SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-282
District Docket No. I-2011-0004E

IN THE MATTER OF

DUANE T. PHILLIPS

AN ATTORNEY AT LAW

Decision

Decided: December 20, 2011

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 I Ethics Committee (DEC), pursuant to R. 1:20-4(f). The complaint charged respondent with violating RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter and to comply with reasonable requests for information), RPC 3.2 (failure to expedite litigation), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and R. 1:20-3(g)(3), more properly RPC 8.1(b) (failure to comply with reasonable requests for information from a disciplinary authority).

The facts of this matter are similar to the facts that we considered earlier this year in DRB 11-039, involving the same defendant and the same cause of action. The issue here is whether respondent deserves additional discipline or whether the censure that he received is sufficient for both cases.

On October 28, 2011, Office of Board Counsel (OBC) received respondent's motion to vacate this default. For the reasons expressed below, we deny respondent's motion and determine to impose additional discipline, 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).

In 2011, he was censured in a default matter that consolidated two complaints against him. There, the clients had retained him to file a consumer fraud action against a business school. He was found guilty of lack of diligence, failure to communicate with clients, misrepresentations to the clients, and failure to cooperate with disciplinary authorities in both matters. In re Phillips, 208 N.J. 205 (2011).

Service of process was proper in this matter. On June 24, 2011, the DEC sent a copy of the complaint, by regular and certified mail, to respondent's office address, 705 White Horse Pike, Suite 8, Absecon, New Jersey 08201. The certified mail receipt was signed by respondent. The certification of the record makes no mention of the regular mail.

On July 28, 2011, the DEC sent a letter to the same address, by regular and certified mail. The letter advised respondent that, unless he filed an answer within five days, the allegations of the complaint would be deemed admitted, pursuant to R. 1:20-4(f), and the record would be certified directly to us for the imposition of discipline. The letter also served to amend the complaint to charge respondent with a willful violation of RPC 8.1(b) for his failure to file an answer.

On August 25, 2011, the certified mail was returned to the DEC marked "Return to Sender, Unclaimed, Unable to Forward." The regular mail was not returned.

Respondent did not file an answer to the complaint.

As noted previously, on October 28, 2011 OBC received respondent's motion to vacate the default. To succeed on such a motion, a respondent must satisfy a two-pronged test: (1) offer a reasonable explanation for the failure to file an answer and (2) assert a meritorious defense to the ethics charges.

Respondent moved not only to vacate the default, but also to have his matter heard by another district ethics committee. In support of the motion, he relied on his attached certification.

Respondent's certification accused the DEC secretary and an attorney, who is now an Atlantic County judge, of engaging in a fraud against one of his clients. Respondent claimed that he did not participate in the DEC hearing process because he did not believe that he could get a fair hearing while "[Fredrick] Shenkman [secretary of the District I Ethics Committee] is the head of the local ethics committee." Respondent stated:

> We have had a lot of problems with corruption down here in Atlantic County that date back many decades, witness the show Boardwalk Empire. I have been frustrated and depressed because I have had to deal with it. I could not believe that Mr. Light was made a judge based upon what I know and what was reported in the Appellate opinion. And I have no doubt that he is upset with my actions because he told me so and that, based upon what he has done in the past, he will seek to hurt me.
>
> [RC¶10.][1]

Respondent admitted that "all of this affected his work and left [him] depressed." He added that he had previously requested a consolidation of this matter with the ones for which he was

[1] RC refers to respondent's certification.

previously censured, but guessed that "Shenkman fought against it so [he] would have more problems."

The Office of Attorney Ethics (OAE) opposed respondent's motion. The OAE's November 2, 2011 letter stated, among other things, that respondent intentionally did not file an answer to the complaint and, instead of providing an explanation for not doing so, requested that his matter be transferred to another committee.

DEC secretary Shenkman also filed a November 2, 2011 letter in response to respondent's motion, stating that his review of the DEC's records uncovered no application from respondent to consolidate his matters. Shenkman explained that a consolidation would have been impossible because this case was not docketed until January 14, 2011, twenty-five days after the certification of the record in DRB 11-039 was forwarded to the OAE.

Shenkman also underscored his limited involvement in respondent's matters. He pointed out that, as the DEC secretary, he had not been involved in the investigation of the grievances, that he had merely docketed them, that the same DEC member had investigated all of the grievances, and that his final involvement had been serving the complaint and preparing the certification of the record.

We note that, in DRB 11-039, respondent also filed a motion to vacate the default. In that case, he conceded that "the grievants had been 'right,' and that he should have prosecuted the cases or returned their retainer and discharged them." In the Matter of Duane T. Phillips, DRB 11-039 (July 22, 2011) (slip op. at 4).

Respondent also raised a bias argument in that motion, which we rejected. Armed with the knowledge that his argument was not persuasive, respondent, nevertheless, raised a similar argument here, rather than move for Shenkman's recusal,[2] seek a change of venue, or seek guidance from the OAE.

Therefore, as in respondent's prior case, we find that he did not satisfy either prong of the test applicable to motions to vacate the defaults. As we previously found, respondent's fear of not receiving fair treatment is not a valid reason for not filing an answer. Moreover, respondent did not provide a meritorious, or any, defense to the allegations of the complaint. We, therefore, deny his motion.

We now turn to the facts of this matter.

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[2] Shenkman's recusal would have had no bearing on the outcome of this case, in any event, given his limited involvement, which was purely ministerial.

On September 14, 2007, Christina Mulligan and her mother, Michelle Benvenuto, retained respondent to represent Mulligan in a consumer fraud action against Premier Education Group a/k/a the Harris School of Business (the Harris School). Respondent informed them that he would amend a pending complaint to add Mulligan as a plaintiff in a lawsuit recently filed against the Harris School on behalf of eight other students. Mulligan gave respondent $200 as a retainer and signed a written fee agreement. Respondent gave her a receipt for the payment.

One month later, Mulligan gave respondent additional documents and a written summary of facts to support her claim against the school. Several months later, after not having heard from respondent, Mulligan tried to contact him to obtain information about the status of the matter and a copy of the amended complaint. Over "several years," Mulligan called respondent approximately fifty times. She left messages either with his secretary or on his voicemail, all to no avail.

Mulligan also made approximately twenty-five unscheduled visits to respondent's office. She met with him only once. At that time, he informed her that her case was progressing and promised to have his secretary mail a copy of the amended complaint to her. As to the other twenty-four attempts, when

respondent's door was not locked, Mulligan left messages with respondent's secretary.

Despite Mulligan's numerous attempts to communicate with respondent, he never replied to them, never filed an amended complaint in almost four years from their initial meeting, and never accounted for or returned the $200 advance payment of the fee that he did not earn.

The complaint alleged that respondent's failure to act potentially exposed Mulligan to serious injury and potentially prejudiced her rights to recovery. The complaint further alleged that respondent "repeatedly" misinformed Mulligan that the "lawsuit amendment would be or was filed with the Court and that her case was progressing," when he had taken no action on her behalf.

On January 19, 2011, the DEC mailed a copy of Mulligan's grievance to respondent, by certified mail. The cover letter requested a written reply within ten days. The certified mail receipt showed that, on January 26, 2011, respondent personally accepted service of the letter. Nevertheless, he did not reply to the grievance.

On February 10, 2011, the DEC sent a second letter, by certified mail, requesting that respondent produce the entire file, within ten days. The certified mail receipt showed that,

on February 16, 2011, respondent personally accepted service of the letter. He did not comply with the DEC's requests.

The facts recited in the complaint support the charges of unethical conduct. 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 allegations of the complaint demonstrate that respondent lacked diligence in pursuing an action against the Harris School on Mulligan's behalf. There are insufficient facts to establish, however, that respondent failed to expedite litigation. There is no evidence that he ever instituted a lawsuit against the Harris School.

Respondent also failed to communicate with Mulligan. On the one or rare occasions that he did, he misrepresented that the amended complaint had been filed and that the case was progressing.

Finally, respondent failed to cooperate with the DEC's investigation of the grievance and did not file an answer to the ethics complaint.

In all, respondent is guilty of violating RPC 1.3, RPC 1.4(b), RPC 8.1(b), and RPC 8.4(c).

The only issue left for determination is the proper quantum of discipline, if any. Because of respondent's pattern of misrepresentations to clients and pattern of failure to cooperate with disciplinary authorities, we determine that additional discipline is, indeed, warranted.

Generally, misrepresentation to a client requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Singer, 200 N.J. 263 (2009) (attorney misrepresented to his client for a period of four years that he was working on the case; the attorney also exhibited gross neglect and lack of diligence and failed to communicate with the client; no ethics history); In re Wiewiorka, 179 N.J. 225 (2004) (attorney misled the client that a complaint had been filed; in addition, the attorney took no action on the client's behalf and did not inform the client about the status of the matter and the expiration of the statute of limitations); and In re Onorevole, 170 N.J. 64 (2001) (attorney made misrepresentations about the status of the case; he also grossly neglected the case, failed to act with diligence, and failed to reasonably communicate with the client; prior admonition and reprimand).

This case requires discipline greater than a reprimand because of the default nature of the proceedings. "A respondent's default or failure to cooperate with the investigative authorities operates 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).

In two cases somewhat similar to respondent's, also default matters, the attorneys received censures. See, e.g., In re Cellino, 203 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; repeatedly lied to her over the next two years that he had filed a complaint and obtained a judgment against the landlord; failed to communicate important aspects of the case to her; ceased communicating with her entirely after the check he gave her to make her whole was returned for insufficient funds; and failed to cooperate with the DEC investigation; no history of discipline) and 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 to the client; prior admonition).

Based on the ethics violations in this case -- lack of diligence, failure to communicate with the client, misrepresentations to the client, and failure to cooperate with disciplinary authorities -- coupled with the default nature of the proceedings, a censure is the appropriate discipline for this respondent. It is true that the misconduct in this matter occurred during the same time frame as the matter that led to his censure and involved the same violations, but to say that no additional discipline is required would go against precedent addressing the totality of respondent's conduct. Had the matters been consolidated for our review, discipline more severe than a censure would have been appropriate. See, e.g., In re London, 186 N.J. 412 (2006) (three-month suspension for attorney who defaulted twice in the same disciplinary matter and, in two client matters, was found guilty of lack of diligence, gross neglect, failure to communicate with client, and misrepresentation about the status of the cases; no prior discipline).

On the other hand, this is not a case of an attorney who failed to learn from prior mistakes, when progressive discipline may be in order. In both DRB 11-039 and here, respondent's unethical conduct took place during the same period, from 2007 to 2010. Progressive discipline is not required when similar

misconduct takes place around the same time, but the disciplinary matters are heard separately. See, e.g., In re Hediger, 197 N.J. 21 (2008) (attorney whose conduct that led to two censures occurred during the same time frame as the conduct in a subsequent disciplinary matter and involved violations similar in nature, which resulted in a reprimand in the later matter).

In sum, based on respondent's ethics violations, his disciplinary history (an admonition and a censure), his continuing failure to cooperate with disciplinary authorities, and the above-cited precedent, we find that a censure is the suitable form of discipline here.

Member Wissinger 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

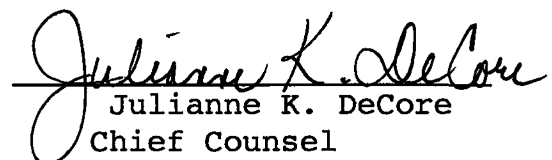
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Duane T. Phillips
Docket No. DRB 11-282

Decided: December 20, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Wissinger						X
Yamner			X			
Zmirich			X			
Total:			7			1



Julianne K. DeCore
Chief Counsel