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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 05-295;
05-296; and 05-297
District Docket Nos. XII-03-059E;
XII-03-060E; and XII-03-062E

IN THE MATTER OF	:
RICHARD H. KRESS	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 17, 2005

Decided: December 29, 2005

Mark Watson appeared on behalf of the District XII Ethics Committee.

Respondent appeared pro se.

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

These matters were before us on a recommendation for discipline (three-month suspension) filed by Special Master John M. Boyle, J.S.C. (retired).

Respondent filed a motion to expand the record to include a letter from his physician. The letter clarified the effects of respondent's medical condition on his ability to function on a day-to-day basis. We determined to grant the motion.

Respondent was admitted to the New Jersey bar in 1979. At the relevant times, he maintained a law office in Clark, New Jersey.

In 1992, the Court suspended respondent for three months when, as a municipal court prosecutor, he failed to disclose to the municipal court judge the circumstances surrounding the dismissal of a drunk-driving case. In re Kress, 128 N.J. 520 (1992). In 1996, he was reprimanded (by consent) for failure to timely file a reply to a motion for pendente lite support and a motion for reconsideration, lack of diligence, and failure to keep his client informed about the status of the matter. In re Kress, 143 N.J. 334 (1996).

In 2003, respondent received a one-year suspension for a pattern of conflict of interest situations in his representation of an accounting firm, as well as its individual partners. After an actual conflict developed between the parties, respondent was not truthful in statements to others, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and exhibited conduct prejudicial to the administration of justice by attempting

to create a sham transaction to deceive a third party that a mortgage had been assigned for bona fide consideration. Respondent also made misrepresentations to the parties to the transaction.

DOCKET NO. DRB 05-295 – DISTRICT DOCKET NO. XII-03-059E

The complaint in this matter charged that respondent violated RPC 1.3 (lack of diligence) and RPC 1.5, presumably (b) (failure to communicate in writing the basis or rate of the fee).

In December 1999, grievant Gary Mannuzza met with respondent to discuss filing a bankruptcy petition. According to Mannuzza, he and respondent had known each other for "numerous" years. He considered respondent a friend. Respondent had not represented the Mannuzzas prior to this matter. Mannuzza claimed that his legal problem was a large debt on his American Express card, which his brother Mark had incurred. Apparently, Mark had gotten into trouble with loan sharks and used Mannuzza's American Express card to pay them back.

During the initial meeting among respondent, Mannuzza, Mannuzza's wife, and brother Mark, they decided to seek a chapter 7 bankruptcy protection. Respondent explained the process and, according to Mannuzza, quoted him a $1,500 fee. Mannuzza claimed that, when he told respondent that he did not have the money to pay him,

> [respondent] said, well, you know, I want to take my daughter on a trip, something with college or something, he says, you know, I'll just charge a trip to your American Express card, a cruise and that'll cost 1,500, 1,700 whatever.
>
> And I said, Rich, as long as I can't get in no trouble and it's going to be taken care of, you know, do what you got to do.
>
> [1T16-8 to 1T16-15.][1]

Mannuzza "faxed" a copy of his credit card to respondent's office. Several days later, respondent telephoned Mannuzza to notify him that the trip cost more than anticipated, approximately $3,100, and that he owed Mannuzza the excess amount. Mannuzza stated:

> I says, Rich, I says in plain English, I'm not a scum bag. I says I'm not gonna take money from you if it's going to get dismissed in bankruptcy. Why would I do that? So that's how the charge on the American Express came about.
>
> [1T16-24 to 1T17-3.]

Respondent knew that Mannuzza was having problems with the credit card when he charged the trip from himself and his daughter in lieu of a fee. The amount of the trip was a credit towards work respondent had done for Mannuzza. Mannuzza claimed that respondent never provided him with a writing setting forth the terms of their fee arrangement.

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[1] 1T refers to the March 22, 2005 hearing transcript in DRB 05-295.

Respondent filed the bankruptcy petition in early May 2000. The balance on Mannuzza's American Express at that time was $101,595.70. Mannuzza recalled that, on June 7, 2000, they appeared before the bankruptcy trustee because American Express had filed an adversarial proceeding. Subsequently, depositions were twice scheduled and postponed. Mannuzza remembered receiving an April 2001 letter from American Express's counsel notifying him that the American Express debt was non-dischargeable, and that a judgment had been entered against him on that debt. Respondent had not told Mannuzza about the judgment.

After receiving that letter, Mannuzza could not reach respondent. He, therefore, called the bankruptcy court, which informed him that the discharge was denied on March 16, 2001. Later that day, Mannuzza again called respondent, who assured Mannuzza that he would take care of the problem.

At some unknown point, Mannuzza's older brother, Anthony, had some legal problems (mail fraud charges), which respondent handled. According to Mannuzza, respondent told him that the best way to get the American Express debt discharged was to blame the debt on Anthony, and then claim that Mannuzza did not "want to go against American Express" because he did not want to get Anthony into further trouble. Relying on respondent's advice, Mannuzza

signed a "letter" blaming the American Express debt on Anthony, even though it had been incurred by his other brother, Mark.

Ultimately, the chapter 7 petition was denied. Respondent told Mannuzza that they would pursue a chapter 13 bankruptcy protection to have the American Express debt discharged. According to Mannuzza, respondent quoted him a $1,500 fee plus filing fees. Mannuzza paid respondent $200 in February 2003, and expected that the charge on his American Express card for the prior petition would cover the balance. Respondent, however, informed him that it had been "eaten up fighting American Express." Mannuzza promised to pay respondent the balance of the fee once his financial problems were resolved and he was able to refinance his mortgage.

Mannuzza claimed that, when he called respondent's office in March 2003, to find out about his chapter 13 petition, respondent told him that he was going to send him a "cover my ass letter" and agreed to file the petition. However, respondent's April 9, 2003 letter to Mannuzza stated that, although he had agreed to accept periodic payments from Mannuzza, he could not file the Chapter 13 petition until his fee was paid in full because that is what the court required. Respondent gave Mannuzza the option of either paying him in full, or not having respondent represent him.

After months of trying to get in touch with respondent, Mannuzza informed respondent's secretary that he had "listened to enough of [respondent's] BS" and was going to contact the ethics committee. Thereafter, respondent's office filed the petition. However, because the attached schedules were incorrect, the bankruptcy court gave Mannuzza until August 1, 2003 to re-file the proper papers or request an extension. When Mannuzza telephoned respondent, respondent told him not to worry because he had obtained an extension. Later, Mannuzza learned that his case had been dismissed because respondent had not requested an extension.

Mannuzza testified that he did not want to file a grievance against respondent, but that he had to look out for himself. He added that his life has been in turmoil for four years and that he was unable to refinance the loan on his house or co-sign a car loan or obtain a college loan for his son because of his bad credit history. He stated that his wife was forced to go to work to help pay the bills and that he will have to sell his house to pay the American Express debt in order to move on with his life.

Mannuzza believed that his chapter 7 petition was dismissed because respondent did not comply with the court's instructions. The bankruptcy court awarded American Express a default judgment

for $87,000. It was only after the default judgment was entered that respondent tried to vacate the default.

For his part, respondent claimed that, when he and Mannuzza agreed that he would charge the trip in lieu of a fee, he believed that Mannuzza and his brothers would continue to keep the payments current on the American Express debt. Respondent was under the impression that, both of Mannuzza's brothers were using the credit card to pay off the interest that they owed some "loan sharks."

Respondent claimed that he tried to settle the debt with American Express, to no avail. According to respondent, non-dischargeable chapter 7 bankruptcy debts are those incurred fraudulently, or incurred within ninety days of filing a bankruptcy petition. Respondent explained that, under the bankruptcy code, incurring a debt with knowledge that it cannot be repaid precludes the debt from being discharged, but is not considered fraud.

As to the fee, respondent stated that the chapter 13 petition was a new matter; hence the reason for sending Mannuzza a retainer agreement setting forth a $1,500 fee. The record is silent on whether the Mannuzzas signed the agreement. As to this fee agreement, the following exchange occurred between the special master and respondent:

JUDGE BOYLE: . . . . I have exhibit P-4 here which is a letter from you to Mannuzza dated December 15, 2000.

. . . .

You mentioned a pretrial coming up and then you say in order to represent you the rules require that I have a signed agreement to provide legal services. A copy is enclosed. Please sign it, return it with a retainer of $1,500. Is that the letter you're referring to?

MR. KRESS: That is the letter I'm referring to.

JUDGE BOYLE: That's P-4. Okay. Now, my question is if you collected $3,100, which was the cruise cost, was that in any way involved with the adversarial proceeding.

MR. KRESS: Eventually that's what I had agreed to do. I had felt that at that point given the amount of work on the Chapter 7, it wasn't just a straight Chapter 7, the discussions and reaffirmation with the boats, the jet skis and all, and the additional negotiations with American Express prior to the filing of the adversarial proceeding, that I had more than used up that $3,000 retainer.

. . . .

JUDGE BOYLE: . . . . They're charging you with the failure to have had a signed retainer agreement when at the time they engaged you for the Chapter 7 proceeding and you concede that I take it.

MR. KRESS: You know what, I don't have the files. I don't know whether I gave them a retainer agreement or whether one was - -

. . . .

I cannot produce one, that's correct.

JUDGE BOYLE: I guess you concede that in lieu of a payment in cash or a check you were willing to accept whatever the cost of the cruise was which turned out to be about $3,100, right.

MR. KRESS: That is correct.

. . . .

MR. KRESS: Knowing that the Chapter 7 bankruptcy was only going to be a $1,500 fee and that the charge was $3,100 it was in my contemplation that he would either have a credit of $1,600 for additional legal services or that we would discuss the disposition of that.

[1T98-24 to 1T101-9.]

According to respondent, he failed to answer the adversarial complaint because he did not have a valid basis to challenge it until after the default judgment had been entered. He, thus, denied having "dropped the ball." Respondent argued that Anthony's criminal problems, which ultimately led to his use of the American Express card, formed a basis to vacate the default or to bargain with American Express. The bankruptcy judge concluded, however, that, even if he were to vacate American Express's judgment, the newly-discovered evidence would not survive a summary judgment motion by American Express.

Initially, respondent asserted that he advised the Mannuzzas that they could not prevail under the existing facts

and that it would be "wiser and cheaper to allow that judgment to go forward and then later file a Chapter 13 because under a Chapter 13 you can discharge this type of debt." Later, however, respondent testified that he could not recall whether he had told the Mannuzzas that he would default on the adversarial complaint.

According to respondent, in February 2003, he told Mannuzza that the "prior [fee] monies" had been spent and that he needed a retainer agreement and payment before he would file the chapter 13 petition. Respondent, nevertheless, prepared the petition. He claimed that, while he was hospitalized, on July 18, 2003, his secretary took it upon herself to file the petition. Respondent maintained that, when Mannuzza called him to tell him about deficiencies in the petition, he was in the hospital and unaware that the bankruptcy petition had been filed. Respondent asked his secretary to look into it, but knew that he could not do anything about it because of his pending suspension from the practice of law.

Respondent testified that, although the chapter 13 petition was dismissed, it was without prejudice and could have been re-filed; he did not do so, however, because of his hospitalizations and suspension.

Respondent conceded that Mannuzza was unsuccessful in his numerous attempts to contact him, because of his absence from the office for medical reasons. In January 2001, respondent began suffering with chronic pancreatitis attacks that would "lay [him] up" for several days. He had difficulty functioning on a day-to-day basis from early 2001 through the end of 2003. Respondent stated that he was hospitalized during some of the relevant time periods and that, because he is a sole practitioner, there was no one else available to handle court appearances, meet with clients or handle day-to-day office matters.

In January 2001, respondent had his gallbladder removed. Thereafter, every twelve to fifteen months he was beset by pancreatitis attacks that would leave him ill for four to six weeks at a time, requiring medical treatment. After respondent's attacks became more frequent, he was referred to a specialist, who performed medical procedures on him. He had stents inserted into his pancreatic duct. Finally, in 2003, the doctor inserted into his pancreas a nasogastric tube with a drain that had to be emptied several times a day.

In the Spring of 2003, respondent's doctors discovered a mass in his pancreas. From February to August 2003, respondent lost almost 100 pounds, leading his doctors to believe that the mass was malignant and that he had only a few months to live. In August

2003, respondent underwent a fourteen-hour procedure for, among other things, the removal of half of his pancreas. Respondent was hospitalized until September 2003. Respondent, thus, explained that his "thoughts" were focused on matters other than his law practice.[2]

Respondent testified that he still has occasional pancreatitis attacks, but that his health is significantly better now.

During the same time period, respondent suffered from depression due to problems in his personal life. From June 2002 through May 2003, he was "seeing a Dr. Herbert Potash [a diplomat in psychotherapy], to help [him] through a lot of problems." According to respondent, he had made great progress by the time he had his surgery, but continues to see Potash on a regular basis.

According to respondent, although he did not inform his clients about his psychological condition, they were well aware of his medical problems. He admitted, however, that by continuing to practice law he hurt not only himself, but also his clients.

Respondent admitted that he never wrote to the Mannuzzas to notify them that he would be unable to file the chapter 13 petition because of his suspension.

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[2] Respondent's medical condition is described more fully in the next matter.

The special master noted that, despite respondent's illness, he continued to practice law until his suspension, on August 11, 2003. The special master found that respondent's health deteriorated progressively as time went on and that some of respondent's "lapses in 2003" could be attributed to his medical problems.

The special master found disturbing respondent's fee payment arrangement (charging the cruise on Mannuzza's American Express card), while they were contemplating the Mannuzzas' bankruptcy. Nevertheless, the special master made no findings in this regard.

The special master found that most of the events "evidencing [respondent's] . . . neglect with his clients" occurred before his physical condition drastically deteriorated in May 2003. The special master found that respondent's office was poorly managed and that there was no evidence that respondent had sought assistance from another lawyer to help him with his practice.

The special master concluded that respondent had violated RPC 1.3 (lack of diligence), presumably based on (1) the fact that American Express, rather than respondent, notified Mannuzza that his debt was non-dischargeable, (2) respondent's assurance to Mannuzza, on April 4, 2001, that he would take care of the "denial," and (3) the "dismissal" of the chapter 13 petition and

entry of a "judgment" against Mannuzza. According to the special master, respondent had an obligation to keep Mannuzza informed about his bankruptcy and to "follow the file and periodically mind its progress."

The special master also found a violation of RPC 1.5, presumably (b), for respondent's failure to provide Mannuzza with a writing setting forth the basis of his fee in the chapter 7 matter.

DOCKET NO. DRB 05-296 – DISTRICT DOCKET NO. XII-03-060E

The complaint in this matter charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(a) (failure to keep a client reasonably informed about the status of the matter or to comply with reasonable requests for information).

Donald Johnson retained respondent to represent him in a personal injury action for damages sustained in a May 1998 automobile accident. In September 2002, the case settled for $92,500; Johnson received $61,666.67. Respondent advised Johnson that the maximum he could hope to recover was the defendant's policy limit of $100,000; that, if they went to trial, the experts would require advance payment to appear in court; and that his pre-existing condition and surgery were factors to be

considered in assessing the value of the case. Johnson was satisfied with the settlement.

According to Johnson, when he asked respondent whether the settlement would affect his $35,000 underinsured motorist claim, respondent informed him that it would not. Johnson assumed that respondent would pursue that claim because he had accepted less than the $170,000 arbitration award.

Respondent did not recall informing Johnson that he had contacted the insurer about underinsurance coverage. However, in his reply to the grievance, respondent stated that he recalled discussing the matter with Johnson on many occasions and believed that Johnson understood his rights in that regard.

Johnson claimed that, after he received the settlement, he had no further contact with respondent, even though, after October 2002, he called respondent's office "at least five times a month" and wrote to him about his underinsured motorist claim. When Johnson finally called his insurance company's claims department, he learned that respondent had not filed an underinsured motorist claim on his behalf.

According to Johnson, he had no further communications with respondent until October 31, 2003, when respondent told him that he was suspended, that he could no longer represent him, and

that Johnson might have an underinsured motorist claim that had not been pursued.

Johnson filed an ethics grievance against respondent because respondent ignored his calls and did not give him information about his case.

Elizabeth Maurer testified that she had been respondent's secretary and only employee for approximately twenty years. Maurer was subpoenaed to testify at the DEC hearing because she did not want to say "bad things" about respondent or get him into trouble. Maurer recalled that Johnson frequently tried calling respondent after his November 2002 settlement and through October 2003. Maurer gave respondent Johnson's messages and told him that Johnson was angry that respondent was not returning his calls. Maurer was certain that Johnson called as many as five times a month; she conveyed those messages to respondent and told him that Johnson thought respondent was stealing his money.

According to Maurer, respondent's "standard practice was not to return [client] phone calls." She claimed that for twenty years the same people would call "over and over and over" and tell her that respondent was not calling them back. Maurer stated that respondent did not spend much time in the office because of court appearances, many vacations, and frequent illnesses. Maurer

added that "[h]e was always late for everything," including appointments with clients, "sometimes an hour or two late."

From January 2002 through September 2003, while respondent was ill, he spent less time in the office and less time doing paperwork. Respondent was only out of the office a few days at a time, until he underwent surgery in Boston. Maurer did not believe that his illness left him too debilitated to return client calls. Because of respondent's absences from the office, Maurer was required to adjourn court dates and cancel appointments. Maurer worked for respondent until his suspension.

Maurer claimed that, during respondent's illness, she saw his "emotions" change. He would come into the office and not do anything. On one occasion, after a pancreatitis attack, he told her that he was "paralyzed," presumably meaning that he could not do anything.

Respondent admitted that most clients knew that he was bad at returning telephone calls. He also admitted that he often told them that, because of his busy schedule, he would not return calls that were not emergencies.

Respondent believed that he had a good rapport with Johnson up until his case settled. He discussed with Johnson that, if he settled his case for less than the full policy limits, he could still proceed against the carrier for underinsured coverage.

Respondent claimed, however, that he never received any information from Johnson indicating that he had such coverage. Respondent was not concerned about that issue because of the six-year statute of limitations and ample time to assert such a claim. He claimed that, after the settlement, Johnson's conduct became extreme and threatening.

According to respondent, he recalled getting some messages about Johnson's telephone calls, but not as many as Johnson claimed. He remembered that Johnson had accused him of settling the underinsured motorist claim and stealing the proceeds. Out of concern, respondent telephoned Johnson to dispel that notion. Respondent disputed the arbitrator's valuation of Johnson's case ($170,000) because of Johnson's pre-existing injuries and arthritis and the defendant's knowledge of that information.

According to respondent, when he notified his clients of his impending suspension, he also informed Johnson that he had not pursued his underinsured motorist claim, and that he had neither the time nor the ability to do so during his illness. Respondent admitted that he should have informed Johnson about his illness, prior to his suspension.

Respondent claimed that he was frequently hospitalized in 2003, and that he did not advise his clients to obtain new counsel because he needed the income to defray his child's

college expenses and he hoped that his condition was not as serious as it turned out to be. Respondent stated:

> I really thought that I was going to get better and that things were going to get better and they didn't. And I know that because of my medical condition it made a bad situation worse that year with the little bit of time that I spent in the office. And I know as much [sic] I'd like to blame my secretary and everybody else I'm the one who didn't make the phone calls to Mr. Johnson, I'm the one who didn't follow-up with him. When it came time to send the letters that I could no longer practice law after the suspension I advised him that he still had time that the statute of limitations had not run and that I had not done anything on his uninsured motorist, Judge.
>
> And, Judge, I mean looking back probably what I should have done was stopped working in April of 2003 and just closed up shop because of my medical condition, but I really thought I was going to get better. I did not think I was going to have a mass on the head of [sic] pancreas and not know whether I was going to live or die during that year and it was just a tight rope balancing act that I did not balance well.
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> [2T81-18 to 2T82-17.][3]

As of the date of the hearing below, respondent was still practicing law "on a limited basis" as a sole practitioner, with no office staff. Since December 2004, respondent has been hospitalized three times for his pancreatitis.

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[3] 2T refers to the April 27, 2005 hearing transcript in DRB 05-296.

Exhibit D is respondent's primary physician's report chronicling respondent's physical ailments from January 1, 2002 through December 31, 2003. The report stated, in relevant part:

> Over a several year period many ERCP's [sic] were performed on the patient under general anesthesia. During these procedures several methods including stent placement were performed in an attempt to prevent further blockages of the pancreatic duct. Eventually, all forms of treatment became useless and Mr. Kress began a recurrent series of severe, acute, chronic pancreatitis attacks. The serious recurrent bouts commenced sometime in late 2001 to early 2002.
>
> [Respondent was prescribed various medications to help with digestion, ease his condition, and manage pain.]
>
> On several occasions from approximately 1996 to 2001, the patient was hospitalized for pancreatitis . . . . On several occasions . . . Mr. Kress was advised . . . to be hospitalized for his pancreatitis attacks, but the patient refused and treated himself at home . . . . The pain from pancreatitis is severe and debilitating and it is rare that a patient does not seek hospitalization.
>
> In January 2002 . . . [respondent] had a severe attack which caused him to be hospitalized . . . . After a subsequent attack, another ERCP was performed . . . .
>
> It is the recommendation that the usual recuperation period for a severe pancreatitis attack is 6 to 8 weeks . . . . [A]lthough there was a lengthy recuperation period suggested, Mr. Kress would attempt to return to his usual routine. It is my opinion that [sic] with a degree of medical certainty that it would be extremely difficult for him to be

able to work and be able to perform all of his duties as an attorney throughout this period . . . .

. . . . Mr. Kress had several bouts of pancreatitis during the period of January 1, 2002 through August 19, 2003. Many of these episodes went untreated and Mr. Kress continued to self treat himself against the advice of his physicians to be hospitalized.

[Respondent had several more attacks including one while in Vietnam and was treated by a physician there.]

. . . .

After several diagnostic tests . . . a mass in the head of the pancreas was observed that was causing the obstruction of the pancreatic duct . . . . [I]t was recommended that Mr. Kress have a Whipple procedure performed. There was a great concern that there was a malignancy present . . . . With that concern it was in the patients [sic] best interests to seek immediate treatment.

[*Respondent endured a fourteen-hour*] procedure in which part of his pancreas was removed and the remainder attached directly to his small intestine . . . . Although his condition and subsequent treatment were significant, I have not been requested to address his physical condition after the Whipple Procedure. [Subsequently respondent had several other procedures performed and continues to be treated by physicians in Boston.]

. . . . I do not doubt that he suffered both physical and emotional disabilities that were far greater than he would acknowledge.

[The doctor also prescribed medication for respondent's anxiety.]

[Ex.D1.]

Respondent also submitted a report from his psychotherapist, from whom he obtained treatment from June 3, 2002 through May 29, 2003. The therapist opined that respondent's long-standing emotional problems were responsible for his disorganized work habits. He concluded that respondent was suffering from an underlying depression, which was exacerbated by his suspension. He experienced a high level of stress about his children's education expenses while he was unable to work, his prognosis for a full recovery, and the fact that he was living with a wife with whom he did not get along. The therapist concluded that these factors made it impossible for respondent to perform capably.

The therapist's prior December 3, 2002 letter recommended that respondent continue in individual therapy to prevent lapses in his personal judgment and that he practice under the supervision of an experienced attorney.

The special master found that respondent violated his responsibilities to his client by neglecting Johnson's underinsured motorist claim. The special master concluded that respondent allowed Johnson's matter to "drift" for almost six months, without communicating with him. He, therefore, found violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(a) (failure to communicate with the client).

The special master found that respondent's defenses of illness, a busy sole practice, and his secretary's "implied" negligence required him to take action, that is, to obtain assistance from another attorney to help safeguard his clients' interests, hire help or reduce his caseload, and hire a competent secretary.

DOCKET NO. DRB 05-297 – DISTRICT DOCKET NO. XII-03-062E

The complaint in this matter charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(a) (failure to keep a client reasonably informed about the status of the matter). At the conclusion of the testimony before the special master, the presenter made a motion to include a charge of RPC 3.2 (failure to expedite litigation), which the special master granted.

Robert Meurer retained respondent in connection with his March 2002 denial of Social Security Disability (SSD) benefits. Respondent also represented Meurer in connection with several bankruptcy actions to forestall a foreclosure action on Meurer's house.

Meurer had applied for SSD benefits on January 10, 2002, after an automobile accident. The Social Security Administration (SSA) denied his application for benefits. By letter dated April

25, 2002, respondent wrote to the Regional Commissioner, Social Security Administration, Elizabeth, New Jersey, to appeal the denial of benefits. Unbeknownst to respondent, he incorrectly typed Meurer's social security number on the appeal letter. Presumably, this error led to problems with the SSA locating the appeal.

About one month later, Meurer met with respondent. Respondent informed Meurer that "it was being worked on, and he [respondent] would do a follow-up." Meurer claimed that, thereafter, he called respondent almost on a weekly basis to try to get information about his matter, to no avail. In January 2003, Meurer learned from the SSA that there was no record of his appeal on file. When Meurer notified respondent about this, on February 13, 2003, some ten months after his initial letter, respondent forwarded a second letter to the SSA, stating:

> Enclosed herewith please find a copy of my letter dated April 25, 2002 and a copy of all supporting documentation.
>
> Pursuant to your conversation with my client, it is my understanding that you do not have a record of receiving an appeal filed on Mr. Meurer's behalf. After you have reviewed the enclosed please advise if any additional information is necessary.
>
> [Ex.P2.]

Meurer received no replies to his telephone call or any letters from respondent about the status of his matter. After

numerous telephone calls to respondent's office, Meurer learned from respondent's secretary that respondent was suffering from an "ailment." Respondent never mentioned his medical problems to Meurer.

In July or August 2003, Meurer retained another attorney, Seamus Boyle, to take over the matter. Boyle testified that he first began representing Meurer on July 24, 2003. At that time, Meurer and his wife believed that respondent was having trouble getting a reconsideration determination. In addition, they were having problems communicating with respondent. Boyle, therefore, wrote to respondent to request a copy of Meurer's file. On September 2, 2003, Boyle discovered that the SSA office did not have a request for reconsideration in their file or the name of an attorney of record. The SSA advised Boyle to file a new application "to protect the earliest possible filing date." He filed the new application on September 5, 2003.

In November and December 2003, two separate SSA offices notified Boyle that they had previously determined that Meurer was not considered disabled within the meaning of the law and that they had no new information justifying a reversal of the denial of benefits. Boyle, therefore, filed a request both for reconsideration and a hearing. A hearing was scheduled for April 11, 2005 (approximately three weeks after the hearing before the

special master). Boyle was optimistic that the SSA would reconsider Meurer's application.

Respondent claimed that, in the winter of 2002, and again in 2003, he informed Meurer about his illness. Respondent believed that, possibly before May or June 2003, his secretary had told Meurer that he would be unable to represent him in the SSD matter. Prior thereto, respondent was still "under the illusion" that he could continue to represent his clients. Respondent never sent Meurer or the SSA letters notifying them that he could no longer represent Meurer.

Respondent recalled that, on two occasions, in Meurer's presence, he called the SSA to check on the status of Meurer's application. Respondent claimed that "the individual" advised him "that it was still pending and that [they would] be hearing from them shortly." Respondent knew from his prior dealings with the SSA that it could take eight to ten months for a determination and was, therefore, not concerned. In January 2003, Meurer informed respondent that he had contacted SSA and had been told that there was no record of his appeal. Respondent claimed that he, too, had called the SSA and received similar information. According to respondent, on February 13, 2003, he personally delivered a copy of Meurer's entire file to the SSA. Approximately one week later, the SSA office informed him that

it had the file. In May or June 2003, respondent again contacted the SSA, at which time he was advised that it did not have Meurer's appeal on file and suggested that he file a new application. When respondent relayed that information to Meurer, he went "wild." It was only during the course of the DEC investigation that it came to light that there was a typographical error in Meurer's social security number.

According to respondent, Meurer was in respondent's office on a regular basis because of difficulties with his mortgage company and with the filing of chapter 13 bankruptcies to forestall foreclosure. Respondent claimed that, because of Meurer's presence at his office, they had the opportunity to discuss his SSD matter on a regular basis. Moreover, respondent contended that Meurer did not remember their conversations because Meurer's memory was affected by his physical disability.

Respondent was unable to substantiate his efforts to unravel the problems with Meurer's SSD application, other than to produce copies of two letters that he had written, on April 25, 2002 and February 13, 2003, and to refer to two telephone calls that he had made in Meurer's presence. Respondent did not submit any records of his written or verbal communications with the SSA beyond February 2003.

In March 2003, respondent visited Hong Kong and became very ill. He was unable to return to the office until the beginning of April.

According to respondent, his physical and emotional problems did not affect his handling of the matter until after February 2003, when his pancreatitis attacks became more frequent. Respondent admitted that, had he been in the office more frequently, he would have been in a better position to follow up on Meurer's matter.

Respondent again testified about his medical condition and submitted his doctors' reports into evidence. He reiterated that his serious medical problems continued through August 2003, when half of his pancreas was removed and other procedures were performed. He was hospitalized until September 9, 2003. He also testified about his emotional problems.

Respondent claimed that he protected his clients' interests while he was sick by not taking on new cases; trying to resolve as many pending matters as possible; having other attorneys cover matters for him; having his daughter assist him; and referring matters that he could not handle. Respondent testified that he tried to do as much as he could, but realized that for some of his clients, including Meurer, he had not done enough. Respondent stated that, in January 2002, he had

approximately 150 to 200 active files in his office. By August 2003, he had fewer than two dozen active files left because he had either disposed of the matters, or referred them to other attorneys. Respondent stated that, when he received the notice of his suspension, he could no longer refer cases; he could only inform his clients that he could not represent them and recommend that they find another attorney.

Respondent admitted that he performed a disservice to Meurer and other clients by failing to acknowledge the extent and depth of his illness, physical and emotional, and its effect on his practice.

The special master found an issue of credibility with respect to whether respondent adequately communicated with his client. Meurer claimed that he had little contact with respondent – that he called weekly with no reply from respondent. Respondent cited the other matters he handled for Meurer to show that there was contact between them. The special master found that, even though respondent became increasingly ill, he failed to notify his client about his illness. The special master noted that, although Meurer's memory might have been affected by his physical disability, a number of his calls went unanswered. The special master, thus, found that respondent violated RPC 1.4(a).

The special master also found that respondent did not act diligently in following up on Meurer's appeal. The special master did not cite RPC 1.3, however. In addition, the special master found that respondent's failure to timely pursue Meurer's appeal violated RPC 1.1(a) (gross neglect).

The special master did not address whether respondent's conduct violated RPC 3.2 (failure to expedite litigation), even though he granted the presenter's motion to amend the charges.

The special master recommended a three-month suspension for respondent's conduct in the three matters. He also recommended that respondent continue his therapy with Dr. Potash and that, upon reinstatement, he practice under the supervision of a proctor for one year. The special master found that "[n]one of the charges are so serious as to recommend a longer suspension, but repetitive enough to demonstrate a pattern of behavior [that] shows significant deficiencies in diligence and communication."

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

In the Mannuzza matter, respondent was charged with violating RPC 1.3 (lack of diligence) and RPC 1.5(b) (failure to

provide a writing setting forth the basis or rate of the fee). Clearly, respondent did not provide Mannuzza with a written agreement for the chapter 7 petition. At one point, he claimed that the petition itself provided the required information to Mannuzza. This, however, does not satisfy the requirements of the rule. The record does not disclose which services Mannuzza expected for the $1,500 fee. Moreover, respondent did not demonstrate, at the hearing below, whether the initial fee encompassed representation in the adversarial proceeding or any subsequent proceedings. Respondent, thus, violated RPC 1.5(b).

As the special master aptly noted, the most troubling aspect of respondent's fee arrangement was that, in lieu of payment, he used Mannuzza's American Express card to charge a cruise for himself and his daughter. Respondent did so knowing that Mannuzza was unable to pay the credit card bill. Indeed, Mannuzza's sole reason for retaining respondent was to have that debt discharged through bankruptcy. Thus, respondent's conduct was deceitful and fraudulent. We, therefore, deem the complaint amended to conform to the evidence and find a violation of RPC 8.4(c). In re Logan, 70 N.J. 222, 232 (1976).

The evidence also established that, although respondent did some work in Mannuzza's behalf, he failed to file an answer to American Express's adversarial complaint to determine the

dischargeability of the debt in the adversarial proceeding, thereby permitting a default judgment to be entered against Mannuzza. Thereafter, respondent failed to advise Mannuzza about the judgment. Mannuzza only learned about the judgment when notified by American Express, almost an entire year after the petition had been filed.

Respondent claimed that there were no defenses to the adversarial proceedings. However, he never conveyed that information to the Mannuzzas or his intention to allow a default to be entered in the matter. Respondent's conduct, thus, violated RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate with clients), because he did not advise his client of the outcome of the case. His conduct also violated RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to allow a client to make an informed decision about the representation), in that he did not discuss his strategy with Mannuzza about defaulting in the matter. These violations were not charged, but were litigated at the hearing and proven by clear and convincing evidence. We, therefore, deem the complaint amended to conform to the proofs, under In re Logan, supra, 70 N.J. at 232.

As to the chapter 13 petition, on February 11, 2003, Mannuzza paid respondent a minimal amount towards the fee ($200) and hoped to pay the remainder once his finances were in order. On April 9,

2003, however, respondent notified Mannuzza that he would not file the petition until his fee was paid in full. After Mannuzza threatened to complain to ethics authorities, respondent's "office" filed the petition. The petition, however, was incomplete. Respondent's "office" acknowledged the deficiency to the bankruptcy court, advising it of respondent's hospitalization and requesting an extension. No further action was taken. Nothing in the record refutes respondent's contention that his secretary filed the petition without his authorization. However, even though respondent may have been seriously ill, he took no steps to insure that his client's interests were protected.

Although we have considered respondent's negative comments regarding the character of his clients we, nevertheless, find that his conduct in this matter violated RPC 1.3, RPC 1.5(b), and RPC 1.4(a) and (b). We also find violations of RPC 1.16(a)(2) (failure to terminate the representation because of physical or mental condition materially impairing ability to represent a client) for respondent's failure to terminate the representation once his medical condition affected his ability to properly represent his clients. We further find violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) for respondent's (1) attempting to get the American Express debt discharged by having Mannuzza blame Anthony for the debt and

having Mannuzza claim that he did not want to get his brother into further trouble; (2) charging his fee on Mannuzza's American Express card; and (3) informing Mannuzza that he had obtained an extension to correct the schedules to the bankruptcy petition, when he had not.

In the Johnson matter, it is not clear that respondent's conduct was grossly negligent. Although respondent did not pursue Johnson's underinsured motorist claim, he did make him aware of it and did obtain a settlement for him in an amount satisfactory to his client. According to respondent, Johnson was not time-barred from pursuing the underinsured motorist claim at the time that respondent notified him of his suspension and inability to continue representing him, a year later. Thus, we find that respondent's conduct amounted to a lack of diligence only (RPC 1.3), as opposed to gross neglect.

As to the charge of a violation of RPC 1.4(a), respondent testified that he had a good rapport with his client, at least until he settled Johnson's case. According to Johnson, however, after the settlement, he called respondent approximately five times a month and wrote to him, without receiving any reply. Respondent's secretary confirmed that, as a matter of course, respondent did not return client calls and specifically did not return Johnson's calls. Moreover, respondent readily testified

that he only returned calls if it was an emergency and that his clients were well aware of this practice. Respondent, therefore, failed to properly communicate with Johnson, thereby violating RPC 1.4(a). We also view respondent's failure to advise Johnson about his illness or ability to pursue his underinsured motorist claim as a violation of RPC 1.4(b), as Johnson was prevented from making an informed decision about how to proceed with the underinsured motorist claim. Although this violation was not charged, we deem the complaint amended to conform to the proofs. In re Logan, supra, 70 N.J. at 232.

Respondent's mitigation included his serious illness for a significant period of time, part of which encompassed the period when he should have pursued Johnson's underinsured motorist claim, notwithstanding his argument before us that Johnson did not have a viable claim. Respondent also suffered from emotional problems stemming from his illness and from marital and financial problems. Maurer testified that respondent's "emotions" had changed, that he was unable to handle matters, and that he was "paralyzed." Nevertheless, respondent's emotional and physical problems do not excuse his failure to protect his clients' interests during this time period. Respondent should have withdrawn from the representation. We, therefore, find that respondent violated RPC 1.16(a)(2).

In sum, respondent's conduct in the Johnson matter violated RPC 1.3, RPC 1.4(a) and (b), and RPC 1.16(a)(2).

As to the Meurer matter, respondent failed to communicate with his client and to return Meurer's calls. In fact, as stated earlier, respondent admitted that he did not return client calls unless he considered them to be emergencies. Respondent's conduct in this context violated RPC 1.4(a).

Respondent also failed to act with diligence. He permitted the matter to sit idle for many months until his client telephoned the SSA and learned that there was no record of his appeal. Although respondent promised Meurer that he would follow up on the matter, there is nothing in the record to substantiate that he acted diligently to determine the problems with Meurer's appeal, other than his two letters to the SSA, ten months apart. The record does not establish, however, that respondent's lack of attention in this matter prejudiced Meurer's ability to obtain benefits. Thus, we find only that respondent failed to act with diligence (RPC 1.3). We do not find that respondent's conduct in this matter rose to the level of gross neglect and dismiss this charge. We also dismiss the added charge of RPC 3.2 (failure to expedite litigation) as inapplicable in this context. We find, however, that respondent's conduct in the

above three matters constituted a pattern of neglect, a violation of RPC 1.1(b).

Although a violation of RPC 1.16(b) was not charged in the complaint, we amend it to conform to the proofs, (In re Logan, supra, 70 N.J. at 232), and find such a violation because of respondent's failure to withdraw from the representation once he became too ill to properly represent Meurer. Thus, in the Meurer matter we find that respondent's conduct violated RPC 1.3, RPC 1.4(a) and RPC 1.16(a)(2).

In sum, we find that respondent's misconduct included violations of RPC 1.3, RPC 1.4(a) and (b), RPC 1.5(b), RPC 1.16(a)(2), and RPC 8.4(c) in the Mannuzza matter; RPC 1.3, RPC 1.4(a) and (b), and RPC 1.16(a)(2) in the Johnson matter; and RPC 1.3, RPC 1.4(a), and RPC 1.16(a)(2) in the Meurer matter. In addition, respondent's conduct in the three matters constituted a pattern of neglect, a violation of RPC 1.1(b).

The discipline in matters involving similar violations has ranged from a reprimand to a period of suspension, depending on factors such as the number of cases involved, the gravity of the offenses, the harm to the clients, and the attorney's disciplinary history. For respondent's misrepresentation to Mannuzza alone (telling Mannuzza that he obtained an extension), he should receive a reprimand. In re Kasdan, 115 N.J. 472, 480 (1989)

(misrepresentation to client warrants the imposition of a reprimand).

Reprimands have also been imposed in matters involving similar violations in a few matters, where the attorney has no ethics history. See, e.g., In re Tunney, 176 N.J. 273 (2003) (reprimand where attorney grossly neglected three matters for the same client and misrepresented their status to the client over a period of years, failed to turn over files to the clients or new counsel, and failed to cooperate with disciplinary authorities) and In re Cervantes, 118 N.J. 557 (1990) (reprimand for failure to pursue two workers' compensation matters; the misconduct included lack of diligence, failure to keep clients reasonably informed about the status of the matters, and misrepresentation of the status of one case).

When there is an ethics history or other aggravating factors are present, periods of suspension have been imposed. See, e.g., In re Cheek, 178 N.J. 114 (2003) (three-month suspension where, in three matters, the attorney displayed gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to turn over a file, failure to reply to a grievance, and misrepresentations; the attorney had a prior admonition and a reprimand); In re Bernstein, 144 N.J. 369 (1996) (three-month suspension for gross neglect, lack of diligence, failure to

communicate, misrepresentation, failure to cooperate with disciplinary authorities; the attorney had a prior private reprimand for similar misconduct); and In re Chen, 143 N.J. 416 (1996) (three-month suspension for pattern of neglect, misrepresentation, failure to communicate, and failure to cooperate with disciplinary authorities in two matters; prior reprimand for gross neglect and failure to communicate in two matters).

Longer suspensions have been imposed when the number of client matters is greater or the conduct itself is of a more serious nature. See, e.g., In re Tunney, 181 N.J. 386 (2004) (six-month suspension where, in seven client matters, the attorney engaged in gross neglect, lack of diligence, failure to communicate, failure to promptly notify a client of receipt of funds, and numerous misrepresentations; the attorney had a prior reprimand); In re Bosies, 138 N.J. 169 (1994) (six-month suspension where, in four matters, the attorney engaged in gross neglect in three of the matters, pattern of neglect, lack of diligence in three matters, failure to communicate with a client, failure to expedite litigation, failure to abide by the scope of the representation in two matters, and misrepresentation in two matters); In re Aranguren, 165 N.J. 664 (2000) (six-month suspension where attorney who represented three clients in five matters engaged in gross neglect, pattern of neglect, lack of diligence, failure to

communicate, failure to protect the interests of a client upon termination of representation, failure to expedite litigation, misstatements of facts or failure to disclose facts in connection with a disciplinary matter, and misrepresentations; the attorney had a prior admonition); and In re Marum, 157 N.J. 625 (1999) (one-year suspension for combinations of gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, and misrepresentations in eleven matters; the attorney had two prior admonitions).

We are troubled by two aspects of respondent's behavior: his admitted practice of failing to return client telephone calls unless their matters involve emergencies and his failure to learn from his prior mistakes. These two factors require enhanced discipline. See, e.g., In re Schubach, 178 N.J. 485 (2004) (discipline increased because of attorney's unwillingness to learn from prior mistakes); In the Matter of Richard P. Schubach, Docket No. DRB 03-218 (November 25, 2003) (slip op. at 15-16)).

We recognize that some of respondent's current ethics troubles may have resulted from his serious illness. However, instead of withdrawing from the matters because of his inability to properly represent his clients, respondent continued with the

cases, motivated solely by self-benefit: the need to generate income – in particular, to pay for his child's college tuition.

We have also considered respondent's significant ethics history – a reprimand, a three-month suspension, and a one-year suspension. Moreover, his suspension cases establish a disconcerting pattern of deceit on his part. In the matter that led to his three-month suspension, respondent failed to disclose information to a municipal court judge; in the case that resulted in his one-year suspension, he was not truthful in his statements to others and tried to create a sham transaction to deceive a third party; in the Mannuzza matter, respondent accepted payment by charging a trip on a credit card, a debt that he knew his client would seek to discharge in bankruptcy, misrepresented to his client that he had obtained an extension, and involved his client in a falsehood by having him blame his credit card debt on his brother. Respondent, thus, does not have a high regard for the truth and seems unable to conform his conduct to the high ethical standards required of members of the bar.

Because, however, of respondent's extreme personal turmoil at the time of his misconduct, we determine that a six-month suspension adequately addresses the extent and nature of his unethical behavior. If not for respondent's severe personal and medical problems, greater discipline would have been required.

Member Boylan voted for a three-month suspension. Chair Maudsley and Vice-Chair O'Shaughnessy did not participate.

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

Disciplinary Review Board
Louis Pashman, Esq.

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Richard H. Kress
Docket Nos. DRB 05-295, 05-296 and 05-297

Argued: November 17, 2005

Decided: December 29, 2005

Disposition: Six-month suspension

Members	Disbar	Six-month Suspension	Three-month Suspension	Dismiss	Disqualified	Did not participate
Maudsley						X
O'Shaughnessy						X
Boylan			X			
Holmes		X				
Lolla		X				
Neuwirth		X				
Pashman		X				
Stanton		X				
Wissinger		X				
Total:		6	1			2

Julianne K. DeCore
Chief Counsel