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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-039

IN THE MATTER OF :
DANIEL N. SHAPIRO :
AN ATTORNEY AT LAW :

Decision

Argued: April 18, 2002

Decided: June 20, 2002

Robyn M. Gnudi appeared on behalf of the District IIB Ethics Committee.

Michael L. Kingman 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 IIB Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1984 and has no prior discipline.

**I. The Miller Matter** - District Docket No. IIB-00-08E

The complaint alleges violations of RPC 1.4(a) (failure to communicate with the

client), RPC 8.4(c) (misrepresentation) and R. 1:20-3(g) (3) and (4)(failure to cooperate with ethics authorities), more properly RPC 8.1(b).

On or about December 28, 1998 Angela Miller, the grievant herein, retained respondent to represent her in a divorce action. She signed a retainer agreement and gave respondent a total of $1,100. According to Miller, on January 11, 1999 respondent told her that he was getting ready to file a complaint in the matter.

Miller alleged that, from January to August 1999, she called respondent over twenty times, requesting information about her case, at which time she left messages with his receptionist and on an answering machine. According to Miller, respondent replied to one or two of those calls.

During one of those conversations, in August 1999, respondent told Miller that

> ...we were waiting for a date to go to court, he said it could be this afternoon, it could be tomorrow, we're gonna' go to court, I'm just waiting for this, I'm just waiting for the judge to call me. That's all I ever heard from [respondent].

Miller testified that she later found out that respondent had not yet filed a complaint at that time. In fact, respondent admittedly never filed – or even prepared – a complaint in Miller's behalf.

According to Miller, she met with respondent in September 1999 to discuss her matter. At that time, she claimed, respondent told her that her divorce would be completed in about three weeks and advised her that she should move out of the marital home. Miller followed respondent's advice.

Over the next two months, Miller repeatedly called respondent to find out if the divorce had been granted. Finally, in November 1999, having heard nothing from respondent, she retained new counsel.

During respondent's representation, Miller received no written communications or documents from him about her case.

For his part, respondent denied that he failed to communicate with Miller about her matter. He testified about his several meetings with Miller, their discussions about her divorce and his lengthy negotiations with her husband's attorney. He also blamed Miller for failing to complete a case information statement ("CIS"), an essential document in the case. According to respondent, Miller did not want to disclose a substantial personal injury settlement award, for fear that she would have to share it with her husband. Miller vehemently denied that allegation, nor is there any evidence to support respondent's contentions in this regard.

With respect to the allegation that respondent misrepresented the status of the case to Miller, he denied ever telling her that he had filed a complaint or was waiting to hear from a judge. However, he admitted the following:

> I'm sure I gave her the impression that I had filed the complaint. I don't deny that, but I never told her definitively that I had ....

Finally, respondent admitted that he failed to cooperate with ethics authorities in the investigation of the matter.

**II. The Adamek Matter** - District Docket No. IIB-00-011E

The complaint alleges violations of RPC 1.4(a) (failure to communicate with the client) and R. 1:20-3(g)(3) and (4)(failure to cooperate with ethics authorities), more properly RPC 8.1(b).

In or about October 1996 Patricia Adamek, the grievant, retained respondent to represent her in a divorce action. She signed a retainer agreement and paid respondent $2,500. From October 1996 until March 1998, when respondent obtained a judgment of divorce, the case proceeded apace.

Adamek testified that problems arose in May 1998, when respondent first told her that her divorce had been finalized. Adamek was upset because respondent had not informed her sooner that the judgment of divorce had been granted months earlier, in March 1998. Moreover, according to Adamek, she had placed over twenty telephone calls to respondent's office during those months, seeking information about her matter.

Adamek also alleged that respondent failed to represent her in several post-judgment enforcement matters for which she had retained him, including the turnover of her husband's 401k and pension plans. According to Adamek, over the next seventeen months – through October 1999 – she called respondent in excess of fifty times, seeking information about her matter. She never received a reply. Exasperated with respondent's failure to contact her, in early 2000 Adamek visited respondent's office, at which time she was told that respondent had moved out sometime earlier.

In or about April 2000, after Adamek filed the within grievance, respondent called her to discuss the case. Adamek stated that, at that time, respondent apologized for delays in the case and offered to pursue the post-judgment issues.

For his part, respondent testified that he was retained to take the divorce case to judgment only, which he successfully obtained for Adamek in March 1998. Respondent denied the allegation that he failed to communicate with Adamek between March and May 1998. Although he admitted that he did not return every one of Adamek's calls, he stated that he had apprised her of the important aspects of the case. Specifically, respondent denied that, for at least two months after receiving the final judgment of divorce, he had failed to communicate that fact to his client. Respondent could not recall when he first learned about the judgment.

Similarly, respondent denied that he had violated any Rule of Professional Conduct in not communicating with Adamek after the judgment was entered. According to respondent, he had no duty to return those calls because the original retainer agreement provided that any post-judgment work would require an additional fee. Respondent stated that, at their May 1998 meeting, Adamek agreed to pay him an additional $1,000 to continue work in her behalf, but that she never paid him. On cross-examination, Adamek vehemently denied that respondent had asked for an additional retainer. There is no other evidence in the record on this issue.

Respondent claimed generally that he had sent a form letter to many of his clients

during this time, informing them that he had severely curtailed his practice of law and that the clients should contact him to retrieve their files. Respondent believed that he had sent that letter to Adamek, but offered no proof in support of that allegation. Shortly thereafter, he moved his office from 55 State Street to 5 Atlantic Avenue, Hackensack. In the new setting, respondent shared office space with another attorney, John Blunt.

**III. The Porrino Matter** - District Docket No. IIB-01-005E

The complaint alleges that respondent failed to communicate with the client, in violation of RPC 1.4(a).

On or about June 20, 2000 Vincent Porrino, the grievant, retained respondent to file an answer to a complaint for divorce. Porrino signed a retainer agreement and testified that he paid respondent $1,500: $1,000 for Blunt and $500 for respondent.[1] Porrino did not know why the two attorneys split the retainer, but believed that respondent was to be the attorney of record.

According to Porrino, he met with respondent three times over the course of the representation. He stated that, at the third meeting, held in or about September 2000, respondent told him that the answer had been "mailed out."

Porrino testified that, at some point, his wife had called him to question whether he had retained an attorney to handle the divorce, since her attorney had been unable to reach

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[1]The retainer agreement is not in the record.

respondent and an answer had not been filed. Thereafter, Porrino visited respondent's new office at 5 Atlantic Avenue, but respondent was not there. Porrino encountered Blunt, who told him that he would have respondent contact him. Shortly thereafter, respondent called Porrino to apologize for his earlier failure to reply to his inquiries. In fact, respondent admitted to Porrino that he had failed to file an answer to the complaint or to otherwise protect Porrino's interests. Porrino also testified about a letter he received from respondent, apologizing for his inaction. That letter is not in the record.

Porrino testified that, after receiving the letter of apology, he assumed that respondent would properly handle the case. Porrino recalled no other conversations with respondent in the wake of that letter. However, in the ten or so days after his receipt of respondent's letter, Porrino left thirteen messages for respondent to contact him, to no avail. In early 2001 Porrino asked Blunt to represent him. The record is silent about the outcome of the divorce case.

Respondent, in turn, testified that he prepared an answer and counterclaim early in the case. However, he claimed, he had not made it clear to a staff member that she should send the answer for filing. Respondent admitted that he had ultimate responsibility for the case.

Respondent also contended that he was sick with a cold during the brief period that Porrino made his flurry of calls to him. Shortly thereafter, according to respondent, he spoke to Porrino and was told that Blunt would be handling the matter. On that basis, he returned Porrino's $500 fee and turned over his file to Blunt, with a certification to the court

apparently explaining his failure to file the answer. Thereafter, respondent alleged, the case proceeded to conclusion smoothly.

With regard to Blunt's involvement in the case, respondent testified as follows:

> John Blunt's been a friend of mine for years. He was representing [Porrino] with negotiations with Paula Crane. I think they used to be Hewlet Crane, his wife's attorney. He called me up and said it wasn't getting anywhere, it was far beyond what he wanted to do, would he take it over. No complaints had been filed. I met [Porrino] at John Blunt's office as an accommodation to myself and to [Porrino] and [Porrino] agreed to have me be his new divorce attorney.

**IV. <u>The Vargas Matter</u>** - District Docket No. IIB-00-035E

The complaint alleges that respondent failed to communicate with his client, in violation of <u>RPC</u> 1.4(a).

Respondent first represented Joseph Vargas in 1985 and handled various matters for him over the ensuing years. In or about September 1998 Vargas retained respondent to represent him in a lawsuit against his business, Media-Mix. After an initial conference about the matter, Vargas attempted to reach respondent by telephone at his office on at least ten occasions, knowing that an answer to the complaint had to be filed soon. According to Vargas, he next spoke to respondent in November 1998. At that time, respondent told him that he would file the answer the following week. Approximately two or three additional months passed with more unreturned telephone calls by respondent, until Vargas was finally able to speak to respondent's secretary. According to Vargas, the secretary told him that the

answer had been filed. When Vargas requested a "faxed" copy of the answer, the secretary claimed that the facsimile machine was broken. Vargas later found out that the answer had not been filed until much later, out of time, with the consent of opposing counsel.

In March 1999 respondent sent Vargas a retainer agreement, which Vargas executed in June 1999.[2] Vargas testified that, at that time, he paid respondent $2,000 and expressed his displeasure with respondent's representation to that point, particularly his failure to reply to his requests for information about the case. Vargas also asserted that respondent gave him assurances that he would give the matter his full attention. Despite those assurances, Vargas testified, respondent performed no further work in his behalf and then failed to attend a mandatory arbitration meeting. Finally, in or about November 1999, Vargas retained a new attorney to represent him.

For his part, respondent maintained that he had handled the Vargas litigation appropriately and had not failed to communicate with his client. In fact, he implied that Vargas was somehow partially to blame for problems in the case, by failing to pay the retainer when they first discussed the matter. Respondent also contended that he spoke to Vargas on numerous occasions. According to respondent, Vargas was difficult to reach because of his busy schedule. Finally, respondent explained that the receptionist at his former office location had failed to send a court notice to his new office location. Otherwise,

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[2]Although the record is not entirely clear, it appears that respondent filed the answer contemporaneously with the March 1999 retainer agreement.

respondent claimed, the matter would have proceeded on course.

Respondent also testified that for many years he has grappled with an alcohol addiction that affected his practice of law. A substance abuse counselor, Gregg Benson, testified that, during the time in question here, respondent was suffering from the effects of his alcoholism. According to Benson, even though respondent had not been actively drinking for some time, his unmet need for alcohol caused him to be arrogant, unfocused and disorganized in his law practice.

According to Benson, by the time of the DEC hearing, respondent was functioning better, although still unable to work independently, without supervision.[3]

Finally, respondent claimed that, during the period in question, his mother was very ill, requiring him to spend much of his time attending to her needs, instead of his law practice.

* * *

In Miller, the DEC found a violation of RPC 8.4(c)for respondent's misrepresentation to Miller that he was awaiting a court date, when, in fact, he had not filed an answer to the complaint. It appears that the DEC also found failure to communicate, in violation of RPC

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[3]A Bergen County judge intervened after several of respondent's matters were dismissed in that county. Respondent agreed to wind down his practice, on the judge's recommendation, and to be mentored by a local attorney, John Seltser. It appears that the court's involvement was informal and that no orders were entered with regard to the arrangement. At the time of the ethics hearing, respondent had been released from the informal agreement with the court, was working as an associate at another law firm and was supervised by a senior attorney.

1.4(a), but the report is not clear in this regard. In Adamek, the DEC found no evidence that respondent had been retained for post-judgment matters. However, the DEC found that respondent failed to communicate that fact to his client, in the face of her numerous requests for information about the case. Instead, respondent allowed Adamek to labor under the false notion that respondent was acting in her behalf, in violation of RPC 1.4(a). In Porrino, the DEC found that respondent had a duty to reply to Porrino's requests for information and that his failure to do so violated RPC 1.4(a). In Vargas, the DEC found a violation of RPC 1.4(a), without specifying the basis for its finding. It is not clear if the DEC found failure to cooperate with disciplinary authorities in Miller and Adamek.

The DEC recommended the imposition of a reprimand, psychiatric proof of fitness to practice law and a proctor for a period of three years.

* * *

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

This record was not well-developed below. Most of the documents discussed at the DEC hearing were not entered into evidence. In addition, respondent initially admitted wrongdoing in some matters, only to deny some of that wrongdoing at the hearing.

In Miller, respondent met with her twice after the initial consultation: once in January and again in September 1999. Miller stated that, at the latter meeting, respondent told her that her divorce would be final in several weeks. Although respondent denied that claim, he

had no explanation for his failure to reply to Miller's repeated attempts, over the next few months, to determine if the divorce was final. Miller also testified that, out of frustration with the lack of information from respondent, she retained another attorney in November 1999.

Other than his testimony, respondent presented no evidence to refute the assertion that he had failed to communicate with his client during these lengthy time periods. There are no letters to Miller, file notes, telephone records or other evidence to contradict her testimony. Therefore, we found that respondent violated RPC 1.4(a).

Respondent also made an affirmative misrepresentation to Miller, when he told her that he was awaiting a court date or a call from the court about her case. In fact, respondent knew at the time that he had not filed a complaint. The DEC believed that Miller's testimony was more credible than respondent's bare denials on that score. We deferred to the DEC in this regard. The DEC had the opportunity to assess the credibility of the witnesses before it. Like the DEC, we found a violation of RPC 8.4(c) for respondent's misrepresentation. At a minimum, respondent made a misrepresentation by silence. He admitted that he allowed his client to labor under the false impression that he had filed a complaint in her behalf and took no steps to correct Miller's misunderstanding. "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984).

In Adamek, respondent denied that, for at least two months after receiving the final judgment of divorce, he failed to communicate that important development to his client. Respondent could not recall when he first learned about the judgment. Adamek's memory

was clear on this issue, however. Although the DEC did not specifically make a finding of a violation of RPC 1.4(a) in this context, in other areas the DEC found that Adamek's recollection was clearer than respondent's and that her testimony was more credible. We, thus, found a violation of RPC 1.4(a) for respondent's failure to inform Adamek, for a period of two months, that her divorce had become final.

Respondent also denied that he was retained to conduct post-judgment work for Adamek. We rejected respondent's argument that, because he was not retained for post-judgment work, he had no duty to communicate further with Adamek. The duty to communicate under these circumstances is contemplated in RPC 1.16 (d), which states as follows:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for the employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law. [Emphasis added.]

Thus, respondent was obligated to take reasonable steps to protect Adamek's interests, even if, as respondent argued, the termination of the representation was to coincide with the entry of the divorce judgment. When it became apparent to respondent that she had a different belief of the terms of the representation, RPC 1.16 (d) obligated him to contact her. Instead, for over one year, during which time Adamek made over fifty unreturned calls for information, respondent allowed her to labor under the false impression that he was still

protecting her interests. In this regard, respondent violated RPC 1.4(a).

In Porrino, respondent breached his duty to inform his client about the status of the case, in violation of RPC 1.4(a). From June to September 2000, respondent failed to inform Porrino about events in the case, including his failure to file an answer to the divorce complaint. Later, respondent ignored Porrino's *thirteen* telephone messages, left over the ten-day period immediately following respondent's letter of apology. Therefore, we found a violation of RPC 1.4(a).

Respondent also admitted "dropping the ball" by not filing the answer and counterclaim in Porrino. His failure to act from June 2000, until Porrino terminated the representation in early 2001, amounted to a lack of diligence, in violation of RPC 1.3. Although respondent was not specifically charged with a violation of RPC 1.3, the record developed below contains clear and convincing evidence of lack of diligence. Furthermore, respondent did not object to the admission of such evidence in the record. In light of the foregoing, we determined that respondent violated RPC 1.3 and deemed the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

In Vargas, respondent claimed that he kept his client informed about the status of the matter from its inception, in September 1998, but presented no evidence to corroborate that contention. Vargas testified convincingly that, between September 1998 and March 1999, he had made numerous calls to respondent for information about the case, to no avail. Indeed, the DEC found Vargas' testimony more credible than respondent's in this regard.

Therefore, we found that respondent failed to communicate with Vargas, in violation of RPC 1.4(a).

Once respondent finally contacted Vargas about his case in March 1999, he promised to give the case his utmost attention. Respondent promptly broke that promise, allowing the matter to further languish, unresolved. Eventually, Vargas retained new counsel. Here, too, there is evidence that respondent's misconduct outstripped the allegations contained in the complaint. Clearly, respondent violated RPC 1.3 by allowing the case to drift. Respondent was required to obtain his adversary's consent to file Vargas' answer months out of time. In fact, respondent's conduct amounted to gross neglect, for, after he made his assurances to Vargas that he would pursue the case, he did no further work. Again, although the complaint did not charge violations of RPC 1.3 or RPC 1.1(a), under In re Logan, supra, 70 N.J. 222 (1976), we deemed it amended to conform to the proofs.

Several other issues bear mention. First, there are some outstanding issues about the availability of documents that were handled and discussed at the hearing, but were not made part of the record. In fact, the record before us was meager. It consisted of an unsigned copy of a retainer agreement in Adamek and the resumé of respondent's substance abuse counselor. We have not seen the remainder of the documents available to the DEC.

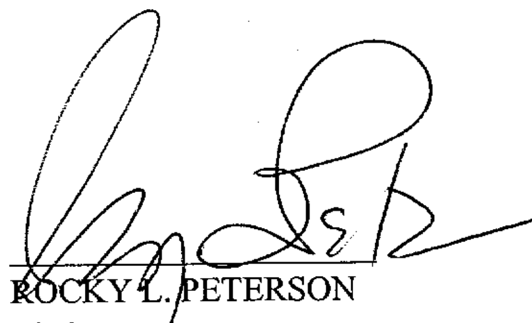
Second, respondent admitted a violation of RPC 8.1(b) for his failure to reply to the DEC investigator's requests for information in Miller and Adamek. The DEC discussed the issue at the hearing, but did not resolve it. Nevertheless, we found a violation, in view of

respondent's admissions.

Similar misconduct has resulted in the imposition of discipline ranging from a reprimand to a three-month suspension. See, e.g., In re Przygoda, 163 N.J. 401 (2000) (reprimand for attorney who grossly neglected seven matters, failed to communicate with her clients and made misrepresentations); In re Eastmond, 152 N.J. 435 (1998) (reprimand for attorney who, in a medical malpractice case, engaged in gross neglect, lack of diligence and misrepresentation to the client); and In re Fox, 152 N.J. 467 (1998) (reprimand for attorney who grossly neglected an estate matter, failed to communicate with the client and made misrepresentations regarding the status of the case to two attorneys; the attorney was also ordered to refund $5,000 to the estate); and In re Hanlon, 152 N.J. 2 (1997) (three-month suspension for lack of diligence in a personal injury matter, failure to communicate with the client, misrepresentation of the status of the matter by claiming to be in the process of negotiations when the case had already been dismissed and continuous disregard of the district ethics committee's requests for information).

Here, in mitigation, respondent urged consideration for his past addiction to alcohol. In addition, he has not otherwise been the subject of discipline since his admission to the New Jersey bar in 1984. We, therefore, unanimously determined to impose a reprimand, with the additional requirement that respondent be supervised, for a period of two years, by a proctor approved by the Office of Attorney Ethics ("OAE") and attend Alcoholics Anonymous meetings on a regular basis, as monitored by the OAE.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.



ROCKY L. PETERSON
Chair
Disciplinary Review Board

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

In the Matter of Daniel N. Shapiro
Docket No. DRB 02-039

Argued: April 18, 2002

Decided: June 20, 2002

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:*** | | | 9 | | | | |

Robyn M. Hill 6/28/02

Robyn M. Hill
Chief Counsel