SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 08-009 and 08-010
District Docket Nos. IIB-07-014E
and IIB-06-024E

IN THE MATTERS OF	
WALTER D. NEALY	
AN ATTORNEY AT LAW	

Decision

Argued: April 17, 2008

Decided: June 10, 2008

David Edelberg appeared on behalf of the District IIB Ethics Committee.

Eric A. Summerville appeared on behalf of respondent.

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

These matters came before us on recommendations for discipline (two three-month suspensions) filed by the District

heard by the same DEC panel, on the same date. The amended complaint in DRB 08-009 charged violations of RPC 1.1 (a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to inform prospective client of how, when, and where the client may communicate with the lawyer), RPC 1.4(b) (failure to keep a client informed about the status of a matter and promptly comply with requests for information), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The complaint in DRB 08-010 charged violations of RPC 1.1(b), RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

We determine that a three-month suspension is the appropriate level of discipline for respondent's conduct in both matters.

Respondent was admitted to the New Jersey bar in 1984. He received a private reprimand in 1990 for displaying a lack of diligence in a real estate refinance. Respondent failed to complete post-closing tasks in a timely manner, resulting in a $2,000 financial injury to the mortgagee. In the Matter of Walter Nealy, DRB 90-096 (June 22, 1990). In 2001, he received a reprimand for negligently misappropriating $4,000 and failing to comply with the recordkeeping rules. In re Nealy, 170 N.J. 193 (2001). In 2004, he was reprimanded again, based on a motion for

discipline by consent. In re Nealy, 180 N.J. 527 (2004). In that case, respondent failed to file an affidavit of merit, resulting in the dismissal, with prejudice, of his client's complaint; failed to take any steps to have the complaint restored until after the ethics grievance was filed (his motion to restore the case was denied because it was untimely filed); and misled the client to believe that the complaint could proceed to trial or settlement. Respondent admitted that he was guilty of gross neglect, lack of diligence, failure to communicate with the client, failure to explain a matter to the extent necessary to permit the client to make informed decisions, and misrepresentation.

A. DRB 08-009 - The Simmons Matter (Docket No. IIB-07-014E)

On April 22, 2003, Gloria Simmons, the grievant, retained respondent to represent her son, Jermaine Jackson, in an appeal from a criminal conviction. Jackson, represented by other counsel, had been convicted of attempted murder, aggravated assault, and a weapons violation. Although the Office of the Public Defender filed the notice of appeal on Jackson's behalf, respondent assumed responsibility for the appeal. The retainer

agreement specifically provided that respondent would prepare and file an appellate brief and appendix.

Shortly after signing the retainer agreement, Simmons paid $5,000 of respondent's $7,500 flat fee, paying the balance in monthly installments until it was paid in full, in January 2004.

After retaining respondent, in April 2003, Simmons met with him again, in July 2003, and on various dates when she delivered fee payments to his office.

During those meetings, respondent indicated to Simmons that he was working on the appellate brief and that he would have news shortly. During the summer of 2005, Simmons again met with respondent, who told her that, although he had been out of the office because of illness, he would be sending her some information in the next several days. It was Simmons' understanding that, during the two years since she had retained respondent, he had met with Jackson once.

On September 12, 2005, respondent sent the following letter to Jackson, with a copy to Simmons:

> First, I want to apologize to your [sic] for my delay. Enclosed herein please find a rough draft of your Appeal Brief which I believe incorporates many of the comments and suggestions that you have provided to me.

> Also, I have enclosed copies of the witness statements that I have, along with a transcript of the Grand Jury proceedings. I have also provided a copy of the trial [sic] brief to your mother and step-father.
> Finally I am in the process of arranging to come visit with you so that we can discuss the contents of the Brief, finalize same and file it with the Court.
>
> Thank you and I shall speak with you shortly.
>
> [Ex.R-1.]

Although Simmons acknowledged that she had received a copy of that letter, she did not recall receiving the draft brief.

Simmons last met with respondent in December 2006, when he told her that, although he had drafted a brief, his secretary had inadvertently thrown it in the garbage.

In January 2007, Simmons sent an e-mail to respondent, expressing her hope that he would meet with Jackson. The record does not disclose whether respondent replied to this e-mail. According to Simmons, she never received a draft brief. She filed the grievance in May 2007, more than four years after she had retained respondent. In the grievance, Simmons expressed her concern about the status of the appeal:

> I understand that there's a time limitation on Direct Appeals and hoping [respondent] has not pass [sic] that time limit, although Mr. Nealy informed us that he filed for a time extension and asked that Jermaine

be sent a copy of the extension and noted the date it was granted, Jermaine has not receive [sic] his requested copies.

[Ex.G-2.]

At some point, Jackson filed a fee arbitration petition. Although respondent admitted, in his reply, that he was obligated to refund the full $7,500 fee to Simmons, he had not repaid any portion of that sum to her as of the date of the ethics hearing.

As it turned out, Jackson's appeal had been dismissed on May 3, 2004. Respondent learned of the dismissal shortly after entry of the order. The record contains no indication that respondent informed either Jackson or Simmons of the appeal's dismissal. Indeed, on October 20, 2005, about sixteen months after the appeal had been dismissed, Jackson sent a letter to respondent, inquiring about the status of the appeal, discussing the issues to be raised in the brief, and complaining of difficulty reaching respondent by telephone. Simmons, too, was not aware of the dismissal, as shown by the above quote from her grievance, expressing hope that the time limit for a direct appeal had not expired.

For his part, respondent asserted that, a few days after Simmons had retained him, he had visited Jackson at New Jersey State Prison, discussing the case with him. Respondent had

obtained from the Office of the Public Defender, free of charge, the trial transcripts, which cost several thousand dollars. By letter dated September 25, 2003, respondent informed Jackson and Simmons that he had obtained the transcripts.

Respondent testified that, after he sent the draft brief to Jackson, they disagreed about several issues that Jackson wanted respondent to raise, which respondent believed were appropriate for post-conviction relief, not a direct appeal. Although respondent claimed that he had failed to file the brief because of these disagreements, he conceded that the disagreements had not excused his responsibility to file the brief and that he had failed to act with diligence. Respondent admitted that he had prepared the draft brief after the appeal had been dismissed. According to respondent, he did not file a motion to restore the appeal because he "just froze on this case."

Respondent further admitted that, although, at some point, he had drafted a motion to extend the time to file the brief, he had not filed it and had no excuse for this failure. In addition, he acknowledged that the Appellate Division's briefing schedule provided that the court would dismiss the appeal on its own motion, if he failed to comply with the deadline for filing the

brief. Respondent admitted that he had not informed either Jackson or Simmons, in writing, of the appeal's dismissal.

Respondent denied informing Simmons that his secretary had thrown the brief in the garbage. Rather, he claimed that he had told Simmons that the documents in the file had been lost. He further asserted that he had shown Simmons a copy of the draft brief and all correspondence, at their December 2006 meeting.

According to respondent, he met with Jackson at the prison five or six times, and talked to him by telephone on several occasions.

On November 9, 2007, about one month after the ethics hearing had taken place, respondent's counsel submitted several documents to the hearing panel, asking that they be admitted into evidence, given that the record had not been closed. Because the hearing panel report indirectly contains a reference to these documents, and because they were included with the record transmitted to us, we presume that the DEC admitted the documents into evidence. Those documents reveal that, on September 20, 2007, respondent filed a motion to restore Jackson's appeal and to be relieved as counsel, indicating that, if the motion were granted, Jackson would be represented by other counsel. On October 23, 2007, the Appellate Division,

noting that the appeal had been dismissed three and one-half years earlier, denied the motion, without prejudice to an application filed by new counsel or by Jackson pro se.

Respondent's post-hearing documents further indicated that he had agreed to refund to Simmons his $7,500 fee in three $2,500 installments, beginning November 1, 2007, and that he had entered into a stipulation of settlement with Jackson, disposing of the fee arbitration. Moreover, respondent attached, as an exhibit to his brief submitted to us, a copy of a January 18, 2008 letter from Simmons, confirming that respondent had refunded $7,500 to her.

Respondent also provided a copy of a letter in which an attorney, G. Allen Washington, offered to serve as his proctor.

The DEC determined that respondent was guilty of gross neglect, lack of diligence, failure to communicate with the client, and conduct involving dishonesty, fraud, deceit or misrepresentation. Although the DEC did not find that respondent had engaged in a pattern of neglect, it "considered same in assessing the appropriate discipline."

The DEC noted respondent's admission that he had never informed Jackson or Simmons that the appeal had been dismissed and found that he had misrepresented the status of the appeal to them.

The DEC concluded that, although respondent's failure to file the appellate brief, without more, did not constitute gross neglect, his failure to prosecute the appeal, his misrepresentations to Jackson and Simmons about the status of the appeal, and his "dishonesty in general," elevated simple negligence to gross negligence.

The DEC found no mitigating factors, observing that respondent had not filed a motion to restore the appeal until after the filing of the grievance. The DEC found, as aggravating factors, respondent's disciplinary history, particularly his 2004 reprimand for similar violations (gross neglect, lack of diligence, failure to communicate with a client, and misrepresentation). The DEC also observed that respondent was not remorseful.

The DEC recommended that respondent be suspended for three months and that, upon reinstatement, he be required to practice under the supervision of a proctor for such period as we deem appropriate.

B. DRB 08-010 – The Peterson Matter (Docket No. IIB06-024E)

The presenter and respondent entered into a stipulation of facts, dated October 2, 2007, the same date as the ethics

hearing. Although respondent admitted, at the hearing, that he was guilty of a lack of diligence, he denied that he displayed a pattern of neglect or that he failed to communicate with the client.

On April 9, 2003, Simon Peterson, the grievant, retained respondent to file a Chapter 7 bankruptcy petition. Respondent filed the petition on May 20, 2003. The petition listed as an obligation Peterson's income tax debt to the Internal Revenue Service ("IRS"), in the amount of $26,070.06, for tax years 1994 through 2002.

On March 8, 2004, after the bankruptcy matter had concluded, Peterson received notice that the IRS had applied his tax refund to his outstanding tax obligation for 1994.

On March 30, 2004, Peterson paid respondent a $790 legal fee to reopen his bankruptcy case, to file an adversary proceeding, and to obtain a discharge of his tax obligation. Respondent took no action on Peterson's behalf until the date of his interview with the DEC investigator, October 4, 2006. This date was two and one-half years after he had been retained and six weeks after Peterson had filed the grievance.

On June 13, 2007, the bankruptcy court, pursuant to a consent order, discharged Peterson's tax obligations for tax years 1990

through 2001. The court determined that all funds that the IRS had seized from Peterson would be applied to any taxes due for tax years after 2001.

Mary Peterson, the grievant's wife, testified that she had repeatedly called respondent and left messages, which he had failed to return. She claimed that she called respondent about two or three times a week, leaving a total of about ten messages with respondent's secretary, who confirmed to her that she had given him those messages. She further stated that, in early 2006, respondent informed her that, because he had filed the wrong paperwork with the court, he was required to file corrected documents.

Upon contacting the court, Mary learned that nothing had been filed since the bankruptcy case had been closed. Mary conceded that, between March 2004, when she paid respondent $790 to reopen the case, and July 2006, when she contacted the bankruptcy court, she had talked to respondent between three and five times. Her husband likewise testified that he had had about three conversations with respondent.

Respondent acknowledged that he had failed to act in a timely manner to obtain relief for Peterson in the bankruptcy court. He denied having represented to Mary that he had filed

the wrong papers. He asserted that he had had five or six telephone conversations with Mary, and that he had called Peterson at least once. During these discussions, he claimed, he had informed the Petersons that he was planning to file the necessary pleadings with the bankruptcy court. Respondent conceded that he had never written to the Petersons.

Respondent contended that he had provided all of the services for which the Petersons had retained him, albeit not in a timely manner.

The DEC determined that respondent violated RPC 1.3, declining to find violations of RPC 1.4(a) or (b). As indicated previously, although the DEC did not find that respondent engaged in a pattern of neglect, it considered "same in assessing the appropriate discipline."

The DEC found no mitigating factors. Acknowledging that respondent had remedied any damage to the Petersons by obtaining the appropriate relief from the bankruptcy court, the DEC declined to consider this action as mitigation because respondent did so only after the grievance had been filed. Similarly, the DEC remarked that, although respondent entered into a stipulation of facts, thus reducing the hearing time, he did so on the day of the hearing, not before. As for aggravating

factors, the DEC considered respondent's disciplinary history (except the private reprimand, which it found too remote in time) and his lack of remorse.

The DEC recommended that respondent be suspended for three months and that, upon reinstatement, he be required to practice under the supervision of a proctor for such period as we deem appropriate. At oral argument, the presenter clarified that the DEC intended to recommend a three-month suspension for the totality of respondent's conduct in both the Simmons and Peterson matters.

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

In the Simmons matter, respondent admitted that his failure to file an appellate brief, resulting in the dismissal of Jackson's appeal, constituted a lack of diligence. He denied, however, that his conduct rose to the level of gross neglect. Although not every incidence of allowing an appeal to be dismissed necessarily constitutes gross neglect, we find, under these circumstances, that, in addition to RPC 1.3, respondent violated RPC 1.1(a). Respondent was retained in April 2003 to represent Jackson in a criminal appeal. He, thus, assumed

responsibility for Jackson's liberty. Had the appeal succeeded, Jackson's conviction would have been reversed and he might have obtained bail pending a new trial. Instead, respondent allowed the appeal to be dismissed in May 2004, about one year after he had been retained.

Worse yet, respondent did not inform either Simmons or Jackson of the dismissal. Instead, he led them to believe that the appeal was pending, as shown by (1) his assurances to Simmons, in the summer of 2005, that he was continuing to work on the brief; (2) his September 12, 2005 letter to Jackson enclosing the draft brief; (3) Jackson's October 20, 2005 letter to him asking about the status of the appeal and referring to the issues to be argued in the brief; and (4) his December 2006 representation to Simmons that his secretary had thrown the draft brief in the garbage (Simmons' version) or that the file had been lost (respondent's version). At a minimum, respondent's failure to inform his clients of the dismissal constituted a misrepresentation by silence, a violation of RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984).

Respondent's failure to inform his clients that the appeal had been dismissed also violated RPC 1.4(b), failure to keep a client informed about the status of a matter.

We do not, however, find that respondent violated RPC 1.1(b). For a finding of a pattern of neglect, at least three instances of neglect are required. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). Here, in 2004, respondent was reprimanded for gross neglect, among other violations, and repeated that misconduct here. Two instances of gross neglect are not sufficient to support a finding of a pattern of neglect. However, we take into account respondent's disciplinary history in imposing discipline.

Similarly, we dismiss the RPC 1.4(a) charge. That rule requires attorneys to inform prospective clients of how, when, and where they may communicate with them. Both Jackson and Simmons knew respondent's telephone number and communicated with him on several occasions. Although Jackson complained that he was having difficulty reaching respondent by telephone, RPC 1.4(a) does not apply to that circumstance.

In the Peterson matter, too, respondent admitted that he had violated RPC 1.3. After agreeing to reopen his client's bankruptcy case to obtain a discharge of tax obligations,

respondent failed to take any action until after the grievance had been filed, more than two and one-half years after he had been retained.

In addition, respondent failed to communicate with his client. Although he had several telephone conversations with Mary Peterson, she left about ten messages for him, which he failed to return. At one point, frustrated over the lack of communication, she even questioned whether respondent's secretary had given him those messages. We, thus, find that respondent violated RPC 1.4(b).

For the same reasons set out in the Simmons matter, we dismiss the charges of a pattern of neglect, RPC 1.1(b), and failure to inform a client of the manner in which to communicate with the lawyer, RPC 1.4(a).

We mention one additional point in connection with the RPC violations. According to Mary Peterson, respondent told her that he had filed the wrong paperwork with the bankruptcy court. When she contacted the court, she was told that no papers had been filed. Although that evidence would seem to establish a misrepresentation, because the complaint did not charge respondent with violating RPC 8.4(c), we make no such finding (R. 1:20-4(b)).

In sum, in the Simmons matter, respondent was guilty of gross neglect, lack of diligence, failure to keep a client informed about the status of a matter, and misrepresentation. In the Peterson matter, respondent was guilty of lack of diligence and failure to communicate with a client.

As to the quantum of discipline, the Court "has consistently held that intentionally misrepresenting the status of lawsuits warrants public reprimand." In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand is usually imposed even when, in addition to the misrepresentation, the attorney has engaged in gross neglect and lack of diligence, has failed to communicate with the client, and has failed to cooperate with disciplinary authorities — so long as the attorney has not defaulted and has no ethics history. See, e.g., In re Bullock, 166 N.J. 5 (2001) (attorney grossly neglected a personal injury lawsuit, failed to file an appellate brief or to seek an extension of time to file an appeal or to reopen the appeal, failed to inform the client for a period of nineteen months that the appeal had been dismissed, and sent the client misleading letters) and In re Stalcup, 140 N.J. 622 (1995) (attorney failed to perfect an appeal, failed to so inform her client, and failed to withdraw from the representation when her

services were terminated; the Court ordered her to refund $750 for costs advanced by the client).

If an attorney has a disciplinary history, more severe discipline may be imposed. See, e.g., In re Wood, 177 N.J. 514 (2003) (censure imposed on attorney who grossly neglected a matter and failed to communicate with his client; the attorney allowed a matrimonial appeal to be dismissed and failed to take any steps to have it reinstated; the attorney had previously been admonished for failure to communicate with a client and had been reprimanded in a default matter for lack of diligence and failure to communicate with a client).

In our view, a significant factor in this case is the criminal nature of the appeal in the Simmons case. In April 2003, respondent agreed to represent Jackson in his appeal from a conviction of serious crimes. A little more than a year later, that appeal was dismissed. Respondent not only failed to inform his client of the dismissal, but, by continuing to refer to the "draft brief," also affirmatively led him to believe that the appeal was pending. It was not until after the grievance was filed, in May 2007, that the clients learned that the appeal had been dismissed three years earlier. Thus, for several years, Jackson remained incarcerated under the misapprehension that

respondent was representing his interests. The harm to the client differs greatly in a criminal matter from the harm in a civil matter. Although there may be significant economic harm in civil cases, personal liberty is at stake in criminal appeals.

In In re Saginario, 142 N.J. 424 (1995), although the attorney filed a notice of appeal from his client's murder conviction and obtained several extensions of time to file his brief, the appeal was dismissed after he failed to comply with the extended filing deadline. In the Matter of Philip M. Saginario, DRB 95-066 (July 7, 1995) (slip op. at 2). About four years after the appeal had been dismissed, the client retained another attorney, who obtained an order reinstating the appeal, reversing the conviction, and granting a new trial. Id. at 3. In comparing the attorney's misconduct to that of another attorney in the context of a civil appeal, we concluded that Saginario's wrongdoing was more serious:

> Respondent's client remained in prison for approximately five years, until retaining another attorney in 1992, apparently all the while believing that respondent had undertaken an appeal. Respondent's argument that he could reinstate the appeal at any time and planned to do so when he filed the appellate brief is specious. If respondent was truly unable to prepare the brief because of problems in his personal life, his obligation was to withdraw from the representation, instead of allowing his client to

> remain in jail for almost five years, until respondent could find the time to prepare the brief.
>
> [Id. at 7.]

Saginario received a three-month suspension. His disciplinary history had consisted of two private reprimands — one for failure to set forth in writing the basis of his fee, failure to keep his clients reasonably informed about the status of a matter, and failure to answer a formal ethics complaint, and the other for issuing an expense check, as well as post-dated checks, against his trust account and for authorizing his secretary to draw checks against that account.

Similarly, here, respondent allowed Jackson to remain incarcerated for three years after the appeal had been dismissed, without taking any steps to advance his client's interests. The harm to Jackson, thus, was significant.

In addition, we consider respondent's disciplinary history as an aggravating factor. He has established a pattern of agreeing to represent clients and neglecting their matters until they file grievances. He did so in the case in which he received a reprimand in 2004 and again in both the Simmons and Peterson matters.

We further consider the sequence of events in these matters. On March 30, 2004, Peterson retained respondent to reopen the bankruptcy case. On May 3, 2004, the appeal in the Simmons matter was dismissed. On July 27, 2004, respondent was reprimanded for gross neglect, lack of diligence, and failure to communicate with a client. Yet, his receipt of the reprimand order did not prompt him to attend to Simmons' and Peterson's matters. Accordingly, we conclude that respondent is unwilling to learn from his prior encounters with the disciplinary system.

Respondent's conduct is more serious than that of the attorney in Wood, who received a censure for allowing a matrimonial appeal to be dismissed. Unlike Wood, respondent also misrepresented the status of the matter to the client. His actions are more akin to those of Saginario, who received a three-month suspension.

Based on the foregoing, for his misconduct in both the Simmons and Peterson matters, we determine that respondent should be suspended from the practice of law for three months. In addition, after reinstatement, he should be required, for two years, to practice under the supervision of a proctor approved by the Office of Attorney Ethics.

Members Baugh and Boylan voted to impose a censure, as well as a two-year proctorship. Member Doremus did not participate.

Finally, we note that, at oral argument, respondent's counsel suggested that, as part of the disciplinary sanction, respondent should seek psychiatric counseling. Although the record does not contain sufficient evidence for us to require such treatment, we encourage respondent to follow his counsel's suggestion and seek psychiatric counseling.

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
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Walter D. Nealy
Docket Nos. DRB 08-009 and DRB 08-010

Argued: April 17, 2008

Decided: June 10, 2008

Disposition: Three-month suspension

Members	Disbar	Three-month suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh			X			
Boylan			X			
Doremus						X
Lolla		X				
Stanton		X				
Wissinger		X				
Total:		5	2			1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel