SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-024

IN THE MATTER OF	:
	:
JONATHAN SAINT-PREUX	:
	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 15, 2004

Decided: May 17, 2004

Linda Ballan appeared on behalf of the District VC Ethics Committee.

Respondent appeared pro se.

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

This matter first came before us as a recommendation for an admonition filed by the District VC Ethics Committee ("DEC"). The four-count complaint charged respondent with failure to set forth the basis or the rate of the fee within a reasonable time after the beginning of the representation, in violation of RPC 1.5(b) (first count)[1]; failure to utilize $2,000 given for travel

[1] Although the complaint specifically refers to a retainer agreement, unless the fee is contingent on the outcome of the case or the nature of the matter is matrimonial, all that is

expenses and to account for such funds, in violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (second count); failure to keep the client reasonably informed about the status of the matter, in violation of RPC 1.4(a) (third count); and failure to cooperate with disciplinary authorities, in violation of R. 1:20-3(g)(3), more properly a violation of RPC 8.1(b) (fourth count).

Following our initial review of the matter, we determined to remand it to the DEC for an investigation on whether either respondent or his associate had misrepresented, in a letter and in a motion filed with an immigration court in Louisiana, that the client was at their office on April 3, 2000, at 8:30 a.m., the day of a telephonic hearing scheduled by the court. We also asked the DEC to consider whether the complaint should add a charge of gross neglect for respondent's failure to notify the client of the April 3, 2000, hearing and to make himself available on that date to appear telephonically.

On October 20, 2003, the DEC investigator filed a new investigative report ("IR"). The report found no evidence that respondent had made a misrepresentation to the court. As to the associate, when he was interviewed by the investigator he asserted that ". . . if the documents he submitted to the court

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required under RPC 1.5(b) is a writing setting forth the basis or the rate of the fee.

say that [the client] was with him, he must have been in the office . . . ." He stated to the investigator that "he normally did not start work before 9:00 a.m. so he would not have been there for an 8:30 a.m. telephonic hearing."

As to whether respondent might have exhibited gross neglect when he did not inform his client of the hearing, the investigator stated:

> In my previous Investigative Report, I indicated that "[w]hether or not respondent believed that the hearing was to be conducted telephonically from his office or in Louisiana, he was negligent in that he failed to notify [the client]." At the time of the original investigation, I considered this issue but did not believe that his actions rose to the level of gross negligence and therefore did not include such account in the complaint.
>
> [IR5.]

The new investigative report addressed one more issue: respondent's failure to cooperate with the new investigation. According to the report,

> [u]nder date of June 4, 2003, I wrote to respondent and requested a response to the allegations of misrepresentation, and requested a detailed explanation of the events of April 3, 2000 concerning [the client's] case, as well as certain documentation, all to be supplied within 10 days. Respondent did not respond, did not inform me in writing of the reason that the information could not be provided within the 10-day period, and did not give a date

certain when the information would be provided.

On June 26, 2003 I phoned the respondent's office and left a message. He did not return my call. I submitted an Investigative Report and recommended that the OAE file and serve a motion for temporary suspension with the Supreme Court in accordance with R. 1:20-3(g)(3), which was approved by the Chair.

On September 19, 2003, I received a telephone call from John McGill, III, Esq., Deputy Ethics Counsel, indicating that in practice, such a recommendation is made only during the course of the investigation. After office hours on September 19, 2003 I received a voicemail message from the respondent indicating that he had received a call from Mr. McGill and would call me the following Monday, September 22, 2003. He did not call. On September 24, 2003 I received a copy of Mr. McGill's letter to Kenneth Fost, returning the Investigative Report to me for further investigation. On September 26, 2003 I again wrote to the respondent, indicating that if he did not cooperate with me and provide the requested information by October 10, 2003, I would forward a request for his temporary suspension to the OAE. On October 10, 2003 I received a fax from the respondent dated October 7, 2003.

[IR1-IR2.]

Four months had elapsed since the investigator's initial request for information and respondent's compliance with that request. The investigator did not amend the complaint to reflect a failure to cooperate with her new investigation of the case.

Following our review of the new investigative report, we determined to order the transcript of the DEC hearing and to schedule the matter for oral argument to decide whether to adopt the DEC's recommendation for an admonition or to impose sterner discipline.

Respondent was admitted to the New Jersey bar in 1992. He is a sole practitioner in Irvington, New Jersey. He has no history of discipline.

On March 21, 1989, Rudverst Cadogan, a citizen of Guyana, was admitted to the United States as an immigrant. In 1992 and 1993, respectively, he pleaded guilty in New Jersey to the offenses of distribution of a controlled dangerous substance (marijuana) and possession of a controlled dangerous substance (marijuana) with intent to distribute within 1,000 feet of a school.

On February 22, 1999, the Immigration and Naturalization Service ("the INS") began deportation proceedings against Rudverst for violations of the Immigration and Naturalization Act. Leroy Cadogan, Rudverst's father, retained respondent to handle a bail application and the removal hearing on behalf of Rudverst. By then Rudverst had been transferred to a detention center in Oakdale, Louisiana. Respondent collected $3,500 from Leroy, in addition to a $2,000 payment earmarked for travel

expenses to Louisiana. Respondent did not memorialize the basis or rate of his fee. Although respondent produced an agreement to provide legal services, he testified that he did not present it to the Cadogans. According to respondent, he explained to Leroy that, because of the difficult nature of the case, the ultimate fee amount was uncertain. He claimed, however, that he and Leroy had some discussions about the fee for the case:

> The retainer agreement was to charge him by the hour, but I gave him an idea of what the retainer agreement was going to be, what the retainer fee was, but we did not know exactly how much it was going to be.
>
> [T112.] [2]

The record contains another indication that Leroy might have been aware of respondent's hourly rate. In his opening statement to the DEC, respondent alluded to two other instances in which Leroy had retained him: an immigration proceeding involving another of Leroy's sons and a landlord-tenant matter.

On May 13, 1999, the Louisiana immigration court held a hearing on the issue of Rudverst's removal and allowed him to apply for deferral of removal. A hearing was scheduled for August 13, 1999, but was continued to November 30, 1999, because respondent was out of the country on that date. On November 30, 1999, neither respondent nor Rudverst appeared at the hearing.

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[2] T denotes the transcript of the DEC hearing on October 29, 2002.

Because, however, the court found that notice of the hearing had not been served on respondent, the hearing was adjourned to April 3, 2000. The court mailed a written notice of the new hearing date to respondent. Although the court's certificate of service indicates that a notice was served on Rudverst as well, he denied having received it. In fact, by that time, Rudverst was no longer in Louisiana, but in New Jersey. Rudverst admitted that he did not inform the Louisiana court of his new address.

On April 3, 2000, Rudverst did not appear for the hearing in Louisiana. As a result, he was ordered deported in absentia. Respondent did not notify Rudverst of the hearing of April 3, 2000. Respondent testified that, because his office had filed a motion to change venue to New Jersey, he was under the impression that the case would be automatically transferred to New Jersey. According to respondent, ". . . had we known that we had to be in our office, we would be in our office." Respondent acknowledged that his reliance on the case's transfer to New Jersey was misplaced:

> That was a mistake. Because as I heard, people say Louisiana, they have their own regulations and the judges in Louisiana they have their own rules. They do not abide by the rules of all the other 49 states, that's their own rule. That may be a mistake.
>
> [T154.]

A few days before the hearing, on March 29, 2000, respondent's associate had mailed to the Louisiana court a motion for change of venue from Louisiana to New Jersey. The associate requested that, if the motion were denied, Rudverst be allowed to appear by telephone. Presumably, the judge granted the latter relief because, on April 3, 2000, the judge telephoned respondent's office. Although is undisputed that respondent was served with notice of the hearing, he was not at his office when the judge called. Having reached neither respondent nor Rudverst, the judge ordered Rudverst deported in absentia. Respondent did not inform either Rudverst or Leroy of this critical outcome, notwithstanding that Leroy came to respondent's office "a hundred times."

On April 10, 2000, respondent's associate wrote a letter to the Louisiana court:

> Dear Judge Wiegand:
>
> On April 3, 2000, Your Honor ordered Respondent [Rudverst] removed from the United States in his absence on the charges contained in the Notice To Appear. Released on bond, he was to appear at the above-referenced hearing. However, a Motion to Change Venue from Oakdale, Louisiana to Newark, New Jersey along with a request to appear telephonically were forwarded to the court by federal express mail. On the morning of April 3, 2000, Respondent [Rudverst] was at our office with Counsel in order to appear by telephone. In light of

> the foregoing, I respectfully ask the court to **reconsider** its April 3, 2000 Order.
>
> [Exhibit C-4.]

Presumably, the court declined to reconsider its order, because, on June 12, 2000, respondent's office filed a motion for reconsideration, which the court deemed as a motion to reopen the proceedings. On June 21, 2000, the court denied the motion:

> In support of the motion to reopen, the respondent [Rudverst] alleges "exceptional circumstances" in that he and counsel were waiting in counsel's office to proceed with the hearing telephonically, and that the Court never called the office to proceed with the hearing. The respondent [Rudverst] also argues that he had filed a pending motion for change of venue prior to the scheduled hearing.
>
> . . . .
>
> The respondent [Rudverst] has offered no evidence that his failure to appear was the result of exceptional circumstances, or that the notice of the hearing was legally insufficient . . . . The Court attempted on the scheduled hearing date to telephone the respondent [Rudverst] and counsel as arranged, but neither was available. The failure of the respondent [Rudverst] or his counsel to be available by telephone in counsel's office as arranged with the Court does not rise to the stringent level of exceptional circumstances as set forth in §240(e)(1) of the Act . . . .
>
> Further, the record does indicate that the respondent [Rudverst], through counsel, attempted to file a motion for a change of

> venue. The pendency of a motion for change of venue does not excuse the attendance of a respondent or counsel while that motion remains pending. The mere submission of a motion for change of venue does not relieve an alien or his attorney of the responsibility to attend the scheduled hearing after notice of that hearing has been given. Unless the Immigration Judge has granted the motion for change of venue prior to the hearing, the alien and his attorney remain obligated to appear at the appointed date and time.
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> [Exhibit S-5.]

All the while, Rudverst and his father remained unaware of these unfavorable developments, which included an immigration warrant for Rudverst's arrest. Because of Rudverst's failure to surrender to the immigration authorities, his $5,000 bond was revoked.

In October 2000, Rudverst was cited for a traffic violation (double parking). When the police conducted a search of his record and discovered the outstanding immigration warrant, Rudverst was arrested and sent to Hudson County Jail. According to Leroy, when he apprised respondent of Rudvert's arrest, respondent replied that he was awaiting the Louisiana court's decision on a motion to change the venue.

Ultimately, respondent was replaced by another attorney, Regis Fernandez, who was able to obtain Rudverst's release from jail. Fernandez was unsuccessful, however, in vacating the

order of deportation. As of the date of the DEC hearing, October 29, 2002, Rudverst was still in the country, pending the outcome of an appeal filed by Fernandez.

After Leroy filed a grievance against respondent, the DEC investigator wrote to respondent on July 16, 2002, asking him to submit, within ten days, numerous items comprised of eleven categories. Some of the documents requested were receipts for fees and travel expenses regarding Rudverst's representation (airline tickets, hotel bills, car rental, gasoline receipts, and meals), copies of respondent's business account ledger from 1999 through 2001, and originals of all business account deposit slips relating to Rudverst's representation.

On July 24, 2002, eight days from the date of the investigator's letter, respondent drove to the investigator's office and produced some of the documents. One month later, on August 23, 2002, the investigator asked respondent to provide the missing items, the majority of which were the above-listed records. According to respondent, he was unable to locate them:

> A. . . . because those books, they contain maybe 100 or 50 [receipts], so every time you're done with that book you have another book so I could not locate it.
>
> . . . .
>
> A. . . . I could not locate the receipts.

Q. You were requested by the investigator to produce deposit slips, copies of check registers related to Mr. Leroy Cadogan's payment. Did you provide those documents?

A. No. I provided to [the investigator] whatever I had, all I had in my possession, the receipts.

. . . .

A. . . . I didn't have [the deposit slips]. I could not locate them.

. . . .

A. . . . when I spoke to [the investigator] I spoke [sic] the accountant who does my taxes. He has all of those documents and I really - - at the time that gentleman was not available as he usually during tax season is available and I could not locate those documents.

. . . .

A. . . . I provided everything that I had concerning the case. And also I called [the investigator] over the telephone and told [her] whether [her] office [was] engaging in a fishing expedition and I was very upset . . . .

. . . .

A. . . . even though I have associates working for me, as a solo practitioner to be looking for all the deposit slips, I said to [the investigator] plainly, openly, that it was a fishing expedition. But everything I had copies of all the motions, copies towards what was done, I always gave that to [the investigator].

[T117-T128.]

Although the complaint charged respondent with failure to cooperate with disciplinary authorities, the allegations refer solely to dates and facts presumably related to an investigation by a DEC member who preceded the current DEC investigator. The complaint is silent about the current investigator's letters of July 16, 2002 and August 23, 2002, and her efforts to obtain records from respondent. Nevertheless, the evidence adduced at the DEC hearing below was confined to the new investigator's requests for documents, with no mention to the former investigator's alleged attempts to obtain records from respondent.

One of the allegations of the complaint is that respondent acted with dishonesty or deceit when he did not utilize a $2,000 payment for travel expenses to Louisiana, but instead applied to his legal fees. Respondent testified on this issue:

> I have no reason to be deceitful. As far as the last trip, I did not make that trip and I always said, when I asked Mr. [Leroy] Cadogan that question money was never an issue. If I was asked to give that money back I would give that money back. But Mr. Cadogan realized that the amount of work that I spent on the case, and I'm saying he's a fair person, he realized the amount of money - - the amount of time that I spent on the case, so the $2,000 for the subsequent trip would go towards the representation.
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> [T152-T153.]

As noted earlier, the first count of the complaint charged respondent with failure to communicate to his client, in writing, the basis or rate of his fee within a reasonable time after being retained, a violation of RPC 1.5(b); the second count charged him with failure to apply $2,000 given by Leroy toward travel expenses to Louisiana, a violation of RPC 8.4(c); the third count charged him with failure to keep his client informed about the status of his case, a violation of RPC 1.4(a); and the last count charged him with failure to cooperate with disciplinary authorities, a violation of RPC 8.1(b).

The DEC dismissed the second count of the complaint, finding no clear and convincing evidence that respondent acted dishonestly in connection with the $2,000 payment. According to the DEC,

> . . . although [respondent] believed he would have to return to Louisiana, ultimately he did not have to return to Louisiana. However, during the course of his representation of Rudverst Cadogan he undertook efforts and expended time that more than earned the amounts received from Leroy Cadogan.
>
> . . . .
>
> Leroy Cadogan confirmed at the hearing that at no time prior to the hearing, even after respondent ceased to represent Rudverst Cadogan, did Leroy Cadogan seek a refund of any monies paid. No fee arbitration proceedings were filed.
>
> [Draft Hearing Report at 6-7.]

The DEC found, however, that respondent did not communicate to his client, in writing, the rate or basis of his fee within a reasonable time after the beginning of the representation, a violation of RPC 1.15(b); did not keep Rudverst reasonably informed about the "status and scheduling of the hearing," a violation of RPC 1.4(a); and did not cooperate with the DEC investigator, a violation of R.1:20-3(g)(3), more properly a violation of RPC 8.1(b). The hearing panel report states that "[f]or some of the categories (i.e. paragraphs 3 and 4), the respondent did not say that he could not locate them; instead, he indicated that in his opinion there was no basis or reason for him to produce the documents requested."

The DEC recommended an admonition.

Following a de novo review of the record, we find that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. As seen below, however, we are unable to agree with all of the DEC's findings.

We concur with the DEC's dismissal of the charge that respondent violated RPC 8.4(c) in connection with his use of the $2,000 payment. There is no clear and convincing evidence that respondent's use of the funds for his legal fees, once he determined that another trip to Louisiana was unnecessary, was dishonest or deceitful. Like the DEC, we find that the extent

of the legal work that respondent's firm performed in the matter justified the application of the funds toward his legal fees.

We also agree with the DEC's finding that respondent violated RPC 1.4(a) by not keeping Leroy and Rudverst informed of the status of the case. Leroy and Rudverst testified that respondent did not send them copies of the motions or submissions prepared by his office and did not otherwise apprise them of important developments in the case, such as the hearing of April 3, 2000, the order of deportation, the denial of the motion to reopen the case, and the warrant for Rudverst's arrest. Respondent offered no evidence to contradict Leroy's and Rudvert's testimony. He acknowledged his failure to keep them informed of certain aspects of the case. The evidence, thus, clearly and convincingly establishes a violation of RPC 1.4(a).

Moreover, we find that respondent also lacked diligence in representing Rudvert's interests. Despite being served with notice of the April 3, 2000, hearing and having the court's permission to appear by telephone, respondent did not inform Rudverst of the hearing and was not present at his office at the scheduled time. As a result, the court ordered Rudverst's removal from the country and revoked his bail. As pointed out by the Louisiana court, that respondent's office had attempted

to file a motion to change venue was immaterial; Rudverst's appearance was still required. Respondent's conduct caused considerable emotional and economic injury to both Leroy and Rudverst, who were forced to retain new counsel to obtain Rudverst's release from jail and to appeal the deportation order. We find, thus, that the foregoing conduct violated RPC 1.3.

Although the complaint did not charge respondent with a violation of this rule, it alleged that "[t]he respondent never notified Rudverst of the hearing date [and] Rudverst was not present in respondent's office on that date." Accordingly, respondent was on notice of a potential finding that he lacked diligence in his representation of Rudverst. Furthermore, the issue was fully litigated below, without any objection from respondent. We, therefore, deem the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

As to respondent's failure to set forth, in writing, the basis or the rate of his fee either before or shortly after the beginning of Rudverst's representation, we find that the proofs do not clearly and convincingly demonstrate that respondent's conduct in this regard was improper. RPC 1.5(b) imposes the requirement of a writing only "[w]hen the lawyer has not regularly represented the client." If the client has been made

aware of the lawyer's rate from prior representation, then the lawyer is not required to present the client with a writing explaining the fee basis or rate.

Respondent testified that he had represented Leroy's interests before – in an immigration case concerning another son of Leroy and in a landlord-tenant matter. Typically, the fee in such matters is calculated on an hourly basis, as opposed to being contingent or flat. A logical inference is, thus, that Leroy was already aware of respondent's rate. Furthermore, respondent testified that, although the difficulty of the case precluded him from quoting a precise sum to Leroy, he had given Leroy "an idea" of what his fee would be. Respondent's testimony was uncontroverted. Nothing in the record suggests that his testimony was unworthy of belief. We, therefore, find that, despite the absence of a writing, Leroy was aware of respondent's fee because of these discussions and because of respondent's prior legal work performed on his behalf. That Leroy never complained about the amounts paid to respondent adds strength to our conclusion.

We are unable to concur with one other finding made by the DEC: that respondent failed to cooperate with the DEC investigator by not producing some of the documents requested. Presumably, this finding relates to the current investigator,

not the former, since the testimony at the hearing below was confined to the records listed in the two letters sent by the current investigator. The DEC remarked that, for some of the items, respondent did not say that he could not locate them, but, rather, that he saw no rational basis for the investigator's request.

A careful search of the record, however, reveals no support for the DEC's statement. In fact, respondent asserted exactly the opposite – that he was unable to locate the records. The only comment made by respondent that might have led the DEC to come to that conclusion was that, in his view, some of the investigator's requests, such as the one for his business account ledger for a two-year period, appeared overly broad and indicative of a "fishing expedition." In the end, however, respondent testified extensively that his failure to submit some of the records was rooted in his inability to find them. For lack of clear and convincing evidence that respondent knowingly failed or refused to produce some of his bank records, we dismiss the charge of a violation of RPC 8.1(b).

It is unquestionable, however, that respondent acted improperly when, for a period of four months, he did not cooperate with the supplemental investigation prompted by our remand. Only after the Office of Attorney Ethics intervened and

only after respondent was threatened with a temporary suspension did respondent supply some information to the investigator. Inexplicably, the investigator did not think it appropriate or necessary to add this new violation to the complaint. Nevertheless, we consider this lack of cooperation as an aggravating factor, particularly because respondent was on notice that, right or wrong, the DEC had made a finding that his failure to provide documents in connection with the primary investigation of the matter constituted unethical conduct.

The only remaining issue is the appropriate degree of discipline for respondent's ethics transgressions.

Discipline for conduct similar to respondent's, even if accompanied by failure to cooperate with ethics authorities, warrants no more than an admonition or a reprimand. See, e.g., In the Matter of Dawn Manning, DRB 02-236 (2002) (admonition for attorney found guilty of lack of diligence for failure to collect sufficient funds to complete a real estate closing); In the Matter of Mark W. Ford, DRB 02-280 (2002) (admonition for attorney who exhibited lack of diligence and failure to communicate with the client about the status of the matter); In the Matter of Paul Paskey, DRB 98-244 (1998) (admonition for attorney who demonstrated gross neglect, lack of diligence, and failure to communicate with the client); In the Matter of Ben

Payton, DRB 97-247 (1998) (admonition for attorney who displayed gross neglect, lack of diligence, and failure to communicate with the client); In re O'Neill, 157 N.J. 639 (1999) (reprimand for attorney who accepted representation of a personal injury client and, thereafter, took no action on the client's behalf; the attorney also ignored the client's attempts to obtain information about the status of the matter and failed to cooperate with disciplinary authorities); and In re Gruber, 152 N.J. 451 (1998) (reprimand for attorney who, in a tax foreclosure matter, engaged in gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with the Office of Attorney Ethics' request for information about the matter).

We are persuaded that respondent's conduct more properly falls within the reprimand range. Because of his failure to notify Rudverst of the hearing date and to be present to appear by telephone, the Louisiana court ordered Rudverst's deportation, his bond was vacated, and he was sent to jail. Rudverst was forced to retain another attorney, who was successful in releasing him from jail. Ultimately, however, the New Jersey immigration court declined to vacate the removal order. The harm to Rudverst is a factor that aggravates respondent's conduct. Another aggravating circumstance is

respondent's failure to cooperate with the new investigation, after being on notice that the hearing panel had found him guilty of failure to cooperate with the original investigation. Therefore, we unanimously determine that a reprimand more appropriately addresses the nature of respondent's ethics misdeeds. Two members did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for costs incurred in connection with the prosecution of this matter.

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 Jonathan Saint-Preux
Docket No. DRB 04-024

Argued: April 15, 2004

Decided: May 17, 2004

Disposition: Reprimand

Members	*Disbar*	*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