

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 01-098 and 01-099

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

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

Decided: October 10, 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 VII 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.

On December 12, 2000 the DEC served a copy of the complaints by regular and certified mail, return receipt requested, to respondent’s last known office address. The

certified mail was returned unclaimed. The complaint sent by regular mail was not returned. On January 5, 2001 the DEC sent a second letter to respondent by regular and certified mail, notifying him that the failure to file answers would constitute an admission of the charges contained in the complaints and could result in his temporary suspension. Again, the certified mail was returned unclaimed and the regular mail was not returned.

Respondent did not file answers to the complaints. The records were 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 1984. In 1996 he received an admonition for failure to cooperate with a district ethics committee investigation. Thereafter, on June 20, 2000 respondent was reprimanded for gross neglect in one matter and for lack of diligence and failure to communicate in two matters. *In re Cubberley*, 164 N.J. 363 (2000). Although we would ordinarily have elevated the discipline to a three-month suspension because of the default nature of the proceeding, we determined to impose only a reprimand due to the mitigating factors cited in respondent's motion to vacate the default. On that same day, respondent was again reprimanded in a default proceeding where, in two matters, he displayed a lack of diligence, failed to communicate and, when considered in conjunction with the earlier reprimand, engaged in a pattern of neglect. *In re Cubberley*, 164 N.J. 532 (2000). In addition, respondent was ordered to enroll in the New Jersey Bar Association ethics diversionary program and to practice under the supervision of a proctor for one year.

In two additional default matters heard under docket numbers 00-373 and 00-403, we determined to impose a three-month suspension and a two-year proctorship for lack of diligence in one matter and for failure to cooperate with an ethics investigation in a second matter. That decision is being transmitted to the Court simultaneously with the within matter.

On March 30, 2001 respondent was temporarily suspended for failure to cooperate with the attorney designated to supervise his practice. He remains suspended to date.

* * *

DRB 01-098 (District Docket No. VII-00-033E)

On or about July 6, 1999 grievant, Susan Boots, consulted respondent about a divorce matter. Although they discussed a written retainer agreement, Boots never signed one. The retainer fee of \$1,000 required by respondent was paid in two installments -- \$250 was paid on or about July 7, 1999 and \$750 was paid on September 15, 1999. Respondent never gave Boots a final version of the retainer agreement. Boots contended that she gave respondent the \$1,000 fee to retain him to represent her in the divorce and to begin the process of preparing and filing the complaint.

From August 1999 to May 2000, Boots made numerous telephone calls to respondent. Although occasionally she spoke to respondent's paralegal, she was not able

to leave a message on respondent's voicemail because it was always full and could not accept additional messages. She was never able to reach respondent directly.

From October 1999 to January 2000, Boots learned that respondent was involved in local elections and was "too busy" to communicate with her. Additionally, respondent told her that, because he was employed by Bristol-Myer Squibb, he was not available to her. In a February 4, 2000 letter, Boots urged respondent to contact her and explain and define his representation in the divorce matter, including the nature of the retainer. Respondent did not reply. On May 24, 2000 Boots sent a second letter complaining that he had not returned her telephone calls, that his paralegal advised her that respondent is busy and that, although she gave him a \$1,000 retainer, he had not performed any services in her behalf. Again, respondent did not reply. Finally, on May 30, 2000, Boots hand-delivered a letter to respondent's office terminating his representation and subsequently retained another attorney. Respondent did not reply to the termination letter.

On September 14, 2000, more than three months after the date of the termination letter, respondent sent Boots a bill for \$1,228. When Boots' son telephoned respondent to make arrangements to retrieve her client file, respondent stated that he would release the file only to Boots.

The complaint charged respondent with violations of *RPC* 1.1(a) and (b) (gross neglect and pattern of neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.4(a) (failure to communicate) and *RPC* 1.5(b), (c) or (d) (failure to prepare written fee agreement).

DRB 01-099 (District Docket No. VII-00-034E)

On May 26, 2000 grievants, Philip and Mary Beth Dunbar, met with respondent for an initial consultation. Philip had received a summons to appear in municipal court as a result of his involvement in a motor vehicle accident. A family member had referred them to respondent, who advised them that an initial retainer of \$375 would be needed to begin the representation and that the total fee would be between \$500 and \$750. Although the Dunbars paid the \$375 retainer, respondent did not prepare a written retainer agreement.

The Dunbars learned that the municipal court hearing was scheduled for June 2000, however, respondent failed to advise them that the hearing had been adjourned. He also failed to return numerous office telephone messages left by the Dunbars. On June 1, 2000 respondent failed to attend a meeting with the Dunbars at which time he was scheduled to take photographs of the damaged vehicle. On July 10, 2000, when Mary Beth arrived at respondent's law office, his staff told her that respondent would meet with them later that night at their home. Respondent never arrived at the Dunbar home that night and did not call to explain his absence. The next day, July 11, 2000 respondent appeared unannounced at the Dunbars' home. Mary Beth then terminated his representation and asked for a refund of the \$375 retainer. Although respondent agreed, he failed to refund the retainer. After the Dunbars filed a fee arbitration petition, respondent failed to appear at the hearing and the Dunbars obtained a \$375 judgment against him.

Despite the Dunbars' termination of representation, as of August 2, 2000, respondent had failed to inform the municipal court that he was no longer the attorney of record for Philip.

The complaint charged respondent with violations of *RPC* 1.1(b), *RPC* 1.3, *RPC* 1.4(a) and (b) and *RPC* 1.5(b), (c) or (d).

* * *

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). On July 19, 2001, the date that we were scheduled to consider this matter, respondent submitted a letter requesting an adjournment to permit him to obtain counsel to file a motion to vacate the default. Because respondent presented neither a sufficient explanation for his failure to file an answer to the complaint nor a colorable claim of a meritorious defense to the allegations of the complaint, we determined to deny respondent's motion.

The complaints contain sufficient facts to support findings of misconduct. In DRB 01-098, although his client, Boots, gave respondent a \$1,000 retainer, he failed to take any action on her behalf. He, therefore, violated both *RPC* 1.1(a) and *RPC* 1.3. Moreover, in

three previous matters, respondent was disciplined for failure to keep a client informed, lack of diligence and gross neglect. Respondent's conduct here, in conjunction with these previous matters, demonstrates a pattern of neglect in violation of *RPC* 1.1(b).

Respondent also violated *RPC* 1.4(a). Despite Boots' numerous attempts to contact respondent between August 1999 and May 2000, he failed to communicate with her and to advise her of the purpose and nature of the written retainer agreement. Respondent's failure to explain the purpose of the retainer and to obtain an executed written fee agreement also constituted a violation of *RPC* 1.5(b). Although the complaint alleged a violation of *RPC* 1.5(b), (c) or (d), only *RPC* 1.5(b) applies. *RPC* 1.5(c) and (d) apply to contingent fee matters.

In DRB 01-099, the *Dunbar* matter, respondent's failure to communicate with his client, to return telephone calls and to explain the purpose and nature of the written retainer agreement constituted a lack of diligence and a lack of communication, in violation of *RPC* 1.3 and *RPC* 1.4(a). In conjunction with his prior discipline, respondent demonstrated a pattern of neglect, in violation of *RPC* 1.1(b). Finally, his failure to prepare and obtain an executed written retainer agreement violated *RPC* 1.5(b).

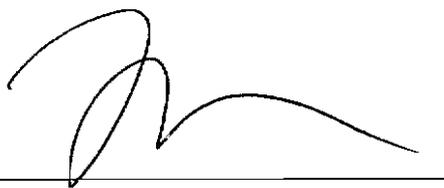
The only remaining issue is the quantum of discipline. In two matters, respondent exhibited a pattern of neglect, failed to act with diligence, failed to keep the client reasonably informed about the status of a matter and failed to communicate the basis or rate of his fee in writing. In default cases, similar misconduct by attorneys generally results in a short-term suspension when there has been prior discipline. *See, e.g., In re Robinson*, 164

N.J. 597 (2000) (six month suspension imposed on attorney who exhibited gross neglect and a pattern of neglect, failed to communicate with a client and failed to cooperate with disciplinary authorities; attorney had a prior three- month suspension and had been temporarily suspended for failure to pay a fee arbitration award); *In re Malfara*, 164 *N.J. 551 (2000)* (six-month suspension for attorney who, in three matters, displayed gross neglect and a pattern of neglect, failed to communicate with clients, failed to prepare a written fee agreement, failed to protect client's interest on termination of representation and failed to cooperate with disciplinary authorities; attorney had previous reprimand); *In re West*, 156 *N.J. 451 (1998)* (six-month suspension for attorney who engaged in gross neglect and a pattern of neglect in three matters, failed to communicate with clients, failed to surrender papers and refund an unearned fee and failed to cooperate with disciplinary authorities; attorney had received an admonition and had been temporarily suspended from the practice of law for failure to pay a fee arbitration award).

We, thus, unanimously voted to suspend respondent for six months, consecutive to the three-month suspension that we voted to impose in docket numbers DRB 00-373 and DRB 00-403. One member recused himself. Three members did not participate.

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

Dated: 10/10/01

By: 
Mary J. Maudsley
Vice-Chair
Disciplinary Review Board