

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-218

IN THE MATTER OF
RICHARD P. SCHUBACH
AN ATTORNEY AT LAW

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Decision

Argued: October 16, 2003

Decided: November 19, 2003

John R. Lanza, Esq., appeared on behalf of the District XIII Ethics Committee.

Michael J. Rogers, Esq., 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 (three-month suspension), filed by the District XIII Ethics Committee (“DEC”).

Respondent was admitted to the New Jersey bar in 1983. He is a sole practitioner in Raritan, New Jersey. The formal ethics complaint charged him with violations of RPC 1.1, presumably (a) and (b) (gross neglect and pattern of neglect); RPC 1.3 (lack of diligence); and RPC 1.4, presumably (a) (failure to keep the client informed about the

status of the matter and to reply to the client's reasonable requests for information about the case).

In 1992, respondent was suspended for three months for serious misconduct in a personal real estate transaction. Specifically, in a business venture with his girlfriend, respondent signed her father's name on a real estate contract, without authority, in violation of RPC 8.4(c); misstated his income on two mortgage applications, in violation of RPC 8.4(c); failed to safeguard the girlfriend's funds by using them in a personal business transaction, without a written agreement or accounting to the girlfriend, in violation of RPC 1.15(a) and RPC 1.15(c); failed to advise the girlfriend to obtain independent counsel, obtained an unfair advantage over her in the later division of their property, and failed to file a deed conveying her interest to him, in violation of RPC 1.8(c); and failed to cooperate with the ethics authorities, in violation of RPC 8.1(b). In mitigation, we considered that respondent was a young attorney at the time of his transgressions. Our decision, however, forewarned respondent that any future brushes with the disciplinary system would not be viewed with such a benign eye. In re Schubach, 130 N.J. 93 (1992).

In March 1993, respondent was reinstated to the practice of law. In 1997, he received a reprimand in a matter that proceeded on a default basis. In that case, respondent failed to act with diligence in vacating a judgment entered against the client, failed to communicate with the client, and failed to remit \$150 to the judgment-creditor,

as instructed by the client. There was no evidence that respondent had misappropriated the funds. In re Schubach, 152 N.J. 19 (1997).

We originally reviewed the present disciplinary matter in 2001, as a default. We denied respondent's motion to vacate the default and determined to suspend him for six months. In the Matter of Richard P. Schubach, DRB 00-402 (December 10, 2001). On April 25, 2002, however, the Court vacated the default and our decision. The matter was remanded to the DEC for the filing of an answer and a hearing on the merits.

The facts of this matter are as follows:

On March 12, 1997, respondent was retained by Victor Cleary in a matrimonial matter, which was permeated with strife between the parties. In July 1997, Victor was awarded temporary custody of the three children of the marriage. Because his attention was devoted mostly to the children's care and the running of his landscaping business, Victor was assisted in the divorce case by his sister, Nancy Blair, and his stepfather, Fred Leuper. It is undisputed that, until December 1997, Victor was satisfied with respondent's representation.

In late 1997 or early 1998, Victor's wife, Alicia Cleary, filed a complaint for divorce and a pendente lite motion for custody of the children, alimony, child support, counsel fees, and the appointment of a psychologist to evaluate the parties and their children.¹

¹ Although the record is not entirely clear, it seems that, prior to the filing of the divorce complaint, the parties' legal matters stemmed from domestic violence complaints.

Upon being served with Alicia's motion, respondent filed a cross-motion, seeking essentially the same relief requested by Alicia. On December 16, 1997, the cross-motion was dismissed for the following technical and procedural deficiencies: failure to include a notice to litigant, pursuant to R.5:5-4(c); failure to provide proof of service; and failure to conform with the rule requiring that typewritten certifications be double-spaced and contain numbered paragraphs.

Notwithstanding the dismissal of respondent's cross-motion, the court maintained Victor as the primary physical custodian and primary caretaker of the children. Alicia, the secondary caretaker, was entitled to visitation. The court also ordered Victor to pay \$2,500 for Alicia's counsel fees within thirty days, and appointed Dr. Lee Monday, a forensic psychologist, to evaluate the parties and their children. Victor was ordered to pay \$5,000, upon demand by the psychologist, for the performance of the family's evaluation (Exhibit CP-31).

According to Fred Leuper, who frequently acted as liaison between Victor and respondent, beginning in 1998, the relationship between attorney and client became contentious. Fred testified that a number of areas needed clarification, but respondent had started to lose interest in the case; respondent simply "...didn't want to be bothered with it" (1T59).²

On January 15, 1998, respondent and his adversary entered into a stipulation extending the time to file the answer. Respondent did not file the answer within the

² 1T refers to the transcript of the DEC hearing on October 21, 2002.
²T refers to the transcript of the DEC hearing on November 7, 2002.
³T refers to the transcript of the DEC hearing on January 9, 2003.

extended period, however. On an unknown date, a default was entered against Victor. On May 5, 1998, the court notified both counsel that the case could not be listed for trial because of the entry of default (Exhibit CP-33). The court scheduled a dismissal hearing for May 29, 1998 (Exhibit CP-34). According to Victor, he was unaware of these developments in the case (2T42-2T43).

On July 9, 1998, respondent filed a motion to vacate the default and to allow Victor to file an answer out of time. Victor was aware of this motion, which was granted. On July 28, 1998, respondent filed an answer and counterclaim.

On August 20, 1998, however, the case was again listed for dismissal, as a result of respondent's failure to file a case information statement ("CIS"). Victor testified that he was unaware of the court's intended action (2T28-2T29).

Although R.5:5-2(b) requires that a CIS be filed within twenty days after the filing of an answer, respondent never filed a CIS on Victor's behalf. Only after Victor retained new counsel was a CIS filed, in March 1999.

There was considerable testimony below on the CIS topic. Respondent testified that, although he gave clear instructions to his client to fill out the CIS form and return it to him for filing, Victor returned only partially filled out CIS forms. Indeed, there are three incomplete CISs in the record (Exhibits CP-13, CP-17, and CP-41). Fred testified that, although he had filled out the CIS for Victor with as much information as was available, there were some areas that needed clarification. To that end, he scheduled an appointment with respondent sometime in November 1998. Upon Fred's arrival at the

office, respondent's secretary informed him that respondent would be unable to see him on that day. As requested by the secretary, Fred left the CIS with her. Thereafter, although Fred called respondent's office several times, reaching only his secretary, he was never told if additional information was required for the completion of the CIS (1T31;1T53).

On January 13, 1999, Victor's pleadings were stricken without prejudice, for failure to file a CIS (Exhibit CP-16).

On December 31, 1998, respondent was served with a motion filed by Alicia's attorney, seeking, among other things, to hold Victor in violation of litigant's rights for his failure to pay the court-ordered counsel fees, failure to pay Dr. Monday, the appointed psychologist, and failure to abide by the visitation arrangement. Other forms of requested relief were as follows: an order to show cause holding Victor in criminal contempt for his failure to comply with the prior court orders; immediate change of the children's residential care from Victor to Alicia; and the issuance of a warrant for Victor's arrest until such time as he complied with the prior court orders.

On December 31, 1998 (a Thursday), Victor picked up the motion papers from respondent's office. Respondent's cover letter to Victor read as follows:

Dear Vic,

In connection with the above referenced matter, I enclosed herein
Noti [cut off] Certifications of Alicia Clearly and Francis Gavin.

Kindly review same and contact me as soon as possible to discuss this [cut off].

Very truly yours,

Richard P. Schubach

[Exhibit CP-2.]

At the DEC hearing, Victor was asked if he had been advised of the deadline to submit a response, when he picked up the papers. At first, he replied, "I don't remember. I don't believe so because it was very fast. In and out" (2T13). He later testified that he knew that a response was due on or before January 7, 1999 (2T100).

According to Victor, the following week, he attempted to contact respondent "for two weeks straight," but was unsuccessful (2T14; 2T18-2T19; 2T103). He was able to reach respondent's secretary only. He also tried to set up an appointment with respondent, to no avail (2T14-2T15).

During that week, Victor had an overnight stay at a hospital, after he experienced heart palpitations. On the morning of the return date of the motion, January 15, 1999, Victor called respondent and asked if they had to appear in court. According to Victor, respondent replied that the motion would be adjourned because of the snow that had fallen the night before (2T18).

A short time later, Victor learned from his children's school principal that he had lost custody of the children. Indeed, on January 15, 1999, the court issued a final opinion providing, among other things, for a change in the custody arrangement:

Considering the delay in the receipt of doctor Monday's report is due to the father's repeated noncompliance with previous Order of the Court, and considering the fact the father has not responded to the within motion, the mother's request with regard to custody is granted.

* * *

The mother certifies that the father has not made any of the above payments and [requests] that he again be held in violation of litigant's rights for such nonpayment. The mother's request is granted. The father should make the relevant payments within 10 days of the issuance of this Order. If the father fails to make the relevant payments, a warrant shall issue for his arrest upon the application of the mother's attorney, and notice to the father's attorney of same.

[Exhibit CP-9.]

According to Victor, respondent did not communicate the outcome of the motion to him.

Fred testified that, when he learned of the judge's decision, he immediately telephoned respondent:

I asked him what happened, why he didn't go to court on the 15th and the answer was well, Fred -- words to this effect, Fred, Victor lost, what can I tell you, if you want we can file an appeal and I asked him is there something we can do right away, get in there tomorrow with this and he kind of laughed a little bit, he said something to the effect his office wasn't there just for Victor, would take him a week or so, week to 10 days to get the paperwork ready and then have to wait for a court date for the appeal to be heard.

[1T35.]

With Fred's assistance, on or about January 19, 1999, Victor filed, pro se, an order to show cause seeking to vacate the January 15, 1999, court order (CP-11). The judge

granted the requested relief, reversing the custody arrangement. The court scheduled a hearing for February 1999. In late January 1999, Victor retained another attorney.

Respondent, for his part, attempted to justify his inaction by shifting the blame to his client. According to respondent,

...we called up Vic, got a hold [sic] of him either by cell phone. We reached out for him. We told him, look, we have serious papers here. You have to pick them up, review them, I need your response.

I believe this particular matter was when Mr. Cleary and -- my secretary had a phone call conversation with Mr. Cleary. Mr. Cleary indicated he was sick and couldn't get to them. My secretary relayed that to me. I kind of blew up. I got her to get him back on the phone. I, basically, said I might have used the terms, I don't give a flying whatever, if you are dying, you get in here and pick up these papers.

[3T27-3T28.]

At the DEC hearing, the following exchange took place between respondent and his counsel:

Q. Was there any discussion between you and Mr. Cleary about the necessity about him [sic] to respond to this motion that you are so heavily criticized for?

A. Sure. This was the granddaddy of all motions to date. That was going to change everything that we had worked for since March of '97 to get done. There were sanctions coming, criminal sanctions coming, change of custody, yeah. It was serious, we need[ed] a response.

Q. The client knew all this, I presume?

A. Yes, he did.

Q. Despite that, he did nothing?

A. No, [he] did nothing.

[3T35.]

On January 7, 1999, the date that the response to the motion was due, respondent sent a letter to his adversary, requesting his consent to an adjournment because of Victor's medical problems. Respondent attached a certification from the doctor who treated Victor at the hospital (Exhibit CP-8). The adversary did not consent to the adjournment. Asked if he had contacted the court, respondent replied, "We may have. I don't recall. I just don't recall..." (3T33-3T34).

Respondent testified as follows about his next communication with Victor:

Q. What is the next communication you had with the client?

A. Probably the day of the hearing or the day before asking do I have to go to court? No adjournment was granted. No papers were filed on our behalf. I had nothing to go to court with. We had not responded and we had not responded because Mr. Cleary didn't give us the papers to respond.

Q. What was [the] last or final communication with him before he discharged you, if any?

A. They came in shortly after the results of the hearing which were -- which were negative to Mr. Cleary. They had taken custody away from Mr. Cleary and whatever other relief the court granted. They had taken custody away. They had come in, I believe he and his stepfather had come in the day after or two days after and wanted to know what we could do about this. Now, it was important that we rectify the situation. They wanted to know if we could go to court that day. I flat out and [sic] said, no, I can't go to court today. I said we had plenty of time to file these papers. Now you got a bad

decision, now you want me to drop everything and you want me to go court today. I can't, my schedule won't allow it.

[3T35-3T36.]

Respondent had no reasonable explanation for his failure to take immediate action to either vacate the court's January 15, 1999 order or file an appeal. He acknowledged that the situation was emergent, but testified that he "wasn't going to drop everything and go up there, that's correct" (3T55).

At the conclusion of the ethics hearing, the DEC found that respondent did not commit any ethics violations in his representation of Victor's interests, reasoning that "[r]espondent and Mr. Cleary were each responsible for a relationship that was less than exemplary" (hearing panel report, paragraph b).

The DEC also found that "Mr. Cleary's inaction in not supplying respondent with the routine information [was] disquieting. Mr. Cleary must share the accountability with respondent. Yet, it is respondent's lack of explanation for his inaction as [of] January 7, 1999 and beyond that is disconcerting" (hearing panel report, paragraph d). The DEC concluded that respondent failed to act with reasonable diligence and promptness in representing his client, in violation of RPC 1.3, and failed to keep his client reasonably informed about the status of his case, in violation of RPC 1.4. The hearing panel report is silent on the charge of a violation of RPC 1.1 (neglect and pattern of neglect).³

³ By letter dated August 4, 2003, and at oral argument before us, the presenter urged us to find violations of RPC 1.1, and to impose at least a six-month suspension.

Two members of the hearing panel recommended that respondent be suspended for three months. The public member dissented, “disagreeing with any suspension.” The hearing panel unanimously recommended that, upon reinstatement, respondent “be required for a five-year period to perform legal work or services either in a firm setting or with a designated mentor, another New Jersey attorney in good standing.”

Following a de novo review of the record, we found that the DEC’s findings that respondent’s conduct was unethical were fully supported by clear and convincing evidence. Unlike the DEC, however, we concluded that respondent’s conduct also amounted to gross neglect, although not a pattern of neglect. Ordinarily, gross neglect in three matters is required for a finding of a pattern of neglect.

Respondent’s overall conduct in this matter was serious. Although, in the beginning of the representation, he obtained favorable results for his client, he later grossly mishandled the case by not filing a CIS, and not filing an answer within the extended time, thereby causing the entry of default against his client. He also failed to keep Victor apprised of these important developments in the case.

Respondent's most egregious conduct occurred in connection with the December 31, 1998, motion. Although Victor was aware of the January 7, 1999, deadline for the filing of a response, and although the past practice was that Victor would supply the necessary information for respondent’s preparation of court papers, it was respondent’s duty to insure that this January 17, 1999, deadline for the filing of a response be observed. Respondent acknowledged that this was the most crucial motion filed in the

case, and that grievous consequences could flow therefrom. Yet, he did nothing to compel Victor to supply the required factual information for the preparation of a response. More seriously, respondent could not recall if he had attempted to obtain relief from the court, after he was unable to get his adversary's consent to an adjournment. The only logical inference is that he did not seek relief from the court. In its opinion, the court cited Victor's lack of response as one of the factors considered in reaching its decision, but made no reference to a request for an adjournment.

Compounding respondent's failure to submit an opposition to the motion and to attempt to obtain an adjournment from the court was his failure to appear on the return date of the motion. Respondent's only explanation was that he had "nothing to go to court with." At a minimum, respondent should have appeared in court, on January 15, 1999, to explain the circumstances to the judge, and to attempt to have the motion adjourned. Another possible course of action was to withdraw from the case, based on his client's lack of cooperation. Indeed, paragraph 6 of the retainer agreement allowed for his withdrawal if the client failed to cooperate with him (Exhibit CP-1).

Respondent's cavalier attitude toward his client's interests continued even after respondent botched the January 1999, motion. Victor had to learn of its outcome from the children's school principal, instead of respondent. After Victor and his stepfather desperately sought respondent's assistance and counsel on how to overturn the judge's findings, respondent reacted with insensitivity, even callousness. He did not attempt to

allay the client's understandable concerns, but appeared indignant at the thought that he had to "drop everything" to return the case to its former posture.

Fortunately for Victor, he was successful in reinstating the prior custody arrangement and avoiding possible harsh consequences from the court's rulings. No great measure of confidence can be reposed in the profession when a client is forced to take immediate action, on his own, in order to remedy his lawyer's irresponsible management of his legal affairs.

Not surprisingly, respondent's attitude throughout these disciplinary proceedings was marked by a total lack of contrition and recognition of wrongdoing. His attempts to lay blame where it did not belong, too, were reprehensible. By contrast, the review of the record unearthed no mitigating circumstances.

Generally, cases involving gross neglect, lack of diligence, and failure to communicate in one or several matters result in either an admonition or a reprimand. See, e.g., In the Matter of Jonathan H. Lesnik, DRB 02-120 (May 22, 2002) (admonition for attorney who, in a divorce matter, did not file an answer or obtain an extension to file the answer, resulting in a final judgment of divorce by default; the attorney also failed to keep the client informed about the matter; the attorney violated RPC 1.1(a), RPC 1.3 and RPC 1.4(a)); In the Matter of Paul Paskey, DRB 98-244 (October 23, 1998) (admonition imposed for gross neglect, lack of diligence, and failure to inform the client of the status of the matter); In the Matter of Ben W. Payton, DRB 97-247 (October 27, 1997) (admonition for attorney who allowed a complaint to be dismissed for lack of

prosecution, failed to disclose the dismissal to the client, and failed to reply to the client's requests for information about the case); In re Aranguren, 172 N.J. 236 (2002) (reprimand for attorney who failed to act with diligence in a bankruptcy matter, failed to communicate with the client, and failed to provide the client with a written retainer agreement); In re Paradiso, 152 N.J. 466 (1998) (reprimand for attorney who, in a personal injury matter, failed to act with diligence and to communicate with the client, causing the case to be dismissed); In re Bildner, 149 N.J. 393 (1997) (reprimand for lack of diligence and failure to communicate with the client after the case was dismissed with prejudice); In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate in two matters; in one of the matters, the attorney also failed to return the file to the client); In re Wildstein, 138 N.J. 48 (1994) (reprimand for misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with the client).

Here, respondent exhibited failure to communicate with his client, lack of diligence, and gross neglect. In our view, the gross neglect bordered on abandonment of the client's interests. Had respondent's disciplinary record been confined to the above transgressions, discipline no more severe than a reprimand would have been appropriate. This is, however, respondent's third encounter with the disciplinary system. He was suspended for three months in 1992 and reprimanded in 2001. Our 1992 decision cautioned him that future instances of unethical conduct would not be favored with indulgence. Respondent refused to heed this fair warning. For respondent's


unwillingness to learn from his prior mistakes, discipline sterner than a reprimand is, therefore, required. A period of suspension will hopefully provide him with some time for reflection on his duty to conform to the high standards that govern the profession.

We unanimously determined that a three-month suspension is the appropriate quantum of discipline for respondent's ethics offenses. We also determined to require him to provide proof of attendance at twelve hours of Professional Responsibility courses approved by the Office of Attorney Ethics. Such proof should be submitted within three months of respondent's reinstatement.

One member recused himself.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: 
Julianne K. DeCore
Acting Chief Counsel

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

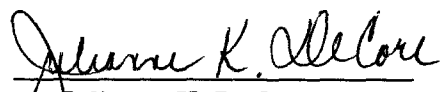
In the Matter of Richard P. Schubach
Docket No. DRB 03-218

Argued: October 16, 2003

Decided: November 19, 2003

Disposition: Three-month suspension

<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>Maudsley</i>		X					
<i>O'Shaughnessy</i>		X					
<i>Boylan</i>		X					
<i>Holmes</i>		X					
<i>Lolla</i>		X					
<i>Pashman</i>		X					
<i>Schwartz</i>		X					
<i>Stanton</i>		X					
<i>Wissinger</i>						X	
Total:		8				1	


Julianne K. DeCore