SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-132
District Docket No. IX-03-025E

IN THE MATTER OF	:
STUART P. SCHLEM	:
AN ATTORNEY AT LAW	:

Decision

Argued: June 16, 2005

Decided: August 5, 2005

R. Diane Aifer appeared on behalf of the District IX Ethics Committee.

Emil S. Cuccio 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 on a recommendation for discipline (three-month suspension) filed by the District IX Ethics Committee ("DEC"). The two-count complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), presumably RPC 1.4(a) (failure to keep a client reasonably informed about the status of the matter and to

promptly comply with reasonable requests for information),[1] RPC 1.15 (failure to safeguard property), and RPC 8.4(c) (conduct involving misrepresentation).

Respondent was admitted to the New Jersey bar in 1983 and the New York bar in 1980. At the relevant times, he maintained an office in Morganville, New Jersey.

In 1994, respondent received a private reprimand for failure to communicate with a client. In the Matter of Stuart P. Schlem, Docket No. 93-434 (February 16, 1994). He was reprimanded in 2000, in a default matter, for recordkeeping deficiencies and failure to cooperate with disciplinary authorities. In re Schlem, 165 N.J. 536 (2000). Effective March 12, 2003, he was suspended for three months in another default matter, for gross neglect, lack of diligence, failure to communicate with a client, misrepresentation, and failure to cooperate with disciplinary authorities. In re Schlem, 175 N.J. 437 (2003). Respondent remains suspended to date.

For the most part, the facts in this matter are not in dispute. Respondent stipulated to most of the allegations in the

[1] Because respondent's conduct occurred in 2002-2003, prior to the 2004 amendments to the Rules of Professional Conduct, he should have been charged under the old rule. Although the complaint cited RPC 1.4(b), the facts of this matter allow the conclusion that the complaint intended to charge respondent with pre-amendment RPC 1.4(a), which is identical to amended RPC 1.4(b).

complaint, and denied only those concerning his communications with the client.

In 2000, respondent was retained to represent the Warwick Condominium Association. The Warwick, a 275-unit condominium, is located on the boardwalk in Atlantic City, New Jersey. The Warwick Condominium Association is governed by a board of trustees. Catherine Grady was the "General Manager of the Condominium" and respondent's contact person "on behalf of the Association."

Respondent was retained by the association's board of trustees for two separate lawsuits against insurance companies that had denied claims for substantial property damage to the Warwick in separate windstorms. One windstorm claim arose in 1996, the other in 1998.

After Crum & Forster Insurance Company denied coverage for the 1996 claim, respondent filed a lawsuit to recover damages under the policy. Following a two-week trial, the association prevailed and was awarded approximately $714,000 before interest. The verdict was upheld on appeal.

In February 1998, Royal Indemnity Insurance Company ("Royal") denied Warwick's claim for property damages. Respondent filed a lawsuit against Royal, and the matter proceeded to an eight-day trial. The jury's verdict in favor of the insurance company was reduced to final judgment on February 28, 2002.

Respondent claimed that, immediately after the verdict, he and Grady discussed whether to file an appeal, or make an application for a new trial. According to respondent, he told Grady that, based on his conversation with the judge following the trial, a motion for a new trial appeared futile. He was aware that there was only a "small window of opportunity" within which to file such a motion. During respondent's cross-examination below, however, he admitted sending Grady a letter on February 20, 2002, explaining available options, which included filing a motion for a new trial or for a judgment notwithstanding the verdict. The letter explained that, although such motions were routinely denied, it "may just be the one case where the judge actually takes a look at it and considers it on the merits." Respondent also recalled discussing the available options with Grady.

Respondent testified that he wrote to Grady on March 4, 2002, to address his potential fee to pursue an appeal in the Royal matter. The letter did not make reference to an hourly rate. Respondent recalled that the association intended to pay his fee from a settlement that Warwick had realized from another lawsuit.

After the Royal trial, respondent was unable to determine whether a basis for an appeal existed, without first reviewing the transcripts. Although he timely ordered the trial

transcripts, he did not receive them until May or June 2002, approximately four months after the judgment had been entered. The court reporter's problems caused this delay. Respondent notified Grady when he received the transcripts, and told her that he was reviewing them to see if there was a basis for an appeal.

Respondent filed a notice of appeal and, in due course, received the briefing schedule from the Appellate Division. Because of the delay with the transcripts, the Appellate Division extended the brief's due date to August 12, 2002. Respondent copied Grady on his July 2, 2002 letter to the Appellate Division confirming the extension, but did not recall having any conversations with Grady after that point.

The time to perfect the appeal expired around October 2002[2]. Although respondent did not notify Grady that he missed the deadline, he recalled talking to her at some point because the Crum & Forster appeal was still pending. By letter to Grady dated November 5, 2002, respondent acknowledged that one of the association's board members had made a number of attempts to

[2] At the DEC hearing respondent estimated that the time to perfect the appeal expired sometime in October 2002. The deadline for filing the appellate brief had been extended to August 12, 2002 and, according to one of respondent's letters, the filing deadline for reply briefs was extended to September 11, 2002. R.2:6-11 provides that the respondent in an appellate proceeding has thirty days after the service of the appellant's brief to reply and, thereafter, the appellant has ten days to reply to the respondent's brief.

contact him over several weeks about "the two claims." He noted that he had been "tied up with numerous business and personal matters" and apologized for not replying. The letter also informed Grady that he was still reviewing the transcripts and that he would "advise the Board shortly as to what arguments we will make in this matter." At the DEC hearing, respondent admitted that, when he wrote the letter, he knew that the deadline to file the appellate brief had passed two months earlier, but had not informed Grady that he had not filed a brief.

In March 2003, the association retained attorney Norman L. Zlotnick to contact respondent about the status of the Royal appeal. When respondent did not reply, Zlotnick contacted the Appellate Division and learned that the appeal had been dismissed on October 15, 2002, for failure to file a brief.

Zlotnick filed a motion to reinstate the appeal, substitute counsel, and compel respondent to turn over the association's file. The Appellate Division denied the motion on May 15, 2003. Thereafter, Zlotnick filed a petition for certification with the Supreme Court, seeking to reverse the Appellate Division's decision. The Court denied the petition on November 24, 2003.

Respondent's November 5, 2002 letter to Grady also stated that the association overpaid respondent $2,861.88, and that he would credit the association in that amount against future

invoices. The letter explained, and respondent testified, that the association was "historically" late in paying its invoices. Therefore, it mistakenly paid two bills, one of which incorporated the prior month's bill. Respondent deposited the money into his business account. He believed that he had had some "communication" with Grady about the overpayment, but did not indicate what he had told her.

According to respondent, he had incurred "charges" in connection with the underlying Royal matter, as well as with the Crum & Forster appeal, totaling approximately $1,500. Respondent explained that some items, such as copying costs, were never billed to the association; and that the "underlying cases" were billed on a contingency basis, while the appeals were billed on an hourly basis at a rate of $275 per hour. Respondent did not recall whether he had ever informed Grady that he intended to offset his disbursements against the overpayment.

Grady wrote to respondent on November 6, 2002, requesting a refund, noting the association's financial situation and its preference for a refund, rather than a credit. On December 31, 2002, Grady again wrote to respondent, reiterating her request for a refund and explaining that the association intended to include the amount in their budget. When respondent did not honor Grady's request, she wrote to him on January 15, 2003, congratulating him on a job well done in the Crum & Forster

matter and for the "fourth time" requesting a refund. At the DEC hearing, respondent acknowledged that he received the letter, but claimed that he did not recall its contents. Respondent never refunded the overpayment and, after November 5, 2002, provided no further legal services in the Royal matter.

In mitigation, respondent gave an emotional statement relating to tragic family events that distracted him from properly performing his legal responsibilities from September 2001 through November 2002.

Both of respondent's children developed serious medical problems, requiring medical intervention and numerous doctor visits, which both respondent and his wife attended.

In late September 2001, respondent's seventeen-year-old son, Evan, blacked out while operating a motor vehicle and crashed into a telephone pole. After a visit with a neurologist, for that and other problems, Evan was diagnosed with a seizure disorder. Since the first grade Even had also suffered from neurological lyme disease, a chronic condition.

Earlier, respondent had sued the Board of Education for damages for the Board's failure to provide Evan with an appropriate education taking into account his disabilities. Evan had not been properly classified until his junior year of high school. Respondent learned that he lost the lawsuit the week

after Evan had been diagnosed with the seizure disorder. Respondent explained that those events sent him into a "funk."

In mid-December 2001, respondent's twelve-year-old daughter, Nyssa, was taken to the hospital after waking from a nap with a dislocated shoulder. Six months later, Nyssa experienced another similar episode while at school, when her shoulder dislocated after she raised her hand in class. She again required an emergency room visit. Thereafter, an orthopedic specialist diagnosed her with Ehlers-Danos Syndrome, a rare disease of the joints that involves the connective tissue.

In August 2002, both children had appointments with New York physicians for their respective medical problems. Nyssa's orthopedist recommended that she give up her flourishing nine-year gymnastics career, because her condition could not be corrected through surgery. The orthopedist referred her to a geneticist for additional testing.

Before entering college, Evan underwent a battery of tests so the college could establish appropriate accommodations for his needs. Prior to the start of college, Evan's neurologist had prescribed medication for his disorder, to which he developed a reaction. He, therefore, had to discontinue the medication.

In addition to his children's medical problems, during this period, respondent began noticing that his mother's mental condition was deteriorating. Eventually, he learned that she had

suffered a series of mini strokes. Ultimately, respondent and his sister convinced their mother to move closer to them so that they could share the responsibility of her care.

Respondent also relayed that he experienced problems coping with the day-to-day responsibilities in his New York practice, as a result of the World Trade Center tragedy. At that time, he was a sole practitioner with offices in New York and New Jersey. It became extremely burdensome for him to travel to his New York office because the PATH trains were no longer operating (he would have to take the train to midtown and then travel downtown) and he was unable to drive into the city by himself until 10:00 a.m.

Respondent admitted that, because of all of his personal problems at that time, he simply "dropped the ball" on the Warwick appeal.

In her closing statements, the presenter stated:

> There's no doubt in by mind that Mr. Schlem is an extremely talented and capable attorney. The correspondence that we have from Ms. Grady on behalf of his client, the Warwick Association, reflects that he handled some of their matters very capably. He got good results. He was responsive, and they had a friendly and collegial relationship.
>
> There's also no doubt in my mind that these extraordinary circumstances contributed to a state of mind, where, as human beings, we kind of prioritize things. And, you know, filing that appellant [sic] brief may take a back seat when, you know, one of your children, let alone both of your children and

> a parent, have some complicating and serious issues.
>
> (T58-T59.)[3]

The presenter opined that, given respondent's good relationship with Grady, he should have recommended that she seek new counsel.

The DEC determined that respondent did not communicate with Grady after his letters of February 20, 2002 (regarding post-judgment options) and March 4, 2002 (regarding his fee for an appeal in the Royal matter) until November 5, 2002. The November letter acknowledged that he had been unresponsive to the association because of numerous business and personal matters, and stated that he was still reviewing the transcripts and would shortly advise the association about what arguments they would make in the matter.

The DEC also noted that the association's new attorney was unsuccessful in his attempts to reinstate its appeal.

Without specifically addressing each violation, the DEC found that respondent's conduct violated RPC 1.1(a) (neglect), RPC 1.3 (diligence), RPC 1.4(b) (communication), and RPC 8.4(c) (deceit, misrepresentation).

The DEC also found that respondent violated RPC 1.15 (safekeeping property) by failing to refund the association's

[3] T refers to the transcript of the June 13, 2005 ethics hearing.

money, after receiving repeated requests for it. The DEC noted that, as of the date of its report, respondent had not reimbursed the association, and had not provided any legal services to the association after November 5, 2002.

The DEC considered the mitigating factors offered by respondent - his seventeen-year-old son's diagnosis of a seizure disorder in May 2002; his twelve-year-old daughter's diagnosis of a rare orthopedic disease, leading to the end of her gymnastics career; the deterioration of his mother's "capacities" and the burden of traveling to New York City after the "9/11" terrorist attacks, to tend to his New York practice.

The DEC recommended a three-month suspension.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

Respondent admitted the allegations of the complaint, with the exception of those concerning his communications with Grady.

Respondent failed to perfect the appeal in the Royal matter by failing to file an appellate brief on behalf of the association. As a result, the appeal was dismissed and subsequent efforts by another attorney to reinstate the appeal were unsuccessful. Respondent's conduct in this regard violated RPC 1.1(a) (gross neglect) and RPC (1.3) (lack of diligence).

Respondent was also charged with failure to communicate with the client. Indeed, the record shows that respondent failed to communicate with the association after the decision was made to file an appeal. Respondent did not disclose to Grady his failure to file an appellate brief and the dismissal of the appeal. He also failed to reply to her requests for a refund of the fee overpayment. Respondent's conduct in this regard violated RPC 1.4(a).

The association's appeal was dismissed on October 15, 2002. Nevertheless, respondent wrote to Grady on November 5, 2002, stating that he "was still reviewing the transcripts, and will advise the Board shortly as to what arguments we will make in this matter." Respondent admitted knowing that he had missed the deadline for filing the brief at the time he wrote to Grady. Undeniably, respondent's statement was misleading and most likely made to convey the impression that the appeal was still pending. Moreover, respondent's failure to notify Grady that the association's appeal was dismissed was a misrepresentation by silence. See Crispin v. Volkswagenwerk, 96 N.J. 336, 347 (1984) ("silence can be no less a misrepresentation than words"). Respondent's conduct, thus, also violated RPC 8.4(c) (misrepresentation).

Respondent was also charged with violating RPC 1.15, presumably (b) (failure to promptly deliver funds that the client

is entitled to receive). Respondent admittedly failed to refund the overpayment of his fee to the association, despite several requests from Grady for its return. Respondent claimed that he was entitled to an offset for disbursements in the Royal matter. However, he did not prove that the disbursements he had made on behalf of the association equaled the amount of the overpayment, nor did he forward any invoices to Grady to show what disbursements, if any, were made on behalf of the association after his November 5, 2002 letter. Respondent, therefore, did not establish that he was entitled to retain those monies. Moreover, as of the date of the DEC hearing, respondent had not reimbursed the association. Although the complaint charged respondent with a violation of RPC 1.15(b), his failure to refund the association's overpayment to him more properly constitutes a failure to return the advanced payment of an unearned fee, violating RPC 1.16(d). Even though the complaint did not charge respondent with a violation of this rule, the record developed below contains clear and convincing evidence of a violation of this rule. We, therefore, deem the complaint amended to conform to the proofs. In re Logan, 70 N.J. 222, 231-32 (1976).

In sum, respondent's conduct violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(d), and RPC 8.4(c).

Failure to properly pursue an appeal leads to discipline ranging from an admonition to a reprimand. See In the Matter of

Vincenza Leonelli-Spina, Docket No. 02-433 (February 14, 2003) (admonition where the attorney was retained by eleven police officers to pursue a lawsuit objecting to a promotional exam administered by a municipality; after entry of summary judgment, the attorney exhibited gross neglect and lack of diligence by failing to file an appellate brief on two separate occasions, and she failed to reply to her clients' telephone calls and correspondence; in imposing only an admonition, we considered her lack of disciplinary history); In the Matter of Lenora E. Marshall, Docket No. 01-207 (September 26, 2001) (attorney admonished where, after filing a notice of appeal from a criminal conviction, failed to file an appellate brief, resulting in the dismissal of the appeal, and failed to communicate with the client; in imposing an admonition, we considered that the attorney had a number of personal and work-related problems that made it difficult for her to proceed in the matter); In the Matter of Frederick M. Testa, Docket No. 00-218 (September 25, 2000) (attorney admonished where, while representing a client in an appeal of a civil matter, misrepresented to his client that the appellate brief was finished and ready to be filed; the attorney then unilaterally decided not to file it and did not so inform his client; we considered that the attorney had no ethics history); In re Stalcup, 140 N.J. 622 (1995) (attorney reprimanded for failure to perfect an appeal and to so inform the

client; the attorney also failed to withdraw from the representation when her services were terminated; the Court ordered her to refund $750 for costs advanced by the client); In re Gaffney, 133 N.J. 65 (1993) (reprimand where attorney failed to file an appellate brief in a criminal matter and failed to reply to various orders of an appellate judge, resulting in a finding that the attorney was in contempt of court). See also, In re Kasan, 115 N.J. 472 (1989) (intentionally misrepresenting the status of a lawsuit warrants a reprimand).

We have considered respondent's ethics history and mitigating circumstances. Both are significant. As to respondent's ethics history, he received a private reprimand in 1994, a reprimand in a default in 2000, and a three-month suspension in another default in 2002.

The circumstances surrounding respondent's prior three-month suspension are remarkably similar to his conduct in this matter. In that default, respondent was retained to represent a client in connection with a condemnation action and any subsequent proceedings that might follow. After a jury trial, the client directed respondent to file an appeal. Respondent filed a notice of appeal, but then had no further communication with the client until seven months later, when he requested his client to pay for the transcript. Four months later, respondent suggested to the client that he pursue a settlement, rather than be "tied up" in

court for years. Respondent did not disclose to the client that the appeal had been dismissed four months earlier because of his failure to file a brief.

Afterwards, for two months, the client was unsuccessful in his attempts to contact respondent. Eventually, the client contacted the Appellate Division, only to learn that his appeal had been dismissed.

As noted above, the Court found that respondent was guilty of gross neglect, lack of diligence, failure to communicate with a client, failure to return funds to his client, misrepresentation by silence, and failure to cooperate with disciplinary authorities.

Clearly, respondent did not learn from his prior mistakes. Although his three-month suspension took effect on March 12, 2003, he was served with the complaint in that matter in May 2002. Therefore, more than two months before the deadline for the filing of the Royal appellate brief (August 12, 2002), he was on notice that his conduct in the earlier matter was improper. Nevertheless, knowing that his prior conduct was under scrutiny by disciplinary authorities, he failed to meet the deadline for perfecting an appeal, failed to communicate with his client, and misrepresented by silence the status of the appeal.

On balance, we have given great weight to respondent's compelling mitigating circumstances (his family's medical

problems and the difficulties he encountered trying to maintain his New York practice after the "9/11" attack). Undoubtedly, his personal problems affected his ability to properly represent his client. It is also likely that some of the ongoing problems with his son contributed to his ability to properly represent the clients in his prior ethics matter as well.

Had this been respondent's first ethics infraction, a reprimand would have been appropriate discipline. Because, however, respondent has demonstrated that he failed to learn from his prior mistakes, we conclude that a three-month suspension is required.

We also determine that respondent must reimburse the association prior to applying for reinstatement and that he must supply such proof to the Office of Attorney Ethics.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: _____
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Stuart P. Schlem
Docket No. DRB 05-132

Argued: June 16, 2005

Decided: August 5, 2005

Disposition: Three-month suspension

Members	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan	X				
Holmes	X				
Lolla	X				
Neuwirth	X				
Pashman	X				
Stanton	X				
Wissinger	X				
Total:	9				

Isabel Frank

By Julianne K. DeCore
Chief Counsel