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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 06-301  
District Docket No. XIV-04-482E

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IN THE MATTER OF  
SAMUEL A. MALAT  
AN ATTORNEY AT LAW

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

Decided: March 19, 2007

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

This matter came before us on a certification of default  
filed by the Office of Attorney Ethics (OAE) pursuant to R.  
1:20-4(f). It arises out of respondent's knowing  
misappropriation of rental payments that he was hired to collect  
on behalf of a landlord, his employment of a convicted felon as  
office manager and to whom he gave full access to his trust and

business accounts, and his failure to cooperate with disciplinary authorities. For the reasons expressed below, we recommend respondent's disbarment.

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. This is the sixth disciplinary proceeding instituted against respondent. Of these six, this is respondent's fourth default.

In 2002, respondent was reprimanded for lack of diligence, failure to communicate with his clients, failure to return client files upon termination of the representation, knowingly disobeying an obligation under the rules of a tribunal, failure to cooperate with disciplinary authorities, and 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 the entry of a 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." Respondent refused to acknowledge any personal wrongdoing, instead shifting blame to others, including ethics authorities. In the Matter of Samuel A. Malat, DRB 01-218 (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's first default, he received a three-month suspension (effective April 7, 2003) 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, respondent intentionally concealed material information from two judges in a lawsuit in which he was a party.

Upon the conclusion of the three-month suspension, respondent petitioned for reinstatement. In September 2003, the Supreme Court denied the petition because, on the same day, it imposed another three-month suspension (retroactive to July 7, 2003) on respondent 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).<sup>1</sup> Respondent did not petition for reinstatement from the September 2003 suspension.

On March 17, 2006, we admonished respondent for filing frivolous claims in two federal lawsuits. In the Matter of Samuel A. Malat, DRB 05-315 (March 17, 2006).

Most recently, on June 22, 2006, in respondent's third default, the Court suspended him for one year for gross neglect,

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<sup>1</sup> Originally, the matter was before us as respondent's second default, which was vacated, thereby allowing the matter to proceed in the ordinary course.

pattern of neglect, lack of diligence, failure to communicate with clients, failure to communicate the basis of his fee in writing, failure to cooperate with disciplinary authorities, and conduct involving dishonesty, fraud, deceit, or misrepresentation. In Re Malat, 187 N.J. 116 (2006). Specifically, in one matter, one year after the client's complaint had been dismissed, respondent told the client that depositions had been scheduled. In another matter, a year and a half after the complaint had been dismissed, he told the client that trial was scheduled. In a third matter, after he had permitted a property to be sold without satisfaction of a lien, he misrepresented to the client that the property had not been sold.

The Court ordered that, prior to reinstatement, respondent provide proof of fitness to practice law, and, following reinstatement, be supervised by a proctor approved by the OAE. The order also prohibited respondent from practicing as a sole practitioner.

Service of process in this matter was proper. On September 5, 2006, the OAE sent a copy of the complaint to respondent's home address, 24 McMichael Avenue, Somerdale, New Jersey 08083, via regular and certified mail, return receipt requested. The

letter sent certified mail was returned with the notation "unclaimed." The letter sent via regular mail was not returned.

On October 11, 2006, the OAE sent a letter to respondent's home address and to the address of his former office, 214 White Horse Pike, Haddon Heights, New Jersey 08035, via regular mail. The letter directed respondent to file an answer within five days - i.e., by October 16, 2006 - and informed him that, if he failed to do so, the record would be certified directly to us for the imposition of sanction. Neither mailing was returned.

As of October 18, 2006, respondent had not filed an answer to the complaint. Accordingly, on that date, the OAE certified this matter to us as a default.

On January 17, 2007, at 1:00 p.m., less than twenty-four hours before our review of this matter and nine days after the deadline for respondent to file a motion to vacate the default, respondent personally delivered his motion to Office of Board Counsel. As discussed below, we determined to deny the motion. To put the discussion in context, we first set forth the charges brought against respondent.

According to the first count of the complaint, on or before June 2001, Arthur Bailey retained respondent to represent him in several legal matters. One of them involved a landlord-tenant

relationship, referred to in the record as "the Burlock lease." Respondent was to act as Bailey's rental agent, by collecting the tenant's rental payments. Respondent did not provide Bailey with a writing memorializing the basis or rate of his fee. Rather, he informed Bailey that he would retain ten percent of each monthly rental payment as his fee.

Between September 7, 2001 and July 2, 2002, ten payments under the Burlock lease were made, totaling \$5840. Each payment was deposited into respondent's trust account. Thus, respondent was entitled to ten percent of this amount, or \$584, and Bailey was entitled to \$5256. However, respondent remitted to Bailey only \$1116: \$517.50 from the September 7, 2001 rental payment and \$598.50 from the January 10, 2002 rental payment. The remaining \$4724 was divided between respondent and his bookkeeper, with respondent receiving \$3,516.50, and the bookkeeper receiving \$1,207.50.

According to the complaint, respondent did not remit the Burlock lease payments to Bailey or advise him that the funds had been received but not maintained in the trust account. Moreover, Bailey did not consent to and, in fact, did not know of respondent's disbursement of the rent monies to respondent and his bookkeeper.

On at least one occasion after July 2002, Bailey requested a bill from respondent. Respondent ignored Bailey's request. The complaint alleges that Bailey paid respondent directly for all fees he owed Respondent for legal services and did not owe respondent any further sums.

After July 2002, Bailey called respondent numerous times, seeking information about the Burlock lease payments. Respondent ignored Bailey's calls.

Based on these allegations, the first count of the complaint charged respondent with gross neglect (RPC 1.1(a)), failure to communicate, in writing, to a client not regularly represented the basis or rate of his fee (RPC 1.5(b)), knowing misappropriation of client funds (RPC 1.15(a)), conduct involving dishonesty, fraud, deceit, or misrepresentation (RPC 8.4(c)), and the principles set forth in In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979)), and violation of his responsibilities regarding non-lawyer assistants (RPC 5.3(a), (b), and (c)).

The second count of the complaint alleged that, from March 1997 to October 2001, respondent employed a paralegal named Joseph Kevin Martino as his office manager. Martino had a criminal record for offenses that included passing bad checks, forgery and obtaining CDS by fraud or forgery, which record was



known to respondent at all relevant times. Respondent and his employees knew that Martino had served time in jail.

As office manager, Martino controlled both the administrative and financial aspects of respondent's office and had full access to respondent's trust and business accounts. According to the complaint, at various times during Martino's employment, both he and respondent instructed respondent's office staff to make out trust account checks to cash and to cash the checks, returning the cash to them. In October 2001, respondent fired Martino and took personal control of his office trust and business accounts.

Based on these allegations, the second count of the complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.15(a) (failure to safeguard client funds), and RPC 5.3(a), (b), and (c) (failure to supervise non-lawyer assistants).

The third count of the complaint alleged that respondent ignored three attempts on the part of the district ethics committee and the OAE to obtain his reply to the grievance. In addition, the complaint alleged that, when respondent appeared at the OAE's office on January 5, 2006 for a demand audit, he did not bring any of the documentation requested by the OAE.

The requested documentation included respondent's books and records from July 1, 2001 to December 31, 2002, the entire original Bailey client file and the completed Attorney Bank Account Disclosure form. The OAE also requested respondent to provide other information, including a copy of his written reply to Bailey's grievance and information as to when the replies were mailed to either the OAE or the committee. Respondent agreed to provide the OAE with the requested information, but he never did.

Based upon these allegations, respondent was charged with violating RPC 8.1(b).

We first consider respondent's motion to vacate the default. As a preliminary matter, we note the tardiness of the motion, which was filed nine days late and on the eve of the hearing. Nevertheless, we opted to consider the motion, given the knowing misappropriation charge brought against respondent.

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. We are unconvinced that respondent has offered a reasonable explanation for his failure to file a timely answer to the complaint.

Respondent admitted that he had received the complaint and the five-day letter. Respondent's answer to the complaint was due to be filed on September 26, 2006, R. 1:20-4(e). He failed to file an answer by that date, or by the deadline established in the five-day letter, which respondent characterized as a "reminder letter." In the end, respondent made no attempt to file an answer until five days after the matter had been certified to us as a default.

The similarities between respondent's current motion to vacate and those of the past are striking. As before, respondent has offered two different reasons for his failure to file a timely answer. On the one hand, he asserted that, notwithstanding his "repeated and protracted efforts," he cannot locate the files 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." As in respondent's prior default, the letter's lengthy recitation establishes nothing more than that respondent made a calculated decision not to file a timely answer. In re

Malat, DRB 06-036 (March 30, 2006) (slip op. at 47). For ease of reference, we choose to set forth the same facts in this decision.

Respondent described 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 claimed 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 (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.

. . . .

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 noted 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 matters, as well as my financial records that the O.A.E. was seeking to investigate, in addition to my accounting documentation, [sic] none of

which have been located after more than three years and I do not have the ability to have them reconstructed at prices that range from \$10.00 to \$15.00 per item and needing several thousand items.

[Letter from Samuel A. Malat to Disciplinary Review Board, dated January 17, 2007, p. 3 (emphasis supplied).]

Respondent also refers to various personal problems that allegedly "form the basis of [his] excusable neglect." They include the following: (1) since his suspension, the past four 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 had open heart surgery in March 2006; and (6) he does not receive mail, which he attributes to the fact that he (a) no longer has an office and (b) spends "considerable time away from home."<sup>2</sup> Id. at 2. What is different from the last motion, which was filed before respondent's mother was to undergo open-heart surgery, is

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<sup>2</sup> Respondent stated that the "potential reasons" why he does not receive his mail "are too numerous to even speculate."

respondent's current claim that, since his mother's surgery, she has been hospitalized three times and has been "the victim of repeated thefts and elder abuse from her caregiver and her caregiver's live-in boyfriend." Ibid.

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 [his] defense." Id. at 3.

In 2002, 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, DRB 02-270 (December 11, 2002) (slip op. at 3). For the same reason, in 2006, we denied respondent's motion to vacate another default. In the Matter of Samuel A. Malat, DRB 06-036 (March 30, 2006) (slip op. at 20-21). We note that respondent's "excusable neglect" explanations in this matter bear a striking resemblance to those offered by him more than four years ago in his failed attempt to vacate that default. We 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.

[In the Matter of Samuel A. Malat, supra, DRB 02-270 (slip op. at 2-3) (emphasis supplied).]

Respondent's "excusable neglect" explanations here are troubling because they echo those identified by him just last year. We stated:

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.

[In the Matter of Samuel A. Malat, supra,  
DRB 06-036 (slip op. at 21-24).]

For the same reasons, we determine that respondent has failed to satisfy the excusable-neglect prong of the test in this matter. As with respondent's previous motions to vacate, he continues to fail 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 that he received the complaint. He has, thus, failed in his attempt to prove excusable neglect.

Finally, we also reject respondent's claim that his 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, as we stated in our prior decision, 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.

As we noted in a prior matter, respondent's 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 there is no evidence that he ever 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 light of our conclusion, there is no need to address the second prong of the test, that is, whether respondent has asserted a meritorious defense to the underlying charges.

Turning to the merits of this matter, the complaint charged respondent with receiving rent monies on behalf of his client, Bailey, and knowingly misappropriating them for his and his bookkeeper's use. These allegations are deemed admitted because respondent failed to file an answer to the complaint. R. 1:20-4(f). Nothing in the record before us suggests a defense to the charge that respondent misused client funds. Accordingly, we see no alternative but to recommend that respondent be disbarred

for the knowing misappropriation of client funds, as alleged in the first count of the ethics complaint. In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979).

Even in the absence of a finding of knowing misappropriation, we would recommend respondent's disbarment. Respondent's disciplinary history, which, to date, encompasses six disciplinary proceedings and four defaults, reflects an abiding contempt for the disciplinary process. Such defiance of the disciplinary system demonstrates that he is unsalvageable as an attorney. Cf. In re Kantor, 180 N.J. 226, 232-33 (2004) (attorney whose disciplinary record included a reprimand and a three-month suspension was disbarred for client abandonment, refusal to cooperate with disciplinary authorities, and refusal to appear on Supreme Court's order to show cause; the Court observed that there was "nothing in the record to suggest that he [was] salvageable as an attorney").

Members Baugh and Lolla did not participate.

We further 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

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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Samuel A. Malat  
Docket No. DRB 06-301

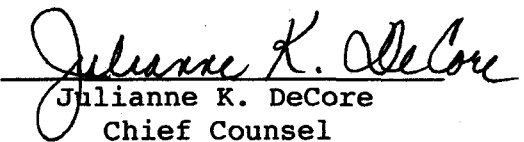
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Decided: March 19, 2007

Disposition: Disbar

| Members        | Disbar | Suspension | Reprimand | Dismiss | Disqualified | Did not participate |
|----------------|--------|------------|-----------|---------|--------------|---------------------|
| O' Shaughnessy | X      |            |           |         |              |                     |
| Pashman        | X      |            |           |         |              |                     |
| Baugh          |        |            |           |         |              | X                   |
| Boylan         | X      |            |           |         |              |                     |
| Frost          | X      |            |           |         |              |                     |
| Lolla          |        |            |           |         |              | X                   |
| Pashman        | X      |            |           |         |              |                     |
| Stanton        | X      |            |           |         |              |                     |
| Wissinger      | X      |            |           |         |              |                     |
| Total:         | 7      |            |           |         |              | 2                   |

  
Julianne K. DeCore  
Chief Counsel