SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-130
District Docket No. XII-04-0039E

IN THE MATTER OF

CHARLES BRIAN DALY

AN ATTORNEY AT LAW

Decision

Argued: June 15, 2006

Decided: July 26, 2006

Diane Stolbach appeared on behalf of the District XII 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 discipline (reprimand) filed by the District XII Ethics Committee ("DEC"). Respondent represented a defendant on New York State drug charges. After the defendant was sentenced, respondent failed to communicate with him and failed to file a motion for relief on his behalf, as he had agreed to do. The complaint charged respondent

with having violated RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client adequately informed about the status of the matter)[1], and RPC 8.4(c) (misrepresentation). Prior to the DEC hearing, the presenter filed a "request" for a dismissal of RPC 8.4(c) because she had difficulty securing witnesses to establish that violation. The panel chair granted the request at the February 24, 2006 DEC hearing.

Based on the facts recited below, we determine that a reprimand is warranted in this case.

Respondent was admitted to the New Jersey bar in 1971, and the New York bar in 1989. At the relevant time, he maintained an office in Union, New Jersey. According to the complaint, as of February 2005, including the date of the DEC hearing (February 24, 2006), respondent maintained a law office in Middletown, New Jersey. On February 23, 2005, however, the Court temporarily suspended respondent after his guilty plea to an information charging him with conspiracy to defraud a financial institution (18 U.S.C.A. § 371). In re Daly, 182 N.J. 422 (2005).

Our jurisdiction in this disciplinary matter is clear, even though respondent's conduct occurred in New York. RPC 8.5(a) provides that

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[1] Because respondent's conduct occurred prior to the 2004 rule changes, henceforth, this memo will reference RPC 1.4(a), the pre-2004 version of RPC 1.4(b).

> [a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs.

Attorneys licensed in New Jersey subject themselves to the disciplinary system of this state, even if they commit misconduct outside of its borders. In re Pease, 167 N.J. 597 (2000), and In re Kalman, 177 N.J. 608 (2003).

Respondent was appointed by the New York Supreme Court, New York County, to represent defendant Angel Aponte in connection with his 1999 arrest for drug charges in New York. The representation lasted for more than two years. In December 1999, the Special Narcotics Prosecutor in New York County Supreme Court indicted Aponte and charged him with first-degree criminal sale of a controlled substance: a November 1997 sale of a kilogram of cocaine to an undercover police officer in Manhattan.

Nancy Ennis had been appointed to represent Aponte on corresponding federal charges. Respondent and Ennis coordinated their efforts to represent Aponte in the separate state and federal charges, in an attempt to obtain the "best deal possible" for Aponte.

Respondent testified that Aponte never made bail on the state charges and remained in federal custody. In 2000, Aponte

entered into separate plea agreements on the federal and state charges. As to the federal charges, Aponte entered a guilty plea to participating in a conspiracy to distribute and to possess with intent to distribute approximately 10 kilograms of cocaine, violating 21 U.S.C. § 846. On August 29, 2000, Aponte entered a guilty plea to the state charges of sale of narcotics.

Early on, Aponte and his attorneys believed that, as part of a plea bargain, the state and federal sentences would run concurrently. Sentencing in the state case was deferred until the federal charges were resolved. The federal sentencing occurred several weeks before the state sentencing, sometime between November 15 and November 20, 2002. An Assistant United States Attorney and Ennis submitted letters to the sentencing judge in the federal matter, highlighting Aponte's cooperation in an investigation and prosecution of two corrupt New York City police officers. Based on that cooperation, Aponte was sentenced in federal court to "time served."

Respondent was surprised by the federal sentence. As a result of this sentence, the state court sentencing judge could not impose a concurrent sentence because the federal sentence had already been served. On December 12, 2002, the state court sentenced Aponte to four years to life. As of that sentencing date, Aponte had served approximately three years in prison and

would be eligible for parole in the state matter in approximately one year. According to respondent, his representation of Aponte ended after the sentencing.

Respondent claimed that, after the sentencing of a client, his procedure was to inform the client of the right to appeal the sentence, hand the client appeal forms, and notify the client of whom to contact for representation on the appeal. Respondent did not mention, however, whether he provided this information to Aponte.

According to respondent, Aponte's credits for time served on the federal charges would have been calculated by the New York State Department of Corrections ("The Department of Corrections") as a matter of course and was, therefore, not mentioned in the plea agreement. Because Aponte had not posted bail on the state charges, he was entitled to receive credit for time served from the date of his state arrest. He would have been eligible for parole in December 2003. However, at the state sentencing, Aponte did not receive credit for time served.

Both Aponte and Ennis wrote to respondent a number of times for help with Aponte's sentence, to no avail. Aponte's letters began in January 2003. By letter dated March 17, 2003, Aponte asked respondent to look into his matter to correct the situation.

Aponte's letter further noted that Ennis had also tried to contact respondent numerous times on his behalf, to no avail.

Previously, on February 13, 2003, Ennis had sent a fax to respondent, concerned that something had "gone very wrong" with Aponte's state sentencing and requesting that respondent "simply approach the sentencing judge for a correction, or . . . bring a CPL 440 motion" to remedy the problem.[2]

On March 31 and April 23, 2003, Ennis faxed additional communications to respondent, confirming that he had agreed to file a CPL 440.20 motion. Ennis's fax stated that, if respondent failed to file the motion, it would "be incumbent" upon her to do so. Ennis also forwarded to respondent copies of two of Aponte's letters expressing his desire to seek "440.20" relief. Ennis pointed out that, because Aponte's federal sentence was finished, there would be "technical barriers to a 'concurrent' sentence," and that Aponte might have to be "re-sentenced in state court ***nunc pro tunc*** to the date of his state arrest."

Respondent admitted that he ignored Aponte's letters and that he reviewed Aponte's case only because of Ennis's requests. He stated that he did not take Aponte's letters seriously because he believed that it was just one of many received every

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[2] A N.Y. CPL § 440.20 motion is a motion to set aside a sentence.

month from his incarcerated clients. Ennis's persistence, however, caught his attention.

Respondent acknowledged that he had agreed to file a motion on Aponte's behalf sometime in early 2003, before reviewing the case. Once he reviewed the file, however, possibly during the "second half of 2003," he determined that it would be pointless to file a motion at that juncture. Respondent admitted that he never informed Ennis or Aponte that he had decided against filing a motion, and that he had no further communications with either one, after making that decision.

Respondent never inquired as to whether Aponte had received his state credits, learning only at the DEC hearing that, ultimately, Ennis had successfully filed a motion nunc pro tunc to Aponte's arrest, correcting Aponte's sentence. Based on his ten years of experience with such cases, respondent opined that the motion was superfluous because the Department of Corrections would have calculated the credits to which Aponte was entitled.

Respondent admitted that, once he decided the motion was pointless, he "threw [Aponte's] file back in storage, and went on doing everything else busy lawyers go about doing." He acknowledged "blowing off" Aponte's case, but explained that many other things were going on in his life at that time, such as a hectic law practice and personal problems: his wife had

been diagnosed with emphysema in 1994, and within the past three years her condition had worsened to the extent that she required a double lung transplant. Because of these problems he claimed his recollection of Aponte's matter was "very, very spotty."

The DEC found that respondent was candid, "forthcoming," and credible. The DEC noted respondent's admission that he had failed to keep Aponte informed about the status of his matter; had failed to reply to numerous written inquiries from Ennis and Aponte; had ignored Ennis's telephone calls; and, after agreeing to file a motion on Aponte's behalf, had decided against doing so, without notifying Aponte or Ennis of that decision. The DEC found that respondent's conduct violated RPC 1.4(a). The DEC did not address the charged violation of RPC 1.3.

The DEC concluded that respondent was an experienced and knowledgeable criminal defense attorney; that he routinely disregarded the communications of his former clients once they were incarcerated, and that he failed to reply to numerous written inquiries from Aponte and Ennis, thereby exhibiting a "pattern of failure to communicate." The DEC determined that a reprimand was the appropriate discipline for respondent's sole violation of RPC 1.4(a).

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.

Although respondent claimed that he no longer represented Aponte after sentencing, he admittedly agreed to file a motion on Aponte's behalf. Aponte, therefore, properly relied on respondent's continuing representation, particularly because the results that Aponte expected had not been achieved. Aponte and Ennis wrote to respondent on numerous occasions. Respondent conceded that he failed to reply to Aponte's letters, and ignored some of Ennis's faxes and telephone calls. Moreover, respondent admitted that he routinely ignored correspondence from inmates whom he had represented.

Ennis's persistence eventually resulted in respondent's agreeing to file a motion on Aponte's behalf. However, despite Ennis's continuing communications on March 31, 2003 and April 23, 2003, respondent failed to take the action he had promised. Respondent claimed that, when he eventually reviewed Aponte's file, he determined that there would be no purpose in filing a motion. He failed, however, to so notify Aponte or Ennis. Respondent's conduct on this score constituted a violation of RPC 1.4(a).

Ultimately, Ennis filed a motion nunc pro tunc and succeeded in obtaining the desired relief. Respondent's failure to file the motion as Aponte's attorney on the state charges constituted a lack of diligence, a violation of RPC 1.3. The DEC's failure to rule on this aspect of the complaint was probably inadvertent.

The DEC dismissed the charge of RPC 8.4(c) (misrepresentation) at the request of the presenter. We agree with that dismissal. The complaint alleged that respondent misrepresented facts concerning the status of the matter and the motion to both Aponte and Ennis. Although respondent initially represented that he intended to file a motion on Aponte's behalf, there is no clear and convincing evidence that he did so with the intent to mislead his client or Ennis. Rather, the record establishes that respondent initially planned to file a motion, but later decided against it. Respondent's misconduct here, as noted above, was his failure to inform his client that he changed his mind about the motion.

We now turn to the quantum of discipline. Generally, an admonition is the appropriate discipline for matters involving lack of diligence and failure to communicate with the client. See, e.g., In the Matter of Jonathan Saint-Preux, DRB 04-174 (July 20, 2004) (attorney engaged in a lack of diligence and failure to communicate in two immigration cases); In the Matter of Carolyn Arch, DRB 01-322 (July 29, 2002) (attorney failed to act promptly

in her client's divorce action and failed to communicate with the client; the attorney had a prior private reprimand); In the Matter of Theodore F. Kozlowski, DRB 96-460 (February 18, 1998) (in two separate matters, the attorney engaged in lack of diligence and failure to communicate with his clients; the attorney had a prior private reprimand); and In the Matter of Cornelius W. Daniel, III, DRB 96-394 (January 16, 1997) (attorney engaged in a lack of diligence by failing to pay medical bills from the net proceeds of a personal injury settlement for a period of four years, and failed to adequately communicate with the client).

Admonitions have also been imposed on attorneys who have engaged in gross neglect, rather than simply lack of diligence. See e.g., In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (attorney engaged in gross negligence and failure to communicate with his client in a trademark matter); In the Matter of Stephen K. Fletcher, DRB 04-077 (April 16, 2004) (attorney engaged in gross negligence and failure to communicate with his client); In the Matter of Mark Krassner, DRB 03-307 (November 25, 2003) (in a matrimonial matter, the attorney engaged in gross neglect by allowing a judgment of divorce to be entered against his client; he also failed to communicate with the client); In the Matter of Vincenza Leonelli-Spina, DRB 02-433 (February 14, 2003) (in representing eleven police officers objecting to a promotional

exam administered by the municipality, the attorney failed to file an appellate brief on two occasions, thereby engaging in gross neglect; she also failed to reply to her clients' telephone calls and correspondence).

Ordinarily, an admonition would be sufficient discipline for respondent's ethics offenses. We are troubled, however, by his admitted policy of disregarding communications from his incarcerated clients. We find it to be an aggravating factor militating against an admonition. We, therefore, determine that a reprimand is the more adequate level of discipline for respondent's misconduct.

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

Disciplinary Review Board
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

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

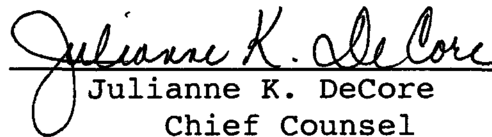
In the Matter of Charles Brian Daly
Docket No. DRB 06-130

Argued: June 15, 2006

Decided: July 26, 2006

Disposition: Reprimand

| Members | Suspension | Reprimand | Admonition | Disqualified | Did not participate |
|---|---|---|---|---|---|
| O'Shaughnessy | | X | | | |
| Pashman | | X | | | |
| Baugh | | X | | | |
| Boylan | | X | | | |
| Frost | | X | | | |
| Lolla | | X | | | |
| Pashman | | X | | | |
| Stanton | | X | | | |
| Wissinger | | X | | | |
| **Total:** | | 9 | | | |



Julianne K. DeCore
Chief Counsel