SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-350

IN THE MATTER OF

JOHN A. TUNNEY

AN ATTORNEY AT LAW

Decision

Argued: January 29, 2004

Decided: March 26, 2004

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

Pamela L. 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 Special Master John M. Boyle. Four complaints, plus an amended complaint, charged respondent with conduct that violated numerous *Rules of Professional Conduct* in seven client matters:

1. The Hutt matter - *RPC* 1.4 (failure to keep a client reasonably informed about the status of the matter), *RPC* 4.1(a)(1) (false statement to a third person), and *RPC* 8.4 (conduct involving dishonesty, fraud, deceit or misrepresentation).

2. The Bojko matter - *RPC* 1.1 (gross neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.4(a), *RPC* 1.15 (breach of an escrow agreement), *Rule* 1:20-3(g)(4) [more appropriately, a violation of *RPC* 8.1(b) (failure to cooperate with disciplinary authorities)], *RPC* 8.4(a) (violate or attempt to violate the *Rules of Professional Conduct*), and *RPC* 8.4(c).

3. The Tobe matter - *RPC* 8.4(b) (criminal act) and *RPC* 8.4(c).

4. The Castaneda matter - *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a) and (b) (failure to explain a matter to the extent reasonably necessary to permit a client to make an informed decision about the representation), *RPC* 1.15(b) (failure to safeguard funds), *RPC* 3.2 (failure to expedite litigation), *RPC* 8.4(a), *RPC* 8.4(c), and *RPC* 8.4(d) (conduct prejudicial to the administration of justice) (count one) and *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a) and (b), *RPC* 1.15(b), *RPC* 3.2, *RPC* 8.4(a), *RPC* 8.4(c), and *RPC* 8.4(d) (count two).

5. The Vonderputten matter - *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a) and (b), *RPC* 1.15(b), *RPC* 3.2, and *RPC* 8.4(a), (c), and (d).

6. The Sherman matter - *RPC* 1.1(a), *RPC* 1.4, and *Rule* 1:20-3(g)(4) [more appropriately, a violation of *RPC* 8.1(b)].

7. The Liscinski matter - *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4, *RPC* 8.1(b) and *Rule* 1:20-3(g)(4) [more appropriately, a violation of *RPC* 8.1(b)].

Respondent was admitted to the New Jersey bar in 1988. He received a reprimand in 2003 when, in three matters for the same client, he was found guilty of gross neglect, lack of diligence, failure to communicate with a client, failure to surrender a client's papers and property, failure to cooperate with disciplinary authorities, and conduct involving dishonesty, fraud, deceit or misrepresentation, and in another matter, he failed to turn over a client's file upon termination of the representation and failed to cooperate with disciplinary authorities. The Court also required respondent to submit proof of fitness to practice law within thirty days of the reprimand order. *In re Tunney*, 176 *N.J.* 272 (2003).

For ease of reference, our determination immediately follows the factual recitation and the special master's finding in each matter.

The Hutt Matter **- District Docket No. VIII-01-023E**

In 1994, respondent was retained to represent Ronald Jacques, Jr., a minor, in a personal injury lawsuit against multiple defendants. Respondent was successor counsel to David Hutt, the grievant. On July 15, 1994, Hutt turned over his file in the Jacques matter to respondent and confirmed in a letter an agreement whereby respondent would distribute to Hutt one-third of any legal fees that he recovered. Respondent signed that letter on August 29, 1994. On September 1, 1998, about four years later, respondent settled the litigation. Despite Hutt's repeated inquiries to respondent about the status of the lawsuit, respondent failed to disclose that the matter had been settled. Although respondent sent Hutt a letter dated September 24, 1998, stating that the matter was "presently pending settlement" and that he would advise Hutt when the case was resolved,

respondent failed to notify Hutt when he received the settlement proceeds in September and October 1998.[1] On October 13 and October 29, 1998, respondent disbursed the settlement proceeds to his client and himself. He did not forward any legal fees to Hutt. Almost one year later, in August 1999, respondent finally disclosed to Hutt that the matter had been settled and agreed to provide the settlement documents and Hutt's portion of the fees. Respondent, however, did not do so.

On January 20, 2000, Hutt sent to respondent a draft complaint against him for breach of contract, advising him that the complaint would be filed unless respondent provided a copy of the settlement agreement and payment of Hutt's legal fees. Respondent did not reply. After Hutt sent respondent an additional letter dated February 24, 2000, which respondent similarly ignored, Hutt filed the complaint against respondent, who was served on April 10, 2000. During this time, respondent and Hutt represented parties in an unrelated real estate transaction. At the closing, respondent represented to Hutt that he would submit copies of the settlement documents and Hutt's share of the legal fees within several days. Again, respondent failed to honor his representation.

Upon respondent's failure to file an answer to the complaint, a default was entered against him. Because Hutt did not know the amount of the Jacques settlement, he could not establish the amount of his damages, an element necessary to secure a default judgment. Hutt tried without success to obtain the settlement information from the court. As it turned out, by the

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[1] Because two defendants contributed to the settlement, respondent received the settlement checks on two different dates.

time the case had been settled, respondent's client was no longer a minor and the settlement was not required to be placed on the record. Hutt then served respondent with a *subpoena duces tecum*, requiring him to appear at Hutt's law office on June 28, 2001, and to produce records from the Jacques matter, including settlement documents. Respondent did not appear. After Hutt filed the ethics grievance, respondent provided Hutt with the settlement documents and Hutt's share of the legal fees.

At the ethics hearing, Hutt testified that, to his knowledge, respondent had not misrepresented the status of the Jacques matter to him.

For his part, respondent claimed that at the time of the Hutt matter, he was suffering from severe depression. After he met with his attorney in connection with the prior ethics matter in which he ultimately received a reprimand, respondent began treating with Joseph S. Vetrano, a psychiatrist. According to respondent, the depression affected his ability to practice law in that he was not able to perform everyday tasks, such as returning telephone calls.[2] Respondent denied that he had misrepresented the status of the matter to Hutt, contending that until he had received the settlement checks and they had cleared his trust account, he could not have disbursed any funds.

Respondent explained that, despite his intention to disburse Hutt's share of the legal fees, he was overwhelmed by the prospect of reviewing the file, locating his agreement with Hutt, and issuing the check. Respondent contended that, at the time, that task seemed monumental.

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[2] Evidence of respondent's depression was offered in mitigation of all of the charges and will be discussed below.

At the ethics hearing, the presenter withdrew the charge of a violation of *RPC* 1.4, conceding that respondent had no duty to keep Hutt, who was not a client, informed about the status of the case.

The special master dismissed all of the charges in the Hutt matter. As noted above, the presenter withdrew the *RPC* 1.4 charge. The special master found that respondent had not misrepresented the status of the litigation to Hutt and that the dispute between the attorneys was of a civil nature resolved by the lawsuit that Hutt filed against respondent.

The charge that respondent failed to communicate with a client was properly dismissed because, as conceded by the presenter, Hutt was not a client. There is clear and convincing evidence, however, that respondent's conduct was unethical in other respects. Although respondent settled the Jacques matter in September 1998, and received both settlement checks by October 1998, he failed to promptly notify Hutt. It was not until almost one year later, in August 1999, that Hutt learned of the settlement. Respondent's silence in this regard amounted to a misrepresentation. "In some situations, silence can be no less a misrepresentation than words." *Crispin v. Volkswagenwerk, A.G.*, 96 *N.J.* 336, 347 (1984). Moreover, respondent violated *RPC* 8.4(c) when he misrepresented to Hutt at a real estate closing in early 2000 that, within a matter of days, he would submit copies of the settlement documents and Hutt's share of the legal fees. We dismissed as cumulative of the *RPC* 8.4(c) violation the charge that respondent violated *RPC* 4.1(a)(1) (false statements to a third person).

In addition, respondent's failure to notify Hutt of his receipt of the settlement funds and to distribute the funds to Hutt violated *RPC* 1.15(b) (failure to promptly notify a third party of

receipt of funds to which the party is entitled and failure to deliver funds to which a third party is entitled). Although respondent was not specifically charged with a violation *RPC* 1.15(b), the record developed below contains clear and convincing evidence of a violation of that *RPC*. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deem the complaint amended to conform to the proofs. *Rule* 4:9-2; *In re Logan*, 70 *N.J.* 222, 232 (1976).

***The Bojko Matter* – District Docket No. VIII-01-048E**

On October 31, 2000, respondent represented Jerry Bojko in the purchase of real estate. As a result of problems discovered during a final inspection of the property, Bojko and the sellers entered into an escrow agreement requiring respondent to retain $1,250 in escrow to be used to address duct work, plumbing repairs, and debris removal. In November 2000, the plumbing was satisfactorily repaired and $500 held in escrow for that purpose was disbursed. Although in November 2000, February 2001, and May 2001, several letters were exchanged between respondent and the sellers' attorney, the duct work and removal of the debris from the property were not resolved. Bojko wanted the duct work to be performed by a professional, while the sellers wanted to perform the work themselves. In addition, although Bojko wanted advance notice before anyone entered his yard to remove the debris, the sellers preferred to arrive unannounced. Bojko explained that because he had had polio and lung cancer, he was not able to perform the repairs himself. Respondent claimed that Bojko had obtained an estimate for the duct work that included unrelated electrical work such that it was not possible to discern the

cost of the duct work alone. In turn, Bojko testified that the duct work alone would not have solved the problem and that the electrical work was part of the duct repairs. As of the date of the ethics hearing, the repair and debris removal issues had not been resolved and respondent continued to hold the funds in his escrow account.

According to Bojko, respondent agreed that he would file a complaint against the sellers for their failure to abide by the escrow agreement. Respondent never filed the lawsuit. Respondent denied representing that he would file a complaint, contending that if litigation had been filed, he would have been a witness as to the terms of the escrow agreement. Respondent conceded that although he could have filed an interpleader action and deposited the funds with the court, he declined to do so because he would not have been reimbursed the filing fee.

On May 17, 2001, Bojko sent respondent a letter stating that despite respondent's representation, at a meeting on April 11, 2001, that he would call Bojko within two weeks, respondent had failed to contact him. Bojko further complained that he had received "zero calls" from respondent during the previous six months. Similarly, in a letter to respondent dated September 19, 2001, Bojko contended that (1) court personnel in Middlesex County had no record of any lawsuit filed by respondent against the seller; (2) respondent repeatedly failed to appear at his office for appointments with Bojko; and (3) respondent had called Bojko only one time in ten months. Respondent did not reply to Bojko's letter.

At the ethics hearing, Bojko testified that respondent appeared for only two of the twelve appointments that had been scheduled at respondent's office and that although he had telephoned respondent between twenty-four and thirty times, respondent had called him only once.

According to respondent, however, he had met with Bojko on five or six occasions after the real estate closing and had spoken with him by telephone another six times.

The special master found that respondent's failure to resolve the escrow dispute over a two and one-half year period, to file a lawsuit, or to deposit the funds in court constituted gross neglect and a lack of diligence. The special master also determined that respondent had failed to keep Bojko informed about the status of the matter, rejecting respondent's testimony that he had called Bojko six times. The special master further found that respondent misrepresented to Bojko that he would file a lawsuit against the sellers. The special master, thus, found violations of *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a), and *RPC* 8.4(c). The special master dismissed the charges that respondent violated *RPC* 8.4(a) and *RPC* 1.15, noting that the funds were held in the escrow account at all times.

The special master's finding that respondent's conduct was unethical is supported by clear and convincing evidence. Respondent permitted the escrow dispute to linger for several years, without taking any steps to resolve it. Although the amount of money in dispute was not substantial, as escrow agent and Bojko's attorney, respondent was obligated to take affirmative steps to settle the matter. His failure to do so amounted to a lack of diligence. Because we find that respondent's inattention was simple neglect, we dismiss the gross neglect charge. No dire consequences, such as the loss of a cause of action, resulted from respondent's failure to act.

Respondent failed to keep Bojko informed of the status of the matter and failed to comply with his reasonable requests for information. According to Bojko, respondent failed to keep appointments and failed to return his telephone calls. Bojko's letters dated May 17 and

September 19, 2001, document his difficulty in contacting respondent. If Bojko's complaints had been inaccurate, one would expect respondent to have disputed them. He never replied to those letters.

Similarly, although respondent denied promising to file a lawsuit against the sellers, respondent ignored Bojko's letter in which he stated that he had discovered from court staff that respondent had never instituted litigation. The record provides no reason to doubt Bojko's statement that respondent had promised to institute litigation. Again, if respondent had not made that commitment, he should have disagreed with Bojko in writing. His failure to dispute Bojko's letter confirms Bojko's testimony that respondent had promised that he would file the lawsuit.

The special master properly dismissed the charges that respondent violated *RPC* 1.15 and *RPC* 8.4(a). Because the record shows that respondent retained the escrow funds intact, he did not fail to safeguard them.

***The Tobe Matter* – District Docket No. VIII-01-058E**

The presenter moved to dismiss this complaint because the grievant did not appear at the ethics hearing. According to the complaint, a check that respondent had issued was returned for insufficient funds. After respondent satisfied the check, the grievant was no longer interested in pursuing the grievance. The special master granted the presenter's motion and dismissed the complaint. We concur with that result.

The Castaneda Matter – **District Docket No. VIII-02-004E**

Respondent represented Linda Castaneda in two litigation matters. He had previously represented her and some of her family members. On September 3, 1997, Castaneda consulted respondent about a potential medical malpractice action against Dr. Paul Goldberg. In 1995, after Dr. Goldberg had removed a mole from Castaneda's chest, a keloid scar developed and continued to grow. Castaneda consulted another doctor, who suggested that she contact an attorney. Respondent and Castaneda signed a fee agreement providing that respondent would represent Castaneda in a matter against Dr. Goldberg. Although the agreement is not dated, Castaneda's testimony that it was signed on September 3, 1997 was not disputed. Castaneda also signed authorizations permitting respondent to obtain her medical records.

Although respondent agreed that he had been retained by Castaneda, he claimed that several days later, on September 8, 1997, she left a message with his staff indicating that she no longer wanted to proceed with the matter against Dr. Goldberg. Castaneda denied respondent's claim. The ethics hearing in this matter focused on whether respondent continued to represent Castaneda against Dr. Goldberg.

According to Castaneda, respondent had indicated that he would send her medical records to a doctor in Philadelphia, who would be retained as an expert witness. Castaneda testified that respondent was planning to retain the expert witness with funds that he had withheld from a prior settlement that he had obtained for her. She stated that in accordance with respondent's request, she also prepared and submitted to him a history of her treatment by Dr. Goldberg. The eighteen-page report, dated November 3, 1999, was addressed to respondent and

related Castaneda's experience with Dr. Goldberg and the effect that his treatment had on her life, including her loss of self-esteem caused by the disfiguring scar. Castaneda claimed that she had provided respondent with pictures and a videotape relating to her surgery. She asserted that respondent frequently assured her that the malpractice case was proceeding and that her case had been reviewed by doctors in Pennsylvania.

Castaneda contended that respondent frequently canceled appointments with her. The record included copies of Castaneda's calendars on which she had noted appointments with respondent from 1997 through 2001. Castaneda testified that on December 27, 2001, she waited in respondent's office for three hours, and although his car was in the parking lot, respondent refused to see her.

Castaneda claimed that respondent was never available by telephone and never returned her telephone calls. Also submitted into evidence were copies of Castaneda's telephone bills showing telephone calls placed to respondent's office for various months, including August, September and December of 2001 and March 2002. Castaneda stated that after she began to lose confidence in respondent due to his failure to communicate with her, she contacted another attorney, Mark Lesser, who advised her that because the statute of limitations had expired, she was precluded from suing Dr. Goldberg. She asserted that she provided Lesser with the identical history that she had given to respondent, except that she had changed the name on the report from respondent's to Lesser's.

Castaneda denied that she had called respondent's office and indicated that she did not want to pursue the medical malpractice case. Her husband, Isaac Castaneda, testified that

Castaneda had never expressed an interest in discontinuing the matter against Dr. Goldberg and that she had never told him that she had so informed respondent. He stated that he had accompanied his wife to some of her appointments with respondent at which they discussed the Goldberg case. Although he recalled giving respondent the report dated November 3, 1999, he could not recall the date.

On cross-examination, Castaneda conceded that she had retained the original November 3, 1999 report addressed to respondent, claiming that when she had brought it to respondent's office, respondent's secretary made photocopies and returned the original to her, instead of giving it to respondent. Castaneda claimed that, although as of November 3, 1999, she believed that respondent continued to represent her against Dr. Goldberg, she submitted the same report to another attorney, Mark Lesser, to obtain another opinion because respondent was not communicating with her at that time.

Patricia Tracy, respondent's real estate paralegal, testified that on September 8, 1997, she took a message from Castaneda in which she stated that she was not going to proceed against Dr. Goldberg. A copy of the message attached to a memorandum from respondent was introduced into evidence. The handwritten memorandum to the file from respondent stated "Confirmed with Linda. Open & close file." The file did not contain a letter confirming in writing to Castaneda that she no longer wished to pursue the case.

For his part, respondent testified that, after retaining him, Castaneda had notified his office that she did not want to proceed with the lawsuit against Dr. Goldberg because he did not have malpractice insurance. Respondent stated that he contacted Castaneda because he did not

want to rely on his secretary's message. He admitted that he had not confirmed the conversation with Castaneda in writing.

Respondent denied requesting the November 3, 1999 report from Castaneda and stated that he had never seen it until the ethics hearing. According to respondent, Castaneda had brought him the November 3, 1999 report addressed to Lesser and had asked him to review it for her because he had an ongoing relationship with the family. Respondent noted that the report provided, in part: "Dr. Carniol referred me to an attorney, Marc Lesser, in Livingston, New Jersey, due that I didn't know who to turn to."

Respondent testified that Castaneda filed the grievance after her brother had also filed a grievance against him.[3]

As to the second litigation matter, on June 27, 1997, Castaneda sprained her ankle after falling on a sidewalk. Respondent filed a complaint against the property owner, Catalina Deocamp[4], and various public entities. Castaneda was awarded $15,000 in an arbitration proceeding. According to Castaneda, on October 17, 2000, respondent told her that her case was going to settle within three months. However, in August 2001, Castaneda contacted the court clerk's office and learned that the matter had been dismissed with prejudice against Deocamp on August 29, 2000. Respondent did not dispute that he had not notified Castaneda of motions for summary judgment filed by Deocamp and the public entities, or of the orders dated December

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[3] Castaneda's brother was the grievant in the ethics matter in which respondent received a reprimand.

[4] The record also refers to Deocamp as "Deocampo" and "De Ocamp."

17, 1999, March 3, 2000, and April 28, 2000, respectively, granting the motions. Respondent also conceded that he had not filed opposition to any of the summary judgment motions and that he had not provided Castaneda with copies of the orders, which she obtained from the clerk's office. Castaneda stated that when she was able to talk to respondent, he told her that the case was "running smoothly."

Castaneda conceded that respondent had informed her that at the arbitration proceeding, the panel had determined that the public entities were not responsible and that although the homeowner was responsible, Deocamp did not have homeowner's insurance. According to respondent, Deocamp was dismissed from the case because a property owner does not have a duty to maintain non-commercial property. He claimed that even if he had opposed Deocamp's summary judgment motion, it would have been granted.

At the hearing, the presenter withdrew the charge that respondent had violated *RPC* 1.15(b), stating that there was no evidence that he had failed to safeguard property.

The special master dismissed the charges in the Goldberg matter, finding that Castaneda had attempted to introduce "tampered" evidence, referring to the November 3, 1999 report.

With respect to the Deocamp matter, the special master found respondent guilty of gross neglect, lack of diligence, failure to keep a client informed about the status of the matter, failure to explain a matter sufficiently to permit a client to make an informed decision about the representation, and conduct prejudicial to the administration of justice. The special master, noting that the presenter had withdrawn the charge that respondent had failed to safeguard property, dismissed the charges that respondent failed to expedite litigation, attempted to violate

the *Rules of Professional Conduct*, and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

In the Goldberg matter, there was conflicting evidence about respondent's representation of Castaneda. It is undisputed that respondent and Castaneda signed a retainer agreement on September 3, 1997. Respondent contended that five days later, on September 8, 1997, Castaneda telephoned his office and told his paralegal, Patricia Tracy, that she did not want to proceed with the matter. A photocopy of that message and respondent's memorandum to the file confirming the conversation with Castaneda were introduced into evidence. Tracy, too, testified that Castaneda had indicated that she did not wish to pursue the malpractice complaint against Dr. Goldberg.

Castaneda, however, denied that she had told respondent that she did not want to proceed with the malpractice matter. Her husband testified that she had never told him that she wanted to discontinue that matter. According to Castaneda, she continuously met with respondent and spoke to him by telephone about the Goldberg case, until he began to cancel appointments and refuse her telephone calls. Castaneda claimed that she then sought a second opinion from Lesser, an attorney who informed her that the statute of limitations had expired.

The telephone records indicate that Castaneda continued to call respondent, even after August 2001, when she had discovered that the Deocamp matter had been dismissed. These records, showing telephone calls to respondent in September and December 2001 and March 2002, support her claim that respondent continued to represent her in the Goldberg matter, because he did not represent her in any other matter at that time. On the other hand, respondent

submitted both documentary evidence and Tracy's testimony in support of his claim that Castaneda had instructed him not to proceed with the matter. Moreover, the reports dated November 3, 1999, to respondent and Lesser are identical, except for the addressees contained on the first and last pages. The report addressed to Lesser (Exhibit C-4) contains the same type throughout the eighteen-page document. The report addressed to respondent (Exhibits C-3 and R-1), however, contains a different font on the first and last pages, indicating that it had been prepared after the Lesser report, and that those pages were changed to substitute respondent's name for Lesser's.

Based on the above, we are unable to find clear and convincing evidence to support a finding of ethics violations in the Goldberg matter. Although respondent should have confirmed in writing Castaneda's instructions to him, his failure to do so did not amount to an ethics violation.

As to the Deocamp matter, respondent admitted that he had not kept Castaneda informed about her case, failing to tell her that summary judgment motions had been filed and granted. Respondent, thus, violated *RPC* 1.4(a) and (b). Respondent's failure to oppose the summary judgment motions, permitting the matter to be dismissed, constituted gross neglect and a lack of diligence. Although the special master found that respondent violated *RPC* 8.4(d), there is no evidence that respondent engaged in conduct prejudicial to the administration of justice.

The presenter properly withdrew the charge that respondent failed to safeguard property. We agree with the special master's recommendation that the charges that respondent failed to expedite litigation and attempted to violate the *Rules of Professional Conduct* should be

dismissed. However, the record supports the charge that respondent violated *RPC* 8.4(c). Castaneda's testimony that respondent had told her that the Deocamp matter was proceeding smoothly was not disputed. Respondent, thus, misrepresented the status of the matter, in violation of *RPC* 8.4(c). Moreover, his failure to advise her of the dismissal of the complaint constitutes a misrepresentation by silence.

The Vonderputten Matter **– District Docket No. VIII-02-028E**

Because respondent stipulated to the facts in this matter, no ethics hearing took place. Respondent admitted to certain *RPC* violations and the presenter withdrew the remaining charges.

Elio and Carmen Vonderputten retained respondent to represent them in a personal injury action arising from a motor vehicle accident occurring on April 8, 1996. Respondent failed to communicate with his clients, canceled appointments, refused their telephone calls, and failed to return their telephone messages. Although respondent filed a complaint on behalf of the Vonderputtens, the complaint was dismissed on March 24, 1999, for lack of prosecution. On May 28, 1999, respondent's motion to restore the matter was denied without prejudice to renewal after valid service on the defendants. Respondent never filed another petition to restore. He never informed the Vonderputtens that their case had been dismissed. Instead, as late as December 2001, more than two and one-half years after the dismissal, respondent continued to assure his clients that the matter would be settled within several months.

Respondent admitted that he had violated *RPC* 1.1(a), *RPC* 1.3, and *RPC* 1.4(a) and (b). The presenter withdrew the charges that respondent violated *RPC* 1.15(b), *RPC* 3.2, and *RPC* 8.4(a), (b) and (c).

The special master accepted the stipulation, finding that respondent violated *RPC* 1.1(a), *RPC* 1.3, and *RPC* 1.4(a) and (b). He recommended dismissal of the *RPC* 1.15(b), *RPC* 3.2, and *RPC* 8.4(a), (b) and (c) charges.

The record contains clear and convincing evidence that respondent violated *RPC* 1.1(a), *RPC* 1.3, and *RPC* 1.4(a) and (b). He agreed to represent the Vonderputtens and then permitted their case to be dismissed for lack of prosecution, in violation of *RPC* 1.1(a) and *RPC* 1.3. Moreover, he failed to communicate with his clients, in violation of *RPC* 1.4(a) and (b). Although the presenter withdrew, and the special master declined to find, a violation of *RPC* 8.4(c), respondent misrepresented the status of the matter. As late as two and one-half years after the complaint had been dismissed, respondent assured his clients that a settlement would be reached within the next several months. We, thus, find a violation of *RPC* 8.4(c), in addition to the admitted violations. We dismiss the charges that respondent violated *RPC* 1.15(b), *RPC* 3.2, and *RPC* 8.4 and (b). There is no indication that respondent failed to safeguard funds, failed to expedite litigation, or engaged in criminal conduct. In addition, we dismissed the *RPC* 8.4(a) charge as cumulative.

***The Sherman Matter* – District Docket No. VIII-02-043E**

On April 29, 1998, Lue Sherman retained respondent to represent her in a personal injury action arising after a bus door closed on her. Sherman never went to respondent's office and, until the ethics hearing, never met him. On August 1, 2000, more than two years after he had been retained, respondent sent interrogatories for Sherman to answer. She promptly signed and returned them, inserting only her social security number, driver's license and date of birth. The other nine questions were left blank. Sherman testified, and respondent conceded, that he had not provided any other written communications to Sherman and that most of her telephone contact was with respondent's staff, not respondent. According to Sherman, respondent never returned her telephone calls.

On October 7, 2002, respondent informed Sherman by letter that her complaint had been dismissed in February 2002, when the court granted summary judgment because Sherman's injuries did not meet the tort threshold. Respondent's letter stated that the defendant's motion was not properly opposed due to an error on his part, and that he was filing a motion to vacate the dismissal order and to reinstate the complaint. That motion, filed about eight months after the entry of the order granting summary judgment, was denied. At the ethics hearing, respondent explained that he had failed to oppose the summary judgment motion because he was dysfunctional at the time. He added that Sherman's injuries were not sufficient to pierce the tort threshold. Respondent conceded that when he filed the motion to vacate the dismissal order, he had not provided Sherman with an opportunity to participate.

Although the complaint charged respondent with failure to cooperate with disciplinary authorities, at the hearing, the presenter withdrew that charge.

The special master determined that respondent violated *RPC* 1.1(a) and *RPC* 1.4. The special master found that respondent's failure to oppose the motion for summary judgment constituted gross neglect and his failure to keep Sherman informed about the status of the case violated *RPC* 1.4. He recommended dismissal of the charge that respondent failed to cooperate with disciplinary authorities, based on the presenter's withdrawal of that charge.

The record contains clear and convincing evidence that respondent violated *RPC* 1.1(a) and *RPC* 1.4. He never met his client. After signing the retainer agreement on April 29, 1998, respondent did nothing to advance the case until more than two years later, when he provided Sherman with interrogatories that defense counsel had served. Although Sherman left most of the questions incomplete, respondent did not meet with her or contact her to obtain additional information. Furthermore, he neither informed her that the defendant had filed a motion for summary judgment, nor that the motion had been granted and the case dismissed, until eight months after the dismissal. Even when he filed the motion to vacate the dismissal, respondent failed to provide Sherman with an opportunity to provide information or otherwise participate. Respondent's actions amounted to gross neglect and failure to communicate with a client. Although we could find that respondent was also guilty of a lack of diligence, he was not charged with a violation of *RPC* 1.3 and a finding of a violation of that *RPC* would not affect the level of discipline to be imposed.

The special master properly dismissed the charge that respondent failed to cooperate with disciplinary authorities.

***The Liscinski Matter* – District Docket No. VIII-02-053E**

Respondent was retained to represent Andrew Kuruc, a defendant in a small claims matter in Middlesex County. Kuruc later retained another attorney, Theodore Liscinski, to represent him. On March 16, 2001, Liscinski asked respondent for the Kuruk file and for a substitution of attorney. Respondent ignored that request, as well as subsequent requests dated April 9, 2001 and May 3, 2001, in which a substitution of attorney signed by both Kuruk and Liscinski was enclosed for respondent's execution. On June 5, 2001, Liscinski filed a motion to relieve respondent as counsel, which was granted on August 29, 2001. Respondent did not oppose the motion. On September 4, 2001, Liscinski served respondent with a copy of the order, requesting again that he turn over the Kuruk file. Respondent did not comply with that request. On September 26, 2001, Liscinski filed a motion for turnover of the file, which was granted on December 22, 2001. Again, respondent neither opposed the motion nor complied with the order. On February 19, 2002, Liscinski filed a motion for an order holding respondent in contempt for failure to comply with the turnover order. On May 10, 2002, the court entered an order holding respondent in contempt and requiring that he turn over the Kuruk file within ten days of service of the order.

The complaint charged respondent with gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities. At the ethics

hearing, respondent admitted that he was guilty of gross neglect, the presenter withdrew the lack of diligence charge, and counsel made arguments to the special master concerning the failure to communicate charge. The presenter contended that, although Liscinski was not a client, he was acting on behalf of Kuruk, and that respondent had failed to promptly comply with reasonable requests for information sought on behalf of a client, in violation of *RPC* 1.4(a). Respondent's counsel conceded that respondent "did not timely provide the client's file to Mr. Liscinski when he was requested to do so. Mr. Tunney has an obligation to provide the client's file . . . . However . . . it's not a violation of communications and . . . he's committed a professional violation." She contended that respondent's failure to produce the file amounted to gross neglect, but not failure to communicate with a client because Liscinski was not a client.

In conformance with the parties' resolution, the special master found that respondent violated *RPC* 1.1(a) and dismissed the *RPC* 1.3 charge. Although the record does not refer to the charge that respondent failed to cooperate with disciplinary authorities, the special master indicated in his report that the presenter withdrew that charge as well.

The special master found that respondent's failure to provide the file to Liscinski violated *RPC* 1.4(a), stating that "Mr. Tunney had a continuing duty and obligation to cooperate and to turn over the file so that the client could be adequately protected."

We find that respondent's failure to execute the substitution of counsel, to reply to the motions, to comply with the court orders, and to turn over the Kuruk file amounted to both a lack of diligence and gross neglect. The record does not indicate when, if ever, respondent eventually provided the file to Liscinski. However, more than one year lapsed between Liscinski's first

request for the file on March 16, 2001, and the order of contempt dated May 10, 2002. In addition, Liscinski was required to file three motions, none of which respondent opposed. Respondent's inaction constituted both a lack of diligence and gross neglect.

Respondent's failure to turn over the file violated *RPC* 1.16(d) (failure to protect a client's interests upon termination of the representation), not *RPC* 1.4(a). We, thus, dismissed the charge that respondent violated *RPC* 1.4(a). Although respondent was not specifically charged with a violation of *RPC* 1.16(d), the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that *RPC.* Furthermore, respondent's counsel conceded that respondent had an obligation to turn over the file to Liscinski and that his failure to do so was a "professional violation." Thus, the record developed below contains clear and convincing evidence of a violation of *RPC* 1.16(d). In light of the foregoing, we deem the complaint amended to conform to the proofs. *Rule* 4:9-2; *In re Logan*, 70 *N.J.* 222, 232 (1976). We dismiss the charge that respondent failed to cooperate with disciplinary authorities. The presenter apparently moved for dismissal of that charge, and, in any event, respondent filed an answer to the complaint.

Respondent's failure to comply with the court orders requiring that he turn over the file violated *RPC* 3.4(c) (failure to obey an obligation of a tribunal). He also violated *RPC* 8.4(d) (conduct prejudicial to the administration of justice). Liscinski filed three motions to require respondent to turn over the file. This waste of judicial resources was prejudicial to the administration of justice. Although respondent was not charged with violations of *RPC* 3.4(c) or

RPC 8.4(d), pursuant to *In re Logan, supra*, 70 *N.J.* 222, 232 (1976), we deem the complaint amended to conform to the proofs.

Respondent presented evidence of depression in mitigation of his unethical conduct. He and his wife, Denise Tunney, who is also an attorney, gave the following account of the events leading to the diagnosis. In July 2001, respondent told Denise that ethics charges were pending against him and he did not want her to learn about them from another attorney or from reading a legal newspaper. These are the charges that ultimately led to the imposition of a reprimand. At that time, respondent had not answered the complaint and expected to be disbarred. According to respondent, he was suicidal. Denise arranged an appointment with respondent's counsel and from there, took respondent to a friend, Dr. Thomas Nucatola, who referred respondent to a psychiatrist, Dr. Joseph Vetrano. As seen below, respondent was prescribed medication and continues to treat with Dr. Vetrano.

Respondent described how his depression affected his law practice, testifying that he was not returning telephone calls or even going to his office. According to respondent, the depression began in 1996 as a result of numerous family and personal problems. Respondent was disappointed that he and Denise could not practice law together. After their attempt to do so in 1995 failed, Denise obtained a position with an insurance company. Earlier, in January 1994, Denise's father was diagnosed with cancer. In August 1996, respondent's father was hit by a car and moved into respondent's home to recuperate. In June 1998, respondent and Denise bought a "handyman special." On the day of the closing, respondent's father suffered a stroke. Although respondent wanted to modify the house to include an addition for his father, the project turned

out to be too expensive, forcing respondent to sell the house. They entered into a contract to have a house built in the same neighborhood as Denise's sister, but before the house was finished, Denise's sister got divorced. Denise's family blamed respondent for any problems with Denise's sister's divorce attorney and with his fees because respondent had recommended him. Respondent and Denise moved in with Denise's parents until their house was completed, causing additional stress. According to Denise, at this time, respondent was irritable and moody and did not get along with her parents. Respondent had stopped working regularly and was not earning money. At the time that respondent informed Denise about the ethics charges, she had contemplated divorce. Denise acknowledged that all of the homes that they owned were in her name only, adding that there were times when she borrowed money to pay respondent's office rent.

Respondent testified that he continues to see Dr. Vetrano every three months and cannot imagine returning to his prior depressed state. He is devastated by his unethical conduct and refused to file a bankruptcy petition, believing that he will be able to earn sufficient fees from his law practice to pay damages to the clients he has harmed.[5] Respondent expressed embarrassment and remorse. He stated that he had made changes to his office practices, such as implementing a database system, to manage his calendar and to keep track of deadlines.

Dr. Thomas Nucatola, a rheumatologist and respondent's longtime friend, testified that after Denise brought respondent's condition to his attention, he reflected on respondent's behavior and realized that respondent had begun to change in 1999. Dr. Nucatola described these

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[5] Respondent did not have malpractice insurance at the time of his misconduct.

changes, recalling that respondent was not in his office as frequently as he had been and had ceased all leisure activities, such as skiing, which he had previously enjoyed. According to Dr. Nucatola, after respondent began treating with Dr. Vetrano, respondent returned to his prior lifestyle and appeared to be functioning normally, both in his professional and personal life. Dr. Nucatola expressed doubt that respondent would return to a depressed state because the difficulty lies in identifying the disease; once the depression is diagnosed, treatment is monitored by medical personnel.

Dr. Vetrano testified that in July 2001 he diagnosed respondent with a major depression. He stated that a classic symptom of depression is the inability to perform simple tasks, which appear to the depressed person as monumental. According to Dr. Vetrano, respondent takes two antidepressants, Celexa and Wellbutrin. He continues to see respondent every three months and believes respondent's depression is under control.

In addition to medical evidence, respondent introduced evidence of his good character. Six individuals, including five attorneys and one client, testified that respondent is honest and has a reputation of high integrity.

Respondent's counsel contended that a reprimand should be imposed, conditioned on respondent practicing under the guidance of a proctor for an unspecified period of time and further conditioned on respondent compensating the clients who suffered financial harm due to his misconduct. Because she recognized that a suspension would likely be imposed, respondent's counsel asked that the suspension be as short as possible. On the other hand, the presenter contended that, although an argument could be made for disbarment, respondent should be

suspended for two to three years, relying on *In re Pavilonis*, 98 *N.J.* 36 (1984), *In re Mintz*, 126 *N.J.* 484 (1992), *In re Beck*, 143 *N.J.* 135 (1996), and *In re Foushee*, 149 *N.J.* 399 (1997).

The special master recommended a two-year suspension, stating that a reduction to one year could be justified by mitigating circumstances.

As mentioned above, following a *de novo* review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is supported by clear and convincing evidence. We found: (1) in the Hutt matter, respondent failed to promptly notify Hutt of his receipt of funds to which Hutt was entitled, failed to inform him that the Jacques matter had been settled, and misrepresented that he would disburse Hutt's fees in several days; (2) in the Bojko matter, respondent displayed a lack of diligence by failing to take steps to resolve the escrow dispute; failed to keep Bojko informed of the status of the matter and to comply with his reasonable requests for information; and misrepresented that he would file a lawsuit against the sellers; (3) in the Castaneda matter, although we dismissed the charges in the Goldberg count, in the Deocamp case, respondent failed to keep his client informed; exhibited gross neglect and a lack of diligence by failing to oppose summary judgment motions and permitting the complaint to be dismissed; and misrepresented to his client the status of the matter; (4) in the Vonderputten matter, respondent was guilty of gross neglect and a lack of diligence when he permitted his client's personal injury complaint to be dismissed for lack of prosecution; he also failed to communicate with his client and misrepresented the status of the matter; (5) in the Sherman matter, respondent failed to oppose a motion for summary judgment and allowed his client's personal injury complaint to be dismissed, thereby exhibiting gross neglect; he also failed to

communicate with his client; and (6) in the Liscinski matter, respondent's failure to execute a substitution of counsel and to turn over his client's file constituted gross neglect, a lack of diligence, failure to protect a client's interests upon termination of the representation, failure to obey an obligation of a tribunal, and conduct prejudicial to the administration of justice. The special master properly dismissed the charges in the Tobe matter, based on the grievant's failure to appear at the hearing.

Respondent's misconduct in these six matters was serious and widespread. Indeed, although he was not charged with a violation of *RPC* 1.1(b), he displayed a pattern of neglect. His clients suffered economic harm resulting from his failure to represent them properly. He exhibited similar conduct in the matter that led to a reprimand.

There is substantial mitigation, however. Respondent was diagnosed with depression and is receiving medication that keeps his condition under control. His unethical conduct primarily consisted of failing to take action, such as returning telephone calls and filing necessary documents. As explained by Dr. Vetrano, these are classic symptoms of depression, in which simple tasks become overwhelming. Moreover, respondent was not motivated by greed or venality. He appeared to express sincere remorse and an interest in compensating his clients for his wrongdoing. Respondent's unethical conduct occurred during the same approximate timeframe as the misconduct for which he received a reprimand. This is not a case, therefore, in which an attorney failed to learn from his mistakes.

Misconduct on the scale presented in these matters usually results in a suspension. *See, e.g., In re Yetman*, 132 *N.J.* 157 (1993) (three-month suspension for gross neglect, pattern of

neglect, lack of diligence, failure to communicate with clients, failure to comply with recordkeeping provisions, and misrepresentation; a mitigating factor was the attorney's alcoholism, which was found to be causally linked to his misconduct); *In re Peluso*, 156 *N.J.* 545 (1999) (three-month suspension for gross neglect in six matters, pattern of neglect, failure to abide by a client's decision, lack of diligence, failure to communicate, failure to explain a matter sufficiently to permit a client to make an informed decision, recordkeeping deficiencies, and failure to deliver a file upon termination of the representation in one of the matters); *In re Casey*, 170 *N.J.* 6 (2001) (three-month suspension for gross neglect, pattern of neglect, failure to communicate with a client, failure to expedite litigation and misrepresentation); *In re Bosies*, 138 *N.J.* 169 (1994) (six-month suspension for gross neglect in three matters, pattern of neglect, lack of diligence in three matters, failure to communicate with a client in one matter, failure to abide by the scope of the representation in two matters, and misrepresentation in two matters); *In re Aranguren*, 165 *N.J.* 664 (2000) (six-month suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate, failure to protect the interests of a client upon termination of the representation, failure to expedite litigation, misstatements of facts or failure to disclose facts in connection with a disciplinary matter, and misrepresentation in five matters; attorney had a prior admonition); *In re Marum*, 157 *N.J.* 625 (1999) (one-year suspension for combinations of gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, and misrepresentation in eleven matters).

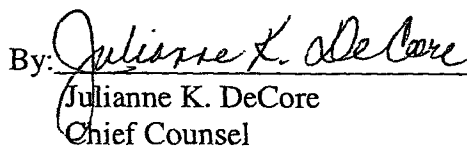
The cases cited by the presenter were not entirely on point. In *In re Pavilonis, supra*, 98 *N.J.* 36 (1984), the attorney had been disbarred in Pennsylvania for taking the bar examination

on behalf of his wife; in *In re Mintz, supra*, 126 *N.J.* 484 (1992), the attorney did not cooperate with disciplinary authorities, abandoned his clients, and failed to maintain a *bona fide* office; in *In re Beck, supra*, 143 *N.J.* 135 (1996), the attorney had an extensive ethics history, including two private reprimands, a public reprimand, two temporary suspensions and a three-month suspension, and was guilty of lack of candor toward a tribunal, lack of truthfulness in statements to others, unauthorized practice of law, and conduct prejudicial to the administration of justice; and in *In re Foushee, supra*, 149 *N.J.* 399 (1997), the attorney had defaulted, thus resulting in enhanced discipline, and previously had been temporarily suspended. All of the above cases had factors not present here that warranted more severe discipline.

Based on the foregoing, we unanimously vote to impose a three-month suspension. If not for evidence of respondent's depression, a longer term of suspension would be warranted. Before reinstatement, respondent must submit a report from a mental health professional approved by the Office of Attorney Ethics, concluding that he is fit to practice law. Upon reinstatement, respondent should be required to practice under the supervision of a proctor for two years. Two members did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

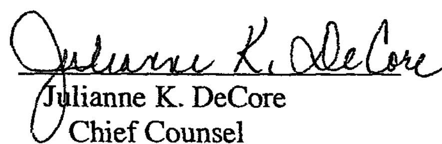
In the Matter of John A. Tunney
Docket No. DRB 03-350

Argued: January 29, 2004

Decided: March 26, 2004

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy							X
Boylan		X					
Holmes		X					
Lolla							X
Pashman		X					
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		7					2



Julianne K. DeCore
Chief Counsel