

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-167

IN THE MATTER OF :
 :
THOMAS J. SCHIAVO :
 :
AN ATTORNEY AT LAW :
 :

Decision

Argued: September 12, 2002

Decided: February 20, 2003

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Peter N. Gilbreth 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 based on a recommendation for discipline filed by the District XIII Ethics Committee (“DEC”). The first count of the three-count complaint charged respondent with misconduct in five real estate transactions and one matrimonial matter. The second count charged respondent with negligent misappropriation, recordkeeping deficiencies and failure to cooperate with the Office of Attorney Ethics (“OAE”). The third count charged respondent with failure to comply with the requirements of R.1:20-20.

Respondent admitted much of his misconduct in his answer to the complaint. In addition, he and the OAE entered into a stipulation of facts and a supplemental stipulation of facts, in which he admitted the majority of the remaining allegations. Respondent continued to deny that he abandoned his law practice, however. At the DEC hearing, respondent testified only as to mitigating factors.

Respondent was admitted to the New Jersey bar in 1979. He previously maintained an office for the practice of law in Ledgewood, Morris County. He was temporarily suspended by order dated October 26, 1999 for failure to cooperate with the OAE's investigation of a matter. In re Schiavo, 162 N.J. 43 (1999). He remains suspended at this time.

In 2000 respondent was suspended for three months for lack of diligence, failure to communicate with client, failure to promptly deliver third-party funds, failure to return an unearned retainer, knowingly disobeying an obligation under the rules of a tribunal and misrepresentation. In re Schiavo, 165 N.J. 533 (2000). That matter was before us as a default.

In each of the current matters respondent's representation occurred in 1999. In five of the six matters, the misconduct took place between April and July of that year. With the exception of the information below, the complaint and the stipulations provided no further details about the matters.

COUNT ONE

The Nancy Rosikiewicz Matter (District Docket No. XI-00-017E)

In connection with an April 23, 1999 real estate matter, respondent failed to pay the title insurance premium, survey expense and real estate taxes at closing.

The Kevin and Diane O'Hara Matter (District Docket No. XI-00-018E)

In connection with an April 16, 1999 real estate transaction, respondent failed to remit all funds due to the lender and failed to pay the title insurance premium and real estate taxes at closing. He further failed to record the deed and mortgage and misrepresented to the title insurance company that he had recorded them.

The Edward Dougherty, Jr. Matter (District Docket No. XIV-00-166E)

In connection with a June 25, 1999 real estate matter, respondent failed to pay the sewer assessment, realty transfer fee and recording fees at closing.

The Isabel Barnes Matter (District Docket No. XI-00-020E)

From January to October 1999 respondent represented Isabel Barnes in a matrimonial matter. He failed to fully account to his client for child support payments received on her behalf and failed to adequately reply to her requests for information about her case.¹

¹ The OAE withdrew the charge that respondent had not remitted the child support funds to Barnes.

In December 1999 respondent disbursed a trust account check to Barnes in the amount of \$657.50. At the time, respondent knew of the Supreme Court's October 1999 order suspending him from the practice of law and knew that the order required his compliance with R.1:20-20, which, among other things, prohibited his use of his trust account. R.1:20-20(b)(5).²

The Kevin Mack and Maureen Ryan Matter

In connection with an April 30, 1999 real estate transaction, respondent failed to pay the \$958 title insurance premium at closing and failed to timely record the mortgage.

The Owen and Diane Saucyn Matter

In connection with a July 29, 1999 real estate transaction, respondent failed to pay \$1,247 in real estate taxes at closing.

The first count charged respondent with violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate with client), RPC 1.15(b) (failure to timely remit trust funds to client or third person), RPC 1.16(d) (failure to protect clients' interests after terminating the representation [abandonment]) and RPC 8.4(c) (conduct involving dishonesty, fraud,

² The complaint originally did not charge respondent with misconduct in connection with issuance of the check. The OAE and respondent's counsel agreed to amend the complaint. By way of clarification, respondent testified that he was not actually aware that he was prohibited from using his trust account during his suspension, but conceded that he should have had knowledge of this prohibition.

deceit or misrepresentation). The complaint did not correlate the RPCs to each individual client matter.

COUNT TWO

On January 4, 1996 respondent was the subject of a random compliance audit conducted by the OAE. The audit revealed a number of recordkeeping deficiencies. By letter dated March 25, 1996 respondent represented to the OAE that he had corrected the noted deficiencies.

In November 1998 the OAE performed a select audit of respondent's attorney books and records, after being notified by respondent's bank that his trust account was overdrawn. At the select audit, respondent admitted to the OAE's auditor that he had not corrected the deficiencies found in the prior random audit and that he had made a misrepresentation in his March 25, 1996 letter to the OAE. The select audit revealed that respondent's trust account had a shortage of \$34,557.95 as of July 31, 1998, resulting from his failure to properly maintain his records.

The select audit uncovered the following improprieties in respondent's records:

- 1) Client trust ledger sheets were not fully descriptive. R.1:21-6(b)(2).
- 2) Client ledger cards were found with debit balances. R.1:21-6(c).
- 3) A schedule of clients' ledger accounts was not prepared and reconciled quarterly to the trust account bank statement. R.1:21-6(b)(8).
- 4) A running cash balance was not kept in the trust account checkbook. R.1:21-6(c).

5) Deposit slips lacked sufficient detail to identify each item of deposit. R.1:21-6(b)(1).

6) A business receipts book was not maintained. R.1:21-6(b)(1).

7) A trust receipts book was not maintained. R.1:21-6(b)(1).

8) A separate ledger sheet was not maintained, detailing attorney funds held for bank charges. R.1:21-6(c).

9) Inactive trust ledger balances remained in the trust account for an extended period of time. R.1:21-6(c).

10) A separate ledger sheet was not maintained for each client. R.1:21-6(b)(2).

11) Old outstanding checks were to be resolved. R.1:21-6(c).

12) Attorney funds held in the trust account were in excess of the amount necessary for bank charges. RPC 1.15(a).

On July 15, 1999 the OAE sent respondent a notice about his accounting deficiencies. Respondent did not reply to that letter. Shortly thereafter, in early August 1999 the OAE received a grievance from First American Title Insurance Company, alleging that respondent had acted improperly in the O'Hara closing, mentioned above. By letters dated August 6 and 19, 1999 the OAE requested information from respondent about the O'Hara closing. Respondent did not reply to those letters. On August 26, 1999 the OAE wrote to respondent about his recordkeeping deficiencies and his failure to cooperate with their requests. Respondent ignored the OAE's letters. On September 22, 1999 the OAE telephoned respondent's office and left a message about the matter. Again, respondent did not reply. Finally, on September 28, 1999 the OAE again wrote to

respondent about the O'Hara closing. Respondent failed to comply with the OAE's requests.

On October 8, 1999 the OAE filed a motion for respondent's immediate temporary suspension, based on his failure to cooperate with the OAE's investigation. As noted earlier, respondent was temporarily suspended by order dated October 26, 1999.

The second count charged respondent with violations of RPC 1.15(a) (negligent misappropriation), RPC 1.15(d) and R.1:21-6 (recordkeeping violations), RPC 8.1(b) (failure to cooperate with disciplinary authorities) and RPC 8.4(c).

COUNT THREE

The suspension order of October 26, 1999 directed respondent to comply with the requirements of R.1:20-20. As of the date of the complaint, April 6, 2001, respondent had failed to file with the OAE Director an affidavit demonstrating his compliance with the order and rule, as required by R.1:20-20(b)(14).

The third count charged respondent with a violation of RPC 3.4(c) (knowing failure to comply with an obligation under the rules of a tribunal) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

* * *

Respondent's answer and testimony set forth mitigating circumstances. According to respondent, a number of personal factors, including marital difficulties, his father's death in 1996 and a friend's suicide in 1997 led to depression and increased use of alcohol. Furthermore, he stated, in January 1999 his secretary of ten years moved out of

state. After his part-time secretary refused to stay on because of his alcohol use, he found himself unable to keep up with his office work and serve his clients' properly.

Respondent stated further that, in a one-year period, he received four citations for driving while intoxicated. One incident resulted in his incarceration from September 30 to October 4, 1999. Upon his release, he immediately entered an inpatient alcoholism treatment facility, Sunrise House, and also met with a representative of the Lawyers' Assistance Program ("LAP"). He claimed that he erroneously believed that someone from LAP would advise the OAE of his situation. Respondent was released from Sunrise House after sixteen days and entered an aftercare program. He completed and was discharged from that program in December 1999. He testified that he is still in contact with LAP.

* * *

The DEC found that respondent violated RPC 1.1(b) and RPC 1.3, based on his admissions in the stipulation and supplemental stipulation. The DEC made no reference to the numerous other charged violations. Somewhat confusing were the DEC's statements that "respondent admits in the Stipulations to the acts charged in the complaint" and that "not all of the initial violations were pursued by the [OAE], as evidenced by the Stipulations submitted."³

The DEC noted that respondent's testimony and exhibits revealed "numerous and persuasive mitigating factors" that explained the source of his misconduct. In addition,

³ In a post-hearing brief to us, the OAE objected to the DEC's position, stating that respondent's admissions in his answer, combined with the stipulations, addressed all of the initial allegations of the complaint that were not withdrawn by the OAE.

the DEC pointed out that respondent's conduct "was not willfully malicious, and there was no incident of theft or misappropriation. Rather, there was a pattern of neglect, which appears to have been the direct consequence of the respondent's inability to function while suffering from severe alcoholism." The DEC noted that respondent sought help for his condition and appears capable of practicing law if he remains sober.

The DEC recommended that respondent be suspended for three years, retroactive to the date of his temporary suspension, October 26, 1999. In addition, the DEC recommended that respondent be required to provide, in sixty days, a full accounting of the child support collected and paid in the Barnes matter and a full accounting of his trust funds. The DEC also recommended that, upon reinstatement, respondent be supervised by a proctor for two years and not be allowed to practice solo or to maintain a trust account for a period of five years.

The OAE agreed that a three-year suspension is appropriate, in view of the mitigation presented. In the OAE's view, however, there is a question of the weight to be given to respondent's rehabilitation. Respondent completed his outpatient program at Sunrise House in December 1999. He testified, however, that he did not stop drinking until September 2001, well after he completed his treatment. The OAE stated that its recommendation for a three-year suspension is conditioned on respondent's successful rehabilitation. Furthermore, the OAE suggested, if we find no reliable evidence of respondent's rehabilitation, then his reinstatement should be conditioned on proof of his full recovery from alcohol addiction.

The OAE agreed with the requirement that an accounting of the child support in Barnes and of respondent's trust funds be provided prior to respondent's reinstatement. The OAE opined that three years was sufficient time for the practice restrictions suggested by the DEC and recommended that, upon reinstatement, respondent be required to continue his outpatient treatment for alcoholism.

In a letter to us dated July 3, 2002, respondent's counsel agreed with the findings and recommendation of the DEC, with the exception of the sixty-day deadlines for the accountings. Respondent requested that the time be extended or, in the alternative, that the completed accountings be a prerequisite to his reinstatement.

* * *

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

The DEC's statement that the OAE did not pursue the allegations not discussed in the stipulation was incorrect. The admissions in respondent's answer remained in force and the allegations did not have to be addressed a second time in the stipulation. In addition, a copy of the OAE's letter-brief, setting forth its position that all allegations had been addressed, was sent to respondent's counsel, who did not take issue with the OAE's assertions.

The one charge denied by respondent and still at issue is his alleged abandonment of his law practice. Exhibit C-F is a petition filed by Bonnie C. Frost, Esq., the DEC secretary, seeking the appointment of a trustee to protect respondent's clients. Exhibit B

to the petition is a certification from an attorney who was respondent's former landlord, setting out circumstances that could lead to a conclusion that respondent abandoned his practice. The landlord discussed respondent's infrequent appearances at his office, failure to communicate with his clients, neglect of their matters and consumption of alcohol. Also in the record is an affidavit from the attorney who was appointed as trustee of respondent's practice:

It was obvious from the condition of his office, his responses to my inquiries with respect to files, account statements and the trust ledger and from information received from various clients, that Mr. Schiavo was troubled both personally and professional [sic] for at least a period of one year prior to his suspension in the fall of 2000. Clients [sic] files had been neglected. Closings appear to have been 'thrown together' resulting in incomplete files, documents unrecorded and fees unpaid. There were matrimonial files, general civil files, estate files and corporate matters that were not tended to. I made every effort to contact those clients with files that appeared open or incomplete.

The responses I received were surprising. Several clients that I spoke to expressed their sincere concern for Mr. Schiavo's well being. From all accounts, attorneys, his attorney landlords, and clients, Mr. Schiavo was well liked. Several clients were aware of his difficulties by way of observation in his office, i.e., disorganization, unanswered telephone calls, lack of secretary or from reading in the paper or word of mouth. Several clients asked about Mr. Schiavo personally and expressed their hope that he was alright.

[Exhibit C-H at 27]

From the above we have concluded that respondent abandoned his clients, albeit not because of indifference to their well-being but because of his alcoholism and other serious personal problems.

As to count one, in six matters respondent demonstrated gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to timely turn over third-party funds and abandonment of clients' interests. As to count two, the record

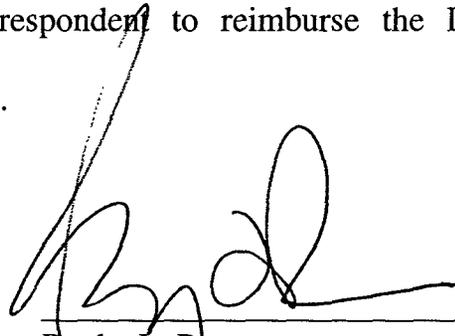
shows that respondent negligently misappropriated clients' funds, did not comply with his recordkeeping responsibilities, failed to cooperate with the OAE and made a misrepresentation to that office. With regard to count three, respondent failed to file the affidavit required under R.1:20-20, thereby disobeying an obligation under the rules of a tribunal and engaging in conduct prejudicial to the administration of justice.

Respondent's ethics violations were numerous and serious. As noted by the DEC, however, his acts were not malicious. Rather, he appeared overwhelmed by the requirements of his practice, particularly after the departure of his secretary of ten years. In addition, we noted that all five real estate matters in question occurred within a four-month period, shortly after his secretary left. Furthermore, although respondent has been previously disciplined, that prior misconduct took place in 1998 and 1999. It is probable that, in 1998, his practice was already suffering from the effects of his alcoholism. For twenty years, his career remained unblemished. Moreover, although the prior matter came to us as a default, respondent received the complaint sixteen days before his incarceration, which was immediately followed by his admission into Sunrise House. Respondent stated in his answer that, upon his release from Sunrise House, he contacted the OAE, after learning that the LAP had not done so in his behalf. He was told that the time to answer the complaint had expired and that the allegations against him were deemed admitted. Taking these factors into consideration, we unanimously determined that the three-year suspension recommended by the OAE and the DEC – and to which respondent agreed – is the appropriate discipline, to begin at the expiration of his prior three-month suspension, in January 2001.

Respondent is to have forty-five days from the date of our decision to file an accounting of the child support and trust funds at issue. It is our understanding that the attorney trustee appointed to oversee respondent's practice still serves in that position. If respondent fails to timely complete the accounting, the trustee may do so. If the trusteeship has been terminated, the OAE may move for the appointment of a new attorney trustee.

Following respondent's reinstatement, there is to be a three-year prohibition on his sole practice of law and access to a trust account. In addition, prior to reinstatement, he is to submit proof of fitness to practice law, as attested to by a mental health professional approved by the OAE. Furthermore, respondent is to participate in AA meetings or other similar program, until discharged by an alcohol counselor. He must provide proof of such participation to the OAE. Finally, upon reinstatement he is to practice under the supervision of a proctor for three years.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: 
Rocky L. Peterson
Chair
Disciplinary Review Board

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

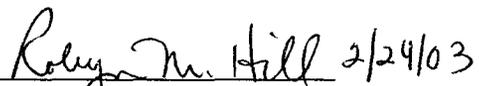
In the Matter of Thomas J. Schiavo
Docket No. DRB 02-167

Argued: September 12, 2002

Decided: February 20, 2003

Disposition: Three-year suspension

<i>Members</i>	<i>Disbar</i>	<i>Three-year Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Peterson</i>		X					
<i>Maudsley</i>		X					
<i>Boylan</i>		X					
<i>Brody</i>		X					
<i>Lolla</i>		X					
<i>O'Shaughnessy</i>		X					
<i>Pashman</i>		X					
<i>Schwartz</i>		X					
<i>Wissinger</i>		X					
Total:		9					


 Robyn M. Hill
 Chief Counsel