SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-062
District Docket No. VA-03-41E

IN THE MATTER OF	
DONALD M. ROHAN	
AN ATTORNEY AT LAW	

Decision
Default [R. 1:20-4(f)]

Decided: June 8, 2005

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

This matter was before us on a certification of default filed by the District VA Ethics Committee (DEC) pursuant to R. 1:20-4(f).

Respondent was admitted to the New Jersey bar in 1996. From June 25, 2001 to March 13, 2003, respondent was an associate with the law firm of Podvey, Sachs, Meanor, Catenacci, Hildner & Cocoziello (Podvey Sachs firm) in Newark, New Jersey. Since March 13, 2003, respondent has worked in temporary positions for various New Jersey law firms. Respondent has no disciplinary history.

On October 18, 2004, the DEC transmitted a copy of the complaint to respondent's home at 26 East Cedar Lane, Maplewood, New Jersey 07040, via regular and certified mail, return receipt requested. Respondent signed for the certified letter. The letter sent to him via regular mail was not returned. Presumably, respondent did not file an answer to the complaint.

On January 12, 2005, the DEC sent a letter to respondent at the same address, via regular and certified mail, return receipt requested. The letter directed respondent to file an answer within five days and informed him that, if he failed to do so, the DEC would certify the record directly to us for imposition of sanction. Respondent signed for the certified letter. The letter sent to him via regular mail was not returned. Respondent did not file an answer.

In February 2005, the DEC certified this matter directly to us for the imposition of discipline pursuant to R. 1:20-4(f).

The four-count complaint, encompassing three client matters, charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information), RPC 1.16(a)(2) (failure to withdraw from the representation of a client if the lawyer's

physical or mental condition materially impairs the lawyer's ability to represent the client), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The Travelers Matter (First Count)

The Podvey Sachs firm represented the plaintiff in a matter captioned The Travelers Insurance Company v. Impact Personnel, Inc. (Travelers matter), which was filed in the Superior Court of New Jersey, Law Division, Morris County. The firm assigned respondent to handle the case.

On December 18, 2002, respondent attended a settlement conference in the Travelers matter where he purportedly settled the case on behalf of the client even though he had no authority to do so. Indeed, respondent never advised his supervisor, Jonathan M. Kuller, Esquire, or the client that a settlement conference had been scheduled, that it had occurred, and that he had "settled" the case. As of December 18, 2002, court records showed that the Travelers matter had been settled. Thus, respondent made misrepresentations to the court and to his adversary when he purportedly settled the Travelers matter in the absence of authority to do so.[1]

[1] Ultimately, the Court vacated the settlement in the Travelers matter and returned the case to active trial status.

In addition, the complaint alleged that, after the December 18, 2002 settlement conference, respondent made affirmative misrepresentations about the status of the case to Kuller and the client. Respondent informed Kuller that he had filed a summary judgment motion and that trial had been scheduled for March 18, 2003.

During the OAE's investigation, respondent claimed that, while he represented the plaintiff, he was afflicted with an anxiety disorder that caused him to panic even during routine situations. Respondent attributed his actions and inactions in the Travelers matter to the anxiety disorder.

Based on these facts, the first count of the complaint charged respondent with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(a)(2), and RPC 8.4(c).

The Liberty Mutual Matter (Second Count)

On June 28, 2002, the Podvey Sachs firm assigned respondent to handle its representation of Liberty Mutual in a dispute with the Sweetheart Cup Company (Liberty Mutual matter). Respondent was instructed to file suit in a New York court. Respondent drafted a complaint and submitted it to Kuller for his review. Thereafter, respondent knowingly misrepresented to Kuller that he had filed the complaint.

In the fall of 2002, respondent told Kuller that the defendant had filed an answer. Respondent's statement was knowingly false. Having learned that an answer purportedly had been filed, Kuller instructed respondent to undertake discovery. In response, respondent drafted discovery and gave it to Kuller for his review. Later, respondent misrepresented to Kuller that he had served the discovery. In fact, respondent never filed the complaint, and he never served discovery.

During the OAE investigation, respondent attributed his actions and inactions in the Liberty Mutual matter to his anxiety disorder.

Respondent was charged with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(a)(2), and RPC 8.4(c).

The Wausau Matter (Count Three)

On June 28, 2002, the Podvey Sachs firm assigned to respondent the case captioned Wausau Underwriters Insurance Co. v. Omne Staffing, Inc., which was filed in the Superior Court of New Jersey, Law Division, Essex County (Wausau matter). A calendar call was scheduled for July 29, 2002. Respondent appeared at the call and, even though he was without authority, "settled" the case for $84,297, which was payable in six equal installments. By settling the case, respondent made a

misrepresentation to the court and to his adversary that he had authority to do so.

Prior to the calendar call, respondent had not informed his client that he would be participating in a settlement conference at the calendar call. After the calendar call, respondent did not inform the client that a settlement conference had been conducted and that he had settled the case.

In addition to the misrepresentations surrounding the settlement, prior to the calendar call, respondent misrepresented to Kuller and to the client that the July 2002 trial date had been adjourned; a motion for summary judgment had been filed; and settlement negotiations were ongoing. On October 18, 2002, respondent e-mailed the client and misrepresented that he was working on a summary judgment motion and that the case was scheduled for trial in November 2002.

On December 9, 2002, respondent sent the client an e-mail in which he misrepresented that the defendant had received a forty-five-day adjournment of the arbitration; the deadline for filing a summary judgment motion had been extended to January 3, 2003; and the arbitration would take place sometime after the January 3, 2003 deadline.

On January 28, 2003, respondent misrepresented in an e-mail to Kuller that the defendant had increased the settlement offer

and that "there were still some questions regarding resolution of the matter yet to be addressed." The record is silent with respect to whether any settlement monies were paid.

As with the Travelers and Liberty Mutual matters, respondent claimed that his actions and inactions in the Wausau matter were the result of his anxiety disorder.

Respondent was charged with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(a)(2), and RPC 8.4(c).

Count Four

As a result of respondent's handling of the Travelers, Liberty Mutual, and Wausau matters, the fourth count of the complaint charged him with having violated RPC 1.1(b) in each case.

Service of process was properly made when the DEC mailed the complaint to respondent's address on October 18, 2004. Inasmuch as respondent failed to file a verified answer to the complaint, the allegations are deemed admitted. R. 1:20-4(f). Moreover, the allegations set forth in the complaint support a finding that respondent engaged in unethical conduct.

In the Travelers matter, respondent engaged in conduct involving deceit and misrepresentation with respect to his supervising partner and the client when he (1) failed to inform them that a settlement conference had been scheduled, that the conference had taken place, and that respondent had settled the matter in the absence of authority from the client. Respondent also engaged in conduct involving deceit and misrepresentation with respect to the court and his adversary when he "settled" the case without the authority to do so. Thus, he violated RPC 8.4(c).

Respondent further violated RPC 8.4(c) when, subsequent to the settlement, he informed Kuller that a summary judgment motion had been filed and a trial date had been scheduled. Although the complaint charged respondent with having made post-settlement misrepresentations to the client about the status of the matter, there are no allegations detailing these particular falsities.

Notwithstanding these wrongdoings, it cannot be said that, by engaging in this conduct, respondent committed gross neglect. The complaint contains no allegations with respect to the action(s) respondent should have been taking when handling the Travelers matter and whether or not he neglected to take those actions. Nevertheless, respondent clearly should have been

taking some action in that matter and, to the extent that he appears to have done nothing other than fabricate the status of the case and his work on it, respondent violated RPC 1.3 (lack of diligence).

In addition, respondent violated RPC 1.4(a) (failure to communicate with the client) and RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation) when he failed to (1) inform the client that a settlement conference had been scheduled and (2) discuss with the client the position that he should take on its behalf at the conference, including respondent's authority with respect to settlement negotiations. For the same reasons, respondent violated RPC 1.2(a) (failure to abide by a client's decision whether to accept an offer of settlement of a matter). Although the complaint did not charge RPC 1.2(a) or RPC 1.4(b), respondent had sufficient notice of the allegedly improper conduct and the potential finding of a violation of those rules.

In the Liberty Mutual matter, respondent violated RPC 1.1(a) (gross neglect) and RPC 1.3 when he failed to file a complaint on behalf of the client in the New York court. He also violated RPC 8.4(c) when he told Kuller that the complaint and the answer had been filed and that he had served discovery

requests upon his adversary. However, there are no allegations with respect to respondent's alleged failure to communicate with the client and, therefore, we dismiss that charge (RPC 1.4(a)).

In the Wausau matter, respondent engaged in conduct involving deceit and misrepresentation when he failed to inform the client that he would be participating in a settlement conference at the call, that a settlement conference had taken place at the call, and that he had settled the matter in the absence of authority from the client. Respondent also engaged in conduct involving deceit and misrepresentation with respect to the court and his adversary when he settled the matter without the authority to do so. Moreover, respondent violated RPC 8.4(c) when he misrepresented certain facts to Kuller and the client: the trial dates, the filing of a summary judgment motion, the scheduling of an arbitration, and an increase in the defendant's settlement offer.

However, as in the Travelers matter, it cannot be said that by engaging in this conduct, respondent committed gross neglect. The complaint contains no allegations concerning the action(s) respondent should have been taking in his handling of the Wausau matter and whether or not he neglected to take those actions. Nevertheless, respondent clearly should have been taking some action and, to the extent that he appears to have done nothing

other than fabricate the status of the case and his work on it, respondent violated RPC 1.3.

Moreover, respondent violated RPC 1.4(a) and RPC 1.4(b) when he failed to (1) inform the client that a settlement conference would be taking place at the calendar call and (2) discuss with the client the position that he should take on its behalf at the conference, including his authority with respect to settlement negotiations. For the same reasons, respondent violated RPC 1.2(a) (failure to abide by a client's decision whether to accept an offer of settlement of a matter). While the complaint did not charge RPC 1.2(a) and RPC 1.4(b), the allegations gave respondent sufficient notice of the allegedly improper conduct and the potential finding of a violation of those rules.

Finally, in all three matters, we find that respondent violated RPC 1.16(a)(2) when he failed to withdraw from the representation of the clients in those cases. Respondent claimed that his misconduct in each matter was the result of an anxiety disorder, which caused him to panic even during routine situations. If true, then that condition materially impaired his ability to represent those clients, and his failure to withdraw from those representations constituted a violation of RPC 1.16(a)(2).

With respect to the fourth count, which charged respondent with having violated RPC 1.1(b), respondent undeniably mishandled all three matters. Although we found that he committed gross neglect in only one of them, respondent committed repeated acts of simple neglect in all three cases. Accordingly, we determine that respondent violated RPC 1.1(b).

Recent cases have focused on our requirement of three acts of gross neglect to sustain a violation of RPC 1.1(b) (pattern of neglect). In re McClure, 180 N.J. 154 (2004) ("at least three instances of gross neglect are required to form the basis of a pattern"); In re Nielsen, 180 N.J. 301 (2004) (where we noted that the finding of a pattern of neglect is generally "reserved for cases where negligence is found in at least three matters;" although attorney committed only one act of gross neglect, we found that he had violated RPC 1.1(b) because the attorney had committed gross neglect in two prior matters). Although the history underlying RPC 1.1 in this State, as well as case law, clearly establish that a single act of ordinary negligence does not constitute an ethics violation, when an attorney repeatedly demonstrates incompetence, a violation of RPC 1.1(b) may be found.

When New Jersey adopted the Rules of Professional Conduct in 1984, the ABA's model Rule 1.1 was rejected. That rule provided: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983). The Supreme Court committee charged with reviewing the ABA's model rules objected to this proposed rule because: "Read literally, and we conclude that it must be read literally, the proposed Rule would subject a lawyer to discipline for a single instance of negligence." Report of the New Jersey Supreme Court Committee on The Model Rules of Professional Conduct (Debevoise Committee Report), Section VI, Lawyer Competence, Rule 1.1 (June 24, 1983). Thus, the Debevoise Committee recommended retention of former New Jersey disciplinary rule DR 6-101, which was substantially similar to the current New Jersey RPC 1.1. Ibid.

The Debevoise Committee Report observed that a single act of neglect does not constitute a violation of the Rules of Professional Conduct. Ibid. Moreover, the committee asserted that "isolated instances of negligence do not constitute morally reprehensible conduct." Ibid. Indeed, in such circumstances, the committee observed, "either the lawyer will voluntarily make good the loss he or she caused or else the client may sue for

professional malpractice." Ibid. Thus, RPC 1.1 was designed to address "deviations from professional standards which are so far below the common understanding of those standards as to leave no question of inadequacy." Ibid. Nevertheless, the committee distinguished between "gross negligence [and] a continuing pattern of negligence," thereby suggesting that a pattern of negligence was not limited to a pattern of gross negligence. In a July 12, 1984 order adopting the Rules of Professional Conduct, the Supreme Court accepted the Committee's recommendation.

Given the language of the Debevoise Committee in its report, it seems clear that RPC 1.1(a) encompasses gross negligence, while RPC 1.1(b) captures repeated acts of either gross or simple neglect. Case law is in accord.

In a 1979 case, the Supreme Court found that an attorney had committed a pattern of neglect but did not expressly find that his negligent acts constituted gross negligence. In In re Fusciello, 81 N.J. 307 (1979), the attorney was disbarred for misconduct in four client matters. In one, he represented the buyers in the purchase of a home. Id. at 308. Instead of using funds to pay off a mortgage, the attorney misappropriated the monies to satisfy pre-existing overdrafts in his trust account. Ibid. In another matter, the attorney was retained to file a

personal injury suit but failed to do so, and the statute of limitations expired. Ibid. In the third matter, the attorney never paid the client her share of settlement proceeds. Id. at 309. In the fourth case, he issued a $43,000 trust account trust that bounced. Ibid.

We did not find that the attorney had violated either subparagraph of DR 6-101. Yet, the Supreme Court did. In addition to the attorney's obvious knowing misappropriation, the Supreme Court observed that "[t]he picture presented [was] not that of an isolated instance of aberrant behavior unlikely to be repeated. Respondent's conduct over a period of years has exhibited 'a pattern of negligence or neglect in his handling of legal matters.'" Id. at 310. The Court cited DR 6-101(A)(2), which is now RPC 1.1(b). Ibid.

While RPC 1.1(a) is clearly limited to gross neglect, subparagraph (b) is not and should not be. Unless RPC 1.1(b) is interpreted to include repeated acts of simple neglect, no ethics rule protects the public from repeated acts of negligence that, while they may not rise to gross neglect, certainly harm clients. Moreover, inasmuch as RPC 1.1(a) expressly encompasses gross negligence, subparagraph (b) is superfluous as to those acts other than to support a finding of aggravation in the repetitive nature of the misconduct. Nevertheless, if we are to

fulfill our mission of protecting the public, RPC 1.1(b) also must be read to capture repeated acts of simple neglect.

To conclude, in the Travelers and Wausau matters, we dismiss the gross neglect (RPC 1.1(a)) charge but find that respondent lacked diligence (RPC 1.3), failed to communicate with his clients (RPC 1.4(a)), failed to withdraw from the representation of his clients when his mental condition materially impaired his ability to represent them (RPC 1.16(a)(2)), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)). In addition, although the complaint did not charge respondent with having violated RPC 1.2(a) and RPC 1.4(b), we also find that respondent violated these rules. In the Liberty Mutual matter, we dismiss the RPC 1.4(a) charge but find that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.16(a)(2), and RPC 8.4(c). Finally, based on respondent's neglect in handling all three matters, we find that his conduct constituted a pattern of neglect in violation of RPC 1.1(b).

There remains the determination of the quantum of discipline to be imposed for these ethics violations. Typically, attorneys who settle cases without their clients' consent are either admonished or reprimanded. See, e.g., In the Matter of John S. Giava, DRB 01-455 (March 15, 2002) (admonition

imposed on attorney who was hired to obtain a wage execution against a defaulting real estate purchaser but instead entered into a settlement agreement with the buyer without the clients' consent); In the Matter of Thomas A. Harley, DRB 95-215 (July 26, 1995) (although RPC 1.2(a) not charged, attorney admonished for violations of RPC 1.16, RPC 3.3, RPC 4.1, RPC 8.4(c) and (d) for settling case without his client's authority and representing to the other parties and the court that he had such authority); In re McKenna, 172 N.J. 644 (2002) (reprimand by consent imposed on attorney who failed to act with diligence in a wrongful termination matter and then settled the case despite his client's objections); In re Ellenport, 152 N.J. 156 (1998) (reprimand imposed on attorney who engaged in conflict of interest and settled litigation without his client's authorization; ethics history consisted of an admonition).

Similarly, reprimands are imposed on attorneys who have engaged in conduct comparable to respondent's and then claimed that a mental condition impaired their ability to represent their clients. In re Hiltebrand, 172 N.J. 584 (2002) (attorney reprimanded for gross neglect, lack of diligence, failure to communicate with client, failure to explain status of the matter to client, failure to provide written fee agreement, failure to expedite litigation, failure to make reasonably diligent efforts

to comply with discovery requests, false statement of material fact in connection with disciplinary matter, failure to disclose fact necessary to correct a misapprehension in a disciplinary matter, and misrepresentation of the status of the case in one client matter where conduct spanned more than a five-year period and attorney claimed that physical or mental condition materially impaired his ability to represent client; ethics history included a private reprimand); In re Walton, 134 N.J. 116 (1993) (attorney publicly reprimanded for misconduct in three matters, which included pattern of neglect, lack of diligence, failure to communicate with the client, failure to withdraw when physical or mental condition may impair the representation, improper termination of employment, and failure to cooperate with disciplinary authorities).

Moreover, the Supreme Court "has consistently held that intentionally misrepresenting the status of lawsuits warrants public reprimand." In re Kasdan, 115 N. J. 472, 488 (1989). So long as the attorney has not defaulted and has no ethics history, this is typically the discipline imposed even where, in addition to the misrepresentation, the attorney has engaged in gross neglect and lack of diligence and has failed to communicate with the client. See, e.g., In re Wiewiorka, 179

N. J. 225 (2004) (attorney reprimanded for gross neglect, lack of diligence, failure to communicate with the client, and conduct involving dishonesty, fraud, deceit or misrepresentation in one client matter where he was hired to investigate a personal injury claim for the purpose of a possible lawsuit but failed to return phone calls and told the client that he had filed suit when he had not, and the statute of limitations had expired); In re Porwich, 159 N. J. 511 (1999) (reprimand imposed upon attorney who admitted to gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with ethics authorities in two client matters; in addition, we found that attorney engaged in conduct involving misrepresentation based on attorney's representation to client that he had filed suit when he had not).

Here, if respondent had not defaulted, a reprimand might have been the appropriate discipline. However, in a default matter, the discipline is upgraded to reflect a respondent's failure to cooperate with disciplinary authorities as an aggravating factor. In re Nemshick, 180 N. J. 304 (2004) (conduct meriting reprimand upgraded to three-month suspension due to default; no ethics history). We, therefore, conclude that a three-month suspension is warranted in this case. See, e.g., In re Schlem, 175 N. J. 437 (2003) (three-month suspension

imposed on defaulting attorney for gross neglect, lack of diligence, failure to communicate, and misrepresentation where he failed to inform his client that the client's appeal had been dismissed because of the attorney's failure to file a brief; ethics history included two reprimands, one of which was in a default matter). We also determine that, before reinstatement, respondent must present proof of fitness to practice law.

We further require respondent to reimburse the Disciplinary Oversight Committee for the 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 Donald H. Rohan
Docket No. DRB 05-062

Decided: June 8, 2005

Disposition: Three-month suspension

Members	Three-month Suspension	Reprimand	Admonition	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				

Julianne K. DeCore
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Chief Counsel