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SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 99-045

IN THE MATTER OF :
MICHAEL A. NELSON, :
AN ATTORNEY AT LAW :

Decision

Argued: April 15, 1999

Decided: December 24, 1999

Peter J. Hendricks appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance before the Board.

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 VIII Ethics Committee (DEC). The complaint charged respondent with misconduct in four matters. At the beginning of the hearing, the presenter withdrew the fourth count of the complaint (Doyle). The allegations in the three remaining counts are set out within the recitation of facts for each matter.

Respondent was admitted to the New Jersey bar in 1988. During the relevant times, he maintained offices for the practice of law in New Brunswick, Middlesex County.

Respondent currently resides in Florida. As of the date of the DEC hearing, he was not practicing law. He has no history of discipline.

At the outset, we are compelled to address certain potential conflict-of-interest situations that arose at the DEC level. First, respondent's counsel, Lennox S. Hinds, has known the grievant in count one, Bruce L. Jennings, for over twenty years. While in high school, Jennings was a friend of Hinds' son and, more recently, was a student of Hinds at Rutgers University. (Jennings was also a student of respondent while at Rutgers). Although respondent saw no problem with the representation, Jennings objected to it. In allowing the representation to continue, the DEC concluded as follows:

> As to the situation with Mr. Hinds knowing the complainant, and apparently there's been a disclosure that the complainant was a student of Mr. Hinds, we the committee don't see that as a conflict or problem.
>
> We also don't think that Mr. Jennings has any right to object to Mr. Hinds representing Mr. Nelson. Mr. Nelson acknowledges the situation and agrees to have Mr. Hinds represent him. Mr. Nelson says that he's satisfied that he will be adequately represented and that Mr. Hinds doesn't have any special knowledge about Mr. Nelson which would - I mean Mr. Jennings - which would give Mr. Hinds maybe kind of an undo advantage. But more importantly, Mr. Jennings does not have a conflict because of that relationship and should not be permitted to object to the representation.
>
> [T10/13/98 20-21]

Further complicating the matter, panel member E. Ronald Wright, Esq. knew all three individuals: respondent, Hinds and Jennings. He has known respondent as a fellow attorney practicing in the county for approximately six years. The two were co-counsel in at least one case. In addition, Wright and Hinds were classmates in law school. Furthermore, Wright

has known Jennings "probably all of his life." Finally, Wright has represented Jennings' mother and at least one of his brothers. Wright indicated that he could decide this case "in a fair and just manner." Neither Jennings nor respondent objected to Wright's role as a panel member.

In assessing the various relationships between the parties, we agreed with the conclusion of the DEC about Hinds' representation of respondent. We found, however, that Wright's participation as a member of the hearing panel was inappropriate. Although we determined not to act on this conflict by remanding the matter for a new hearing, we expressed our disapproval of the participation of any hearing panel member who has a personal or professional relationship with any of the parties of a disciplinary matter.

The Jennings Matter (Count One - District Docket VIII-97-082E)

In 1996, Bruce L. Jennings, the grievant herein, was a defendant in a criminal trial that resulted in a guilty verdict. Jennings was represented by Anthony J. Mignella, a senior trial attorney at the Office of the Public Defender in Somerset County. On June 22, 1996, Jennings filed a motion pro se to have Mignella removed as his counsel. The court granted the motion on September 9, 1996. Before that, in July 1996, Jennings had contacted the court to request a copy of the transcript of the trial. The court referred his request to Mignella. It is unclear why the transcripts were not supplied to Jennings.

On August 26, 1996, Delores Reese, Jennings' mother, retained respondent to represent Jennings at his sentencing and to file an appeal from the guilty verdict and the sentence.[1]

Jennings testified that he first met with respondent in August 1996, after the jury verdict in his case, but prior to sentencing. The meeting, which took place at the county jail, was arranged by Reese. Jennings and respondent spoke in general about the case and also discussed specific issues, including an ineffective assistance of counsel claim against prior counsel, a Hornes hearing and Jennings' retention of an expert witness. Respondent told Jennings that he would represent him at sentencing and on appeal of the conviction and sentence. They next met on November 8, 1996, when respondent represented Jennings at his sentencing.

According to Jennings, respondent "vanished" after the sentencing. Despite Jennings' lack of communication with respondent, he believed that his mother had been making monthly payments to respondent, was setting up meetings with him and that an appeal was being pursued. As it turned out, the appeal was never filed. Jennings testified that he trusted that respondent would file the appeal, while respondent contended that it was agreed that Jennings would act pro se.

Central to this matter is the question of who had agreed to obtain the transcripts for the appeal. According to Jennings, at some point after August 26, 1996 and at respondent's

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[1] According to Jennings, Reese died the week before the DEC hearing.

suggestion, he applied in forma pauperis for the transcripts. His request was denied because he was being represented by a private attorney. At the DEC hearing, the following exchange took place between Jennings and respondent's counsel:

> Q: Okay. Do you have a recollection, sir, that he talked to you about the need for you to apply for the transcripts because of the issue of costs?
>
> A: I do recall, yes, I do recall he did mention something, okay.
>
> Q: And is it fair to say, sir, that Mr. Nelson in dealing with strategy discussed with you, based upon your financial situation, that it would be desirable for you to apply for the transcripts in forma pauperis, as a poor person, as somebody who couldn't afford to pay for the transcript?
>
> A: Okay. Now that you mention it, I do believe Mr. Nelson mentioned the fact that I should apply for the transcripts. And perhaps that is what initiated me to apply for the transcripts.
>
> Q: Okay. Do you have a recollection, sir, that Mr. Nelson, again from a strategic standpoint, indicated to you that while he was prepared to represent you on the appeal, that it was better for you to file a notice of appeal, so that you would be in a pro se posture in terms of obtaining the transcripts?
>
> A: Absolutely not.
>
> Q: But you have a recollection of him talking to you about proceeding for the transcripts on a pro se basis?
>
> A: Yes, yes.
>
> [T10/13/98 89-90]
>
> [Panel member] At some point in time did Mr. Nelson say to you, transcripts - it's easier, cheaper, better, quicker for you to try to get the transcripts or I'm not doing anything until I get the transcripts?

[Grievant] No. That was my understanding, Mr. Wright.

[Panel member] Did you ever hear him say words to that effect?

[Grievant] Well, I paraphrased it. Words to that effect, yes.

[Panel member] You did hear him say that?

[Grievant] Yes.

[T10/13/98 99]

Jennings testified that, during the course of the representation, he attempted to contact respondent from prison, but his calls were not accepted. He also testified that he sent letters to respondent, beginning in May 1997, which apparently went unanswered. It is clear, however, that neither respondent nor Jennings filed the notice of appeal within the prescribed forty-five days.

Respondent's testimony was at odds with Jennings' in several respects. For instance, respondent recollected four meetings with Jennings since August 1996. According to respondent, they discussed the issues of sentencing and appeal, including the costs in hiring an expert. Respondent deemed an expert unnecessary and allegedly so advised Jennings. Respondent testified that he agreed to pursue the appeal if Jennings filed the appeal and supplied the transcripts:

> [Respondent's counsel] Now, did you have any discussions with Mr. Jennings either on the October - the August or October or November meetings that you had with him concerning a strategy for obtaining transcripts?
>
> [Respondent] Yes.

[Respondent's counsel] When did you have your first discussion with him on that?

[Respondent] The first discussion occurred in August. And there were subsequent discussions. What we discussed is that because there was not a lot of money involved - I knew Bruce Jennings and I knew his mother, I know his brother, and so I decided I would represent Bruce for minimal costs to myself. And the only way that can be accomplished is if he would file a pro se motion to get the transcripts. After the transcripts have been received, a notice of appeal is filed. Then the notice of appeal has to be filed first and then the transcripts received. Then I would take the matter and handle it, handle the appeal.

[Respondent's counsel] Okay. What was your understanding with Mr. Jennings with respect to filing a notice of appeal?

[Respondent] My understanding is that he would do that. And I in fact told him to contact Mr. Mignella, because I was not aware of the issues that occurred during the appeal [sic]. And I couldn't address any of the issues with the exception of the ineffective assistance of counsel, which Mr. Jennings mentioned.
Of course, in effect, ineffectiveness of counsel is very broad. And so that's when I put in a few calls to Mr. Mignella at the public defender's office at Somerset County. And then I ran into him at the court and we spoke about Mr. Jennings [sic] case.[2]

[Respondent's counsel] Okay. When did you first talk to Mr. Mignella concerning the case?

[Respondent] I made calls in November and December to his office. And I met him in January.

[Respondent's counsel] Okay.

[Panel Chair]: You didn't talk to him on the phone, though?

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[2]Mignella testified that, although he had a "very vague" recollection of speaking with respondent about Jennings' case, he did not recall the details of that conversation.

[Respondent] Never. I never spoke to him.

[Panel Chair]: You called but couldn't reach him?

[Respondent] That's correct.

[Panel Chair]: So you talked to him in January?

[Respondent] Yes.

[Respondent's counsel] What year?

[Respondent] 1997.

[Respondent's counsel] Where?

[Respondent] On [sic] the Somerset County courthouse. I think the fourth floor.

[Respondent's counsel] And what was the sum and substance of the conversation you had with him, if any?

[Respondent] I refreshed his recollection with regards to his representation of Mr. Jennings. I told him that Mr. Jennings needs to get his appeal filed and that if he would assist him in filing it. And he says he's no longer representing him, but that Mr. Jennings can get that done through his social worker.
I saw Mr. - I communicated - I don't remember if I told Mr. Jennings this in person or - I don't remember how I communicated it to him, but I told Mr. Jennings to get in touch with his social worker and have the appeal filed.
[T10/13/98 118-121]

[Respondent's counsel] Mr. Nelson, wasn't an issue of who would file a motion [sic] of appeal the question of obtaining free copies of the transcript? Wasn't that the issue?

[Respondent] That's correct.

[Respondent's counsel] Okay. And didn't you - is it fair that you testified that you discussed with Mr. Jennings the strategy of him proceeding pro se in filing

the notice of appeal so that he would be able to get free copies of the transcript?

[Respondent] That's the only way he can get the transcript free. And so we discussed that.

[T10/13/98 131]

During his testimony, respondent recalled that he, in fact, advised Jennings' mother, Reese, that Jennings should contact his social worker to assist him in filing the appeal. Indeed, it appears that respondent frequently communicated with Jennings through Reese. Respondent testified that he thought it unnecessary to write to Jennings about this advice because the information had been conveyed to Reese. Respondent added that his two attempts to telephone Jennings in prison had been unsuccessful. In this context, respondent testified as follows:

[Respondent] Because I had spoken to Miss Ries [sic]. His mom came in. And what was happening is that you would discuss the case with her and she would ask some specific questions. And I would explain to her what was happening.

And I explained to her that Mr. Mignella says that Mr. Jennings has to file for his appeal through the social worker. Prior to that, I had explained to Mr. Jennings on several occasions that the notice of appeal has to be filed. And once that is filed, then you can get the transcript. I mean you couldn't get the transcript before.

When he was in court before Judge Arnold, Judge Arnold rejected the request for the transcript, because I was representing him at the sentencing and you can't get the transcript if you have an attorney, a private attorney. And so it was rejected at that time.

Subsequent to the sentencing, Mr. Jennings was to file a notice of appeal. And at the - I learned later that he did not have the transcript, all right, and that's when I spoke to Mignella about helping him to get the transcript.

[Panel Member] And you were comfortable with the idea of transmittal of the information to Mr. Jennings through his mother?

[Respondent] That's how it was done. The retainer agreement was done that way. Everything else was done that way.

[T10/13/98 133-134]

Respondent further testified that, during a January 1997 meeting with Reese, he advised her that the appeal could be filed even though they were beyond the forty-five day period, but that Jennings had to act quickly. The record is unclear as to what transpired thereafter. It seems that Jennings eventually obtained the transcript on his own and filed an unspecified "application" to the court. The record does not reveal the status of that application.

* * *

A question arose during the hearing below about the fee paid to respondent. According to respondent, he was paid $2,300: $1,500 for the sentencing and $800 for the appeal. On the other hand, Jennings testified that respondent was to be paid $7,000. The retainer agreement does not resolve this discrepancy, but suggests that a fee greater than $2,300 was contemplated. According to respondent, as of the DEC hearing he was holding in "escrow" between $500 and $800 of Jennings' funds - funds earmarked for the appeal that was never filed. The record does not reveal if either Jennings or Reese asked respondent for the return of the unearned portion of the fee.

* * *

The complaint charged respondent with a violation of RPC 1.1(a)(gross neglect), RPC 1.3 (lack of diligence), RPC 1.4 (a) and (b) (failure to communicate) and RPC 8.4 (c)(conduct involving dishonesty, fraud, deceit or misrepresentation).

The DEC determined that respondent violated RPC 1.3 and RPC 1.4(a) and (b). The DEC noted the following deficiencies in respondent's representation of Jennings:

> Specifically, the Committee finds that Michael A. Nelson, Esq. placed an unfair burden on his client in requiring him to obtain the transcripts while he was being incarcerated. He failed to properly advise his client of the methods that he could have used to obtain the transcripts. But, more importantly, he left it up in the air as to who would be paying for the transcripts. During this period of time that attempts were being made to retrieve the transcripts, the respondent failed to properly protect his client, in that he failed to file a Notice Of Appeal to stop the clock from running and to protect his client's interest. Certainly, an attorney who takes on a criminal matter should have had this basic knowledge that the filing of the Notice of Appeal is an important step in protecting an appellant's rights. It is clear that he accepted money from the complainant for the purpose of filing the appeal and he therefore had to act with all due diligence pursuant to RPC 1.3 and apparently, he failed to do so. To further complicate the problem, the Committee finds that he violated RPC 1.4(a) and (b) in that he failed to communicate with Mr. Jennings so as to advise him as to the status of the appeal and to answer any questions he may have had while being incarcerated concerning what steps, if any, he could take to effectuate the appeal.

The DEC did not address the alleged violation of RPC 8.4(c). Presumably no violation was found.

The Peters Matter (Count Two - District Docket No. VIII-97-085E)

As will be seen below, it is undisputed that respondent was retained to represent a

juvenile in connection with two criminal charges. This matter appears to boil down to a disagreement or misunderstanding between the client and respondent about what those charges were. The retainer agreement, exhibit RP-2, states in relevant part: "This Law Firm is retained for the sum of two thousand five hundred dollars to represent Mr. Peters at trial for two incidents wherein the juvenile may be charged with third degree offenses." The specific charges are not enumerated.

In March 1997, Richard D. Peters (Peters) retained respondent to represent his son, Edward Peters, in connection with two juvenile matters. Peters paid respondent $2,500 in or about April 1997. The testimony of Peters and respondent diverged as to the subsequent events.

Peters testified that respondent was retained to represent his son in connection with charges of burglary and escape. Peters explained that his son was a patient at Bonnie Brae School for Boys ("Bonnie Brae"). In or about May 1997 the son went "AWOL." After the son was retrieved, respondent appeared on his behalf at a May 27, 1997 hearing on an aggravated assault charge. This hearing was continued to November 1997, on the condition that the son return to Bonnie Brae. Peters' understanding was that the hearing on the "criminal charges" was scheduled for November 1997. Exhibit RP-3, the disposition sheet from the May proceeding, clearly indicates that a November 18, 1997 hearing was scheduled on the assault charge.

According to Peters, he heard nothing further from respondent. Peters unsuccessfully attempted to contact respondent in mid- to late September 1997. Thereafter, in early October 1997, Peters received a call from someone purporting to represent respondent, advising Peters that respondent could no longer continue the representation and asking Peters to pick up his file from respondent's office. Mrs. Peters retrieved the file. No portion of the retainer was refunded. Peters retained other counsel in October 1997 to represent his son.

Respondent's testimony differed from Peters' in several key respects. According to respondent, he was retained to represent Edward Peters in connection with charges of escape and aggravated assault, rather than the burglary charge, as contended by Peters. Respondent testified that, in fact, he did not know about the burglary charge until the morning of the DEC hearing, when he examined the court records. According to respondent, the burglary charge arose after the May 1997 hearing.

Respondent testified that he began representing Edward in February 1997, before he had been formally retained. During the course of the representation, he communicated with Edward, his social worker, the staff of Bonnie Brae, the prosecutor and Mr. and Mrs. Peters. Respondent stated that because Mr. Peters traveled frequently, much of his communication took place with Mrs. Peters, who was aware of the developments in the case.[3] Respondent testified that he appeared in court on Edward's behalf every three weeks from February 27 to May 27, 1997. His efforts resulted in the dismissal of the escape charge on March 3, 1997.

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[3]Mrs. Peters was not called as a witness.

(Peters testified that he was unaware of this dismissal). In addition, respondent added, by the date of the above mentioned May 1997 hearing, he and the prosecutor had already agreed that the hearing on the assault charge would be continued to November 1997, on the condition that Edward return to Bonnie Brae. If Edward successfully completed the program and had no further charges levied against him, the assault charge would be dismissed at the November hearing.

Respondent testified that he explained this agreement to the Peterses during the May hearing. It appears from Peters' testimony, however, that he did not understand the agreement between respondent and the prosecutor.

Respondent offered little testimony about his withdrawal from Edward's representation, other than to state that he had become psychologically disabled in September 1997 and, therefore, unable to continue practicing law. His answer refers to an October 6, 1997 letter to Peters and a call to Peters from a Ms. Myrne Ward, advising Peters of respondent's inability to continue the representation. It is unclear if Peters received the October 6, 1997 letter. The record is silent as to whether respondent filed a motion to withdraw from the matter.

* * *

The complaint charged respondent with a violation of RPC 1.1(a), RPC 1.3 and RPC and 1.4(a) and (b).

The DEC was unable to conclude that respondent was guilty of unethical conduct and recommended that this matter be dismissed. The DEC found that this case sounded more like a fee dispute and suggested that Peters proceed before the fee arbitration committee. Indeed, at the close of the ethics hearing, Peters stated his belief that he had overpaid respondent for the services rendered and explained that he was trying to retrieve his fee from the New Jersey Lawyers' Fund for Client Protection ("CPF"). He understood that an ethics proceeding was the first step to take toward that end.[4]

The Daniels Matter (Count Three - District Docket No. VIII-97-091E)

Raney Daniels Jr. retained respondent on February 9, 1996 to represent him in a civil rights claim. Daniels paid respondent $2,500, whereupon respondent began to pursue the claim.

On March 6, 1996, respondent filed a multi-defendant complaint, which he had reviewed with Daniels. Answers were filed and the case proceeded apace. It was stipulated at the DEC hearing that respondent spent over forty hours on the case.

During the course of the representation, respondent became disabled and could not

[4]As to the DEC's suggestion that Peters proceed before the fee arbitration committee, there is no record of a fee arbitration proceeding between respondent and Peters. Moreover, Peters' comment concerning the CPF seems misplaced: pursuant to R.1:28-3 only those claims arising from "dishonest conduct" would be considered for payment by the CPF. Accordingly, without an accompanying finding of dishonest conduct, Peters' claim that respondent charged an excessive fee would not be considered by the CPF.

continue as Daniels' attorney. Respondent did not file a motion to be relieved as counsel. Rather, he claimed, he sent a letter to Daniels on October 6, 1997, stating that he would be unable to proceed with the representation due to "medical reasons"and instructing Daniels to either retrieve the file from his office at a specified time or to call during that same time. Exhibit RD-2. Respondent testified that the letter was followed by a phone call. Respondent explained that he retained a "Miss Ward" to be present in the office to distribute files. Respondent did not know why Daniels had not picked up his file. Respondent's understanding was that Daniels had asked to go into the office and "see what else [was] there," which was not permitted. Daniels was the only client who did not retrieve his file. Respondent contended that he had then asked his brother to deliver the file to Daniels. To the best of respondent's knowledge, that had been done in October 1997.[5]

Contrarily, Daniels testified that at some point he lost contact with respondent, who had changed his office location. It is unclear how the contact was renewed. Although Daniels could not recall the above mentioned October 6, 1997 letter, he did remember a phone call about picking up his file. Daniels contended that he had made at least twenty phone calls about the file and had gone to respondent's office to pick it up on at least a dozen occasions. He maintained that his attempts to retrieve the file had been unsuccessful. Daniels denied that respondent's brother had delivered the file to him.

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[5]Respondent's brother was not called to testify.

As of the date of the DEC hearing, Daniels was proceeding pro se in his matter, without the benefit of his file.

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The complaint charged respondent with a violation of RPC 1.1(a), RPC 1.3 and RPC 1.4(a).

The DEC determined that respondent had violated RPC 1.16(d) (termination of representation). The DEC recognized that respondent had not been charged with a violation of that rule, but concluded as follows:

> Specifically, 1.16 requires that upon termination of representation that an attorney may, in fact withdraw as counsel under 1.16(a)(2) if the lawyer's physical and mental condition materially impairs the lawyer's ability to represent the client. However, the Rule goes on to require that there be an orderly termination of the representation in that the lawyer shall take steps to the extent reasonably practical [sic] to protect the client's interest such as giving reasonable notice to the client, allowing time for 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 Committee finds that a letter was sent to Mr. Daniels dated October 6, 1997, advising him that 'I regret to inform you that due to medical reasons, I am unable to continue representation of your matter.' . . . The letter does not communicate any information to Mr. Daniels concerning the status of his case and whether or not new counsel should or would be substituted for him and specifically, what should be done to protect his interests. The Committee finds that the letter of Dr. Kassoff [is] unpersuasive with reference to Mr. Nelson's duty to comply with RPC 1.16. However, the Committee finds that Mr. Nelson may very well have believed that he was so disabled that he could no longer continue representation. His violation, however, occurred from that point forward where he failed to take appropriate steps to protect the interest of his client.
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> [Hearing panel report at 11-12]

The DEC did not address the charged violations of RPC 1.1(a), RPC 1.3 and RPC 1.4(a). Presumably no violations of those rules were found.

* * *

Respondent submitted into evidence a report from David B. Kassoff, M.D., a psychiatrist, dated February 5, 1998 (over eight months before the DEC hearing), which had been prepared in connection with another court proceeding. According to the report (exhibit RP-4), Dr. Kassoff first examined respondent in September 1997. In Dr. Kassoff's opinion, respondent was suffering from major depression as a result of personal family problems and the pressures of his law practice. Dr. Kassoff treated respondent regularly with psychotherapy and medication until November 25, 1997, when respondent moved to Florida. Dr. Kassoff did not offer an opinion as to whether respondent's conduct was the product of his psychiatric problems. The DEC found the report unpersuasive.[6]

The DEC recommended that respondent be reprimanded.

* * *

Upon a de novo review of the record, we agreed with the conclusion of the DEC that respondent was guilty of unethical conduct.

In the Jennings matter, the DEC found a violation of RPC 1.3. That finding is

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[6]One point in the report is troubling. Dr. Kassoff stated that respondent had stopped working approximately two months before seeing him in September 1997. If that is the case and respondent stopped practicing in July 1997, he should not have waited until October 1997 to send out notification letters to his clients.

appropriate. We recognized that there was a misunderstanding as to who was doing what in connection with the transcripts and the notice of appeal.[7] Respondent, however, should have contacted the Appellate Division or his client to ascertain if the notice of appeal had been filed and, on discovering that it had not, should have filed the notice himself to preserve Jennings' rights. Although respondent's concerns about the cost for the transcripts are understandable, it would have been more prudent to file the notice of appeal and then to supply the transcripts.

This appears to be a communication problem with far-reaching results. Had respondent and Jennings communicated more directly, it is probable that these difficulties would not have arisen. As to communication, the DEC found a violation of RPC 1.4(a) and (b). Jennings testified that he was unable to contact respondent by phone and that he did not write to respondent until May 1997 because he believed that the matter was proceeding apace. Respondent, in turn, testified that he was unable to reach Jennings by phone, had informed Reese as to what had to be done and apparently thought that Jennings had followed his instructions. Respondent should have taken further steps, however. Although it was reasonable for him to expect that his messages to Jennings were being conveyed through Reese he should have followed up and confirmed that Jennings had received the necessary information.

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[7]The DEC noted in its report that respondent did not know that he could have appealed Jennings' sentence without the transcript. It is not so clear, however, that that would have been permitted.

In an earlier disciplinary case, an attorney was representing a client on the appeal of a criminal matter. The client's father paid the attorney and the attorney communicated with the client's father. During the course of the representation, the client's father instructed the attorney to stop pursuing the matter. The attorney followed the father's instruction. The attorney did not speak directly with the client or withdraw as counsel of record. We found that the attorney should have communicated directly with the client to advise him of her withdrawal from the representation. The attorney was reprimanded. In re Stalcup, 140 N.J. 622 (1995).

Here, the scenario is different. Respondent had every reason to believe that Reese was acting in Jennings' best interest and was conveying his messages to Jennings. Unfortunately, the missing link in the puzzle, Reese, was unavailable to testify about what respondent communicated to her. Nevertheless, despite respondent's belief that Reese was transmitting his advice to Jennings, respondent should have taken the next step and confirmed critical communications himself, in writing, if necessary.

One additional issue warrants mention. There is no question that respondent did not pursue the appeal for which he was paid at least $800. Yet he failed to return any of that fee to his client. Although the record does not reveal if Jennings or Reese asked for the funds to be returned, the events in question took place in late 1996 and early 1997. He should have refunded the unearned $800 to Jennings. Respondent was not charged with a violation in this regard and we are reluctant to find misconduct here without testimony indicating that there

were requests made to respondent that he return the fees.

In the Peters matter, the record does not easily answer the scope of respondent's representation of Edward Peters. The only evidence of the date of the burglary charge was respondent's testimony, which pointed to sometime after the May 1997 hearing. It does not appear that the retainer agreement was renegotiated to include the handling of any subsequent charges. Further complicating the matter is the number of charges pending against Edward Peters during the time in question. Peters testified that respondent was to prepare a defense to "seven counts of juvenile misdemeanors, burglary, et cetera." Respondent, too, made reference to "four or five charges that came out of 1997." That factor, combined with the vagueness of the retainer agreement, lends support to the DEC's conclusion that this grievance resulted from a misunderstanding. The charged violations of RPC 1.1(a) and RPC 1.3 are, therefore, dismissed.

The finding of a violation of RPC 1.4(a) is more troubling because of a void in the record. It appears from the testimony that Peters did not fully understand what was to take place at the November hearing, lending support to his claim that respondent did not adequately communicate with him. On the other hand, respondent testified that he spoke with Mrs. Peters about the proceedings. Without her testimony to rebut respondent's claim, it is difficult to find clear and convincing evidence that respondent failed to communicate with his client. Although this charge is a closer call, it is dismissed as well.

There is a question of whether respondent violated RPC 1.16(d) (improper termination of representation), a charge not cited in the complaint. In September 1997 respondent deemed himself unable to continue to practice law. Peters testified that in mid- to late September he was unable to contact respondent. In early October 1997, however, respondent sent a letter to his clients advising them that he was disabled and no longer able to represent them. Thus, Peters could not locate respondent for only two weeks. Given that the next scheduled proceeding was in November, it is likely that there would have been no developments in Edward Peters' case during that time. We found that the period when respondent was unreachable — approximately two weeks — was not significant, particularly since, to respondent's knowledge, it was probable that the remaining charge against his client would be dismissed. Accordingly, we determined to dismiss the Peters matter.

In the Daniels matter, we agreed with the conclusions of the DEC. Again, the issues are respondent's withdrawal from the representation and the return of Daniel's file. Respondent's conduct here is troubling on three fronts. First, assuming that it is true that respondent asked his brother to return Daniels' file to him, respondent had an obligation to follow up and confirm that the file had been delivered. In addition, respondent determined to close his practice while Daniels' case was proceeding. Clearly, he should have filed a motion to be relieved as counsel. This he failed to do. Finally, respondent's letter to Daniels, dated October 6, 1997, stated that either his file had to be picked up on October 10,

1997 or calls placed in a brief window of two or four hours.[8] Particularly in the Daniels case, where the client was disabled, respondent did not give adequate notice to his clients to allow them to make arrangements to get the files or possibly even to call. Indeed, it is possible that the letter would not have been received until after respondent's designated time. Although respondent was not charged in the complaint with a violation of RPC 1.16(d), we deemed the complaint amended to conform to the proofs and found a violation in that regard. We also agreed with the DEC's dismissal of the charges of violations of RPC 1.1(a), RPC 1.3 and RPC 1.4(a).

Before discussing the appropriate quantum of discipline, one other point needs mention. Respondent was charged with a pattern of neglect in the Jennings, Peters and Daniels matters, in violation of RPC 1.1(b). That charge was enumerated, however, within the allegations of the Doyle matter, which was withdrawn. The DEC did not address the charge in its report. Hence, the allegation is deemed withdrawn because of its placement within the fourth count of the complaint. In addition, given that we did not find gross neglect in the three matters at issue, a finding of a pattern of neglect is inappropriate.

In sum, respondent's ethics transgressions were limited to failure to communicate and lack of diligence in Jennings and improper withdrawal from representation in Daniels. Generally, an admonition is sufficient discipline for such misconduct. See, e.g., In the Matter of Robert Hedesh, Docket No. DRB 98-347 (December 3, 1998) (admonition imposed where

[8]Our copy of that document is illegible.

the attorney failed to communicate with his client to explain the problems with and the status of his case, failed to give the client reasonable notice of his efforts to withdraw from the representation and failed to obtain the consent of the client and the court to the withdrawal); In the Matter of Antoinette Clarke Forbes, Docket No. DRB 98-331 (October 21, 1998) (admonition imposed where the attorney was guilty of failure to communicate, failure to turn over a file and failure to return an unearned retainer in an estate matter) and In the Matter of Vera E. Carpenter, Docket No. DRB 97-303 (October 27, 1997) (admonition imposed where the attorney was guilty of lack of diligence, failure to communicate and failure to turn over a file to new counsel in a personal injury matter).

We unanimously determined to impose an admonition for respondent's ethics offenses. One member did not participate.

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

Dated: 12/24/98

By: _____
LEE M. HYMERLING
CHAIR
DISCIPLINARY REVIEW BOARD

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael A. Nelson
Docket No. DRB 99-045

Argued: April 15, 1999

Decided: December 24, 1999

Disposition: Admonition

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling				x			
Cole				x			
Boylan				x			
Brody				x			
Lolla				x			
Maudsley				x			
Peterson				x			
Schwartz				x			
Board member Thompson was on a temporary leave of absence							
Total:				8			

By Robyn M. Hill 1/11/2000
Robyn M. Hill
Chief Counsel