Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-363
District Docket Nos. XA-2019-0010E
and XA-2019-0011E

In the Matter of

Nelson Gonzalez

An Attorney at Law

Decision

Decided: June 23, 2020

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 XA Ethics Committee (DEC), pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with violations of RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter and to comply with reasonable requests for information); RPC

1.5(a) (collecting an unreasonable fee); RPC 1.5(b) (failure to set forth in writing the basis or rate of the fee); and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

Respondent filed a motion to vacate the default. For the reasons set forth below, we determine to deny that motion and find that respondent committed misconduct. We are unable, however, to reach a consensus on the proper quantum of discipline. Three members voted to impose a censure; three members voted to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1997 and to the District of Columbia bar in 1999. At the relevant times, he maintained an office for the practice of law in Dover, New Jersey.

On April 9, 2020, the Court suspended respondent for three months for his misconduct in several client matters, including gross neglect; lack of diligence; failure to communicate with clients; failure to safeguard client funds; failure to comply with recordkeeping requirements; failure to expedite litigation; failure to comply with reasonable discovery requests; failure to supervise non-attorney staff; false statements of material fact to disciplinary authorities; and misrepresentations to clients. The Court further ordered that respondent shall not employ his wife or give her access to his law practice or his attorney accounts, books, and records and shall provide

proof thereof to the Office of Attorney Ethics (OAE) as a condition of reinstatement. In re Gonzalez, ___ N.J.___ (2020).

Service of process was proper. On July 3, 2019, the DEC sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's office address of record. The DEC received a certified mail receipt bearing a delivery date of July 8, 2019, and an illegible signature. The regular mail was not returned.

On August 14, 2019, the DEC sent a letter to respondent, by certified and regular mail, to his office address, informing him that, unless he filed a verified answer to the complaint within five days of the date of the letter, 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). According to the United States Postal Service, the certified mail was delivered on August 16, 2019. The regular mail was not returned.

As of September 20, 2019, respondent had not filed an answer to the complaint, and the time within which he was required to do so had expired. Accordingly, the DEC certified this matter to us as a default.

We now turn to the allegations of the complaint.

In 2009, first cousins JJT (age eight) and JMT (age nine), both

citizens of Honduras, entered the United States at the Texas border, intending to seek asylum in this country. They further desired to reunite with family members residing in Morris County, New Jersey. JMT claimed a fear of persecution in Honduras, for reasons that may have enabled him to obtain asylum here. Thus, the boys journeyed together to the United States. In 2009, separate immigration cases were initiated in Texas for each of them. Initial removal hearings were scheduled for March 22, 2010 in the Immigration Court, Newark, New Jersey, but were adjourned to August 2010 and again to December 22, 2010.

On November 9, 2010, after the boys had been reunited with family members in New Jersey, their respective parents retained respondent to represent them in their individual immigration matters. The two cases were administratively consolidated and heard together. The family paid respondent $4,000 toward the representation and, in turn, respondent provided them with a fee agreement that failed to set forth the basis or rate of the fee for his legal services, but provided that $1,000 of the fee was nonrefundable, regardless of the scope of legal services provided. Upon his retention, respondent gave the family his assurance that he would diligently represent them, file required asylum applications, and appear in court, as necessary.

On December 4, 2010, respondent filed a notice of appearance for JJT and, on a date not set forth in the record, entered his appearance in JMT's case.

Thereafter, respondent neither met with the boys to evaluate the merits of their asylum claims nor provided them with updates in respect of their asylum applications. They attended the December 22, 2010 removal hearing, at which the immigration judge advised them that, because respondent was their counsel, they need not personally appear at the next court hearing originally scheduled for September 26, 2011. The judge also recommended that the boys remain in school and focus on their studies.

On October 3, 2011, the Newark Immigration Court issued a notice of hearing, directed to respondent as the boys' counsel, scheduling a removal hearing for February 21, 2012. Respondent failed to appear at that hearing and, shortly afterward, received a notice that his clients had been ordered removed from the United States, in absentia, for their failure to appear at the removal hearing.

From December 2010 through March 30, 2018, respondent remained as counsel of record in JJT's and JMT's immigration matters. Yet, from 2012 through March 2018, he failed to return the clients' numerous telephone calls requesting information about the status of their applications.

On March 30, 2018, the cousins retained Stanley Smotritsky, Esq., to investigate the status of their immigration matters. That same date, Smotritsky sent respondent a letter informing him that he represented the boys, who had just

learned of the orders of removal, and that they intended to file motions to reopen their matters, based on a claim of respondent's ineffective assistance of counsel. The letter also sought respondent's reply to the ineffective assistance of counsel claim. Respondent failed to reply to Smotritsky.

Further, between April 15 and June 18, 2019, the DEC investigator sent three letters to respondent and placed one telephone call to him at his office, requesting his written reply to the boys' April 10, 2019 grievances against him. On April 30, 2019, an unidentified employee in respondent's office left a voicemail for the investigator, indicating that respondent would furnish a full, written reply to the grievances by May 6, 2019. Respondent, however, failed to do so or otherwise reply to the investigator.

On February 6, 2020, respondent filed a motion to vacate the default in this matter, which we determine to deny.

In order to vacate a default matter, a respondent must overcome a two-pronged test: (1) offer a reasonable explanation for the failure to answer the ethics complaint, and (2) assert a meritorious defense to the underlying charges.

In support of his motion to vacate the default, respondent submitted, through counsel, a brief and two certifications – one from respondent and one from Yennie Gonzalez. In respect of his failure to file an answer to the ethics complaint, respondent claimed that he did not receive the ethics grievances or

the DEC's letters and, therefore, did not knowingly fail to cooperate with disciplinary authorities. Respondent asserted that he has "experienced problems in the past with mail delivery at our office," and is once again facing such problems.

We note that, in 2016, in another default matter that was dismissed on other grounds (DRB 16-140), respondent blamed his secretary for failing to give him mail that had been delivered to respondent's office. During the ethics investigation of DRB 16-140, respondent assured the OAE that he had rectified the mail issues in the office, in part through the use of a post office box that he alone could access.

Respondent also experienced problems receiving mail from disciplinary authorities in the matter resulting in his recent three-month suspension. There, respondent's wife and employee, Anicia, accepted incoming mail, including mail from disciplinary authorities, and concealed it from respondent. In that matter, respondent represented to us that he had taken additional steps, including terminating Anicia's employment in March 2016, to ensure that all office mail reached him.

In respondent's current motion to vacate the default, he claimed that, once again, problems with his office mail prevented his receipt of correspondence from disciplinary authorities. He also questioned why the DEC had not sent

copies of the instant grievances to ethics counsel, as had been the practice in his prior unrelated disciplinary cases.

Respondent asserted that, if mail sent to his office does not specifically designate "2d floor," it might not be delivered to him, and maintained that none of the letters sent in this case contained a second-floor designation. He also faulted unidentified mail carriers for sometimes failing to deliver his mail to the second floor and for delivering other individuals' mail to him. Respondent claimed, without other supporting evidence, that he had complained about that mail issue to the postmaster, who stated that he "would look into it."

A July 3, 2019 certified mailing containing the ethics complaint was delivered to respondent's office address and accepted by someone who affixed an illegible signature to the certified mail receipt. In her February 6, 2020 certification, Yennie Gonzalez stated that, as a current employee, she retrieves mail from the post office and from the mail carrier who brings it to respondent's office. She then date-stamps the mail and calls respondent to inform him of the mail received that day. Ms. Gonzalez asserted that she immediately tells respondent of the arrival of any mail that requires a signature if he is not in the office at the time. She is the only person who signs for "the overnight mail, certified mail, or mail that arrives by courier."

Ms. Gonzalez certified that she had not seen, received, or signed for any documents in this matter. She specifically denied having signed the July 3, 2019 return receipt for the mail containing the complaint, which she also noted had no second-floor designation.

Respondent also denied receipt of the DEC's August 14, 2019 letter sent to his office address, by certified mail, without a second-floor designation. He noted that postal service tracking information indicated that the item had been left with an unidentified person.

On February 17, 2020, Kevin J. O'Connor, Esq., the DEC investigator and presenter in this matter, filed opposition to respondent's motion to vacate the default. In support of his position, he attached an audio file of an April 30, 2019 voicemail message left for him by an individual claiming to be an employee of respondent's office, who stated that respondent was aware of the two grievances in these matters, and that he would soon provide a confirming letter and written response to them.

Two days later, on February 19, 2020, we received a supplemental certification from respondent, in which he stated that he had filed his original, February 6, 2020 certification in good faith, believing its contents "to be true in all respects." Indeed, he claimed that, before he certified to us his non-receipt of the grievances in this matter, he checked with his office staff which, once

again, included his wife. Anicia also had denied receipt of the grievances.

However, when respondent listened to the presenter's recording of the April 30, 2019 voicemail, he realized that the voice was that of his wife. On February 19, 2020, despite her prior denial, Anicia admitted to respondent that she had left the voicemail message for the presenter. She claimed to have done so without respondent's knowledge or authority. Respondent stated: "I fired my wife today immediately and permanently. She will no longer have any involvement whatsoever with my office or my practice." He also denied any prior knowledge of the grievances or having discussed them with Anicia, as she had alleged in that voicemail.

In respect of the requirement that respondent provide a reasonable explanation for his failure to file an answer, we find his arguments woefully inadequate. First, he asked us to believe that, after years of problems with his office mail – and promises that he had resolved all those issues, including the representation that he had "fired" Anicia on one or more prior occasions – he received no DEC mail in respect of these grievances, because his office was located on the second floor. To accept respondent's claim would require us to be persuaded that he had not received the certified mail, the regular mail, a telephone message left for him with office staff, or a facsimile sent to his office. The latter two communications were not dependent on a second-floor

designation. Moreover, in the context of his heightened awareness of previous mail issues at his law office, it was incumbent on respondent to have a system in place to ensure his receipt of mail.

Then, on the eve of considering respondent's default, we learned that he had continued to permit Anicia to manipulate mail in his office, years after representing to disciplinary authorities that he had terminated her employment. We conclude that none of respondent's explanations for his failure to file a conforming answer, including the last-minute excuse contained in his supplemental certification, are reasonable. Thus, he has failed the first prong of the test to vacate the default.

In respect of prong two, meritorious defenses, respondent urged us to conclude that he properly represented his immigration clients, but that they were motivated to file grievances seven years after they were ordered removed from the United States, because changes in the political climate have fostered fear among undocumented immigrants that they may soon be removed from the United States.

In respondent's brief in support of the motion to vacate default, counsel stated that the "grievants filed a motion to reopen the in-absentia deportation order. To do that, they had to throw [respondent] under the bus, arguing ineffective assistance of counsel, which they established under prevailing law

by simply filing an unsubstantiated grievance against [respondent]."

In respect of the charge that he lacked diligence in the representation, respondent claimed to have met numerous times with the clients' mothers and to have prepared pleadings for their Special Immigrant Juvenile status. He rejected assertions in the complaint that either of his clients had sought protection as a member of a protected class or that they had expressed a fear of persecution if they were returned to their home country.

Respondent maintained that, on October 10, 2011, he notified the clients of their required appearance at the February 21, 2012 immigration hearing; that, on February 8, 2012, he submitted an adjournment request, but did not appear at the February 21, 2012 hearing; and that office staff confirmed with one of the mothers (on an unspecified date) that she and the clients would attend the hearing, because respondent had a conflict that day.

Respondent neither asserted that his adjournment request was granted nor explained his failure to appear in court on February 21, 2012, without leave of court. Rather, he simply blamed his minor clients for their failure to attend the hearing. Respondent also surmised, without support, that removal orders likely would not have been entered had his clients attended the hearing without him.

Respondent also denied receiving the removal orders entered against his clients after the February 21, 2012 hearing, for reasons that he did not explain.

Thereafter, according to respondent, the clients, not he, "abandoned their cases" from February 2012 through 2018. Finally, respondent denied having received a March 30, 2018 letter, from the clients' new attorney, expressing their dismay to learn in 2018 that they had been ordered removed to their home country six years earlier.

In our view, respondent's defense to the charge that he lacked diligence in the representation lacks merit. After failing to attend his clients' removal hearing, he remained attorney of record until 2018, when they obtained substitute counsel. During those final six years of the representation, respondent took no action to advance his clients' claims, but, instead, blamed them for failing to appear at their hearing and for their purported failure, thereafter, to contact him.

Respondent also failed to provide a meritorious defense to the charge that he failed to reply to his clients' requests for information about their matter and to keep them reasonably informed about events in the case. Once again, respondent blamed his clients – for failing to communicate with him. Yet, respondent has provided no evidence of any attempts to communicate with his clients from their February 2012 removal hearing through 2018, when they retained subsequent counsel.

Respondent offered no meritorious defense to the charge that he failed to set forth, in writing, the basis or rate of his fee. He certified that his written fee agreement with the parties was for a flat $5,000 fee, $1,000 of which was nonrefundable, and claimed that this was a below market fee. Importantly, respondent's certification did not discuss another provision in that same paragraph, which undercuts respondent's claim of a flat fee agreement: "[t]he Attorney cannot forecast or guarantee the total amount to be paid for the legal services provided. The amount will depend on the time spent working for your case plus any other related expenses."

The fee agreement, therefore, clearly stated that respondent could not predict the total fee and that he would commence work on receipt of an initial payment. Respondent's failure to state the manner in which those additional fees would be calculated (hourly, and if so, the hourly rate, or additional lump sum payments) renders the agreement deficient and renders his proffered RPC 1.5(b) defense meritless.

Finally, respondent failed to provide a meritorious defense to the RPC 8.1(b) charge. He claimed that "the grievances were readily refutable" and denied receiving any relevant correspondence from the DEC. For the reasons stated earlier, in respect of prong one, respondent's denials of having received mail from disciplinary authorities lack credibility.

Respondent, thus, failed to provide meritorious defenses to the numerous charges against him. We, thus, determine that he also failed to satisfy prong two of the test. Accordingly, we deny respondent's motion to vacate the default and turn to the substance of the complaint.

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

In 2009, JJT and JMT, both minors, fled Honduras to seek asylum in the United States. After their entry at the Texas border, federal authorities instituted removal proceedings against them. While awaiting those proceedings, the boys traveled to Morris County, New Jersey, where they were reunited with family members.

On November 8, 2010, the boys' family retained respondent to press their asylum claims and to attempt to prevent their removal from this country. Family members paid respondent $4,000 and were given a written fee agreement that failed to set forth the basis or rate of respondent's fee. RPC 1.5(b) provides that, when an attorney has not regularly represented the client, the basis or rate

of the fee shall be communicated in writing before or within a reasonable time after commencing the representation. Respondent's failure to provide that information constituted a violation of RPC 1.5(b).

In respect of the $1,000 non-refundable portion of respondent's fee, RPC 1.5(a) provides that all attorney fees shall be reasonable. Yet, respondent's entire $4,000 fee may have been unearned. He never met with the clients about their asylum claims, filed no asylum applications, and failed to take steps to prevent their removal from the United States – the legal issues for which he had been retained.

Respondent's fee might have been reasonable, had he performed the legal services for which he was retained, but the complaint contains insufficient facts for us to draw any conclusion about the reasonableness of the fee. In the absence of sufficient evidence to support a finding that the fee was unreasonable, we dismiss the RPC 1.5(a) charge. Parenthetically, although respondent apparently kept the entire $4,000 fee, the complaint did not charge an RPC 1.16(d) violation for his failure to refund any unearned portion of the fee. Therefore, we make no finding in respect of that Rule.

In early December 2010, respondent filed notices of appearance in the boys' respective immigration matters. Thereafter, he failed to meet with the clients about their asylum claims. In October 2011, the Immigration Court

issued a notice to respondent that a removal hearing had been scheduled for February 21, 2012. Yet, respondent failed to appear at that hearing and, a short time later, received a notice that his clients had been ordered removed from the United States for failure to appear at the removal hearing. Respondent took no action to contest the removal order. Respondent's failure to present his clients' asylum claims to immigration authorities or to protect their claims amounted to a lack of diligence, in violation of RPC 1.3. Although the record would also support a finding of gross neglect, because respondent was not charged with a violation of RPC 1.1(a), we make no finding in respect of that Rule.

For six years, from 2012 through March 2018, numerous telephone calls were placed to respondent in behalf of the boys, seeking information about the status of their asylum applications. Those calls went unanswered. Apparently, the clients were unaware of the removal orders for six years, until March 2018, when they retained attorney Smotritsky to represent them. Although Smotritsky wrote to respondent seeking information about the cases, respondent failed to reply. Respondent's utter failure to keep his clients adequately informed about their matters and to respond to their reasonable requests for information violated RPC 1.4(b).

Finally, respondent failed to reply to the DEC investigator's three letters and a telephone message left for him at his office, requesting his written reply

to the grievances. Although someone at respondent's office left a voicemail for the investigator, indicating that respondent would provide replies to the grievances, he never did so. For his failure to reply to the DEC's requests for information and permitting this matter to proceed to us as a default, respondent is guilty of having violated RPC 8.1(b).

In sum, we find that, in a consolidated matter involving two clients, respondent violated RPC 1.3, RPC 1.4(b), RPC 1.5(b), and RPC 8.1(b). We determine to dismiss the charge that he violated RPC 1.5(a). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

Generally, an admonition is the appropriate form of discipline for lack of diligence and failure to communicate with the client. See, e.g., In the Matter of Christopher G. Cappio, DRB 15-418 (March 24, 2016) (after the client had retained the attorney to handle a bankruptcy matter, paid his fee, and signed the bankruptcy petition, the attorney failed to file the petition or to return his client's calls in a timely manner); In the Matter of Charles M. Damian, DRB 15-107 (May 27, 2015) (attorney filed a defective foreclosure complaint and failed to correct the deficiencies, despite notice from the court that the complaint would be dismissed if they were not cured; after the complaint was dismissed, he took no action to vacate the dismissal, a violation of RPC 1.3; the attorney also failed

to tell the clients that he had never amended the original complaint or filed a new one, that their complaint had been dismissed, and that it had not been reinstated, a violation of RPC 1.4(b); compelling mitigation considered); and In the Matter of Stephen A. Traylor, DRB 13-166 (April 22, 2014) (attorney was retained to represent a Venezuelan native in pending deportation proceedings instituted after he had overstayed his visa; although the attorney and his client had appeared before the immigration court on three separate occasions, the attorney failed to file a Petition for Alien Relative Form until several days after his client was ordered deported; the attorney then failed to inform the client that a subsequent appeal from that order was denied; the petition was granted months later; violations of RPC 1.3 and RPC 1.4(b)).

Conduct involving the failure to set forth, in writing, the basis or rate of a fee, as RPC 1.5 requires, typically results in an admonition, even if accompanied by other, non-serious ethics offenses. See, e.g., In the Matter of Jean Watson E. Francois, DRB 18-042 (April 24, 2018) (after being retained to defend a municipal traffic summons and receiving $200 for the representation, the attorney failed to set forth in writing the basis or rate of the legal fee, a violation of RPC 1.5(b); lack of diligence and failure to communicate with the client also found); In the Matter of John L. Conroy, Jr., DRB 15-248 (October 16, 2015) (attorney drafted documents and processed a disability claim for a new client

without setting forth the basis or rate of the fee in writing; the attorney also practiced law, albeit while unaware that he was administratively ineligible to do so for failure to submit required IOLTA forms, a violation of RPC 5.5(a); thereafter, the attorney lacked diligence, failed to communicate with the client, and failed to reply to the ethics investigator's three requests for information, violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b), respectively; in mitigation, the attorney entered into a disciplinary stipulation, returned the entire $2,500 fee, and had an otherwise unblemished record in forty years at the bar); and In the Matter of Osualdo Gonzalez, DRB 14-042 (May 21, 2014) (attorney failed to communicate to the client, in writing, the basis or rate of the fee, a violation of RPC 1.5(b); he also failed to communicate with the client, a violation of RPC 1.4(b); in addition, the attorney caused his client's complaint to be withdrawn, based on a statement from the client's prior lawyer that the client no longer wished to pursue the claim, a violation of RPC 1.2(a); we considered, in mitigation, the attorney's otherwise unblemished twenty-seven-year career at the bar and several letters attesting to his good moral character).

Ordinarily, admonitions are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (attorney failed to reply to repeated requests for information from the ethics investigator

regarding his representation of a client in three criminal defense matters, a violation of RPC 8.1(b)) and In the Matter of Spencer B. Robbins, DRB 14-315 (February 25, 2015) (attorney failed to reply to the ethics investigator's three letters requesting information about the client's grievance; although the attorney had assigned the reply to the grievance to another attorney in the office, it remained his own responsibility to ensure that a reply to the grievance was filed).

Standing alone, an admonition might have sufficed for the combination of infractions present here. In crafting the appropriate discipline in this matter, however, we also must consider aggravating and mitigating factors.

First and foremost, respondent's utter inaction after being retained caused serious harm to his clients. They were minors, seeking asylum and were ordered removed from the United States, in absentia, as a direct result of respondent's wholesale failure to prosecute their claims. A reprimand, thus, is the baseline sanction warranted.

In further aggravation, however, we must consider the default status of this matter. "[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) (citations omitted). In light of respondent's default, the enhanced sanction of a censure is warranted.

On balance, considering both the harm to the clients and respondent's default, Chair Clark and members Boyer and Hoberman voted to impose a censure. Members Rivera, Singer, and Zmirich voted to impose a three-month suspension, consecutive to the three-month suspension that the Court imposed on April 9, 2020.

Vice-Chair Gallipoli and Members Joseph and Petrou did not participate.

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
Bruce W. Clark, Chair

By: _____
For: Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Nelson Gonzalez
Docket No. DRB 19-363

Decided: June 23, 2020

Disposition: Other

Members	Censure	Three-Month Suspension	Recused	Did Not Participate
Clark	X			
Gallipoli				X
Boyer	X			
Hoberman	X			
Joseph				X
Petrou				X
Rivera		X		
Singer		X		
Zmirich		X		
Total:	3	3	0	3

For: Ellen A. Brodsky
Chief Counsel