SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-315
District Docket No. XI-06-021E

IN THE MATTER OF	:
MICHAEL K. MULLEN	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 17, 2008

Decided: March 4, 2008

A. William Sala, Jr. appeared on behalf of the District XI Ethics Committee.

Robyn M. Hill appeared on behalf of respondent.

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

This matter came before us on a recommendation for a three-month suspension filed by the District XI Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of

the matters), and RPC 1.5(b) (failure to provide client with a writing setting forth the basis or rate of the fee), which charge the presenter dismissed at the hearing. The remaining charges stem from respondent's representation of Paul Adamoff and his company, Airtron Technology, in approximately forty-three collection matters, ranging in value from several hundred dollars to about $35,000. We determine to reprimand respondent.

We first address a topic of a procedural nature.

At the DEC hearing, respondent, through his former counsel, announced his intention not to contest the allegations of the complaint. Prior to oral argument before us, respondent retained new counsel, Robyn Hill. New counsel then filed a motion to supplement the record with numerous documents that, counsel argued, established that the only proven violation in this case was respondent's failure to timely turn over the files to the client's new lawyer. Counsel contended that an admonition is the proper level of discipline for that infraction. In the alternative, counsel urged us to remand the case to the DEC for a new investigation.

The presenter did not reply to the motion and, apparently did not oppose it, although he argued before us that the three-month suspension recommended by the DEC was too lenient and that a one-year suspension was warranted, together with a five-year proctorship.

Following a review of the motion, supplemented by oral argument, we determined to deny it. Our de novo, independent review of the record persuades us that, despite respondent's prior decision not to contest the charges, there is clear and convincing evidence that respondent acted improperly in only two of the cases. Therefore, we find no compelling reason to remand this case to the DEC for a new investigation, as requested by new counsel.

Respondent was admitted to the New Jersey bar in 1982. He is a partner in the firm of Schenck, Price, Smith & King in Morristown, New Jersey.

In 1999, respondent was admonished for lack of diligence and failure to communicate in an estate matter. He permitted his grandmother's estate to languish for a period of one and one-half years and failed to comply with a beneficiary's numerous efforts to obtain information about the status of the matter. In re Mullen, 158 N.J. 20 (1999).

In this case, the presenter did not examine any witnesses at the DEC hearing, asserting, "My opening statement will be my case." He then proceeded to either read into the record or to identify the contents of numerous exhibits, consisting of (1) several emails from Adamoff to respondent, complaining about what Adamoff termed "an ongoing problem" with adequate communication from respondent, including the cancellation of several meetings

(Exhibits P1A, P1B, P1C, and P1D); (2) a September 29, 2005 letter from Adamoff to respondent, stating that he had retained new counsel (Andrew Borg), that he believed that the statute of limitations had run on all of his collection claims, and that he had not received an update from respondent in four years (Exhibit P1F); (3) Borg's letters to respondent, sent between August 3, 2005 and July 24, 2006, requesting the return of all the files in respondent's possession and an update on the status of each matter (Exhibits P1E, P1G, P1H, and P1I); (4) a letter from respondent to Borg, dated July 17, 2006, presumably the date that respondent turned over the files to Borg (Exhibit P1J); and (5) a summary of forty-three collection cases, prepared by respondent [1] (Exhibit P2).[2]

At the DEC hearing, the presenter selected two of the cases listed in respondent's summary as illustrative of respondent's conduct: Mall at Galaxy, Inc. (Galaxy) and Bartlett Dairy, Inc.

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[1] The precise number of collection cases at issue is unknown. The complaint referred to fifty or more cases, without identifying the problematic ones; elsewhere in the record, there are references to forty-nine cases; and respondent's summary lists forty-three.

[2] This decision neither identifies one final exhibit (P3) nor details its contents because of the confidentiality conferred on its subject matter by the Court Rules (R. 1:20-9). We have not considered that exhibit or the presenter's references to that confidential subject matter, which references are deemed stricken from the record.

(Bartlett), which allegedly involved claims of $17,915.26 and $620, respectively.

The Galaxy entry on respondent's summary states:

> Mall at Galaxy, Inc. – Preparation of demand letters; phone conferences with representatives of customer; preparation of draft complaint; letter dated Feb. 12, 2002 from Mr. Mullen to client regarding status of case and contact with customer; letter from Mr. Mullen to customer dated 2/13/02 with copy to Airtron; letter to [sic] from Mr. Mullen to Airtron dated 2/15/02 regarding status; at least two or three telephone calls between Mr. Mullen and customer in which Mr. Mullen prevailed upon the customer to respond to Airtron's claim.
>
> [Ex.P2¶1.]

According to the presenter, respondent did no further work on this claim (presumably, after February 15, 2002).

As to the Bartlett case, the entry on respondent's summary states: "Preparation of demand letters; phone conferences with representatives of customer; preparation of draft complaint." The presenter told the DEC, however, that, despite the above indication of some work performed in the case, he had found no documents in the Bartlett file. The presenter concluded, "Obviously, nothing has been done on that matter." He then added:

> It's obvious to me that these cases, these 43 cases, none of them have been brought to completion, and these are the 43 cases which are the subject of another lawsuit, but these

are the ones which the statute of limitations ran [sic].

[T16-25 to T17-5.][3]

The foregoing was the sum total of the presenter's case. He concluded by saying, "[RPC] 1.1, 1.3, 1.4, I believe I presented a considerable amount of evidence and legal basis for the board [sic] to find, if they so choose, that the Respondent violated those three RPC's."

At the hearing, respondent did not contest the allegations of the complaint, charging that, "except possibly a few times on a few of the fifty matters, [respondent] did not keep [Adamoff] reasonably informed about the status of the matters;" that "by not resolving the Statute of Limitations problems and not responding promptly to [Adamoff's] new attorney, [respondent] did not act with reasonable diligence;" that respondent did not comply with Borg's requests for the transfer of the files until almost a year later; and that "[r]espondent's conduct in this matter when combined with other acts of negligence and considering the cumulative nature of his present and past conduct demonstrates a pattern of neglect." The complaint charged that the above conduct violated RPC 1.4(b), RPC 1.3, and RPC 1.1(b), respectively. The complaint did not charge respondent with having violated RPC 1.16(d) (failure to protect

[3] T refers to the transcript of the DEC hearing on May 26, 2007.

client's interests upon termination of the representation – in this instance, failure to promptly return the files).

In his answer, respondent denied all but one of the allegations. He admitted that the files had not been promptly turned over to Borg, explaining that he had instructed his secretary to do so well before August 2006 and that, "unfortunately, the files were not sent at that time, although Respondent was under the mistaken impression that they were."

At the hearing, respondent expanded on his failure to promptly comply with Adamoff's requests for his files:

> So when [Adamoff] began to ask for his files back, my response in terms of I'm hiding or I don't want to give the files back. My response each time was to try to create more time to make progress on these various files with them.
>
> It's not a great answer. I'll admit that. But that's the honest truth. I wasn't trying to jam him up. I wasn't trying to hurt anybody. I wasn't trying to ignore anything, but I had a friendship with this gentleman, and I felt that I needed to make the effort based upon a friendship with him to see if I could make progress on it.
>
> [T33-14 to T34-3.]

As to the charge of lack of communication with Adamoff, respondent asserted in his answer that, "on numerous occasions during the course of his representation he had phone

conversations with [Adamoff], wrote to [Adamoff] and met with [Adamoff] at which times he advised [Adamoff] of the status of the collection matters." Respondent denied that he had failed to keep Adamoff reasonably informed about the status of the matters.

The answer also denied the charged violation of RPC 1.3, asserting that respondent "did act with reasonable diligence consistent with his agreement with [Adamoff]."

Respondent maintained, in his answer, that the scope of his representation in these matters was quite limited. He claimed that he had agreed to

> make reasonable efforts, short of filing formal Complaints, to recover money for [Adamoff] on particular accounts. These efforts did not include the filing of formal Complaints inasmuch as there were numerous problems regarding collecting on these accounts, including but not limited to the lack of documentation of the amount owed, disputes between [Adamoff's company] and its customers as to the exact amount owed, the exact nature of the agreements between [the company] and its customers, statute of limitations problems and, in many cases, the fact that a number of [the] customers had either gone out of business, moved, or were in poor financial condition.
>
> Accordingly, Respondent fulfilled his responsibilities pursuant to the agreement he had with [Adamoff] by taking the actions he took on each account.
>
> [A4.][4]

[4] A refers to respondent's answer to the formal ethics complaint.

Respondent appended to his answer a copy of his December 28, 1999 letter to Adamoff, which set forth the basis for respondent's fee and the services he had agreed to provide on Adamoff's collection matters. That letter states, in relevant part:

> Attached please find a summary sheet which we have prepared which relates to the various matters which you have forwarded to us for review.[5]
>
> As you will note, in some instances, we are uncertain as to the specific service and billing date. Such a date is important because the statute of limitations for actions which are essentially contract actions is six years. For instance, item number 3, is a lost cause as the billing and service date took place some time in 1991. We need, then, for Airtron to develop more specific billing/service dates for [eight matters].
>
> There are a number of matters which we think Airtron would be best served by simply sending a demand letter attached to which would be a proposed Complaint. If there is no answer to the demand letter, a second demand letter would be issued. In any matter, however, where the amount in controversy is $3,500 or less, we would not recommend the filing of a lawsuit because the legal costs . . . might very well outweigh the ultimate recovery. [Respondent listed thirty-three such claims.]
>
> The hope, of course, is that the demand letters noted above will generate settlement/payment discussions and activity.

[5] This summary sheet is the document that the presenter introduced into evidence as Exhibit P2, listing as forty-three the number of collection matters entrusted to respondent.

> [Five or six matters appeared to have bankruptcy implications. In one, respondent noted that they would have to determine whether there was any value in pursuing the claim.]
>
> . . . .
>
> We have noted in a number of instances where we would require some additional information from your company in order to better assess the possibility of collection.
>
> As I have mentioned to you, our firm really would not be interested in handling any of the matters noted in the summary document on a contingent fee basis. . . . Nonetheless, because I have grown so fond of you, I think we can work together to develop a cost-effective way to handle these cases.
>
> [Respondent discussed, among other cost-saving measures, using initial form demand and second demand letters and complaints and using an associate at a lower billing rate.]
>
> [Exhibit to Answer.]

As mentioned above, despite respondent's denials in his answer, at the DEC hearing his attorney informed the hearing panel that they were not "contesting the allegations." Presumably by way of either explanation or mitigation, however, respondent testified that some of the cases had problems from the outset:

> A number of [the] claims were problematic. What I did is when I received these files from Paul [Adamoff], and I received them not in dribs and drabs but in bunches, I would

> review the file in order to determine what was going on, if anything. Many of the cases which we did receive were matters, which we did look at, [that] had already expired as a result of the statute of limitations. Sometimes it was people simply not paying the bill. Sometimes there was dissatisfaction with the services rendered by [the company]. There were other disputes which went to the amount of the bill . . . . And then there were a series of cases where the defendants, if you will, would claim either they were not customers of [the company] or that services were not rendered . . . .
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> [T30-18 to T31-14.]

Respondent's certification in support of his motion to supplement the record, too, detailed problems with many of the cases, including that the only information provided to him was a copy of the company's invoice. The certification also stated that Adamoff "knew from the beginning that we were attempting to bluff the customer into paying the Airtron bill, and that even though we might send a draft complaint with our letter, we had no intention of filing suit in most of the matters."

Asked by his then-counsel if, nevertheless, he agreed that his handling of the matters resulted in ethics violations, respondent replied, "I absolutely do." He added, however, that his firm had done a lot of work on these files. Respondent testified:

> I do not recall the Bartlett Dairy file, but what we would do is we would take each one of these matters, and we would generate one to, mostly, two to three, separate demand letters directed to the various customers . . . .
>
> So I absolutely admit that I did not fully discharge my obligations. I'm not doubting that. I'm not questioning that at all. However, I am sensitive to the fact that it sounds as if I did nothing on these files, and that couldn't be further from the truth.
>
> [T32-2 to 14.]

At the DEC hearing, respondent expressed regret for his "failings":

> All this sounds sort of canned. . . . I take these things very seriously. Being a lawyer is important, very important, to me. Taking care of clients is very important to me. It's heart wrenching to have my partners come [h]ere and support me like this. It's heart wrenching for me to disappoint anyone. I made a strong effort, and I didn't carry that effort all the way through.
>
> [T34-7 to T34-15.]

Once respondent began getting emails from Adamoff, he did not discuss them with, or seek the advice from, other partners. He conceded that he should have. He explained that he has "a tendency to put it all on [himself]," but that in the last several years he has "done a lot better" delegating tasks to others.

In his certification in support of his motion to supplement the record, respondent asserted that, although at the DEC hearing he had admitted violating the Rules of Professional Conduct, he had never admitted violations in all of the matters. He explained that the reason for his admissions was his embarrassment over the ethics charges.

The only admission that respondent did not challenge in his motion concerned his failure to promptly turn over Adamoff's files. He pointed out that, although this conduct could be viewed as a failure to act with reasonable diligence and promptness, as charged in the complaint, RPC 1.16(d) (upon termination of representation, attorney must surrender papers and property to which the client is entitled) is the more applicable rule. For this violation, respondent argued, he deserves only an admonition.

By way of mitigation, respondent explained that, during the time he was representing Adamoff, he was "spread thin." He was going through a divorce, which had become final in early 2002. Because of his wife's personal issues, he had become the primary caretaker of his three active children. He had also cared for his mother, who had suffered from cancer and early Alzheimer's disease.

In addition, he had been "intensely" involved in his firm's management and had participated in other non-firm related

activities. For more than twelve years, he would spend ten to twelve hours per week involved with his firm's management committee. He had also headed his firm's attorney recruitment program and the orientation and integration of newly-hired attorneys into the firm, which, during the height of the recruiting season, was very time-consuming.

By way of further mitigation, respondent stated that he was active in his local bar association in various capacities and in the New Jersey Law Firm Group, which provides mentoring, education and placement services to minority law students in New Jersey. He was also involved in charitable organizations, including his high school's alumni-related events, the New Community Foundation to "reinvigorate [a] portion of Newark", the Morris County chapter of the American Cancer Society, and his church parish.

Dr. Sharon Ryan Montgomery, a forensic clinical psychologist, testified that she had interviewed respondent on two occasions, April 22 and 30, 2007, and had administered "a battery of psychological personality" tests. The testing did not show any psychopathology. She added that respondent is "not schizophrenic, doesn't have a thought disorder. No real depression or mood disorders, bipolar. No sociopathy . . . . He certainly does know right from wrong and has a conscience . . . ."

According to Dr. Montgomery, respondent had a large number of stressors in his life and, as the "first born child," is an overachiever, always trying to please others. She stated that he is an "overfunctioner in life, and had difficulty setting limits and boundaries with people. He had a hard time saying no to people and became overextended."

Dr. Montgomery viewed respondent's resignation from his firm's management and recruitment committees as a positive step to help make his life more manageable, particularly because of his extensive responsibilities with his children.

Respondent produced a number of character witnesses with whom he worked. His secretary, Elizabeth Karet, testified that she has known him for approximately twenty years. She described him as a warm and giving person, to whom the firm's employees would go for guidance with their work.

Gilbert Leeds, respondent's friend and a partner at the firm concurred with Karet's assessment of respondent, stating that he was the "Godfather" to young associates or summer clerks. According to Leeds, respondent works extremely long days and spends an extraordinary amount of time taking care of his children.

Sheila O'Halloran, also a partner at the firm, testified that respondent is very smart and "very, very devoted to his clients as he is to the world." He is the first person anyone

goes to with a problem and is a tremendous asset to the firm. She added that respondent practices law in a compassionate, nonjudgmental, respectful way.

Edward Ahart, the managing partner at this firm of 120 employees, testified that respondent is one of the finest people he has ever met. According to Ahart, respondent spent approximately twenty-five percent of his time involved in management functions for the firm. He noted that the estate matter for which respondent had been earlier admonished involved a family matter, a dispute between his father and uncle. His uncle had filed the grievance against him.

Ahart mentioned that Adamoff is suing the law firm over the collection files. Ahart had a responsibility to deal with respondent's situation and determined that respondent's cases needed to be proctored – "another set of eyes and ears on the matters that he's currently handling because these kinds of things cannot happen." Ahart entered into an agreement with respondent, in which he would serve as his proctor. Ahart's goal was to ensure that no matters were lost or "fell through the cracks," that respondent developed good habits, and that no further problems emerged. Ahart was not aware of any other client complaints against respondent.

The DEC determined that the presenter had set forth a prima facie case. It found that respondent had violated RPC 1.1, RPC 1.1(b), and RPC 1.4(b). As noted earlier, the DEC recommended a three-month suspension.

Following a de novo review of the record, we find that the DEC's conclusion that respondent's conduct was unethical is supported by clear and convincing evidence. That evidence, however, is limited to the two cases that the presenter selected as representative of respondent's conduct in all of the matters.

Indeed, the presenter's case was confined to two of the files, Galaxy and Bartlett. We are left to wonder what other cases respondent allegedly mishandled and what precisely he did not do that he should have done. The record does not tell us. We do not even know the exact number of matters under scrutiny. All we know with certainty is that respondent accepted representation in at least forty-three cases and that only two of the files, Galaxy and Bartlett, were identified as having been mishandled by respondent. Because the burden of proving the totality of the charges by clear and convincing evidence has not been discharged in this case, we must dismiss all the allegations but those relating to the Galaxy and Bartlett files. Only those two cases were the subject of the "examination" that took place at the DEC hearing.

The unusual method of presentation of the charges aside, respondent himself testified that, although he had performed some or even considerable work in the appropriate cases, he had not "fully discharge[d] [his] obligations;" he had "made a strong effort" to advance the progress of the cases, but had not "carr[ied] that effort all the way through."

Simply stated, we need not canvass this sparse record to determine the sufficiency or insufficiency of respondent's work. As it stands, the record does not demonstrate to a clear and convincing standard that respondent lacked diligence in handling cases other than Galaxy and Bartlett. The presenter's identification of these two cases by name, the client's several expressions of disenchantment with respondent's attention to the matters, and, more significantly, respondent's acknowledgement that he could have done more amply support a finding that respondent lacked diligence in managing those two cases.

We have no difficulty in finding, also, that respondent did not always adequately communicate with Adamoff. The record is replete with complaints from Adamoff that communication with or from respondent was an "ongoing problem," including respondent's cancellation of several appointments. At the DEC hearing, respondent did not address those allegations, offering no excuses or defenses. We find, thus, that respondent violated RPC

1.4(b), but, again, only as to the two cases brought out at the DEC hearing, Galaxy and Bartlett.

Finally, it is undisputed that respondent did not promptly comply with Adamoff's and/or Borg's requests for the return of the files. Respondent does not deny that violation.

We are aware that the complaint did not specifically cite the applicable rule, RPC 1.16(d), but RPC 1.3 (lack of diligence) instead. Nevertheless, the facts recited in the complaint gave respondent sufficient notice that he was being charged with failure to promptly return the files; respondent admitted the violation and continues to so admit; and respondent's new counsel acknowledged that the appropriate rule is RPC 1.16(d). Consequently, there will be no due process violations in not strictly adhering to the language of R. 1:20-4(b) in this instance.

We dismiss the charged violation of RPC 1.1(b), inasmuch as at least three instances of neglect are required for a finding of a pattern of neglect. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). Respondent neither neglected the present cases nor was found guilty of neglect in the matter that led to his 1999 admonition.

Ordinarily, lack of diligence, failure to communicate with the client, and failure to promptly return files result in an

admonition. See, e.g., In the Matter of Bernard I. Weinstein, DRB 02-209 (July 22, 2002) (attorney did not return two files to the client's new attorney and failed to keep the client apprised of the progress of the cases); In the Matter of Gary A. Kay, DRB 00-382 (February 15, 2001) (failure to return collection files to client's new attorney and failure to communicate with the client); In the Matter of Howard M. Dorian, DRB 95-216 (August 1, 1995) (attorney did not inform his client that her case had been mistakenly dismissed as settled, took no action to restore it, did not reply to her inquiries about the matter, failed to withdraw as counsel, and delayed the return of her file for almost five months; the attorney also failed to cooperate with the investigation of the grievance); and In the Matter of Richard J. Carroll, DRB 95-017 (June 26, 1995) (attorney lacked diligence in handling a personal injury action, failed to properly communicate with the client, and failed to comply with the new lawyer's numerous requests for the return of the file; the attorney also failed to reply to the grievance).

If the attorney has been disciplined before, a reprimand generally results. See, e.g., In re Garbin, 182 N.J. 432 (2005) (attorney failed to send her client a copy of a motion to enforce litigant's rights filed in his divorce action and failed to inform him of the filing of the motion, which proceeded

unopposed; the court then found her client in violation of the final judgment of divorce; the attorney also failed to return the file to either her client or new counsel; prior admonition) and 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).

For respondent's infractions in this matter and his demonstrated failure to learn from prior mistakes -- his 1999 admonition also stemmed from lack of diligence and lack of communication -- we determine that a reprimand is the appropriate sanction.

Chair O'Shaughnessy and members Lolla, Neuwirth and Baugh did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Vice-Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael K. Mullen
Docket No. DRB 07-315

Argued: January 17, 2008

Decided: March 4, 2008

Disposition: Reprimand

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy						X
Pashman				X		
Baugh						X
Boylan				X		
Frost				X		
Lolla						X
Neuwirth						X
Stanton				X		
Wissinger				X		
Total:				5		4

Julianne K. DeCore
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Chief Counsel