano after Mr. Morano gave him the $350 check.

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[1]There was testimony about another check from the Moranos to respondent in the amount of $35. dated June 16, 1986. Neither respondent nor the Moranos could explain its significance.

The Romano Matter

The amended complaint alleged violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) [mistakenly referred to as RPC 1.4(c)] and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

In or about October 1988 Riccardo and Ann Romano and their son Frank retained respondent to file a lawsuit for damages resulting from a persistent sewer blockage that backed up into Frank Romano's basement apartment in the Romano home. The Romanos asserted that respondent was also supposed to file a claim under their homeowner's warranty and that he never did so.

After respondent filed suit against the municipality and other defendants, the Romanos retained an expert to testify about the sewer problem. At some point during the litigation, the expert ran for a borough council seat and backed out of the case due to a conflict of interest. The case was then set down for trial at least eight times over the next four years. The last trial date was set for May 12, 1992. On March 30, 1992 respondent sent a letter to the Romanos notifying them of the May trial. Apparently, that letter was respondent's last correspondence with the Romanos.

Frank Romano testified that, in June 1993, some four years after the Romanos retained respondent to file suit, the elder Romanos refinanced their house. According to Frank, at the closing he had asked respondent about the status of the litigation; respondent had told him, in the presence of his parents, that the suit was moving onward.

Frank had little more to do with the matter until December 1995, when he called the court and found out that the complaint had been dismissed twice, first in 1991 and then on May 12, 1992, for plaintiff's failure to appear at trial. Based on that information, on December 28, 1995 Frank sent a letter to respondent asking about the status of the case. Respondent did not reply to that letter. Frank also made "countless" telephone calls to respondent, none of which prompted a response. On January 3, 1996 Frank sent another letter to respondent demanding information about the case or, in the alternative, that respondent return the file. This letter drew a January 4, 1996 reply from respondent advising the Romanos that their file was available to be picked up. It is unknown if the Romanos ever did so.

Frank also testified that the Romanos had received four letters from respondent after the grievance was filed. In those letters respondent had mentioned the need to obtain a new expert and the Romanos' alleged agreement to find the new expert.

Frank further testified that he visited respondent at his office three times after Frank became involved in the case in 1995. On the first occasion Frank had delivered bills related to the flood damage. On the second occasion he had met with respondent to discuss the case. On the final occasion he had given respondent a copy of the homeowner's warranty and asked him to file a claim on the Romanos' behalf.

Frank testified that respondent never discussed with him the need to retain a new expert. According to Frank, respondent discussed that problem directly with his father, Riccardo. Frank testified that respondent had never informed him of the dismissal of the suit.

Riccardo Romano, apparently elderly and with memory problems, testified that he remembered some things about the case. He recalled retaining respondent on a contingency basis and reading a letter from respondent confirming that the Romanos had to find a new expert. Riccardo remembered a letter from respondent stating that a new expert would cost between $2,500 and $3,000. He also remembered informing respondent of his own unsuccessful attempts to obtain a new expert. Lastly, Riccardo admitted that respondent told him that without a new expert there was no hope for success in the case.[2]

On the other hand, Riccardo recalled that, when he asked respondent about the case at the 1993 closing, respondent replied that the case was moving along, urging Riccardo to be patient. Significantly, all of respondent's correspondence and communications with Riccardo about the expert took place in 1992, before the closing, when respondent told Riccardo that the case was progressing. According to Riccardo, respondent never told him that the complaint had been dismissed.

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[2]Frank later testified, on redirect examination, that both the Romanos and respondent were supposed to try to retain an expert. Frank claimed that his father's testimony about new expert letters from respondent was mistaken, that his father suffered from Alzheimer's disease, and that his father had seen those letters only after Frank had showed them to him. According to Frank, he had obtained the letters in the course of the ethics matter.

Riccardo's wife, Ann Romano, also testified that she had discussed the sewer case with respondent at the 1993 closing. According to Ann, respondent told the Romanos that the case was moving along. Ann vigorously asserted that, had respondent told them prior to the refinancing that the complaint had been dismissed, they would not have retained respondent for the 1993 loan refinancing.

Respondent, in turn, testified that most of his dealings were with Riccardo Romano. Respondent contended that he was never retained to file a claim under the homeowner's warranty, stating that the warranty covered plumbing work for a period of two years and that the warranty had expired before his involvement in the case. For that reason, respondent continued, the Romanos' only recourse was litigation. Respondent claimed that things were moving forward until the expert withdrew from the case. Respondent recalled many discussions with Riccardo, prior to the dismissal of the case, about retaining a new expert. None of those discussions were documented.

Respondent also testified about the dismissals. Apparently, the case was improperly dismissed in August 1991 for plaintiff's failure to answer interrogatories, and was restored on November 12, 1991. With regard to the May 1992 dismissal, respondent stated the following:

> What happened later on, however, was the fact that because we didn't have an expert's report, motions were filed in order to either compel an expert report or to strike any testimony related thereto. Exhibit R3 then SSS is an order of the court doing exactly that. We did not have an expert report. I was never asked to have an expert. We had conversations. The client

> wanted to hire their own expert. That was their instruction. I told them what would be necessary if they wanted me to do it. They didn't want to do it. Those are my conversations with Riccardo Romano throughout that time period.
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> We then received subsequent trial dates and my discussions with Mr. Romano was [sic]to the effect that we were not - if we went to trial, we were going to get blown out of the water. We didn't have - we wouldn't even be able to get a jury. Without an expert witness, our case would be dismissed immediately after we presented our evidence. What we decided to do was simply to take the only way out we had . . . So the only way we could do it was by dismissing for failure to prosecute.

At the DEC hearing respondent remembered, for the first time, two telephone conversations with Riccardo at the time of the May 12, 1992 dismissal. Respondent alleged that, in those conversations, he informed Riccardo that he, respondent, had not appeared on the trial date and that the case had been dismissed for that reason:

> Basically, I reiterated the fact that we needed to have an expert, that we weren't going to proceed with the May 12 trial date. We couldn't have proceeded with the May 12 trial date because we would have lost. I told him we took the only way out we had at that time and we had to have an expert. I reiterated that a million times.

With regard to the 1993 refinancing, respondent claimed that he told the Romanos "that their case was being processed, exact words.... What I meant by that was that I still had the ability to restore it if I could get an expert." Respondent admitted that he did not tell the Romanos about the dismissal that day "because it was a secondary matter."

* * *

In Petruzelli, the DEC found a violation of RPC 1.3 for respondent's failure to file suit; RPC 8.4(c) for respondent's misleading letters to the Petruzellis, misrepresentations regarding court delays in scheduling the case for trial, [and about the case being number forty-two and number nineteen on the court's trial calendar]; and RPC 1.4(a) for respondent's failure to communicate with his clients and for his admitted attempt to reduce the frequency of the Petruzellis' calls to his office about the case.

In Morano, the DEC dismissed all charges for lack of clear and convincing evidence of any ethics violations.

In Romano, the DEC found a violation of RPC 1.3 for respondent's failure to restore the complaint after the May 12, 1992 dismissal; RPC 1.4(a) for his failure to advise the Romanos of the dismissal and his failure to respond to Frank's repeated requests for information about the case; and RPC 8.4(c) for his misrepresentations during the refinancing and also for his failure to advise the Romanos of the dismissal.

Finally, the DEC found a pattern of neglect, in violation of RPC 1.1(b), for respondent's misconduct in Petruzelli and Romano. The DEC recommended a proctor for a minimum of two years, as well as a psychiatric evaluation and counseling. While the DEC initially considered recommending a suspension, it failed to state what discipline, short of a suspension, was appropriate.

* * *

Upon a de novo review of the record, the Board was satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

In Petruzelli, respondent came very close to admitting a pattern of misrepresentation to the Petruzellis about the status of their case. It is undeniable that respondent's letters and conversations over a period of more than three years led the Petruzellis to believe that an action was pending, when, in fact, respondent had not filed suit. Respondent conceded as much. Although respondent claimed that his statements to Mr. Petruzelli about the case's position on the court's list was an effort to prevent the Petruzellis from making further inquiries into the status of the case, they were no less a misrepresentation. Such statements, as well as no fewer than twelve letters from respondent, induced the Petruzellis to believe that their suit was advancing as expected. Clearly, thus, respondent's false statements to the Petruzellis constituted conduct involving deceit and misrepresentation, in violation of RPC 8.4(c). Also, in light of the inevitable conclusion that respondent made numerous misrepresentations to the Petruzellis that a suit was pending, respondent's testimony that he was not retained to file suit is rendered devoid of any credibility.

With regard to respondent's alleged lack of diligence and gross neglect, once the Wargacki deal fell through, respondent did nothing to further the Petruzellis' claims. Indeed, from that point on respondent's energies were expended in hiding the truth from the

Petruzellis, instead of moving the case forward, as evidenced by his misleading letters. Mr. Petruzelli authorized the filing of the suit against Mr. Wargacki in September 1991. Despite that authorization, from September 1991 through the end of 1994 respondent did nothing to institute suit. Respondent's misconduct in this regard violated both RPC 1.3 and RPC 1.1(a).

Lastly, in view of the fact that respondent communicated with the Petruzellis about the case — albeit untruthfully — the Board dismissed the charge of a violation of RPC 1.4 (a). Although the DEC found that respondent's false statements to the Petruzellis were a violation of RPC 1.4 (a), RPC 8.4 (c) more properly addresses that sort of misconduct. Therefore, the Board found a violation of RPC 8.4 (c).

In Morano, there was conflicting testimony in several critical areas. The Moranos admitted that they received respondent's December 3, 1986 letter requiring a $300 retainer prior to filing suit. Nonetheless, although the Moranos were unable to explain why they had paid more than the amount respondent had requested, they insisted that they had paid respondent a $425 retainer. On the other hand, respondent claimed that Mr. Morano had delivered to him a $350 check, instead of a $425 check, which was designated for the payment of prior legal work, as opposed to a retainer, and that, in fact, Mr. Morano had been surprised to hear that respondent required a retainer prior to initiating litigation. In turn, the Moranos denied that the $425 was earmarked for legal fees in the older matter, claiming that they never received respondent's $350 bill for that matter, despite respondent's contention

that the bill had been sent in the same envelope as his December 3, 1986 letter, which the Moranos acknowledged receiving. In this regard, the parties' testimony and the documentation on their respective positions made little sense. The Moranos produced a check register with a $425 entry for a check to respondent on November 29, 1986. Respondent produced a ledger showing the receipt of $350 six days later, on account of the older matter. According to either version, the numbers do not match, generating confusion in the record.

Because none of the testimony from either side is buttressed by any documentation, the resolution of the case boils down to the credibility of the parties. Unfortunately, there is no believable version of events. Otherwise stated, the credibility issues cannot be resolved in favor of either party. Under these circumstances, the Board decided to defer to the DEC's findings, as the latter had the opportunity to observe the parties' demeanor and to gauge their credibility. Like the DEC, the Board dismissed the charges in the complaint for lack of clear and convincing evidence.

In Romano, respondent filed suit and the matter proceeded apace for some time. Ultimately, however, the lack of an expert caused the undoing of the case. Respondent admitted discontinuing work on the case after the expert's withdrawal. In this context, there was conflicting testimony about whose responsibility it was to retain a new expert: respondent's or the Romanos'. Riccardo, allegedly suffering from Alzheimer's disease, assumed the blame for not finding an expert. In a suspicious show of poor timing, respondent suddenly recalled two critical telephone conversations with Riccardo in which he allegedly

explained to Riccardo that they could not prevail at trial without an expert and that the best course of action was to allow the case to be dismissed for failure to prosecute. Respondent claimed that it was at Riccardo's instruction that he did not appear on the trial date. There is no other testimony or documentation in the record to support respondent's assertions in this regard.

According to all three Romanos, however, respondent told them at the time of the 1993 refinancing that the case was moving forward. If, as respondent alleged, he had already told Riccardo in May 1992 that he would not be appearing at trial and that, therefore, the case would be dismissed, he had no reason to tell the Romanos in 1993 that the case was progressing; more believably, he would have reiterated to them that the complaint had been dismissed for failure to obtain an expert. Yet, by telling the Romanos that the suit was moving along, respondent led them to believe that whatever difficulties might have existed before as a result of the failure to retain an expert, had been overcome. Respondent attempted to explain, however, that his statement to the Romanos that the case was "being processed" meant that it could be reinstated if an expert were found. Respondent's testimony in this context appears contrived. The case was not being "processed;" it had been dismissed. Had respondent been truthful, none of the Romanos would have left the closing believing that their case was still alive. The conclusion is unavoidable that respondent attempted to hide from the Romanos that the complaint had been dismissed and to mislead them that it

was proceeding as expected. The Board found that respondent's misconduct in this context violated RPC 8.4(c).

With regard to the allegations of lack of diligence and gross neglect, respondent argued that he followed Riccardo's instructions by not attending the trial date. Riccardo, however, denied that respondent ever told him that the case would be dismissed, although he recalled trying unsuccessfully to find a new expert on his own. In effect, respondent blamed the Romanos generally, and Riccardo in particular, for not having an expert ready to testify at trial. Respondent would have one believe that he did all he could by having the case dismissed without prejudice. However, the record is devoid of any evidence to support respondent's contention that it was the Romanos' responsibility to find an expert or that there was an agreement that they would assume any responsibility for that aspect of the case. If such an agreement existed, it should have been reduced to writing. There are no letters, telephone records, notes or other documents evidencing such an understanding. In view of all of these circumstances, the Board found that respondent's testimony on this score cannot be believed. The Board found that respondent's failure to procure an expert and his failure to appear at trial, resulting in the dismissal of the case, was a violation of RPC 1.3 and RPC 1.1(a).

As to the alleged violation of RPC 1.4(a), Frank Romano testified that he made "countless" attempts to obtain information about the case. He claimed that, when his inquiries failed, he finally wrote to respondent requesting that respondent either supply

information about the case or return the file. Here, the Board found that respondent's failure to communicate with Frank prior to a demand for the return of the file was in clear violation of RPC 1.4(a).

Finally, with regard to the alleged violation of RPC 1.1(b), the Board generally finds a pattern of neglect only where there are three or more instances of simple or gross neglect present. Only two such instances occurred here. Therefore, the Board dismissed that charge.

In summary, in Petruzelli, respondent showed lack of diligence (RPC 1.3), gross neglect [RPC 1.1(a)] and a pattern of deceit and misrepresentation in a series of letters and conversations with his clients [RPC 8.4(c)]. In Romano, respondent displayed a lack of diligence (RPC 1.3), failure to communicate [RPC 1.4(a)], gross neglect [RPC 1.1(a)] and misrepresentation of the status of the case [RPC 8.4(c)].

In cases dealing with misrepresentations to clients, often accompanied by gross neglect, lack of diligence and failure to communicate, the appropriate degree of discipline is generally either a reprimand or a short term of suspension. See, e.g., In re Cervantes, 118 N.J. 557 (1990) (reprimand imposed where the attorney failed to pursue two workers' compensation matters, exhibited a lack of diligence and failed to keep the clients reasonably informed about the status of the matters; in one matter, the attorney misrepresented the status of the case); In re Silverberg, 142 N.J. 428 (1995) (reprimand imposed where the attorney exhibited gross neglect, lack of diligence and misrepresentation in a real estate matter, by failing to amend a RESPA statement to accurately reflect the terms of the transaction); In re

Martin, 120 N.J. 443 (1990) (public reprimand imposed where the attorney displayed a pattern of neglect in six matters in addition to misrepresenting to a client in one of her matters that her case was pending when the attorney knew that the case had been dismissed.); In re Bernstein, 144 N.J. 369 (1996) (three-month suspension imposed where the attorney exhibited gross neglect, lack of diligence, failure to communicate and misrepresentation, in addition to failure to cooperate with the disciplinary authorities; the attorney had received a prior private reprimand for similar misconduct,); In re Chen, 143 N.J. 416 (1996) (three-month suspension imposed where the attorney engaged in a pattern of neglect, misrepresentation, failure to communicate and failure to cooperate with the disciplinary authorities in two matters; the attorney had received a prior reprimand for gross neglect and failure to communicate in two matters).

Here, because of the pattern of misrepresentations, a short term of suspension is more appropriate. See, e.g., In re Weinstein, 144 N.J. 367 (1996) (three-month suspension imposed where, in four matters, the attorney exhibited a pattern of gross neglect, lack of diligence, failure to communicate and a pattern of misrepresentation in the matters, the attorney also failed to turn over a file in one case and failed to cooperate with the disciplinary authorities).

While the absence of prior discipline over a twenty-five year career should be considered as mitigation, that factor is counterbalanced here by the numerous misrepresentations to clients, as well as by respondent's steadfast refusal to recognize his

wrongdoing and his preference to view his misrepresentations as actions open to interpretation.

In light of the foregoing, the Board unanimously determined to impose a three-month suspension for respondent's misconduct. The Board further required respondent, upon reinstatement, to practice under the supervision of a proctor, approved by the Office of Attorney Ethics, for a period of two years.

The Board also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Dated: 2/14/98

LEE M. HYMERLING
Chair
Disciplinary Review Board