SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-219
District Docket No. VA-2011-0022E

IN THE MATTER OF	:
CONNIE MCGHEE	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 16, 2014

Decided: January 15, 2015

Richard Bernstein appeared on behalf of the District VA Ethics Committee.

John McGill, III appeared on behalf of respondent.

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

This matter was before us on a recommendation for a reprimand filed by the District VA Ethics Committee (DEC). The four-count complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.4(b) (failure to communicate with a client), RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), and RPC 1.5,

presumably (c) (failure to provide a client with a written statement at the conclusion of a contingent fee case and to return an unearned fee).

Respondent's counsel filed with us, among other things, a motion to supplement the record with one exhibit, which we granted. Based on the record before us, we determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1982. When she first met the grievants, she maintained a solo practice in Irvington, New Jersey. At the time of the DEC hearing, her office was located in Newark, New Jersey. She has no history of discipline.

This matter arose from respondent's representation of grievants Delretha and Leon DeVose, II, in a wrongful death case against the Essex County Jail and other defendants. The case stemmed from their son's (Leon III) September 24, 2004 suicide, while on suicide watch, during his incarceration at that jail.

Before retaining respondent, the DeVoses had met with several other attorneys about the case. On November 11, 2004, they retained Ronald Hunt from the law firm of Hunt, Hamlin, and Ridley. On August 6, 2006, one month prior to the expiration of the statute of limitations, Hunt withdrew from the representation, due to a

conflict of interest.[1] Hunt's firm had done nothing to advance the DeVoses' interests, other than to file the notices required under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

According to Delretha, before she and her husband had retained Hunt, respondent had approached them to "offer her services shortly after [their son's] death." On August 17, 2006, after Hunt withdrew from the case, Leon sent respondent a fax, asking whether she had a conflict similar to Hunt's and whether she was interested in handling their case. He noted, in that fax, that she had been the "first to approach" them about the case and that she had known their son. If she was not interested, they would go to their "Plan 'B'."

Leon testified that, in light of their families' ties, the DeVoses believed that respondent would "put up the best fight" for them. Their children had been playmates, when they were neighbors in Montclair. Leon thought that, although respondent was trying to help them, it was a business decision on her part to take their case. Respondent had never represented the DeVoses

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[1] Hunt was reprimanded for his representation of these same grievants. He was found guilty of, among other violations, a conflict of interest, gross neglect, lack of diligence, and failure to communicate. In re Hunt, 215 N.J. 300 (2013). Hunt withdrew from the grievants' representation eight months after his firm had signed an agreement to represent Essex County in unrelated matters.

prior to this matter. She assumed that they had no one else to turn to, despite Leon's reference to a "Plan B."

Respondent agreed to take the case. On August 28, 2006, she met with the DeVoses and the mothers of Leon III's children. Respondent informed them that the children would receive the bulk of any settlement and that any remaining amounts would cover funeral expenses. She directed Leon, as the family member in charge of the matter, to obtain the necessary authorizations from the Surrogate's Office to pursue the wrongful death claims on behalf of the estate. She informed Leon that she could not be a part of that process, because it would create a conflict of interest. Leon was, thereafter, appointed the administrator of the estate and the guardian ad litem for Leon III's children.

On that same date, respondent entered into an agreement with the DeVoses to provide legal services, on a contingent fee basis, in connection with a wrongful death action and, possibly, a medical malpractice component. According to respondent, they had also discussed payment on an hourly basis ($200 per hour, $250 per hour for court appearances), but she had advised them that a contingent fee agreement would be a better choice, because she could not predict the amount of time she would spend on the case.

Respondent's contingent fee agreement acknowledged the need to petition the court for additional fees. According to respondent, the fee agreement she used provided that "even if there's no recovery . . . the clients pay for expenses. And I also talked to them about fees for myself on a minimal level, but if it didn't work out it did not work out. I'm not coming back after them for anything." The contingency fee agreement further provided:

> In addition to legal fees, You may be required to pay for expenses in connection with the institution and prosecution of your claim. Such expenses may include, among other things, expert's fees and expenses for other testimony or evidence, court costs, accountant's fees . . . deposition costs . . . . You will not be required to pay for usual and customary law office overhead expenses, such as local telephone charges, routine photocopying and postage costs and expenses associated with legal research.
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> The Law Firm may pay the above expenses for the Client or require that the expenses be paid in advance. The Client must pay the Law Firm for these costs and expenses even if there is no recovery of money. [emphasis supplied].
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> [Ex.J-23.]

Leon testified that, based on the language of the fee agreement, he understood that respondent would be entitled to fees based on a percentage of the recovery and that the DeVoses would be responsible only for expenses incurred in the case.

Respondent admitted that there was no other written executed agreement that altered the terms of the contingent fee agreement between the parties. She claimed, however, that, despite their written agreement, she and the DeVoses had discussed that she would be paid "minimal fees . . . in order to sustain whatever [she] needed to do" and that she would be paid "on a minimal level," that is, her hourly fee. She believed that the DeVoses had clearly understood the above. She conceded, however, that none of their discussions amended the terms of the written fee agreement, which provided that they were not required to pay customary law office expenses.

On October 9, 2006, Leon gave respondent a check with the notation "legal expenses." Respondent gave Leon a receipt stating "Received for legal expenses and fees for legal work to be completed." She referred to the notation as "an executed understanding."

Leon did not recall having had any discussions with respondent about amending the terms of the contingent fee agreement. He denied entering into a written agreement amending the original terms. It was Delretha's understanding that they were required to pay respondent only for expenses. She, too, denied any discussions with respondent about paying her a legal fee on an hourly basis. Delretha noted that they gave respondent

funds for depositions or for other necessary actions in the case, as those items arose. She never saw respondent's handwritten notation on the receipt and was adamant that the money they gave her did not represent legal fees.

Leon, in turn, acknowledged reading respondent's notation on the October 9, 2006 receipt, but claimed a belief that it was an error on respondent's part. Moreover, he pointed out that he had never counter-executed the document. He assumed that respondent's notation related to expenses such as fees for doctors or for depositions, not fees for respondent. He trusted respondent and understood that they were operating under the terms of their original agreement.

In contrast, respondent testified that expenses "could also be [her] legal fees which could also be considered as expenses in doing this case." She stated that, if she could not keep her office open or pay her rent, then she could not be "the conduit through which they're going to be able to have this case presented." In addition, because the DeVoses had not required that she deposit the funds into her trust account, she was entitled to them.

Respondent's position was that she had discretion to decide how to use the DeVoses' funds, based on the amount of time spent on their case. She stated, simply, that the funds were meant for expenses, if needed; otherwise, she could use them as she saw fit.

She remarked that, financially, her law office was not in a position to finance the DeVoses' litigation, which she estimated would cost approximately $50,000.

Ultimately, the DeVoses paid respondent a total of $12,500: $2,500 on October 9, 2006, $2,500 on July 10, 2007, and $7,500 on July 13, 2007. One receipt that respondent prepared for a $2,500 payment did not indicate how the funds were to be used. A third hand-written receipt stated, "Received of Leon DeVose, twenty-five hundred dollars costs as expenses payment on the matter of: DeVose vs. Essex County et als." It made no reference to fees.

According to respondent, she has since learned to memorialize changes to retainer agreements. She had not done so with the DeVoses' because of their "integrity" and their prior personal relationship. She realized that handling "a big case," such as the DeVoses', required a lot more than her solo practice could handle. She acknowledged that, because of her limited resources, she should not have agreed to represent them.

On May 2, 2007, after respondent filed the complaint, one of the defendants was successful in removing the case to federal court. Realizing that she did not have sufficient federal practice experience, respondent sought help by reaching out to two attorneys with federal court experience, Robert Pickett and Cassandra Savoy. Savoy agreed to "come on board" to assist

respondent in the matter. Respondent remarked that, when she met with Savoy, the time to object to the case's removal to the federal court had expired. Moreover, she reasoned that litigating the venue issue would have been a waste of money.

Savoy testified that she met with respondent and the clients to discuss the case. Savoy's understanding was that it was a contingent fee case and, that, therefore, she would not receive any fees, while the case was pending; the existing fee agreement could not be changed. Once she agreed to assist respondent, she entered her appearance in the case, in late July 2007, and immediately contacted the adversaries to try to get a sense of their strategy and of the status of the case. Although she scanned the file, she did not know the strengths and weaknesses of the case. She recognized, however, that they were behind schedule on actions that should have been taken.

Savoy testified that she withdrew from the case on July 31, 2007, only one week after entering her appearance, when she sensed respondent's feeling that she was trying to control the litigation.

On June 10, 2009, the DeVoses' federal civil action was dismissed. Afterwards, respondent arranged a meeting with the DeVoses, in the presence of another attorney. She informed the DeVoses that she had "missed a deadline." Leon recalled

respondent's admission that she had "dropped the ball" by not replying to a motion for summary judgment. Respondent asked the DeVoses whether they wanted her to "figure out a way" to get the case back on track. According to Delretha, respondent had the other attorney present at that meeting to corroborate her assessment that, if they tried to reopen the case, they stood little chance of obtaining any significant recovery. That other attorney confirmed respondent's negative assessment of the case.

To Leon, the meeting looked like a "CYA" meeting.[2] In his grievance, Leon asserted that respondent had used precedent to assure them that they had a good case and, later, the same precedent to support her opinion that there was no chance of any significant recovery, if they tried to reopen the case.

Respondent, in turn, testified that she had previously communicated to the DeVoses her failure to oppose the summary judgment motion. She asserted that this conversation had taken place prior to their final meeting, when she had a colleague present. She stated:

> But prior to that I had talked to them on the phone once or twice, that I think I did document, and I explained that without funding to respond to the summary judgment motion . . . we wouldn't be able to go

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[2] Respondent's counsel spent a good portion of the second day of the hearing attempting to discredit Leon's testimony.

> anywhere with the case. When the complaint was dismissed I brought them in because I wanted them to really understand what it would take to go forward. The federal court required an affidavit or certification from me. And I had to do it in good faith. So if I couldn't come up with a good faith reason. We didn't have investigation [sic].
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> [3T54-19-3T55-5.][3]

As corroboration of her discussions with the DeVoses, respondent pointed to her June 6, 2009 letter to them, which stated:

> [I]t is my understanding that contrary to the recent position we discussed, this office has permission to file opposition papers to the motion for summary judgment immediately and to continue on a course towards resolution of this case. We shall immediately proceed to do so. In that regard, I shall immediately forward a letter to the Hon. Jose Linares seeking permission to file opposition papers to the motion for summary judgment and that the opposition is expected to be filed within 30 days.
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> [Ex.J-104.]

Respondent never sent such a letter to the judge, however. She claimed that, after she had spoken to attorneys Bob Pickett and Bob Martin, she had decided it would not be the best course of action, because there "was no money to do an investigation." She claimed that she had communicated her decision to the

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[3] 1T refers to the transcript of the November 6, 2013 DEC hearing; and 3T refers to the December 11, 2013 transcript.

DeVoses, after the date of her June 6, 2009 letter, although not in writing.

At the meeting that took place after the case was dismissed, respondent asked Delretha to call her office the next day to find out how much money they would be getting back. In a November 19, 2010 email to respondent, more than five months after the case's dismissal, Delretha asked respondent for an accounting of the money that they had given her for expenses and to refund the difference. Respondent's email reply asked Delretha to either call or visit her office. Respondent asserted that she had not provided the accounting, because she "wanted to talk to them and find out what they wanted. What was on their mind."

In a January 2, 2011 letter to respondent, Delretha reiterated that she wanted to end the matter and again requested an accounting of the funds that they had given her. On March 9, 2011, Delretha sent respondent a follow-up letter, again asking for an accounting. All of her requests were to no avail. Respondent denied that she had failed to produce the accounting to prevent the DeVoses from knowing how their money had been spent.

On September 30, 2011, nine days after respondent learned about Leon's grievance, she sent the DeVoses a letter, enclosing

an invoice for expenses and fees for the litigation. The letter stated:

> It had been previously discussed and understood between us that some of the monies received would be used for legal fees given that I was a sole practitioner with no financial resources to pursue this matter and would need to depend upon your limited resources for expenses.
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> [Ex.J-53;1T84.]

To that letter respondent attached an invoice for $36,498 that included time spent for, among other things, reviewing, researching, and drafting the complaint (97 hours), photocopying expenses, deposition preparation charges, deposition transcripts ($888), secretarial services (300 hours), telephone calls or conferences (150 hours), and parking and toll expenses. No dates for any services provided were included on the invoice. Respondent claimed that her intent in sending the invoice was to demonstrate what actions she had taken on the case. She did not plan to pursue the DeVoses for the balance of funds.

In connection with the DEC investigation, respondent prepared a reconstructed business account disbursement sheet for the $12,500 that she received from the DeVoses. It showed payments of $1,950 and $1,748 to Kaplan Associates LLC for legal fees. Kaplan Associates was a real estate company. The payment was not for legal fees but for respondent's residential rent.

According to respondent, the above entry was a mistake and it should not have appeared in the accounting. She explained that the entry reflected "an example of money that was actually my money in a sense but I didn't label it to me. I labeled it to where the check went." She added that the fees to Kaplan did not "go into advancing the DeVose's [sic] case in that sense, but it certainly kept me alive, so to speak, when I paid my rent."

The accounting further revealed that respondent paid her son, Samuel, $50 for photocopying. There were also charges for secretarial and paralegal services (respondent admitted that she never told the DeVoses that she would charge them for paralegal and secretarial services);[4] UPS; a computer set-up ($104.98); "IRS 2005" ($185) (presumably, for an accountant); cell phone ($100), and Deluxe Business Systems ($86.34).

The following charges were listed as "Legal Fee" on the accounting: Auto Phone Charge ($3.50); AT&T ($308.16); Verizon ($599.27 and $400); Phone Charge ($3.50); and Paychex ($806.25 and $43.39). Charges that related specifically to the DeVoses'

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[4] The accounting showed nine entries for payments to Sharon Heyward, from September 22, 2006 to August 2, 2007, totaling $2,533.15 for paralegal services. However, respondent's own testimony revealed that Heyward was her secretary. Although respondent was not aware whether Heyward held any credentials from a paralegal school, respondent claimed that Heyward performed paralegal services for her.

matter related to the death certificate ($22), "Additional money for filing complaint" ($10), and "DeVose Filing Fee" ($200), a total of $232. The total for costs and expenses was $12,440.70. The disbursement sheet ended on August 13, 2007, when only $59.30 remained from the original $12,500.

Respondent did not return any portion of the $12,500 to the DeVoses because, she stated, "the case went on . . . . and there was additional research, preparation, depositions. . . . [t]here was an ongoing case for which there was [sic] no more funds paid."

Although respondent admitted that the retainer agreement was not amended to require the DeVoses to pay ordinary overhead office expenses, she claimed that the expenses that appeared on the schedule were "not [ordinary] expenses." She denied that local telephone charges, routine photocopying, postage, and expenses associated with legal research were customary law office overhead expenses.

As to respondent's handling of the case, she pointed out that she had been brought into it at the last minute. She maintained that the prior attorney should have conducted a preliminary investigation, in the two years before the expiration of the statute of limitations.

According to respondent, she had insufficient time to investigate the matter, prior to filing the complaint. In the month after she was retained, she verified if a notice of tort claim had been filed; engaged in discussions with the DeVoses' prior attorney; contacted the county to see if she had any active cases with them (she was under contract with the county until December 31, presumably 2006); explained to the DeVoses that she did not "think" that she would have a conflict of interest; consulted with the DeVoses and with her friend, Hardge Davis, the former deputy surrogate; obtained documents from the Essex County Jail, including certain jail management procedures, incident reports, jail medical records, toxicology report, scene investigation report, and the medical examiner's report; went to Trenton to research archived cases; filed the civil complaint in Superior Court against the Essex County Jail and various Jane and John Does; personally obtained a copy of the autopsy report; propounded form interrogatories on the defendants, which they answered (she did not supply all of the answers to the DEC investigator); and attended the DeVoses' depositions.

Respondent filed the complaint on September 22, 2006. On February 10, 2007, the court issued a dismissal notice for lack of prosecution. On April 2, 2007, she served the complaint on the defendants. She claimed that she had not served the

defendants beforehand because they "were not all . . . represented by counsel." She believed that a complaint is not served until the defendant retains counsel. She reasoned that, in this instance, all of the defendants were connected to the county:

> So the complaints could go to the County Counsel's office. And then that counsel would tell that person that you now have a complaint pending against you. And will [sic] either assign counsel or will represent you ourselves if there's no conflict. So you find out that way as the employee.
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> [1T130.]

Respondent claimed that, without additional funds, she could not conduct basic depositions of the defendants, fact witnesses, or third parties. Initially, the only charge was wrongful death, but respondent expanded it to include a malpractice component.

Respondent admitted that she was not experienced in federal court matters and had not anticipated that the case would be removed to federal court. She asserted that she did not serve requests for the production of documents, because certain documents had been provided with the responses to the initial interrogatories. She did not prepare an affidavit of merit, because they did not have "real names of people" whom they could charge with failure to exercise reasonable care. The names in

the complaint were Jane and John Does, Dr. Does, and Company Does. Respondent added that the DeVoses could not continue to fund the litigation.

Respondent learned the names of medical staff members through a Rule 26 disclosure. In addition, she had a copy of the prison's policy that reflected that personnel had to be trained in suicide prevention, both initially and annually. Yet, she did not follow through to determine whether the personnel had received the required training. She claimed that, because those individuals had not been named in the complaint, she could not obtain discovery relating to them. She did not move to amend the complaint to add names, even after she received them through discovery on October 4, 2007. According to respondent, she made a discovery request for videotapes of Leon III's cell and surrounding areas, which were not produced. She neither moved to compel their production nor visited the jail.

Respondent asserted that she had tried to obtain experts for the case, by reaching out to friends who were doctors and to a security expert. She never retained an expert, however, because she had no funds available to do so. She claimed that, although she was aware of one expert within the DeVoses' "budget," she had neither obtained sufficient discovery nor conducted an adequate investigation for that potential expert to

render "a reasonable opinion." She stated that she had communicated orally with the DeVoses about her difficulties with their claims and that, at some point, had told them that the claims were not sustainable. She did not recall reducing any of her concerns to writing.

In December 2008, the defendants moved for summary judgment. Respondent did not oppose the motion because, she claimed, she had no expert and insufficient evidence to do so. The case was dismissed on June 9, 2009.

The June 9, 2009 oral decision of the Honorable Jose L. Linares, U.S.D.C.J., stated that the plaintiff's September 22, 2006 complaint alleged medical malpractice, wrongful death, and a violation of civil rights, pursuant to 42 U.S.C. §1983. It was never amended to add any members of the jail's medical staff, even though, on October 4, 2007, the identity of the medical providers was disclosed, pursuant to Rule 26. According to the judge's decision, after the case was removed to federal court, the defendants conducted depositions of the DeVoses and Leon III's siblings, but the plaintiff did not make any discovery requests of the defendants.

As to the malpractice claims, the judge noted that the plaintiff did not file the required affidavit of merit or a required expert report, setting forth an opinion that the breach

of the standard of care was a proximate cause of the suicide. The judge ruled that "[n]o discovery having been sought by the plaintiff, or expert report having been propounded, no affidavit of merit having been filed in this matter, and no opposition having been filed to any summary judgment motion in this case, the summary judgment sought by Correctional Health Services is appropriate."

With respect to the other named defendants, the judge noted that the plaintiff had failed to oppose their motions or point the court to any concrete evidence that would be admissible at trial. The judge stated that it was "incumbent" on the plaintiff to "come up with facts" to show that Leon III's death was caused by a "wrongful act, neglect or default of one of the defendants herein, and that if they had not acted wrongfully, the death would not have occurred." Although the plaintiff made such allegations, they were not supported by any particular evidence. "Had the plaintiff conducted appropriate discovery, perhaps genuine issues of material fact could have been raised with regard to any of these defendants, but no such evidence has been presented . . . upon which the Court could deny summary judgment."

Respondent contended that, after the summary judgment motion was granted, she discussed with the DeVoses the absence

of sufficient information to support a motion for reconsideration. She asserted that neither she nor the DeVoses had the approximately $50,000 necessary to fund the case. Yet, she admitted that she never considered being relieved as counsel.

Respondent's reply to the grievance stated, in mitigation, that to better communicate with her clients, she has made necessary changes to her practice. At the ethics hearing, she explained that the changes included trying to properly document her conversations with clients, recording conversations with clients on an iPad, and obtaining "printed paper cell phone bills;" instituting the use of a computerized calendar and the Quicken accounting program; employing a part-time paralegal to help with billing; relying on two attorneys to whom she can turn for help; trying to return calls more quickly; and decreasing her memberships in professional organizations to spend more time on her practice.

During the investigation in this matter, respondent prepared a "Reconstructed Timeline from August 2006 to June 2009," detailing the time she had spent on the DeVose matter. Although, within the first two months, she spent a considerable amount of time on the case, as time progressed, she spent fewer and fewer hours on it.

Respondent claimed that there were extenuating circumstances that compromised her ability to effectively address her clients' matters. She mentioned, for example, that moving her office resulted in disorganization and disruption from 2008 to late 2009. She admitted, however, that the disruption did not result in her withdrawal from representing any of her municipal clients. She also pointed to unusual demands on her time, due to her involvement in the "Paul Bergrin case." She conceded that she had not represented Bergrin, but defendants Mark Edwards and Vincent Estevez (drug racketeering), while "juggling" her responsibilities to other clients. She admitted, however, that Edwards had been arrested on May 29, 2008 and entered a guilty plea on October 30, 2008, two months before she had been served with the summary judgment motion in the DeVose matter. The DeVose case was dismissed six months later.

Respondent denied that she had solicited the DeVoses' case because of financial motivations. Although she claimed that she was doing "okay" financially at the time, a number of judgments had been entered against her by various creditors, in amounts ranging from less than $200 to $22,132 (an IRS lien) in 2003, and a $25,604 federal tax lien in 2011, as well as a 2010 "order of powerful entry and detainer" by Kaplan Associates in 2010.

She admitted knowing about some of the liens, claimed that some had been paid off, and denied knowledge of others. She conceded having paid Kaplan Associates from funds that the DeVoses had given her.

According to the DEC, respondent was forced by circumstances that she did not create to preserve any claims against the defendants and then to conduct the necessary investigation into the merits of the claims, if any. The hearing panel report cited the numerous actions that respondent initially took on the DeVoses' behalf. Balancing those actions against respondent's failure to oppose the defendants' summary judgment motion, the DEC did not find clear and convincing evidence that she had engaged in gross neglect or a pattern of neglect.

The DEC found that respondent lacked diligence, however, because, in the almost three years that the case was pending, she had failed to (1) "pursue written discovery (other than serving form interrogatories and document requests at the outset of the case);" (2) take depositions of any defendant, relevant fact witness, or third parties; (3) retain experts or obtain an affidavit of merit; (4) oppose the defendants' summary judgment motions (or file any discovery or dispositive motions of her own); or (5) otherwise prosecute the case in any meaningful way.

In short, she had failed to perform the services for which she had been retained – prosecution of the wrongful death case.

The DEC also found that not until the summary judgment was granted did respondent inform the DeVoses that she would not be opposing it. Her time records, prepared several years later, in response to the grievance, showed that she spent little time on the case, as it progressed, and that she failed to keep the DeVoses informed about its status or keep them sufficiently informed to enable them to actively participate in the decisions made during the course of the representation.

As to respondent's alleged oral agreement with Leon -- that she could use the funds advanced to prosecute the claim -- the DEC did not accept respondent's argument that Leon's failure to dispute her handwritten notation on the receipt was sufficient evidence to demonstrate the DeVoses' understanding of and acquiescence to it.

According to the DEC, even though the factual allegations of the ethics complaint referenced only the failure to provide an accounting, count four set forth the allegations relating to the contingent fee agreement. The DEC determined that the complaint could be amended by reference, when evidence is presented at the hearing, without objection, citing R. 1:4-3, R. 4:9-2, and In re Vincenti, 152 N.J. 253, 279-80 (1998). The DEC

added that, under R. 1:20-4(b), the complaint need only include "sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." The DEC concluded that the complaint met this standard.

Finding the DeVoses' testimony credible, the DEC concluded that the "credible" clear and convincing evidence adduced at the hearing established that the fee agreement "was not amended by any oral or written understanding/agreement." The monies advanced were for case-related expenses only, not for legal fees and personal expenses. Without specifying the nature of the violation or the subsection of the rule, the DEC found a violation of RPC 1.5, "based upon the Contingent Fee Agreement."

The DEC further found that respondent had failed to provide a timely accounting to the DeVoses, which they had requested, on numerous occasions. The accounting was not provided until after the grievance was filed. Even then, the accounting was facially deficient, incomplete, and inadequate. Furthermore, respondent did not return any portion of the $12,500 that the DeVoses had advanced. The DEC, thus, found a violation of RPC 1.5, "based upon the failure to provide the accounting."

The DEC rejected the proffered mitigation, other than respondent's lack of an ethics history. It found, as aggravating

that she used the fees advanced by the DeVoses for her office and personal expenses and that her failure to oppose the summary judgment motion extinguished the estate's claims and any hope of compensation for the decedent's suicide. The DEC recommended a reprimand.

As indicated previously, respondent's counsel filed a motion with us to supplement the record to include Exhibit R-26, a June 15, 2012 email from the presenter to respondent's counsel. Although counsel had attempted to introduce the exhibit during the DEC hearing, the panel chair had sustained the presenter's objection, citing a lack of foundation and hearsay.

Counsel's purpose for introducing the exhibit was to establish that respondent had not been treated fairly, during the investigation of this matter. As evidence of this alleged unfair treatment, counsel relied on his November 2, 2011 letter to the investigator/presenter (presenter). That letter asked that the presenter find out if, prior to the grievance, the DeVoses had objected to respondent's "representation" that the October 2006 advance was also for "fees legal work to be completed;" counsel be informed what evidence was available as proof; and counsel be informed of the results of the presenter's inquiries.

Counsel claimed that the excluded exhibit proved that respondent had been unfairly treated, during the ethics investigation. The exhibit is the presenter's June 15, 2012 email to counsel that states, "For belts and suspenders, I will re-verify with the Grievants their understanding of the fee agreement and the meaning of the notations on the October 9, 2006 receipt." Counsel complained that, at no time since that email, has the presenter ever represented that he solicited and obtained a response from the grievants, as promised in Exhibit R-26.

Counsel argued that the evidence created "an uncontroverted reasonable inference" that the presenter never solicited a response from the grievants and that, therefore, the document was relevant to a showing that respondent had not been treated fairly during the investigation.

To bolster his argument of unfair treatment, counsel referred to the presenter's April 18, 2012 email, representing that his investigation would include an interview with respondent. Counsel argued, among other things, that, because the presenter failed to interview the grievants on the disputed issue, "the opportunity to obtain the critical evidence in the search for truth has been irreparably lost," and the presenter's failure to obtain this "critical evidence" deprived respondent

of a complete and fair investigation, by allowing the hearing panel to "attribute credibility" to Leon's testimony. Counsel added that respondent had reasonably relied on the presenter's false representations that he would conduct a fair and complete investigation on material issues and that the presenter's failure to interview respondent, before filing the complaint, "led her to reasonably feel unfairly mistreated, unlike other attorney respondents similarly situated and reasonably believe the process is tainted with bias against her."

Although counsel conceded that the Court Rules do not guarantee respondent the right to an investigation interview, he claimed that the relevant issues are (1) whether, during the course of an investigation, "the DEC is obligated to do so competently in the interest that justice be done in a manner fair to all interested parties without misrepresentation" and (2) whether respondent "may reasonable [sic] rely on the DEC representations in the conduct of a disciplinary investigation." Thus, counsel requested that the record be supplemented to include Exhibit R-26.

The presenter disputed respondent's contention that she was not fairly treated. He pointed out that there was sufficient evidence generated during the investigation stage. Moreover, documentation provided to respondent included, among many other

documents, Leon's June 10 and November 18, 2011 letters to the DEC and his grievance, which contained Leon's written understanding of the fee agreement between him and respondent. In addition, Leon's notation on the first fee check supported his understanding of the fee agreement. The presenter added that respondent's counsel had ample opportunity to question Leon, during the three days of the DEC hearing. The presenter noted that, "paradoxically," the only written document that respondent could offer to set forth her assertions about the fees was the one receipt that she had provided to Leon.

The presenter took issue with counsel's attempts, throughout the ethics investigation and hearing, to discredit Leon's testimony by, among other means, questioning his mental status. The presenter emphasized that the DEC rejected all of counsel's efforts, found that Leon was a credible witness, and concluded that the testimony of Delretha, whose credibility was not challenged, corroborated Leon's testimony, as did all of the written evidence.

The presenter argued further that respondent was given more than ample opportunity to provide her viewpoint, during the investigation. Specifically, a full factual record was developed during the investigatory phase of this matter; respondent attached to her motion to supplement the record only one of

"literally hundreds of emails that were considered during the investigation;"[5] and the investigation report (which is not in evidence) was over 1,000 pages, with exhibits, and contained a detailed procedural history of the investigation, including "numerous occasions when Respondent's counsel told the investigator that the Respondent has no additional relevant information to provide with respect to the investigation." According to the presenter, the evidence before us established that respondent was not denied her due process rights during the investigation.

The presenter suggested that, if we seek to explore this issue further, our review should not be limited to the piecemeal documentation provided by respondent, but should include, among other documents, the investigative report. Based on the foregoing, the presenter urged us to deny respondent's motion in its entirety.

In respondent's brief to us, she agreed with the DEC's determination that she did not violate RPC 1.1(a) and conceded that she violated RPC 1.3, RPC 1.4, and RPC 1.5. She asserted that the DEC erred in its credibility findings, however.

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[5] The presenter maintained that the email in question was presented out of context.

As to the rule violations, respondent "accepts the Hearing Panel's determination that the record does support a finding by clear and convincing evidence, that she failed to timely provide Grievants an accounting of the funds collected," acknowledging that it was provided at least nine months after the DeVoses first requested it. Respondent disagreed that the accounting was incomplete or inadequate and "requests that the issue be referred to fee arbitration, prior to a determination that any portion of the $12,500 be returned," noting that, during the investigation stage, counsel requested that the matter first proceed to fee arbitration.[6]

To support her contention that an admonition is sufficient discipline in this matter, respondent pointed to several mitigating factors: (1) the DEC's failure to consider that the presenter did not afford her a promised interview, during the pre-complaint investigation; (2) her full and complete cooperation, throughout the proceedings; (3) her lack of a disciplinary history; (4) her acceptance of the case at the eleventh hour; (5) her performance of substantial services on the estate's behalf; (6) the assistance that she sought, when

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[6] We note that matters cannot be "referred" for fee arbitration. Rather, the attorney must notify the client of the right to request fee arbitration. The decision to file a fee arbitration request rests solely with the clients. R. 1:20A-6.

the case was removed to federal court; (7) the fact that she was overwhelmed by extenuating circumstances, between 2008 and 2009 (disorganization in her office management, after she moved her office, insufficient personal funds to finance the costs of the litigation, inability to obtain assistance on the case, and work on other demanding cases); and (8) changes to her law practice to protect her clients and the public.

In his brief to us, the presenter urged us to suspend respondent "for a period of time" and to condition her reinstatement on the return of the entire $12,500 to the DeVoses. He pointed out that respondent used only a small portion of the DeVoses' funds to advance their case, using the bulk of those monies for her own personal expenses (including residential rent), general office overhead expenses, paralegal services, and photocopying expenses paid to her adult son. The presenter pointed out that only three entries on respondent's expense schedule related to the prosecution of the DeVose case.

According to the presenter, respondent spent decreasing amounts of time on the DeVose case, as it progressed. Her time records show that she spent 61.2 hours, during the first two months she represented the DeVoses, but, afterwards, spent "an immaterial amount of time" on their matter (16 hours from October 2006 to December 2006 and a "paltry" 29.8 hours in

2007). The presenter argued that respondent's inaction culminated in the case's dismissal on an unopposed motion for summary judgment.

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

We first consider respondent's claim of unfair treatment. The presenter pointed out that respondent was not disadvantaged because, from the outset, she had a copy of the DeVoses' grievance, to which she submitted a reply; there were hundreds of emails between counsel, before the filing of the complaint; there were motions filed, before the hearing; on a number of occasions, respondent's counsel informed him that there was no additional relevant information to provide with respect to the investigation; after the filing of the complaint, respondent filed an answer; and she participated in a three-day hearing.

We find that respondent had a full opportunity to reply to the grievance, to submit an answer to the complaint, and to launch a full defense, at the DEC hearing, by examining and cross-examining witnesses. Thus, we find that respondent did not suffer any prejudice.

Additionally, we note that the Court Rules do not provide that a respondent must be interviewed. Simply put, respondent has no right to shape the course of the ethics investigation. It is clear that the presenter conducted a thorough investigation of the matter. After reviewing the hundreds of pages of documents, conducting interviews of the grievants, reviewing respondent's reply to the grievance, and communicating at length with respondent's counsel, the presenter concluded that he had sufficient information to file a complaint against respondent. She was then given a fair opportunity to defend herself against the charges, which were properly brought against her. Had no unethical conduct been found, then, arguably, her point may have had some merit. That is simply not the case here.

In sum, although we grant counsel's motion to supplement the record, we find that, under the circumstances, it has no bearing on the outcome of this case.

During the course of the three-day hearing, the contingent fee agreement between respondent and the DeVoses was the subject of extensive testimony. The DEC found that the credible evidence clearly and convincingly established that there was no amendment to the agreement, written or oral, giving respondent permission to use, as fees, the funds advanced by the DeVoses. The DEC

found the DeVoses' testimony on this issue credible and, conversely, respondent's testimony not credible.

We defer to the DEC's findings with respect to credibility. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). A court will defer to a tribunal's findings with respect to those intangible aspects of the case not transmitted by the written record, such as witness credibility. Here, the DEC observed the demeanor of the witnesses and heard their testimony. Accordingly, it had a "better perspective" than do we "in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988). In the Matter of Thomas Deseno, DRB 08-367 (May 12, 2009) (slip op. at 25). Moreover, based on the record before us, we agree with the DEC's assessment.

Apart from the credibility issue, we reject respondent's claim that the written fee agreement was modified, given that there was no meeting of the minds. Respondent asserted that the parties orally altered the fee agreement and that the October 9, 2006 notation on the receipt memorialized the change. However, Delretha never saw the notation and Leon believed that it was a mistake. Moreover, respondent produced no evidence that the DeVoses had agreed to change the nature of the fee arrangement from contingent to hourly, or to a hybrid payment arrangement.

We note that, although the complaint alleged that the DeVoses were never provided with or executed any document that amended the fee agreement, it did not charge respondent with any specific violations relating to an improper use of the advances. Count four charged respondent only with a violation of RPC 1.5, for (1) failing to provide the DeVoses with an accounting, at the conclusion of the representation, or after several requests by the DeVoses, and (2) not returning any of the advances. Because, however, the issue was thoroughly litigated at the hearing and the wrongdoing itself was alleged in the complaint, we find that respondent's failure to return the advances to the DeVoses, after the case was dismissed, constituted a violation of RPC 1.16(d) (upon termination of the representation, failure to return property or advanced payment of an unearned fee), as an aggravating factor.

As to respondent's failure to provide the accounting, the section of RPC 1.5 that appears relevant in this case is (c), which states, in relevant part, "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." Because there was no recovery in this matter, this rule is inapplicable. We, therefore,

dismiss the RPC 1.5 charge. However, we view respondent's failure to provide the accounting to be a violation of RPC 1.4(b), in that she failed to reply to the clients' reasonable requests for information, that is, the accounting for the advances.

Respondent is also guilty of having violated RPC 1.4(b) for failing to keep the DeVoses accurately and adequately informed about the status of their case. For example, as late as June 6, 2009, respondent led the DeVoses to believe that she would be replying to the motion for summary judgment. Her letter to them specifically represented that she would seek permission from the judge to "file opposition papers to the motion for summary judgment and the opposition is expected to be filed within 30 days." Not only did she fail to seek that "permission," but the case was dismissed four days later. Respondent did not promptly notify the DeVoses of the dismissal. It was not until some undetermined time later that respondent admitted to the DeVoses that she had "dropped the ball" and that their case had been dismissed. Respondent claimed that she had asked the DeVoses if they wanted her to "figure out a way" to get the case "back on track." She had another attorney present at the meeting to corroborate that there would be little to gain from doing so. Respondent, thus, failed to keep the DeVoses reasonably informed

about the status of their matter and failed to explain the matter to them, at a meaningful time, to permit them to make informed decisions about the representation, violations of RPC 1.4(b) and (c). She also misled the DeVoses, with her June 6, 2009 letter, that she would file an opposition to the summary judgment motion, conduct that we deem to be an aggravating factor.

Contrary to the DEC, we find that there is also clear and convincing evidence that respondent engaged in gross neglect. Respondent's failure to oppose the summary judgment motion precluded the DeVoses from pursuing their claim. Their disillusionment was clear – they learned how their son had died and, in the end, just wanted closure. The record is replete with respondent's failure to properly pursue the case, even though, initially, she performed some services on the DeVoses' behalf. As time progressed, however, she did less and less, until the case was dismissed, without her objection.

Specifically, she was retained on August 28, 2006 and filed the complaint on September 22, 2006. After receiving a February 10, 2007 dismissal notice for failure to prosecute, she served the complaint on April 2, 2007. In the last week of July 2007, respondent secured Savoy's assistance. Savoy withdrew from the case on July 31, 2007.

Although respondent attended the plaintiffs' depositions, she did not depose any defendants, witnesses, or third parties; she did not seek the production of documents; she did not amend the complaint to add the names of the defendants, even though she had obtained that information; she did not retain experts, even though the DeVoses believed that she had done so; she did not obtain experts' reports; and she did not file an affidavit of merit. Most egregiously, she failed to oppose the motion for summary judgment and failed to appear on the return date of the motion. After the case was dismissed, she met with the DeVoses, purportedly to ascertain whether they wanted her to reopen the matter. It appears, however, that the true purpose of the meeting was to convince them that their case was not worth pursuing. Respondent should have conveyed that information, if true, much earlier in the representation.

Although respondent claimed that she had informed the DeVoses, early on, that it would cost approximately $50,000 to pursue the case, she made no effort to obtain funding to do so after July 13, 2007. Instead of using the $12,500 to pay for an expert, which the DeVoses believed she had done, she used the bulk of the funds for herself and to keep her law office running. She used only $232 of the $12,500 for the benefit of her clients.

Moreover, respondent never informed the DeVoses that she was not equipped to handle the case financially and lacked the relevant experience to pursue it. She should have moved to be relieved as counsel, after she preserved their claims from the statute of limitations and definitely after the case had been removed to federal court, where she admittedly had little or no experience.

We dismiss, however, the charged violation of RPC 1.1(b) (pattern of neglect). To find a pattern of neglect, at least three instances of neglect are required. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16).

There are a number of aggravating factors to consider and to balance against respondent's otherwise untarnished disciplinary record of thirty-two years.

Respondent took advantage of vulnerable clients who had tragically lost their son. Initially, the DeVoses retained the Hunt firm. After that firm acquired a more lucrative client, Essex County, the firm withdrew because of a conflict of interest. Shaken in their trust of attorneys, the DeVoses turned to respondent, whom they knew and trusted. Their children had played together, when they all lived in the same neighborhood. Once again, however, the DeVoses' trust and confidence in the legal system was shattered. Respondent misled them, for many

years, that their case was worth pursuing and that she was capable of pursuing it. In addition, rather than spending the DeVoses' funds to advance their claim, as they believed she had, she used the funds to pay for own expenses. We find disingenuous respondent's claim of a reasonable belief that she had the discretion to use the funds as she saw fit. The DEC found her testimony not to be credible.

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b) and (c), aggravated by her improper use of the DeVoses' funds; the misrepresentation, in her June 6, 2009 letter to the DeVoses, that she would oppose the summary judgment motion; her failure to inform the DeVoses that she had no experience in the field and, later, to withdraw from the case; and her failure to return any funds to the DeVoses.

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history. See, e.g., In the Matter of Robert A. Ungvary, DRB 13-099 (September 30, 2013) (admonition for attorney who, in a civil rights action, permitted the complaint to be dismissed for

failure to comply with discovery, then failed to timely prosecute an appeal, resulting in the appeal's dismissal; the attorney also failed to inform the client of his decision not to pursue the appeal or of the appeal's dismissal); In the Matter of James E. Young, DRB 12-362 (March 28, 2013) (admonition imposed on attorney who failed to file any pleadings in a workers' compensation claim and failed to appear at court-ordered hearings, resulting in the petition's dismissal with prejudice for lack of prosecution; for the next five or six years, the attorney failed to advise the client of the dismissal and failed to reply to the client's repeated requests for information; the attorney later paid the client the amount he estimated the claim was worth ($8,500)); In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (admonition for attorney who filed an appearance in his client's federal civil rights action and chancery foreclosure matter; was unable to demonstrate what work he had done on behalf of his client, who had paid him $10,000; failed to communicate with his client; and failed to reply to the disciplinary investigator's requests for information about the grievance); In re Uffelman, 200 N.J. 260 (2009) (reprimand for attorney who was guilty of gross neglect, lack of diligence, and failure to communicate with a client; although the attorney had no disciplinary record, the reprimand

was premised on the extensive harm caused to the client, who was forced to shut down his business for three months because of the attorney's failure to represent the client's interests diligently and responsibly); In re Aranguren, 172 N.J. 236 (2002) (reprimand for attorney who failed to act with diligence in a bankruptcy matter, failed to communicate with the client, and failed to memorialize the basis of the fee; prior admonition and six-month suspension); In re Zeitler, 165 N.J. 503 (2000) (reprimand for attorney guilty of lack of diligence and failure to communicate with clients; extensive ethics history); In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with the clients in two matters; in one of the matters, the attorney also failed to return the file to the client; prior reprimand); and In re Wildstein, 138 N.J. 48 (1994) (reprimand for misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients).

Because (1) respondent's conduct bordered on reckless; (2) after bringing Savoy into the case, she tried to maintain control of it, despite her lack of familiarity with federal practice; (3) she showed no remorse for her conduct; (4) she showed no compassion for her vulnerable clients and, in fact, took advantage of them financially; (5) she let her clients

down, despite their prior personal relationship and after their case had already been "dropped" by another lawyer; (6) her conduct towards the DeVoses was deceitful, in that she knew that she was not competent or equipped to handle their case and failed to reveal that information to them; and (7) she misled them about the progress of their case, we find that a censure is warranted, despite respondent's clean disciplinary record.

We further determine to require respondent to refund $12,268 to the DeVoses ($12,500 less the $232 actually spent on their case), within thirty days of the date of the Court order.

Vice-Chair Baugh recused herself.

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
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Connie McGhee
Docket No. DRB 14-219

Argued: October 16, 2014

Decided: January 15, 2015

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Recused	Did not participate
Frost			X			
Baugh					X	
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera			X			
Singer			X			
Yamner			X			
Zmirich			X			
Total:			8		1	

Ellen A. Brodsky
Chief Counsel