

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-279
District Docket No. VI-09-0012E

IN THE MATTER OF :
ALAN S. PORWICH :
AN ATTORNEY AT LAW :

Decision

Decided: December 14, 2010

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

This matter was before us on a certification of default filed by the District VI Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.3 (lack of diligence) and RPC 1.4, presumably (b) (failure to communicate with the client) in a personal injury matter. We determine to impose a reprimand.

Respondent filed a motion with us seeking to have the default vacated. We denied respondent's motion.

In order for a default to be vacated, a respondent must meet a two-pronged test. The motion must provide a reasonable explanation as to why the respondent failed to file an answer to the complaint and also present a meritorious defense to the allegations in the complaint. Respondent's motion did not meet the test. The motion set forth a number of personal issues that respondent has faced, specifically, the deaths of his mother, sister, and father-in-law, and the break-up of his marriage. As to professional issues, respondent stated that he had taken on more clerical duties, in part because his secretary had missed "significant amounts of time," due to personal and medical issues. He stated that it had become more and more difficult for him to deal with his practice.

Respondent's motion attached a proposed answer, admitting the allegations in the complaint, but stating that, "under the circumstances," his inaction was reasonable. The answer also set forth the above events as mitigating circumstances.

Although respondent painted a sympathetic picture, we were compelled to deny his motion to vacate the default.

Respondent's personal issues do not explain his dereliction, which he admitted, in his representation of his client. To begin, his matrimonial situation arose in March 2009, when the representation had been long over. As to his sister's death, she slipped into a coma in October 2006. That unfortunate event does not explain respondent's failure to communicate with his client, beginning in July 2006. Similarly, respondent's mother's illness, in the spring of 2008, does not justify his failure to communicate with his client before then or his failure to forward the client's file, after his services were terminated in November 2008. Respondent has not provided a meritorious defense to the underlying charges.

Moreover, although his mother's illness, in mid-2009, could explain his initial failure to reply to the grievance at that time, her death, in November 2009, does not explain his ignoring a letter from the DEC in April 2010, requesting a reply to the grievance. Furthermore, it does not explain his failure to answer the complaint, which was served on him on May 19, 2010.

Although respondent's matrimonial situation could explain his failure to answer the complaint (his wife filed for divorce in January 2010 and left their house in June 2010; respondent

received a five-day letter from the DEC in late June or early July 2010), as noted above, he has failed to present a meritorious defense to the underlying charges. In fact, he admitted the allegations of the complaint. Therefore, we determined that this matter must proceed on a default basis.

Respondent was admitted to the New Jersey bar in 1979. He is a partner in the firm of Feintuch, Porwich & Feintuch, in Jersey City. In 1999, he was reprimanded for misconduct in three matters. There, he was found guilty of a combination of gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to cooperate with disciplinary authorities, and misrepresentation to one client. In re Porwich, 159 N.J. 511 (1999).

Service of process was proper in this matter. On May 19, 2010, the DEC secretary sent a copy of the complaint, by certified and regular mail, to respondent's office address: 721 Newark Avenue, Jersey City, New Jersey 07306. The certified mail receipt indicates delivery on May 20, 2010. The signature is not respondent's. The regular mail envelope was not returned. Respondent did not file an answer to the complaint.

On June 29, 2010, the DEC secretary sent a second letter to the above address, via certified and regular mail. The letter advised respondent that, if he did not file an answer within five days, 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. Neither the regular mail nor the certified mail receipt has been returned.

Respondent did not file an answer to the complaint.

According to the complaint, in April 2005, Ismail Salgado retained respondent to represent him in a personal injury matter. Despite numerous requests by Salgado, respondent did not forward a formal retainer agreement to him until July 2006. Salgado executed the agreement and returned it to respondent in July 2006.

Beginning in July 2006, and continuing through November 2008, Salgado made numerous attempts to communicate with respondent about the status of his claim, to no avail. As a result of respondent's failure to communicate with Salgado, in November 2008 Salgado terminated respondent's services. Thereafter, Salgado requested that respondent forward a copy of

is file. Despite respondent's agreement to forward the file, as of the date of the complaint he had failed to do so.¹

On May 8, 2009, a copy of Salgado's grievance was sent to respondent. Respondent did not reply to it. In January 2010, respondent was contacted by telephone (presumably by the DEC) and stated that his failure to reply was due to the death of his mother. Respondent represented that a reply to the grievance would be forthcoming.

On April 16, 2010, the DEC sent a second letter to respondent requesting a reply to the grievance by April 20, 2010, and advising him that his failure to do so would cause the allegations in the grievance to be deemed admitted. Respondent did not provide a reply to the grievance.

Respondent'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. R. 1:20-4(f)(1). The facts recited in the complaint support some, but not all of the charges of unethical

¹ In his motion to vacate the default, respondent stated that he has made arrangements for Salgado to obtain his file.

conduct. Indeed, although the complaint cites RPC 1.3, it does not allege any facts that would sustain that charge. We, therefore, make no finding that respondent lacked diligence in the representation of Salgado. As to the other charged violation, RPC 1.4(b), the allegations of the complaint amply support a finding that respondent did not adequately communicate with his client.

The complaint also states that Salgado terminated respondent's services in November 2008 and requested that respondent forward a copy of his file. As of the date of the complaint, respondent had failed to do so. Although the complaint did not cite RPC 1.16(d) (failure to protect a client's interests on termination of the representation), the facts recited therein gave respondent ample notice of the nature of the alleged unethical conduct. Therefore, a finding of a violation of RPC 1.16(d) would not violate respondent's due process rights. We find that respondent violated RPC 1.16(d).

Similarly, we find that respondent's failure to cooperate with the disciplinary investigation violated RPC 8.1(b). The facts set forth in the complaint provided sufficient notice to respondent that a finding of misconduct based on his failure to reply to Salgado's grievance could be made.

In sum, we find that respondent violated RPC 1.4(b), RPC 1.16(d), and RPC 8.1(b).

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Edward G. O'Byrne, DRB 06-175 (October 27, 2006) (attorney did not inform his client about court-imposed costs against the client and delayed notifying him of a motion subsequently filed by the adversary for the collection of those costs); In the Matter of Alan Zark, DRB 04-443 (February 18, 2005) (attorney did not reply to the clients' requests for information about their matter; in addition, the attorney caused his clients unnecessary concern over the disposition of some checks to be transmitted to a court-appointed fiscal agent when the attorney turned over the checks to the agent six months later, without first notifying the clients); In the Matter of William H. Oliver, DRB 04-211 (July 16, 2004) (attorney failed to keep client apprised of developments in her matter, including a sheriff's sale of her house); In the Matter of Howard S. Diamond, DRB 01-420 (February 8, 2002) (attorney failed to reply to executrix' inquiries and concerns about an estate matter); and In the Matter of Paul A. Dykstra, DRB 00-182 (September 27,

2000) (attorney failed to inform his clients that an arbitration award that the clients declined to accept had never been appealed but had been dismissed a year earlier).

An admonition can still result if the case also involves other, non-serious ethics improprieties. See, e.g., In the Matter of John S. Giava, DRB 01-455 (March 15, 2002) (instead of obtaining a wage execution against a defaulting buyer of real estate previously owned by his clients, attorney entered into an agreement with the buyer for monthly installment payments, without first consulting with the clients; the attorney also did not timely reply to the clients' reasonable requests for information about the case and did not provide them with a writing setting forth the basis or rate for his fee) and In the Matter of Vera Carpenter, DRB 97-303 (October 27, 1997) (attorney failed to act diligently, failed to communicate with a client, and failed to turn over the client's file to new counsel).

Absent a default, respondent's failure to communicate with Salgado and his failure to turn over the client file would result in an admonition. Respondent, however, did not file an answer to the complaint. In default matters, the proper discipline for the found ethics violations 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). Thus, the appropriate discipline in this case is a reprimand.

One additional point must be mentioned. Respondent does have a disciplinary history. He received a reprimand in 1999. Ordinarily, an attorney's prior discipline would serve to ratchet up the appropriate discipline to the next level — here, a censure. There is, however, a measure of human sympathy for respondent's plight and the sad events that have befallen him. Even though these circumstances do not excuse his mishandling of Salgado's matter or his failure to file an answer to the complaint, we have considered them in assessing the measure of discipline. See In re Battaglia, 179 N.J. 419 (2004) (where we denied a motion to vacate a default proceeding, but allowed the attorney to submit mitigating evidence.) Here, too, although not vacating the default, we considered the offered mitigating factors in assessing the appropriate measure of discipline and concluded that a reprimand is sufficient discipline for respondent's infractions.

Vice-chair Frost 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
Julianne K. DeCore
Chief Counsel


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Alan S. Porwich
Docket No. DRB 10-279

Decided: December 14, 2010

Disposition: Reprimand

Members	Disbar	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