

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 10-247  
District Docket No. IX-08-028E

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IN THE MATTER OF  
THOMAS DE SENO  
AN ATTORNEY AT LAW

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Decision

Argued: November 18, 2010

Decided: December 13, 2010

Jennifer Stone Hall appeared on behalf of the District IX Ethics Committee.

Peter Chamas appeared on behalf of respondent.

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

This matter was previously before us at our July 22, 2010 session, on a recommendation for an admonition filed by the District IX Ethics Committee (DEC). At that time, we determined to treat it as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4).

The complaint charged respondent with violating RPC 1.1(a) (gross neglect); RPC 1.1(b) (pattern of neglect); RPC 8.1(b)

(failure to cooperate with disciplinary authorities), cited in the complaint as R. 1:20-3(g)(3) and (4); RPC 3.3(a) (knowingly making a false statement of material fact or law to a tribunal); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).<sup>1</sup> For the reasons expressed below, we determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1990. He maintains a law office in Manasquan, New Jersey.

In 2009, respondent was reprimanded for mishandling the property damage claim of a client, Irene Langan, failing to keep her informed about the status of the case, failing to return her numerous telephone calls, failing to explain the matter to the extent reasonably necessary to permit her to make informed decisions about the representation by agreeing to dismiss her complaint without consulting her, and failing to cooperate with disciplinary authorities. Respondent's "lack of truthfulness" warranted enhancing the appropriate discipline. In re De Seno, 200 N.J. 201 (2009). The charges in the present case stem from this prior disciplinary matter (DRB 08-367).

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<sup>1</sup> The complaint could have charged respondent with violating a more applicable rule, RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter), rather than RPC 8.4(c).

The DEC investigator/presenter (the presenter), Jennifer Stone Hall, was sworn in and testified at the DEC hearing. Respondent's counsel did not object to her testimony. The relevant facts were corroborated by documentary evidence.

As stated in the prior disciplinary matter, on May 23, 2000, Irene Langan retained respondent in connection with a fire loss that occurred at a South Orange apartment complex where she lived. Individual actions were instituted on behalf of the residents. On April 1, 2002, respondent filed an action on Langan's behalf.<sup>2</sup> By consent, but without Langan's knowledge, her case was dismissed without prejudice. The parties were given sixty days to reopen the action, if a settlement was not consummated within that time. Respondent did not re-open the case within that period. Langan testified, at that first ethics hearing, about her numerous unsuccessful attempts to contact respondent about the status of the case.

Also at that ethics hearing, respondent testified that there was a pending motion for leave to reinstate Langan's complaint. The motion was granted on July 18, 2008. Respondent explained to the hearing panel that counsel for defendant PSE&G did not oppose his motion to reinstate Langan's complaint

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<sup>2</sup> Rose Langan was also listed as a plaintiff in that action. At some point, Irene became the executor of Rose's estate.

because counsel for the defendant had failed to inform him about a settlement in a related federal lawsuit, even though counsel had informed the other plaintiffs' attorneys.

One issue in the present case is whether respondent misrepresented to the DEC the date on which he filed a new complaint on Langan's behalf. At the prior DEC hearing, the hearing panel gave respondent ten days to file a new complaint on Langan's behalf.

In an August 1, 2008 letter to the hearing panel chair, respondent attached a copy of the July 18, 2008 court order, allowing him to file Langan's "new complaint with a new docket number within 45 days" of the order. The deadline to file the new complaint was, according to respondent, September 2, 2008. Respondent's August 1, 2008 letter to the panel chair stated that he had sent the complaint to the Essex County Clerk's Office and that he was "awaiting the docket number." At the DEC hearing in the present matter, respondent claimed that he had paid the filing fee, but had not been given a docket number, because "You never get a docket number." He speculated that he had paid the filing fee in cash, but did not have a copy of a cancelled check to prove that he had filed the complaint. Respondent testified as follows:

On August 1<sup>st</sup> when I hand delivered that letter to Mr. Carlton [the panel chair], it

was five o'clock on a Friday, I had drafted everything up to mail it to Essex County and told them what I have done, I'm mailing it to Essex County.

On Monday providence shined upon me. It's too important. I have this Disciplinary Review Board hearing coming up. I'm going to hand deliver it to the court on August the 29<sup>th</sup>. I remember distinctly because I parked next to the courthouse, I got a parking ticket that day . . . .

[T44-15 to 25.]<sup>3</sup>

Respondent's testimony was unequivocal that, even though his letter to the panel chair stated that he had sent the complaint for filing on August 1, 2008, he had not filed it until August 29, 2008. Respondent testified further that, in October 2008, when the Langan case still had not been assigned a docket number, he began calling the court, "every month, every three weeks to say where is my docket number;" the court informed him that there was no docket number for that case.

Respondent testified that he had complied with the order requiring him to file the complaint within forty-five days and had a copy of it stamped "filed." However, he could not get the docket number. Therefore, he requested a meeting with the clerk. He shuffled back and forth between the clerk's office and the

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<sup>3</sup> T refers to the transcripts of the January 25, 2010 DEC hearing in this disciplinary matter.

fee office to try to locate the complaint. Finally, the court clerk informed him that it appeared that the complaint had been lost. The clerk instructed him to re-file the complaint and agreed to stamp that day's date (March 27, 2009) on the complaint that bore the August 29, 2008 date stamp to make it clear that the complaint had been filed within the time prescribed by the court. The clerk required respondent to pay another filing fee, but provided him with a refund form, in case it was discovered that the filing fee had been paid before. Indeed, on April 17, 2009, the court sent respondent a refund/overpayment disbursement notice approving his refund of the filing fee.

Respondent neither told Langan that he had filed the complaint nor did he send her a copy of it, either in August 2008, when he originally filed it, or in March 2009, when he re-filed it. As a result, according to the presenter, between September and November 2008, the Office of Attorney Ethics (OAE) and Langan contacted the court to determine whether respondent had filed a new complaint. The court informed them that no complaint had been filed. Langan then filed another grievance against respondent, which was docketed in December 2008.

By letter dated January 7, 2009, the presenter forwarded to respondent a copy of the new grievance and instructed him to

submit a written reply within ten days. The letter specifically stated: "This grievance pertains to the events which followed the ethics hearing involving Irene Langan." On that same day (but prior to oral argument before us on the first Langan matter), the presenter copied respondent on a letter that she had sent to us, attempting to supplement the facts in the first Langan matter. Respondent claimed that he was confused by the two letters and did not realize that the letters related to two different grievances until he spoke to Langan, the night before the February 19, 2009 oral argument before us.

Prior to his February 2009 appearance before us, respondent submitted to the presenter a copy of the first page of the complaint in the Langan civil matter, which he claimed had been filed on August 28, 2008 and had purportedly been misplaced by the court. The copy did not contain a docket number.

The presenter requested that respondent provide her with the docket number. The following day, by letter dated February 20, 2009, the presenter confirmed that, in their recent telephone conversation, respondent had claimed that he had not realized that the presenter's January 7, 2009 letter related to a new grievance. The presenter's letter reiterated that it was a new grievance and that he had to submit a written reply within ten days.

As to the copy of the complaint that respondent had given her, the presenter wrote that the court had no record of it having been filed and that respondent should provide her with a case docket number and summary of the status of the litigation, including any correspondence to Langan. She heard nothing further from respondent.

At the DEC hearing on the current matter, respondent asserted that he believed that the new grievance simply requested proof that he had filed the complaint, that he had to file a response, and that his response was "whether or not [he] filed the complaint," which was accomplished by providing the presenter with the copy of the complaint. He added that, in February 2009, when the presenter asked him for the docket number, he did not have it until March 2009. He acknowledged that he failed to provide that information to the presenter. According to respondent, he believed that, after our May 12, 2009 decision in the first matter, finding that he had filed a new complaint, he had no further obligation to reply to the presenter's request for information about the grievance.

Irene Langan testified via telephone. She claimed that she had no communications with respondent between July 2008 (the date of the order giving respondent forty-five days to file a new complaint) and the summer of 2009 and that she did not



receive any documents from him, including a copy of the new complaint. She personally obtained it from the court on May 20, 2009.

According to Langan, she contacted respondent on June 16, 2009. At that time, he told her that the parties would all get together to proceed with the matter. She heard nothing further from him until the night before the DEC hearing on this matter (January 24, 2010), when he contacted her to inform her that he was going to "get things going." According to respondent, he spoke to Langan in July 2009, but had no further communications with her until January 25, 2010.

The Langan case was ultimately settled on April 1, 2010.

In his brief to us and before the DEC, respondent's counsel argued that the ethics complaint should be dismissed because the DEC brought the same claims against respondent twice. Counsel asserted that the second complaint charged respondent with failing to file a complaint on Langan's behalf, which we had already ruled had been filed. Moreover, he contended, the DEC's continuation of this matter violated the principles of res judicata, collateral estoppel, and the fifth amendment protection against double jeopardy.

The DEC found that the fact that the Essex County Clerk refunded respondent's filing fee lent support to respondent's

assertion that the Langan complaint had been filed in late August 2008. Therefore, the DEC did not find clear and convincing evidence that respondent had violated RPC 1.1(a) or (b).

The DEC, however, found respondent guilty of violating RPC 8.4(c) (misrepresentation) for stating to the panel chair that he had sent the new Langan complaint for filing on August 1, 2008, when, based on his own admission, he had not done so for another twenty-eight days. The DEC did not find a violation of RPC 3.3(a).

Although the DEC was troubled by respondent's failure to communicate with his client for a six-month period, it noted that, because the complaint did not charge him with a failure to communicate with his client, it could not find respondent guilty of violating RPC 1.4.

Finally, the DEC found that the presenter had not satisfied the burden of proving to a clear and convincing standard that respondent had failed to cooperate with the DEC investigation. The DEC, thus, dismissed that charge.

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

At the outset, we deny respondent's counsel's motion to dismiss the complaint. Counsel's position that the principles of double jeopardy, collateral estoppel, and res judicata apply here has no merit. First, double jeopardy applies to criminal matters. Second, the underlying grievance relates to respondent's continuing violations of the Rules of Professional Conduct, not the same violations for which he had been charged in the first complaint. To say that respondent cannot be charged with another violation of the same rule if he continues to violate it is a wholly untenable position. In this instance, the continuing violations relate to the same grievant.

When Langan filed her second grievance, she reasonably believed that respondent had failed to file a complaint on her behalf because the clerk of the Essex County Court informed both her and the OAE that no complaint had been filed. Viewing respondent's testimony in the best light, however, we accept that he filed the complaint on August 29, 2008. The court apparently misplaced it. True, respondent could produce no evidence that he had paid the filing fee, claiming that he must have paid it in cash. On the other hand, while his claim was somewhat suspect, no evidence was presented to refute it. Moreover, he did produce a document indicating that the \$200 fee would be refunded. Therefore, we cannot find clear and

convincing evidence that respondent grossly neglected the matter by failing to timely file a new complaint. Nor is there any evidence of a pattern of neglect.

On the other hand, the record supports, to a clear and convincing standard, that respondent misrepresented to the hearing panel chair that he had filed the Langan complaint on August 1, 2008. In fact, he did not file it until the end of the month. Respondent's conduct, therefore, not only violated RPC 8.4(c) (misrepresentation), but also RPC 3.3(a) (lack of candor to a tribunal (the DEC)).

The DEC dismissed the charge that respondent failed to cooperate with disciplinary authorities. We are unable to agree with that dismissal. The presenter made it clear to respondent, on at least two occasions, that Langan had filed a second grievance. If respondent had taken the time to read the presenter's January 7, 2009 letter, he would have seen that it stated specifically that the grievance related to the events that "followed" the ethics hearing. The presenter clarified that fact in her subsequent telephone conversation with respondent, as well as in her February 20, 2009 letter to him. Respondent's claim that he believed that providing the presenter with a photocopy of the first page of a stamped complaint was a sufficient reply to the grievance was hollow proof of

cooperation, given the presenter's written and verbal requests for a status update of the case and its docket number, neither of which respondent supplied. We, thus, find that respondent failed to cooperate with the DEC, a violation of RPC 8.1(b).

Finally, the DEC noted its concern about respondent's continuing failure to communicate with Langan (he was found guilty of RPC 1.4(b) and RPC 1.4(c) in the first Langan matter), but it did not find such a violation here because it was not charged. It is true that the complaint did not charge respondent with violating RPC 1.4(b), even though he spoke with Langan only twice: once in July 2009 and, again, the day before the January 24, 2010 DEC hearing. We, therefore, cannot find that he violated this rule. R. 1:20-4(b).

The only issue left for determination is the proper quantum of discipline.

Generally, in matters involving misrepresentations to ethics authorities, the discipline ranges from a reprimand to a term of suspension, depending on the gravity of the offense, the presence of other unethical conduct, and aggravating or mitigating factors. See, e.g., In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who created a phony arbitration award to mislead his law partner and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years

since the occurrence, the attorney's unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Homan, 195 N.J. 185 (2008) (censure for attorney who fabricated a promissory note reflecting a loan to him from a client, forged the signature of the client's attorney-in-fact, and gave the note to the OAE during the investigation of a grievance against him; the attorney told the OAE that the note was genuine and that it had been executed contemporaneously with its creation; ultimately, the attorney admitted his impropriety to the OAE; extremely compelling mitigating factors considered, including the attorney's impeccable forty-year professional record, the legitimacy of the loan transaction listed on the note, and the fact that the attorney's fabrication of the note was prompted by his panic at being contacted by the OAE and his embarrassment over his failure to prepare the note contemporaneously with the loan); In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension for attorney who submitted two fictitious letters to the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; the attorney also filed a motion on behalf of another client after his representation had ended and failed to communicate with both clients); In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney

who did not diligently pursue a client matter, made misrepresentations to the client about the status of the matter, and submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the matter); and In re Katsios, 185 N.J. 424 (2006) (two-year suspension for attorney who improperly released escrow funds to his cousin, a party to the escrow agreement, and then falsified bank records and trust reconciliations to mislead the ethics investigator that the funds had remained in escrow).

As to the failure-to-cooperate charge, ordinarily admonitions are imposed if the attorney does not have an ethics history. See, e.g., In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the district ethics committee's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to district ethics committee's requests for information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous communications regarding a grievance); In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance); In the Matter of Andrew T. Brasno,

DRB 97-091 (June 25, 1997) (attorney failed to reply to the ethics grievance and failed to turn over a client's file); and In the Matter of Mark D. Cubberley, DRB 96-090 (April 19, 1996) (attorney failed to reply to the ethics investigator's requests for information about the grievance).

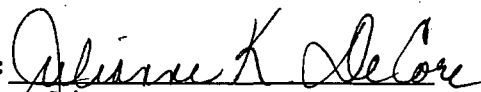
Here, respondent made a misrepresentation to the DEC, although, unlike the attorneys in Homan (censure with compelling mitigating factors), Bar-Nadav (three-month suspension), Rinaldi (three-month suspension), or Katsios (two-year suspension involving egregious falsification of documents), he did not create a fictitious document to mislead the DEC. Taking into account respondent's misrepresentation to the DEC, his failure to reply to the grievance, his minimal communication with his client, and his prior reprimand, we conclude that more than an admonition, the discipline recommended by the DEC, is required here. We, therefore, determine to impose a reprimand.

Vice-Chair Frost did not participate.



We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board  
Louis Pashman, Chair

By:   
Julianne K. DeCore  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Thomas DeSeno

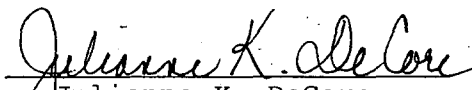
Docket No. DRB 10-247

Argued: November 18, 2010

Decided: December 13, 2010

Disposition: Reprimand

Members	Disbar	Reprimand	Censure	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost						X
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		8				1

  
Julianne K. DeCore  
Chief Counsel