SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-305

IN THE MATTER OF

KEVIN J. CARLIN

AN ATTORNEY AT LAW

Decision

Argued: November 21, 2002

Decided: March 7, 2003

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Carl D. Poplar 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 IIA Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1985. He has no disciplinary history.

With several exceptions, the facts in this matter are generally not in dispute. Respondent admitted that, in three matters, he did not perform certain tasks on behalf of his clients and did not comply with the attorney recordkeeping requirements. He denied, however, that his letterhead violated the rules. The central issues are, thus, the level of discipline to be imposed and the extent to which mitigating factors serve to temper the discipline.

The Odessky Matter

Respondent represented Emil Odessky, the plaintiff in a personal injury action filed as a result of a January 11, 1993 automobile accident. Through a Russian interpreter, Odessky testified that he had rejected the defendant's offer to settle the case for $15,000. According to respondent, however, while initially Odessky had been reluctant to accept that sum, he had ultimately agreed to the settlement because it represented the insurance policy limits and because respondent had agreed to negotiate with Odessky's medical

providers to reduce the amount of their liens. Respondent stated that the liens ultimately were reduced to zero.

In turn, Odessky contended that respondent settled the case for $15,000 without consulting him or obtaining his consent. He asserted that only after he filed the grievance did he learn that the case had been settled. According to Odessky, respondent advised him of the settlement in a letter in which he offered to waive his legal fees.

Respondent acknowledged that, although the case was settled for $15,000 in February 1997, he failed to prepare a release for Odessky's signature. On September 16, 1998 the court signed an order allowing the defendant to deposit the settlement proceeds into court if respondent failed to provide a release within thirty days. Because respondent did not submit a release, the funds were deposited into court.

Both Odessky and his daughter, Maria, a recent law school graduate, testified that, despite having left numerous messages with respondent's office or having discussed the matter with him, they were unable to obtain information about its status. According to Maria, although respondent told them that he would review the file and return their calls, he never contacted them. In an August 16, 1999 letter to respondent, Odessky complained that respondent had failed to communicate with him during the past one and one-half years. Odessky asked for a copy of his file and stated that he had grounds to contact the disciplinary authorities and to take legal action against respondent. On August 27, 1999,

respondent replied that neither he nor his secretary remembered receiving any telephone calls from Odessky. Despite respondent's representation that he would review the file and contact Odessky within the next two weeks, he never got in touch with him.

After the grievance was filed, respondent stated in a March 9, 2000 letter to the DEC that, although he had promised to review the file in August 1999, the date had not been calendared and the file had been prematurely marked as "closed" and stored off-site. Respondent informed the DEC that he was simultaneously delivering a release to Odessky and that he would be obtaining and releasing the funds to him. It was not until February 7, 2001, almost one year later, that respondent filed a motion to withdraw and turn over the funds to Odessky. On March 5, 2001, more than four years after the case was settled, the court entered an order requiring that the $15,000, plus interest, be turned over to Odessky. Respondent remitted all of the funds to Odessky, waiving his one-third fee.

The complaint charged respondent with violations of *RPC* 1.1(a) (gross neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.4(a) (failure to communicate with a client) and *RPC* 3.2 (failure to expedite litigation).

The Hardwick Matter

Respondent represented Morton Kassover, the landlord in a dispute with a tenant of commercial property. In April 1995 respondent deposited into his trust account $15,000 belonging to the tenant, to be held pending the outcome of the litigation. That sum represented unpaid rent. On April 3, 1998 the court entered an order dismissing Kassover's complaint with prejudice, based on failure to comply with discovery orders. The order further directed respondent to return the $15,000 to the tenant.

During the next two years, attorneys and legal interns from the Seton Hall Law School Clinic ("the clinic,") who represented the tenant, tried to enforce the order requiring respondent to return the funds to their client. Respondent failed to reply to letters and telephone calls from the clinic. Consequently, Virginia Hardwick, a professor and attorney with the clinic, filed a motion to turn over the funds, returnable March 17, 2000. On the day before the return date of the motion, respondent obtained a two-week adjournment until March 31, 2000. Respondent then failed to file an objection or to appear in court. The court entered another order, dated March 17, 2000 and filed March 31, 2000, requiring respondent to return the funds, with interest.

On April 7, 2000 the court issued an order requiring respondent to pay a $5,048 legal fee to the clinic. Respondent failed to comply with both orders. Professor Hardwick became concerned that respondent was no longer retaining the funds in his trust account.

On April 26, 2000 she filed a grievance against respondent. Respondent did not remit the $15,000, without interest, until September 27, 2000, five months after the grievance was filed. According to Professor Hardwick, in December 2000 the clinic accepted a "moderate payment" from respondent, in settlement of his obligation to pay the clinic's attorneys' fees.

The OAE auditor testified that, when she conducted a demand audit of respondent's records on June 26, 2000, she asked respondent about his failure to disburse the funds to Professor Hardwick. He replied that his practice had become a series of fires to be put out and that the *Hardwick* matter had not been burning hotly enough. From June until the second audit visitation in October 2000, the auditor stressed to respondent the importance of disbursing those funds immediately.

For his part, respondent did not dispute the above facts. He contended that he had indicated to Professor Hardwick's predecessor, Professor McLaughlin, that he would be filing a motion to vacate the order requiring him to turn over the $15,000 to the tenant. According to respondent, McLaughlin had asked respondent to delay filing the motion until September, because there were no students working at the clinic during the summer, to whom he could assign the motion. Respondent stated that, after he had put the file aside, he had forgotten about it.

The complaint charged respondent with violations of *RPC* 1.15, presumably (b) (failure to promptly deliver funds to a third person), *RPC* 3.2, *RPC* 3.4(c) (failure to obey an obligation under the rules of a tribunal) and *RPC* 8.4(d) (conduct prejudicial to the administration of justice).

Letterhead Violations

The complaint charged that respondent's letterhead was misleading because it listed a New York office. Although respondent was admitted in two federal district courts in New York, he was not admitted in the New York state courts. In addition to a sample letterhead, the presenter introduced into evidence a June 3, 1999 letter from respondent to a New Jersey client, in which he invited the client to contact him if he can be "of further assistance to you in the State of New Jersey or the State of New York."

The complaint alleged that respondent's letterhead was also misleading because it stated that the law firm of Janoff & Gurevich ("J & G") is "of counsel." J & G is a law firm with offices in New York. The presenter argued that the letterhead was misleading because it indicated the existence of a partnership or similar relationship between respondent and J & G, when none existed. The complaint referred to *Advisory Committee on Professional Ethics* Opinion 522, 112 *N.J.L.J.* 384 (1983), which held that a New Jersey law firm could not list on its letterhead a Pennsylvania law firm as "of counsel"

because the law firms did not have a partnership association, but simply referred cases to each other. The complaint also cited *Committee on Attorney Advertising* Opinion 21, 147 *N.J.L.J.* 979 (1997), which held that an attorney may be designated as "of counsel" on a law firm's letterhead and other communications "as long as an attorney's relationship with a law firm is close, ongoing, and involves frequent contact for the purpose of providing consultation and advice."

On February 15, 2001, respondent replied to an OAE inquiry as follows:

> Janoff & Gurevich ('J & G') have been 'Of Counsel' to this office for a number of years . . . I am not a partner in the firm and they are not partners in my New Jersey practice, although Alexander Gurevich, Esq. is admitted to practice before the Courts of the State of New Jersey. The firm has referred substantial numbers of clients to me over the past decade for handling after performing some work on their matters. We are part of each other's law firms. Notwithstanding the ongoing business relationship between our practices, the fees divided reflect quantum meruit, rain-making factors, facilities accommodations, translation services for Russian-speaking clientele, extent of services rendered and claim viability pursuant to the decision in LaMantia v. Durst, 234 N.J. Super. 534 (App. Div.) certif. den., 118 N.J. 181 (1989). . . . As a matter of mutual convenience, I have used the New York offices of J & G on many occasions to meet with clients. Over the years they have used my offices for the same purposes. . . .

Respondent contended that, although he is not admitted to practice law in the state of New York, he believed, and still believes, that it is permissible to include his New York office address on his letterhead because of his admission in the federal district courts of New York. He denied that he had any intent to mislead clients or that he obtained clients due to the listing of his New York address on his letterhead.

With respect to his relationship with J & G, respondent stated that, when he met the members of the firm, they needed help on their New Jersey cases. J & G initially referred about seventy cases to him. Respondent testified as follows:

> I've worked on cases of theirs, both New York cases where I'm not admitted but where I can do research and help them out and give them ideas. Helped them on their New Jersey cases that they're settling themselves, maybe they have some issues arising. I've gone to federal court for people charged with criminal offenses in the eastern district in – and Brooklyn. . . . I know them on a social level. . . . On a legal level, I've done everything they've ever asked of me and shared their offices and they've shared mine. Used their offices for meetings with my clients exclusively, plus the ones that we shared.
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> [1T158-159][1]

The complaint charged respondent with violations of *RPC* 7.1(a) (false or misleading communication about the lawyer) and *RPC* 7.5(a) (use of letterhead that violates *RPC* 7.1(a)).

Recordkeeping Violations

In his answer to the complaint, respondent admitted that he (1) maintained client ledger cards with debit balances; (2) maintained inactive trust ledger balances for an extended period of time; and (3) failed to separately maintain funds held in a fiduciary

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1 1T refers to the transcript of the April 30, 2002 DEC hearing.

capacity. At the DEC hearing, however, the presenter agreed to dismiss the first and third charges because respondent had cured those deficiencies after the demand audit.

The auditor's testimony that respondent failed to reconcile his trust account was not rebutted.

The complaint charged respondent with a violation of *RPC* 1.15(d), as well as *R.* 1:21-6 (recordkeeping requirements).

The Orthmann Matter

Respondent represented a minor, Felicia Bennett, in a personal injury action arising out of a July 28, 1995 accident. On November 7, 1996 respondent issued a "letter of protection" to a medical provider, Sports Medicine of Teaneck ("Sports Medicine"), in which he represented that "[w]e will be glad to protect you out of the proceeds of any settlement or judgment in this matter and pay your fee prior to any disbursement to our client." Respondent had settled Bennett's case for $17,500 in August 1996, three months before he issued the letter of protection. In January 2000 respondent received additional settlement proceeds of $2,700. He did not remit any monies to Sports Medicine, disbursing $1,800 to his client and keeping $900 in his trust account. Sports Medicine's lien amounted to $637.50.

During an April 12, 2001 telephone conversation with George Orthmann, an attorney representing Sports Medicine, respondent stated that he would remit the funds in a few weeks. In May, June, August and September 2001 Orthmann left telephone messages for respondent, who did not return his calls. By this time Orthmann had sued Bennett's parents, who filed a bankruptcy petition and obtained an order discharging the debt. Orthmann's only recourse for payment of the lien, thus, was against respondent.

On October 1, 2001 the OAE notified respondent's counsel of the *Orthmann* grievance, asking for an explanation. On October 15, 2001 the OAE sent a follow-up letter to respondent's counsel. Respondent did not reply to the OAE's requests for information. The OAE then filed an amended complaint addressing this matter and incorporating by reference the allegations of the original complaint. Respondent did not file an answer to the amended complaint.

At the ethics hearing, respondent's counsel[2] moved for dismissal of the amended complaint. He argued that, because respondent was not holding funds for a client, he had no obligation to Sports Medicine beyond maintaining the funds in his trust account. According to this argument, respondent had no obligation to release the funds, only to

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2 Respondent's counsel at the ethics hearing was not the same attorney who appeared before us.

hold them intact in his trust account.[3] Counsel asserted that Sports Medicine's remedy was to sue respondent for the funds. Counsel further contended that, because respondent did not dispute the factual allegations of the complaint, counsel had made a "tactical decision" not to file an answer to the complaint.

At the April 30, 2002 ethics hearing, respondent tendered $600 to Orthmann. At the May 13, 2002 ethics hearing, respondent's counsel represented that Orthmann had confirmed to him that he had received the balance of the lien.

The amended complaint charged respondent with violations of *RPC* 1.1, *RPC* 1.3, *RPC* 3.2, *RPC* 8.4(c) and *RPC* 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) with respect to the *Orthmann* matter.

Mitigation

In mitigation, and not as a defense to the ethics charges, respondent cited certain personal problems that he experienced at the time of the above events. He stated that, on the day after his son was born, in May 1994, his wife was unable to move her arm due to rheumatoid arthritis. This condition prevented her from caring for their son. The ensuing chemotherapy treatment caused his wife to sleep for several days in a row, usually during the weekends, when he was available to care for their son. As a result, he claimed, he

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[3] It is unquestionable that the funds remained intact in respondent's trust account.

worked at his law office all week and cared for his son every weekend. In addition, respondent's son was diagnosed with autism at the age of two. The additional stress aggravated respondent's wife's disease. Respondent and his wife hired therapists, at their expense, to try to improve their son's condition. They committed substantial amounts of time and funds to obtaining therapy for their son and placing him in a specialized school. Although the educational expenses were paid by the local school district, the cost of therapy was not covered by insurance or any government program. During the first year following the autism diagnosis, the cost of therapy amounted to $60,000. Respondent and his wife sought marital counseling because of the toll that these difficulties exacted on their relationship.

At some point, respondent relocated to Mercer County because his son was attending school in Princeton. After commuting to Hackensack for two years, respondent obtained a position with a Mercer County law firm.[4] Respondent testified that a Mercer County attorney and former chair of a district ethics committee had agreed to serve as his proctor. Respondent had met with the attorney about five times, beginning in February 2002. In addition, a former OAE auditor agreed to assist the proctor and to reconcile respondent's bank accounts.

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[4] After the ethics grievance was filed, the law firm asked respondent to leave.

In 1999 respondent contacted the Lawyers' Assistance Program, which referred him to William Pursley, a licensed professional counselor. Pursley testified that approximately sixty percent of his practice is comprised of treating patients who are addicted to drugs, alcohol, gambling and so forth. The remainder of his practice is devoted to treating patients with adjustment or mood disorders.

Pursley treated respondent on twenty-six occasions between August 1999 and December 2000. He diagnosed respondent with adjustment disorder with mixed disturbance of emotions and conduct. Pursley described this condition as follows: "It's an inability to deal with life successfully and adjust to the type of stressors that we all have to deal with but are greater than normal amount." 2T51[5]. When asked by the panel, Pursley agreed that that behavior would simply be referred to as "procrastination," if not for the diagnosis of adjustment disorder. He further opined that respondent probably used procrastination as a "coping mechanism," before the emergence of the stressors in his life. According to Pursley, adjustment disorder results in depression, anxiety and inability to concentrate fully, causing a cycle of more procrastination and stress. When asked how respondent had been able to successfully represent other clients during this difficult period, Pursley expressed surprise that respondent's misconduct was limited to three client matters. Pursley opined that, if respondent continues to receive weekly therapy and

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[5] 2T refers to the May 13, 2002 DEC hearing.

"to work on the stressors by learning relaxation techniques and time management and assertiveness, his prognosis is very, very good." 2T14.

Respondent stopped treating with Pursley in December 2000, when Pursley relocated to Pennsylvania. Pursley recommended that respondent continue treatment with another therapist. Although respondent again contacted the Lawyers' Assistance Program, he was told that the program could not find anyone to help him. Because respondent made no effort to locate a therapist through other sources, he received no treatment after December 2000. At the ethics hearing, both respondent and Pursley testified that respondent would be resuming treatment with one of two therapists whom respondent had recently contacted. In Pursley's opinion, continuing therapy would prevent a recurrence of respondent's conduct. He further explained that respondent would benefit from a supportive environment, such as assistance from a proctor and someone to reconcile his accounts. Pursley also predicted that a suspension from the practice of law would be counterproductive to respondent's treatment and harmful to his recovery.

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The DEC found that, in *Odessky*, respondent violated *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a) and *RPC* 3.2.

In *Hardwick*, the DEC determined that respondent violated *RPC* 1.15(b), *RPC* 3.2, *RPC* 3.4(c) and *RPC* 8.4(d).

As to the letterhead charges, the DEC found that its contents were misleading, giving the appearance that respondent was admitted in the state of New York. Specifically, the DEC noted that the letterhead listed a New York address, without disclosing that respondent was admitted only in New Jersey.

Because the DEC found the existence of an "of counsel" relationship, it concluded that respondent did not violate *Committee on Attorney Advertising* Opinion 21, which permits law firms to designate attorneys as "of counsel" on their letterhead, as long as the relationship is "close, ongoing, and involves frequent contact for the purpose of providing consultation and advice."

The DEC further found that the letterhead violated *ACPE* Opinion 522 because it listed the members of J & G, an out-of-state law firm in which one of the members is not licensed in New Jersey. According to the DEC, respondent's letterhead would have been permissible if there had been a partnership arrangement with J & G.

The DEC found that respondent violated the recordkeeping rules by failing to reconcile his trust account quarterly and by permitting the *Orthmann* and *Hardwick* balances to remain in his trust account for an extended period of time.

In the *Orthmann* matter, the DEC rejected respondent's contention that, because he did not have an attorney-client relationship with Sports Medicine, he had no obligation to disburse the funds to Sports Medicine. The DEC, thus, found that respondent exhibited lack of diligence and failed to expedite litigation. It declined, however, to conclude that respondent's failure to disburse the funds constituted gross negligence or conduct involving dishonesty, fraud, deceit or misrepresentation, finding no evidence that, when respondent issued the letter of protection, he had no intention to honor it. Finally, the DEC found that respondent failed to cooperate with disciplinary authorities.

The DEC found the following mitigating factors: (1) personal problems; (2) medical problems; (3) contrition and remorse; (4) admission of wrongdoing; (5) absence of personal gain; (6) subsequent remedial measures in coordinating a support system including therapist, proctor and auditor; and (7) no disciplinary history. The following were cited as aggravating factors: (1) disregard of three court orders; (2) failure to cooperate with disciplinary authorities; and (3) pattern of misconduct, as shown by the failure to exercise reasonable diligence in two matters, failure to expedite litigation in three matters and failure to abide by more than one court order.

The DEC recommended a three-month suspension.

* * *

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.

In *Odessky*, there is no doubt that respondent failed to take the necessary action to obtain and disburse the settlement funds for his client. After the matter was settled in February 1997, respondent failed to prepare a release. After waiting for about nineteen months, the defendant's attorney obtained a September 16, 1998 order allowing the defendant to deposit the settlement proceeds into court. Because respondent failed to provide a release within thirty days, the defendant's attorney deposited the funds into court. In August 1999, about two and one-half years after the case was settled, Odessky tried to obtain information about its status, indicating that efforts to contact respondent during the past eighteen months had been unsuccessful. Despite respondent's representation that he would review the file and contact Odessky, he failed to do so. Respondent, thus, failed to communicate with Odessky and to keep him informed of the status of the matter, in violation of *RPC* 1.4(a).

Respondent's neglect of the file continued even after the grievance was filed. Although he stated in a March 9, 2000 letter to the DEC that he was delivering a release and would be obtaining his client's funds, he waited almost one year, until February 7, 2001, to file the motion to withdraw the funds from the court.

Respondent demonstrated gross neglect and a lack of diligence, in violation of *RPC* 1.1.(a) and *RPC* 1.3, as follows:

- he failed to prepare a release after the case was settled;
- he failed to reply to the notice of motion compelling him to draft a release;
- he failed to comply with the September 16, 1998 order requiring him to prepare a release;
- he failed to review the file and contact Odessky, as he promised in his August 27, 1999 letter;
- he failed to file a motion to turn over funds until eleven months after he indicated in a letter to the DEC that he would do so; and
- he failed to disburse funds to his client until more than four years after the case had settled.

Because the matter had terminated, however, and there was no litigation to expedite, we did not find a violation of *RPC* 3.2.

In the *Hardwick* matter, respondent again failed to disburse funds, this time to his adversary in a landlord-tenant matter. After the complaint was dismissed for failure to comply with discovery orders, respondent ignored an April 3, 1998 order requiring him to distribute $15,000 to the tenant, represented by Professor Hardwick of the Seton Hall Law School Clinic. For the next two years, respondent ignored the efforts of the clinic's attorneys and students to enforce the order. After Professor Hardwick finally filed a motion for the turnover of the funds, respondent obtained an eleventh hour adjournment.

He then failed to file any opposition to the motion or to appear in court on the extended return date. In addition, respondent failed to comply with the March 31, 2000 order requiring him to disburse the funds to Professor Hardwick and with the April 7, 2000 order requiring him to pay the clinic's attorneys' fees of $5,048. Five months after the grievance was filed, six months after the second turnover order and three years after the first turnover order, respondent finally disbursed the $15,000 to Professor Hardwick. About two months later, he made a "moderate payment" towards the clinic's attorneys' fees.

Respondent's failure to disburse the funds to Professor Hardwick violated *RPC* 1.15(b), requiring attorneys to promptly deliver funds to a third party. In addition, his failure to obey the two court orders requiring him to turn over the funds violated *RPC* 3.4(c) and *RPC* 8.4(d). As in the *Odessky* matter, however, we dismissed the charged violation of *RPC* 3.2 because respondent failure to disburse the funds occurred after the litigation had been concluded.

As to the letterhead, we found that it was misleading because the listing of a New York address gave the appearance that respondent was admitted to the New York bar, when he was admitted only in the federal courts in that state. If respondent wished to list a New York address, he should have indicated that he was admitted only in New Jersey

and the specific federal courts in New York. Respondent's letterhead, thus, violated *RPC* 7.1(a) and *RPC* 7.5(a).

The DEC found that respondent's letterhead also violated *ACPE* Opinion 522, prohibiting a law firm from listing on its letterhead a Pennsylvania law firm as "of counsel" if the law firms simply refer cases to each other and do not have a partnership relationship, as found by the DEC. The DEC found that respondent's letterhead did not violate *Committee on Attorney Advertising* Opinion 21, permitting law firms to designate attorneys as "of counsel" if the relationship met certain criteria. Here, the DEC found that an "of counsel" relationship existed between respondent and J & G. There is support in the record for that finding. Respondent testified that (1) J & G initially sent him seventy cases; (2) he worked on those cases for them; (3) they worked on his cases; (4) they each shared the other's office; (5) they divided fees in accordance with numerous factors; (6) he appeared in court for their clients; and (7) he performed other tasks for J & G.

ACPE Opinion 522 states that it is improper for a law firm to list an out-of-state law firm on its letterhead if the law firms are not partners and merely refer cases to each other. That opinion does not prohibit law firms from listing an out-of-state law firm as "of counsel" if the law firms have a *bona fide* "of counsel" relationship. Because respondent had an "of counsel" relationship with J & G, it was not improper for him to list the firm as "of counsel" on his letterhead. Respondent's letterhead indicated that, although Gurevich

was admitted in New York and New Jersey, Janoff was admitted only in New York. We, thus, declined to find that the listing of J & G as "of counsel" on respondent's letterhead was improper.

As to the recordkeeping violations, the presenter agreed to dismiss the charges that respondent maintained client ledger cards with debit balances and failed to separate funds held in a fiduciary capacity. Respondent conceded that the *Hardwick* and *Orthmann* funds remained in his trust account for an extended period of time. In addition, the auditor's testimony that respondent failed to reconcile his trust account was not rebutted. Although respondent was not specifically charged with failure to reconcile his trust account, the record developed below contains clear and convincing evidence of that violation. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deemed the complaint amended to conform to the proofs. *R.* 4:9-2; *In re Logan*, 70 *N.J.* 222, 232 (1976).

In the *Orthmann* matter, we were unable to accept respondent's argument that he had no duty to Sports Medicine, Orthmann's client, because of the absence of an attorney-client relationship. *RPC* 1.15(b) requires an attorney to promptly deliver to a third party funds or other property that the third party is entitled to receive. The rule does not limit an attorney's obligation in this regard to clients only, but expressly refers to third parties. Moreover, the letter of protection that respondent issued specifically

provided that he would remit Sports Medicine's fee before disbursing funds to his client. Yet, he disbursed $1,800 to his client and retained $900 in his trust account, presumably for Sports Medicine. He then ignored Orthmann's numerous attempts to contact him and failed to fulfill his own promise to remit the funds. He finally disbursed most of the funds to Orthmann at the first ethics hearing and paid over the balance before the second hearing.

Respondent clearly violated *RPC* 1.15(b) in this matter. Although he was not specifically charged with a violation of *RPC* 1.15(b), the facts recited in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that *RPC*.

We determined to dismiss the remaining *Orthmann* charges. Because respondent's misconduct did not rise to the level of gross neglect, we dismissed the charge of a violation of *RPC* 1.1(a). In addition, *RPC* 1.3 requires an attorney to "act with reasonable diligence and promptness in representing a client." It is clear from the record that Sports Medicine was not respondent's client. As to the failure to expedite litigation, respondent's failure to disburse the funds violated *RPC* 1.15(b), not *RPC* 3.2. We, therefore, dismissed that charge. Moreover, there was no indication that, when respondent issued the letter of protection or represented that he would disburse the funds shortly, he intended to deceive Sports Medicine. In other words, his failure to fulfill his obligation

does not, on its own, establish a misrepresentation. Accordingly, we also dismissed the charged violation of *RPC* 8.4(c).

We also disagreed with the DEC's finding that respondent violated *RPC* 8.1(b). The evidence clearly showed that the OAE's letters in the *Orthmann* matter were sent directly to respondent's counsel. There was no evidence presented that respondent was even aware that those letters had been sent. Moreover, respondent's counsel contended that, because respondent did not disagree with the factual allegations in the amended complaint, counsel had made the decision not to file an answer. Respondent should not be disciplined for counsel's inaction.

In sum, in *Odessky*, respondent exhibited gross neglect, as well as lack of diligence, and failed to communicate with the client; in *Hardwick*, he failed to promptly deliver funds to a third person, failed to comply with two court orders and engaged in conduct prejudicial to the administration of justice; he used misleading letterhead that gave the appearance that he was admitted to the bar in the state of New York; he failed to comply with recordkeeping requirements; and in *Orthmann*, he failed to promptly deliver funds to a third person.

Attorneys who have committed a combination of the violations presented here have received reprimands or short-term suspensions. *See, e.g., In re Schiavo*, 165 *N.J.* 533 (2000) (three-month suspension in a default matter in which the attorney failed to

promptly deliver funds to a third party; failed to communicate with a client in a second matter; failed to act with reasonable diligence, failed to communicate with a client, failed to refund an unearned fee and misrepresented the status in a third matter; and failed to act with reasonable diligence and to communicate with a client in a fourth matter); *In re Gilbert*, 159 *N.J.* 505 (1999) (three-month suspension where the attorney failed to promptly return funds to his client's former spouse in an effort to obtain payment of his fee from his client and failed to respect the rights of third persons); *In re Saavedra*, 147 *N.J.* 269 (1997) (three-month suspension where the attorney engaged in gross neglect and a pattern of neglect, displayed lack of diligence, failed to communicate with a client, failed to return an unearned retainer to a client, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct prejudicial to the administration of justice); *In re Lesser*, 139 *N.J.* 233 (1995) (three-month suspension where the attorney failed to promptly notify a client of receipt of funds and to promptly deliver those funds, failed to comply with recordkeeping requirements and failed to communicate with a client; attorney had a prior private reprimand); *In re Breig*, 157 *N.J.* 630 (1999) (reprimand where the attorney failed to promptly remit funds received on behalf of a client and failed to comply with recordkeeping rules; numerous mitigating factors were considered).

Here, as in *Breig,* there is substantial mitigation. Respondent's wife and son were both diagnosed with serious conditions. Because of those illnesses, respondent was required to be the caregiver to his young son, while trying to maintain his solo law practice, commute long distances and search for therapists and educational facilities for his son. He and his wife underwent marital counseling. Although it is difficult to explain why only some cases were neglected and why respondent did not take the simple step of distributing funds to which individuals were entitled, respondent was dealing with very troubling issues. Moreover, he has no disciplinary history, demonstrated contrition and remorse, admitted his wrongdoing (with the exception of the letterhead violation), was not motivated by personal gain and has taken remedial measures by arranging to continue with therapy and by retaining a former OAE auditor to assist him with his recordkeeping.

The DEC found as aggravating factors respondent's disregard of three court orders, failure to cooperate with disciplinary authorities and pattern of misconduct, as demonstrated by the failure to exercise reasonable diligence in two matters, failure to expedite litigation in three matters and failure to abide by more than one court order. As discussed above, the charges of failure to cooperate with disciplinary authorities, failure to expedite litigation and lack of diligence in one of the matters were dismissed. Moreover, although respondent failed to comply with court orders requiring him to

disburse funds, his failure to do so was an independent violation, not an aggravating factor.

Based on the substantial mitigation in this case, we unanimously voted to impose a reprimand. Two members did not participate.

We further required 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 Kevin J. Carlin
Docket No. DRB 02-305

Argued: November 21, 2002

Decided: March 7, 2003

Disposition: Reprimand

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

Robyn M. Hill 3/18/03

Robyn M. Hill
Chief Counsel