

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-271

IN THE MATTER OF
JOHN A. TUNNEY
AN ATTORNEY AT LAW

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Decision

Argued: October 17, 2002

Decided: January 28, 2003

Timothy J. Little appeared on behalf of the District VIII Ethics Committee.

Pamela Lynn Brause appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by the District VIII Ethics Committee (“DEC”). The second amended complaint alleges lack of diligence, failure to communicate with clients and failure to turn over client files to subsequent counsel in several matters.¹

¹Only a complaint and second amended complaint were filed in these matters. No amended complaint preceded the filing of the second amended complaint.

Respondent was admitted to the New Jersey bar in 1988. He has no prior discipline.

I. The Robinson Matter (District Docket No. VIII-00-44E)

The complaint alleged that respondent failed to turn over a file to subsequent counsel in a workers' compensation matter, in violation of RPC 1.15(a) and (b), more properly RPC 1.16(d) (failure to return file upon termination of representation). The complaint also alleged that respondent failed to cooperate with ethics authorities in their requests for the turnover of the file, in violation of R. 1:20-3(g)(3), more properly a violation of RPC 8.1(b).

In or about mid-1999 Deborah Robinson, the grievant, retained respondent to reopen a workers' compensation case for which she had already been awarded partial compensation. Respondent had handled the prior matter.

Robinson testified at the DEC hearing that, after she retained respondent, he did not return her calls for information about the case. According to Robinson, she was able to speak only to respondent's secretary, who made excuses for his absence. Although Robinson left messages for respondent to call her either at her home, at work or on her cellular telephone, respondent never did so. Therefore, in December 1999 she retained a new attorney, Edward B. Shinrod, to take over the matter. On December 20, 1999 Shinrod sent a letter to respondent stating that he had been retained to represent Robinson and requesting Robinson's file. Respondent did not reply to the letter, prompting three more letters from Shinrod, dated

December 28, 1999, February 2, 2000 and May 16, 2000. Respondent ignored all three of those requests for the file.

The complaint also alleged that respondent failed to cooperate with the DEC in its investigation of the grievance. On September 14, 2000 the DEC sent respondent an initial letter requesting information about the grievance. Respondent did not reply to that letter or to a follow-up letter dated October 5, 2000. Thereafter, on October 18, 2000, the DEC sent respondent a subpoena for the file. Respondent failed to produce the file until sometime after the November 15, 2000 DEC hearing date. The file was then turned over to Shinrod.

Respondent was represented by counsel at the DEC hearing. Respondent did not refute Robinson's testimony, electing not to testify in these matters. His position was set forth in his verified answer to the ethics complaint, wherein he claimed that his failure to produce the file for the DEC was the result of the "substantial volume of material requested" and difficulties in photocopying the file.

II. The Montano Matters (District Docket No. VIII-00-061E)

The complaint alleged that respondent improperly handled three cases for the same grievant, Angel Montano.²

²The record is not clear about the nature of the cases. The record refers to them as accident and personal injury cases.

One count of the complaint alleged that respondent failed to return Montano's files upon the termination of the representation in the three matters below and that he failed to cooperate with ethics authorities in their investigation of these matters. That count is discussed in more detail below.

A. Montano/Aielo

The complaint alleged that respondent violated RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.4 (b) (failure to explain matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 8.4(a) (attempt to violate the Rules of Professional Conduct) and RPC 8.4 (c) (misrepresentation).

Sometime after an October 1992 accident, Montano retained respondent to represent him in the prosecution of a claim against Galia Aiello, the Township of Hillside and other defendants. It is uncontroverted that Montano's case was dismissed in 1997 for failure to prosecute. In fact, the record includes orders for summary judgment in favor of the defendants. The orders also indicate that the motions for summary judgment were unopposed.

Montano testified that, throughout the pendency of the matter, respondent failed to return his telephone calls. According to Montano, on several occasions when respondent did reply, he was informed that the case was still open and told "not to worry." Montano recalled that, at his last meeting with respondent, which took place in 2000, respondent represented

that this and the two other matters discussed below were still pending with the court. According to Montano, respondent told him, "I'm working on them. Don't worry about them. These cases can't be closed until I close them. Give me another month or so and you'll see. Don't worry." Finally, Montano testified that the three cases had outstanding medical expenses in excess of \$10,000, for which he blamed respondent.

Respondent did not contest that the complaint had been dismissed or that he had failed to communicate with Montano. However, in his answer he denied misrepresenting to Montano, after the dismissal, that the case was ongoing.

Approximately one month after their last meeting, Montano requested the return of his file. Over the following year, although he made numerous additional requests, respondent did not return the file.

Respondent did not deny his failure to turn over the file to Montano. He attempted to excuse his conduct by citing the voluminous nature of the documents requested.

B. Montano/Murad

The complaint alleged that respondent violated RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 8.4(a) (attempt to violate the Rules of Professional Conduct) and RPC 8.4 (c) (misrepresentation).

In or about November 1993 Montano retained respondent to represent him in another accident matter, which was later dismissed in December 1996. As in the Aielo matter,

Montano testified that respondent failed to keep him informed about important aspects of the case, including its dismissal. In addition, he testified, respondent misrepresented to him that the case was active, after its December 1996 dismissal. Montano told the DEC that respondent had misrepresented the status of the matter to him for almost five years:

I knew [respondent] for ten years. I would say five years ago. So, he lead [sic] me on. He took my trust. And I trusted this man as a family attorney and he just lied to me. There is no word for that, [] you know.

Respondent's answer offered no insight into Murad, simply denying any improper conduct.

C. Montano/Desel

The complaint alleged that respondent violated RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client) and (b) (failure to explain matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 8.4(a) (attempt to violate the Rules of Professional Conduct) and RPC 8.4 (c) (misrepresentation).

In or about August 1994 Montano retained respondent to represent him in a personal injury suit against Dilipkuma Desel. Respondent's answer admitted that he never prepared a complaint in the matter and that he misrepresented to Montano that he had filed a complaint.

Montano also testified that respondent had lied to him about the Desel matter. He expressed his frustration with respondent's pervasive failure to communicate with him about events in the case, ultimately discovering that respondent had never done any work on his behalf.

Montano's father, Wilfredo, also testified briefly about respondent's handling of his son's three cases. Apparently, both men met respondent at his office, sometimes twice a month, until late 2000 or early 2001. By that time the Montanos were concerned that the cases had been dismissed. When Wilfredo was questioned, on direct examination, whether Montano had ever asked respondent if his cases had been dismissed, Wilfredo recalled that respondent had repeatedly told them not to worry about dismissals because only respondent could close a case. That testimony was not challenged on cross-examination.

* * *

As noted earlier, the second count of the complaint alleged that respondent failed to return Montano's files in Aielo, Murad and Desel, upon the termination of his representation. The complaint alleged violations of RPC 1.15(b), but RPC 1.16(d) more appropriately addresses that type of misconduct.³ Respondent did not refute the contention that he failed to return Montano's files. Rather, he offered the excuse that the files were voluminous and difficult to copy.

³The complaint also alleges a violation of RPC 1.15(a) (failure to safeguard property of a third person). It is unclear why that RPC was charged, as there are no facts regarding the involvement of third-party property.

Finally, the second count of the complaint also alleged that respondent failed to cooperate with ethics authorities in their requests for information about the three Montano matters, in violation of R.1:20-3(g)(3), more properly a violation of RPC 8.1(b). Specifically, the DEC notified respondent of the grievance and requested information from him by correspondence dated November 1 and November 22, 2000. On December 14, 2000 the DEC investigator wrote to respondent requesting the files. On January 29, 2001 the investigator “faxed” a letter to respondent stating his intention to retrieve the files from respondent’s office the following day. On January 30, 2001 the investigator went to respondent’s office and was told that the files were not ready, but would be delivered to him by the end of the following day. They were not.

On February 20, 2001 the investigator hand-delivered to respondent a subpoena for the files. Respondent ignored the subpoena. In fact, although it appears that respondent released some documents to the DEC, the extent to which respondent ultimately complied with the DEC’s requests is unclear from the record.

* * *

The majority of the record is devoted to mitigation. There was extensive testimony about respondent’s major depressive disorder, for which he sought psychiatric treatment in or about July 2000. Respondent’s counsel perceived the need for such lengthy testimony because the presenter argued throughout the proceedings for respondent’s disbarment. Respondent’s psychiatrist, Victor Vetrano, M.D., testified that respondent’s practice of law

suffered, probably as a partial result of respondent's disorder, which began around 1998. Respondent has also been prescribed various medications, including Celexa (similar to Prozac) and Ativan (similar to Lithium or Valium). Dr. Vetrano reported that respondent reacted well to these medications.

In addition, respondent's physician and longtime friend, Thomas Nucatola, M.D., testified about changes in respondent's behavior, which led him to recommend a psychiatric evaluation by Dr. Vetrano in July 2000. Dr. Nucatola went to great lengths to describe the nature of respondent's problems and his progress since 2000. Moreover, numerous character witnesses testified to respondent's hardworking nature and good character. Finally, respondent's wife, also an attorney, testified in his behalf. As previously noted, much of this testimony was in response to the presenter's position that respondent's misconduct required disbarment.

* * *

The DEC's findings of misconduct were not correlated to each matter. In general, the DEC found violations of RPC 1.3, RPC 1.4(a), R. 1:20-3(g)(3) and RPC 8.4(c). The DEC also made a finding of a violation of RPC 8.4(d), without offering any explanation. A violation of that RPC was not charged or otherwise pursued in any of the matters.

The DEC recommended the imposition of a three-month suspension for respondent's misconduct in these matters.

* * *

Upon 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 differ, however, in some respects with certain of its findings.

In Robinson, respondent presented no evidence that he had turned over his client's file to her new attorney. Robinson testified that respondent ignored her repeated requests for information and that in December 1999 she retained Shinrod to represent her. Shinrod's attempts to secure the file were also unsuccessful. Between December 1999 and May 2000, he sent respondent three letters requesting the file, all of which went unanswered. In fact, he never received the file directly from respondent. Rather, the DEC secured it at some point after the ethics hearing. Respondent's failure to promptly deliver the file to his client or her new attorney violated RPC 1.16(d).

With regard to the allegation of a violation of RPC 8.1(b), respondent contended in his answer that his failure to comply with the DEC investigator's repeated requests for information about the case was due to the large volume of documents that had to be copied. There is no other evidence that respondent encountered difficulties in preparing the file, or that he ever requested an extension to comply with the DEC investigator's requests. The inevitable conclusion is that respondent simply chose to ignore the DEC's requests for the file, in violation of RPC 8.1(b).

As to the charge of a violation of RPC 1.15 (a), we dismissed it for lack of any factual support in the complaint or the remainder of the record.

In Montano, respondent neglected all three matters: Aielo, Murad and Desel. In Aielo and Murad, he allowed the complaints to be dismissed. In Aielo, summary judgment was entered against Montano by at least two defendants. The details of the Murad dismissal are unclear, but respondent acknowledged that he allowed that complaint to be dismissed. In both matters, respondent also failed to take steps to reinstate the complaints, upon their dismissal. Worse yet, in Desel, respondent admittedly neglected to draft a complaint or take any other action to protect Montano's interests. Respondent's lack of diligence in Aielo, Murad and Desel violated RPC 1.3. Also, his failure to return the files to Montano upon termination of the representation violated RPC 1.16(d). Lastly, his failure to take any action to protect Montano's interests in these matters amounted to gross neglect, in violation of RPC 1.1(a). Although respondent was not specifically charged with violating RPC 1.1(a), the record developed below contains clear and convincing evidence of a violation of that rule. Furthermore, respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deemed the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

With regard to the allegations of failure to communicate with Montano, respondent conceded the violation in Aielo, but not in Murad or Desel. Importantly, however, he did not rebut Montano's testimony that he failed to reply to Montano's repeated requests for information about those cases throughout the representation. Therefore, we found violations of RPC 1.4(a) in each instance.

In Aielo, the complaint also alleged a violation of RPC 1.4(b) (failure to inform client to the extent reasonably necessary to allow clients to make informed decisions about the representation). However, that charge was not adequately addressed by the DEC at its hearing or in its findings. We, thus, dismissed that charge, finding that our conclusion as to RPC 1.4(a) sufficiently addresses respondent's failure to communicate with Montano.

In Aielo and Murad, respondent misrepresented the status of the cases to his client. Montano and his father testified that respondent lied about the cases long after they had been dismissed. Respondent's only claim of innocence in this regard was a faint denial contained in his verified answer in Aielo, wherein he stated that he did not "believe that he represented that the case was still active." We found that respondent's denial does not outweigh the Montanos' credible testimony that he lied to them about their cases. Without any other evidence to support respondent's version of events, we found violations of RPC 8.4(c) in both Aielo and Murad. As to Desel, respondent admitted that he misrepresented to Montano that he had filed a complaint on his behalf, also in violation of RPC 8.4(c).

Finally, with regard to respondent's alleged failure to cooperate with ethics authorities in Aielo, Murad and Desel, we found that he failed to deliver any of the files after at least four written requests from the DEC, made over a period of more than six months. When respondents ultimately file an answer and appear at the hearings below, we tend to dismiss

the charge of failure to cooperate with the investigation of the case. Here, however, because respondent's conduct encompassed four cases, we found a violation of RPC 8.1(b) .

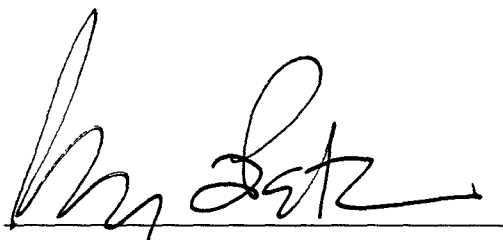
In cases dealing with misrepresentations to clients, often accompanied by gross neglect, lack of diligence and failure to communicate, the appropriate degree of discipline is generally either a reprimand or a short term of suspension, depending on the gravity of the offenses and the attorney's disciplinary record. See, e.g., In re Martin, 120 N.J. 443 (1990) (public reprimand for pattern of neglect in six matters and misrepresentation to one client that the case was pending); In re Cervantes, 118 N.J. 557 (1990) (reprimand for failure to pursue two workers' compensation matters, lack of diligence and failure to keep the clients reasonably informed of the status of the matters; the attorney misrepresented the status of one of the cases); In re Bernstein, 144 N.J. 369 (1996) (three-month suspension for gross neglect, lack of diligence, failure to communicate and misrepresentation, in addition to failure to cooperate with disciplinary authorities; prior private reprimand for similar misconduct); and In re Chen, 143 N.J. 416 (1996) (three-month suspension for pattern of neglect, misrepresentation, failure to communicate and failure to cooperate with disciplinary authorities in two matters; prior reprimand for gross neglect and failure to communicate in two matters).

Here, respondent grossly neglected three matters and misrepresented their status to his client, Montano, over a period of years. In those matters and in Robinson, respondent also failed to turn over the files to the clients or new counsel and failed to cooperate with the DEC

investigation. In mitigation, we considered that respondent suffered from depression from at least 1998, for which he has been under psychiatric care since July 2000.

After consideration of these relevant circumstances, which included respondent's unblemished record since his admission to the bar in 1988, a five-member majority voted to impose a reprimand. Four members would have imposed a three-month suspension.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

A handwritten signature in black ink, appearing to read "Rocky Peterson", written over a horizontal line.

ROCKY L. PETERSON

Chair

Disciplinary Review Board

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

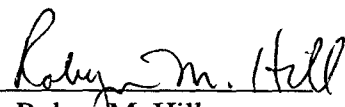
In the Matter of John A. Tunney
Docket No. DRB 02-271

Argued: October 17, 2002

Decided: January 28, 2003

Disposition: Reprimand

<i>Members</i>	<i>Disbar</i>	<i>Three-month Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Peterson</i>			X				
<i>Maudsley</i>			X				
<i>Boylan</i>			X				
<i>Brody</i>		X					
<i>Lolla</i>		X					
<i>O'Shaughnessy</i>			X				
<i>Pashman</i>		X					
<i>Schwartz</i>		X					
<i>Wissinger</i>			X				
Total:		4	5				

 2/4/03
 Robyn M. Hill
 Chief Counsel