SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-036
District Docket Nos. XIV-03-561E
and XIV-03-651E

IN THE MATTER OF

SAMUEL A. MALAT

AN ATTORNEY AT LAW

Decision
Default [R. 1:20-4(f)]

Decided: March 30, 2006

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

This matter was before us on a certification of default filed by the Office of Attorney Ethics ("OAE") pursuant to R. 1:20-4(f). At the relevant times, respondent, who was admitted to the New Jersey bar in 1989, practiced law in Haddon Heights, New Jersey. He has an extensive disciplinary history.

In 2002, respondent was reprimanded for lack of diligence, failure to communicate with his clients, failure to return client files upon termination of representation, knowingly disobeying an obligation under the rules of a tribunal, failure to cooperate with disciplinary authorities, and engaging in conduct prejudicial to the administration of justice in four matters. In re Malat, 174 N.J. 564 (2002). Specifically, among other things, respondent failed to comply with two court orders (including one holding him in contempt) that required him to turn over a client's files; counseled a client to file for bankruptcy to avoid a levy even though he knew that the petition's "shortcomings . . . would guarantee its dismissal;" failed to advise a client that, in one matter, his case had been dismissed twice and, in another matter, failed to advise the client of his right to reject an arbitration award; respondent then failed to take steps necessary to avoid entry of judgment against the client; in those same two cases, he refused to comply with the OAE's repeated requests for information about the grievance because he "was busy with other pressing cases;" and he refused to acknowledge any personal wrongdoing, instead shifting blame to others, including ethics authorities. In the Matter of Samuel A. Malat, Docket No. 01-218 (DRB January 30,

2002) (slip op. at 3-4, 21-22, 25-26). In our determination that a reprimand was the appropriate form of discipline, we took note of respondent's arrogance toward his clients, the courts, and disciplinary authorities, his lack of contrition, and his refusal to acknowledge any wrongdoing. Id. at 26. We also issued "a stern warning that any further misconduct by him will result in harsher discipline." Id. at 27.

In March 2003, respondent received a three-month suspension (effective April 7, 2003) in a default matter for knowingly making a false statement of material fact or law to a tribunal, knowingly failing to disclose to a tribunal a material fact, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, failing to cooperate with disciplinary authorities, and engaging in conduct prejudicial to the administration of justice. In re Malat, 175 N.J. 554 (2003). Specifically, among other things, in an action between respondent and a former employee, Judge John B. Mariano granted the former employee's unopposed motion to dismiss respondent's complaint without prejudice. In the Matter of Samuel A. Malat, Docket No. 02-270 (DRB December 11, 2002) (slip op. at 4). Thereafter, the employee filed a motion to dismiss the complaint

with prejudice, which was assigned to Judge John T. McNeill. Ibid.

About a month following the second motion to dismiss, respondent filed a motion requesting Judge Mariano to vacate the original order of dismissal. Ibid. Respondent did not inform Judge Mariano that a motion to dismiss with prejudice was pending before Judge McNeill. Ibid. Judge McNeill granted the second motion to dismiss two days after respondent had filed the motion to vacate the first order of dismissal, but respondent never notified Judge Mariano, even though he knew of the entry of the order. Ibid. Judge Mariano granted the motion to vacate the first order of dismissal, and respondent then filed a motion to vacate the second dismissal before Judge McNeill, who denied the motion. Ibid.

When the employee filed a motion to vacate Judge Mariano's order vacating the dismissal, respondent filed a certification stating both that he had and had not received a copy of the first motion to dismiss. Id. at 5. Judge Mariano granted the employee's motion, and then reported respondent's conduct to disciplinary authorities. Ibid. Thereafter, respondent failed to comply with the OAE's multiple requests for information about the matter. Id. at 5-7.

Upon the conclusion of the three-month suspension, respondent filed a petition for reinstatement. In September 2003, the Supreme Court denied respondent's petition because, on the same day, it imposed another three-month suspension upon him for accepting compensation from someone other than a client, sharing legal fees with a non-lawyer, and assisting another in the unauthorized practice of law. In re Malat, 177 N.J. 506 (2003). Originally, the matter had been before us as a default, but we vacated it, and the matter proceeded on a hearing before the DEC. In the Matter of Samuel A. Malat, Docket No. 03-112 (DRB July 28, 2003) (slip op. at 3). There, respondent had contracted with a Texas corporation to review various revocable living trusts and other estate-planning documents (based on templates that respondent had created) on behalf of clients of retirement age, for which the corporation paid him. Id. at 4.

Respondent's second suspension was retroactive to July 7, 2003. To date, he has not sought reinstatement.

Most recently, on March 17, 2006, we imposed an admonition upon respondent for filing frivolous claims in two of three federal lawsuits. In the Matter of Samuel A. Malat, Docket No. 05-315 (DRB March 17, 2006).

On December 8, 2005, in this third default matter, the OAE transmitted a copy of the complaint to respondent at his home and business addresses, via regular mail and certified mail, return receipt requested. The certified letters were returned and marked "unclaimed." The letters sent to respondent via regular mail were not returned.

On January 19, 2006, the OAE sent a letter to respondent at the same addresses, via regular and certified mail, return receipt requested. The letter directed respondent to file an answer within five days and informed him that, if he failed to do so, the record would be certified directly to us for the imposition of sanction. As of February 2, 2006, neither the certified letters nor the letters sent to respondent via regular mail were returned.

Respondent admitted to us that he had received the complaint. Nevertheless, he did not file an answer within the time prescribed and did not seek an extension.

On February 2, 2006, the OAE certified this matter to us as a default. On March 6, 2006, the Office of Board Counsel received respondent's motion to vacate the default, which, for the reasons expressed below, we denied.

The six-count complaint charged that respondent committed some or all of the following ethics violations in four client matters: RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), former RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information), former RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 1.5(b) (failure to communicate the basis or rate of fee to client, in writing), RPC 1.16(d) (upon termination of representation, failure to take steps to the extent reasonably practicable to protect a client's interests), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The Hess Matter (Count One)

According to the complaint, on an unidentified date, Jackie and Charles Hess retained respondent to represent their minor daughter, Faith, in connection with a slip-and-fall injury sustained on September 27, 1998. Respondent did not regularly represent the Hesses or Faith.

By letter dated August 10, 1999, respondent sent Mr. Hess a form retainer agreement, which was missing the first page. According to the complaint, respondent "did not otherwise communicate the basis or rate of the fee in writing to the client before or within a reasonable time after commencing the representation."

On July 11, 2000, respondent filed an action captioned identified in the formal ethics complaint as Hess v. Dutch Wonderland, in the Superior Court of New Jersey, Law Division, Cumberland County. However, Dutch Wonderland was not a proper party defendant because Faith had not been injured on property that it owned or controlled. In addition, New Jersey did not have jurisdiction over the action because the injury had occurred in Pennsylvania and involved a claim against a Pennsylvania landowner.

In January 2001, Dutch Wonderland and other defendants filed an answer to the complaint and a motion to dismiss for lack of personal jurisdiction. Respondent was served with the answer and motion, but did not file a response to the motion. On January 28, 2001, the court issued a notice stating that the case would be dismissed for lack of prosecution. The notice was

sent to respondent's office; he received it; and he did not oppose the dismissal.

On February 16, 2001, the court entered an order granting the defendants' motion to dismiss the complaint. Respondent did not inform his clients of the dismissal, took no action to reinstate the complaint in New Jersey, and did not file suit in Pennsylvania.

On numerous occasions, the Hesses attempted to contact respondent by telephone to discuss the progress of the case. According to the complaint, "[r]espondent failed and refused to respond to [their] reasonable requests for information," and "failed and refused to explain the matter to the extent reasonably necessary to permit [them] to make informed decisions regarding the representation."

In early 2003, however, respondent told Mr. Hess that depositions in the matter were scheduled for September of that year. That statement was false because the suit had been dismissed, and respondent knew it.

Shortly before the statute of limitations expired, the Hesses learned that the lawsuit had been dismissed. They retained another attorney to represent their daughter.

According to the complaint, respondent's conduct in the Hess matter violated the following rules: RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(b), RPC 1.16(d), and RPC 8.4(c).

The Santiago Matter (Count Two)

According to the complaint, at some unidentified time, Gilberto Santiago retained respondent to represent him in connection with a slip-and-fall injury that occurred on March 1, 1999. Although respondent did not regularly represent Santiago, the complaint alleged that he "did not communicate the basis or rate of the fee in writing to [Santiago] before or within a reasonable time after commencing the representation."

On March 1, 2001, respondent filed an action captioned Gilbert Santiago v. Cooper River Manor in the Superior Court of New Jersey, Law Division, Camden County. However, respondent did not serve the complaint upon the defendant.

On July 16, 2001, the court issued a notice advising respondent that the matter would be dismissed for lack of prosecution. The notice was mailed to respondent's office, and he received it. However, he did not file an opposition to the scheduled dismissal.

On September 14, 2001, the court dismissed the complaint. Respondent did not inform Santiago of the complaint's dismissal and did not take any action to reinstate the complaint. Nevertheless, in the Spring of 2003, respondent told Santiago that a trial was scheduled for August of that year. Respondent's statement was false, and he knew it was false when he made it.

According to the complaint, respondent's conduct in the Santiago matter violated the following rules: RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5(b), RPC 1.16(d), and RPC 8.4(c).

The Rink Matter (Count Three)

According to the complaint, at some unidentified time, Nelson Rink retained respondent to represent him in connection with a March 24, 1999 trip-and-fall injury. On March 1, 2001, respondent filed an action captioned Nelson Rink v. Presidential Courts Apartments in the Superior Court of New Jersey, Law Division, Camden County. Respondent did not serve the complaint upon the defendant.

On July 11, 2001, the court issued a notice advising respondent that the matter would be dismissed for lack of

prosecution. The notice was mailed to respondent's office, and he received it.

On September 7, 2001, the court dismissed plaintiff's complaint for failure to prosecute. Respondent did not inform Rink of the dismissal and took no action to reinstate the complaint.

After the dismissal, Rink's caregiver, Ruby Clarke, repeatedly tried to obtain information pertaining to the status of the lawsuit. Despite Clarke's and Rink's repeated attempts to communicate with respondent, he failed and refused to provide them with any documents or information concerning the lawsuit. According to the complaint, respondent "failed and refused to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

After respondent was suspended in April 2003, Clarke continued to make attempts to get information about Rink's case, as well as Rink's file, to no avail.

According to the complaint, respondent's conduct in the Rink matter violated the following rules: RPC 1.1(a), RPC 1.3, RPC 1.4(a), and RPC 1.16(d).

The Fawns Matter (Count Four)

According to the complaint, in November 2001, Sheldon Fawns retained respondent to collect on two subcontractor liens that Fawns had filed against a parcel of real estate, as a result of funds owed Fawns by a general contractor named Don Dillon, who did business as World Class Homes. Respondent did not regularly represent Fawns. Moreover, he did not communicate the basis or rate of the fee in writing to the client before or within a reasonable time after commencing the representation.

Shortly after Fawns had retained respondent to collect on the Dillon/World Class Homes liens, he hired him to file another lien, as a result of funds owed to him by a general contractor named Jerry Crawford. As with Dillon/World Class Homes, respondent "did not communicate the basis or rate of the fee in writing to the client before or within a reasonable time after commencing the representation."

On January 3, 2002, respondent filed an action captioned Sheldon H. Fawns, III v. World Class Homes, Inc. and Don Dillon in the Superior Court of New Jersey, Law Division, Special Civil Part, Gloucester County. Although the complaint correctly stated that the action was venued in Gloucester County, respondent filed the complaint in Camden County.

Upon service of the complaint, counsel for World Class Homes informed respondent that the complaint had been filed in the wrong venue. Respondent stated that he would transfer the matter to Gloucester County and requested that the attorney refrain from filing an answer until the transfer had taken place. Respondent never transferred the action, however.

The complaint charged that respondent failed to collect on Fawns' liens against World Class Homes "or to take reasonably prompt and diligent action on his client's behalf to protect grievant's financial and legal interests in the matter."

With respect to the Crawford matter, the complaint alleged, respondent filed only a "notice of unpaid balance and right to file lien." He failed to take any further action to perfect the lien or to take reasonably prompt and diligent action on his client's behalf to protect grievant's financial and legal interests in the matter.

With respect to both matters, respondent failed and refused to keep Fawns informed as to their progress. As a result of respondent's inaction, both properties were sold without Fawns' liens having been satisfied. Moreover, in order to conceal his improper handling of Fawns' claim against Crawford, respondent misrepresented to Fawns that the property, which should have

been subject to a lien, had not been sold when, in fact, it had been sold. Respondent failed and refused to advise Fawns that "his matters were closed" and never informed Fawns that he had been suspended from the practice of law.

Fawns could not afford to hire another attorney. Thus, he lost $4878 on the World Class Homes matter and $3475 on the Crawford matter.

According to the complaint, respondent's conduct in the Fawns matter violated the following rules: RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5(b), RPC 1.16(d), and RPC 8.4(c).

The complaint also charged respondent with having violated RPC 1.1(b), as the result of the pattern of neglect exhibited in his handling of the matters described in the first four counts of the complaint.

In addition, respondent was charged with failure to cooperate with disciplinary authorities. According to the complaint, on February 23, 2004, the OAE wrote to respondent and asked him to provide that office with a list of files that had remained in his possession and to make arrangements for the files to be turned over to the clients or to "succeeding counsel." Respondent did not provide the OAE with the requested information and did not "otherwise communicate" with the OAE.

With respect to the matter docketed under No. XIV-03-561E, on April 1, 2004, the OAE wrote to respondent, enclosed a subpoena, and directed him to produce all open or active client files either in his possession or located at his former law office. Respondent did not produce the files and did not "otherwise communicate" with the OAE.

On May 3, 2004, the OAE wrote to respondent and requested the original files in the Fawns, Hess, Rink, and Santiago matters. The OAE also requested that respondent provide a written reply to the grievances against him, on or before May 20, 2004. The complaint alleged that respondent "did not provide a timely reply or otherwise respond to the OAE in a timely fashion."

Based on all of these incidents, the OAE charged respondent with having violated RPC 8.1(b).

Motion to Vacate Default

To vacate a default, a respondent must meet a two-pronged test: offer a reasonable explanation for the failure to answer the ethics complaint and assert a meritorious defense to the underlying charges.

Respondent unabashedly admitted to the OAE and to us that he had been served with the complaint. He offered two different reasons for his failure to file an answer. On the one hand, respondent asserted that he has worked diligently, but unsuccessfully, in trying to locate missing files in order to obtain the information necessary to prepare an answer. On the other hand, he asserted that personal problems have prevented him from attending to his obligations, including the obligation to file an answer to the ethics complaint.

With respect to the first excuse, respondent's letter goes into great detail about "the issue concerning missing the filing deadline." However, the lengthy recitation establishes nothing more than that respondent made a calculated decision not to file a timely answer.

Respondent describes how, after he was suspended on April 7, 2003, "two partners" named Brian Puricelli and Theodore Kravitz "agreed to maintain [his] practice in its former location in a building owned by [his] family." Respondent gave them his office space, and "they assumed all of [his] former employees." Respondent "continued to maintain utilities, phone service and paying for other services."

According to respondent, when the Supreme Court denied his petition for reinstatement in September 2003, Puricelli and Kravitz – unbeknownst to respondent – decided to leave the building by the New Year (2004). Respondent did not learn of their plan until December 23, 2003.

Respondent claims that Puricelli and Kravitz moved their office "about 2 blocks away" and took the files with them. After they had done so, respondent arranged to meet a former employee named Ms. Holshue, at his building, "so that she could take files from the building." It is not clear whether respondent wanted her to take the files, or whether he arranged to meet her, as a courtesy, so that she could take files that belonged to Puricelli and Kravitz, for whom she now presumably worked. In any event, respondent asserted that Ms. Holshue arrived early, entered the building (presumably without him), "advised that it had been burgled [sic] and that the files that she sought were missing." Ms. Holshue never identified which files were missing.

Respondent continued:

> When my former partners left, I attempted to locate the computer that had been used as my file server. It could not be found. I attempted to locate the computer that had been used for the purpose

> of maintaining my backup of data, and although it could be found, most of the data had been deleted. While these discoveries were irritating at the time, they were of no moment.
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> . . . .
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> Admittedly, when the Complaint arrived, I could have filed an incomplete answer, but, since there is no easy mechanism to amend an Answer to these proceedings, I opted for completeness instead of promptness. Additionally, as note [sic] above, my office was burglarized in the Winter of 2003 – 2004 causing great concern since very little tangible property was removed or damaged. What I discovered, after being asked by the O.A.E., was that many files are missing. Most importantly, the files concerning these four matters, as well as my financial records that the O.A.E. was seeking to investigate, in addition to my accounting documentation, none of which have been located after more than two years [sic].
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> [Letter from Samuel A. Malat to Disciplinary Review Board, dated March 6, 2006, pp. 1-2 (emphasis supplied).]

In addition to respondent's assertion that he was prevented from filing a "complete" answer due to missing files, which he claimed to have expended a significant amount of effort to locate, respondent also claimed that various personal problems "form the basis of [his] excusable neglect." These problems include the following: (1) since his suspension, the past three

years have been "very difficult;" (2) as the result of "a myriad of personal problems," he has "let many personal things go;" (3) he is unable to perform "ministerial functions" and spends "hours 'vegging' while knowing there are important things to do;" (4) he is frustrated by telephone calls that he receives from former clients, who apparently seek his legal assistance but whom he is prohibited from helping; (5) his mother's open heart surgery in March of this year; and (6) he continues not to receive mail, which he attributes to the fact that he (1) no longer has an office and (2) spends "considerable time away from home."[1]

Finally, in seeking vacation of the default, respondent appealed to the liberality with which such motions are viewed, and claimed that the OAE "knew of these matters for years without taking any action prejudicing my defense." Id. at 3.

In 2003, we denied respondent's motion to vacate a default based upon his "failure to provide a reasonable explanation for his failure to file a timely answer to the complaint." In the Matter of Samuel A. Malat, supra, Docket No. 02-270, slip op. at 3. For the same reasons, we deny respondent's motion to vacate

[1] Respondent stated that the "potential reasons" why he does not receive his mail "are too numerous to even speculate."

the default in this matter. Indeed, respondent's "excusable neglect" claims in this matter bear a striking resemblance to those identified by him almost three-and-a-half years ago in his failed attempt to vacate that default. Our decision in that matter stated:

> Respondent's motion to vacate the default alleged that he did not review the "default package" sent to him by the DEC because he presumed that it was discovery in the underlying matter. Respondent further claimed that he had had a difficult summer. He alluded to the death of his father, but failed to indicate when that had occurred. He also claimed that he had a myriad of other personal problems, but did not specify what they were. He stated only that as a result of the problems, he "let many things go." Respondent further claimed that his office had been burglarized in late April 2002 and that materials removed from his evidence locker were critical to several targeted cases. He admitted, though, that he had other copies, and did not allege that the materials taken related to this matter.
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> [In the Matter of Samuel A. Malat, supra, Docket No. 02-270, slip op. at 2-3 (emphasis supplied.]

Here, too, respondent has failed to identify any of the "myriad of personal problems" that he has experienced or why they have prevented him from answering the complaint. He has failed to offer any medical explanation for his inability to perform ministerial duties or his "vegging" condition. He has

failed to explain why and where "clients" are calling him for legal assistance, in light of his suspension from the practice of law. He has failed to explain the relevance of his mail-delivery difficulties, in view of his admission to having received the complaint. He has, thus, failed in his attempt to prove excusable neglect.

Moreover, the striking resemblance between respondent's reasons in support of his motion to vacate now and the motion to vacate that he filed three years ago is troubling. Hopefully, the similarities are the result of nothing more than respondent's bad luck.

Finally, we also reject respondent's claim that his allegedly determined, albeit unsuccessful effort to locate the client files at issue also constituted excusable neglect. Respondent does not claim that his inability to locate the files prevented him from filing an answer. Instead, respondent made a calculated decision to "opt[] for completeness instead of promptness." In fact, he ultimately did file an answer in which he neither admitted nor denied most of the allegations because he did *not* have sufficient information to respond.

This conduct cannot be deemed "excusable neglect" for several reasons. First and foremost, R. 1:20-20(14)(C) required

respondent to maintain "files, documents, and other records of pending matters in which [he] had responsibility on the date of, or represented a client during the year prior to, the imposition of discipline." Respondent's failure to comply with this rule cannot be considered either excusable or neglectful. Second, respondent's failure to file the answer was a calculated, intentional decision on his part. As he freely admits, he "opted for completeness instead of promptness." Again, this is not neglect. Moreover, his decision was not excusable insofar as he never even asked the OAE for an extension.

Finally, when faced with the default, respondent was able to overcome his personal problems and draft an answer, even in the continued absence of the missing files. Although the answer is hardly responsive, inasmuch as it contains repeated assertions that information is not available because records are missing, nothing (except respondent's calculated decision) would have prevented him from filing this very document at the time it was originally due.

In short, respondent has offered us no reason that supports a finding of excusable neglect on his part in failing to file a timely answer to the complaint. Accordingly, we conclude that

there is no need to address the second prong of the test and deny his motion to vacate the default.

Service of process was properly made when the OAE mailed the complaint to respondent's home on December 8, 2005, which he admits that he received. Inasmuch as respondent failed to file a verified answer to the complaint within the time prescribed, the allegations are deemed admitted. R. 1:20-4(f). Moreover, the allegations set forth in the complaint support a finding that respondent has engaged in unethical conduct.

The Hess Matter

At the least, respondent engaged in gross neglect and lack of diligence when, after the defendants' motion to dismiss had been granted, he failed to take steps to reinstate the complaint in New Jersey or file suit in Pennsylvania. Thus, he violated RPC 1.1(a) and RPC 1.3.

In addition, respondent failed to keep his clients reasonably informed about the status of the matter, a violation of RPC 1.4(a), when he failed to tell them that the complaint had been dismissed. By failing to provide this information to his clients, respondent also committed a representation by silence. Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347

(1984) (sometimes "silence can be no less a misrepresentation than words"). He further violated the rule when he failed to respond to the clients' requests for information with respect to the status of the case. Moreover, when respondent failed to inform the clients that the matter had been dismissed for lack of jurisdiction and discuss with them the options available to them, he violated RPC 1.4(b) by denying his clients the opportunity to make informed decisions regarding the representation.

Respondent, who did not regularly represent the Hesses, also failed to communicate the basis of the fee in writing, even though he sent them a retainer agreement. The first page of the agreement, in which a portion of the fee provision of the agreement was located, was missing. The information contained at the top of the second page was not enough for the clients to divine respondent's fee. Thus, he violated RPC 1.5(b).

Although the complaint charged respondent with having violated RPC 1.16(d), it contains no factual support for the claim. Nevertheless, respondent was suspended, and he has not accounted for the files. Thus, he violated R. 1:20-20(14)(C), which required him to maintain "files, documents, and other records of pending matters in which [he] had responsibility on

the date of, or represented a client during the year prior to, the imposition of [his suspension]." Finally, respondent also violated RPC 8.4(c) when, in early 2003, he misrepresented to Mr. Hess – two years after the complaint had been dismissed – that depositions were scheduled to take place later that year, even though he was fully aware of the dismissal.

To conclude, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.5(b), and RPC 8.4(c). He did not violate RPC 1.16(d); rather, he violated R. 1:20-20(14)(C).

The Santiago Matter (Count Two)

Respondent committed gross neglect and engaged in lack of diligence when he failed to serve the complaint, allowed it to be dismissed, and took no action to reinstate it. Thus, he violated RPC 1.1(a) and RPC 1.3. Moreover, when respondent failed to inform Santiago that the complaint had been dismissed, he failed to keep Santiago reasonably informed about the status of the matter, a violation of RPC 1.4(a). Respondent also committed a representation by silence. Crispin, supra, 96 N.J. at 347.

Respondent also violated RPC 1.5(b) because he did not regularly represent Santiago, and he never communicated the

basis or rate of his fee in writing to the client. Finally, as in the Hess matter, the allegations do not support the conclusion that respondent violated RPC 1.16(d). However, he did fail to comply with R. 1:20-20(14)(C).

Finally, respondent violated RPC 8.4(c) when, about a year-and-a-half after the complaint had been dismissed, he misrepresented to Santiago that a trial was scheduled for August 2003, when he knew that, in fact, the complaint had been dismissed.

To conclude, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5(b), and RPC 8.4(c). He did not violate RPC 1.16(d); rather, he failed to comply with his obligations under R. 1:20-20(14)(C).

The Rink Matter (Count Three)

As in the two preceding matters, respondent committed gross neglect and engaged in a lack of diligence when he failed to serve the complaint upon the defendant, allowed the complaint to be dismissed, and took no action to reinstate it. Thus, he violated RPC 1.1(a) and RPC 1.3. In addition, by failing to inform Rink that the complaint had been dismissed, respondent failed to keep Rink reasonably informed about the status of the

matter, a violation of RPC 1.4(a). Respondent also committed a representation by silence. Crispin, supra, 96 N.J. at 347. Moreover, respondent failed to comply with Rink's and Clarke's reasonable requests for information when he did not reply to their many attempts to communicate with him.

As in the Hess and Santiago matters, the facts do not support the conclusion that respondent violated RPC 1.16(d), but he did fail to comply with R. 1:20-20(14)(C).

To conclude, respondent violated RPC 1.1(a), RPC 1.3, and RPC 1.4(a). While he did not violate RPC 1.16(d), he did not comply with R. 1:20-20(14)(C).

The Fawns Matter (Count Four)

Respondent committed gross neglect and engaged in a lack of diligence when he filed the World Class Homes matter in the wrong county, failed to transfer the action to the proper county, and failed to collect upon the lien, which was the purpose of his retention by Fawns. He engaged in the same misconduct with respect to the Crawford lien, which he never perfected. The result of respondent's neglect and lack of diligence was the sale of the properties without satisfaction of Fawns' liens.

When respondent failed to inform his client that he had taken no action to perfect or collect upon the liens, he violated RPC 1.4(a), which required him to keep his client reasonably informed about the status of the matters. Moreover, respondent violated RPC 1.5(b) in both cases because, not having regularly represented Fawns, he did not communicate in writing the basis of his fee either before or within a reasonable time after the representation had commenced.

As in the three preceding matters, there is no support for the conclusion that respondent violated RPC 1.16(d), although he failed to comply fully with the requirements of his suspension, including taking steps to transfer the file either directly to the client or to another attorney.

Finally, respondent violated RPC 8.4(c) when he told Fawns that the property that should have been subject to a lien against Crawford was not sold. In fact, the property had been sold, without Fawns' "lien" having been satisfied.

To conclude, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5(b), RPC 8.4(c), and R. 1:20-20.

Furthermore, respondent engaged in a pattern of neglect, a violation of RPC 1.1(b). A pattern of neglect requires three acts of neglect. In re McClure, 180 N.J. 154 (2004); In re

Nielsen, 180 N.J. 301 (2004). Here, the allegations of the complaint support a finding of gross neglect in all four client matters.

Finally, respondent violated RPC 8.1(b) when he ignored the OAE's three separate requests for information. In response to the OAE's first request for documents, respondent claimed that he informed the OAE that "there were no files" that had not been taken over by Puricelli and Kravitz and, therefore, no files were in his possession. With respect to the OAE's second request, respondent claimed that he provided an answer to the OAE in a letter. However, he did not attach a copy of the letter to the answer. Here, too, respondent stated that clients whose files were transferred to Puricelli and Kravitz had been "begging" respondent to resume their representation. Finally, with respect to the OAE's third request, respondent stated that he informed the OAE that the records were missing.

There remains the determination of the quantum of discipline to be imposed for respondent's ethics violations. When an attorney with an ethics history engages in conduct involving gross neglect and lack of diligence and fails to communicate with clients, a reprimand is typically imposed. See, e.g., In re Aranguren, 172 N.J. 236 (2002) (reprimand

imposed upon attorney who failed to act with diligence in a bankruptcy matter, failed to communicate with the client, and failed to memorialize the basis of fee; prior admonition and six-month suspension); In re Zeitler, 165 N.J. 503 (2000) (reprimand imposed upon attorney who engaged in lack of diligence and failed to communicate with clients; extensive ethics history); and In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with clients in two matters; prior reprimand). A reprimand also will be imposed when the attorney does not have a disciplinary record, but commits this misconduct in several client matters. See, e.g., In re Wildstein, 138 N.J. 48 (1994) (reprimand imposed upon attorney who engaged in gross neglect and lack of diligence, and failed to communicate with clients in three matters).

In addition, it is well settled that "intentionally misrepresenting the status of lawsuits warrants public reprimand." In re Kasdan, 115 N.J. 472, 488 (1989); In re Bildner, 149 N.J. 393 (1997) (attorney with no ethics history reprimanded for violations of RPC 1.3, RPC 1.4(a), and RPC 8.4(c) for failure to inform his clients that their complaint had been dismissed twice -- with prejudice the second time -- as

a result of his failure to appear at an arbitration proceeding). So long as the attorney has not defaulted and has no ethics history, this is typically the discipline imposed even where, in addition to the misrepresentation, the attorney has engaged in gross neglect and lack of diligence and has failed to communicate with the client. See, e.g., In re Wiewiorka, 179 N.J. 225 (2004) (attorney reprimanded for gross neglect, lack of diligence, failure to communicate with the client, and conduct involving dishonesty, fraud, deceit or misrepresentation in one client matter where he was hired to investigate a personal injury claim for the purpose of a possible lawsuit but failed to return phone calls and told the client that he had filed suit when he had not, and the statute of limitations had expired); In re Porwich, 159 N.J. 511 (1999) (reprimand imposed upon attorney who admitted to gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with ethics authorities in two client matters; the Disciplinary Review Board also found that the attorney engaged in conduct involving misrepresentation based on attorney's representation to the client that he had filed suit when he had not).

Therefore, if respondent had not defaulted and had an untarnished disciplinary history, his violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(a), as well as his misrepresentation of the status of his clients' lawsuits, could still be met with a reprimand. However, respondent has defaulted. In a default matter, the discipline is enhanced to reflect a respondent's failure to cooperate with disciplinary authorities as an aggravating factor. In re Nemshick, 180 N.J. 304 (2004) (conduct meriting reprimand enhanced to three-month suspension due to default; no ethics history).

However, our inquiry does not stop with the default. There is also respondent's ethics history to consider. The default nature of this proceeding and respondent's disciplinary record would have warranted enhancement of the discipline to a three-month suspension. However, respondent's disciplinary history is extensive (an admonition, reprimand, and two three-month suspensions). Moreover, two of these matters included the same misconduct displayed by respondent here.

Respondent's 2002 reprimand was based upon his lack of diligence in allowing a client's case to be dismissed twice and then failing to communicate the dismissals to the client in one matter, and, in another matter, failing to inform the client

that he had a right to reject an arbitration award and then failing to inform him that judgment had been entered against him. Moreover, in both matters, as in this one, he repeatedly failed to cooperate with the DEC and the OAE in their investigations. Similarly, in the case resulting in his first three-month suspension, respondent failed to comply with the OAE's multiple requests for information about the matter.

The client matters now before us are four more examples of respondent's refusal to represent his clients competently and diligently and to cooperate with disciplinary authorities in their attempt to investigate grievances filed against him. Moreover, one of respondent's separate affirmative defenses demonstrates resoundingly his contempt for the disciplinary system. He states:

> 2. The [disciplinary] action is being sought for purposes of malicious prosecution, revenge, and retaliation and as part of an effort to chill Plaintiffs' lawyers in pursuing Civil Rights matters.
>
> . . . .

> 4. The true nature of <u>this proceeding is retaliation for Respondent being successful in defeating other Ethics Complaints</u>.
>
> [A,Affirmative Defenses¶2;¶4 (emphasis added).[2]]

In view of the foregoing, and consistent with our 2002 "stern warning that any further misconduct by [respondent] will result in harsher discipline," we determine to impose a six-month suspension upon respondent, who, in multiple matters, has displayed gross neglect and lack of diligence, failed to communicate with clients, misrepresented the status of his clients' lawsuits to them, failed to cooperate with disciplinary authorities, has defaulted, has an extensive ethics history, persists in engaging in the same sort of misconduct that caused him to be disciplined previously, and has demonstrated an outright refusal to learn from his prior mistakes.

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[2] "A" refers to respondent's proposed answer to the formal ethics complaint.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Samuel A. Malat
Docket No. DRB 06-036

Decided: March 30, 2006

Disposition: Six-month suspension

Members	Six-month Suspension	Reprimand	Admonition	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan	X				
Holmes	X				
Lolla	X				
Neuwirth	X				
Pashman	X				
Stanton	X				
Wissinger	X				
Total:	9				

Julianne K. DeCore
Chief Counsel