

13

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-080
District Docket Nos. X-03-092E
and X-03-005E

IN THE MATTER OF
HOWARD S. DIAMOND
AN ATTORNEY AT LAW

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Decision

Argued: April 21, 2005

Decided: July 7, 2005

Sheldon Simon appeared on behalf of the District X Ethics Committee.

Albert B. Jeffers, Jr. waived appearance on behalf of respondent.

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 (six-month suspension) filed by the District X Ethics Committee ("DEC"). Two complaints charged respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to keep clients reasonably informed about the status of the

matter), RPC 1.4(b) (failure to explain a matter to the extent necessary to permit the client to make informed decisions about the representation), and RPC 8.1(b) (failure to comply with lawful requests for information from a disciplinary authority).

Respondent was admitted to the New Jersey bar in 1985. He currently maintains a law practice in Randolph, New Jersey.

Respondent received an admonition in 2002, for failure to reply to an executrix' requests for information in an estate matter. In re Diamond, Docket No. DRB 01-420 (February 8, 2002). Also in 2002, respondent was reprimanded for grossly neglecting a matter that resulted in the entry of default judgments against his clients and levies on their personal and business accounts, and for failing to provide his clients with a writing setting forth the basis or rate of his fee. In re Diamond, 174 N.J. 346 (2002).

The facts set out in the complaint were largely undisputed. Thus, the matter was scheduled for a hearing essentially on mitigation - primarily respondent's substance dependency. The DEC hearing started on November 9, 2004, and was continued to November 29, 2004. Three weeks prior to the initial hearing, however, respondent suffered a relapse. As a result, his treating psychiatrist would not release the draft of his expert's report because he had to revise it based on that information.

The DEC required respondent to serve the report on the presenter, prior to presenting his psychiatrist's testimony. Although respondent's counsel served the report on the presenter, the psychiatrist had discharged respondent as a patient because respondent stopped meeting with him. As the psychiatrist did not know about respondent's current condition or whether respondent was continuing to take his medications, he declined to testify at the continuation of the DEC hearing. In addition, his report was not submitted as evidence to support respondent's testimony about his psychiatric condition.

Although respondent testified during the first day of the DEC hearing, he failed to appear at its continuation. According to his counsel, respondent had disappeared two weeks prior thereto. When respondent returned, his wife tried to have him readmitted into the rehabilitation facility where he had been previously treated for his alcohol and drug addiction. At one point, respondent moved out of his house. Afterwards, respondent's counsel did not hear from either respondent or his wife. Earlier, however, respondent's counsel had informed him of the continuation date.

The Gallagher Matter - District Docket No. 04-005E

Donna Gallagher retained respondent in January 2000, in connection with a personal injury matter. Respondent filed a

complaint on her behalf, and engaged in some discovery. Depositions were scheduled and adjourned. One adjournment was at the defendant's request because of Gallagher's failure to submit answers to interrogatories. The rescheduled deposition in August 2002 was again canceled, purportedly due to Gallagher's "schedule conflicts" and her unwillingness to take time off from her job as a school nurse.

According to Gallagher, she did not hear from respondent after August 2002. As a result, she attempted to contact him by leaving messages on his answering machine. Gallagher admitted that initially respondent would reply to her telephone messages by writing to her about the status of the case. However, by December 2003, that had changed. Gallagher left numerous messages on respondent's answering machine, to no avail. Eventually, when Gallagher called respondent's telephone number, she received a pre-recorded message indicating that respondent's line had been disconnected. The recording gave no forwarding information. Gallagher, nevertheless, continued to call respondent's office every day from December 15 through December 22, 2003, and received the same message.

On December 27, 2003, Gallagher and her husband drove to respondent's Randolph, New Jersey office. Although respondent's name was posted on the marquis, no office in either of the two buildings at respondent's law office address had his name on it.

In January 2004, Gallagher received a letter from the court indicating that her case had been dismissed with prejudice. Gallagher, therefore, retained another attorney in an attempt to reactivate the matter. That attorney settled Gallagher's claim without reinstating the case. Gallagher testified that, although she was not satisfied with the settlement, she just wanted the matter resolved because it had dragged on for so long. Gallagher received \$10,000 - less than one-third of the amount she had originally sought.

On January 28, 2004, the DEC investigator sent a letter to respondent requesting a written reply to Gallagher's grievance within ten days. In a February 6, 2004 facsimile transmission, respondent acknowledged receipt of the grievance, which had been mailed to his former office address, requested that the investigator use respondent's new office address, and that he be granted additional time to reply.

On February 17, 2004, the investigator sent respondent a second letter, noting that he had not yet received respondent's reply, and requesting it by no later than February 23, 2004. Again, respondent did not reply. On March 11, 2004, the investigator left a telephone message on respondent's answering machine, stating that respondent was delinquent in furnishing a response, and that his failure to cooperate would constitute an additional ethics violation.

Finally, on March 19, 2004, the DEC mailed a letter to respondent by regular and certified mail, return receipt requested, stating that, if he did not reply to the grievance by March 19, 2004, the DEC would file an ethics complaint that would include a violation of RPC 8.1(b) (failure to cooperate with ethics authorities). Although respondent did not pick up the certified mail, the regular mail was not returned to the investigator. Respondent did not reply to the grievance.

The Green Matter - District Docket No. X-03-092E

During the relevant time period, respondent maintained offices in Randolph and later Denville, New Jersey.

At an unspecified date, Deborah Green retained respondent in connection with a May 1999 motorcycle accident in which she was the passenger and her husband the driver. Respondent filed suit on Green's behalf against her husband. The matter proceeded to arbitration on August 8, 2002. Green attended the arbitration hearing with respondent, and testified at the arbitration hearing. The arbitration panel determined that Green's husband was not at fault.

Although Green wanted to go forward with a lawsuit, respondent recommended that she accept a settlement of her claim. Green ultimately agreed to accept a \$35,000 settlement, for which she signed a release. Respondent kept \$12,089.57 for

fees and costs, and paid Green \$10,000. The balance of the funds (approximately \$12,910.43 plus interest) remained in respondent's trust account as a result of a disagreement over whether CIGNA Insurance Company ("CIGNA") had to be reimbursed for Green's medical bills. As of the date of the DEC hearing, Green did not know whether respondent had resolved that issue.

After Green received her portion of the settlement, she heard nothing further from respondent. Green attempted to contact respondent on numerous occasions - in person, in writing, and by telephone, to no avail. As of the DEC hearing, she had not received any of the balance of the escrowed monies, nor had she heard from respondent since her receipt of the \$10,000.

In addition to the foregoing matter, Green was involved in a motor vehicle accident on February 22, 2000. Green and her husband retained respondent to represent them in connection with that matter for incurred personal injury and property damages.

Respondent notified the adverse parties that he was representing the Greens. On January 30, 2002, the Greens received notification from respondent that, on January 29, 2002, he had filed a complaint to protect their interests because "the two-year statute to file same [was] rapidly approaching."

Thereafter, respondent took some action on their behalf, including gathering certain information and records. After the

filing of the complaint, however, the Greens heard nothing further from respondent, despite their numerous telephone calls and letters to him. Respondent also failed to notify the Greens that he had moved his office "on several occasions." As of the date of the DEC hearing, the Greens did not know the status of their matter.

On December 9, 2003, the DEC investigator mailed a copy of the Greens' grievance to respondent by regular and certified mail, return receipt requested. A photocopy of the certified mail receipt shows delivery of the letter on December 16, 2003. Respondent did not reply. As a result, on January 15, 2004, the DEC mailed a second letter to respondent at his new office in Denville, New Jersey, by regular and certified mail, return receipt requested. The letter gave respondent an additional ten days to reply to the grievance. Again, respondent failed to reply.

By letter dated February 17, 2004, mailed to respondent's home address by regular and certified mail, return receipt requested, the DEC investigator enclosed copies of his previous two letters to respondent. The certified mail was received on February 18, 2004. In May 2004, respondent's attorney contacted the investigator and notified him that he would be representing respondent in these ethics matters.

In his behalf, respondent testified that he was unable to resolve the controversy with CIGNA, presumably because of the problems he was facing at the time. In addition, he could not recall what had happened in the Greens' other lawsuit. According to respondent, he was suffering from "a bipolar condition," depression, anxiety, and adult attention deficit disorder ("ADD"), which became more pronounced in 1998 or 1999. At that time, he began treatment with Dr. White, a psychiatrist, who specialized in ADD. Respondent treated with White for approximately five years. White prescribed many different medications until he settled on a course of medication for respondent's ADD, depression, and anxiety.

After a while, respondent claimed that he attempted to "self-medicate" through the use of alcohol and drugs. Respondent's drinking became a problem in 2000-2001. Around 1999, respondent was also using cocaine on average of once or twice a week.

According to respondent, by 2002 he was becoming less effective in his law practice, the size of his practice decreased as he lost clients, and did not take on any new ones.

In September 2003, respondent tried to form an association with another attorney located in Denville, New Jersey. Respondent claimed that the attorney was supposed to be answering his telephone and working on his cases. However, their

financial agreement never materialized, leading respondent to become more depressed, and reliant on "other things."

Earlier, in August 2003, respondent had been involved in a motorcycle accident, and became incapacitated for approximately forty-five days. He was prescribed medications and painkillers. He did not go to his office or perform any work during that time period.

After his accident, respondent was feeling worse, and did not believe that his doctor was addressing his problem. He was drinking a lot, had been in and out of Alcoholics Anonymous ("AA"), and had also been treated at an "intensive" out-patient treatment facility.

Respondent switched psychiatrists in January 2004. He began treatment with Dr. George Lutz, a specialist in addiction disorders. He met with Lutz or someone from Lutz' office three or four times a month, and was treating with Lutz at the time of the DEC hearing.

As a result of respondent's mental condition, he filed for disability insurance, and was declared totally disabled as of January 2004, when he started treating with Lutz. According to respondent, because of his addiction problems, Lutz took him off some of the medications and prescribed Wellbutrin, Zoloft, and Lithium. As of the DEC hearing, respondent was taking only Seroquel. Respondent claimed that the medications made him feel

dopey and lethargic, made sleep and concentration difficult, and decreased his tolerance; in other words, he had a "short fuse."

In April 2004, while intoxicated, respondent was involved in a serious motor vehicle accident, which resulted in his decision to enter into a month-long in-patient treatment facility. As a result of the accident, respondent lost his driver's license for seven months.

According to respondent, he had not practiced law in 2004, and did not have more than a couple of active files. He was just trying to deal with his ethics matters, return files to his clients, and take care of some minor matters for his wife that involved contractual issues. Respondent realized that he was incapable of practicing law in early 2003, and decided to close his Randolph, New Jersey office in July 2003. Nevertheless, at the DEC hearing, respondent indicated that a listing of his law office would appear in the 2005 New Jersey Lawyers' Diary.¹

Respondent admitted that he had relapsed with regard to his alcohol abuse, three to four weeks prior to the DEC hearing, but claimed that he had not had a drink in about two and one-half weeks. Lutz had prescribed Antabuse, which would make him sick if he had a drink. According to respondent, he was still taking

¹ The 2005 Diary lists respondent at 390 Route 10W, Randolph, NJ 07869.

the Antabuse and attending AA meetings four or five times a week.

At the DEC hearing, respondent claimed that his goal was to stay sober, get "mentally healthy," and try to get his life back together so that, in the future, he could practice law again. He admitted that, at that time, he did not feel that he was able to function as an attorney.

The DEC found that respondent consciously disregarded his obligations in both the Gallagher and Green matters. As to the Gallagher matter, although respondent had instituted a lawsuit on her behalf and commenced discovery, he stopped communicating with her and ignored her repeated attempts to communicate with him. Eventually, in January 2004, Gallagher learned that her lawsuit had been dismissed with prejudice. The DEC, thus, found violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to keep client reasonably informed about the status of the matter and to comply with reasonable requests for information) and (b) (failure to explain a matter to the extent necessary to permit client to make informed decisions about the representation), and RPC 8.1(b) (failure to cooperate with reasonable requests for information from a disciplinary authority).

In the Green matter, the DEC found that, after respondent filed the lawsuit for Green's motorcycle accident and the case

was settled, respondent failed to communicate with Green, despite her repeated attempts to contact him. The DEC also found that, despite a few minor attempts, respondent never resolved the issue of the medical reimbursements to CIGNA. As for Green's subsequent motor vehicle accident, the DEC found that respondent took little action after filing a complaint. As of the date of the DEC hearing, Green had no information about the status of her case. Thus, the DEC found violations of RPC 1.3, 1.4(a) and (b), and RPC 8.1(b).

The DEC also found that respondent abandoned his clients, resulting in the dismissal with prejudice of one lawsuit, and that, in another matter, he retained settlement monies for a substantial period without communicating with the client about it and without knowing the current status of the monies. The DEC, thus, found that respondent's conduct in this regard constituted gross neglect, violating RPC 1.1(a).

The DEC also found that respondent's conduct in the two Green matters constituted a pattern of neglect, violating RPC 1.1(b).

As to respondent's claim that his addictive and mental disorder mitigated his actions, the DEC determined that his problems did not equate to a loss of comprehension, competency or will sufficient to excuse his conduct. In addition, the DEC found that respondent's reoccurring relapses, the abandonment of

his practice, and his flagrant and deliberate disregard of disciplinary proceedings, not only during the investigative stage but also at the DEC hearing, demonstrated his lack of fitness to practice law.

The DEC identified the following as aggravating factors: respondent's failure to cooperate with ethics authorities, lack of remorse, conduct as part of a pattern of a continuing course of neglect, and prior discipline. The only mitigating factor noted by the DEC was that respondent is no longer practicing law.

Based on these factors, the DEC recommended the imposition of a six-month suspension, the appointment of a "proctor" to oversee the orderly transition of respondent's remaining files and to perform an accounting of respondent's trust account, continuing mental health and alcohol/substance abuse counseling, and proof of psychiatric and medical fitness to practice law.

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.

Respondent failed to properly represent his clients and, in fact, abandoned them. In Gallagher's personal injury matter, respondent filed a complaint and engaged in discovery for a limited time. Depositions were twice adjourned, not necessarily through the fault of respondent. However, following the second

adjournment, Gallagher heard nothing further from respondent despite her repeated telephone calls.

Eventually, Gallagher learned that respondent's telephone had been disconnected. She and her husband drove to respondent's Randolph, New Jersey office, only to discover that it was no longer located there. Respondent closed his office without notifying her, and without resolving her matter. Ultimately, Gallagher learned that her lawsuit had been dismissed with prejudice. As a result, she retained another attorney, who was able to obtain a recovery for her without reinstating the lawsuit, albeit for a fraction of the amount she had originally sought.

Respondent's misconduct in the Gallagher matter included lack of diligence, and failure to keep a client reasonably informed about the status of the matter, or to explain a matter to the extent necessary to permit the client to make informed decisions about the representation, and, as the DEC properly found, gross neglect. Although RPC 1.1(a) was not charged, the record developed below contains clear and convincing evidence of this violation. We, therefore, deem the complaint amended to conform to the proofs In re Logan, 70 N.J. 222, 231-32 (1976). Moreover, respondent failed to cooperate with the DEC's investigation of the Gallagher grievance.

In Green, respondent failed to finalize two matters. Although he ultimately settled the matter involving Green's motorcycle accident, he never made a final distribution of the funds he had escrowed in connection with the controversy with CIGNA. Respondent claimed that the funds remained in his trust account, and intimated that he was never able to resolve to whom the funds belonged, because of his addiction problems. No proof was offered that the funds were actually kept in respondent's trust account. Respondent's failure to properly dispose of the funds violated RPC 1.15(b) (failure to promptly deliver funds to the client or third person). Although RPC 1.15(b) was not charged in the complaint, we find that respondent's own testimony sustains a finding of a violation of that rule. We, thus, deem the complaint amended to conform to the evidence. In re Logan, supra, 70 N.J. at 231-32.

As to Green's automobile accident, although respondent filed a complaint on her behalf, he never resolved the matter. As of the date of the DEC hearing, Green did not know the status of her claim. Despite Green's efforts to try to communicate with respondent about her cases, she was unable to reach him. Here, too, respondent's conduct included lack of diligence, failure to communicate with the client (RPC 1.4(a) and (b)), and failure to cooperate with ethics authorities. Again, although RPC 1.1(a) was not charged, respondent's conduct rose to the level of gross

neglect, as he did nothing to resolve Green's lawsuit after filing a complaint. Because there were three matters involved, we find, as did the DEC, that respondent's conduct also involved a pattern of neglect, a violation of RPC 1.1(b). Finally, respondent failed to cooperate with the DEC's investigation into these matters.

As stated above, we view respondent's misconduct, despite his addiction problems, as an abandonment of his clients. He closed his office without notifying them, failed to complete their cases, and took no steps to protect their interests, once he stopped attending to their matters. Respondent's conduct also violated RPC 1.16(a)(2) (a lawyer shall withdraw from the representation of a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client). Clearly, respondent's addiction problems prevented him from properly representing his clients and ultimately resulted in his abandonment of their cases. Again, while this RPC was not charged in the complaint, the evidence in the record clearly and convincingly establishes that respondent violated this rule.

Generally, the abandonment of one or several clients has led to suspensions of varying lengths, depending on factors such as the circumstances of the abandonment, the presence of other misconduct, and the attorney's disciplinary history. See, e.g.,

In re Hoffman, 163 N.J. 4 (2000) (three-month suspension in a default where the attorney closed his office without notifying a client in a workers' compensation matter and three clients in a personal injury matter; the attorney was guilty of gross neglect, lack of diligence, failure to communicate with clients, failure to protect clients' interests upon termination of representation, and failure to cooperate with disciplinary authorities; attorney had a prior reprimand and a three-month suspension); In re Jennings, 147 N.J. 276 (1997) (three-month suspension for abandonment of one client and failure to cooperate with ethics authorities; attorney had no prior disciplinary history); In re Bowman, 175 N.J. 108 (2003) (six-month suspension for abandonment of two clients, misrepresentations to disciplinary authorities, pattern of neglect, and misconduct in three client matters, including gross neglect, lack of diligence, failure to communicate with clients, failure to explain a matter to the extent reasonable necessary to permit the client to make an informed decision about the representation, failure to provide a written fee agreement, failure to protect a client's interests upon termination of representation, and misrepresenting the status of a matter to a client; attorney had a prior private reprimand (Bowman I)); In re Bock, 128 N.J. 270 (1992) (six-month suspension for attorney, who, while serving as both a part-time municipal court judge and

a lawyer, with approximately sixty to seventy pending cases, abandoned both positions by feigning his own death); In re Bowman 178 N.J. 24 (2003) (one-year suspension in a default where the attorney abandoned four of six client matters; violations included gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to protect clients' interests on unilateral termination of representations, communicating about the subject of the representation with a person the lawyer knew or should have known to be represented by another lawyer in the matter, failure to adopt and maintain reasonable efforts to ensure that the conduct of non-lawyer employee is compatible with the professional obligations of the attorney, failure to properly supervise non-lawyer employee, failure to cooperate with disciplinary authorities, and misrepresentation of the status of a matter; ethics history included private reprimand, temporary suspension, and two six-month suspensions (Bowman II)); In re Greenwalt, 171 N.J. 472 (2002) (one-year suspension for attorney who grossly neglected three client matters, abandoned his law practice, failed to notify clients of a prior suspension, and failed to cooperate with disciplinary authorities; attorney had been temporarily suspended for failure to cooperate during the ethics investigation); and In re Mintz, 126 N.J. 484 (1992) (two-year suspension where attorney abandoned four clients and

was found guilty of a pattern of neglect, failure to maintain a bona fide office, and failure to cooperate with ethics authorities).

The DEC properly determined that respondent's addiction and psychiatric problems do not excuse his conduct. There was no evidence presented, much less competent evidence, to prove that respondent "suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." In re Jacob, 95 N.J. 132, 138 (1984). Respondent's testimony, however, highlighted the serious problems he encountered with his addiction, and apparently continues to face to date. We have considered this significant factor in rendering our decision and believe that his problems are so consuming that they have prevented him from participating in his own defense.

Respondent's misconduct involved only two clients, in three matters. While his ethics offenses did not encompass as many cases as the Bock matter, they were, nevertheless, egregious and exacerbated by his failure to appear at the continuation of the DEC hearing, his admitted use of cocaine,² and his "relapse."

² In fact, respondent's use of cocaine was not only unethical, but criminal. Possession of small amounts of cocaine for personal use routinely results in a three-month suspension. See In re Gross, 170 N.J. 510 (2004); In re Kervick, 174 N.J. 377 (2002), In re Radler, 164 N.J. 550 (2000), and In re Nixon, 122 N.J. 290 (1991).

Respondent's conduct is more like that found in Bowman I, which involved the abandonment of two clients and other ethics transgressions in three client matters, for which Bowman was suspended for six months.

We recognize that "the principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general." In re Kushner, 101 N.J. 397, 400 (1986) (quoting In re Wilson, 81 N.J. 451, 456 (1979)), and that, in making disciplinary decisions, we must consider the interests of the public as well as of the bar and the individual involved. Ibid. In so doing, we have determined that respondent has displayed an inability to protect the interests of his clients. To safeguard the public from further harm, we determine to suspend respondent for a one-year period. Member Spencer Wissinger recused himself.

We further determine that the Office of Attorney Ethics ("OAE") should conduct an audit of respondent's attorney records to locate the \$12,000 withheld in the Green matter and to ensure its appropriate disbursement. In addition, prior to reinstatement, respondent should submit proof of fitness to practice law, as attested by a mental health professional approved by the OAE, and should be required to provide proof that he continues to participate in a substance abuse program.

We also determine that, upon reinstatement, respondent should practice, for an indefinite period, under the supervision of a proctor approved by the OAE.

We further determine to 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

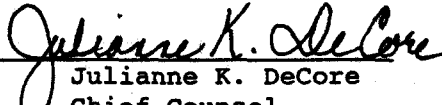
In the Matter of Howard S. Diamond
Docket No. DRB 05-080

Argued: April 21, 2005

Decided: July 7, 2005

Disposition: One-year suspension

Members	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan	X				
Holmes	X				
Lolla	X				
Neuwirth	X				
Pashman	X				
Stanton	X				
Wissinger				X	
Total:	8			1	


Julianne K. DeCore
Chief Counsel