

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 07-043 and DRB 07-105
District Docket Nos. VC-05-014E, VC-05-024E, VC-05-025E, VC-05-026E, VC-05-054E, and VC-05-032E

IN THE MATTER OF
JEFFRY F. NIELSEN
AN ATTORNEY AT LAW

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Decision

Argued: May 10, 2007

Decided: June 21, 2007

Kathleen Campi appeared on behalf of the District VC Ethics Committee.

Gerald Miller appeared on behalf of respondent.

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

These matters were before us on a recommendation for discipline filed by the District VC Ethics Committee ("DEC") and on a disciplinary stipulation between respondent and the DEC.¹

¹ On both parties' motion, the matters were consolidated for purposes of discipline.

In DRB 07-043, all five counts of the complaint charged respondent with violating RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence, mistakenly cited throughout the record as RPC 1.5), RPC 1.4 (failure to communicate with clients), RPC 1.15 (failure to safeguard client funds), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Counts one, three, and four also charged violations of RPC 1.5(b) (failure to communicate the basis or rate of a fee in writing), and counts two and five also charged violations of RPC 7.1 (making false and misleading statements about the lawyer or his services). Respondent and the presenter entered into a stipulation of facts, wherein respondent admitted all of the violations charged in the complaint, with the exception of RPC 1.15 and RPC 8.4(c).

In the stipulation under DRB 07-105, respondent admitted that, in one matter, he violated RPC 1.3 (lack of diligence, mistakenly cited throughout the record as RPC 1.5) and RPC 1.4 (failure to communicate with the client).

In DRB 07-043, the hearing panel recommended that respondent be suspended for three years. In DRB 07-105, there is no recommendation for discipline. We determine to impose a six-month suspension for the totality of respondent's conduct.

Respondent was admitted to the New Jersey bar in 1990. In April 2001, he received a reprimand, in a default matter, for gross neglect, lack of diligence, and failure to communicate with the client in one matter, and lack of diligence, and failure to communicate with the client in a second matter. In re Nielsen, 167 N.J. 54 (2001).

In a series of five client matters, respondent received a second reprimand, in June 2004, for gross neglect in two matters, and a pattern of neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities in all five matters. In re Nielsen, 180 N.J. 301 (2004).

According to the report of the New Jersey Lawyers' Fund for Client Protection, respondent has been retired from the practice of law since 2005.

DOCKET NO. DRB 07-043

Count One - The Nunez Matter (District Docket No. VC-04-054E)

In July 2003, Joann Nunez paid respondent \$1,750 to represent her brother, Johnny Nunez, who was incarcerated and had pending criminal charges against him. Respondent, who had

not previously represented Johnny, failed to provide a written "legal services agreement."²

Respondent promised Joann that he would visit her brother in prison. However, respondent performed no work on the Nunez case and had no further communication with either Joann or Johnny. He also failed to return numerous telephone calls, and ignored written and faxed correspondence about Johnny.

Furthermore, respondent failed to return any of the fee that Joann had paid, despite a promise to the ethics presenter that he would do so. In November 2006, after respondent executed the stipulation of facts, his counsel refunded the money to Joann.

Finally, respondent failed to file a written reply to the grievance.³

Respondent stipulated that he violated RPC 1.1(b), RPC 1.3, RPC 1.4, RPC 1.5(b), and RPC 8.1(b).

² The record mentions the terms "legal services agreement" and "retainer agreement." Presumably, they refer to a written statement of the basis or rate of respondent's fee.

³ The hearing panel report and the stipulation state that respondent failed to reply to "the complaint." However, since exhibit B is respondent's answer to the formal ethics complaint, "the complaint" is presumably the grievance.

Count Two - The Valente Matter (District Docket No. VC-05-014E)

In April 2003, Laurie Valente paid respondent \$5,000 to represent her fiancé, August Stadtler, by filing a motion for reconsideration of his criminal sentence. Respondent gave Valente a handwritten "legal agreement."

Respondent met with Stadtler, who was incarcerated, and spoke with Valente ten-to-twenty times within days of being retained. Respondent determined that the time for filing a motion for reconsideration had expired before Valente had retained him. The record is silent as to whether respondent performed any other work for Stadtler.

In May 2004, a fee arbitration committee directed respondent to return the \$5,000 fee within thirty days of its determination. Respondent did not comply with that directive until December 2004. Furthermore, he failed to reply, in writing, to the grievance.

Respondent stipulated that he violated RPC 1.1(b), RPC 1.3, RPC 1.4, RPC 7.1, and RPC 8.1(b).

Count Three - The Roman Matter (District Docket No. VC-05-24E)

In September 2003, Pablo Roman, Jr. paid respondent \$5,000 to represent his brother, Jaime Roman, in a criminal matter.

Although respondent had not previously represented Jaime, he did not provide him with a written "legal services agreement."

Respondent met with Jaime, who was incarcerated, on one occasion, but did not enter an appearance and did no further work on the case. Respondent ignored numerous telephone calls from Pablo and had no further communication with the Romans.

In September 2004, a fee arbitration committee directed respondent to refund the \$5,000 fee within thirty days. Respondent failed to comply with that determination until November 2006. Following his execution of the stipulation, his counsel refunded the money to Pablo.

Respondent submitted a reply to the ethics grievance, albeit three months after he was notified of its filing.

Respondent stipulated that he violated RPC 1.1(b), RPC 1.3, RPC 1.4, RPC 1.5(b), and RPC 8.1(b).

Count Four - The Santos Matter (District Docket No. VC-05-026E)

In January 2003, Joaquim Santos paid respondent \$10,000 to represent Fernando Poulsen in a criminal matter. Respondent alone signed the handwritten "legal services agreement."

Respondent met with Poulsen four times while he was incarcerated. Respondent appeared in a New York court on Poulsen's behalf and prepared, but never filed, a motion to be

admitted pro hac vice. Following the initial court appearance, Santos advised respondent that Poulsen had hired another attorney.

Respondent failed to return telephone calls from Santos. Furthermore, he failed to return the \$10,000 fee, despite an October 2004 order from the fee arbitration committee, directing him to do so within thirty days. In November 2006, after respondent executed the stipulation in the present matter, his counsel refunded the fee to Santos.

Respondent did not reply to Santos' grievance, in writing, until three months after he was notified of its filing.

Respondent stipulated that he violated RPC 1.1(b), RPC 1.3, RPC 1.4, RPC 1.5(b), and RPC 8.1(b).

Count Five - The Barzey Matter (District Docket No. VC-05-025E)

In June 2002, Delma McDonald paid respondent \$2,500 to represent her son, DeShawn Barzey, in a municipal court matter. Respondent prepared a handwritten "retainer agreement," which only Barzey signed.

The \$2,500 was a partial payment. Barzey's family refused to pay the remainder of the fee, when requested by respondent. Although respondent filed a written appearance with the municipal court, he failed to appear on the hearing date and

failed to return McDonald's phone calls.⁴ The record does not reveal if respondent's derelictions were due to Barzey's failure to pay the quoted fee.

Barzey hired another attorney, who was able to have the charges dismissed.

In September 2004, a fee arbitration committee directed respondent to return the \$2,500 to Barzey within thirty days. Although as of the date of the hearing panel report, the necessary funds were still in respondent's counsel's trust account because Barzey could not be located, respondent's counsel represented to us, at oral argument, that all clients have been paid.

Respondent did not provide a written reply to the grievance until three months after he had been made aware of its filing.

Respondent stipulated that he violated RPC 1.1(b), RPC 1.3, RPC 1.4, RPC 7.1, and RPC 8.1(b).

In mitigation, the parties stipulated that "there came a time when Respondent's practice took an extreme downturn as a result of Respondent's mismanagement and stress overload from running Respondent's own law practice, trying his best to be a

⁴ According to the stipulation, "Ms. McDonald made numerous telephone calls to Respondent and left messages but respondent did not return all of her calls" (emphasis added). That language suggests that respondent returned some of her calls.

good dad and husband and providing for his family financially." During this time, respondent and his wife, who have seven children, were experiencing marital difficulties and his wife had become ill. These problems negatively affected respondent's law practice. In addition, respondent was evicted from his law office for failure to pay the rent. For a time, respondent turned to alcohol "to escape from stress." He has not consumed alcohol for nearly three years prior to the date of the stipulation. Also, he has not practiced law for over three years prior to the date of the stipulation. He is employed outside the legal field.

As noted above, all of the clients involved in this matter have received the funds owed them. Respondent was forced to sell his family residence to obtain sufficient funds for that purpose.

Respondent expressed remorse for the problems he caused his former clients and his family.

The DEC determined that, as stipulated, respondent violated RPC 1.1(b), RPC 1.3, RPC 1.4, and RPC 8.1(b) in all five counts, in addition to RPC 1.5(b) in counts one, three, and four, and RPC 7.1 in counts two and five. The hearing panel report does not mention RPC 1.15 and RPC 8.4(c), the violations that respondent denied.

The DEC found respondent's mitigating factors "not compelling." Based on the stipulated facts and respondent's ethics history, the DEC recommended a three-year suspension and, on reinstatement, supervision by a proctor.

DOCKET NO. DRB 07-105

In July 2003, Suzie Collin contacted respondent about an employment matter regarding her nursing license.⁵ In August 2003, Collin formally retained respondent, paying him \$3,000 of his \$4,500 fee. After respondent accepted the \$3,000, he made two telephone calls in Collin's behalf, but performed no further work in the matter. He also failed to return her calls.

In September 2003, as a result of respondent's failure to take additional action in Collin's behalf and failure to communicate with her, she retained another attorney.

In December 2003, Collin filed a request for fee arbitration, seeking the return of her \$3,000 fee. In September 2004, the fee arbitration committee directed respondent to return the full \$3,000. He did so in December 2004.

⁵ The stipulation states: "On or about July 18, 2003, the Respondent transmitted to the Respondent via FAX transmission a document related to the case. The Respondent and Grievant also discussed the matter on the telephone." It is unclear who sent a fax to whom and how many phone calls took place.

Respondent stipulated that he violated RPC 1.3 and RPC 1.4.

Following a de novo review of the record, we are satisfied that the record clearly and convincingly establishes that respondent's conduct was unethical.

In DRB 07-043, the stipulation of facts states that "[t]he allegations set forth in this Complaint could have been encompassed in the Ethics Complaint previously made and should have been part of the punishment imposed because they occurred during the same period and are part of the same pattern of neglect set forth in that Complaint." We cannot agree that these and the past matters combined would have led to the prior "punishment" imposed.

The misconduct in the cases that led to respondent's 2001 reprimand occurred in 1995 through 1997, well before the conduct at issue in the present cases. In turn, the misconduct that led to respondent's 2004 reprimand took place in 1999 through 2001. Thus, the reference to "Ethics Complaint previously made" must be to the 2004 matter. Here, the misconduct in the matters under both docket numbers occurred in 2002 and 2003. Thus, although the time of the representations is not the same, the representations here follow those for which respondent was disciplined in 2001 and 2004. However, had the present six matters been considered part of the record in respondent's 2004

encounter with the disciplinary system, the discipline imposed would have been more serious than a reprimand. Eleven client matters would have been at issue had all the cases been combined. We would likely have voted for a suspension. Thus, the stipulation in DRB 07-043 incorrectly assessed this case as one where, if all matters had been heard together, no greater discipline would have been imposed.

As to the specific violations in DRB 07-043, the DEC's conclusions are correct, with two exceptions. The first concerns the DEC's finding that respondent violated RPC 7.1 (misleading statements) in counts two and five. The record is unclear as to what conduct that charge refers. Presumably, the DEC's finding was based on respondent's representations about the work he would undertake for his clients and his ensuing failure to perform.

Although respondent stipulated that he violated RPC 7.1, we dismiss that charge. RPC 7.1 is typically charged in connection with violations of the advertising rules and is not applicable to these facts. If the complaint intended to allege that, when respondent accepted these clients' cases, he had no intent to perform the work for which he had been retained, the applicable rule would have been RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation). However, this record does

not suggest that respondent's intent was dishonest when he accepted the cases. It cannot, thus, sustain a finding of a violation of RPC 8.4(c). Compare In re Spagnoli, 115 N.J. 504 (1989) (attorney disbarred for, inter alia, accepting retainers from fourteen clients over three years without intending to act in their behalf; we found the attorney guilty of fraud).

The second questionable finding concerns the DEC's conclusion that respondent violated RPC 8.1(b) as to each of the five client matters. Clearly, respondent violated RPC 8.1(b) in Nunez and Valente, when he failed to reply to the grievances filed against him. However, in the remaining three matters, Roman, Santos and Barzey, respondent submitted a reply, albeit late. Thus, as to those three matters, respondent did not violate RPC 8.1(b).

Also, the complaint charged respondent with violating RPC 1.15 and RPC 8.4(c) in all five matters. Respondent denied violating those rules. The DEC made no finding in that regard. We, therefore, also dismiss the alleged violations of RPC 1.15 and RPC 8.4(c).

In sum, in DRB 07-043, we find respondent guilty of four instances of lack of diligence (Nunez, Roman, Santos and Barzey)⁶ five instances of failure to communicate with the client (Nunez, Valente, Roman, Santos, and Barzey), three instances of failure to provide a written retainer agreement (Nunez, Roman, and Santos), and two instances of failure to cooperate with disciplinary authorities (Nunez and Valente).

Respondent also admitted, and the DEC found, that he was guilty of a pattern of neglect in five matters, a violation of RPC 1.1(b). We agree with that finding. Although a single act of ordinary negligence does not constitute an ethics violation, when an attorney repeatedly demonstrates incompetence, that attorney violates RPC 1.1(b). See In re Rohan, 184 N.J. 287 (2005) (three-month suspension for, inter alia, a pattern of simple neglect).

In DRB 07-105, respondent admitted that he lacked diligence (RPC 1.3) and failed to communicate with his client (RPC 1.4). Those admissions are fully supported by the record. After accepting payment on his fee, respondent did nothing for Collin,

⁶ Although respondent stipulated a violation of RPC 1.3 in Valente, the stipulated facts do not clearly and convincingly support a finding in this regard.

other than to make two phone calls. He thereafter failed to return Collin's calls to him.

There are a number of aggravating factors present here. Respondent is not a newcomer to the disciplinary system. He has two prior reprimands. His 2001 reprimand was imposed prior to the misconduct in these matters. That should have put him on notice to change his ways. Instead, he repeated very similar conduct. Furthermore, although his 2004 reprimand was imposed after the current infractions had taken place, the formal ethics complaint was served on him in January 2003, before almost all of the misconduct in the present matters. Respondent was at least on notice, during the representation of these six clients, that his conduct in five earlier matters was under review and was questionable at best.

Also in aggravation, we considered the serious consequences that could have befallen respondent's clients because of his transgressions. These were criminal cases; one case involved a professional license. The clients' personal liberty and livelihood were at stake.

Moreover, thirteen clients were affected by respondent's infractions, when his four disciplinary matters are considered in concert – not an insignificant number. A strong message must be sent to him that conduct of this sort will not be tolerated.

We are mindful of, and sympathetic to, the mitigating factors respondent set out. He was clearly struggling to take care of his ill wife and his large family. However, he also had an obligation to his clients. If he knew that he was unable to serve his clients well, he had an obligation to withdraw from the representation. RPC 1.16(a)(2). This he failed to do.⁷

In light of the above aggravating factors, a term of suspension is warranted here. We find, however, that the three-year suspension recommended by the DEC is grossly excessive. The DEC did not support its conclusion with case law. Our own review of precedent shows that it does not support a three-year suspension. It is possible that the DEC based its recommendation on the fact that respondent repeated misconduct for which he had already been disciplined. However, even when that factor is taken into account, a three-year suspension is too severe a penalty.

Three-month suspensions were imposed in In re Bernstein, 144 N.J. 369 (1996) (gross neglect, lack of diligence, failure to communicate, misrepresentations, and failure to cooperate with disciplinary authorities); In re Ortopan, 143 N.J. 586

⁷ Under RPC 1.16(a)(2) respondent had an obligation to withdraw from the representation. Although he was not charged with violating this rule, we find his failure to withdraw an aggravating factor.

(1996) (lack of diligence, failure to communicate, failure to turn over a file, and failure to cooperate with disciplinary authorities); and In re Kates, 137 N.J. 102 (1994) (lack of diligence, failure to communicate, and extreme indifference towards the ethics system).

Respondent's ethics violations warrant more serious discipline than that imposed in Bernstein, Ortopan, and Kates. In Bernstein, only one client matter was involved and the attorney had previously received a private reprimand. Similarly, in Ortopan, only one client matter was involved and the attorney's ethics history consisted merely of a temporary suspension for failure to pay a fee arbitration award. Finally, in Kates, although the attorney displayed extreme indifference for the disciplinary system, only one client was involved. Here, respondent's actions exposed six clients to great risk. In addition, he has a disciplinary record, which Kates did not have.

At oral argument before us, respondent's counsel stated that respondent voluntarily absented himself from the practice of law. It is unclear if counsel was urging us to consider this as a mitigating factor or if he sought to have the time respondent did not practice law credited to any suspension to be imposed. Under In re Farr, 115 N.J. 231 (1989), however, "the

suspension must be imposed by order of the Court and not through the voluntarily action of the respondent." Id. at 238. Thus, we are unable to consider respondent's voluntary withdrawal from practice in determining the appropriate level of discipline.

In our view, the aggravating factors in this matter, specifically, respondent's disciplinary history and the number of client matters involved, warrant a six-month suspension. In addition, if respondent returns to the practice of law, he should be supervised by a proctor for a period of one year.

Member 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
William J. O'Shaughnessy, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

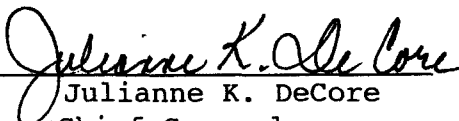
In the Matter of Jeffry F. Nielsen
Docket No. DRB 07-043 and DRB 07-105

Argued: May 10, 2007

Decided: June 21, 2007

Disposition: Six-month suspension

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


Julianne K. DeCore
Chief Counsel