SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-457

IN THE MATTER OF

FERNANDO REGOJO

AN ATTORNEY AT LAW

Decision

Argued: February 13, 2004

Decided: April 6, 2004

James P. Flynn appeared on behalf of the District VI Ethics Committee.

Joseph P. Castiglia 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 VI Ethics Committee ("DEC"). The complaint, as amended, charged respondent with violations of *RPC* 1.1(a) (gross neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.4(a) (failure to keep a client reasonably informed about the status of the matter), *RPC* 1.8(h) (settlement of malpractice claim with former client without observing safeguards), *RPC* 8.1(b) (failure to cooperate with the

disciplinary authorities), and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1981. He received a reprimand in 2001 when, in one matter, he failed to promptly pay funds to third parties in a real estate transaction; in ten matters, he negligently misappropriated client funds; and he failed to maintain proper records. The Court also required respondent to submit to the Office of Attorney Ethics quarterly trust account reconciliations for two years. *In re Regojo*, 177 *N.J.* 67 (2001).

In this matter, respondent conceded that he had committed legal malpractice by permitting a client's personal injury complaint to be dismissed and failing to move to restore it. He contended, however, that his actions, although negligent, were not unethical. In addition, while the complaint charged that respondent sent funds to his client, misrepresenting that they constituted settlement proceeds from the defendant, respondent contended that he had explained to the client that the funds were sent to settle the client's potential malpractice action against respondent.

On December 19, 1994, Alberto Ramirez retained respondent to represent him in a personal injury lawsuit following an automobile accident in which Ramirez had been a passenger. Respondent's settlement negotiations with the insurance company were not successful. Ramirez claimed that respondent rejected the settlement offer because it was insufficient. According to respondent, however, it was Ramirez who rejected a final settlement offer of $5,000 from the defendant's insurance company.

After settlement negotiations failed, respondent filed a personal injury lawsuit in Bergen County on behalf of Ramirez on November 25, 1996. Because respondent failed to serve the defendants, the complaint was dismissed on July 23, 1997 for lack of prosecution. Ramirez testified[1] that respondent never notified him of the dismissal and that he learned of the dismissal at the ethics hearing. Respondent stated that he did not learn of the dismissal until April 1998, about nine months later. He conceded that he had "failed to follow up on the file." Respondent contended that he did not file a motion to restore the complaint because he believed that too much time had passed since the dismissal.

On April 13, 1998, respondent sent a letter notifying Ramirez of the dismissal, adding "Please note that my office is willing to settle your claim with you, or if you prefer, you have the right to file a claim against my professional insurance carrier, Herbert L. Jamison, seeking damages." Ramirez claimed that he never received the letter, which had been sent to an address in West New York, New Jersey. At first, Ramirez testified that he had never lived in West New York and had never provided respondent with that address. He later conceded that he had either resided at that address with a friend or had given that mailing address to respondent. Respondent stated that Ramirez had provided him with that address, which is the same address that appears on Ramirez' application for personal injury protection benefits.

Although respondent tried to contact Ramirez by telephone, using various telephone numbers that Ramirez had provided, the telephones had been disconnected. According to

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[1] Ramirez testified through a Spanish language interpreter.

respondent, Ramirez had moved many times and had provided new addresses and telephone numbers. Respondent did not send the April 13, 1998 letter to any other address and did not request a postal search for Ramirez. After some time had lapsed without any contact from Ramirez, respondent closed his file.

Ramirez testified that, throughout respondent's representation, he had difficulty contacting respondent. Ramirez asserted that respondent failed to return telephone calls, and that, although he appeared at respondent's office, respondent either refused to speak with him or assured him that the case was proceeding well.

Respondent denied that he had failed to return telephone calls or to meet with Ramirez. He stated that, although Ramirez often appeared at his office without an appointment, he took the time to advise Ramirez about the status of his case.

Ramirez moved to South Carolina in September 2000. According to Ramirez, about one month later, he provided respondent's office with his new address and telephone number. Ramirez contended that, although he left messages for respondent, he never returned the calls. In turn, respondent denied receiving contact information or telephone calls from Ramirez after Ramirez moved to South Carolina.

No further activity occurred in the Ramirez matter until January 2002, when Ramirez telephoned respondent, inquiring about the status of his lawsuit. According to Ramirez, respondent told him that he had received $5,000 from the insurance company and that, after deducting expenses of $1,900, he would send him a check for $3,100. On February 20, 2002, respondent sent a letter to Ramirez, as follows:

> In accordance with the settlement reached in the above matter I am enclosing herewith my trust account[2] check in the sum of $3,100.00 representing the amount due you after deducting attorney fees (33.33% x $5,000.00 = $1,665.50) and costs of file ($234.50).
>
> This matter is now concluded and I shall close out my file.
>
> [Exhibit P-2.]

The check bore the notation "D/L 11/2/94, Settlement Proceeds," indicating that the date of loss was November 26, 1994, the date of Ramirez' automobile accident.

Although Ramirez endorsed the check, he added the following legend on the reverse side: "I do not accept this check as final payment for my accident on 11/26/94. Have never received copy of settlement from my attorney Fernando Regojo. He has refused to send it." Ramirez testified that, because he cannot write in English, he asked a friend, Fernand Trujillo, to insert that language on the check.

On March 25, 2002, Donna D. Stobbe, an attorney in Columbia, South Carolina, notified respondent that Ramirez had contacted her for assistance in getting information about his settlement. Apparently, Stobbe provided legal services to Ramirez in accordance with a pre-paid legal services plan. In that letter, Stobbe asked respondent to provide to her or to Ramirez a copy of a settlement statement so that Ramirez could find out the amount of the settlement check and the amounts deducted from it. About one week later, on April 2, 2002, respondent sent to Ramirez a check for $1,900, with a letter stating:

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2 Although the letter refers to a trust account check, respondent enclosed a business account check.

> As promised, I am enclosing herewith my check in the sum of $1,900.00 in addition to the $3,100.00 check sent to you on February 20, 2002.
>
> Thee [sic] two checks totals [sic] $5,000.00, the total amount of the settlement. all [sic] costs and expenses are hereby waived.
>
> [Exhibit P-4.]

The check bore the notation "Settlement check, D/L 11/26/94."

Ramirez asserted that respondent told him that he sent the $1,900 check because he did not want to keep money from his clients. Ramirez testified that he understood that the funds were paid by the insurance company in connection with the automobile accident. Ramirez inserted the same legend on the reverse of the $1,900 check as he had on the $3,100 check. Thereafter, on April 22, 2002, Ramirez filed a grievance against respondent.

According to Ramirez, about two or three months after he received the second check, respondent left a message for him. Ramirez stated that, when he returned the call, respondent told him that he was going to send him an additional $10,000 because "I was going to hurt him, that he was gonna have problems with the suit that I had and that he was gonna give me $10,000 to finish with everything." Ramirez accepted the offer. This time, respondent sent a release reciting that, in consideration for the sum of $15,000, Ramirez released respondent from all claims. On January 7, 2003, Stobbe returned the release, signed by Ramirez, indicating that, because she had not participated in the matter, she had not signed the release. Ramirez testified that, although the document purported to release respondent from all claims, he continued to believe that he was settling his personal injury claim and that the funds had been paid by the defendant's insurance company, not by respondent.

Ramirez claimed that, after he received notice of the ethics hearing, respondent offered him $2,500 in exchange for not attending the hearing because Ramirez was going to "hurt" him by testifying. Ramirez refused the offer. He contended that, about one week later, respondent increased the offer to $5,000, which he also rejected. According to Ramirez, respondent asked him what it would take to "fix" it and Ramirez replied that he would accept $20,000. Ramirez stated that respondent would not agree to pay $20,000.

Respondent advanced an entirely different version of these events. According to respondent, in January 2002, when Ramirez finally contacted him after moving to South Carolina, respondent explained to Ramirez that the complaint had been dismissed and that Ramirez had a claim against him. Respondent testified that, although at first Ramirez did not understand, respondent believed that Ramirez finally comprehended that his personal injury complaint had been dismissed and that he and respondent had negotiated a settlement of Ramirez' claim against respondent. Respondent testified that they agreed that Ramirez would receive the same amount as if he had accepted the insurance company's pre-complaint offer of $5,000. Therefore, respondent deducted costs and fees when he forwarded the check to Ramirez. Respondent stated that he orally advised Ramirez that he had a right to independent counsel with respect to the potential malpractice claim. Respondent conceded that he neither advised Ramirez to seek independent counsel with respect to negotiating a settlement with respondent, nor did he ever advise Ramirez in writing to obtain counsel. Respondent admitted that, until he met with counsel, he was not aware that *RPC* 1.8(h)(2) prohibits an attorney from settling a potential legal

malpractice claim with a client or former client unless the attorney provides written notice to the client of the desirability of seeking independent counsel.

Respondent asserted that Ramirez then complained that the $3,100 was not enough. He stated that, to placate his client, on April 2, 2002, he sent the additional $1,900, waiving his costs and fees. According to respondent, after he sent the second check, Ramirez asked him for a copy of the insurance settlement check and a closing statement. Respondent stated that he again explained to Ramirez that the funds were paid by him in settlement of a possible malpractice claim, not by the insurance company for the driver involved in the car accident. Respondent testified that Ramirez' friend, Trujillo, made harassing telephone calls to him on behalf of Ramirez. Respondent contended that, after Ramirez asked for $15,000, respondent sent $10,000 and a release to Stobbe. When asked why he had not submitted a release to Ramirez with either of the previous two checks that he had sent, respondent claimed that Ramirez was "in such a hurry to get his money" and that it "was just forgetfulness on my part."

Respondent claimed that, after he received the notice of hearing in the ethics matter, Ramirez asked for an additional $5,000. According to respondent, he rejected this demand and, when Ramirez called again, respondent instructed his secretary to inform Ramirez that he would not send any more money and would not accept his telephone calls.

On September 17, 2002, during the investigation of the ethics matter, the DEC investigator sent a letter to respondent asking for additional information about the personal injury complaint. The investigator did not receive a reply. Respondent claimed that he sent the information to the investigator. At the hearing, the investigator disclosed that she often does not

receive mail sent to her office and that respondent's failure to reply did not impede her investigation because she obtained the information from the court. She did not withdraw the charge that respondent failed to cooperate with the investigation.

On June 18, 2003, the investigator filed an amendment to the complaint adding a charge that respondent violated *RPC* 1.8 (presumably *RPC* 1.8(h)), apparently based on his failure to advise Ramirez of his right to independent counsel before settling the malpractice claim. The amendment also charged respondent with a violation of *RPC* 8.4(c) based on respondent's telephone communication with Ramirez after Ramirez received a subpoena to testify at the ethics hearing.

The DEC found that respondent violated *RPC* 1.4(a) by failing to inform Ramirez that the personal injury complaint had been dismissed. The DEC determined that respondent had an affirmative duty to make all reasonable efforts to notify his client about the dismissal and that respondent violated this duty by sending a single letter and possibly trying to contact his client by telephone. In addition, the DEC found that respondent violated *RPC* 1.8(h) by failing to advise Ramirez in writing of his right to seek independent counsel to review his potential malpractice claim against respondent.

The DEC recommended the dismissal of the remaining charges. With respect to the charges of gross neglect and lack of diligence, the DEC found that the failure to prosecute one civil matter does not rise to the level of an ethics violation, although it may constitute malpractice. The DEC further determined that respondent cooperated with the investigation; that he did not deliberately mislead Ramirez into believing that he was settling the personal injury

matter, not a potential malpractice claim; and that respondent did not offer Ramirez a payment in exchange for Ramirez' nonappearance at the ethics hearing. The DEC, thus, recommended dismissal of the *RPC* 1.1(a), *RPC* 1.3, *RPC* 8.1(b), and *RPC* 8.4(c) charges.

The DEC recommended that respondent receive a reprimand.

Following a *de novo* review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is supported by clear and convincing evidence. We are unable to agree, however, with the DEC's dismissal of the charges of violations of *RPC* 1.3 and *RPC* 1.1(a). Respondent acknowledged that he mishandled Ramirez' matter. Although respondent filed a personal injury complaint on behalf of Ramirez, he failed to serve the defendants and permitted the complaint to be dismissed. He, thus, was guilty of a lack of diligence. Even if we accept respondent's testimony that he did not learn of the dismissal until nine months later, his failure to file a motion to restore the complaint is difficult to understand. He claimed that he thought too much time had passed since the dismissal to warrant the filing of a motion to restore the matter. As a result, respondent decided to resolve the matter by notifying Ramirez of a potential malpractice claim. Respondent should have filed a motion to restore the complaint. In our view, his failure to do so violated *RPC* 1.3.

The DEC found that a single instance of permitting a complaint to be dismissed does not amount to gross neglect. The Court, however, has found that such misconduct can constitute gross neglect. *See, e.g., In re Dorian*, 166 *N.J.* 558 (2001) (attorney who filed a personal injury complaint but never served the defendant, resulting in dismissal of the complaint, and who failed to notify the client of the dismissal, was guilty of gross neglect, lack of diligence, and failure to

communicate with a client); *In re Neiman*, 167 *N.J.* 616 (2001) (attorney permitted a client's complaint to be dismissed for failure to answer interrogatories, did not learn of the dismissal until six years later, and did not notify the client until one year after learning of the dismissal, and only after the ethics grievance was filed; the attorney was found guilty of gross neglect, lack of diligence, and failure to communicate).

Here, just as in *Dorian*, respondent failed to serve the defendants, resulting in the dismissal of his client's personal injury action. Respondent should have taken steps to either restore the complaint or to locate his client. We find that respondent's shortcomings amounted to gross neglect, a violation of *RPC* 1.1(a).

Respondent also failed to communicate with Ramirez. Although respondent disputed Ramirez' testimony that he failed to return his client's telephone calls, respondent conceded that he did not inform Ramirez until January 2002 that his complaint had been dismissed in 1997. Respondent's failure to take steps to locate his client in order to inform him of the status of the complaint violated *RPC* 1.4(a).

The complaint charged that respondent misrepresented to Ramirez that he had settled the personal injury matter for $5,000 and that the defendant's insurance company, not respondent, had funded the settlement. Ramirez maintained that respondent had never disclosed that the personal injury complaint had been settled. Respondent claimed that, although he explained several times to Ramirez that the complaint had been dismissed and that respondent was settling a potential malpractice claim, Ramirez did not seem to understand. Because the evidence on this

issue did not rise to the level of clear and convincing, we dismiss the charge that respondent violated *RPC* 8.4(c).

The DEC properly found a violation of *RPC* 1.8(h). Respondent acknowledged that he had not advised Ramirez in writing to seek independent counsel before negotiating a potential malpractice claim, as required by *RPC* 1.8(h)(2). At oral argument before us, respondent's counsel conceded that respondent had failed to comply with the safeguards contained in that *RPC*. We find that respondent violated *RPC* 1.8(h)(2) by negotiating a malpractice settlement with a client or former client without advising the client to obtain legal counsel.

The DEC properly dismissed the charge that respondent failed to cooperate with disciplinary authorities. Although respondent mailed a reply to the investigator's request for additional information, the investigator did not receive it. She stated at the ethics hearing, however, that it was not uncommon for her mail not to be delivered. Moreover, the investigator conceded that her failure to receive respondent's reply did not impede her investigation because she obtained the requested information from the court. Respondent replied to the grievance and filed an answer to the complaint and to the amended complaint. We, therefore, dismiss the charge that respondent violated *RPC* 8.1(b).

Similarly, we dismiss the charge that respondent violated *RPC* 8.4(c) by contacting the grievant after a subpoena had been issued. The evidence does not establish by clear and convincing evidence that respondent contacted Ramirez. Respondent testified that it was Ramirez who initiated the communication. There is no clear and convincing evidence that

respondent offered payment to Ramirez in exchange for Ramirez' failure to appear at the ethics hearing.

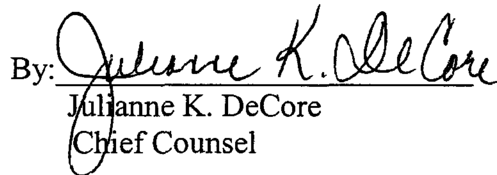
In sum, respondent was guilty of gross neglect, lack of diligence, failure to communicate with a client, and negotiating a malpractice settlement with a client without advising the client to seek independent counsel. For these violations, the range of discipline is an admonition to a reprimand. *See, e.g., In the Matter of Jeffrey M. Cohen*, Docket No. DRB 98-248 (1998) (admonition where the attorney permitted a complaint to be dismissed, failed to file a motion to restore the complaint, and failed to inform his clients that the lawsuit should be discontinued because the defendants had no assets, in violation of *RPC* 1.1(a), *RPC* 1.3, and *RPC* 1.4); *In the Matter of Paul Paskey*, Docket No. DRB 98-244 (1998) (admonition where the attorney twice allowed the same complaint to be dismissed and failed to inform his client of the dismissal or to reply to her inquiries about the status of the matter, in violation of *RPC* 1.1(a), *RPC* 1.3, and *RPC* 1.4(a)); *In re Neiman, supra*, 167 *N.J.* 616 (2001) (reprimand where the attorney permitted a client's complaint to be dismissed and did not notify the client until one year after learning of the dismissal, in violation of *RPC* 1.1(a), *RPC* 1.3, and *RPC* 1.4(a)); *In re Dorian, supra,* 166 *N.J.* 558 (2001) (reprimand where the attorney filed a personal injury complaint but never served the defendant, resulting in the dismissal of the complaint, and failed to notify the client of the dismissal); *In re Gavin*, 153 *N.J.* 356 (1998) (reprimand for gross neglect in a personal injury matter, resulting in the running of the statute of limitations and failure to communicate with the client); *In re Paradiso*, 152 *N.J.* 466 (1998) (reprimand for lack of diligence in a personal injury matter, resulting in the dismissal of a case with prejudice, and failure to communicate with a

client); *In re Ruddy*, 142 *N.J.* 428 (1995) (reprimand for gross neglect, lack of diligence, and failure to communicate with a client in one matter, and, in another matter, failing to communicate with a client and entering into a legal malpractice settlement agreement without advising the client to obtain independent legal counsel).

Based on respondent's disciplinary history, we unanimously determine that a reprimand is the appropriate discipline for his infractions. Two members did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

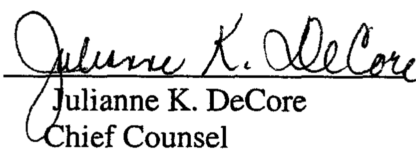
In the Matter of Fernando Regojo
Docket No. DRB 03-457

Argued: February 13, 2004

Decided: April 6, 2004

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley			X				
O'Shaughnessy			X				
Boylan			X				
Holmes			X				
Lolla							X
Pashman							X
Schwartz			X				
Stanton			X				
Wissinger			X				
Total:			7				2



Julianne K. DeCore
Chief Counsel