SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-089

IN THE MATTER OF

GARY D. BARTON

AN ATTORNEY AT LAW

Decision

Argued: June 21, 2007

Decided: August 7, 2007

David Marcus appeared on behalf of the District IIB Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline (reprimand) filed by the District IIB Ethics Committee (DEC). It arose out of respondent's representation of the driver and the passenger of an automobile involved in an accident. The complaint charged respondent with gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, and conflict of interest, violations of

RPC 1.1(a), RPC 1.1(b), RPC 1.3, RPC 1.4(a)[1], and RPC 1.7, respectively. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1974. On April 30, 1980, he received a private reprimand for surreptitiously tape-recording a conversation between him and his secretary about the reasons for her employment termination. His intent was to use the tape against her when she applied for unemployment insurance benefits. In the Matter of Gary D. Barton, DRB 80-57 (April 30, 1980).

On December 9, 2000, Eva Manganiotis was involved in an automobile accident. Manganiotis, age eighty-three, was the owner/passenger of the automobile driven by her eighty-seven-year old boyfriend, Philip Mattera. Manganiotis and Mattera are the grievants in this matter.

Manganiotis' car was "rear-ended" by a bus while she and Mattera sat in traffic. In turn, the bus had just been hit from behind by a large "Roto-Rooter" truck. The two were not treated for injuries at the scene, but went to the hospital emergency room the following morning, each complaining of back pain.

On December 11, 2000, Manganiotis and Mattera retained respondent to file a personal injury suit on their behalf.

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[1] Effective January 1, 2004, paragraph (a) was redesignated as paragraph (b).

Manganiotis and Mattera signed separate contingent fee agreements to memorialize respondent's representation.

Two years later, on December 9, 2002, respondent filed a lawsuit against numerous real and fictitious entities, in order to preserve Manganiotis' and Mattera's claims. It is undisputed that, on June 23, 2004, the complaint was dismissed for failure to prosecute. Respondent had not served the complaint on any of the defendants. Respondent did not promptly disclose to either Manganiotis or Mattera that the complaint had been dismissed.

According to Manganiotis, she and Mattera were told by their physician that they had suffered permanent injuries that required physical therapy. They underwent extensive therapy three times a week for five months. To corroborate their claim, they furnished ethics authorities with many medical bills, showing numerous treatments.

Manganiotis further testified that, although she and Mattera began receiving bills for treatment early in the case, respondent advised them not to pay medical bills "until we get paid."

Manganiotis asserted that, shortly after telling them not to pay bills, respondent began to ignore them, failing to keep them abreast of events in connection with the case. In Manganiotis' words, respondent "never told [them] much of

anything" about his efforts to further their claims, keeping any information "to himself." She added that, rather than give her specific details, he would simply counsel her to "be patient."

Manganiotis also recalled that, at a meeting in 2004, respondent advised her that the lawsuit would be concluded by Christmas. According to Manganiotis, that holiday came and went with no real information about the case.

Manganiotis testified that, after the 2004 meeting, she called respondent numerous times about the matter, before he finally called her back. When Manganiotis reminded him that the case had been "going on for years," he countered with "I don't need this aggravation from you," and hung up on her.

When asked if respondent had sent her any correspondence, Manganiotis replied that he had not. She, in turn, had written him several letters, four of which were entered into evidence. Those letters mirror her testimony about a growing frustration with respondent's failure to give her an update about the lawsuit.

Although two of Manganiotis' letters were undated, she remembered that she had sent one in 2004, and the other "way after 2004."[2]

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[2] That second letter refers to the case as "almost five years" old, which would place the letter in mid-2005.

In all, Manganiotis stated, she and Mattera had two meetings with respondent, early in the case. Thereafter, the couple made numerous telephone calls and sent several letters to him, none of which prompted him to update the status of the case. Because respondent failed to reply to any of their requests for information, Manganiotis and Mattera filed ethics grievances against him on August 27, 2005.

On cross-examination by respondent, Manganiotis recalled that it was only during the 2005 investigation of the grievances that she had learned that a complaint had been filed and that it had later been dismissed for failure to prosecute. Respondent asked Manganiotis if she recalled meeting with him in about October 2004, at which time he allegedly had advised her and Mattera that their complaint had been dismissed. Manganiotis denied that respondent had ever told her so.

Mattera, too, testified at the DEC hearing. He acknowledged that he, not Manganiotis, was driving her car at the time of the accident, an issue that respondent disputed in an apparent effort to discredit both. The police report (and later respondent's complaint) identified Manganiotis as the driver, an error that both Manganiotis and Mattera attributed to the police officer at the scene, who had merely asked them who owned the vehicle, not who had been driving it.

Mattera echoed Manganiotis' claims that respondent was unresponsive to their requests for information about the case. Mattera asserted that he also had called respondent numerous times between 2000 and 2004, but rarely had been able to speak with him. Mattera estimated that respondent returned a total of six calls over the years, and met with him about as many times during that entire period. On those occasions, Mattera testified, respondent never mentioned any problems with the case. Like Manganiotis, Mattera denied that respondent had ever told him that a complaint had been dismissed or even filed. On cross-examination, Mattera, too, recalled that he had learned about the dismissal during the 2005 investigation of the grievances and that, later, respondent had told him that the case had been "thrown out of court."

According to Mattera, respondent never discussed a possible conflict of interest with him. Also, he complained that he and Manganiotis had to pay an $800 co-payment for their medical expenses.

For his part, respondent acknowledged some mistakes in his handling of the case. In order to control the record, which had accumulated some extraneous detail, the panel chair at one point narrowed the focus of the hearing:

> I spent over an hour reading [respondent's] answer, and I think he concedes in his

> answer that he did do certain things wrong, but he says he told them to get another attorney, which is in issue whether he said it, and this is in mitigation, that there were compelling reasons as to why he didn't take certain actions on their behalf.
> I think that's clear in a very lengthy answer. Am I right? That is basically your position.
>
> [1T88-22 to 1T89-6.][3]

Respondent replied, "that is about 90 percent of my position."

Respondent did not testify at the DEC hearing. Rather, he relied on his lengthy verified answer.[4] Although that answer is seventy-three pages in length, it largely fails to refute the ethics charges.

With regard to the charges of gross neglect and lack of diligence, respondent's answer acknowledged that he had filed a complaint in order to comply with the two-year statute of limitations (the complaint was filed on the last day under the statute of limitations). Thereafter, he had taken no action to advance his clients' claims, failing even to serve the complaint on the defendants.

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[3] 1T denotes the transcript of the DEC hearing of September 28, 2006.

[4] The most recent version of respondent's answer is Exhibit R-50.

Respondent conceded that the complaint had been dismissed without prejudice on June 28, 2003, and that he had taken no action to have it reinstated.

At a meeting with Manganiotis and Mattera in late 2004, after the complaint had been dismissed, respondent informed them that he would try to obtain an insurance settlement for their medical expenses. He allegedly sent a letter (not a part of the record) to Manganiotis and Mattera requesting signed medical waivers. Although both clients recalled respondent's letter and his late promise of help, respondent never pursued that insurance claim.

With respect to his communication with Manganiotis and Mattera, respondent submitted no letters, file notes, telephone records or other indicia demonstrating that, prior to the June 2003 dismissal of the complaint, he had communicated any important events in the case to his clients.

Respondent claimed, however, that, "in September or October 2004," about a year after the dismissal of the complaint, he had informed Manganiotis and Mattera of the dismissal, at which time he allegedly had reviewed the entire case with them.

Respondent maintained that another client, Carl Eibl, was present at that October 2004 meeting, a contention that Eibl corroborated at the DEC hearing. Eibl recalled that he had been

seated at respondent's conference table when respondent had asked Manganiotis and Mattera permission for Eibl to stay, while they discussed their matter. According to Eibl, Manganiotis and Mattera had agreed.

Eibl further recalled that the meeting had lasted about an hour and a half. On cross-examination, he was asked why he had been so keenly aware of the duration of a meeting that had not pertained to him. He replied that he had been a career corrections officer for twenty-five years and that he would habitually look at his watch because he had been required to keep logs at work.

Eibl also recalled that respondent had "spoke[n] to [Manganiotis and Mattera] about their legal issues, what their legal rights were under the law, and at the end of that time, [] said to them that the case was dismissed."

Apparently skeptical about Eibl's role in respondent's office, the presenter asked him further questions and learned that, in addition to being a client, Eibl was respondent's neighbor of twenty years, as well as a friend. Eibl explained to the hearing panel that respondent had allowed him to use the office to work on his legal matter and to use the office copier. Eibl denied that respondent had offered to compensate him for his testimony, adding that he was simply volunteering

information because he had been in respondent's office on the day in question.

Neither Manganiotis nor Mattera were re-called to testify about their recollections of Eibl's presence at their meeting.

As to the allegation that he had engaged in a conflict of interest by representing both the driver and passenger of the car, respondent countered that he "has many times represented a driver and passenger in an auto accident where it was a rear end." According to respondent, he "did inform Grievants of the above but superficially as it never created a problem for Respondent in the past." There is no other evidence in the record that respondent addressed the possible existence of a conflict of interest or that he obtained a waiver from either client.

Finally, without any elaboration, respondent denied that he had engaged in a pattern of neglect.

Respondent offered evidence in mitigation of his actions. In 2001, he became engrossed in litigation against an ex-girlfriend, Carrie Perlson, for the repayment of loans that he had made to her. By July 2001, the litigation had affected him to the point that he had to seek psychiatric treatment from Peter M. Crain, M.D.

Dr. Crain wrote a lengthy July 23, 2001 letter to respondent, for use in the Perlson litigation, stating that the "dysfunctional relationship perpetrated upon [respondent] by Carrie Perlson" had compromised respondent's judgment.

Dr. Crain, who testified at the DEC hearing, did not treat respondent between 2001 and early 2006. On May 22, 2006, Dr. Crain examined respondent for a second time, in preparation for these ethics proceedings. In an opinion-letter dated May 22, 2006, Dr. Crain stated:

> At the time of the events described by [the ethics investigator], [respondent] was initially distracted by an obsessional disorder, related to the Perlson Matter, followed by a depressive letdown when the case ended in March 2003. Subsequently, various health problems developed that interfered with his ability to read documents and keep focused due to dizziness, fatigue and medication side-effects. He became anxious over his health and feared going blind, necessitating prescription of a tranquilizer. Such extenuating circumstances interfered with his ability to follow usual procedures and document his work in regard to preparation of the case for the grievants for possible settlement, without resorting to litigation.
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> [AEx.1 at 4.][5]

[5] A refers to respondent's answer to the formal ethics complaint, dated June 23, 2006.

At the hearing below, Dr. Crain reiterated his opinion that respondent was "highly obsessed with this [Perlson] matter day and night," to the detriment of Manganiotis' and Mattera's case.

Dr. Crain testified that, after the Perlson matter had been concluded, in March 2003, and Manganiotis' and Mattera's complaint had been dismissed, in June 2003, other health problems had beset respondent:

> Later on . . . you started developing these other problems which involved eyesight, trouble reading documents, you had trouble with diabetes, had hypoglycemia and dizziness and fainted, trouble with regulating medication for high blood pressure which caused drowsiness and also fear about, perhaps, a heart problem, all these things were contributing to anxiety. And then for that reason you didn't go to the general doctor who prescribed medication for you, which was Ativan, a tranquilizer, and a sleeping pill, Lunesta, those things were indicated for those problems, and you got treatment for them.
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> [2T12-19 to 2T13-8.][6]

The DEC found respondent guilty of lack of diligence, failure to communicate with his clients, and conflict of interest. The DEC found no gross neglect, citing In re Kantor, 180 N.J. 226 (2004), and stating that "the neglect herein does not rise to the level of abandonment of clients so as to warrant disbarment."

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[6] 2T denotes the transcript of the DEC hearing of November 11, 2006.

As previously noted, the DEC recommended a reprimand. It also recommended a proctor for one year and "psychiatric counseling for the period of the [proctorship]."

Following a de novo review of the record, we find that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. In fact, respondent admitted some of the charges of unethical behavior.

Respondent was retained, on December 9, 2000, to file a straightforward personal injury lawsuit. Some degree of success was assured, given that the couple's vehicle had been "rear-ended" while stopped in traffic.

Two years later, respondent filed a complaint, but never served it on the defendants. As a result, the complaint was dismissed for failure to prosecute, in June 2003. Thereafter, respondent took no steps to have the complaint reinstated.

Furthermore, although he met with his clients twice, early in the case, he had no other meetings with them until October 2004, when he offered to pursue an insurance claim for medical expenses. He failed to follow through on that late promise as well.

In finding no gross neglect, the DEC distinguished this case from abandonment cases, noting that respondent's conduct had not approached that of the attorney in In re Kantor, supra,

180 N.J. 226 (2004), who was disbarred. Abandonment, however, is not a necessary ingredient of the ethics offense of gross neglect. In this case, respondent failed to advance his clients' claims, failed to protect them from dismissal, and took no action to restore them after the dismissal of the complaint. We find that such inaction constituted a lack of diligence and gross neglect, violations of RPC 1.3 and RPC 1.1(a).

Respondent also failed to communicate with his clients. Although there were several telephonic communications and a few meetings over the course of his representation of Manganiotis' and Mattera's interests, the Rules of Professional Conduct require more. Respondent had an affirmative duty to keep his clients reasonably informed about the status of the case. Yet, he presented nothing, not a single letter or note, to substantiate any meaningful exchange of information with his clients. RPC 1.4(a) required respondent to keep the grievants "reasonably informed" and to "promptly comply with [their] reasonable requests for information."

Moreover, respondent did not promptly apprise his clients of the dismissal of the complaint. Even if we were to accept his contention that he conveyed that information to them in late 2004, that was a year too late – the complaint was dismissed in June 2003.

So, too, respondent engaged in a conflict of interest by representing both the driver and the passenger in a case stemming from a motor vehicle accident. Several Advisory Committee on Professional Ethics (ACPE) opinions have addressed the propriety of an attorney's dual representation of driver and passenger. Opinion 156, 92 N.J.L.J. 489 (1969), held that, pursuant to a 1968 Supreme Court directive, an attorney may not engage in such simultaneous representation unless there is a legal bar to the passenger's suing the driver – for instance, when they are husband and wife, unemancipated child and parent, or co-employees and the accident occurs in the course of their employment.

Subsequently, the ACPE determined that, even if the driver and the passenger consent to the multiple representation and waive their right to sue each other, an attorney may not represent both parties. Opinion 188, 93 N.J.L.J. 789 (1970). In the ACPE's view, consent and waiver do not mean that an attorney may represent two or more parties with potential claims against each another, arising out of the same transaction.

In Opinion 248, 96 N.J.L.J. 93 (1973), however, the ACPE carved out an exception to the prohibition against multiple representation. That opinion held that, if it is clear that liability for the accident rests completely on the other driver,

and if that driver's insurance coverage is sufficient to compensate the plaintiffs' claims, an attorney may represent both the driver and passenger. That opinion reasoned that, if the insurance coverage is inadequate, the attorney may improperly compromise the interests of one client over the other, while trying to settle both claims. In addition, the opinion noted that, in 1970, the Court, having abrogated the doctrines of spousal immunity and parent-child immunity, issued a directive stating that the same prohibitions apply to all driver-passenger situations, regardless of the parties' relationship.

The ACPE later made it clear that, in spousal and parent-child situations, disclosure and consent are required. Opinion 253, 96 N.J.L.J. 449 (1973), and Opinion 373, 100 N.J.L.J. 646 (1977).

Respondent's representation of both parties may have been permissible if (1) the other driver was totally culpable (presumably true in a rear-end collision such as this), (2) the culpable driver's insurance coverage was sufficient to cover both claims, and (3) respondent had obtained his clients' written consent to the representation.

Here, respondent made no effort to determine the extent to which his clients' circumstances fell within the permissible

joint representation. In addition, even if he did mention the conflict to Mattera, as he claimed, he did not obtain the required waiver. Therefore, his conduct violated RPC 1.7(b).

We do not find, however, that respondent engaged in a pattern of neglect. For a finding of a pattern of neglect at least three instances of neglect are required. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). Here, respondent's conduct involved only one matter.

In mitigation, we have considered that respondent was undoubtedly distracted by the Perlson litigation, while representing these clients. The psychiatric reports and testimony from Dr. Crain were compelling as to respondent's obsessional disorder at the time. In fact, respondent was still distracted by the Perlson litigation when he filed his answer to the ethics complaint – sixty-five pages of his seventy-three page verified answer deal exclusively with the Perlson matter.

To this day, respondent remains somewhat fixated on the Perlson litigation, requesting us to allow him to submit exhibits that have no direct bearing on the ethics issues before us. In an odd way, that request, too, strengthens his argument for leniency.

In a letter to respondent, dated May 2, 2007, Dr. Crain states that respondent no longer requires psychiatric care,

monitoring or counseling, as his psychiatric and medical issues have all been resolved through medication and surgery.

Cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients, ordinarily result in a reprimand. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994). But see In the Matter of Anton Muschal, DRB 99-381 (February 4, 2000) (admonition for attorney who represented a client in the incorporation of a business and the renewal of a liquor license and then filed a lawsuit against the former client on behalf of another client).

Attorneys who have simultaneously represented driver and passenger have received reprimands. See, e.g., In re Nadel, 147 N.J. 559 (1997) (reprimand for attorney who represented a driver in a suit against the driver of another vehicle and then represented the passenger in a suit against both drivers) and In re Starkman, 147 N.J. 559 (1997) (reprimand for attorney who engaged in a conflict of interest when he represented both the driver and two passengers involved in an automobile accident, withdrew from representing the driver, and then sued the driver, his former client, on behalf of the two passengers).

At times, a reprimand may still result if, in addition to engaging in a conflict of interest, the attorney displays other

forms of unethical behavior that are not considered serious enough to merit a suspension. See, e.g., In re Barone, 180 N.J. 518 (2004) (reprimand for attorney who engaged in conflicts of interest on two occasions by simultaneously representing driver and passenger in automobile matters; after filing the complaints, the attorney allowed them to be dismissed and took no further steps to have them reinstated; the attorney was found guilty of gross neglect, lack of diligence, and failure to communicate with clients); In re Kraft, 167 N.J. 615 (2001) (reprimand for attorney whose unethical conduct encompassed four matters; in one matter, he was found guilty of a conflict of interest by failing to explain to the client the advantages or disadvantages of pursuing her case jointly or independently of the client's co-worker, who was also represented by the attorney; in another matter, the attorney failed to clearly explain to the client his legal strategy, thereby precluding her from making an informed decision about the course of the representation and the pursuit of her claims; in all four matters, the attorney exhibited lack of diligence and failure to communicate with clients; and, in one of the matters, the attorney failed to prepare a written fee agreement); and In re Castiglia, 158 N.J. 145 (1999) (on a motion for discipline by consent, the Court agreed that a reprimand was the appropriate

discipline for an attorney who engaged in a conflict of interest by simultaneously representing various parties with adverse interests, repeatedly failed to communicate to his clients, in writing, the basis or rate of his legal fee, and witnessed the signature on a deed and affidavit of title, even though the documents had been signed outside of his presence).

The present case is factually similar to Barone, the most recent of the cases dealing with driver/passenger conflicts. As in Barone, respondent allowed the complaint to be dismissed, took no action to have it reinstated, and displayed gross neglect, lack of diligence, and failure to communicate with their clients.

In aggravation, we have taken into account that the clients had to pay an $800 co-payment as a result of respondent's misdeeds, and that respondent was privately reprimanded in 1980, albeit for unrelated conduct.

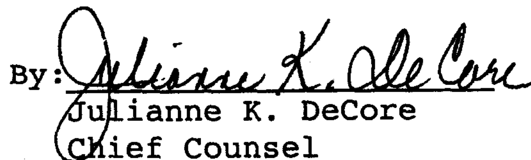
In mitigation, we have considered respondent's mental problems, which clouded his judgment during the time that he mishandled his clients' matter. The physical maladies, however, such as diabetes, high blood pressure, and eye trouble all post-dated the representation and, therefore, do not serve to mitigate respondent's conduct.

After consideration of the relevant circumstances, such as the nature of respondent's misconduct and the aggravating and mitigating factors present in this case, we determine that a reprimand is the appropriate level of discipline for respondent's ethics violations.

We also determine to require respondent to submit to the Office of Attorney Ethics (OAE), within sixty days of the date of this decision, proof of fitness to practice law, as attested by a mental health professional approved by the OAE.

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
William O'Shaughnessy, Chair



By: Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

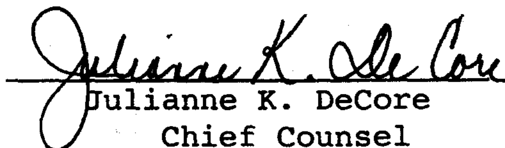
In the Matter of Gary D. Barton
Docket No. DRB 07-089

Argued: June 21, 2007

Decided: August 7, 2007

Disposition: Reprimand

Members	Suspension	Reprimand	Admonition	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh		X			
Boylan		X			
Frost		X			
Lolla		X			
Pashman		X			
Stanton		X			
Wissinger		X			
Total:		9			



Julianne K. DeCore
Chief Counsel