SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-098
District Docket No. X-05-085E

IN THE MATTER OF :
:
RICHARD ROSENTHAL :
:
AN ATTORNEY AT LAW :

Decision

Argued: July 19, 2007

Decided: August 30, 2007

Peter Petrou appeared on behalf of the District X Ethics Committee.

Robert B. Cherry 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 X Ethics Committee (DEC). A single-count complaint charged respondent with gross neglect (RPC 1.1(a)), lack of diligence (RPC 1.3)), failure to communicate with the client (RPC 1.4(a)), failure to return the client's file on termination of the representation (RPC

1.16(d)), false and misleading communications (RPC 7.1(a)(1)), and misrepresentation (RPC 8.4(c)). The charges stemmed from respondent's representation of Eric Waldinger in connection with injuries suffered as a result of an automobile accident. We determine that respondent should be suspended for one year.

Respondent was admitted to the New Jersey bar in 1965. He has an extensive disciplinary record. In 1982, he was (publicly) reprimanded for failure to advise one client that her suit was about to be dismissed and failure to notify her when it was dismissed. In another matter, he did not file a bankruptcy petition and did not reply to the client's inquiries about the progress of the case. In re Rosenthal, 90 N.J. 12 (1982).

In 1990, respondent was suspended for one year for misconduct in three matters, including gross neglect, pattern of neglect, failure to communicate with clients, misrepresentations about the status of the cases, failure to refund a retainer, and failure to cooperate with disciplinary authorities. Aggravating and mitigating factors were, respectively, respondent's prior reprimand and his demonstrated psychological problems. Respondent's reinstatement was conditioned on proof of psychiatric fitness and on the refund of a retainer to one client. Following reinstatement, respondent was required to practice under a one-year proctorship. In re Rosenthal, 118 N.J.

454 (1990). Respondent was reinstated in 1992.

Effective November 2003, respondent was suspended for six months for gross neglect, lack of diligence, failure to communicate with the client, failure to return the file upon the termination of the representation, and misrepresentation that he had filed the complaint. Respondent also supplied the client with a false docket number to mislead him that suit had been filed. That disciplinary matter proceeded on a default basis. In re Rosenthal, 177 N.J. 606 (2003).

Finally, effective May 15, 2004, respondent was suspended for three months for gross neglect and failure to communicate with a client in a personal injury matter. He was required to submit proof of fitness before reinstatement. The Court order provided that, on reinstatement, he should not practice as a sole practitioner and should be supervised by a proctor. In re Rosenthal, 181 N.J. 330 (2004). He has not applied for reinstatement.

Since September 2002, respondent has been ineligible to practice law for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

The facts are as follows:

In 1998, Eric Waldinger retained respondent to represent him in connection with injuries stemming from an automobile accident. The driver of the other car was uninsured.

According to Waldinger, when a year went by without any communication from respondent, he called respondent to determine the status of the case. Respondent assured him that it was proceeding apace and that he would contact Waldinger by phone or mail if there were any changes.

Two more years elapsed without Waldinger's hearing from respondent. Once again, he called respondent; once again, respondent told him that he was "working on the case" and that he would inform Waldinger of any changes.

Waldinger's next phone call to respondent took place a few months later. Respondent informed him that he would be filing for arbitration and would then attempt to negotiate with the insurance carrier. As Waldinger remarked at the DEC hearing, by that time three years had gone by since he had hired respondent.

Five months later, in the fourth year of respondent's representation, Waldinger called him again. Waldinger testified:

> I says [sic], you know, I believe I remember that it's only — it's about four years now, and something should have happened. So I feel like I'm getting brushed off with this. The guy never contacts me. That's why I made the calls. So at that particular time, I asked him, how long are we going to wait before we go to court? So he says to me,

I'll call you back, I'm busy with a client right now. I says [sic] okay. I'll call you back in a couple of days. Couple of days went into a couple of months, at least, two or three months. I called him back again. And at this time, it's almost going into the fifth year. And he says to me, at this particular time, he says, you better get yourself another lawyer. I says [sic], why? He says, I'm going to retire.

[T18—24 to T19-15.][1]

At the DEC hearing, Waldinger complained about respondent's lack of communication with him:

As a lawyer in a profession like that, you should be professional and contact your client, and let them know what's going on. I felt, you know, you get a lawyer like that, it makes it look bad for the profession, and then you have no confidence in the next lawyer. It's hard to get it back into you. Luckily, I got Mr. Purvin [new counsel], and I got a little confidence back in the lawyer. That wasn't right for what he done [sic]. He should have contacted me by mail or by phone, whichever. I was kept in the dark. That's the way I feel. That's not the way to do that. That's not professional.

[T22-20 to T23-8.]

When respondent directed Waldinger to seek representation elsewhere, Waldinger asked him for the return of his file so

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[1] T denotes the transcript of the DEC hearing, on February 6, 2007.

that he could retain another attorney. Respondent's reply was that he would assemble Waldinger's documents and let him know when they could be picked up.

Two months later, respondent still had not contacted Waldinger. When Waldinger called respondent's office, he was told that respondent was not there. Respondent never returned the file to Waldinger.

Ultimately, Waldinger gave his new attorney, Michael Purvin, the few documents that he had in his possession: the accident report and "a couple of other things." Purvin was able to negotiate a settlement to Waldinger's satisfaction.

At the DEC hearing, Purvin explained the procedure in uninsured motorist cases:

> When you are involved in an accident with someone [who] has no insurance, rather than chase the uninsured driver, you go against your own policy . . . . [Your carrier] will stand in the shoes of that uninsured driver and pays you for your bodily injuries so you don't have to chase a defendant without an insurance to get a judgment you can collect on. You need to file a complaint in that case in Superior Court, a regular liability complaint, against the uninsured driver so the statute of limitations is tolled as to that driver . . . . What they do sometimes is [your carrier] will say, okay, we will pay $10,000 dollars on that claim. [Your carrier] then assumes representation from the underlying liability case and goes after

that uninsured driver to get back what they paid out to the plaintiff.

[T29-5 to T30-2.]

Before Purvin assumed Waldinger's representation, he discussed the case with respondent. He asked what steps respondent had taken on Waldinger's behalf. According to Purvin, respondent replied that he had contacted the carrier, had either filed a complaint or an order to show cause to compel arbitration, and was waiting for an arbitration date.

When Purvin took over the case, in December 2002, he sent a letter to respondent, asking for the file. He did not receive a reply. In January 2003, he made a second request, with which respondent did not comply. Purvin's third request, in March 2003, was sent to respondent by certified mail. Once again, Purvin was ignored. His postal search revealed that he had a good address for respondent. At this point, he asked Waldinger for whatever documents he had.

Through Waldinger's doctor, Purvin was able to find out the name of the PIP carrier. He then contacted the carrier, who had a file regarding Waldinger's claim. Purvin opined that, because of the carrier's knowledge of the claim, respondent's statement to him that he had contacted the carrier had been truthful.

For his part, respondent denied having told Purvin that he

had filed a complaint:

> That I would never tell him point blank because when dealing with . . . uninsured motorist, it's a waste of effort to file it. It's up to the insurance carrier to pursue whatever remedies they have. They are the ones with the claim. By doing anything in an action, if it's your action, to pursue a claim against an uninsured motorist, if you do anything, it will be construed against you. It's their action, it's their case to take, it's their action to handle . . . . The action is that of the insurance carrier by subrogation to handle it in whatever way or if they do choose to handle that action.
>
> . . . .
>
> That's their cause of action to do. I don't follow up to see what they do or don't do as far as that action does. The action goes into arbitration . . . . They know it's their action to attempt to resolve the issue.
>
> [T49-19 to T51-1.]

Asked, at the DEC hearing, what he had done to advance Waldinger's claim, respondent replied that he had sent a notice of claim to the carrier on February 19, 1998. Hearing nothing from the carrier, he had sent a second notice, on January 1, 1999. He did not recall if additional letters had followed, explaining that the next step would have been to file an order to show cause to compel arbitration.

Respondent denied having told Purvin that he had filed an

order to show cause. He remembered telling Purvin, "[L]ook, I haven't done anything. If you want to take the case, take over, I have no problem with that, about giving it."

Respondent further denied having failed to keep Waldinger informed about the progress of the case. Although the letters that respondent wrote on Waldinger's behalf do not indicate that copies had been sent to Waldinger, respondent claimed that they had.

As to his failure to return Waldinger's file, respondent explained that had been unable to find it until recently, due to the relocation of his office.

By way of mitigation, respondent testified about his serious health problems at the time, including prostate cancer, a total re-section of his stomach, and emotional stress. The latter, he claimed, forced him to pare down his practice gradually in 2002, to the point where he was no longer handling litigation, but merely rendering legal advice and, even so, on a limited basis. On this topic, he offered the following testimony:

> And I realized about the time where I was encountering the difficulties and at the time I left the law office, et cetera, that I wasn't performing as I should have been, as I was doing. I realized my responsibilities to my clients. I was not performing to my clients. I drastically, drastically, drastically curtailed whatever

> practice was going on at this point. I was going to start on Social Security. I realized at this point I wasn't performing with other matters . . . . I realized my responsibility to my clients so I stopped and effectively stopped practice [sic] law. The only reason that I am here today is I have no intention to pursue it, but certain facts were made, and I totally disagreed with the facts and as a matter of principle I am here. I didn't realize I didn't handle it for this long a period of time. I'm not proud of that. I'm ashamed of that. But on the other hand, I did realize the responsibility, and I'm sorry that Mr. Waldinger had to undergo this lengthy period of time.
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> [T55-22 to T56-22.]
>
> The other thing is when I did tell Mr. Waldinger, there wasn't an attempt to hide it. It was to say, look, at this point -- after I spoke to Mr. Purvin, I didn't do anything. Whatever we did at this point, I said, look, I'm retired so just get yourself another attorney.
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> [T58-22 to T59-3.]

Respondent maintained that he does not intend to return to the practice of law:

> [I]n addition when I realized I was having a problem, I did it of my own volition, I didn't pay the clients' security fund. I didn't handle any cases, so I didn't pay -- under a recent ruling under the past year or two, I think I have to take the Bar exam now, and there's no way in the world I'll take the Bar exam, period. If you are

concerned I will go back into the practice of law, no, I will not take a Bar exam . . . . I'll be 70 years old next month. I love the law. I love the law, but unfortunately, it's not for me anymore . . . . I don't even give advice to clients. I just say I retired, I don't even get involved on some things . . . . I haven't been listed in the Law [sic] Diary now, I believe it's over four or five years.[2]

[T57-3 to 23.]

Finally, respondent disavowed any intent to evade Waldinger's attempts to communicate with him. He testified that callers, including Purvin, were given his unlisted phone number when they called his office.

At the conclusion of the DEC hearing, the presenter made a motion to dismiss the charged violations of RPC 7.1(a)(1) (false and misleading communications) and RPC 8.4(c) (misrepresentation) for lack of clear and convincing evidence. The DEC granted the motion.

The DEC found that, during respondent's four-and-a-half-year representation (from early 1998 to late 2002),

very little [was] done on the case . . . . . No steps were taken to file an application

[2] Under R. 1:28-2(c), the license of an attorney who remains ineligible for a period of seven or more years will be revoked. If the attorney then applies for membership, the attorney will be required to take the bar examination. Respondent has been ineligible for five years. His license has not yet been revoked.

> with the Court to compel Uninsured Motorist arbitration or the like. The last piece of correspondence submitted by [respondent] in support of his actions is dated January 13, 1999. There seems to have been very little if anything done on this case subsequent thereto.
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> [HPR2.][3]

The DEC also found that Waldinger testified credibly that respondent did not communicate with him and that, on the few occasions that he was able to reach respondent, very little detail was provided about the progress of the case. The DEC concluded that respondent "did essentially nothing to affirmatively communicate with his client or to accurately keep his client up to date on the details of his case."

As to the surrender of Waldinger's file, the DEC remarked that, although respondent was aware of Waldinger's and Purvin's many requests for its return, respondent never complied with such requests. The DEC noted that, if respondent was having difficulty in locating the file, he should have so informed either Waldinger or Purvin. Yet, he "did nothing to assist in reconstituting the file."

In mitigation, the DEC considered that respondent "candidly admitted that he had been far less than diligent with regard to

[3] HPR refers to the hearing panel report.

his management of the matter," that he was beset by serious health problems at the time, that he does not intend to return to the practice of law, and that he apologized for "any inconvenience he had caused Mr. Waldinger."

The DEC found respondent guilty of lack of diligence, but dismissed the charge of gross neglect:

> It is well recognized by the New Jersey Supreme Curt that simple negligence, or a discrete instance of practicing "below accepted standards of care", does not amount to the gross negligence required to manifest a violation of this RPC. The case law makes it clear that a pattern of conduct involving numerous matters or egregious behavior is required to establish such gross neglect.
>
> [HPR3.]

The DEC found violations of RPC 1.3, RPC 1.4(b) (formerly RPC 1.4(a)), and RPC 1.16(d).

The DEC saw no reason to disagree with the presenter's recommendation that respondent receive a three-month suspension, a degree of discipline that respondent's counsel, too, found appropriate.

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

The DEC properly found that respondent failed to keep

Waldinger apprised of the status of the matter and ignored his requests for information about its progress, a violation of <u>RPC</u> 1.4(a), the rule paragraph in effect at the time. At the DEC hearing, Waldinger expressed his frustration and disappointment at respondent's inadequate communication with him over a period just shy of five years. Worse yet, during Waldinger's last conversation with respondent, respondent told him to "get yourself another lawyer; I'm retiring."

Not surprisingly, respondent's conduct caused Waldinger to lose confidence in the legal profession as a whole. Fortunately, he was able to hire a competent, diligent attorney, who obtained a satisfactory settlement on his behalf. As Waldinger testified at the DEC hearing, his new lawyer's successful efforts to complete his matter began to restore his confidence in the bar.

Moreover, after directing Waldinger to hire another attorney, respondent did absolutely nothing to assist his client and new counsel in pursuing a resolution of the case. Instead of apprising them of his difficulty in locating the file, respondent ignored their numerous requests for the return of Waldinger's documents, forcing Purvin to reconstruct the file on his own. In this regard, too, respondent's conduct was appalling and a violation of the <u>Rules of Professional Conduct</u>, here, RPC 1.16(d).

That respondent did almost nothing to advance respondent's interests is unquestionable. Waldinger retained his services in February 1998. In December 2002, almost five years later, his work on Waldinger's behalf consisted merely of having notified the carrier of Waldinger's claim. In fact, he admitted to Purvin, during their telephone conversation, that he had done no more than that.

In this respect, we are unable to agree with the DEC that respondent's conduct constituted mere lack of diligence, as opposed to gross neglect. The DEC incorrectly interpreted what is required for a finding of gross neglect, noting that one instance of practicing "below accepted standards of care" does not amount to gross neglect and that "case law makes it clear that a pattern of conduct involving numerous matters of egregious behavior is required to establish such gross neglect." In fact, a pattern of conduct is required for a finding of a pattern of neglect (RPC 1.1(b)), but not for a finding of gross neglect (RPC 1.1(a)). One single instance suffices. We find, thus, that respondent's conduct constituted not only lack of diligence, but also gross neglect.

We also find that respondent engaged in a pattern of neglect. His gross neglect in this case, combined with other instances of gross neglect displayed in his prior disciplinary

matters, serves to form a basis for a finding of a pattern of neglect (RPC 1.1(b)). In the Matter of Jeffry F. Nielsen, DRB 04-023 (April 30, 2004) (slip op. at 15) and In the Matter of Larry J. McClure, DRB 03-361 (March 12, 2004) (slip op. at 5).

We make one additional finding. Respondent testified at length about the psychological and physical problems that prevented him from giving his client matters the attention that they deserved, problems that forced him, at first, to confine his practice to tasks that he felt capable of undertaking and then to come to the realization that the practice of law is no longer an option for him.

Although respondent's problems evoke a measure of human sympathy, there can be no doubt that he failed in his responsibilities toward his clients. When emotional or physical capabilities materially impair an attorney's ability to represent his or her clients, the attorney has an obligation, under the Rules of Professional Conduct, to withdraw from the representation. RPC 1.16(a)(2). Respondent did not do so. Instead, during one of Waldinger's desperate attempts to learn what respondent had done to advance his claim, respondent took the opportunity to notify him that he was retiring and to instruct him to "get himself another lawyer."

Although the complaint did not specifically charge

respondent with having violated RPC 1.16(a)(2), the evidence adduced at the DEC hearing amply supports a finding that he violated that rule. Therefore, the complaint may be deemed amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

The remaining (and somewhat thorny) issue is the appropriate level of discipline for respondent's ethics transgressions. Standing alone, they would generally lead to a reprimand. See, e.g., In re Weiss, 173 N.J. 323 (2002) (reprimand for lack of diligence, gross neglect, and pattern of neglect); In re Balint, 170 N.J. 198 (2001) (reprimand for attorney who, in three client matters, engaged in lack of diligence, gross neglect, pattern of neglect, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (reprimand for lack of diligence, failure to communicate in a number of cases handled on behalf of an insurance company, gross neglect, and pattern of neglect).

In aggravation, however, we must consider respondent's extensive disciplinary record. It includes a reprimand (1982), a one-year suspension (1990), a six-month suspension (2003), and a three-month suspension (2004). It is clear to us that he has not learned from his prior mistakes. In such instances, even if the

new infractions are not that grievous, harsh discipline is warranted to send a message to the public -- and, at the same time, warn the recidivist attorney -- that such behavior will not be tolerated.

We are told that respondent's health problems were partially responsible for his misdeeds. We have no reason to disbelieve respondent's testimony on this score. Nevertheless, he had an obligation to disclose his impairment to Waldinger as soon as it began to materially affect his representation, to promptly advise Waldinger to retain new counsel, and to cooperate fully with the transfer of the file to Purvin. As early as 1987, respondent was advancing emotional stress as mitigation for his failure to provide his clients with proper representation. Our decision in the 1990 matter that led to respondent's one-year suspension already alluded to his psychological problems and to his attempt to "bring up a defense of emotional stress during the [DEC] hearing on April 1987." In the Matter or Richard L. Rosenthal, DRB 88-263 (October 11, 1989) (slip op. at 3). Yet, only in late 2002 did respondent "withdraw" from Waldinger's representation, by instructing him to "find himself another lawyer." By that time, respondent had allowed the case to languish for five years.

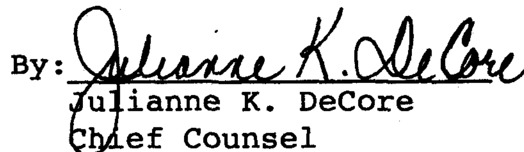
Respondent's continuing failure to conform his conduct to

the rules of the profession, coupled with the need to prevent further harm to potential clients, requires that he receive a lengthy suspension. We determine that a prospective one-year suspension is appropriate. In addition, should he ever re-think his decision to retire and apply for reinstatement (which should be conditioned on proof of fitness), he should continue to be precluded from working as a sole practitioner and be required to be supervised by a proctor until further order of the Court.

Member Frost recused herself. Vice-Chair Pashman and Member Boylan 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 O'Shaughnessy, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

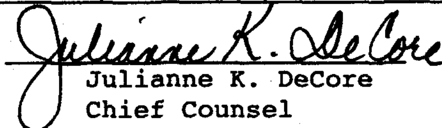
In the Matter of Richard Rosenthal
Docket No. DRB 07-098

Argued: June 21, 2007

Decided: August 30, 2007

Disposition: One-year suspension

Members	One-year 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:	6			1	2



Julianne K. DeCore
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