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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket Nos. DRB 07-075 and 07-131  
District Docket Nos. XIV-07-487E,  
XIV-04-194E, and XIV-04-0269E

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IN THE MATTERS OF  
DIANE S. AVERY  
AN ATTORNEY AT LAW

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Decision  
[Default R. 1:20-4(f)]

Decided: December 19, 2007

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

These matters came before us on two certifications of  
default filed by the Office of Attorney Ethics ("OAE"), pursuant  
to R. 1:20-4(f). In DRB 07-131, a three-count complaint alleged  
that respondent grossly neglected three estate matters. In DRB  
07-075, a two-count complaint alleged that respondent grossly  
neglected an estate matter and failed to produce a court-ordered  
accounting, after being removed as executrix of the estate. We  
determined to impose a prospective three-month suspension for  
the combined matters.

Respondent was admitted to the New Jersey bar in 1981. She has no prior final discipline. On August 25, 2003, the Supreme Court temporarily suspended her for failure to cooperate with ethics investigators in another matter.<sup>1</sup> Respondent remains suspended to date.

I. The Breuckner Matter – Docket No. DRB 07-075  
(District Docket No. XIV-05-487E)

Service of process was proper. On January 2, 2007, the OAE sent respondent a copy of the complaint, by both certified and regular mail, to her home address, 76 Hungry Hollow Road, Chestnut Ridge, New York, 10977. The certified mail was returned on January 29, 2007, marked "unclaimed." The regular mail was not returned.

On January 29, 2007, the OAE sent respondent a "five-day" letter, notifying her that, unless she filed an answer to the complaint within five days of the date of the letter, the OAE would certify the matter directly to us, pursuant to R. 1:20-4(f). The letter was sent to respondent's home address by both certified and regular mail. The certified mail was returned marked "unclaimed." The regular mail was not returned.

Respondent did not file an answer to the complaint.

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<sup>1</sup> That matter was also ripe for our review on October 18, 2007, under DRB 07-174. In a separate decision of even date with this decision, we determined to censure respondent.

Count one charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to communicate with the client), RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Julia Breuckner passed away on March 3, 2001, leaving a July 8, 1998 will that named respondent as executrix of her estate. On March 14, 2001, the will was admitted to probate. Respondent was duly appointed executrix on that same date.

Helga Lasko, the grievant, had been Breuckner's close friend for forty-five years. In recognition of the friendship, Breuckner devised and bequeathed to Lasko a life estate in Breuckner's Ridgewood, New Jersey, house, and gifted to her the entire contents of the house.

Under the terms of the will, upon the termination of Lasko's life estate, the house was to go to Breuckner's residuary beneficiary, the New Jersey Synod of the Evangelical Lutheran Church.

On November 24, 2003, the then Synod's attorney, Paul W. Dare, sent a letter to respondent requesting an accounting and information about the status of the estate by December 1, 2003. Respondent did not reply to that letter.

Dare thereafter made repeated additional requests for an accounting, but respondent failed to comply with those requests for information.

On October 3, 2005, two years after the matter was admitted to probate, subsequent counsel for the Synod, Mark Winkler, filed a complaint in probate court, requesting an accounting and respondent's removal as executrix. Three days later, the court entered an order removing respondent as executrix, appointing an administrator, and requiring respondent to turn over all estate materials to the administrator.

Respondent never complied with the court order and failed to cooperate with the new administrator in settling the estate.

Count two of the complaint alleged that respondent's chronic failure to reply to the OAE's requests for information about the estate violated RPC 8.1(b).

Between October 12, 2005 (the date the OAE sent the grievance to respondent) and November 8, 2006 (the date of the OAE's final correspondence to respondent), respondent ignored at least four written demands for information about the grievance. Respondent never turned over the estate materials or otherwise cooperated with ethics investigators in the matter.

At one point during the time in question, however, respondent wrote not to the OAE, but to the estate's new administrator, excusing her recalcitrance by claiming that

illness had prevented her from getting back to the administrator.

**II. The Waller, Rupp and Hallbauer Matters – Docket No. DRB 07-131 (District Docket Nos. XIV-04-269E and XIV-04194E)**

Service of process was proper. On April 3, 2007, the OAE sent respondent a copy of the complaint, by both certified and regular mail, to her home address, 76 Hungry Hollow Road, Chestnut Ridge, New York, 10977. The certified mail was returned on April 30, 2007, marked "unclaimed." The regular mail was not returned.

On April 30, 2007, the OAE sent respondent a "five-day" letter, notifying her that, unless she filed an answer to the complaint within five days of the date of the letter, the OAE would certify the matter directly to us, pursuant to R. 1:20-4(f). The letter was sent to respondent's home address by both certified and regular mail. Neither the certified mail nor the regular mail had been returned to the OAE as of May 9, 2007.

Respondent did not file an answer to the complaint.

On May 21, 2004, Robert J. Baron, Esq., contacted the New Jersey Lawyers' Client Protection Fund on behalf of his client, Marilyn Antunes, the grievant herein. Baron alleged that respondent had failed to account for the sale of assets of the estates of Elinore Waller and Irene Rupp.

I. The Waller Estate Matter

Count one charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b) (failure to communicate with the client).

Elinore Waller died intestate on October 5, 2001. The heirs of her estate were her two nieces, Marilyn Antunes and Eveline Foster. On April 22, 2002, the will was admitted to probate, with Antunes and Foster acting as co-administratrices of the estate.

On October 26, 2001, Antunes and Foster retained respondent to represent the Waller estate. Because both nieces lived out of state, they authorized respondent to collect assets for the estate.

In July 2002, the nieces approved the sale of Waller's house for \$365,000. Respondent conducted the closing of title, but failed thereafter to provide the nieces with a HUD-1 Uniform Settlement Statement, or another form of accounting for her distribution of the sale proceeds. In addition, respondent failed to return Antunes' telephone calls and letters regarding the status of the transaction.

In June 2003, Antunes received a notice from New Jersey tax authorities, stating that the estate had not filed an

inheritance tax return and that the State had assessed an inheritance tax of \$90,000 plus \$9,542.47 in accrued interest.

In July 2003, Antunes was notified by New Jersey Bond & Surety Company that respondent had failed to renew the administratrices' bond, which had been due since April 20, 2003.

On July 3, 2003, the nieces sent respondent a certified and regular mail letter terminating the representation and demanding the turnover of the sale proceeds of the house and the entire estate file. In addition, attorney Baron placed a copy of the letter through respondent's office mail slot.

Respondent did not reply to the termination letter or turn over the sale proceeds and file to Baron. Therefore, in 2004, Baron filed an order to show cause and verified complaint in the probate court, seeking an accounting of the sale proceeds, as well as an accounting of the decedent's securities and bank accounts.

On July 30, 2004, Baron obtained a judgment requiring respondent to hold the sale proceeds in escrow and to cooperate with him in his role as the attorney for the estate.

Baron later learned that respondent had been holding the proceeds of sale all the while, pending the removal of the New Jersey inheritance tax lien and a federal estate tax lien. After respondent left Avery and Avery, the law firm she had shared

with her husband when the matter originated, respondent took no further action to protect her clients' interests.

On November 3, 2004, the parties entered into a "consent to release escrow," under which the inheritance and estate taxes were paid, tax waivers obtained, and the residual funds turned over to the administratrices.

## II. The Rupp Estate Matter

Count two charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b) (failure to communicate with the client).

On April 13, 2000, Irene Rupp (Eleanore Waller's sister) and respondent executed an irrevocable trust agreement, under which respondent was appointed trustee. It gave respondent complete control over Rupp's assets. Rupp also executed a power of attorney in favor of respondent, replacing an earlier power of attorney in favor of Antunes.

The beneficiaries of the Rupp trust included Antunes and Eveline Foster, Rupp's adopted daughter.

On November 17, 2000, Rupp executed a last will and testament prepared by respondent, naming respondent executor of Rupp's estate. The will funded the Rupp trust, which, in turn, controlled the distributions to Rupp's beneficiaries, after her



death. Rupp died on November 24, 2000. The will was admitted to probate on December 15, 2000.

In November 2001, respondent sold Rupp's house for \$405,000. According to Baron, who was the new attorney for the Rupp estate as well, respondent made only one distribution in the matter, which consisted of periodic income checks to Eveline Foster. She did not make timely distributions of other assets of the Rupp estate or provide an accounting of her handling of the estate.

Faced with the order to show cause in the Waller matter, on July 30, 2004, respondent finally furnished an accounting of the Rupp estate for the period of November 24, 2000 through July 29, 2004. Baron specifically stated to ethics investigators that, although respondent did not distribute the funds in a timely manner, the accounting showed that the funds remained intact while under her control.

### **III. The Hallbauer Estate**

Count three charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.4(b), (failure to communicate with the client).

On May 23, 2001, respondent was retained to represent the estate of Freda Hallbauer. On June 29, 2001, Hallbauer's will was admitted to probate.

Early in the representation, respondent notified four beneficiaries, Hackensack University Medical Center, Eastern Christian Children's Retreat Center, Trinity Evangelical Church, and Fritz Reuter Altenheim, that each was to receive a \$5,000 bequest from Hallbauer's estate.

As of April 2004, respondent had not carried out any of the four bequests. After the grievant (and executor), John Waldvogel, complained to respondent about her inactivity, she finally made the distribution of the bequests on June 24, 2004.

Thereafter, respondent failed to timely file estate income tax and inheritance tax returns, resulting in penalties, late filing fees, and additional taxes to the estate totaling almost \$162,000.

On September 16, 2004, Waldvogel filed a claim with the New Jersey Lawyers' Fund for Client Protection ("CPF") for the losses to the estate. Respondent forwarded documentation that satisfied Waldvogel that she had properly accounted for the estate funds. Respondent also forwarded those documents to the CPF.

According to the complaint, in respondent's reply to the CPF, she acknowledged responsibility for the estate losses and

attributed the problems in the case to an illness, about which the complaint did not elaborate.

The complaints in these matters contain sufficient facts to support a finding of unethical conduct. Because of respondent's failure to file answers, the allegations of the complaints are deemed admitted. R. 1:20-4(f).

In the Breuckner matter, respondent was retained to settle Julia Breuckner's estate, but took little action for the two years following the will's admission to probate in March 2003. Due to her inaction, she was removed as executrix in October 2005. We find that respondent grossly neglected the case and lacked diligence in handling it, violations of RPC 1.1(a) and RPC 1.3, respectively.

Thereafter, respondent failed to comply with the turnover requirements of the October 2005 court order, and failed to cooperate with the estate administrator, violations of both RPC 3.4(c) and RPC 8.4(d).

Finally, respondent failed to reply to ethics authorities' numerous requests for information during the investigation of the grievance, and allowed the matter to proceed to us on a default basis, thereby violating RPC 8.1(b).

In the Waller matter, respondent neglected the affairs of the estate to the degree that the heirs had her removed from the case. Thereafter, respondent did not reply to the new attorney's

requests for the estate assets, the estate file, and an accounting of her handling of the estate assets.

Only after Baron filed an order to show cause and a complaint did respondent enter into a consent judgment requiring her to cooperate with Baron.

Baron was later able to determine that respondent had not resolved the New Jersey or federal tax lien issues or attempted to distribute the sale proceeds to the parties entitled to them. By her inaction, respondent grossly neglected the case and lacked diligence, violations of RPC 1.1(a) and RPC 1.3, respectively.

In the Rupp matter, respondent, as trustee, neglected the affairs of an estate for four years, until attorney Baron filed an order to show cause and a complaint against her. Only then did respondent provide Baron with an accounting of the estate assets. Respondent's inaction during those four years constituted gross neglect (RPC 1.1(a)) and lack of diligence (RPC 1.3)).

In the Hallbauer matter, respondent failed to carry out four simple bequests and to file federal and state estate tax returns for three years. As a result, tax authorities assessed penalties in excess of \$160,000 against the estate. Here, too, respondent's conduct constituted gross neglect (RPC 1.1(a)) and lack of diligence (RPC 1.3)).

Furthermore, in Waller, Rupp, and Hallbauer, respondent failed to communicate with the clients about important events in their cases, a violation of RPC 1.4(b). In all of the matters, the grievants were forced to file actions in court to compel respondent's cooperation.

In all, we find respondent guilty of gross neglect, lack of diligence, and failure to communicate with clients in the four estate matters, and failure to cooperate with ethics authorities in the Breuckner matter.

The discipline in cases involving similar violations has ranged from a reprimand to a three-month suspension. Reprimands were imposed in In re Weiss, 173 N.J. 323 (2002) (in an estate matter, attorney failed to file a fiduciary income tax return for more than four years, and failed to prepare an estate accounting, refunding bonds, and releases for the beneficiaries of the estate; no prior discipline); In re Cheek, 162 N.J. 98 (1999) (attorney grossly neglected an uncomplicated estate matter, failed to communicate with the executrix and beneficiaries with respect to the status of the matter, and failed to maintain proper trust and business account records; the attorney had a prior admonition at the time); In re Morris, 152 N.J. 155 (1998) (attorney grossly neglected an estate by failing to take any substantial action for a period of eleven years, including failing to file an inheritance tax return, open

an estate account, or deposit checks forwarded to the estate; the attorney ultimately made restitution to the estate for its losses totaling more than \$8,000; the attorney had a prior admonition for mishandling an estate).

Three-month suspensions have been imposed in more serious matters where the impact of the misconduct, the attorneys' ethics histories or the default nature of the proceedings were considered. See, e.g., In re Rodgers, 177 N.J. 501 (2003) (as administrator of an estate, attorney displayed gross neglect, lack of diligence, failure to communicate, and failure to properly deliver funds or property to a client or third person; as a result of the attorney's conduct, the successor administrator obtained a judgment against him for \$70,000 plus interest); In re Cubberley, 171 N.J. 32 (2002) (in a default matter, attorney failed to complete an informal accounting in an estate matter for more than eight months, failed to reply to numerous requests for documents by the beneficiary of the estate, and failed to cooperate with ethics authorities; prior admonition, two reprimands, and a temporary suspension); In re Rosen, 170 N.J. 630 (2002) (attorney exhibited gross neglect and a lack of diligence over a six-year period in settling an estate, failed to communicate with clients, and failed to protect their interests upon termination of the representation; in another matter, the attorney engaged in gross neglect and

lack of diligence, charged an unreasonable fee, breached an escrow agreement, and displayed a pattern of neglect; the attorney had a prior admonition and a reprimand); In re Mandle, Jr., 170 N.J. 70 (2001) (attorney failed to properly and timely prepare an estate's state tax returns, resulting in an assessment to the estate of more than \$7,000 in penalties and interest, and failed to cooperate with disciplinary authorities; the attorney had three prior reprimands); In re Wildstein, 169 N.J. 220 (2001) (attorney grossly neglected an estate, engaged in a conflict of interest, and improperly drafted a will by changing the residuary beneficiary clause from the names of others to himself; notwithstanding that the change had been made at the testator's request, the attorney failed to explain a matter to the extent necessary to permit the client to make informed decisions about the representation, and conduct involving deceit or misrepresentation; prior private and public reprimands); and In re Payton, 168 N.J. 109 (2001) (in a default matter, attorney failed to file inheritance tax returns and to appeal tax assessments, significantly delaying the administration of the estate; the attorney's inaction resulted in a loss of \$2,000 in interest penalties to the estate; the attorney also failed to prepare a writing memorializing the fee, failed to communicate with clients, and engaged in recordkeeping

violations; at the time, the attorney had a prior admonition and a reprimand).

We find several factors present in these matters that should ratchet respondent's misconduct upward from a reprimand. These two separate complaints proceeded to us on a default basis.

In default matters, the appropriate discipline for the found ethics violations is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In the Matter of Robert J. Nemshick, DRB 03-064, 03-365, and 03-366 (March 11, 2004) (slip op. at 6). In re Nemshick, 180 N.J. 304 (2004).

In addition, respondent's failure to cooperate in the Breuckner matter was particularly egregious. She stonewalled ethics authorities, the probate court, and the estate administrator, frustrating all efforts to hold her accountable for the estate funds in her care. Unlike the other matters, Waller, Rupp, and Hallbauer, where respondent ultimately came forward with an accounting, in Breuckner, she did not do so. Not even her 2003 temporary suspension for refusal to turn over estate records - records sought to rule out a knowing misappropriation charge - appears to have had an impact on her in this regard.

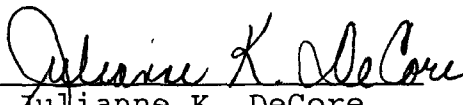


Furthermore, respondent caused serious harm to her clients. In the Hallbauer matter alone, the estate was charged over \$160,000 in penalties and interest, due to respondent's inaction. For all of these reasons, we determine that harsher discipline - a three-month (prospective) suspension - is warranted for respondent's conduct in both matters. We also require respondent to provide proof of fitness to practice, as attested by a qualified mental health professional approved by the OAE.

Member Lolla 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  
William J. O'Shaughnessy  
Chair

By:   
Julianne K. DeCore  
Chief Counsel

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

In the Matters of Diane S. Avery  
Docket Nos. DRB 07-075 and DRB 07-131

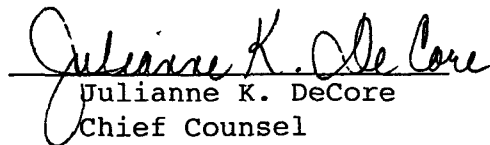
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Decided: December 19, 2007

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O' Shaughnessy		X				
Pashman		X				
Baugh		X				
Boylan		X				
Frost		X				
Lolla						X
Neuwirth		X				
Stanton		X				
Wissinger		X				
Total:		8				1

  
Julianne K. DeCore  
Chief Counsel