SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-039
District Docket Nos. I-2010-0002E
and I-2010-0007E

IN THE MATTER OF	:
DUANE T. PHILLIPS	:
AN ATTORNEY AT LAW	:

Decision

Decided: July 22, 2011

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

The matter under District Docket No. I-2010-0002E was previously before us, as a default, at our January 21, 2010 session. At that time, we granted respondent's motion to vacate the default and directed him to file a verified answer by February 16, 2010. He filed an answer. In the interim, a new grievance against respondent was filed. The DEC, therefore, filed a new complaint, consolidating the charges in the remanded complaint and in the new disciplinary matter. Respondent failed to file a verified answer to that complaint. The consolidated matters are now before us on a default basis.

The five-count consolidated complaint charged respondent with violating RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with a client), RPC 3.2 (failure to expedite litigation), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and R. 1:20-3(g), more appropriately, RPC 8.1(b) (failure to comply with a reasonable request for information from a disciplinary authority).

On April 12, 2011, respondent once again filed a motion to vacate this default. For the reasons expressed below, we deny respondent's motion and determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1993. He maintains law offices in Absecon and Brigantine, New Jersey.

In 2010, respondent was admonished for representing a client in her Nevada divorce proceedings, even though he was not licensed to practice law in that state, thereby violating RPC 5.5(a)(1) (unauthorized practice of law).

Service of process was proper in this matter. As mentioned previously, after we granted respondent's motion to vacate the default in District Docket No. I-2009-0004E (now I-2010-0002E), by copy of Office of Board Counsel's letter, dated January 29, 2010, respondent was instructed to file a verified answer to the complaint on or before February 16, 2010. Respondent filed an answer dated February 23, 2010. In the interim, a second

grievance was filed against respondent, arising from the same facts. Under cover letter dated November 10, 2010, the DEC mailed a copy of a complaint consolidating the charges in the remanded matter and the new charges, by regular and certified mail, to respondent's office address, 705 White Horse Pike, Absecon, New Jersey 08201. Respondent signed the certified mail receipt. The regular mail was not returned.

A post-script to the DEC's November 10, 2010 letter instructed respondent to file an answer to the new complaint, even though he had previously filed an answer in connection with the remanded matter. Respondent failed to do so. Therefore, on December 7, 2010, the DEC sent a second letter to respondent, by regular and certified mail, informing him that, if he did not file an answer within five days, the matter would be certified to us for the imposition of discipline and the complaint would be deemed amended to include a willful violation of RPC 8.1(b). As of the date of the certification of the record, December 17, 2010, the regular mail had not been returned, the certified mail receipt had not been returned, and respondent had not filed an answer to the complaint addressing the additional charges.

As noted above, on April 12, 2011, respondent filed a motion seeking, among other things, to vacate the default. To succeed on such a motion to vacate a default, a respondent must

satisfy a two-prong test: (1) offer a reasonable explanation for the failure to file an answer and (2) assert a meritorious defense to the ethics charges.

In the certification in support of his motion, respondent stated that he had filed a lawsuit on behalf of his clients, but that the judge presiding over the case had improperly dismissed it, even though respondent had provided the defendants with discovery. Respondent claimed that he had not been treated fairly by the judge because he was not a friend of the judge and accused him of bias. Respondent further accused the DEC secretary of masterminding a fraud against one of respondent's other clients, conduct that, he claimed, the same judge had authorized. Therefore, he contended, he did not want to risk going forward with a hearing in this ethics matter because he did not believe that he would get a fair hearing, just as his client did not get a fair hearing in the civil matter.

Respondent conceded, however, that the grievants had been "right," and that he should have prosecuted their cases "or returned their retainer and discharged them." He stated that he was returning their retainers and files and suggesting to them that they join in a similar lawsuit filed by another attorney because the statute of limitations has not yet run on their case.

Because respondent did not satisfy either requirement to succeed on a motion to vacate the default (his fear of not receiving fair treatment is not a valid reason for not filing an answer and he failed to provide meritorious defenses to the allegations of the complaint), we deny his motion in its entirety.

We now address the allegations of the complaint.

On September 13, 2007, respondent agreed to represent Linda Eagan, Diane Chieffo, Carol Douglas, and Bessie Gano (the clients) in a consumer fraud action against Premier Education Group a/k/a the Harris School of Business (the Harris School). Respondent's clients signed a written fee agreement and paid him a $400 retainer.

Afterwards, Eagan heard nothing further from respondent. She tried to telephone him on numerous occasions and forwarded emails to him, requesting information about the status of the case. Because respondent failed to reply to Eagan's requests for information, she began going to his office. On two occasions, respondent agreed to speak with Eagan in the lobby. Each time, he reassured her that he was working on her file and that the lawsuit would be filed in "a few weeks." During their last such communication, in September 2008, respondent told Eagan that he

was very busy with other things, but that he would have the lawsuit filed by the "end of the week."

As of September 22, 2010, respondent had not filed a complaint, had contacted the clients, or had accounted for or returned the $400 fee to them.

On March 6, 2008, respondent agreed to represent another client, Marie Cummings, in a consumer fraud action against the Harris School, based on the same facts asserted by the above clients. Cummings signed a fee agreement and paid respondent a $100 retainer. Respondent told Cummings that he would "add her" to the other clients' "class action" consumer fraud lawsuit that was pending against the Harris School.

Thereafter, over a two-year period, Cummings left respondent more than twenty telephone messages and sent one email, requesting a copy of the signed retainer agreement and information about the status of her case. When Cummings tried to leave respondent additional messages, she was unable to do so because his answering machine was full.

Cummings' attempts to communicate with respondent were all to no avail, with the exception of a single telephone conversation, in December 2009. During that conversation, respondent told Cummings that, including her, there were twenty plaintiffs in the consumer fraud action and that he might

transfer the case to a more experienced lawyer. Respondent promised to provide Cummings with a copy of her retainer agreement and to keep her informed about the status of her case. He did neither. As of the date of the formal ethics complaint, he had not contacted Cummings, filed a lawsuit on her behalf, or accounted for or returned the $100 retainer to her.

After three years from the time the first clients met with respondent and two and one-half years after Cummings met with him, respondent had failed to take any action on their behalf, including failing to file a lawsuit against the Harris School. Respondent repeatedly told them that a civil action would be filed immediately with the court, "in a few days or by the end of the week," and that their case was progressing, even though he had not taken any action on their behalf.

In addition, respondent failed to cooperate with the DEC's investigation in the matter. He failed to reply to the DEC's three letters requesting a reply to the grievance and a copy of his file. It was only after the default was entered against him and that the default was vacated that he filed an answer to the original complaint. Afterwards, he failed to reply to the Cummings grievance and did not produce his client files, despite having agreed to do so, during a May 12, 2010 pre-hearing conference. Eventually, on August 17, 2010, respondent wrote to

the DEC, assuring it that he would forward "the records . . . in two days," but failed to do so.

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). We find that the facts recited in the complaint support most of the charges of unethical conduct.

The allegations established that respondent lacked diligence in pursuing an action against the Harris School (RPC 1.3). However, there were insufficient facts alleged to establish that he failed to expedite litigation (RPC 3.2). Although respondent's certification in support of his motion to vacate the default made reference to the court's dismissal of the complaint, the motion also referred to another case. That it is not clear which case was dismissed is irrelevant. The formal ethics complaint stated that respondent did not file a lawsuit on his clients' behalf. Because the allegations of the complaint are deemed admitted, we find that respondent did not institute suit. Because there was no litigation to expedite, RPC 3.2 does not apply. We, therefore, dismiss this charge.

As to the charged violation of RPC 1.4(b), although it appears that respondent had some communications with the clients, he failed to return many of Eagan's numerous telephone

calls and emails, prompting her to appear at his office to obtain information about her matter. He also failed to return many of Cummings numerous telephone calls. We, therefore, find that RPC 1.4(b) has been violated.

Respondent was also charged with making misrepresentations (RPC 8.4(c)) to Eagan and Cummings, namely, that he would file a lawsuit immediately and that the case was progressing. In In re Uffelman, 200 N.J. 260 (2009), we found that, if an attorney makes a statement believing it to be true at the time that he makes it, it is not a misrepresentation. In the Matter of David Uffelman, DRB 08-355 (June 19, 2009) (slip op. 11-12). Here, respondent may have truly intended to file the lawsuit, but circumstances may have prevented him from doing so. Thus, we do not consider that statement alone to be a misrepresentation. However, because he also informed his clients that their case was progressing, when he had not filed a complaint and had not taken any action to further their claims, we find that affirmative statement to be a misrepresentation.

Finally, respondent also failed to reply to both grievances, a violation of RPC 8.1(b). He did not take any action on either grievance until his failure to answer the first formal complaint led to the entry of a default against him.

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.3, RPC 1.4(b), RPC 8.1(b), and RPC 8.4(c) in both matters.

Reprimands have been imposed in default matters involving similar violations, except for misrepresentations. See, e.g., In re Abramowitz, 193 N.J. 490 (2008) (in two client matters, the attorney failed to act with diligence, failed to keep the clients reasonably informed about the status of their cases and failed to cooperate with disciplinary authorities; three prior admonitions) and In re White, 165 N.J. 577 (2000) (attorney engaged in gross neglect, lack of diligence and failure to communicate with the client; prior three-month suspension).

Cases that included misrepresentations, additional ethics violations and/or more extensive ethics histories resulted in censures. See, e.g., In re Cellino, 207 N.J. 375 (2010) (in a landlord/tenant action for the recovery of a security deposit, the attorney took no action on the client's behalf and repeatedly lied to her over the next two years that he had filed a complaint and obtained a judgment against the landlord; he also failed to communicate important aspects of the case to her, ceased communicating with her, and failed to cooperate with the DEC investigation; no history of discipline); In re Boyman, 201 N.J. 203 (2010) (in two client matters attorney was guilty of gross

neglect, lack of diligence, and failure to cooperate with disciplinary authorities in both matters; he also failed to communicate with the client, entered into an improper business transaction with the client, and failed to turn over the client's file in one of the matters; no history of discipline); In re Franks, 188 N.J. 386 (2006) (attorney failed to abide by a client's decision about the representation, lacked diligence, failed to communicate with the client, failed to cooperate with disciplinary authorities, and made misrepresentations; prior admonition); and In re Banas, 194 N.J. 504 (2008) (in two client matters, attorney lacked diligence and failed to communicate with the clients; prior reprimand and three-month suspension).

We find that this matter is similar to the Cellino and Franks matters.[1] Like these attorneys, respondent lied to his clients that their matters were progressing. Like Cellino, he did so repeatedly. In addition, he has an admonition on his ethics record.

We, therefore, find that a censure is the appropriate form of sanction here.

Member Baugh did not participate.

[1] Although each of those matters involved only one client, the grievances in this matter arose from the same case.

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 Duane T. Phillips
Docket No. DRB 11-039

Decided: July 22, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	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

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