

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-101
District Docket No. XIV-08-0505E

IN THE MATTER OF
JOHN A. MISCI, JR.
AN ATTORNEY AT LAW

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Decision

Decided: July 20, 2010

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

This matter came before us on a certification of default filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-4(f). The complaint charged respondent with violating RPC 1.5(b) (failure to reduce the basis or rate of the fee to writing), RPC 1.16(b), (c) and (d) (withdrawal from representation), RPC 3.3(a)(1) and (4) (false statement of material fact or law to a tribunal and offering evidence the lawyer knows to be false), RPC 4.1(a)(1) (false statement of material fact or law to a third person), and RPC 8.4(c) (conduct

involving dishonesty, fraud, deceit or misrepresentation). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1995. He has no history of discipline. The New Jersey Lawyers' Fund for Client Protection report lists respondent as having been retired since 2009.

Service of process was proper. On January 15, 2010, the OAE forwarded a complaint to respondent via certified and regular mail at his last known home address: 111 Pristine Place, Sewell, New Jersey, 08080. The certified mail was returned marked "unclaimed." The regular mail was not returned.

On January 26, 2010, the OAE received correspondence from Brian L. Calpin, Esq., advising that respondent had consulted with him about this matter. Calpin's letter stated that respondent denied the allegations of the complaint, but that he would not be filing an answer. Specifically, Calpin stated:

As Mr. Misci has indicated to you, he has been determined disabled by the United States Social Security Administration.

Mr. Misci denies each and every material allegation in the ethics complaint.

Mr. Misci is not filing a formal answer in this matter, as he does not want to [sic] the Office of Attorney Ethics and the State of New Jersey to incur any costs and he has

no present intention to practice law
anywhere.

[OAECEx.4.]¹

Thereafter, by letter dated January 28, 2010, the OAE advised Calpin that respondent was required to file an answer, pursuant to R. 1:20-4(e). A copy of the complaint and of the service letter was enclosed with the OAE's letter.

The OAE sent a second letter to Calpin, on February 18, 2010, advising him that, unless respondent filed an answer within five days of the date of the letter, the allegations of the complaint would be deemed admitted and the record would be certified to us for the imposition of discipline. The letter also served to amend the complaint to charge respondent with violating RPC 8.1(b), based on his failure to file an answer. Respondent did not file an answer to the complaint.

In March 2008, Sharnay Paschall retained respondent to represent her in municipal court. Paschall paid respondent \$600, with a balance of \$200 to be paid at a later time. In April 2008, respondent appeared in court with Paschall. The

¹ OAECE refers to the OAE's certification of the record, dated March 22, 2010.

matter was not resolved and was scheduled for trial at a special court session, on July 14, 2008 at 3:30.²

On July 14, 2008, the parties and witnesses appeared in court. Respondent did not appear. When the judge inquired about respondent, Paschall stated that respondent would not appear because she owed him \$200. Paschall further advised the court that respondent had instructed her to seek an adjournment and that he would represent her, when she paid him in full.

Exhibit 1 to the complaint provides more insight into what occurred in court that day:

I returned to the bench and my Court Administrator handed me a Substitution of Attorney form marked received by this Court on May 13, 2008 [reference omitted]. This was the first time I saw that form. I then questioned [Paschall] and she denied any knowledge of that form. She also denied signing it. I placed her and her mother under oath and they both denied ever seeing that form or signing it. They also pointed out that the defendant's purported name and signature were misspelled.

I then directed my Court Administrator to contact Mr. Misci's office and have him report to Court by 6pm.

He arrived and entered the Court chambers with the words "What's the problem?"

² This was a special listing for only this case. The regular court session began later in the day.

I explained the problem. He repeatedly insisted his client signed the Substitution of Attorney form. I told him she denied signing the form or ever seeing it. I also pointed out the misspelling of her name and signature. I also showed him her signature on the Public Defender's Application. Nevertheless, he again insisted that the Defendant signed the Substitution of Attorney Form.

[CEx.1.]³

Respondent denied having forged Paschall's signature on the form.

During the OAE's investigation, respondent admitted that he did not reduce the basis or rate of the Paschall fee to writing. Count two of the complaint charged him with violating RPC 1.5(b).

Pursuant to R. 1:20-4(f)(1), an attorney's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. Despite respondent's "admission" of the charges, however, we determine to dismiss most of them.

Specifically, according to the complaint, Paschall denied having signed the substitution of attorney. Respondent, in turn,

³ C refers to the formal ethics complaint, dated January 12, 2010.

claimed that Paschall had signed it and denied having forged her signature on the document. Despite Paschall's and respondent's conflicting statements in its factual recitation, the complaint charged that the "conduct as described above" violated the following RPCs: RPC 1.16, in that respondent attempted to improperly terminate the representation; RPC 3.3, in that respondent presented a forged substitution of attorney to the court; RPC 4.1, in that he made a false statement to the court about the status of his representation of Paschall; and RPC 8.4(c), in that he engaged in conduct involving dishonesty and deceit.

The facts recited in the complaint, however, do not support a finding of a violation of the above RPCs. Although it is true that, in a default case, the allegations of the complaint are deemed admitted, the complaint must contain sufficient facts to sustain the charged RPC violations. That was not the case here. We, therefore, determine to dismiss the above charges.

On the other hand, the allegation of count two of the complaint has been sustained. According to the complaint, respondent admitted to the OAE that he had not reduced to writing the rate or basis of the fee charged to Paschall. He,

therefore, violated RPC 1.5(b). He also violated RPC 8.1(b) by not filing an answer to the complaint.

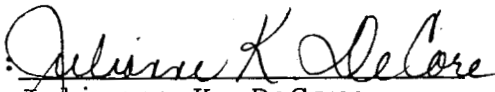
Conduct involving a violation of RPC 1.5(b), even when accompanied by other, non-serious ethics offenses, results in an admonition. See, e.g., In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (attorney failed to memorialize the rate or basis of his fee and, in another client matter, failed to promptly deliver funds to a third party); In the Matter of Alfred V. Gellene, DRB 09-068 (June 9, 2009) (in a criminal appeal, the attorney failed to furnish the client with a writing that set forth the basis or rate of his fee; the attorney also lacked diligence in the matter); In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007) (in an estate matter, the attorney failed to provide client with a writing setting forth the basis or rate of his fee); and In the Matter of Carl C. Belgrave, DRB 05-258 (November 9, 2005) (attorney was retained to represent the buyer in a real estate transaction, and failed to state in writing the basis of his fee, resulting in confusion about whether a \$400 fee was for the real estate closing, or for a prior matrimonial matter for which the attorney had provided services without payment; recordkeeping violations also found).

Absent respondent's failure to answer the complaint, the suitable discipline for his failure to memorialize the rate or basis of his fee would be an admonition. In default matters, however, the discipline is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6). We, therefore, determine that the otherwise appropriate discipline for respondent's violation of RPC 1.5(b), an admonition, must be increased to a reprimand.

Member Stanton 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
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

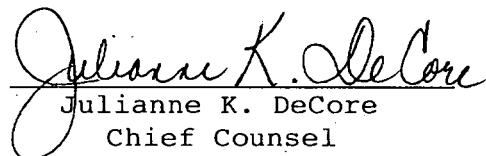
In the Matter of John A. Misci, Jr
Docket No. DRB 10-101

Argued: May 20, 2010

Decided: July 20, 2010

Disposition: Reprimand

<i>Members</i>	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton						X
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1


Julianne K. DeCore
Chief Counsel