SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-222
District Docket No. IV-08-047E

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

Corrected
Decision

Decided: February 18, 2011

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 District IV Ethics Committee (DEC), pursuant to R. 1:20-4(f). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to communicate with the client), RPC 1.5(a) (unreasonable fee), RPC 1.5(b) (failure to reduce the basis or rate of the fee to writing), and RPC 7.1(a)(4) false statement about the lawyer's services). We determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1995. On October 5, 2010, respondent was reprimanded in a default matter for failing to reduce the basis or rate of his fee to writing and for failing to cooperate with disciplinary authorities. In re Misci, 203 N.J. 429 (2010).

Respondent was temporarily suspended by order dated September 27, 2010 for failing to comply with a fee arbitration determination.

The report of the New Jersey Lawyers' Fund for Client Protection indicates that respondent has been retired from the practice of law in New Jersey since June 12, 2009.

Service of process was proper. On March 23, 2010, the DEC secretary forwarded a copy of the complaint, via certified and regular mail, to respondent's last known home address, 111 Pristine Place, Sewell, New Jersey, 08080. The certified mail was returned marked "unclaimed." The regular mail was not returned. Respondent did not file an answer to the complaint.

The DEC secretary received a letter, dated April 5, 2010, from Brian L. Calpin, Esq. on respondent's behalf. Calpin advised that respondent had consulted him about the within matter. Calpin stated further that respondent denied the allegations of the complaint and that he would not be filing an answer because "he does not want the Committee, the Office of

Attorney Ethics, the State of New Jersey or any other person or entity to incur any costs and he has no intention ever again [sic] practice law anywhere." Calpin advised the DEC that respondent had been retired from the practice of law since July 15, 2008.

Thereafter, by letter dated April 20, 2010, the DEC secretary advised respondent and Calpin that Calpin's letter was an insufficient answer, did not contain a verification from respondent, and did not meet the requirements of the court rules. By way of that letter, the DEC secretary advised respondent that, should he fail to file a verified answer, the allegations of the complaint would be deemed admitted and the record would be certified to us. Respondent was further advised that his lack of cooperation with the DEC could be deemed a violation of RPC 8.1(b). The DEC secretary noted in his letter that, although respondent had been listed in the Lawyers' Diary as "inactive," it appeared that a resignation without prejudice had not been completed. The letter was sent to respondent by certified and regular mail at the above address and to Calpin by regular mail. The regular mail was not returned. The certified mail was returned unclaimed.

The record contains a July 7, 2010 letter from respondent to the DEC secretary, denying the allegations in the complaint

and stating that he was "**never** filing a formal answer." The record contains a similar letter from respondent to Office of Board Counsel (OBC), dated August 10, 2010. There, respondent questioned the integrity of the investigation in this matter and again denied the allegations in the complaint.

We now proceed to the allegations of the complaint.

Count One

In April 2007, Vincent Masciandaro retained respondent to represent him in a matrimonial matter. Respondent failed to advise Masciandaro of a pending motion to strike his pleadings, as well as the consequences of failing to reply to the motion, the consequences of the entry of default, and the consequences of failing to reply to his adversary's discovery request. He did not timely advise Masciandaro that responses to the motion seeking default and to discovery requests were due. It was not until the deadline for a responsive pleading had passed that respondent so advised Masciandaro.[1] Respondent also failed to serve any discovery on Masciandaro's behalf.

[1] There was a dispute as to whether Masciandaro was ever advised, by letter, of his need to reply to the motion and to comply with discovery requests. Masciandaro denied receipt of two letters found in respondent's file, which were incorrectly addressed.

After default was entered, respondent did not advise Masciandaro that the default was entered without prejudice or of the consequences of failing to cure the default. Moreover, he failed to timely advise Masciandaro, the Matrimonial Early Settlement Panel (MESP), and his adversary that he would not participate in the panel. It was not until the day before the MESP meeting, and after the MESP memo was due, that respondent sent a letter to the panel advising that he would not participate.

The complaint alleged that:

> Respondent failed to properly explain what the nature of an equitable distribution hearing was, the precise meaning of 'default' as well as that his Answer was 'struck' and not that he had dismissed 'his Complaint' . . . and that, as a party to the equitable distribution hearing, respondent would be unable to participate in a meaningful way.
>
> [C¶9.][2]

Masciandaro believed, until the date of "the hearing," that his matter would be "strongly contested," that respondent would present his case, and that he would have a chance to testify. In fact, he was barred from testifying and respondent was "barred from making his own case." The complaint alleged that

[2] C refers to the complaint, dated March 18, 2010.

respondent failed to properly represent Masciandaro, listing several issues that respondent failed to address at an equitable distribution hearing in May 2008.

The complaint charged respondent with violating RPC 1.1(a), RPC 1.3, and RPC 1.4(b).

Count Two

In August 2007, respondent wrote to Masciandaro, advising him that his initial $8,000 retainer was depleted and demanding that Masciandaro send another $8,000. Masciandaro requested an itemized bill showing how the initial retainer had been used. The seven bills that respondent simultaneously sent covered only the first two and a half months of the representation. Respondent "demanded" the additional $8,000 from Masciandaro, threatening to discontinue his representation and cease further action on his behalf until he received the funds. Masciandaro paid respondent $19,000, of which only $8,000 of services and costs appeared to be accounted for in the bills that respondent forwarded to him.

Respondent failed to provide Masciandaro with a basis for his fee, in writing. In addition, his fee was unreasonable. For example, Masciandaro received a bill indicating that respondent had spent five hours to prepare an answer to the

complaint and five hours to research an issue without the benefit of discovery, which research was not located in his file.

The complaint also alleged that respondent "provided false information regarding his legal obligation to continue services, even in the absence of continued payment." According to the complaint, respondent was not permitted to cease work on the case without filing and prevailing on a motion to do so.

The complaint charged respondent with violating RPC 1.5(a), RPC 1.5(b) and RPC 7.1(a).

We find that the facts recited in the complaint support the charges of unethical conduct. We deem respondent's failure to file an answer an admission that the allegations of the complaint are true, with one exception, and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f).

The complaint charged respondent with violating RPC 7.1(a), alleging that he made false statements to his client about his intention to withdraw from the representation, if not paid additional fees. RPC 7.1(a), an advertising rule, is inapplicable to the within facts. Moreover, given the limited information supplied about the underlying matter, it is difficult to conclude with certainty that respondent could not

have withdrawn from the representation. We, therefore, dismiss that allegation.

The remaining allegations of the complaint establish that respondent was grossly negligent, lacked diligence, failed to communicate with his client, charged an unreasonable fee, and failed to reduce the basis or rate of his fee to writing. He also failed to cooperate with disciplinary authorities, when he allowed this matter to proceed as a default.

An attorney's failure to reduce the basis of a fee to writing, even when accompanied by other, non-serious ethics offenses, typically 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; in another client matter, he 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 the 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, but failed to state in writing the basis of his fee, resulting in confusion on 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).

In the above cases, the attorney was guilty of only one additional ethics violation. Here, respondent was grossly negligent, lacked diligence, and failed to communicate with a client in one matter and allowed this matter to proceed as a default.

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).

We find it unjust to consider respondent's prior reprimand as an aggravating factor in this case. The reprimand was issued shortly before we considered the within matter. Moreover, the grievance giving rise to that matter was filed roughly one year after respondent committed the infractions before us now. A fitting aggravating factor, however is respondent's contempt for the disciplinary system, as reflected in his letters. Respondent's letter to OBC chief counsel, dated August 10, 2010,

reflects a lack of respect for disciplinary authorities, this Board, and the Court, the likes of which we have seldom seen. Furthermore, that respondent allowed this matter to proceed as his second default evidences his indifference to the disciplinary system.

In light of respondent's unethical behavior and the above-cited aggravating factors, we determine to impose a three-month suspension.

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