SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-367
District Docket No. IX-07-17E

IN THE MATTER OF

THOMAS DESENO

AN ATTORNEY AT LAW

Decision

Argued: February 19, 2009

Decided: May 12, 2009

Jennifer Stone Hall appeared on behalf of the District IX Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for a censure filed by the District IX Ethics Committee ("DEC"), based on respondent's mishandling of his client's property damage claim and his lack of cooperation with disciplinary authorities.

For the reasons stated below, we determine to impose a reprimand on respondent for his misdeeds.

Respondent was admitted to the New Jersey bar in 1990. At the relevant times, he maintained an office for the practice of law in Asbury Park and Toms River.

Respondent has no disciplinary history. However, from September 24, 2007 to March 7, 2008, he was on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers Fund for Client Protection.

The first count of the formal ethics complaint charged respondent with gross neglect (RPC 1.1(a)), pattern of neglect (RPC 1.1(b)), failure to communicate with his client (RPC 1.4(b) and (c)), and failure to expedite litigation (RPC 3.2) with respect to his representation of a client who had sustained property damage as the result of a fire at the apartment complex where she lived. The second count of the complaint charged respondent with having violated R. 1:20-3(g)(3) and (4) (failure to cooperate in a disciplinary investigation by not replying in writing to a request for information) as a result of his failure to reply to the grievance filed against him by his client, as

well as the telephone calls and letters directed to him by the DEC investigator.

The facts that gave rise to the charges against respondent are as follows: A fire took place on April 2, 2000 at an apartment complex in South Orange, where Irene Langan resided. Two legal actions were filed as a result of the damage to the structure and to the property of the occupants. Respondent testified that a subrogation action was instituted in federal court by the building's insurers to recoup the value of the apartment complex, which, according to respondent, was in the millions of dollars. Individual actions were instituted in the Superior Court of New Jersey, Essex County, on behalf of the residents. Respondent represented Langan and some other residents in one of these actions, which was filed on April 1, 2002.

According to respondent, because "everything burned up" in the fire, its cause could not be determined. Thus, "we couldn't prove negligence." The only possible cause of action was against PSE&G for its failure to shut off the gas line to the building until two to three hours after the fire had begun. Respondent's firm and two others represented the plaintiffs.

At some point, the plaintiffs in the federal court subrogation action agreed to permit the plaintiffs in the Essex County action to use their expert witnesses. At the request of plaintiffs' counsel in the Essex County matter, Judge James S. Rothschild, Jr. granted a postponement of the September 2003 trial date.

A delay in the retention of experts by the plaintiffs in the federal court subrogation action required the plaintiffs in the Essex County action to seek another adjournment of the trial date. At this point, Judge Rothschild suggested that counsel either try the case without experts or dismiss the case without prejudice until after the federal case was resolved.

Respondent called each of his clients, including Langan, and sought their consent to a dismissal. He testified that all of them agreed to it. The consent order of dismissal without prejudice was entered on September 15, 2003.

Once the federal court action had settled, PSE&G's attorney, who represented the company in the federal and state court actions, was to notify respondent and the other

plaintiffs' lawyers so that they could reinstate the Essex County action.[1] However, according to respondent, the federal court case "dragged on and on." On December 7, 2005, the federal action was dismissed without prejudice, pursuant to the terms of the settlement agreement reached in that matter.

Irene Langan testified at the DEC hearing via telephone conference call. Langan stated that, in the year 2000, she had retained respondent to represent her interests with respect to the fire. Her initial meeting with respondent was by telephone. It was the only conversation that she had ever had with respondent.

The retainer agreement that Langan signed was exchanged between her and respondent via the mail. The retainer letter was the only correspondence that she had ever received from respondent.

Langan stated that respondent never sent a copy of the Essex County complaint to her. During "a couple months [sic]

[1] The express terms of Judge Rothschild's order stated that plaintiffs could refile the complaint "within 45 days of notice by defendant's counsel of resolution of a separate but related federal lawsuit."

duration," Langan made close to one hundred attempts to communicate with respondent, via telephone and letter, all to no avail.

Langan estimated that approximately thirty letters had been returned to her by the post office. These letters had been sent by Langan to the address where respondent's telephone was being answered by his employees.

Langan testified that, whenever she telephoned respondent's office, she spoke only to female employees, all of whom stated that they would give him a message that she had called. Langan always provided her telephone number when she left messages with respondent's office staff. The last time that Langan called the office was after she had learned that the federal court matter had been dismissed. Langan had obtained a copy of the order and sent it to respondent "so he would get the point."

When Langan called respondent's office for what turned out to be the last time, the female employee with whom she spoke told her that respondent had her file in his car. Langan "blew [her] top" at the employee, who told her never to call the office again. Langan then filed the grievance against respondent.

Langan stated that no one in respondent's office ever attempted to explain the status of her case to her. Respondent never discussed with her the voluntary dismissal of the Essex County action. She learned of the dismissal only by calling the court house and obtaining "the paperwork." No one from respondent's office ever contacted her to say that the matter could be reinstated.

Respondent, in turn, testified that Langan might have been confused when she learned that the federal case had been dismissed, thinking instead that it was her case. He stated that he had explained to her that the federal court order did not dismiss her state court action. Respondent elaborated:

> I explained everything.
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> And when I tell you, she probably has called me a hundred times, and I probably was on the phone with her fifty of those times, and fifty times I would let my paralegal explain to it [sic] her, because at some point – you know, I'm going to put this out there, I don't know before the Ethics Committee, if it's wrong or not, at some point when you've told a client over and over the same thing, sometimes you don't let them get past your paralegal, you know you've instructed them, I'm not holding anything against Mrs. Langan, she's aged, and I don't think she – no matter how many times you tell her, she doesn't understand, but I promise you, I repeatedly explained

> everything to her, every time she would call.[2]
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> [T52-22 to T53-16.]

Respondent claimed that Langan was the only plaintiff among twelve in the Essex County action who had complained about him to the disciplinary authorities. Unlike Langan, his other clients knew and understood everything. He explained:

> I don't blame her for not understanding, but I, my position here is, it's not that she wasn't told, it's not that it wasn't explained, there were numerous times, it is not that she wasn't kept abreast, it's that she simply doesn't understand, and I think that's the situation we're dealing with.
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> [T56-4 to 11.]

According to respondent, Langan's Essex County action was dismissed for failure to prosecute (R. 1:13-7). He testified that the dismissal was not his fault, however, as defense counsel in the federal court action never informed him that the matter had been settled. Respondent testified that he had filed a motion to reinstate the complaint in the Essex County action,

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[2] "T" refers to the transcript of proceeding, dated July 15, 2008.

which was to be decided on the Friday following his testimony before the DEC in this disciplinary matter. The motion was unopposed. After the disciplinary hearing, respondent provided the DEC with proof that Langan's complaint had been reinstated.

Respondent conceded that he had not told Langan about the pending motion to reinstate the Essex County complaint. He claimed that he did not know whether it would have been appropriate for him to communicate with her inasmuch as the grievance against him was pending, and he did not "want to be seen as influencing her in any way."

Respondent claimed that, during the course of the Essex County litigation, he had sent a letter to each plaintiff about the need to answer interrogatories. The letter that he sent to Langan was dated June 7, 2002.[3] Respondent testified that he had received a response to his letter from every plaintiff, except Langan. Yet, he did not follow up with Langan and repeat his request that she answer the interrogatories "because at that point, the case, we didn't have our liability experts and

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[3] Respondent admitted that this was the last mailing he had sent to her, other than the court orders. He did not have any cover letters for the orders, however.

everything came to a head where we dismissed it and I didn't — I didn't work on the damages end because we weren't going to deal with it until the case got reinstated."

On the record, DEC investigator/presenter Jennifer Stone Hall confirmed as true the allegations of the complaint regarding the DEC's attempts to communicate with respondent about Langan's grievance against him. She also questioned respondent in this regard. Upon Hall's questioning, respondent denied that he had received an August 28, 2006 letter from DEC secretary Kathleen Sheedy addressed to him at a Belmar address, informing him that she had been contacted by Langan, who stated that she had encountered difficulty in communicating with respondent. The letter requested that respondent confirm in writing to Sheedy that he had communicated with his client. Respondent denied that he had received the letter, claiming that he had not had an office in Belmar since 2001.

On May 18, 2007,[4] Hall stated, she mailed Langan's grievance to respondent at an Asbury Park office address, which was the

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[4] There is a discrepancy between Hall's statement to the DEC about the date and the written record. The letter sent to respondent is dated May 21, 2007.

address listed in the New Jersey Lawyers Diary. She also called respondent, as was her practice, on June 1, 2007 at the telephone number listed in the Lawyers Diary. Hall identified herself to respondent's secretary and left a message for him to call her. On June 18, 2007, Hall called respondent again, as the time for him to reply to the grievance had expired. She left another message for him to call her. The person who took this second message confirmed that she had given respondent the previous message.

At some point, respondent called Hall and left a voice mail message for her. The fact that he had returned her calls established, in Hall's mind, that the telephone number where she had called him previously was the correct number. This was the only time that respondent had contacted Hall's office. He never informed her that he had spoken to Langan, as requested by Sheedy.

On June 29, 2007, Hall called respondent again at the Asbury Park office and left a message with a secretary, who confirmed that he had been given the prior messages. Respondent did not return this call. On the same date, Hall wrote a letter to respondent at the Asbury Park address and informed him of the possible consequences of his failure to reply to the grievance.

On July 16, 2007, Hall left another message for respondent and confirmed with his employee that he had received the previous messages. At about the same time, Hall "reached out" to respondent's partner, Tom Kunz, and requested that he ask respondent to call her.

On August 13, 2007, respondent wrote to Hall, on letterhead with the Asbury Park address that she had been using and informed her that he did not have "a complaint made against me by Ms. Langan." The letter also stated that he had left several voice mail messages for Hall. Respondent requested that Hall send him "whatever filings there are" and that he would "see to them promptly."

Hall testified that, on August 16, 2007, she sent a letter to respondent at the Asbury Park address, via certified mail, enclosing the grievance and giving respondent seven days to reply. The post office attempted to deliver the letter three times, without success. The letter sent via regular mail was not returned. On September 14, 2007, Hall called respondent's office and confirmed that the address was correct.

On October 8, 2007, DEC secretary Sheedy served the formal ethics complaint on respondent at his Asbury Park address. On

December 3, 2007, she sent a "five-day letter" to him at the same address.

On January 25, 2008, respondent sent a letter to Sheedy, written on letterhead reflecting a Manasquan office address, explaining that his law firm had recently dissolved and that the Asbury Park post office had stopped all of his mail and was returning it to the senders, upon the inaccurate claim that respondent had not been current on the rental payments for the post office box. Respondent requested a copy of the ethics complaint.

Hall testified that, on February 3, 2008, Sheedy sent a copy of the complaint and another "five-day letter" to respondent at the Manasquan address. Respondent filed an answer to the complaint on March 7, 2008.

Respondent claimed that he had two offices in 2007, Asbury Park and Toms River. According to respondent, he handled the Asbury Park office; his partner, Tom Kunz, handled the Toms River office. Respondent stated that the firm had secretaries only in the Toms River office and that he did not have a secretary in "all of 2007." In fact, the Asbury Park office had no secretary since 2006. According to Hall, when she called the numbers listed in the Lawyers Diary and on respondent's

letterhead, the secretary with whom she spoke stated that she had given respondent the messages.

Respondent stated that that there was "no way" that he saw the August 28, 2006 letter from DEC secretary Kathleen Sheedy, enclosing Langan's grievance. According to respondent, he moved his office out of Belmar in 2001. Respondent learned that Sheedy was trying to get in touch with him from Kunz, whom Sheedy told in court that respondent needed to get in touch with her. Respondent claimed that he then called Sheedy and left a message for her. He also stated that he also wrote a letter to her.

Respondent testified that the problem with the post office box began at the end of the summer of 2007. Although respondent claimed that he had letters back and forth with the post office about the post office box problem, he did not produce them at the ethics hearing. He was given ten days to provide them to the DEC, but he failed to do so.

The DEC disbelieved respondent's testimony, determining that Langan was credible and honest and that her testimony was "completely truthful both based upon her credibility and the lack of any supporting documentation to the contrary." Thus, the DEC accepted Langan's testimony that she had had only one

telephone conversation with respondent, that she had called his office nearly one hundred times but had never spoken to him, that he had never returned any of her calls, that she had never received a single letter from him, that she had never received a copy of an order dismissing her case, that she had learned of the dismissal of the federal court action only after she had called the court personally and inquired of its status, and that respondent had never informed her of the dismissal of the state court action.

As for respondent, the DEC observed that he had no copies of correspondence to Langan and no notes or time records detailing their alleged telephone conversations. The DEC found, "beyond any reasonable doubt," that respondent had no contact with Langan after their original telephone conversation and that, consequently, he had violated RPC 1.4(b) and (c).

The DEC further found, "beyond any reasonable doubt," that respondent never contacted any lawyer in the federal court action to ascertain its status. Although respondent was charged with violating RPC 3.2 (failure to expedite litigation), the DEC found RPC 1.3 (lack of diligence) to be more applicable to respondent's inaction.

The DEC did not address the gross neglect charge (RPC 1.1(a)). However, it did find that respondent had not demonstrated a pattern of neglect (RPC 1.1(b)) because this was the only client matter and grievance at issue.

Finally, the DEC found that respondent had violated R. 1:20-3(g)(3) when he failed to reply to the grievance. The DEC noted that the grievance had been mailed to respondent at the Asbury Park address, which was the address listed in the Lawyers Diary. None of the DEC investigator's telephone calls was returned, even though it was clear that the office staff had been giving respondent the messages.

When respondent called the investigator and claimed that he had not received the grievance, she sent a copy to him. Still, he did not reply to it. Despite having been given the opportunity to document his claim that the Asbury Park post office had been withholding his mail, respondent failed to do so. The DEC explained its determination:

> The panel finds the respondent's position essentially impossible to believe. We find as true [the] facts set forth in the second count of the complaint outlining all facts of the respondent's failure to cooperate with the ethics investigation. We find it impossible to believe the respondent or his secretary would have received eight plus phone calls indicating a grievance had

> been filed and his need to respond and yet not have a clue that a grievance was filed against him. This assertion is untenable and incredible and we find that the presenter has proved the second count of the complaint by clear and convincing evidence.
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> [HPR4.][5]

For respondent's failure to communicate with the client and his failure to cooperate with disciplinary authorities, the DEC recommended the imposition of a censure. Although the DEC recognized that these violations ordinarily would amount to no more than a reprimand, it enhanced the discipline because "respondent told such a fantastic and incredible story about his mail not being delivered, having never received the grievance that all panel members completely disbelieved his testimony."

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

The DEC correctly determined that respondent had failed to communicate with Langan and failed to cooperate with disciplinary authorities. Langan testified that, after she had

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[5] "HPR" refers to the DEC's hearing panel report, dated September 2, 2008.

retained respondent, she called his office approximately one hundred times, but she was never able to reach him, and he never returned her calls. She also testified that respondent had sent her a single letter, which transmitted the retainer agreement that he had sent to her shortly after he was retained. Yet, as the DEC observed, respondent offered no proof that he had ever communicated with Langan beyond their initial telephone conversation and the retainer agreement that he had sent to her in the mail.

At oral argument before us, respondent asserted a number of facts that were not a part of the record, including conversations that had allegedly taken place between him and Langan. Because our review is de novo on the existing record, we are unable to consider respondent's statements. Yet, even if these conversations had taken place, they do not save respondent from a finding that he failed to communicate with his client. Indeed, respondent violated RPC 1.4(b) when he failed to take or return Langan's telephone calls and failed to keep her updated on the status of her matter. He violated RPC 1.4(c) when he failed to consult with Langan prior to agreeing to dismiss the Essex County action.

The DEC correctly dismissed the gross neglect and pattern of neglect charges. The gross neglect charge stemmed from the dismissal of Langan's complaint and respondent's failure to have it reinstated. However, respondent was able to reinstate the complaint. Accordingly, neither the RPC 1.1(a) charge nor the RPC 1.1(b) were sustained.

The DEC was also correct in dismissing the failure-to-expedite litigation charge (RPC 3.2). That rule applies to pending litigation. Inasmuch as the charge was based on respondent's failure to "institute appropriate, timely litigation" on Langan's behalf, nothing was pending and, therefore, the rule does not apply to these circumstances. Instead, the applicable rule would be RPC 1.3, which was not alleged in the complaint.

R. 1:20-4(b) requires an ethics complaint to "set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." In the absence of the charge, respondent cannot be found to have violates this rule, inasmuch as the purpose of R. 1:20-4(b) is to ensure that a respondent has clear notice of the alleged wrongdoing and, thus, an opportunity to defend against the charges.

Unquestionably, however, respondent failed to cooperate with disciplinary authorities. He ignored several phone calls from the DEC investigator and never replied to the grievance. It is true that respondent was not charged with having violated RPC 8.1(b), which addresses an attorney's knowing failure to respond to a lawful demand for information from a disciplinary authority. Instead, he was charged with having violated R. 1:20-3(g)(3) and (4), which govern the filing of a motion for temporary suspension based on an attorney's failure to reply in writing to a request for information. In this instance, however, a finding that respondent violated RPC 8.1(b) does not violate R. 1:20-4(b) because the allegations of the second count of the complaint clearly delineate respondent's failure to cooperate with disciplinary authorities. Moreover, R. 1:20-3(g)(4), though not entirely applicable to the facts of this case, relates to an attorney's failure to cooperate with disciplinary authorities. The erroneous citation to the Court Rule, then, is a matter of form, rather than substance, and does not amount to a due process violation.

In summary, we conclude that respondent violated RPC 1.4(b) and (c) and RPC 8.1(b).

There remains for determination the quantum of discipline to be imposed for respondent's failure to communicate with his client and failure to cooperate with disciplinary authorities. For failure to communicate with clients, an admonition is generally imposed. See, e.g., In the Matter of Gerald M. Saluti, Jr., DRB 07-117 (June 22, 2007) (attorney failed to communicate with the mother and girlfriend of an incarcerated client); In the Matter of Edward G. O'Byrne, DRB 06-175 (October 27, 2006) (attorney did not inform his client about court-imposed costs against the client and delayed notifying him of a motion subsequently filed by the adversary for the collection of those costs); In the Matter of William H. Oliver, DRB 04-211 (July 16, 2004) (attorney failed to keep client apprised of developments in her matter, including a sheriff's sale of her house); In the Matter of Howard S. Diamond, DRB 01-420 (February 8, 2002) (attorney failed to reply to executrix's inquiries and concerns about an estate matter); In the Matter of Beverly G. Giscombe, 96-197 (July 24, 1996) (attorney failed to communicate the status of the matter to a client in a personal injury case); and In the Matter of Anthony F. Carracino, DRB 95-381 (November 30, 1995) (attorney failed to keep his client

reasonably informed of the status of her personal injury matter).

Ordinarily, admonitions, too, are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the DEC investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to DEC's requests for information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the DEC's numerous communications regarding a grievance); In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance); In the Matter of Andrew T. Brasno, DRB 97-091 (June 25, 1997) (attorney failed to reply to the ethics grievance and failed to turn over a client's file); and In the Matter of Mark D. Cubberley, DRB 96-090 (April 19, 1996) (attorney failed to reply to the ethics investigator's requests for information about the grievance).

Based on precedent, an admonition would be appropriate for each of respondent's two violations. However, the DEC was greatly troubled by respondent's lack of veracity. The DEC was so disturbed that it considered his untruthfulness to be an aggravating factor, which warranted enhancement of the discipline, in its view, from a reprimand to a censure.

We defer to the DEC's findings with respect to respondent's credibility, pursuant to Dolson v. Anatasia, 55 N.J. 2, 7 (1969), where the Supreme Court observed that a court will defer to a tribunal's findings with respect to those intangible aspects of the case not transmitted by the written record, such as witness credibility. Here, the DEC hearing panel presided over the case, observed the witnesses, and heard them testify. Accordingly, it had "a better perspective" than do we "in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988).

Moreover, the record itself demonstrates respondent's lack of truthfulness, as seen by his claim that he did not receive telephone messages left for him at the Asbury Park office. Hall and Langan testified that respondent's staff told them that respondent had been given their messages. When respondent did

return one of Hall's calls, he had done so based on a message that he had received from an employee.

For these reasons, we, too, believe that a reprimand more properly reflects respondent's lack of candor to the tribunal.

Chair Pashman recused himself. Member Baugh voted to impose an admonition. Members Boylan and Lolla did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Vice-Chair

By:
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

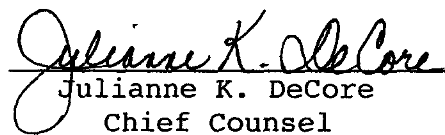
In the Matter of Thomas DeSeno
Docket No. DRB 08-367

Argued: February 19, 2009

Decided: May 12, 2009

Disposition: Reprimand

Members	Disbar	Admonition	Reprimand	Dismiss	Disqualified	Did not participate
Pashman					X	
Frost			X			
Baugh		X				
Boylan						X
Clark			X			
Doremus			X			
Lolla						X
Stanton			X			
Wissinger			X			
Total:		1	5		1	2



Julianne K. DeCore
Chief Counsel