SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-100
District Docket Nos. IIB-04-028E,
IIB-05-011E, IIB-05-013E,
IIB-05-019E, and IIA-07-010E

IN THE MATTER OF	:
DANIEL D. HEDIGER	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 17, 2008

Decided: October 21, 2008

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

Joseph Castiglia 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 a recommendation for a six-month suspension filed by Special Master Helen Glass.[1] Two formal

[1] Respondent waived any objection to having the special master hear these matters, although she had been a member of the District IIB Ethics Committee ("DEC") six years earlier.

ethics complaints charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.2, presumably (a) (failure to abide by a client's decision about the representation), RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to keep a client reasonably informed about the status of the matter or to comply with client's reasonable requests for information), RPC 1.15, no subsection cited (failure to safeguard funds), RPC 1.16(b)(1) (failure to properly terminate the representation), RPC 4.1, presumably (a)(2) (failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client), RPC 5.5(a) (practicing law while ineligible for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF"), RPC 7.1(a)(1) and (a)(4) (false or misleading communications about the lawyer's services or fees), RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority), and RPC 8.4(d) (conduct prejudicial to the administration of justice). The latter charge stemmed from respondent's failure to promptly cooperate with the DEC investigators (more properly, a violation of RPC 8.1(b)).

Following our independent, de novo review of the record, we find that the evidence clearly and convincingly establishes violations of only RPC 1.4(b) (failure to communicate with the

client Dabbie Davis) and RPC 5.5(a) (practicing while ineligible). Our recommendation to the Court is that the two censures imposed on respondent in 2007 be vacated and that, instead, a suspended three-month suspension be imposed for the totality of respondent's conduct in the current matters and in the two disciplinary cases that led to his two censures. In our view, this action would serve several purposes: adherence to established precedent, uniformity in dispensing attorney discipline, and fairness to respondent.

Respondent was admitted to the New Jersey and New York bars in 1995, and to the Connecticut and Pennsylvania bars in 1996. He maintained a law office in Edgewater, New Jersey, until October 2005, when he relocated his office to Hackensack, New Jersey.

In 2004, respondent was reprimanded for gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with the investigation of the grievance. In re Hediger, 179 N.J. 365 (2004). That matter proceeded on a default basis.

On July 12, 2007, respondent was censured twice. In one matter, he was found guilty of lack of diligence, negligent misappropriation of client funds, failure to promptly deliver funds to a third person, recordkeeping violations, improper use of a firm name, and failure to cooperate with disciplinary authorities. In re Hediger, 192 N.J. 105 (2007).

On the same day, respondent received another censure for lack of diligence, failure to communicate with a client, recordkeeping violations, and failure to cooperate with disciplinary authorities. The Court's order required respondent to provide proof to the Office of Attorney Ethics ("OAE") that all outstanding balances in his attorney trust account had been reconciled; that he submit to the OAE, for a two-year period, quarterly reconciliations of his trust accounts, prepared by a certified public accountant approved by the OAE; and that, for the same two-year period, he practice under the supervision of an OAE-approved proctor. In re Hediger, 192 N.J. 108 (2007).

According to the CPF, respondent was ineligible to practice law for failure to timely pay the attorney assessment on several occasions: four days in 1999, nine months in 2000-2001, eleven days in 2002, three months in 2004, ten days in 2005, and eight days in 2007.

We address first the charge of failure to cooperate with ethics authorities.

District IIB Ethics Committee ("DEC") investigator Rustine Tilton was not the original investigator of the grievances against respondent. When the matters were re-assigned to her, she requested that respondent reply to the Jihan Khouri, Antoine

Khouri, and James Duffy grievances. Tilton never met with respondent.

Respondent did not comply with Tilton's request. After being contacted by respondent's counsel, Tilton sent him copies of the grievances.

At the end of January 2006, counsel sent Tilton copies of the replies that respondent had previously given to the former investigator, Sharon Clancy, in February and March 2005. Tilton received no other documentation. Respondent, however, received no further requests for information.

Respondent explained that he had been unable to locate the Duffy and the Jihan Khouri files because of his office's poor filing system, the relocation of his office, and the turnover in his staff.[2] He had tried to re-create the Duffy file by obtaining new copies of the police reports and by unsuccessfully attempting to obtain copies from the court. Likewise, he had tried to locate the Jihan Khouri file, to no avail. Any exhibits that he was able to obtain were generated from a computer file.

According to respondent, Tilton had contacted his counsel directly about the Duffy and the Jihan Khouri grievances. It was

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[2] From 2003 to 2005, respondent's office staff consisted of one person, who acted as a receptionist/secretary. There were periods when respondent had no staff, while he was looking for office help.

his understanding that the DEC had provided the results of Clancy's investigation to Tilton. Although respondent recalled meeting with Clancy no more than twice, he could not state with certainty whether he had provided her with any documentation, beyond his initial replies to the grievances. He speculated that he may have done so.

Respondent maintained, however, that he had provided a copy of the Antoine Khouri file to Clancy. A few weeks before the ethics hearing, he located a cover letter purportedly sent to Clancy, along with the file. According to respondent, the letter had been sent in anticipation of a March 9, 2005 meeting with Clancy.

Respondent explained that his files were in disarray because he had left his Edgewater office in a hurry, over a disagreement with the attorney with whom he shared space. Some of his work product was on the other attorney's computer. He had hurriedly downloaded the information on a number of memory "sticks." Subsequently, he had experienced difficulty locating certain information because his files and computer records were not backed up electronically, as they are now.

With regard to the Dabbie Davis grievance, respondent testified that he had submitted an initial reply to Clancy, in March 2005. In April 2005, a new investigator, Anna Navatta, was

assigned to investigate the Davis grievance. The OAE, however, asked her to withhold the investigation until January 2006.

On January 27, 2006, by regular and certified mail, Navatta asked respondent to submit a written reply to the grievance and supporting documentation. The return receipt card indicated that respondent received the letter on February 6, 2006.

When respondent did not reply to the grievance, Navatta sent him a second letter, on March 2, 2006, by regular and certified mail. Although respondent received the letter on March 9, 2006, he did not reply to it because, as he admitted, he "was quite overrun with other matters." He had completed a matter with the DEC a couple of months earlier and his mother had passed away at the end of November 2005, after a long illness. Later, he attempted to locate the file, but was unable to find it until late 2006 or early 2007, when his counsel supplied it to the investigator/presenter.

The complaint charged that respondent failed to cooperate fully with the DEC investigators.

I. The Duffy Matter (District Docket No. IIB-05-13E)

On the evening of October 27, 2001, James Duffy was assaulted in The Fort Lee Saloon ("the Saloon") by one of its employees, Arnold Davenport. There was a dispute as to who had

started the fight. Duffy claimed that Davenport had punched him in the eye, thrown him to the ground, and pushed his face into Duffy's. Duffy then "turned around and took as big a bite out of [Davenport's] face as [he] could." Unlike Davenport's, Duffy's injuries were not permanent. They were limited to a black eye.

Duffy charged Davenport with simple assault, while Davenport charged Duffy with aggravated assault. Duffy's initial attorney advised him that most likely he would not prevail because he had no witnesses to corroborate his version of the events.

In March 2002, Duffy hired respondent. Respondent's advice to Duffy was to attempt to obtain mutual dismissals of the charges because Duffy had more to lose -- his state job -- if he were found guilty of the charges. Duffy, however, did not agree with that approach. Respondent, thus, continued with the representation.

According to respondent, Duffy's case had become "less and less promising as more facts became apparent." Duffy conceded that his case against Davenport might be weak because there were no witnesses to the incident. Nevertheless, he believed that he could prevail against Davenport because Davenport had a criminal record.

Eventually, respondent ceased representing Duffy. Either respondent obtained the court's permission to withdraw from the case or Duffy determined to proceed without respondent.

Duffy also retained respondent to represent him in a civil action against Davenport. Reluctantly, respondent agreed to pursue the case.[3] Duffy, in writing, asked respondent to consider suing the public defender and municipal court judge involved in his criminal matter; the Boroughs of Fort Lee and Leonia, because they had not enforced the "ABC" laws by permitting a known felon, Davenport, to work in a bar; and the Leonia Fire Department.[4]

On October 27, 2003, respondent filed a complaint on Duffy's behalf. He did not name the Saloon as a co-defendant because it had gone out of business in 2003.[5] To avoid a statute

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[3] At the ethics hearing, both attorneys had difficulty controlling Duffy's testimony. Frequently, his answers were either unresponsive or strayed to other areas. In addition, it was not always clear whether he was testifying about his criminal or his civil case.

[4] Respondent's counsel's brief speculates that Duffy's claim against the Fire Department might have been based on the Department's acceptance of Davenport as a volunteer firefighter.

[5] Apparently, the Saloon was impleaded into the consolidated matters. The New Jersey Property Liability Insurance Guarantee Fund substituted in on behalf of the defunct Saloon's insolvent insurer and interposed a defense. Davenport purportedly recovered more than $20,000.

of limitations bar, the complaint also named as defendants various John Does and fictitious entities.

Because of respondent's failure to serve Davenport, the complaint was dismissed on May 6, 2004. Respondent testified that he had difficulty locating Davenport. Fourteen months later, he was able to serve the complaint on Davenport.

On February 22, 2005, eight months after the dismissal of the complaint, respondent was successful in having it reinstated. The court ordered personal service on Davenport before February 18, 2005,[6] identification and service on the fictitious defendants on or before February 28, 2005, restoration of the case to the active trial calendar, adjournment of the trial date, extension of discovery, a date for a status/settlement conference, and a new trial date.

On December 13, 2005, the complaint was again dismissed, without prejudice. The day before, respondent had failed to appear for the trial calendar. Respondent testified that he was at his father's house at the time -- his mother had passed away eighteen days earlier. Sometime during the morning, he called his office to retrieve his messages, at which time he learned that the judge had called him. He then called the judge,

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[6] At a November 15, 2004 status conference, the judge may have instructed respondent to make personal service before February 18, 2005. That would explain why the order was dated after the date the defendant had to be served.

explained his personal circumstances, and was granted a continuation of the case until the following day, December 13, 2005.

Duffy, however, failed to appear in court on December 13, 2005. According to respondent, the day before Duffy had informed him that he might not be feeling well the next day but, nevertheless, would be accessible by phone. Respondent strongly suspected that Duffy was unwilling to appear. According to respondent, Duffy had also failed to attend a scheduled meeting with him to prepare for the trial.

Because of Duffy's absence and over respondent's objections, the court dismissed the case, without prejudice, rather than adjourn it. At respondent's request, the court added to its order that the statute of limitations would not constitute a bar, should Duffy decide to reinstate the complaint. The court also granted respondent's motion to be relieved as counsel.

Duffy decided not to reinstate the complaint. According to Duffy, the judge had threatened to saddle him with the costs of Davenport's representation, if there were any more delays in the processing of the case. Duffy testified that, even though the delays were attributable to the other attorney, as a practical matter it would not be in his best interests to restore the case.

Duffy complained of difficulty in contacting respondent or getting information from him about the status of his cases. He claimed that "nine times out of ten" their appointments were canceled. In numerous faxes to respondent, Duffy cited respondent's missed, scheduled appointments and his attempts to reach respondent.

According to respondent, Duffy occasionally came to his office without an appointment. Respondent testified that, although there were several canceled appointments, he met with Duffy numerous times and was accessible by cell phone.

Duffy testified that, whenever he was able to communicate with respondent, respondent would assure him that his cases were proceeding normally. Because Duffy felt that respondent was not adequately communicating with him, he contacted the court directly and learned that his civil case had been dismissed without prejudice for lack of prosecution on more than one occasion and that his and Davenport's cases had been consolidated.

For his part, respondent maintained that he had informed Duffy of any notices from the court, because Duffy was a regular visitor to his office. Respondent did not, however, have any independent recollection of sending Duffy letters about the status of the case, nor did he have copies of any letters corroborating his communications with Duffy.

Although respondent did not recall writing to Duffy to explain the weakness of his case, he was fairly certain that it had been the subject of numerous conversations with Duffy, either on the telephone or in person. He contended that, "definitely without hesitation," he had explained to Duffy why he had not named the Saloon as a defendant and that Duffy had understood his reasons.

Respondent testified that Duffy had become consumed with the idea that he had been wronged by the municipal court judge, the prosecutor, and Davenport. Duffy had hired an investigator to find out whether Davenport had a criminal record. Respondent began having difficulty reasoning with Duffy, who wanted to sue two towns, a fire department, a judge, and a prosecutor, and to file ethics complaints against the judge and the prosecutor.

According to respondent, he had tried to manage Duffy's case and to lower his expectations about a viable recovery. Respondent concluded that Duffy could have been adjudged the instigator of the fight. In addition, respondent could not come up with any cause of action against the other parties that Duffy wanted to sue.

Respondent explained that he had engaged in limited discovery to avoid exposing Duffy to depositions, in which he believed Duffy would not fare well. Respondent testified that

both he and the attorney hired by Duffy's homeowner's insurance to represent Duffy in a suit filed by Davenport had agreed "without question" that opposing counsel

> would basically undress and then skin Mr. Duffy in a deposition . . . . His story was making less and less sense as we proceeded, he didn't reveal certain facts, he had these conspiracy theories, he seemed to be quite paranoid and he wouldn't fair [sic] well in a deposition. So definitely the tactic was to avoid any depositions in the matter. . . . [H]e can come across fairly credible in narrow testimony but through a deposition I don't think he would fair [sic] so well and, of course, if we had a deposition, that would undermine any settlement efforts in the case.
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> [4T113-8 to 24.][7]

Respondent was concerned that Duffy would "fall victim to an adverse finding on liability." Moreover, he found Davenport's version of the events "eminently more believable than Mr. Duffy's."

Duffy had also tried to assert that he suffered psychological damage from the incident. Duffy's mental health professional informed respondent that he could not find that Duffy had been psychologically damaged from the incident and refused to testify on Duffy's behalf. Respondent, therefore, concluded that he could not prove that Duffy had sustained a psychological injury.

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[7] 4T denotes the transcript of the hearing on November 28, 2007.

Respondent obtained a $5,000 settlement offer, which he strongly recommended that Duffy accept. Duffy rejected the offer because he believed that he could recover a more significant amount, presumably from all potential defendants. On December 13, 2005, respondent's motion to be relieved as counsel was granted.

The complaint charged that respondent failed to "conduct discovery, appear for trial, sue a necessary party, and keep his client apprised of the status of the case . . . contrary to RPC 1.1(a), and RPC 1.3;" that respondent failed to "return Duffy's file, despite requests," contrary to RPC 1.15;" and that respondent failed to "cooperate fully with the reassigned Committee investigator, even though the events in the case had changed since Respondent communicated with the prior investigator. Respondent did not convey any additional records, file materials or retainer agreement despite a written request to do so," contrary to RPC 8.4(d).

II. The Davis Matter (District Docket No. IIA-05-15E)

In September 2003, Dabbie Davis retained respondent to represent him in the purchase of a house. A contract of sale had already been executed and the attorney review period had expired.

The closing occurred on November 26, 2003. Although the seller had not corrected certain problems with the property, Davis

needed to proceed with the closing because his "interest rate lock" was about to expire. Respondent, therefore, served the seller "with a formal notice setting a closing date with a precise date and time."

A provision in the contract stated as follows: "Seller has disclosed that an older oil tank will be decommissioned and that the termite problem will be corrected. Buyer is willing to close at the earliest date Seller is prepared to pass title." Respondent did not draft that clause.

Because the problems with the property were not resolved by the November 26, 2003 closing date, the parties and their attorneys executed a closing agreement providing that the seller's attorney would hold $15,000 in escrow, pending resolution of the oil tank issue and the treatment of termite and carpenter ant problems.

Davis' understanding was that the seller was required to remove the underground oil tank from the property. According to respondent, the seller's position was that the tank only had to be "decommissioned," not removed.

It was also Davis' understanding that respondent would send him copies of the closing documents, such as the deed and the HUD-1 statement. Davis never received them, however. Davis recalled that, on many occasions following the closing, in person and by telephone, he had requested that respondent forward the

documents to him. Most of Davis's requests went unanswered. Only once, when Davis met personally with respondent in June 2004, did respondent tell him that the deed had been recorded, that he would send the documents to him as early as possible, and that he would reach out to the other attorney to resolve the oil tank problem.

According to Davis, he had obtained that appointment with respondent by masquerading as a new client. He did not receive the documents, following that meeting.

More than eight months after the closing, on August 9, 2004, Davis wrote to respondent requesting the closing documents. Davis also demanded that the seller fulfill her contractual obligation to remove the oil tank, remedy the insect problems, and replace a toilet that had been removed from the property.

By letter dated March 7, 2005, Davis notified respondent that, after he had paid $1,535 for the tank removal, in December 2004, soil samples had shown that the soil was contaminated by oil. The Bergen County Department of Health was pressing Davis to remedy the problem. The soil had to be removed, discarded, and replaced. The driveway had to be re-paved. The estimated costs for the clean-up totaled $6,500.

According to Davis, he had pleaded with respondent for help in obtaining a reimbursement for the costs incurred with those services. Respondent, however, had not replied to his letter.

On cross-examination, Davis admitted that his letter to respondent contained a street address that was different from the address used in an initial letter to respondent, that he had misspelled respondent's name, and that he had incorrectly written Hedge Water, rather than Edgewater. He stated, however, that the letter had not been returned to him as undeliverable.

Because Davis could not resolve the situation through respondent, he retained another attorney, Joseph Meyers. Meyers wrote two letters to the seller's attorney, seeking the release of the escrow funds, to no avail. Eventually, the seller and her attorney reimbursed Davis for his expenses, with the exception of his legal fees (approximately $2,000).

For his part, respondent claimed that he had never agreed to "litigate" the release of the escrow fund. He had informed Davis that he would have to retain another attorney to handle that aspect of the matter. According to respondent, he had not received Davis' letters. They were not in his file.

Respondent also claimed that he had sent the closing documents to Davis' New York address. In a written submission to

us, however, respondent conceded that he had "failed to *ensure* that [Davis] received them in a timely manner."

Ultimately, Davis obtained copies of the documents from respondent's office, "in a subsequent meeting." According to respondent, his current procedure is to give his clients their documents at the closing.

The complaint charged that respondent's "failure to act to effectuate a resolution of the issues regarding the oil tank, forcing Grievant to retain other Counsel, and his failure to provide any Closing documents" constituted gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3; that respondent's "failure to keep his client, the Grievant, adequately and accurately informed about the status of his case and his failure to promptly comply with the Grievant's reasonable requests for information" constituted a violation of RPC 1.4; and that respondent's "failure to respond to the Ethics Committee's investigative letters" violated RPC 8.1(b).

III. The Jihan Khouri Matter (District Docket No. IIB-05-11E)[8]

Jihan Khouri filed a pro se complaint with the Equal Employment Opportunity Commission ("EEOC"), charging her former

[8] Neither Jihan nor her husband, Antoine (the grievant in the next matter) appeared at the ethics hearing. The presenter was unable to locate them.

employer with sexual harassment. On an unknown date, the EEOC dismissed the complaint.

In or about October 1999, Jihan retained respondent.[9] According to respondent, he had informed Jihan that she had one year from the date of the dismissal to file an action in Superior Court.

The parties' retainer agreement provided for a contingency fee. Respondent was to negotiate a settlement with Jihan's employer, "and if the lawyer in his sole discretion subsequently agrees to commence a lawsuit against the employer, a separate agreement shall be entered for that purpose."

According to respondent, in furtherance of a settlement, he met with Jihan several times, spoke with the EEOC hearing officer and the employer's attorney, and attempted to interview a favorable witness. He was "fairly certain" that he had obtained a copy of the EEOC decision, but did not recall getting the transcript. Respondent admitted that he did not prepare or submit a settlement proposal on behalf of Jihan. He could not recall whether he had discussed a settlement amount with his adversary. Respondent explained that settlement had become a moot point after the adverse finding by the EEOC, "because they weren't going to settle at that point." Ultimately, respondent was unable to settle the case.

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[9] Respondent had formerly represented Jihan and her husband in the purchase of a house and in a trespass action filed against them in municipal court.

Jihan had paid respondent $205 on February 1, 2001. Respondent claimed that the amount was not a legal fee, but for filing and serving the complaint. He prepared a draft complaint, but did not file it or charge Jihan a fee for it. He returned the filing fee to Jihan.

According to respondent, he presented Jihan with another retainer agreement to file suit against her former employer. Jihan, however, was not interested in pursuing the matter further because of the prohibitive litigation costs and problems with the case. Also, respondent was unable to contact the witness named by Jihan.

The complaint charged that respondent's "failure to institute suit within the 1-year statute of limitations, and his subsequent failure to advise his client that he did not file the case in Superior Court violate[d] RPC 1.16(b)(1) and RPC 1.2, 1.3, and 1.16" and that his failure to promptly comply with the DEC investigator's request for a reply to the grievance violated RPC 8.4(d).

IV. The Antoine Khouri Matter (District Docket No. IIB-04-28E)

On January 20, 2002, Antoine Khouri retained respondent to represent him in connection with a claim against Peter Iacavino. The claim stemmed from a June 14, 2001 assault by Iacavino upon

Antoine, following a dispute. According to respondent, following some aggressive driving by both, the men exited their respective vehicles and began to argue. Iacavino then punched Antoine, who suffered a bloody nose. The matter ended up in the Saddle Brook Municipal Court.

On March 1, 2002, respondent filed a civil suit on Antoine's behalf. Respondent had concerns about proving the case because Iacovino was a sympathetic defendant. He was thirty years older than Antoine, a cancer patient receiving chemotherapy, a World War II veteran, and a retired iron worker. As an Arab-American citizen, Antoine was also concerned about anti-Arab sentiment after the events of September 11, 2001.

On January 4, 2003, the court informed the parties that, on March 3, 2003, the case would be dismissed for failure to serve the complaint on Iacavino. The notice was addressed to respondent's Oradell office. According to respondent, by that time his office had been relocated to Edgewater. Respondent testified that, although he had arranged for his mail to be forwarded to the Edgewater address, he had no recollection of having received that notice. The next day, respondent served Iacavino, ten months after the filing of the complaint. There was no testimony about this delay.

On February 6, 2004, the complaint was dismissed, without prejudice, for failure to provide answers to interrogatories. Respondent did not oppose the dismissal. Although the complaint was later reinstated (presumably, by consent), it was again dismissed, on May 28, 2004, for Antoine's failure to answer interrogatories.

Three months later, on August 29, 2004, Antoine filed a grievance against respondent. Respondent obtained the DEC investigator's permission to contact Antoine to find out if he still wanted respondent to go forward with his case. Antoine indicated that he wished to proceed with respondent's representation.

On March 30, 2005, seven months after the filing of the grievance, respondent filed a motion to vacate the dismissal. He blamed the delay on Antoine's failure to provide him with interrogatory answers. According to respondent, Antoine wanted him to answer the interrogatories. He informed Antoine that he could not do so. He instructed Antoine to draft preliminary answers, which he would then review and supplement.

After a substantial period of time, Antoine provided respondent with a narrative. Admittedly after some delay, respondent told Antoine that the narrative was unacceptable and that he had to provide complete answers.

Respondent testified that he and Antoine had multiple meetings about the interrogatories and that multiple revisions had to be made, while Antoine was assembling the necessary information.

Ultimately, respondent was able to reinstate the complaint. At some unknown time, respondent settled the case for $5,000. According to respondent, Antoine was satisfied with the settlement.

The complaint charged that "the one-year gap between the filing of the complaint and the service of process constituted lack of diligence contrary to RPC 1.3;" that respondent's failure to obtain and serve answers to interrogatories and schedule depositions, which caused the dismissal of the case, constituted lack of competence, contrary to RPC 1.1(a) and (b);" that respondent's "failure to communicate the dismissal to the client constituted lack of communication, contrary to RPC 1.4 and RPC 4.1;" and that respondent's "failure to provide the reassigned investigator any communication or file documentation to assist in the investigation constituted obstruction of the legal process, contrary to RPC 8.4(d)."

One last allegation in this case was that, although the settlement sheet listed a $175 amount for a deposition transcript, respondent had paid only $100 to the transcription

services, leaving a $75 balance that should have been, but was not, returned to Antoine. The complaint deemed this conduct to be a violation of RPC 7.1 (a)(1) and (a)(4) (false or misleading communications about the lawyer's services).

Respondent's explanation was that he had negotiated a reduction of the bill, that he was still holding the $75 in his trust account, and that he would turn it over to Antoine, if Antoine could be located. As mentioned before, Antoine did not appear at the hearing because the presenter did not know his whereabouts.

V. Practicing While Ineligible

The complaint charged that respondent practiced law during a three-month ineligibility period in 2004 (from September 17 through December 14, 2004) and a seventeen-day period of ineligibility in 2005 (from September 19, 2005 to October 6, 2005).[10] Respondent admitted those allegations, but claimed that he was unaware of his ineligible status.

Respondent offered significant mitigation for his conduct. He testified that, over the years, his office had been located at three different addresses: initially, in Oradell, New Jersey;

[10] According to the CPF report, respondent became ineligible on September 26, 2005, not September 19, 2005, as alleged in the complaint.

beginning in December 2002, in Edgewater; and from November 2005 to December 2006, in Hackensack.

Respondent's first marriage lasted from 1999 to December 2003. They separated after two years. He re-married three years ago. He has an eight-year old stepson, as well as a stepdaughter from his first marriage. His wife works in his office on a part-time basis.

Respondent is an only child, as were both of his parents. His mother passed away in November 2005. She had survived breast cancer in 1993. In 2001, the cancer returned and metastasized to her ribs, sternum, and pelvis. Initially, when the cancer re-appeared, it was not debilitating. The doctors treated her with hormone therapy. In February 2004, however, spots appeared on her lung. She, thereafter, began chemotherapy treatment. The treatment was somewhat effective until February or March 2005, when cancerous lesions appeared on her brain. There was no more treatment available. She passed away later that year.

Respondent's father was overwhelmed with the care of his wife. He, too, suffered from health problems, orthopedic in nature, that limited his mobility. There were no other family members to assist in his mother's care. Therefore, respondent was often away from his office, handling family matters.

According to respondent, he underwent an emotionally difficult time. His personal and professional problems -- his mother's illness, his marital difficulties, the relocation of his office, his difficulty maintaining office staff -- overlapped with and distracted him from his work. During the same time period, he experienced problems managing his trust account.

Respondent stated that, from January 2001 to the first half of 2006, he continued to work full-time, weekends and holidays, despite his personal difficulties. His normal schedule, then and now, was to start work early and take a dinner break. However, during that period, his work was interrupted by his other personal obligations. In 2001, he assisted with his mother's care, approximately two days a week; from May 2004 to the end of that year, when his mother's health worsened, he performed daily tasks for his family. He helped to care for his parents, brought them food, took care of their basic needs, transportation, home renovations and mail, paid their bills, and cared for their dogs. In 2005, when his mother's health deteriorated because of brain lesions, his duties increased, including helping her to the bathroom and to bathe.

Currently, respondent's practice consists almost exclusively of real estate matters. It includes some municipal

court work, but generally no litigation. He has instituted procedures to insure that his annual fee to the CPF is timely paid, has computerized everything in his office, has an experienced paralegal on staff, has retained an accountant, Steven Moskowitz, to assist with his account reconciliations, and is supervised by a proctor, Brian Chewcaskie.

Chewcaskie testified at the ethics hearing. He has been respondent's proctor since the fall of 2005, reviewing and overseeing respondent's practice. Chewcaskie performs file reviews, ensures the completion of reports, and the maintenance of appropriate accounting methods.

Pursuant to Chewcaskie's instructions, respondent opened a new trust account, began keeping appropriate records, and later retained Moskowitz to assist with his recordkeeping obligations. According to Chewcaskie, respondent has been "substantially compliant with those court rules." In fact, Chewcaskie also consults with Moskowitz on a regular basis to ensure that respondent is fulfilling his accounting requirements. Chewcaskie instructed respondent not to take any cases, other than real estate or routine municipal court work, without first obtaining his approval.

At the conclusion of the ethics hearing, the special master found respondent guilty of violating several RPCs.

In the Duffy matter, the special master "inferred" that, because the Davenport lawsuit (L-5381-03) had an earlier docket number than the Duffy lawsuit (L-7831-03), the Davenport case had been filed first. Because respondent certified, when he filed Duffy's complaint, that the matter in controversy was not the subject of any other pending or contemplated action, the special master concluded that respondent violated RPC 1.3 by failing to perform due diligence to ascertain whether or not there was a related action pending.[11]

The special master also found that respondent lacked diligence in permitting Duffy's complaint to be dismissed for failure to serve Davenport, that he displayed a pattern of non-communication with Duffy, and that he failed to safeguard Duffy's file, violations of RPC 1.3, RPC 1.4 (a), and RPC 1.15 (no subsection cited). The special master remarked that, although RPC 1.15 typically addresses an attorney's duties in connection with trust funds, by extension, it requires an attorney to safekeep other client property, including their files and documents. The special master found "hollow and incredible" respondent's excuses for not having located the file, that is, his poor filing system, the relocation of his office, and the turnover in his staff.

[11] The complaint did not charge respondent with this violation.

Finally, the special master found that respondent failed to cooperate with the DEC investigator, including submitting the Duffy file. From respondent's failure to produce the file, the special master drew the adverse inference that the documents would have exposed facts unfavorable to him.

The special master did not find credible respondent's claim that he had prepared Duffy for testimony at the December 2005 trial. The special master remarked that respondent himself had failed to appear on that day, rather than request an adjournment because of family problems. The special master concluded that respondent had either lied about preparing Duffy for trial or had forgotten about the trial. She found neither to be acceptable conduct and determined that his representation of Duffy was neither diligent nor competent.

As to the Jihan Khouri matter, the special master noted that the retainer agreement provided that respondent would "protect the client's legal rights and perform all the necessary legal work to properly represent the client . . . ." The special master found that respondent had failed to abide by these terms. She concluded that, by drafting and forwarding a complaint and accepting a filing fee, respondent had created a reasonable expectation in Jihan's mind that the complaint would be filed and that her rights would be protected. She found that respondent thereby misled

Jihan, in violation of RPC 1.2, RPC 1.3, and RPC 1.16. She did not find reasonable that respondent would have told Jihan that he would not represent her further, unless he received a retainer and she signed a new fee agreement.

The special master found that respondent further violated RPC 1.16 by not advising Jihan, in writing, that the statute of limitations would expire unless suit was filed and by not "acting in some manner to protect her right to litigate."

As to the Antoine Khouri matter, the special master found that, by failing to timely serve the defendant, provide answers to interrogatories, and move to vacate the dismissals, respondent had violated RPC 1.3.

Noting that the investigation of the Antoine Khouri grievance had started before the case had been settled, the special master found unbelievable respondent's claim that he had lost the file. She concluded that his "alleged" loss of the file was "at best irresponsible and at worst . . . an intentional effort to obstruct the investigation, either of which is contrary to RPC 8.1."

In the Davis matter, the special master agreed that respondent was not responsible for litigating the oil tank issue and that he was not the administrator of the escrow funds. She found, however, that he was required to provide Davis with

closing documents and to correct Davis's misperception that he was responsible for the release of the escrow funds. The special master concluded that respondent had a duty to inform Davis that he was not representing him after the closing and that he should not have ignored Davis' telephone calls and letters. The special master found that such conduct violated RPC 1.4.

The special master also found that respondent practiced law while ineligible in 2004 and 2005, thereby violating RPC 5.5.

As to the charges of failure to cooperate with disciplinary authorities, the special master found that respondent failed to cooperate with the investigation of the Duffy grievance, a violation of RPC 8.1(b). The special master determined that respondent's March 2005 reply was only partially responsive to the grievance. In the Davis matter, the special master found that respondent violated RPC 8.4, in that his testimony about his failure to provide documentation until he found his file was misleading and an attempt "to shift time."

The special master rejected respondent's defenses: his divorce (finalized in 2003); his family responsibilities, culminating in the death of his mother in 2005; and his rehabilitation, beginning with his proctorship, in October 2005. She did, however, consider respondent's emotional strain from

his mother's illness and death in assessing the quantum of discipline.

The special master accepted that respondent's mother's illness and death may have played a role in his failing to appear at Duffy's trial, but determined that his preoccupation with his mother's illness was insufficient to excuse his lack of diligence up to that point.

Similarly, the special master did not find that respondent's separation from his first wife, office moves, or his mother's health excused his conduct in the Jihan Khouri matter and in the Davis matter. She noted that the Jihan Khouri matter preceded the scan showing the spread of the mother's cancer and that her health had not worsened until five months after the Davis closing.

As for Antoine Khouri's matter, the special master agreed that respondent's personal problems might have affected his conduct.

The special master also noted that respondent's ethics history dated back to 1999, before his personal problems had begun, and that his ethics problems continued after his proctorship took effect, that is, his failure to pay the CPF in 2006 and 2007, and his failure to cooperate with Navatta's investigation of the Davis grievance.

Finally, the special master found that respondent had engaged in a pattern of neglect by receiving money from clients and doing little to protect their interests.

The special master remarked that, if not for respondent's emotional stress due to his mother's long term illness, she would have recommended more than a six-month suspension.

Both respondent and his counsel filed submissions with Office of Board Counsel. Among other things, counsel argued that, even though respondent had admitted that he had not paid the CPF assessment in 2004, 2005, and 2006, no evidence had been presented to establish that respondent had practiced law while ineligible in 2006.

Counsel also noted that, contrary to the special master's statement, she had considered respondent's 2007 late payment to the CPF as evidence that respondent had not mended his ways even after his proctorship. The special master had represented earlier that she would not consider that late payment because it had not been cited in the complaint.

Counsel stressed that respondent's practice "has been brought into order since institution of the proctorship" and that there have been no further incidents since that time.

In addition to pointing out that many violations found by the special master were not supported by the evidence, counsel argued that it would be

> self-defeating now for the Board to accept a recommendation of suspension for violations of a comparatively minor character that occurred at the time of Mr. Hediger's more serious transgressions. That is especially so in consideration of the exceptional progress he has made under the tutelage of his proctor . . . . and the fact that [he] no longer undertakes any matters except real estate transactions and ordinary Municipal Court appearances without Mr. Chewcaskie's prior approval and consent.

Respondent currently relies on the assistance of his proctor, his forensic accountant, his paralegal, and his wife to "right the ship."[12] Respondent's letter to Office of Board Counsel outlined how he currently manages and prioritizes his work. He requested that we refrain from imposing a suspension to permit him to continue practicing under his newly-adopted procedures.

At oral argument before us, respondent's counsel pointed out that respondent's conduct in these matters and in the matters that led to his two censures took place within the same time frame. Counsel added: "So those events are contemporaneous with the events for which this Board has already found such substantial mitigating circumstances as to opt for a discipline

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[12] His wife works in his office for several hours a day and periodically on weekends (she is a physical therapist).

other than suspension." Counsel took exception to the special master's rejection of the effect that respondent's personal problems had on his law practice and pointed to our prior findings on this subject:

> This Board has already found that there were circumstances, personal circumstances in Mr. Hediger's case that were so overwhelming, to quote the Board "that caused him to devote less than his full time and energies to his practice, and his practice was in disarray." Nobody disputes that. We can't dispute that. It's the fact. The Board has already passed on that issue. That the local committee disagrees is of no significance. No more significance than that a trial judge may disagree with a decision of the Appellate Division. You can disagree, but you have to conform.
>
> [BT24 at 8 to 18.][13]

Counsel's position was that no more than a reprimand is warranted for respondent's current infractions and urged us to impose a probationary period or a suspended suspension, as allowed by R. 1:20-15A(b)(6).

After an independent, de novo review of the record, we are unable to agree with all of the special master's findings. In our view, only two violations have been clearly and convincingly established by the proofs: respondent's failure to communicate with client Dabbie Davis and his practicing law while ineligible in 2004 and 2005, violations of RPC 1.4(b) and RPC 5.5(a), respectively.

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[13] BT denotes the transcript of the oral argument before us.

In fact, respondent conceded those violations. At oral argument before us, he admitted, through counsel, that he had not adequately communicated with Davis after the closing. Furthermore, he stipulated, in a joint exhibit admitted into evidence (Exhibit J-2), that he practiced law while ineligible for three months in 2004 and ten days in 2005. Nothing contradicted respondent's testimony that he was unaware of his ineligibility and that he promptly made the CPF payments, once he learned that he had been declared ineligible.[14]

We are compelled to dismiss the balance of the charges for lack of clear and convincing evidence. The clear and convincing standard was described in In re James, 112 N.J. 580 (1988), as

> [t]hat which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established," evidence "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."
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> [Id. at 585.]

In our view, the proofs fall short of the requisite clear and convincing standard with respect to all of the allegations

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[14] The special master improperly found that respondent also practiced law while ineligible in 2006 and 2007. The complaint did not charge respondent with those violations. Pursuant to R. 1:20-4(b), the complaint must "set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." Therefore, the special master's finding of a violation not specified in the complaint is at odds with the requirements of the rule.

in the Duffy and in the two Khouri matters, as well as to all but the charge that respondent did not adequately communicate with the client in the Davis matter.

In the Duffy matter, respondent's greatest sin appears to have been his acceptance of the cases without having faith in their strength. In the criminal case, there were no witnesses to corroborate Duffy's account of the events. Furthermore, Duffy's injury, a black eye, was far less serious than the one he inflicted on Davenport when he bit Davenport's face. Respondents' advice to Duffy that they seek a mutual withdrawal of the criminal charges was reasonable and not new to Duffy. His prior lawyer had told him that he would have been unlikely to prevail because there were no witnesses to support his version of the incident. Duffy, too, perceived the weakness of his complaint against Davenport. Nevertheless, he insisted on proceeding. He had learned of Davenport's possible criminal record and hoped to capitalize on his discovery.

At some point, respondent discontinued his representation in the criminal case. In his brief, respondent's counsel alludes to an eventual withdrawal of both parties' charges.

In the civil case, too, respondent would have been better off declining representation, as fifteen other lawyers had done before him. Allegedly because he felt sorry for Duffy,

respondent accepted the case, on a contingent basis. Respondent was not persuaded that Duffy would obtain a considerable recovery against Davenport, but hoped that a jury might award him a modest amount.

Seemingly, Duffy's expectations exceeded reasonable limits. He suggested that respondent sue the municipal court judge, the public defender, the Boroughs of Fort Lee and Leonia, and the Leonia Fire Department. Respondent apparently declined to do so.

The complaint charged respondent with gross neglect and lack of diligence in the Duffy civil case. The evidence, however, is insufficient to support a finding that respondent mishandled the case. He tried to lower Duffy's expectations to a reasonable level; he did not succumb to Duffy's attempts to control the direction of the case; to preserve the statute of limitations, he named several John Does and fictitious entities as defendants; he did not name the Saloon as a defendant because it had gone out of business; the first dismissal of the complaint was due to his inability to locate Davenport and the second was the result of Duffy's failure to appear in court; he engaged in limited discovery to avoid exposing Duffy to depositions; he believed that Duffy would not fare well at a deposition and that, as a result, settlement negotiations could

be jeopardized; and he obtained a $5,000 settlement offer that Duffy rejected.

In the absence of clear and convincing evidence that respondent grossly neglected the case and lacked diligence in handling it, we dismiss the charged violations of RPC 1.1(a) and RPC 1.3. We are aware that it took eight months for respondent to obtain the reinstatement of the complaint after the first dismissal. We do not believe, however, that, in the context of the case, this span was so significant as to rise to the level of gross neglect and lack of diligence on respondent's part. [15]

Similarly, we find no clear and convincing evidence that respondent failed to adequately communicate with Duffy. Although respondent acknowledged that he had cancelled several appointments with Duffy, he testified that the appointments had always been re-scheduled, that he had met with Duffy on numerous occasions, that he had explained the weakness of the case to him during their many conversations, and that he had apprised him of the court's notices of dismissal. Here, too, for lack of clear

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[15] We are unable to agree with the special master that respondent violated RPC 1.3 by erroneously certifying that there were no other pending actions in the Duffy matter. Respondent's ministerial error did not affect Duffy's case, the letter on which the special master relied to draw this conclusion contained was unreliable (it had at least one factual error), and the complaint did not charge respondent with this impropriety.

and convincing evidence of a violation of RPC 1.4(b) we dismiss that charge.

The complaint also charged that "[r]espondent did not return Duffy's files despite requests [presumably by Duffy], contrary to RPC 1.15." The more applicable rule here would have been RPC 1.16(d) (upon termination of the representation, a lawyer must return the papers and property to which the client is entitled). RPC 1.15(b) provides that, upon receiving funds or property in which a client or third person has an interest, the lawyer shall promptly deliver to the client the property that the client is entitled to receive.

We also dismiss this charge. The record is devoid of any evidence that respondent failed to provide Duffy with a copy of his file. In fact, when questioned by the special master, Duffy replied that he had his own file.

The final charge in Duffy -- that respondent did not fully cooperate with the investigation of the grievance -- is addressed below, in conjunction with the same charges in the two Khouri matters.

In the Davis matter, it is unquestionable that respondent's conduct was unethical in one respect. As indicated earlier, he admitted that he did not communicate adequately with Davis. Specifically, respondent acknowledged that, after the closing,

he "failed to *insure* that [Davis] received [the closing documents] in a timely manner."

As to the allegation that respondent did not reply to two letters from the DEC investigator, respondent explained that he was "overrun with other matters," meaning the OAE's investigation of one of his prior disciplinary matters, which lasted from April 2005 to early 2006. Furthermore, he was unable to locate the Davis file at the time and, therefore, did not produce it for the investigator, when requested. He did so later. After his office's relocation in October 2006, he found the file and, through counsel, submitted it to the investigator.

We do not find that respondent's conduct rose to the level of a violation of RPC 8.1(b). Although it is true that he did not reply to the investigator's two requests as promptly as he should have, he later did furnish the file to the investigator, when he was able to locate it. We cannot find, thus, that he "knowingly fail[ed] to respond to a lawful demand for information from . . . a disciplinary authority." RPC 8.1(b).

The two remaining charges in the Davis matter, gross neglect and lack of diligence, have not been sustained by clear and convincing proofs. There is no evidence that the scope of respondent's representation included the resolution of the oil tank removal. Respondent testified that he had been hired to

close title only and pointed out that the seller's attorney was the escrow agent, not he. The client, Davis, acknowledged that respondent had not been hired to litigate the oil tank issue. And even the special master found that respondent had no "responsibility to litigate the oil tank issue and that he was not the 'administrator' of the escrow account."

One might argue that, at a minimum, respondent had the duty to reply to Davis' two letters, complaining about the oil tank problem. Respondent, however, denied having received them, which is a possibility. Davis conceded that one of the letters had been incorrectly addressed to Mr. "Hangier," instead of Hediger, and "Hedge Water," as opposed to Edgewater. The other letter listed a wrong street number.

In short, the only finding in Davis that is supported by clear and convincing evidence is respondent's failure to adequately communicate with Davis after the closing, a violation of RPC 1.4(b).

In both of the Khouri matters, also, the allegations of the complaint have not been sustained. In the Jihan Khouri matter, respondent contended that he had been retained solely to attempt to achieve a settlement on Jihan's behalf. The retainer agreement bears out this contention. Moreover, the agreement

unambiguously stated that, if suit were to be filed, the parties would have to execute a new fee agreement.

According to respondent, after he was unable to reach a settlement, he drafted a complaint and presented a new retainer agreement to Jihan. Jihan, however, had declined to file a suit because of its prohibitive costs and problems with her claim. Respondent then returned the filing fee ($205) to her. Respondent also testified that he had advised Jihan that she had one year from the dismissal of her EEOC complaint to file suit.

Respondent's testimony was unrebutted. Jihan did not appear at the ethics hearing.

In the Antoine Khouri matter, too, the proofs do not clearly and convincingly support a finding of unethical conduct.[16] Unlike the special master, we cannot find that respondent's failure to promptly serve Iacavino was a violation of RPC 1.3. No one testified, at the ethics hearing, about the reasons for the ten-month delay. No other evidence was introduced to establish that the delay was attributed to respondent's inaction. We, therefore, dismiss that charge.

Similarly, the record does not support a finding that respondent is to be blamed for the two dismissals of the complaint for failure to answer interrogatories. The record is

[16] Antoine, like his wife, did not testify. The presenter could not locate him.

silent about the reason for respondent's lack of objection to the first dismissal, which occurred on February 26, 2004. What the record tells us is that respondent was able to have the complaint reinstated, possibly by consent.

We do not know who was responsible for the second dismissal, which took place on May 28, 2004. What we do know is that, three months later, Antoine filed a grievance against respondent and that, with the DEC investigator's permission, respondent contacted Antoine to determine if he still wanted respondent to assist him in answering the interrogatories. Antoine expressed a desire to proceed with respondent as his counsel. Following numerous working sessions with Antoine, respondent obtained the required answers and filed a motion to restore the complaint in March 2005. The motion was granted.

Eventually, respondent negotiated a $5,000 settlement for Antoine, who was satisfied with that outcome.

In view of the foregoing, we cannot agree with the special master's conclusion that respondent demonstrated lack of diligence by not expeditiously providing answers to interrogatories and moving to vacate the dismissals.

We also find no violation with regard to the $75 in respondent's trust account. He testified that he was able to reduce the amount of the bill to $100 and that he would turn

that sum over to Antoine, if Antoine could be found. There is no evidence that respondent held unduly to the money or that he could, but did not, promptly disburse it to Antoine. It is possible that the reduction of the bill occurred well after respondent disbursed Antoine's portion of the settlement and that, by that time, Antoine could not be located.

Finally, the record is silent on the charge of failure to communicate with Antoine, which we also dismiss.

As to respondent's failure to cooperate with the investigation of the Khouri grievances, the record shows that respondent's counsel submitted to the new investigator, Tilton, the same reply that had been forwarded to the first investigator, Clancy. Respondent testified that, afterwards, the DEC made no further requests for information. Therefore, respondent may have reasonably believed that no further information was warranted. Moreover, he reasonably relied on his counsel to defend him against the allegations. We, thus, dismiss those charges in the Khouri matters and, for the same reason, the equivalent charge in the Duffy matter.

In sum, the evidence clearly and convincingly supports only that respondent failed to adequately communicate with Davis (RPC 1.4(b)) and that he practiced law while ineligible for three months in 2004 and ten days in 2005 (RPC 5.5(a)). We dismiss all

other allegations of the two complaints for lack of clear and convincing evidence.

Before we address the issue of discipline, one additional point warrants mention. On a number of occasions, the special master challenged respondent's credibility and motives. She found that he exploited his personal circumstances to excuse the deficiencies in his representation of clients and the failure to cooperate with the DEC. The special master questioned respondent's inability to locate his files, concluding that he had produced only those portions that supported his case. She gave little or no weight to respondent's mitigating circumstances, that is, the relocation of his office, his marital problems, and his mother's long illness and eventual death.

We are unable to agree with the special master's findings in this context. We draw no adverse inference from respondent's failure to produce the totality of the documents requested by the DEC investigators. In one of the matters that led to respondent's 2007 censure, we found that his failure to produce client files was the result of extreme disorder, rather than design and deliberation. In that case, the OAE auditor testified about the chaotic state of respondent's office. She observed "files stacked upon files" and boxes and documents lying haphazardly around the room. In the Matter of Daniel D. Hediger, DRB 07-010

(May 24, 2007) (slip op. at 4). The auditor believed that respondent truly cared about his responsibilities, but noted that he had "buried himself into [a] hole" and probably did not know how to "get out of it to start fresh" (Id. at 7).

Because it is clear that respondent's failure to produce portions of the files was the product of disorderliness, we cannot find that his excuses were hollow and incredible, as found by the special master.

The special master also rejected the contention that respondent's personal problems had adversely affected his practice. The special master found that the "chronology of events does not comport with the time line of [respondent's] abdication of professional responsibilities." As seen below, however, respondent's conduct in the present matters occurred during the same time span as his conduct in the two matters that resulted in his 2007 censures. There, we found that respondent's "personal circumstances continued to affect [him] to the extent that he may have been distracted from giving his practice the full attention it required." In the Matter of Daniel D. Hediger, supra, DRB 07-010 (May 24, 2007) (slip op. at 16). We are, therefore, unable to concur with the special master's conclusion that respondent's personal circumstances were not, at least in part, responsible for his transgressions.

We now turn to the difficult task of assessing the proper degree of discipline for respondent's current ethics offenses, viewed in the context of the time of the infractions for which he was censured twice in 2007.

Our close examination of the record in the prior two matters and in the present matters reveals that respondent's unethical acts there and here were similar and occurred during approximately the same time frame. In DRB 06-223, the misconduct spanned the period from early 2003 to January 2004; in DRB 07-010, it encompassed the period from July 2004 to January 2006; and, in the current matters, the failure to communicate with Davis began in November 2003 and the practicing while ineligible violation occurred in 2004 (three months) and 2005 (ten days).[17]

Given that respondent's conduct was part and parcel of the same overall pattern of misconduct, it cannot be said that he demonstrated an unwillingness to learn from past mistakes. Otherwise stated, we do not "encounter a record of longstanding ethical lapses nor a record on which one can fairly conclude that respondent has refused to alter his behavior for the better in light of the earlier imposition of discipline." In re Kivler,

[17] We do not mean to suggest that, during this entire period, from early 2003 through early 2006, respondent acted unethically in a continuous, uninterrupted fashion. The 2003 and 2006 dates merely mark the time of respondent's first and last unethical acts in these cases.

193 N.J. 332, 342 (2008). More fairly, we should consider which level of discipline would have been appropriate for the totality of the conduct in the two censure matters (DRB 06-223 and DRB 07-010) and in these matters.

Parenthetically, we note that the two grievances in DRB 07-010 and the grievances in the instant matters could have been consolidated for resolution. The OAE records tell us that all five grievances in the current matters were filed *before* the two grievances in DRB 07-010. The Antoine Khouri grievance was filed on August 28, 2004; the Jihan Khouri grievance was filed on September 7, 2004; the Duffy grievance was filed on January 6, 2005; the DEC grievance (failure to cooperate) was filed on February 8, 2005; and the Davis grievance was filed on March 22, 2005. In turn, the DRB 07-010 grievances were filed on April 8, 2005 (Edward McCloud) and June 16, 2005 (Jeffrey Klein). The second of the two grievances, Klein, was filed ten months after the first grievance in these matters (Antoine Khouri).

In DRB 06-223, the three grievances were filed much earlier, in 2003. However, the hearing on all three was held on October 18, 2005, four months after the filing of Klein, the last of the seven grievances (five here and two in DRB 07-010). Absent special circumstances, all ten grievances could have been consolidated for disposition. Had that been the case, we would

now be fashioning the measure of discipline for the ten grievances as a whole, instead of three separate sanctions.

The problem with considering, piece by piece, grievances that should have been addressed collectively is obvious. When the grievances are severed, they give the appearance that the attorney refuses to learn from past mistakes and suggest that progressive discipline is warranted. Consolidation, in turn, accomplishes a fairer outcome. The attorney's disciplinary record will reflect one penalty for the aggregate of the conduct that occurred during the same time period, rather than several -- a more severe penalty but, still, a single one.

In any event, even when consolidation is impracticable, because, for instance, the grievances do not come to light in quick succession, the disciplinary system's longstanding practice has been to sanction contemporaneous conduct as a whole. This is so even when discipline has already been imposed for parts of the whole. See, e.g., In re Diamond, ___ N.J. ___ (2007) (DRB 07-068, June 29, 2007) (one-year suspension already imposed not increased by new finding of failure to communicate with the client); In re Tunney, ___ N.J. ___ (2005) (DRB 04-387, March 3, 2005) (no additional discipline required for misconduct that took place during the same time frame as the wrongdoing for which the attorney had already been disciplined);

In re Foushee, 153 N.J. 361 (1998) (no additional discipline for newly-found violations that took place during the same period as the violations for which prior three-year suspension was imposed); In re Gaffney, 147 N.J. 593 (1997) (no further discipline for misconduct similar to and displayed during the same period as the misconduct that led to prior three-year suspension); and In re Lesser, 147 N.J. 592 (1997) (no additional discipline warranted for conduct that occurred during the same time as the conduct that resulted in a prior one-year suspension).

With these principles in mind, we now look to precedent for guidance on the discipline that would have been imposed if all the grievances had been considered at the same time. The combined violations that we must consider are as follows: DRB 06-223 (failure to cooperate with the DEC investigation; failure to promptly remit funds following two real estate closings; recordkeeping violations and negligent misappropriation; and improper use of a firm name by implying that the firm operated as a partnership); DRB 07-010 (late payment of title insurance premiums in sixteen real estate matters; in another matter, failure to promptly complete post-closing steps and failure to communicate with the client; recordkeeping violations; and failure to promptly

cooperate with the OAE); and DRB 08-100 (failure to communicate with a client and practicing law while ineligible).

Altogether, thus, respondent mishandled four client matters (Cupo, McCloud, Klein, and Davis). In three of them, he exhibited gross neglect, lack of diligence, failure to promptly remit post-closing funds, and failure to timely reply to the DEC's investigator's requests for information about the grievance (Cupo, McCloud, and Klein) and in three of them he failed to communicate with the client (Cupo, Klein, and Davis). He also failed to properly observe the recordkeeping rules and negligently misappropriated clients' funds as a result of his deficient accounting practices. In a client matter in which he was cleared of lack of diligence (DeMarzo), he did not fully cooperate with the DEC investigator. Also, he practiced law during two periods of ineligibility (three months and ten days) and implied that his association with another attorney was a true partnership, when, in fact, the partnership agreement made it clear that, although their expenses were to be shared, it was their intention to maintain separate practices.

Practicing law while ineligible, without more, is generally met with an admonition if the attorney is unaware of the ineligibility, as here. See, e.g., In the Matter of Christopher W. Hyde, DRB 08-173 (July 24, 2008) (attorney who failed to

timely pay the annual attorney assessment was declared ineligible and practiced law during the nine-month ineligibility period); In the Matter of Lewis N. White, III, DRB 07-284 (January 23, 2008) (attorney practiced law while ineligible for failure to pay the CPF fee); In the Matter of William C. Brummel, DRB 06-031 (March 21, 2006) (attorney practiced law during a four-month period of ineligibility); and In the Matter of Richard J. Cohen, DRB 04-209 (July 16, 2004) (attorney practiced law during a nineteen-month period of ineligibility). In all of those cases, the attorneys were unaware of their ineligible status.

For negligent misappropriation and recordkeeping violations a reprimand is the ordinary degree of discipline. See, e.g., In re Philpitt, 193 N.J. 597 (2008) (attorney negligently misappropriated $103,750.61 of trust funds as a result of his failure to reconcile his trust account; the attorney was also guilty of recordkeeping violations); In re Conner, 193 N.J. 25 (2007) (in two matters, the attorney inadvertently deposited client funds into his business account, instead of his trust account, an error that led to his negligent misappropriation of clients' funds; the attorney also failed to promptly disburse funds to which clients were entitled); In re Winkler, 175 N.J. 438 (2003) (attorney commingled personal and trust funds,

negligently invaded clients' funds, and did not comply with the recordkeeping rules; the attorney withdrew from his trust account $4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account); and In re Blazsek, 154 N.J. 137 (1998) (attorney negligently misappropriated $31,000 in client funds and failed to comply with recordkeeping requirements).

Conduct involving gross neglect, lack of diligence, and failure to communicate with the client usually results in a reprimand, if more than one client matter is involved. See, e.g., In re Wildstein, 138 N.J. 48 (1994) (attorney exhibited misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients).

Failure to cooperate with disciplinary authorities is generally met with an admonition. See, e.g., In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the DEC investigator'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 DEC'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); and 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).

The above cases demonstrate that each of respondent's violations, standing alone, would merit either an admonition or a reprimand. What discipline is then appropriate for the totality of respondent's conduct? In the following cases, the attorneys received a term of suspension for misconduct in multiple client matters. In re Peluso, 156 N.J. 545 (1999) (three-month suspension for misconduct in six client matters, including gross neglect, lack of diligence, failure to communicate with clients, failure to explain matters to the extent necessary to permit clients to make an informed decision about the representation, failure to abide by the client's decision concerning the representation, failure to return the file upon termination of the representation, pattern of neglect, and recordkeeping violations; in one instance, the attorney's neglect caused a default judgment to be entered against the client; the attorney assured the client that he would take steps to have the judgment vacated but once again did nothing to protect the client's interests; no prior final discipline; the attorney had been temporarily suspended for failure to cooperate

with disciplinary authorities; no mitigation presented); In re Bowman, 179 N.J. 367 (2004) (three-month suspension for attorney who grossly neglected six client matters, displayed a pattern of neglect, lacked diligence in handling the cases, failed to communicate with the clients, failed to abide by a client's decisions concerning the representation, failed to withdraw from the representation when his mental condition materially impaired his ability to represent the clients, and lied to the clients about the status of their cases; in one instance, the attorney lied to a client that a settlement offer had been made; in another, he settled a case for less than the client was willing to accept and then forged the client's signature on the settlement agreement and mutual release; significant mitigation offered, including the attorney's alcoholism and depression, his financial difficulties, and his considerable work and family responsibilities; no prior discipline); In re LaVergne, 168 N.J. 410 (2001) (six-month suspension for attorney who mishandled eight client matters; the attorney exhibited lack of diligence in six of them, failure to communicate with clients in five, gross neglect in four, and failure to turn over the file upon termination of the representation in three; in addition, in one of the matters the attorney failed to notify medical providers that the cases had been settled and failed to pay their bills;

in one other matter, the attorney misrepresented the status of the case to the client; the attorney was also guilty of a pattern of neglect and recordkeeping violations; no evidence of mental illness; reprimand for conviction of failure to make required disposition of property received); In re Lester, 148 N.J. 86 (1997) (six-month suspension for attorney who displayed lack of diligence, gross neglect, pattern of neglect, and failure to communicate in six matters, failed to cooperate with the investigation of the grievances, and allowed the disciplinary matter to proceed as a default; in one of the matters, the attorney misrepresented, in a letter to his adversary, that the adversary's secretary had consented to extend the time to file the answer; the attorney had received a reprimand in 1990 for gross neglect in two matters, at which time the Court noted the attorney's recalcitrant and cavalier attitude toward the district ethics committee, and another reprimand in 1996 for failure to communicate with the client, failure to supervise office staff, and failure to release a file to a client); and In re Pollan, 143 N.J. 305 (1996) (attorney suspended for six months for misconduct in seven matters, including gross neglect, pattern of neglect, failure to communicate with clients, failure to deliver a client's file, misrepresentation, recordkeeping improprieties, and failure to

cooperate with ethics authorities; clinical depression alleged; no former discipline).

A comparison of respondent's overall conduct to that of the above attorneys shows that they mishandled more client matters than respondent (six to eight, vis-à-vis four); that, in all but one case (Peluso), the attorneys demonstrated a flaw in their characters by either lying to their clients or forging their signature; that some of them, unlike respondent, engaged in a pattern of neglect; and that, in some instances, no special circumstances mitigated their conduct.

Furthermore, respondent's conduct was mitigated by special circumstances -- his divorce in 2003, his office relocation on several occasions, his parents' illness, and his mother's death. All of these factors contributed to the chaos in respondent's practice. The OAE auditor's testimony summarized in DRB 07-010 underscored the problems that respondent faced with his disorganized practice, problems that existed while he represented the clients in these matters too, and problems that undoubtedly affected his ability to fully cooperate with the investigation of the grievances. Seemingly, respondent's personal problems are now behind him.

Therefore, our collective experience tells us that respondent's breach of the rules of the profession was the

product of temporary, unusual circumstances, rather than a deficiency in his character. He made no misrepresentations to his clients; he did not cover up his inaction; he did not forge signatures or fabricate documents; and he was not motivated by personal gain. Instead, he either did not act or did so late. He caused no economic harm to his clients.

Currently, respondent is practicing under the supervision of a Court-ordered proctor, has employed a forensic accountant, as ordered by the Court, and seems to have found an experienced paralegal to assist him in keeping his practice in order. We are confident that these safeguards provide great guidance to respondent and ample protection to his clients.

In the interest of fairness and, significantly, to be faithful to established precedent, we believe that respondent should be globally disciplined for conduct that was similar in nature and that occurred during the same time frame. In re Diamond, supra, ___ N.J. ___ ; In re Tunney, supra, ___ N.J. ___ ; In re Foushee, supra, 153 N.J. 361; In re Gaffney, supra, 147 N.J. 593; and In re Lesser, supra, 147 N.J. 592. That result may be obtained by placing respondent in the position in which he would have been if all the grievances had been consolidated for resolution. In our view, it would be eminently unfair to encumber respondent's disciplinary

record with three separate forms of discipline, when one would have been appropriate.[18]

We, therefore, recommend that the two censures previously imposed on respondent be vacated and that he be disciplined for his overall conduct. Comparing respondent's conduct to that of the above-named attorneys who mishandled multiple matters, we believe that the nature and extent of his ethics offenses, which were mitigated by special circumstances, warrant a three-month suspension.

Because, however, to suspend respondent at this point, when he has made strides to bring his practice into compliance with the rules and when stringent, precautionary measures are in place, will serve no salutary purpose, we recommend that the three-month suspension be suspended and that respondent be placed on probation for a period to be determined by the Court. [19]

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[18] It has not escaped us that to discipline for fractional conduct that should have been resolved all at once also carries with it an undue financial burden on the attorney. Each time, the attorney will be saddled with fixed administrative costs of $2,000. R. 1:20-17(b)(1)(C).

[19] We fully recognize that our recommendation that the Court vacate the two censures already imposed on respondent and impose a three-month suspended suspension is novel, although not unprecedented. In 2002, the Court vacated an admonition already imposed on an attorney and dismissed the charges against her. In re Padin, 171 N.J. 1 (2002).

Should respondent stray from the ethics rules during the probationary period, the repetition of his errant ways will demonstrate to us that his past conduct was not prompted by the unfortunate personal circumstances that beset him at the time, but by an unwillingness to abide by the rules of the profession. In that case, severe consequences could befall him, including, of course, the activation of the suspension.

Member Wissinger voted for a prospective three-month suspension.

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 Matter of Daniel D. Hediger
Docket No. DRB 08-100

Argued: July 17, 2008

Decided: October 21, 2008

Disposition: Vacate censures and impose a three-month suspended suspension

Members	Disbar	Three-month suspended Suspension	Three-month suspension	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Boylan		X				
Clark		X				
Doremus		X				
Lolla		X				
Stanton		X				
Wissinger			X			
Total:		8	1			

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel