SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-052
District Docket No. XIII-04-034E

IN THE MATTER OF	
PATRICK PERONE	
AN ATTORNEY AT LAW	

Decision

Argued: April 20, 2006

Decided: June 6, 2006

Sheryl Schwartz appeared on behalf of the District XIII Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline (reprimand) filed by the District XIII Ethics Committee ("DEC"). The complaint charged respondent with having violated RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter and to comply with reasonable requests for information), RPC 1.4(c) (failure to

explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), and RPC 1.5, presumably (a) (unreasonable fee).

Respondent was admitted to the New Jersey bar in 1992. At the relevant time, he maintained a law office in Plainfield, New Jersey. He currently practices in Manahawkin, New Jersey.

In May 2003, David Harris telephoned respondent seeking advice about inadequate services received from Morgan Marina, Inc. Harris had retained the marina to paint his boat. After their initial conversation, Harris faxed some information to respondent, including receipts and the contract with Morgan Marina.

On July 31, 2003, respondent met with Harris to discuss the problems in greater detail. At that time, they entered into a retainer agreement. The agreement provided that respondent would file a lawsuit against the marina, alleging consumer fraud. The retainer called for an initial payment of $750, which was also listed as the minimum fee "regardless of the amount of time actually spent on this case." Respondent's hourly rate for services was set at $175 per hour. Harris was responsible for the payment of costs and expenses, including but not limited to court costs and expert's fees. Harris paid respondent the $750 retainer at that initial meeting.

During this same meeting, Harris also retained respondent to obtain post-conviction relief ("PCR") from a 1993 guilty plea. The retainer for this matter quoted a $2,500 initial payment and minimum fee, and an hourly rate of $175. Harris paid that initial fee as well. He returned to respondent's office that same day to turn over his original file, which included a transcript of his plea agreement.

Notwithstanding the retainer agreements' provision that the law firm would send Harris itemized bills "from time to time," respondent never sent Harris any bills or statements of services in either case.

As to the consumer fraud matter, respondent never provided Harris with a filed copy of a complaint. According to Harris, respondent claimed that the matter would be resolved by October 2003 (within three months), which did not occur.

Harris asserted that, after he retained respondent, he had great difficulty contacting him by telephone. He, therefore, resorted to emailing and even "instant messaging" respondent. Sometime after July 2003, Harris's wife, Vivian, also tried to contact respondent for information about the status of both cases, to no avail. In an October 13, 2003 email to respondent, Harris again inquired about the status of both cases. Harris recalled that he met with respondent once more, possibly in

November 2003, and that respondent cancelled a February 2004 meeting and did not show up for an April 2004 meeting.

At the DEC hearing, the parties disagreed about whose responsibility it was to locate an expert witness for the boat case. The testimony established that, early on, respondent initiated the process without asking for Harris's assistance. In July 2003, respondent located an expert, Captain Wary, whom they later rejected because of his excessive fees. Harris, therefore, assumed that it was respondent's obligation to locate an expert.

Six months later, in January 2004, Harris telephoned respondent to inquire whether respondent had located another expert witness. Harris stated that the conversation became "somewhat heated" and that respondent told him that, according to the "small print" on the retainer agreement, respondent could direct Harris to find an expert. Based on that conversation, Harris downloaded a list of possible expert witnesses from the internet and, on January 21, 2004, emailed it to respondent.

Harris testified that he had seen a copy of a draft complaint in August (presumably 2004), and that respondent had requested him and his wife to make any necessary corrections to it. According to Harris, respondent telephoned him from the courthouse, to obtain a figure for the amount of the damages

sustained. Respondent inserted by hand the amount of "$3,075.00" on the complaint, dated February 11, 2004.

Harris presumed that respondent had filed the pleading at that time. In late March or early April 2004, Harris and his wife both called the courthouse and learned that there was no record of his lawsuit against the marina. In response to Harris's inquiries and his March 31, 2004 email forwarding a second list of potential expert witnesses, respondent sent Harris an April 2, 2004 email:

> I have tried a few of these and they do not seem willing to testify. In addition, boat surveyors are mostly concerned with the construction of and not the painting and/or preparation prior to painting boats. . . .
>
> I am going to continue looking for the expert. In addition, I do not know what occurred in Middlesex for the filing as it was hand delivered. I recall calling you from the courthouse on that day. I will check into it and straighten this out ASAP. Right now I am focused first on finding a boat paint expert and completing the legal brief for [W]ednesday on the other matter (emphasis added).
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> [Ex.C16.]

According to Harris, respondent did not "straighten out" the problem with the complaint.

Harris scheduled an April 2004 inspection of his boat with a marine surveyor, Paul Case, a potential expert witness, and notified respondent of the appointment. Harris maintained that respondent was to drop off some photographs for use by the

surveyor, but failed to do so, and that it was the second appointment that respondent had missed. Respondent denied that he ever definitively told Harris that he would stop by that day. Moreover, he claimed that it "was not appropriate" for him to do so while the expert was there. Respondent further alleged that Harris had an extra copy of the photographs and that Harris stated that "it would be okay" if respondent did not show up.

In an April 10, 2004 email, Harris warned respondent that Paul Case was contacting the marina directly, and expressed his concern that this direct contact could jeopardize his lawsuit. Harris wanted respondent's advice on how to handle the situation. Presumably, respondent never replied to this email. Shortly thereafter, on April 15, 2004, Harris tried to discharge respondent.

As to the PCR matter, respondent prepared a petition listing a return date of November 28, 2003, which he forwarded to Harris. Although the petition and supporting documentation were signed by respondent, the documents were left undated. According to Harris, because respondent failed to keep him informed about the status of that matter, he did not know if respondent had filed the petition with the court until after he filed his ethics grievance against respondent. Respondent's reply to the grievance included a copy of the petition for PCR, dated January 19, 2004. The return date,

however, was listed as "Friday the 28th day of November, 2003." The document was stamped filed on April 26, 2004.

By certified letter dated April 15, 2004, Harris attempted to discharge respondent because of his difficulties contacting him. Respondent, however, did not accept service of the letter. Harris retained another attorney, Edmund P. Glasner, to take over the marina matter. Glasner wrote to respondent on April 15 and May 21, 2004, requesting the entire marina file. As of the date of the DEC hearing, Harris believed that respondent had not complied with Glasner's request. Harris testified at the DEC hearing that the marina case was at the jury selection stage.

By fax and an April 22, 2004 email, Harris notified respondent that his repeated attempts to contact him via different methods had been unsuccessful, that he was discharging him from both matters, and that he wanted all materials relating to the two matters returned on or before April 25, 2004, in addition to itemized statements for services performed in both matters and a refund of the retainers. Respondent did not return Harris's file, prompting Vivian to appear at respondent's office, unannounced, to retrieve it. The original transcript from Harris's plea hearing, however, was missing from the PCR file.

According to Harris, after he tried to discharge respondent from his cases, respondent convinced him that the PCR matter was

ready to proceed and that, if Harris discharged him, Harris would have to proceed pro se. Rather than proceed without counsel, Harris chose to have respondent continue with the PCR case. At the DEC hearing, Harris stated his belief that there had been a ruling in the PCR matter, but he did not know the outcome.

Harris continued to encounter problems contacting respondent. Finally, by letter dated June 24, 2004, Harris discharged respondent from the PCR matter, asked that he forward the PCR file to his new attorney, Joshua D. Altman, and requested a refund of his retainer. On July 12, 2004, Altman wrote to respondent requesting the transcripts from the plea and sentencing. Harris testified that respondent did not comply with Altman's request. Harris noted that Altman was ultimately able to obtain the underlying transcript by contacting a retired transcriptionist from the Ocean County court system. Afterwards, Altman filed a petition to have Harris's criminal record expunged.

After his discharge from both cases, respondent neither refunded Harris's retainer, nor advised him about the status of the cases.

Vivian testified that, sometime after February 2004, she called the Middlesex County Courthouse to obtain the docket number for the marina matter, but was informed that no such case had been docketed. In addition, when she contacted the Ocean

County Courthouse to follow up on the PCR case, she learned that nothing had been filed on Harris's behalf.

For his part, respondent testified that, from the outset, he had informed Harris that he needed an expert witness before he could file a complaint in a consumer fraud case. He claimed that, as early as July 2003, he told Harris that it was Harris's responsibility to obtain the expert, although he would assist Harris in the process. Respondent maintained that most of the experts that he contacted were not willing to testify.

According to respondent, either in late February or early March 2004, he contacted Harris to request a $54 check for filing fees in the marina matter. Thereafter, he dropped the complaint off "in the filing area in Middlesex County." He notified Harris that he had "done everything;" that the complaint would get logged into the computer; that a docket number would be assigned within two or three days; and that the defendant had thirty days to file an answer.

Respondent testified that, the next day, the court notified him that the filing fee had not been included with the packet that he had left for filing. He, therefore, contacted Harris and requested a check for $54. According to respondent, Harris told him to send him a bill. Respondent claimed that he was unaware that Harris had not dropped off the filing fee. He also maintained, however, that he thought that there was a check

included in the envelope when he dropped off the complaint for filing. He claimed further that, when the court advised him that the filing fees were missing, he replied "hold it right there, this guy is going to come down to provide a check. I gave [Harris] a call. He never provided a check." Respondent stated that he did nothing further on the case, because Harris had retained new counsel.[1] According to respondent, he notified the new attorney that he had turned over all the original documents to Vivian, and that the remaining information was already in Harris's possession.

As to the PCR matter, respondent initially advised Harris that it would be better to pursue an expungement proceeding, but Harris wanted to pursue PCR. Respondent blamed the gap between the preparation of the PCR document, in November 2003, and its filing, in April 2004, on attempts to find an expert witness for the consumer fraud case.

Respondent testified that he was unaware that he was required to file a PCR brief until he was directed to do so by the court in January 2004. It took him another three months to prepare the brief before he filed the petition on April 26, 2004. Respondent, however, never filed the brief. His explanation for not doing so was incomprehensible. He claimed alternatively that

[1] Harris, however, did not discharge respondent until mid-April.

the judge's chambers told him that he had to file a brief, that the judge required specific forms, and that no brief was required. The case was ultimately dismissed because the statute of limitations expired.

As to mitigation, respondent noted that this was his first ethics problem in his thirteen-year career; that for the last ten years he had been an assistant public defender in Montgomery Township; and that he took on pro bono cases.

Respondent claimed that he did not submit additional bills or statements to Harris because he had not requested additional funds from Harris. Respondent opined that Harris's and his own recollection of events were not entirely accurate, and that problems had arisen because of a personality conflict between the two of them.

The DEC found the Harrises' testimony credible, disbelieving respondent. The DEC was "especially upset" that, although the PCR petition was stamped filed on April 26, 2004, it called for a return date of November 28, 2003, which was five months before the filing date, and that it was dated January 19, 2004, four months before the filing date. Based on Harris's testimony, the DEC concluded that Harris was forced to keep respondent as his attorney in this case, and that respondent rushed to file the petition when Harris announced his intention to discharge him.

The DEC was also troubled by respondent's testimony concerning his failure to file a complaint in the consumer fraud matter. The DEC found that the emails contradicted respondent's testimony, and that his attempt to explain the contradictions were strained and unbelievable at best. According to the DEC,

> [o]n the one hand the Respondent testified that he knew that the SCP [special civil part] complaint had not been filed since they had not paid the filing fees while on the other hand he attempts to explain away the April 2, 2004 email by alleging that he had believed that Mr. Harris paid the filing fee directly to the Court. It should be noted that none of the emails, (including the April 2, 2004 email) mentioned the need to pay a filing fee in order to have SCP filed. Had the respondent's story been true, it is thought that the April 2, 2004 email would have said something about the fact that the filing fee had to be paid before the complaint would be filed.
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> [HR7.[2]]

The DEC, thus, found that respondent failed to act with reasonable diligence by not timely filing the SCP complaint and the PCR petition, and then "falsely" represented to his client that he had done so; that he failed to keep his client reasonably informed about the status of his cases and to promptly comply with his reasonable requests for information; and that he failed to explain the matter to the extent reasonably necessary to permit Harris to make informed decisions about the representation, by falsely

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[2] HR refers to the DEC hearing report, dated July 20, 2005.

telling Harris that his matters were proceeding when they were not, by filing an improperly prepared PCR petition, at the last minute, and by telling Harris that he would have to proceed pro se if he discharged respondent. The DEC found violations of RPC 1.3, 1.4(b), and RPC 1.4(c). The DEC also believed that respondent was "less then truthful to the Panel."

The DEC did not find a violation of RPC 1.5, presumably (a) (unreasonable fee). The DEC reasoned that, because respondent never billed Harris for any further services, and because the retainer agreements called for a minimum fee, he was not required to provide a bill for services. The DEC did not, however, pass on the reasonableness of the fee charged, finding that that issue would be more properly resolved through fee arbitration.

The DEC recommended a reprimand.

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

We find that respondent failed to diligently pursue both of Harris's cases. In the consumer fraud case, notwithstanding the terms of the retainer agreement, respondent led Harris to believe that he would find an expert witness, a prerequisite to filing a complaint. After locating an expert, whose fees were excessive, respondent "dropped the ball." Once Harris began complaining,

respondent instructed him to find his own expert. Thereafter, even though respondent eventually drafted a complaint, it was never filed. Respondent never completed the matter.

In the PCR case, even though respondent must have drafted the petition sometime prior to November 28, 2003 – the purported return date of the motion – he did not sign the papers until January 19, 2004, and did not file them until April 26, 2004, the day after Harris notified him that he was discharging him from both matters.

The record is replete with evidence that respondent failed to adequately communicate with the Harrises. He failed to return their telephone calls, prompting them to communicate via email, and, at least in one instance, by "instant messaging" respondent. In addition, respondent did not accept service of Harris's certified letter. We find, thus, that respondent violated RPC 1.4(b).

Also, respondent failed to explain the matters to the extent reasonably necessary for Harris to make informed decisions about the representation. In the consumer fraud matter, Harris did not initially know that he was responsible for finding an expert or for paying the filing fees. In the PCR matter, respondent improperly told Harris that he would have to proceed pro se if he discharged respondent and failed to advise him of other avenues that he could pursue. Respondent, thus, violated RPC 1.4(c).

On the other hand, we find insufficient evidence to conclude that respondent charged an unreasonable fee in the two matters, in light of the terms of the retainer agreements calling for a minimum fee. In addition, although there were no records of the time spent on Harris's matters, respondent did some work on the matters. We, therefore, dismiss the charged violation of RPC 1.5 and leave Harris to other remedies available to him.

In matters involving a lack of diligence and failure to communicate with a client, the standard discipline is an admonition. See, e.g., In the Matter of Jonathan Saint-Preux, Docket No. DRB 04-174 (July 20, 2004) (attorney engaged in a lack of diligence and failure to *communicate in two immigration* cases); In the Matter of Carolyn Arch, DRB 01-322 (July 29, 2002) (attorney failed to act promptly in her client's divorce action and failed to communicate with the client; the attorney had a prior private reprimand); In the Matter of Theodore F. Kozlowski, DRB 96-460 (February 18, 1998) (in two separate matters, the attorney engaged in lack of diligence and failure to communicate with his clients; the attorney had a prior private reprimand); and In the Matter of Cornelius W. Daniel, III, DRB 96-394 (January 16, 1997) (attorney engaged in a lack of diligence by failing to pay medical bills from the net proceeds of a personal

injury settlement for a period of four years, and by failing to adequately communicate with the client).

Admonitions have also been imposed where, instead of displaying lack of diligence, attorneys have engaged in gross neglect in one or a few matters. See, e.g., In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (attorney engaged in gross negligence and failure to communicate with his client in a trademark matter); In the Matter of Stephen K. Fletcher, DRB 04-077 (April 16 2004) (attorney engaged in gross negligence and failure to communicate with his client); In the Matter of Mark Krassner, DRB 03-307 (November 25, 2003) (in a matrimonial matter, the attorney engaged in gross neglect by allowing a judgment of divorce to be entered against his client; he also failed to communicate with the client); In the Matter of Vincenza Leonelli-Spina, DRB 02-433 (February 14, 2003) (in representing eleven police officers objecting to a promotional exam administered by the municipality, the attorney failed to file an appellate brief on two occasions, thereby engaging in gross neglect, and also failed to reply to her clients' telephone calls and correspondence).

The record further established that respondent made false statements to Harris, led him to believe that the matters were proceeding properly, and even deceived Harris by telling him that there was a hearing coming up shortly and that, if Harris

discharged him, Harris would have to proceed pro se. We find, thus, that respondent violated RPC 8.4(c) (conduct involving deceit or misrepresentation). Although the complaint did not specifically charge respondent with this violation, we find that the record developed below contains clear and convincing evidence of a violation of that RPC. We, therefore, deem the complaint amended to conform to the proofs. In re Logan, 70 N.J. 222, 231-32 (1976).

We also find as aggravating circumstances that respondent failed to turn over the file to either Harris or his new counsel, and that the DEC believed that respondent was "less than truthful" at the hearing below.

Based on the above violations and aggravating circumstance, we find that a reprimand is warranted in this matter. Members Boylan and Neuwirth voted to impose an admonition. Vice-Chair Pashman did not participate.

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

Disciplinary Review Board
William J. O'Shaughnessy, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Patrick Perone
Docket No. DRB 06-052

Argued: April 20, 2006

Decided: June 6, 2006

Disposition: Reprimand

Members	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy			X		
Pashman					X
Baugh			X		
Boylan				X	
Frost			X		
Lolla			X		
Neuwirth				X	
Stanton			X		
Wissinger			X		
Total:			6	2	1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel