SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-371
District Docket No. VI-2015-0001E

IN THE MATTER OF

JOSEPH A. VENA

AN ATTORNEY AT LAW

Decision

Decided: August 4, 2016

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

This matter was before us on a certification of the record filed by the District VI Ethics Committee (DEC), pursuant to R. 1:20-4(f). The two-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client), RPC 1.4(c) (failure to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), RPC 1.16(a)(3) (failure to withdraw from the representation upon discharge), RPC 3.3(a)(1) (false statement of material fact or law to a

tribunal), RPC 3.3(a)(5) (failure to disclose a material fact to a tribunal knowing that the omission is reasonably certain to mislead the tribunal), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice) (count one); and R. 1:20-3(g)(3) and RPC 8.1(b) (failure to cooperate with disciplinary authorities) (count two).

Respondent filed a motion to vacate the default. For the reasons set forth below, we determine to deny that motion and to impose discipline, based on the record certified to us. Four members voted to impose a censure. Four members voted to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1970. At the relevant times, he maintained offices for the practice of law in West Orange and, subsequently, in Fairfield, New Jersey. He has no history of discipline. However, he has been ineligible to practice law since August 24, 2015 for failure to pay the 2015 annual assessment to the New Jersey Lawyers' Fund for Client Protection.

Service of process was proper in this matter. On July 17, 2015, the DEC sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's office address. The certified mail was signed for by "Debbie" (last name illegible)

and the regular mail was not returned. Respondent did not timely file a verified answer to the complaint.[1]

Accordingly, on September 2, 2015, the DEC sent a second letter to respondent, by certified and regular mail, at his office address, informing him that, unless he filed a verified answer to the complaint within five days, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to charge a willful violation of RPC 8.1(b).[2] Once again, the certified mail was signed for by "Debbie," confirming receipt, and the regular mail was not returned. Respondent did not timely file a verified answer to the complaint.

Because respondent had not filed an answer to the complaint by October 13, 2015, the DEC certified the record to us as a default.

On February 18, 2016, respondent, through counsel, filed a motion to vacate the default in this matter. To prevail on such

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[1] As set forth below, respondent was aware that the ethics grievance underlying the complaint had been filed against him – he filed a tardy explanation in response.

[2] Respondent had been declared administratively ineligible ten days earlier. Thus, this second letter should have been directed to his home address. However, as previously noted, the complaint already had been served on respondent at his office two months earlier, in July, before he had been declared administratively ineligible.

a motion, respondent must satisfy a two-pronged test. First, he must offer a reasonable explanation for the failure to answer the ethics complaint and, second, he must assert a meritorious defense to the underlying ethics charges.

Respondent suggested that his failure to file an answer may have been attributable to a currently undiagnosed psychological issue that is causing him to act in manners he cannot explain. Specifically, respondent stated that he has been experiencing "an 'inability' to carry out the most urgent tasks or to follow through on simple matters that were related to files or matters which made him stick his head in the sand." Respondent offered no medical documentation or other evidence to support his claim.

We conclude that respondent's explanation for his failure to file an answer is not reasonable. Although it is possible that respondent has a psychological issue that contributed to his failure to file an answer, he has not provided us with any evidence to support such admitted speculation.

Assuming, arguendo, that respondent had satisfied the first prong of the test, we still would deny his motion to vacate the default. In his certification in support of his motion, respondent concedes that he is "unable to offer 'specific and meritorious defenses to the charges' but [that] the facts stated herein may suggest reasons to view this application with

leniency." Further, respondent states that "[i]f [his motion to vacate the default] is granted [he intends] to answer the Complaint, admit the allegations and request a hearing on the quantum of discipline to be imposed." By his own admission, respondent has failed to satisfy the second prong of the test, which requires that he assert a meritorious defense to the underlying ethics charges. Accordingly, we determine to deny his motion to vacate the default.

The facts alleged in the complaint are as follows. At the time the misconduct underlying this matter began, respondent was employed with the law firm of Mandelbaum, Salsburg, Lazris & Discenza, P.C., in West Orange, New Jersey. He left that firm and began a solo practice in Fairfield, New Jersey.

On March 24, 2011, Victor Khubani retained respondent to appeal tax assessments in Fairfield Township, New Jersey. About twenty-two months later, in December 2013, respondent told Khubani that, during a telephone conversation with the Fairfield Township tax assessor, he had settled the tax appeals.

For a period of three months thereafter, respondent failed to reply to requests for information from Khubani's general counsel, David Katz, regarding the details of these alleged settlements. Consequently, on March 18, 2014, both Khubani and Katz wrote to respondent, terminating his representation of

Khubani and authorizing the release of Khubani's file, presumably to Katz.

On or about June 3, 2014, Khubani retained the law firm of Stavitsky & Associates as his new tax counsel, which prepared and sent to respondent a substitution of attorney. Respondent neither executed nor acknowledged receipt of the substitution of attorney. On or about June 16, 2014, respondent submitted a stipulation of settlement to the Tax Court, signed by him and dated June 12, 2014, in respect of Khubani's tax appeals. In response, the court notified respondent that the stipulation was deficient, as it omitted a required second caption, and would not be processed until the correction was made. On or about September 3, 2014, in response to several subsequent inquiries from the court, respondent submitted a revised stipulation of settlement for Khubani's matters, captioned "Lane Road LLC v. Fairfield Township." Except for this caption, the second stipulation was identical to the first submission, was also dated June 12, 2014, and was also signed by respondent.

On receipt of the second, revised stipulation of settlement, the court sent the documents to the Tax Court Management Office in Trenton, to be processed for judgment. On September 30, 2014, the Clerk of the Tax Court entered judgment

in connection with the purported Khubani stipulation of settlement.

Previously, on September 24, 2014, attorney Mitchell Fagan, of Stavitsky & Associates, had contacted the Tax Court, on behalf of Khubani, requesting that entry of the judgments be withheld, as Khubani had not consented to the settlement of his tax appeals.

After the grievance in this matter was filed, respondent was uncooperative, failing to reply to the investigator's letters for almost a month; failing to provide a written explanation to the grievance for almost three months; and, ultimately, failing to produce his file in the Khubani matter to the DEC, despite multiple demands and multiple extensions of time to do so.

The facts recited in the complaint support most of the charges of unethical conduct set forth therein. Respondent's failure to file a verified answer to the complaint is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f). Notwithstanding that rule, each charge in an ethics complaint must be supported by sufficient facts for us to determine that unethical conduct occurred.

In that vein, we determine that the record contains insufficient facts to conclude that respondent violated either RPC 1.1(a) or RPC 1.3 in connection with Khubani's matters. Although respondent may have utterly failed to prosecute Khubani's tax appeals between March 24, 2011 and December of 2013, such a conclusion is not supported by the facts contained in the complaint. Indeed, the complaint provides only that respondent eventually settled the matters in December 2013. It does not address what respondent did or did not do in the interim. We are, therefore, left with no evidence to determine whether respondent committed the infractions of gross neglect and lack of diligence.

The record does contain sufficient facts, however, to conclude that respondent violated RPC 1.4(b) and (c). By settling Khubani's tax appeals unilaterally, respondent failed to explain the matters to Khubani, who was, thus, not able to make an informed decision regarding the proposed settlements.[3] Moreover, after advising Khubani of the settlements, respondent ignored his client's and counsel's multiple requests for information over a three-month period. By failing to adhere to

[3] The complaint did not charge respondent with having violated RPC 1.2(a) (lawyer shall abide by a client's decisions concerning the scope and objectives of the representation) in connection with the unauthorized settlements by respondent.

one of the fundamental duties of counsel – communication with the client – respondent violated RPC 1.4(b) and (c).

Respondent's lack of communication caused Khubani to terminate the representation on March 18, 2014 and request his file.[4] Nevertheless, respondent proceeded with the representation. Even after receiving the substitution of counsel from Stavitsky & Associates, on June 3, 2014, respondent pressed on with the tax appeals, undaunted, filing a deficient stipulation of settlement, dated June 12, 2014, with the Tax Court.

Thereafter, respondent continued to represent Khubani, despite the passage of almost three months from his receipt of the letter terminating the representation and the substitution of counsel. Rather than honoring these documents and withdrawing as counsel, respondent eventually filed a corrected stipulation of settlement with the tribunal, on September 3, 2014. In proceeding with Khubani's matters in this fashion, and filing pleadings with the Tax Court after he had been expressly terminated as Khubani's counsel, respondent violated RPC

[4] The complaint did not charge respondent with having violated RPC 1.16(d) (failure to take steps to protect a client's interests upon termination of the representation, such as surrendering papers and property to which the client is entitled) in connection with Khubani's request for his file.

1.16(a)(3), RPC 3.3(a)(1), RPC 3.3(a)(5), RPC 8.4(c), and RPC 8.4(d).

Finally, respondent's repeated failures to cooperate with the DEC's investigation of this matter, both through his delay in replying to the investigator's letters and his refusal to produce Khubani's file, as required, violated both R. 1:20-3(g)(3) and RPC 8.1(b).

The only remaining issue is the appropriate discipline to be imposed for respondent's violations of RPC 1.4(b) and (c), RPC 1.16(a)(3), RPC 3.3(a)(1), RPC 3.3(a)(5), R. 1:20-3(g)(3) and RPC 8.1(b), RPC 8.4(c), and RPC 8.4(d).

Generally, in default matters, a reprimand is imposed for failure to communicate with the client and failure to cooperate with disciplinary authorities, even where such conduct is accompanied by other ethics infractions. See, e.g., In re Cataline, 219 N.J. 429 (2014) (attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with requests for information from the district ethics committee investigator; no prior discipline); and In re Rak, 203 N.J. 381 (2010) (attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with the investigation of a grievance; no prior discipline).

An attorney who continued representation of a client, despite having been discharged, received a reprimand. See In re Lu Sane, 124 N.J. 31 (1991) (attorney reprimanded for failing to keep his client reasonably informed about the status of the case, in violation of RPC 1.4(a), for failing to comply with his client's wish that he cease his representation of him, in violation of RPC 1.16(a)(3), and for failing to file an answer to the ethics complaint, in violation of RPC 8.1(b); three prior private reprimands).

Other cases in which attorneys have violated RPC 1.16(a)(3) also include either other serious infractions or prior discipline, not applicable here. See, e.g., In re Olitsky, 158 N.J. 110 (1999) (six-month suspension for attorney who committed gross neglect, pattern of neglect, failure to communicate with clients, failure to reduce fee agreement to writing, continued representation of a client after termination of the representation, and failure to surrender client property after termination; attorney's ethics history included a private reprimand, an admonition, and two three-month suspensions); and In re Kramer, 49 N.J 19 (1997) (six-month suspension for attorney who refused to terminate representation of a client after being discharged and improperly obtained a proprietary interest in litigation; prior reprimand for similar misconduct).

Lack of candor to a tribunal has resulted in discipline ranging from an admonition to a long-term suspension. See, e.g., In the Matter of Richard S. Diamond, DRB 07-230 (November 15, 2007) (admonition for attorney who filed certifications with the family court making numerous references to attached psychological/medical records, which were actually mere billing records from the client's medical provider; although the court was not misled by the mischaracterization of the documents, the conduct nevertheless violated RPC 3.3(a)(1)); In the Matter of Lawrence J. McGivney, DRB 01-060 (March 18, 2002) (admonition for attorney who improperly signed the name of his superior, an Assistant Prosecutor, to an affidavit in support of an emergent wiretap application moments before its review by the court, knowing that the court might be misled by his action; in mitigation, it was considered that the superior had authorized the application, that the attorney was motivated by the pressure of the moment, and that he brought his impropriety to the court's attention one day after it occurred; no prior disciplinary history); In re Bronson, 197 N.J. 17 (2008) (reprimand for attorney who practiced law in New York, a state in which he was not admitted, failed to prepare a writing setting forth the basis or rate of his fee in a criminal matter, and failed to disclose to a New York court that he was not

licensed there; attorney was temporarily suspended following criminal guilty plea, for which final discipline was pending); In re Schiff, 217 N.J. 524 (2014) (reprimand for attorney who filed inaccurate certifications of proof in connection with default judgments; specifically, at the attorney's direction, his staff prepared signed, but undated, certifications of proof in anticipation of defaults; thereafter, when staff applied for a default judgment, at the attorney's direction staff completed the certifications, added factual information, and stamped the date; although the attorney made sure that all credits and debits reflected in the certification were accurate, the signatory did not certify to the changes, after signing, a practice of which the attorney was aware and directed; the attorney was found guilty of lack of candor to a tribunal and failure to supervise non-lawyer employees; no prior disciplinary history); In re Manns, 171 N.J. 145 (2002) (attorney reprimanded for misleading the court, in a certification in support of a motion to reinstate the complaint, as to the date the attorney learned of the dismissal of the complaint; the attorney also lacked diligence in the case, failed to expedite litigation, and failed to properly communicate with the client; prior reprimand); In re Duke, 207 N.J. 37 (2011) (attorney received a censure for failure to disclose his New York disbarment on a form filed with the Board Of Immigration Appeals; the attorney also

failed to adequately communicate with the client and was guilty of recordkeeping deficiencies; prior reprimand; the attorney's contrition and efforts at rehabilitation justified only a censure; prior reprimand); In re Hummel, 204 N.J. 32 (2010) (censure in a default matter for gross neglect, lack of diligence, failure to communicate with the client, and misrepresentation in a motion filed with the court; the attorney had no disciplinary record); In re Trustan, 202 N.J. 4 (2010) (three-month suspension for attorney who, among other things, submitted to the court a client's case information statement that falsely asserted that the client owned a home and drafted a false certification for the client, which was submitted to the court in a domestic violence trial; no prior disciplinary history); In re Stuart, 192 N.J. 441 (2007) (three-month suspension for assistant district attorney in New York who, during the prosecution of a homicide case, misrepresented to the court that he did not know the whereabouts of a witness; in fact, the attorney had made contact with the witness four days earlier; compelling mitigation; no prior disciplinary history); In re Moras, 220 N.J. 351 (2015) (default; one-year suspension imposed on attorney who exhibited gross neglect and a lack of diligence and failed to communicate with the client in one matter, misled a bankruptcy court in another matter by failing to disclose on his client's bankruptcy petition that she

was to inherit property, and failed to cooperate with the ethics investigation in both matters; extensive disciplinary history consisting of two reprimands, a three-month suspension, and a six-month suspension); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve; two prior private reprimands); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney who had been involved in an automobile accident and then misrepresented to the police, to her lawyer, and to a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing; no prior disciplinary history).

Here, in mitigation, respondent has enjoyed an unblemished history since his admission to the bar, more than forty-five years ago. In aggravation, however, the default status of this matter must also be considered. "A respondent's default or failure to cooperate with the investigative authorities acts as

an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332, 342 (2008).

Based on the foregoing, Chair Frost, and Members Gallipoli, Rivera, and Zmirich voted to impose a censure. Members Boyer, Clark, Hoberman, and Singer voted to impose a reprimand. Vice-chair Baugh did not participate.

In his motion to vacate the default, respondent admitted that he has been experiencing "an 'inability' to carry out the most urgent tasks or to follow through on simple matters that were related to files or matters which made him stick his head in the sand." Although respondent should be commended for his candor, we determine to require him to provide proof of fitness to practice law, as attested to by a mental health professional approved by the Office of Attorney Ethics, within sixty days of the date of the Court's Order in this matter.

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, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph A. Vena
Docket No. DRB 15-371

Decided: August 4, 2016

Disposition: Reprimand (4)
Censure (4)

Members	Disbar	Suspension	Reprimand	Censure	Did not participate
Frost				X	
Baugh					X
Boyer			X		
Clark			X		
Gallipoli				X	
Hoberman			X		
Rivera				X	
Singer			X		
Zmirich				X	
Total:			4	4	1

Ellen A. Brodsky
Chief Counsel