SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 00-386, 00-394 and 01-024

IN THE MATTER OF	
KEVIN J. DALY	
AN ATTORNEY AT LAW	

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

Decided: September 6, 2001

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

Pursuant to *R.* 1:20-4(f), the District VA Ethics Committee ("DEC") certified the record in these three matters directly to us for the imposition of discipline, following respondent's failure to file an answer to the formal ethics complaints.

In DRB 00-386, the DEC sent a complaint by regular and certified mail on September 13, 2000 to respondent's last known address: 2380 Colonial Drive, Clark, New Jersey 07860. The certified mail was returned signed by respondent and indicating delivery on September 14, 2000. The complaint sent by regular mail was not returned. On October 18, 2000 the DEC sent a second letter to respondent by regular and certified mail, advising him that the failure to file an answer would constitute an admission of the allegations contained in the complaint and could result in his temporary suspension. The certified mail receipt was returned signed by respondent and indicating delivery on October 19, 2000. The copy sent by regular mail was not returned.

In DRB 00-394, the DEC sent a complaint by regular and certified mail on October 6, 2000 to the Clark address. The copy sent by certified mail was returned, marked "unclaimed." The complaint sent by regular mail was not returned. On November 13, 2000 the DEC sent a second letter to respondent by regular and certified mail, advising him that the failure to file an answer would constitute an admission of the allegations contained in the complaint and could result in his temporary suspension. Once again, the copy sent by certified mail was returned, marked "unclaimed," while the copy sent by regular mail was not returned. Between these two mailing dates, on October 19, 2000, respondent signed a certified mail return receipt for materials sent to the same address by the DEC in DRB 00-386.

In DRB 01-024, on October 31, 2000 the DEC sent a copy of the complaint by regular and certified mail to the Clark address. The certified mail was returned "unclaimed" and the regular mail was not returned. On December 7, 2000 the DEC sent a second letter to respondent by regular and certified mail, advising him that the failure to file an answer would constitute an admission of the allegations contained in the complaint and could result in his temporary suspension. Once again, the copy sent by certified mail was returned, marked "unclaimed," while the copy sent by regular mail was not returned.

Respondent did not file an answer to any of the complaints. The record was certified directly to us for the imposition of discipline, pursuant to *R.* 1:20-4(f)(1).

Respondent was admitted to the New Jersey bar in 1980. On February 8, 1999 respondent was suspended for three months for gross neglect, lack of diligence, failure to communicate with a client, failure to notify a client of receipt of funds and to promptly deliver funds and conduct involving dishonesty, fraud, deceit and misrepresentation. *In re Daly*, 156 *N.J.* 541 (1999). In that default matter, respondent was retained to resolve post-judgment matrimonial issues. Despite his acceptance of a $2,000 retainer, respondent took no action in his client's behalf. He misrepresented to her that he had filed the motion, fabricating reasons for the delay. Respondent paid his client $500, misrepresenting that the source of the funds was a child support payment from her ex-husband. Although he received an escrow check representing his client's share of funds from the sale of the former marital

residence, respondent placed the check in the client's file, failing to notify her of his receipt of the funds or to remit them to her. Respondent received a replacement check and again placed it in the client's file without notifying her about the funds or sending them to her.

On January 10, 2001 respondent received an additional three-month suspension for lack of diligence and failure to communicate with a client. *In re Daly*, 166 *N.J.* 24 (2000). In that case, another default matter, respondent failed to file an answer to a motion to enforce litigant's rights and to increase child support. Respondent's inaction resulted in the entry of an order increasing his client's child support obligation, requiring the client to submit financial documents and directing that his client be taken into custody pursuant to a bench warrant issued for failing to comply with prior orders.

* * *

DRB 00-386

The Edzek Matter - VA-99-088E

On September 18, 1998 Ronald Edzek retained respondent to represent him in a divorce. Edzek gave respondent a $1,500 retainer. Respondent sent Edzek periodic billing statements. The February 1, 1999 statement reflected a $775 credit. On February 8, 1999 respondent was suspended from the practice of law for three months. In a March 1, 1999

letter, respondent notified Edzek that he was suspended, that Edzek should retain another attorney to represent him and that respondent was prohibited from recommending another attorney.

Notwithstanding the prohibition against recommending attorneys, respondent referred Edzek to Thomas F. Cermack, Jr., Esq., a close friend. Respondent arranged for Cermack to assume responsibility for some of his files during his suspension. Cermack used respondent's office for this purpose.

In May, June and July 1999 Cermack sent Edzek billing statements. Because the July statement showed a credit of only $145, Edzek decided to pay an additional $1,000 on account. On July 23, 1999 Edzek gave respondent's legal secretary, Maryanne Esmerado, a $1,000 check, leaving the payee blank. Because he was unsure whether to make the check payable to respondent or to Cermack, he asked Esmerado to complete that portion of the check. By telephone, respondent directed Esmerado to make the check payable to "cash," to cash the check and to put the money on respondent's desk. Esmerado complied with respondent's instructions. Respondent used the funds to pay $500 to Esmerado and $500 to another secretary. Respondent's bank account had been seized and their payroll checks had been returned for insufficient funds.

Neither respondent nor Cermack took any further action on Edzek's file. Edzek received no billing statements after July 1999. He never received a statement showing a

credit for the $1,000 paid on July 23, 1999. His numerous telephone calls to respondent and Cermack went unanswered.

After Edzek received a copy of his canceled check and noticed that it had been made payable to "cash," he contacted the Cranford Police Department, which conducted an investigation, interviewing respondent, Cermack, Edzek, Esmerado and respondent's other secretary. In a transcript of the police interview, Cermack stated that he took over respondent's files, including the *Edzek* matter, and that he met with the client on one occasion. He denied receiving any money for his services in that matter, including any portion of the $1,000 that Edzek gave Esmerado on July 23, 1999. Cermack asserted that respondent told him that he had used the money to pay office staff.

According to a November 18, 1999 update to the police report, Edzek informed the police department that respondent had given him $2,500 to compensate him for his financial loss in the matrimonial proceeding. Edzek further reported that he had reconciled with his wife.

Although the Cranford Police Department did not file criminal charges against respondent, it referred the matter to the Union County Prosecutor's Office, which, in turn, contacted the OAE. On December 27, 1999, the OAE sent a copy of the *Edzek* grievance to respondent, requesting a reply by January 21, 2000. Upon respondent's failure to reply, the

OAE sent a February 7, 2000 letter, directing that respondent reply by February 17, 2000. Respondent never replied to the grievance.

The complaint charged that respondent violated *RPC* 1.1(a) (gross neglect), *RPC* 1.4(a) (failure to communicate with a client), *RPC* 1.15(a) and (c) (failure to safeguard funds), *RPC* 1.16(d) (failure to protect client's interests upon termination of representation), *RPC* 5.5(a) (practicing law in violation of New Jersey regulation by failing to comply with *R.* 1:20-20), *RPC* 8.1(b) (failure to cooperate with ethics authorities) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

***The Listinsky Matter* - VA-00-046E**

In July 1997 John S. Listinsky retained respondent to represent him in a divorce matter. Respondent filed a divorce complaint on Listinsky's behalf on July 24, 1997. On September 1997 he filed an answer to a counterclaim that Listinsky's wife had filed. Thereafter, respondent did not provide discovery, did not file motions or opposition to motions and did nothing to protect Listinsky's interests in the litigation, particularly regarding property settlement and child custody issues. As a result, Listinsky's pleadings were stricken and substantial monetary sanctions were imposed on Listinsky.

Specifically, on August 27, 1997, counsel for Listinsky's wife served discovery requests on respondent. He repeatedly tried to contact respondent, both by telephone and by

letter, to ask for answers to interrogatories and documents that he had requested. Having received no response, on January 9, 1998, the attorney filed a motion to compel discovery and for sanctions. He entered into a consent order whereby respondent was to provide the outstanding discovery materials by February 9, 1998. Upon respondent's failure to comply, the attorney asked the court to strike respondent's pleadings and suppress his defenses as provided in the consent order.

On February 21, 1998 the attorney received answers to interrogatories and documents; however, almost all of the answers were not responsive and respondent failed to produce the majority of the critical documents. By letters to respondent dated March 4 and April 7, 1998, the attorney detailed the deficiencies in the discovery materials he had provided and requesting additional documents and answers. After again receiving no response, he wrote to the court, requesting sanctions and an order compelling respondent to comply with the discovery obligations under the consent order. When the court directed the attorney to file a formal motion to compel discovery, respondent asked him to delay filing the motion because he would provide the discovery materials "within the next several days."

After waiting a period of time and receiving no discovery, the attorney filed a motion to compel discovery and for sanctions and attorney's fees. On June 12, 1998 the court entered an order granting respondent an additional ten days to provide discovery. According to the order, upon respondent's failure to comply with the deadline, Listinsky's pleadings and

defenses would be dismissed and monetary sanctions would be imposed. On July 10, 1998 the court entered an order striking Listinsky's pleadings. On July 22, 1998 the court ordered that Listinsky be sanctioned $200 per day effective June 22, 1998 until the discovery materials were provided. The court also granted counsel fees of $1,215 payable by Listinsky.

Respondent did not inform Listinsky of the entry of the above orders. In August 1998, after learning about the motion to impose sanctions on him, Listinsky contacted respondent, who assured him that he would comply with the discovery requests. Respondent told grievant that the judge was a friend of his and would not enforce the daily fine for failure to provide discovery materials.

On September 4, 1998 the court entered an order (1) reducing to judgment the monetary sanction that had accumulated to date, $15,000; (2) continuing the $200 per day sanction; (3) freezing Listinsky's assets; and (4) awarding counsel fees of $720 (in addition to the $1,215 previously ordered) payable by Listinsky to his wife's attorney. The order recited that the motion had been unopposed.

At an October 22, 1998 case management conference, the court entered an order directing respondent to provide all discovery items by November 5, 1998. The order also stated that the court would hold a hearing to consider imposing additional sanctions, including Listinsky's incarceration.

Listinsky's wife's attorney continued to request discovery from respondent, indicating that, before his client could consider settling the matter, the discovery items would have to be provided. Respondent replied that he would bring a "box" containing all outstanding discovery materials at a settlement conference that was ultimately held on May 8, 1999. Because by that time, respondent had been suspended, Cermack represented Listinsky at the settlement conference. Although the complaint alleged that no "box" of discovery was produced at the settlement conference, it is not clear whether any discovery at all was submitted. Respondent told Listinsky that he would continue to represent him during the period of his suspension and that Cermack would handle any court activity. Apart from two meetings with Cermack, all of Listinsky's contact, including meetings and telephone conferences, were with respondent.

In April 1999 Listinsky informed respondent that his wife wanted to relocate to California with the parties' minor son. Respondent represented to Listinsky that he would resolve all custody issues before she left the state. Although Listinsky asked respondent several times to take action to delay his wife's departure until the matter was settled, respondent failed to do so. After Listinsky gave respondent a detailed list of issues to be included in a settlement agreement, respondent prepared a settlement offer that was sent to his adversary on June 24, 1999 under Cermack's signature. In response to a settlement proposal that the attorney sent to Cermack, Listinsky met with respondent in July 1999 and

drafted a counter-proposal. Respondent assured Listinsky that he would send the counter-proposal to the attorney, but failed to do so.

On July 29, 1999 Listinsky's wife relocated to California with their son. No visitation or support arrangements had been made before her departure.

In June 1999 Listinsky informed respondent that the former marital home was to be sold on August 24, 1999 and that he wanted respondent to take the necessary action to ensure proper distribution of the sale proceeds. Respondent indicated that, because of his suspension, the matter would be handled by Cermack. Although on August 13, 1999 respondent told Listinsky that everything was being taken care of, Listinsky discovered that no action had been taken. Neither respondent nor Cermack replied to Listinsky's four attempts to discuss the upcoming real estate sale. As it turned out, Listinsky represented himself at the closing and arranged for the sale proceeds to be held in escrow. Listinsky then retained substitute counsel.

On May 11, 2000, the OAE sent a copy of the *Listinsky* grievance to respondent, requesting a reply by June 2, 2000. Respondent did not reply.

The complaint charged that respondent violated *RPC* 1.1(a), *RPC* 1.3 (lack of diligence), *RPC* 1.4(a), *RPC* 5.5(a), *RPC* 8.1(b), *RPC* 8.4(c) and *RPC* 8.4(e) (stating or implying an ability to influence improperly a government agency or official).

DRB 00-394

The Sherman Matter - VA-99-085E

In 1994 Susan Sherman retained respondent to represent her in a divorce proceeding. During the next five years, respondent did not oppose motions filed by his adversary and did not appear in court on Sherman's behalf. He convinced Sherman that his strategy was to "give in" to her husband's demands to expedite the divorce, assuring her that there was a one-year period within which to appeal adverse orders. Despite respondent's promises to take the appropriate action to protect Sherman's interests, he failed to do so.

On April 28, 1997 a final divorce judgment was entered in the *Sherman* matter. On January 21, 1998, Michael Fox, Sherman's former husband, obtained an order for post-judgment relief, providing, among other things, that Sherman's failure to produce various documents as required by the divorce judgment would result in the imposition of a sanction of $100 per day. Upon Sherman's failure to comply with the January 21, 1998 order, the court entered an April 1, 1998 order allowing Fox to withdraw $26,634.28, plus $6,300 in sanctions from Sherman's IRA account. Respondent did not oppose this motion.

Pursuant to a June 12, 1998 supplemental judgment as to equitable distribution, Sherman was required to pay Fox $24,000 obtained by refinancing the marital home. That sum represented equitable distribution, counsel fees and other debts that Sherman owed Fox. In accordance with respondent's request, on June 1, 1998, Sherman gave respondent a

$24,000 check payable to "Trust of Kevin Daly." Her cover letter to respondent indicated that the enclosed check was in final payment for the buyout of the home. Sherman later learned that she owed Fox almost $100,000 for his interest in the property.

On June 15, 1998 respondent deposited the $24,000 check into his attorney trust account. On June 29, 1998 respondent sent to his adversary his trust account check number 1714 for $22,000 along with a cover letter stating that the sum represented partial payment of the buyout of the marital home. On the same day, June 29, 1998 respondent issued trust account check number 1715 in the amount of $2,000 to himself. The check does not contain any notation identifying a specific client matter. According to the complaint, respondent had not claimed or demonstrated an entitlement to the $2,000 and his disbursement of Sherman's funds to himself was not authorized.

On July 6, 1998 respondent's adversary acknowledged receipt of the $22,000 check and provided an accounting showing that Sherman had paid Fox all but $27,364.81 of the $99,364,81 due for her purchase of the marital home. Respondent's adversary enclosed a mortgage note and mortgage in the amount of $27,364.81 for Sherman's signature. Respondent neither forwarded the documents to Sherman nor notified her of the requirement that she execute them. As a result, on December 2, 1998, the court entered another post-judgment order providing, among other things, that upon Sherman's failure to pay Fox $27,364.81 within ten days, the sum shall be withdrawn from her IRA account. When the

OAE questioned Sherman about her failure to sign the mortgage, she revealed that she had not been aware of the order requiring its execution. The December 2, 1998 order further directed Sherman to pay Fox's counsel fees of $3,000.

Under the terms of a subsequent order, Sherman was required to pay $1,000 to a court-appointed psychiatrist, and $500 to her daughter's court-appointed attorney. Sherman directed respondent to pay those sums from the $2,000 that should have remained to her credit in his trust account. Although respondent agreed, he did not pay the psychiatrist or the attorney. In an April 23, 1999 letter to respondent, Sherman reminded respondent that he retained $2,000 of her funds in escrow and again directed that he pay the psychiatrist and the attorney. By this time, respondent had been suspended. He did not reply to the letter, make the required disbursements or return the funds to Sherman. In September and October 1999 Sherman paid the outstanding fees from her own funds.

On December 28, 1999 the OAE sent a copy of the *Sherman* grievance to respondent, directing that he reply by January 24, 2000. Respondent did not reply. He also did not reply to a February 9, 2000 letter from the OAE.

The complaint charged that respondent violated *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.15(a) (knowing misappropriation of client funds), *RPC* 8.1(b) and *RPC* 8.4(c).

The Rickvalsky Matter - VA-00-012E

In July 1996 Robert E. Rickvalsky retained respondent to represent him in a paternity and child support matter. Respondent obtained an adjournment of August 2 and December 9, 1996 hearing dates. Although Rickvalsky appeared at an April 15, 1997 support hearing, respondent failed to appear. The hearing officer ordered respondent to appear the next day. Respondent appeared on April 16, 1997 and received a ninety-day adjournment to permit him to obtain documents from the state of Florida and to file a motion to dismiss the petition. Respondent neither requested the Florida documents nor moved for dismissal. At a July 16, 1997 support hearing, respondent's request for another adjournment was denied and Rickvalsky was ordered to undergo genetic testing to determine paternity. Although respondent told Rickvalsky that he would appeal the order, he did not do so. On October 10, 1997, upon receiving notification of a November 6, 1997 genetic test, Rickvalsky contacted respondent, who assured him that he would have the test postponed because he wanted to delay the process as much as possible.

Over the next several months, Rickvalsky did not receive any court notices or communication from respondent. When Rickvalsky contacted respondent, he was told that it was in Rickvalsky's interest to delay the proceedings, that he had not received any notices about the matter and that, if the court ruled against him, case law supported an appeal. A notice of hearing sent to respondent's office in early 1999 was returned to the court as

undeliverable. Although as of February 8, 1999, respondent was suspended from the practice of law, he did not notify Rickvalsky of the suspension or take any action to protect Rickvalsky's interests.

Based on respondent's and Rickvalsky's failure to appear at a hearing, a default was entered against Rickvalsky. In February 1999 Rickvalsky received a court notice indicating that he had defaulted, that he owed $39,000 in child support and that a wage execution in the amount of $251 per week was to be enforced. Rickvalsky left eight telephone messages and never received a return call from respondent.

On February 3, 2000 the OAE sent a copy of the *Rickvalsky* grievance to respondent, directing that he reply by February 28, 2000. He did not reply. Respondent also failed to reply to a March 7, 2000 letter from the OAE.

The complaint charged that respondent violated *RPC* 1.3, *RPC* 1.4(a), *RPC* 1.16(d), *RPC* 5.5(a) *RPC* 8.1(b) and *RPC* 8.4(c).

The Herford Matter - VA-00-026E

On April 20, 1998 Regina Herford retained respondent to represent her in a divorce matter, giving him a $3,500 retainer. At the end of May 1998, respondent told Herford that he had filed her divorce complaint. At that time, Herford asked respondent to delay the proceedings while she recovered from surgery. In September 1998 Herford notified

respondent that she had recovered sufficiently from the surgery to continue with the divorce proceedings. At that time, respondent "faxed" to her a draft of a property settlement agreement.

In early 1999 Herford contacted respondent, asking about the status of her case. Respondent told Herford that the delay in the divorce action was due to her husband's failure to keep appointments with his attorney. He did not inform her that, as of February 8, 1999, he had been suspended from the practice of law. Respondent notified Herford of a May 19, 1999 court appearance, making an appointment with her for May 12, 1999. He then canceled the appointment, telling Herford that the court date had been postponed because her husband wanted to obtain another house appraisal.

In June 1999, after Herford had made numerous unreturned telephone calls, respondent told her that the case was scheduled for July 13, 1999 before an early settlement panel. Before July 13, 1999, respondent informed Herford that her husband had agreed to a settlement and that respondent would be having a conference call with his adversary and the judge. After the alleged conference call had taken place, respondent told Herford that the judge had ordered a thirty-day waiting period before the parties signed an agreement to ensure that they were satisfied with its terms. He assured her that she would be divorced by Labor Day, 1999.

In July 1999 respondent directed Herford to use his cell phone when trying to reach him. When she called his office telephone, she discovered that it had been disconnected. When questioned about this, respondent told Herford that he was sending cards to notify his clients that he was relocating his office to Clark. Herford never received a card from respondent about his relocation. Respondent repeatedly assured Herford that, although the divorce was progressing, it had not been finalized for various reasons.

In November 1999 Herford learned from her brother that respondent had been suspended from the practice of law. She then discovered that respondent had never performed any work on her case, had not had any conversations with her husband's attorney, had not drafted a settlement agreement and had not filed the divorce complaint.

On March 3, 2000 the OAE sent a copy of the *Herford* grievance to respondent, directing that he reply by March 27, 2000. Respondent did not reply. He also did not reply to a second letter sent by the OAE on April 20, 2000. The complaint charged that respondent violated *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a), *RPC* 5.5(a), *RPC* 8.1(b) and *RPC* 8.4(c).

DRB 01-024, District Docket No. VA-00-038E

In July 1999 respondent was retained by Donald Pentz to institute proceedings to have Pentz' son declared emancipated. Pentz paid respondent $750. Respondent failed to advise Pentz that he was suspended from the practice of law at that time. It was not until September

1999 that Pentz learned, through the New Jersey Lawyers' Fund for Client Protection, that respondent had been suspended since February 8, 1999. After Pentz confronted respondent about his status in October 1999, respondent assured Pentz that he would be reinstated by the end of January 2000. Pentz agreed to permit respondent to continue as his attorney. Respondent gave him a cell phone number where he could be reached.

In late January 2000, respondent told Pentz that his reinstatement "didn't look good" and that he would refer Pentz to Jim McClure, an attorney in Clark, New Jersey. According to the complaint, there is no such attorney. Respondent gave Pentz "McClure's" address or telephone number and Pentz never received any correspondence from "McClure." Soon thereafter, respondent advised Pentz that "McClure" would attempt to obtain his son's student records from Middlesex County College. The documentation was never obtained and Pentz has not received any information regarding "McClure's" representation.

On February 24 and 25, 2000, Pentz requested that respondent return his $750 retainer. Respondent returned neither the calls nor the retainer.

The complaint charged respondent with violations of *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a), *RPC* 1.15(a), *RPC* 1.16(d), *RPC* 5.5(a), *RPC* 8.1(b) and *RPC* 8.4(c).

* * *

Service of process was properly made in this matter. Following a review of the record, we find that the facts recited support a finding of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. *R.* 1:20-4(f)(1).

The complaints contain sufficient facts to support findings of misconduct. In DRB 00-386, with respect to the *Edzek* matter, although respondent belatedly complied with that portion of *R.*1:20-20 requiring him to notify clients of his suspension, he referred Edzek to Cermack. Respondent was aware of the prohibition against recommending attorneys because he referred to it when he notified Edzek of his suspension. Respondent, thus, violated *RPC* 8.4(c) by intentionally disregarding the provisions of *R.*1:20-20 when he referred Edzek to Cermack. He also violated *RPC* 1.16(d) by failing to refund the unearned portion of the $1,500 retainer that Edzek had given him. At the time of respondent's suspension, Edzek had a $775 credit against the retainer. Instead of refunding this sum, respondent kept it. In addition, respondent retained the $1,000 that Edzek brought to his office on July 23, 1999, using the funds to pay his staff. As a suspended attorney, respondent should have had no involvement with his law office. By receiving fees not yet earned and by paying his staff, respondent practiced law while suspended, in violation of *RPC* 5.5(a).

Because the complaint does not allege sufficient facts to support the remaining charges in *Edzek*, we dismissed them. There was no indication that respondent grossly

neglected the matter. Respondent apparently performed services from his initial retention in September 1998 until he was suspended in February 1999. Thereafter, Cermack assumed representation of Edzek, who must have been satisfied with the services he was receiving because he voluntarily paid an additional $1,000 on account. Because Edzek reconciled with his wife, there is no indication that respondent neglected the divorce matter. Furthermore, although the complaint alleged that despite Edzek's "numerous attempts to contact respondent and/or Cermack, he could not get a return telephone call," there are no details provided concerning when or how many times Edzek tried to contact respondent. If respondent was suspended at the time, he cannot be held responsible for his client's inability to reach him, although his continued involvement in his law practice violated *RPC* 5.5(a) as discussed above. The bare allegation, however, that Edzek did not get a return telephone call does not support the charge of failure to communicate with a client.

Similarly, the complaint does not support the charge that respondent violated *RPC* 1.15(a) and (c). It alleges that respondent did not hold client's property separate from his own property and that he did not separate property in which both he and another person claimed interests. Presumably, these allegations refer to the fees that Edzek gave respondent. Respondent was not required to safeguard his own attorney's fees for his client's benefit. Once Edzek paid respondent, the only obligation respondent had was to return any unearned portion of the fees. As mentioned earlier, his failure to do so violated *RPC* 1.16(d). In

addition, there was no allegation that another person claimed an interest in the funds such that they had to be kept separate pending an accounting.

We, thus, dismissed the following charges: *RPC* 1.1(a), *RPC* 1.4(a), and *RPC* 1.15(a) and (c).

On the other hand, in the *Listinsky* matter, the allegations of the complaint support all of the charged violations. It is unquestionable that respondent displayed gross negligence and a lack of diligence in representing Listinsky. He repeatedly failed to provide discovery materials, despite the entry of court orders directing him to do so. Ultimately, respondent's client paid a sanction of $15,000, paid his wife's attorney's fees, and had his pleadings stricken and his assets frozen. Moreover, despite Listinsky's repeated requests, respondent took no action to resolve custody and support issues before Listinsky's wife relocated to California with their minor son.

Respondent also violated *RPC* 1.4(a) by failing to inform Listinsky about the various orders that had been entered regarding respondent's lack of compliance with discovery requirements.

Respondent blatantly continued to practice law while he was suspended, in violation of *RPC* 5.5(a). He appeared at his office periodically, met with Listinsky and drafted a settlement proposal. He even told Listinsky that, despite his suspension, he would continue to represent him and that Cermack would appear in court. Obviously, respondent represented

Listinsky "behind the scenes," while Cermack handled necessary court appearances to conceal respondent's continued involvement. Respondent's deceitful actions in this regard violated *RPC* 8.4(c) as well. He again violated *RPC* 8.4(c) by falsely assuring Listinsky that he would comply with his adversary's discovery requests and that he would take the necessary action to protect Listinsky's interests at the real estate closing of the sale of the former marital home. Instead, respondent took no action, resulting in harm to his client.

Finally, by telling Listinsky that the judge was a friend of his and would not enforce the daily monetary sanction imposed for failure to provide discovery materials, respondent violated *RPC* 8.4(e). He was also proven incorrect on that score.

In DRB 00-394, the complaint contains sufficient facts to support findings of misconduct. In *Sherman*, respondent exhibited gross neglect and lack of diligence in failing to oppose motions filed against his client, with the result that monetary sanctions were imposed against her.

Much more seriously, respondent knowingly misappropriated client funds. Sherman remitted $24,000 to respondent to be forwarded to Fox in partial payment for his interest in the marital home. Respondent sent only $22,000 to Fox, issuing a $2,000 check to himself on the same day. He acknowledged that he was holding $2,000 of Sherman's funds when he agreed to pay the psychiatrist and court-appointed attorneys their fees. The Court has found that failure to pay escrow funds to a third party under certain circumstances constitutes

knowing misappropriation. *See In re Cavuto*, 160 *N.J.* 185 (1999). In that case, the attorney was disbarred for knowing misappropriation after he received settlement proceeds from a personal injury action, agreed to pay his client's health care providers from those funds, issued a check to his client for his share and disbursed the remaining funds to himself. In finding clear and convincing evidence that Cavuto knowingly misappropriated client funds, the Court stated as follows:

> Respondent either knew or had reason to know that he was invading client funds when he immediately started to issue checks to himself and failed to retain the required amount to pay his client's medical bills. The inference of knowledge is clear and inescapable.
>
> [*Id.* at 193]

Moreover, because respondent failed to answer the complaint, the allegations set forth therein are accepted as true. In charging respondent with knowing misappropriation, the complaint alleged that respondent "neither claimed nor demonstrated his entitlement to the said $2,000 in client funds" and that the issuance of the check to himself "represented an unauthorized disbursement of grievant's funds to himself."

We find that respondent knew, or should have known, that he held $2,000 of Sherman's funds in his trust account and issued that amount to himself, knowing that he was obligated to disburse the funds to third parties in Sherman's behalf. In so doing, he knowingly misappropriated client funds.

In addition, respondent failed to cooperate with the OAE, in violation of *RPC* 8.1(b).

In the *Rickvalsky* matter, respondent was retained in a paternity and child support matter. Notwithstanding his assurances to Rickvalsky that it was in his interest to delay the proceedings, respondent failed to appear at hearings, resulting in the entry of a default order setting child support arrears at $39,000 and directing a wage execution of $251 per week. Respondent took no action to appeal or set aside the order. In his representation of Rickvalsky, respondent exhibited a lack of diligence, in violation of *RPC* 1.3. He also failed to return Rickvalsky's numerous telephone calls to his office, in violation of *RPC* 1.4(a). Respondent's failure to notify Rickvalsky of his suspension amounted to a violation of *R.*1:20-20. By failing to take appropriate steps to safeguard Rickvalsky's interests upon termination of representation, respondent violated *RPC* 1.16(d). Respondent violated *RPC* 8.4(c) by misrepresenting to Rickvalsky that he would appeal the order requiring genetic testing and that, if the court ruled against him in establishing paternity and ordering child support, case law supported an appeal. Respondent violated *RPC* 8.1(b) by failing to reply to the grievance or answer the complaint. Because the complaint did not allege that respondent practiced law while suspended, we dismissed the charge of a violation of *RPC* 5.5(a).

In the *Herford* matter, the client gave respondent a $3,500 retainer to represent her in a divorce proceeding. Respondent accepted the fee and performed little or no services on Herford's behalf. Although he misrepresented to her that he had filed a divorce complaint,

he had not. Respondent then invented various excuses for the delay in the progress of the matter, such as that Herford's husband failed to keep appointments with his attorney and that the judge ordered a waiting period before the parties could sign the property settlement agreement. These excuses were falsehoods. Respondent, while under suspension, also lied when he told Herford that a court appearance had been scheduled for May 18, 1999, that it was postponed, that the case had been scheduled before an early settlement panel and that she would be divorced by Labor Day 1999. He also falsely stated that his office telephone had been disconnected because he was relocating his office. In fact, respondent had been suspended. All of these misrepresentations constituted violations of *RPC* 8.4(c). Respondent's failure to inform Herford about his suspension violated *R.* 1:20-20.

Respondent also violated *RPC* 1.1(a) and *RPC* 1.3 by failing to perform any services in Herford's behalf. His failure to return Herford's repeated telephone calls violated *RPC* 1.4(a). He also violated *RPC* 5.5(a) by continuing to practice law while suspended. By failing to reply to the grievance or to file an answer to the ethics complaint, respondent violated *RPC* 8.1(b).

In DRB 01-024 respondent never initiated any action on Pentz's behalf, in violation of *RPC* 1.1(a) and *RPC* 1.3. Near the end of his "representation," he did not return Pentz' phone calls, in violation of *RPC* 1.4(a). He also failed to return Pentz' retainer, in violation of *RPC* 1.16(d).

Moreover, respondent misrepresented to Pentz that the case would be referred to an attorney who, as it turned out, did not exist. Lastly, respondent's acceptance of a retainer to perform legal services while suspended from the practice of law and his failure to inform his client that he was suspended violated *RPC* 5.5(a) and *RPC* 8.4(c).

Respondent's transgressions in these matters were very serious. He accepted retainers in matrimonial matters and then performed very little work. In most instances, he failed to tell his clients of his suspension. Even when he complied with *R.*1:20-20 by disclosing his suspension, he nevertheless violated the rule by referring clients to another attorney. Respondent flagrantly disregarded the prohibition against practicing law while suspended, even telling Listinsky that he would continue to represent him during the suspension and that Cermack would handle any necessary court appearances. Respondent made numerous misrepresentations to his clients to mislead them about the status of their matters. He grossly neglected the cases, causing financial harm to some of his clients. He knowingly misappropriated client funds. These matters represent respondent's third, fourth and fifth defaults. He clearly has no regard for the disciplinary system.

Because we find that respondent knowingly misappropriated client or escrow funds, we recommend his disbarment. *See In re Wilson*, 81 *N.J.* 451 (1979). Even absent a finding of knowing misappropriation, the pattern of misconduct demonstrated by respondent, including practicing while suspended and persistently lying to "clients" — not to mention the

the degree of harm to these clients — together with his disciplinary history and continuing disregard for the disciplinary system, warrants his disbarment. *See In re Templeton*, 99 *N.J.* 365 (1985).

We unanimously voted to recommend disbarment. Eight members found that respondent knowingly misappropriated client funds. One member, while not finding clear and convincing evidence of knowing misappropriation, voted for disbarment based on the totality of respondent's conduct and his ethics history. One member did not participate in the matter under Docket No. DRB 01-024.

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

Dated: 9/6/01

By: _____
Rocky L. Peterson
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kevin J. Daly
Docket No. DRB 01-024

Decided: August 6, 2001

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	X						
Peterson	X						
Boylan							X
Brody	X						
Lolla	X						
Maudsley	X						
O'Shaughnessy	X						
Schwartz	X						
Wissinger	X						
Total:	8						1

Robyn M. Hill 9/13/01

Robyn M. Hill
Chief Counsel

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kevin J. Daly
Docket No. DRB 00-386 and 00-394

Decided: August 6, 2001

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	X						
Peterson	X						
Boylan	X						
Brody	X						
Lolla	X						
Maudsley	X						
O'Shaughnessy	X						
Schwartz	X						
Wissinger	X						
Total:	9						

Robyn M. Hill 9/13/01
Robyn M. Hill
Chief Counsel