

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-315

IN THE MATTER OF
MARK D. CUBBERLEY
AN ATTORNEY AT LAW

Decision

Argued: November 20, 2003

Decided: January 23, 2004

Catherine Fitzpatrick appeared on behalf of the District VII Ethics Committee.

Robert Ramsey appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by the District VII Ethics Committee ("DEC"). The four count complaint charged respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4 (failure to keep client informed about the status of the matter and to comply with requests for information), RPC 8.1(b) (failure to comply with reasonable requests for information from a disciplinary authority), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1984. At the relevant time he maintained a law office in Hamilton, New Jersey.

In 1996, respondent received an admonition for failure to cooperate with the DEC investigation. In the Matter of Mark D. Cubberley, Docket No. DRB 96-090 (April 16, 1996). On June 20, 2000, in the first of a series of defaults, he was reprimanded for gross neglect in one case, and lack of diligence and failure to communicate in two cases. Mitigating factors persuaded us that a suspension was not warranted. In re Cubberley, 164 N.J. 363 (2000). Respondent was again reprimanded in 2000 for lack of diligence and failure to communicate in two matters, and a pattern of neglect. In re Cubberley, 164 N.J. 532 (2000).

On March 30, 2001, respondent was temporarily suspended for failure to cooperate with the attorney designated to supervise his practice. In re Cubberley, 167 N.J. 61 (2001). Thereafter, he received a three-month suspension, effective March 8, 2002, for lack of diligence in one matter, and failure to cooperate with an ethics investigation in a second matter. In re Cubberley, 171 N.J. 32 (2002). On the same date, he received a six-month suspension for gross neglect in one matter, lack of diligence, failure to communicate with a client, failure to prepare written fee agreements in two matters, and a pattern of neglect. In re Cubberley, Supreme Court Docket No. D-53-01 (March 8, 2002).¹ In mid-2002, we vacated yet another default and remanded it to the DEC to allow respondent to file an answer to the complaint. He failed to file a proper and timely answer. It, therefore, proceeded as a default matter. The Court imposed an additional six-month suspension, to take effect December 9, 2003, for respondent's gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities. In re Cubberley, 178 N.J. 103 (2003).

On the same date, the Court suspended respondent for three years, also to take effect December 9, 2003, for respondent's failing to comply with a reasonable request for information from a disciplinary authority, taking a fee from a client while suspended, failing to advise his

¹ That order was not published.

client and the court of his suspension, practicing law while suspended, conduct involving dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice, and failing to file a detailed affidavit about his compliance with R.1:20-20. In re Cubberley, 178 N.J. 101 (2003).

Rosemary Jones ("Jones") retained respondent on October 12, 2000 to represent her in connection with the purchase of a house. The retainer agreement quoted a fee of \$595, with a minimum charge of \$75 if no closing were to occur. Jones paid respondent a \$200 deposit, for which she received a receipt.

During their initial meeting, respondent reviewed the contract of sale. He told Jones to contact him if she had any questions or concerns about the matter. After that initial meeting, Jones was unable to contact respondent.

Jones mistakenly believed that the mortgage company planned to obtain a title search in her behalf. She tried to contact respondent shortly after the October 12 meeting because she did not want to incur the expense of a duplicate search. She left respondent messages on his answering machine on October 13, 2000 and twice on October 17, 2000. Respondent did not return any of the calls. Unable to reach respondent, Jones contacted the title company directly and was assured that mortgage companies do not order title searches.

Pursuant to the contract of sale, Jones ordered an inspection of the premises. She obtained an inspection report that revealed, among other problems, electrical and roofing deficiencies. Jones had only fifteen days from the date of the contract, to October 25, 2000, to negotiate repairs with the seller. The inspection report had been faxed directly to respondent. Upon her receipt of the report, Jones attempted to contact respondent to discuss the necessary repairs. On October 24, 2000, Jones reached respondent at his office. He told her that he had received the fax but had not reviewed it and would call her back the next day. Respondent again

did not return her call. Jones, therefore, telephoned her real estate agent for advice on how to proceed. The real estate agent was also unsuccessful in her attempt to contact respondent. Thereafter, Jones left messages on respondent's answering machine on October 26, 27, and 30, 2000. Again he did not return her calls. Finally, on November 1, 2000 when Jones again called respondent, a woman answered respondent's telephone. Jones informed her of the urgency of the situation. The woman agreed to leave respondent a message. Respondent still did not return the call.

Because of her inability to contact respondent, Jones took matters into her own hands. She wrote directly to the seller's attorney in an attempt to negotiate the needed repairs uncovered during the home inspection. She also sent a copy of the letter to respondent. The seller's attorney refused to negotiate with Jones because she was represented by counsel. According to Jones the seller, nevertheless, agreed to repair the roof Jones agreed to pay for the electrical repairs, an \$8,000 expense.

By letter dated November 11, 2000, Jones discharged respondent and requested the refund of her \$200 deposit. He did not return the money. The title company served as closing agent at the closing on November 30, 2000.

Jones filed a grievance against respondent in December 2000. The presenter sent letters to respondent seeking a reply to the grievance on January 16, February 2, and March 7, 2001. On February 26, 2001, she also left a message on respondent's answering machine requesting that he call her to discuss the grievance. Respondent did not reply to the telephone call or any of the letters, and none was returned as undeliverable.

Respondent admitted that he met with Jones on October 12, 2000, and spent approximately thirty to forty-five minutes with her. During that time, he reviewed the contract of sale and informed her of the procedures involved in the matter. He instructed Jones to obtain

an inspection report and told her that he would obtain the title insurance and survey. Respondent claimed that he was unaware of the date that the attorney review period ended because he did not know when the sellers received their copy of the inspection report. He alleged, however, that he replied to the inspection report "late in the time frame." Respondent stated that normally he discussed the home inspection report with his client before communicating with the other side. In this instance, however, he asserted that he learned of Jones' position about the repairs from either the realtor or the title company, not from Jones. According to respondent, he did not write a separate letter, but instead made notations on the report and "faxed" it to the seller's attorney. Although respondent claimed that his telephone bill would reflect the charge, he did not produce the telephone bill at the DEC hearing.

Respondent did not deny that he had received Jones' messages and admitted that it was possible that he did not return her calls.

Respondent claimed that he did not reimburse the \$200 deposit to Jones because he believed that he had earned it. His hourly fee was \$200. He stated that if Jones disputed the amount, she could have filed for fee arbitration. Respondent also asserted that he acted with reasonable diligence in the matter, did all that he was required to do, and that the closing took place in a timely fashion. According to respondent, if he had been in a better state of mind, he would have communicated with his client.

Respondent blamed the problems in his law practice on personal factors. He testified that two and one-half years before meeting with Jones, his daughter was born two months prematurely and suffered substantial health problems. She was on heart and lung monitors for her first eleven months. Respondent also claimed that there was an issue as to the paternity of the child. Although not married to his child's mother, the two had had a twelve-year relationship. Three months into the pregnancy, respondent learned of the woman's infidelity. It

created problems in their relationship and caused his “whole world to collapse.” Respondent alleged that he was also negatively affected by the mother removing his child from their home both before and after Jones had retained him.

In 2000, respondent sought help from his minister, Reverend Thomas Perry, who is certified, but not licensed as a family and marriage counselor. The minister directed respondent to a psychologist. Respondent later met with a psychiatrist who prescribed medication for his severe depression.

Respondent claimed that the turmoil in his life prevented him from focusing on his law practice. In the fall of 2000, because of his “downward spiral,” he stopped handling major litigation and took only cases that he thought he could handle.

Respondent testified that, as of the date of the DEC hearing, he had not applied for reinstatement because he did not feel that he was ready to resume his law practice. According to respondent, he sees the reverend approximately every six weeks for counseling and apparently lives with him on weekends.

Reverend Thomas Perry testified that he counseled respondent and referred him to see a psychologist for his depression.

The DEC requested reports from both Reverend Perry and respondent’s mental health professionals. Although the DEC agreed to keep the record open for thirty days for such a “team report,” it was not a part of the record before us.

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

Respondent did not provide proof that he reviewed the inspection report, made comments on it, and forwarded it to the seller’s attorney. He admitted, however, that he never discussed the report with his client, and learned about her position from either the realtor or title company. His

failure to communicate with Jones drove her to represent herself in an attempt to negotiate repairs. There is no believable evidence in the record that respondent took any action to negotiate the repairs in Jones' behalf. Respondent's inaction violated RPC 1.3.

Respondent did not deny that he failed to communicate with his client. Jones documented the number of times that she left messages on respondent's answering machine. Respondent's failure to return Jones' calls or to otherwise communicate with her after their initial meeting violated RPC 1.4(a).

The complaint charged that respondent's failure to return Jones' \$200 deposit violated RPC 8.4(c). Respondent did initially provide some services to Jones. He reviewed her real estate contract and discussed the steps necessary for the closing. Respondent correctly noted that his failure to return the requested money was a fee arbitration issue, not a violation of RPC 8.4(c). We, therefore, dismissed this charge.

Finally, respondent's failure to reply to the DEC's requests for information violated RPC 8.1(b).

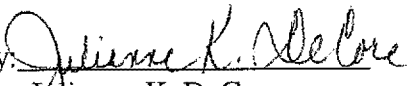
Absent a report from respondent's mental health professionals, we recognize that infidelity in a relationship, and the illness of a child, are serious traumatic events. We note, though, that these events occurred two years before Jones retained respondent. While the events may have precipitated respondent's downward tailspin, there is no professional evaluation or prognosis of respondent's condition in this record. Although we recognize that there may be a valid basis to respondent's claim that he suffered from severe depression, we have also taken into consideration that by respondent's own admission, he is not ready to resume the practice of law.

Respondent's conduct in this matter was not egregious; it involved only one client. Moreover, there is no conclusive evidence in the record that Jones suffered any financial harm as a result of respondent's inaction. We note further that respondent's conduct in this matter

occurred prior to his actions giving rise to In re Cubberley, 178 N.J. 103 (2003). Nevertheless, we cannot ignore respondent's total disregard of the ethics process and conclude that, as a result, additional discipline must be imposed here. We, therefore, unanimously determined to impose an additional six-month suspension, to run concurrently with his most recent suspensions. Three members did not participate. See In re Marra, 170 N.J. 410 (2002) (six-month suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate with client, failure to return file on termination of representation and failure to cooperate with disciplinary authorities; attorney had a prior private reprimand, a public reprimand and a three-month suspension).

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: 
Julianne K. DeCore
Chief Counsel

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

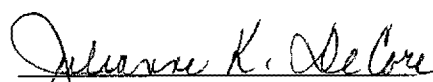
In the Matter of Mark D. Cubberley
Docket No. DRB 03-315

Argued: November 20, 2003

Decided: January 23, 2004

Disposition: Six-month suspension

<i>Members</i>	<i>Disbar</i>	<i>Six-month Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Maudsley</i>		X					
<i>O'Shaughnessy</i>							X
<i>Boylan</i>		X					
<i>Holmes</i>							X
<i>Lolla</i>		X					
<i>Pashman</i>		X					
<i>Schwartz</i>							X
<i>Stanton</i>		X					
<i>Wissinger</i>		X					
Total:		6					3


 Julianne K. DeCore
 Chief Counsel