

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 13-020;
DRB 12-395; DRB 13-047; and
DRB 13-048
District Docket Nos. XIV-2012-0204E;
XII-2010-0007E; XII-2011-0029E; and
XII-2011-0050E

IN THE MATTERS OF
SERGIO RAFAEL PASTOR
AN ATTORNEY AT LAW

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Decision

Decided: April 23, 2013

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

These default matters are consolidated for the purpose of imposing one discipline. Although the allegations in DRB 13-020 support a recommendation for respondent's disbarment, we, nevertheless, find that the appropriate discipline in the remaining three defaults is a three-month suspension.

Respondent was admitted to the New Jersey bar in 1998. At the relevant time, he maintained a law practice in Cranford, New Jersey. Although he has no history of final discipline, he was temporarily suspended on August 28, 2012, pursuant to R. 1:20-

3(g)(4) and R. 1:20-11(a), for failure to cooperate with an Office of Attorney Ethics (OAE) investigation. In re Pastor, 211 N.J. 563 (2012). He remains suspended to date.

DRB 13-020 – DISTRICT DOCKET NO. XIV-2012-0204E

This matter was before us on a certification of default filed by the OAE. The two-count complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with a client), RPC 1.15(a) (knowing misappropriation of client funds), the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985), RPC 1.15(b) (failure to promptly notify a client or third person upon receipt of funds), RPC 8.1(b) (failure to comply with reasonable requests for information from a disciplinary authority), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).¹

Service of process was proper in this matter. On December 7, 2012, the OAE sent copies of the complaint, by regular and

¹ Although the complaint listed conflict of interest in the heading under count one, there were no facts alleged to support the charge nor was the corresponding rule violation listed in the text. The complaint also mistakenly cited RPC 1.4(a), rather than RPC 1.4(b), and RPC 8.1(a), instead of RPC 8.1(b).

certified mail, to respondent's last known home address. The certified mail receipt indicated delivery. The signature of the recipient is Barbara Dlugosz.

On January 10, 2013, the OAE sent a letter, by regular and certified mail, to the same address. The letter notified respondent that, if he did not file an answer within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record 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) (five-day letter). The certified mail receipt indicated delivery. The signature of the recipient is not legible. The certification of the record made no mention of the regular mail.

As of the date of the certification of the record, respondent had not filed an answer to the ethics complaint.

Respondent represented Neil Asch in the sale of his primary residence, in Hillside, New Jersey. Alcides Andril represented the buyer. The closing occurred on October 7, 2010, the date Asch died. Roberta Chiafullo, acting as Asch's attorney-in-fact, signed the documents on his behalf. The proceeds from the sale totaled \$117,025.26. Respondent received a \$118,025.26 check, representing the sales proceeds plus \$1,000. He informed

Chiafullo that he would hold the proceeds on behalf of the estate until she was appointed the executrix of Asch's estate.

On October 7, 2010, respondent deposited the funds into his trust account and opened a sub-account in Asch's name.² Chiafullo was appointed as the executrix on November 16, 2010.

Thereafter, respondent failed to turn over any of the \$117,025.26 to Chiafullo and did not maintain the funds inviolate in his trust account. According to the complaint, "[f]rom October 13, 2010 through May 12, 2011, respondent invaded the Asch Estate trust funds by making a series of withdrawals from his attorney trust account [the Asch sub-account], until the balance on September 14, 2011 was zero." Exhibit 4, the TD Bank bank statements for the Asch sub-account, shows that an overdraft, on May 11, 2011, resulting in a negative balance of \$10,034.74, was not cured until respondent deposited \$10,035 into the account, on May 12, 2011. On that date, the account had a balance of "0.26," which remained until September 14, 2011, when the sub-account had a zero balance.

Respondent also represented Asch's estate. After Chiafullo was appointed executrix of the estate, on respondent's instructions, she obtained information about Asch's bank account

² The name "Neil Aseh" appears on the TD Bank bank statements.

balances and "faxed" the information to respondent so that he could apply for tax waivers. Respondent informed her that the tax waivers would be available by the end of January 2011. From January through December 2011, Chiafullo called respondent weekly, left numerous voicemail messages for him, and, on occasion, left messages with a woman named Anna. Neither respondent nor anyone from his office returned Chiafullo's telephone calls.

Count two of the complaint alleged that the OAE sent letters to respondent on April 12 and May 9, 2012, by regular and certified mail, requesting a reply to the Asch grievance. The certified mail receipts indicated delivery. The regular mail envelopes were not returned. Respondent failed to reply to the letters.

By letter dated May 18, 2012, sent by regular and certified mail, the OAE scheduled a demand audit of respondent's books and records, to be held at the OAE's offices on June 5, 2012. The regular mail was not returned and the certified mail receipt indicated delivery. Respondent failed to appear at the audit.

On July 2, 2012, TD Bank notified the OAE about an overdraft in respondent's attorney trust account. Therefore, on July 17, and August 9, 2012, the OAE sent letters to respondent

seeking an explanation for the overdraft. Respondent did not reply to the OAE's letters.

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).

The allegations establish that, after respondent deposited the proceeds from the sale of Asch's property into his trust account, he failed to maintain the funds intact and, through a series of withdrawals, improperly depleted the funds for his own benefit. That respondent had an overdraft in his trust account, depleted all of the funds from the Asch sub-account for his own benefit, and did not turn over any of the funds to Chiafullo establish knowing misappropriation, a violation of RPC 1.15(a) and RPC 8.4(c).

As to RPC 1.15(b), the allegations charged in the complaint do not support a finding that respondent failed to promptly notify Chiafullo that he had received the funds.

With respect to the allegations relating to the tax waivers, they support only a finding that respondent failed to keep Chiafullo advised about the status of the estate and failed to comply with her requests for information (RPC 1.4(b)). The

allegations do not establish that respondent failed to apply for the tax waivers or that the investigation revealed that he had not done so. Therefore, it cannot be found that respondent grossly neglected the matter (RPC 1.1(a)) or lacked diligence in representing the client (RPC 1.3).

Finally, the allegations support a finding that respondent failed to cooperate with the OAE's investigation (RPC 8.1(b)).

For respondent's misappropriation of client trust funds, under the principles of In re Wilson, 81 N.J. 451 (1979), we recommend that he be disbarred.

DRB 12-395 - DISTRICT DOCKET NO. XII-2010-0007E

This matter is before us on a certification of default filed by the District XII Ethics Committee (DEC). The two-count complaint charged respondent with having violated RPC 1.3 (lack of diligence) and RPC 1.4, presumably (b) (failure to keep a client reasonably informed about the status of a matter or to comply with reasonable requests for information).

Service of process was proper in this matter, as well as in DRB 13-047 (District Docket No. XII-2011-0029E) and DRB 13-048 (District Docket XII-0050E). The complaints in the three matters were ultimately served simultaneously on respondent in the same envelope.

On June 21, 2012, the DEC sent a copy of the complaint in District Docket No. XII-2010-0007E, by regular mail only, to respondent's office address, 340 North Avenue, 3rd Floor, Cranford, NJ 07016. The letter was not returned.

On November 27, 2012, the DEC sent a "five-day letter" by regular and certified mail to the same address. The certified mail receipt indicates delivery of the letter on July 30, 2012. The signature of the recipient is illegible. The regular mail was not returned.

On August 17, 2002, the DEC sent to the same address, by regular and certified mail, copies of the June 21, 2012 letter and the DEC's March 9, 2012 letter in DRB 13-048 (District Docket No. XII-2011-0050E), as well as the June 21, 2012 letter in DRB 13-047 (District Docket No. XII-2011-0029E), together with copies of the complaints. The certified mail receipt indicates receipt, but is not dated. The signature of the recipient is not legible. The regular mail was not returned.

On October 5, 2012, the DEC sent a letter, by regular and certified mail, to respondent's home address provided by the OAE. The letter gave respondent the same warning contained in the "five-day letter" for the three matters. The certified mail receipt shows delivery on October 10, 2012. The signature of the recipient is not legible. The regular mail was not returned.

As of the date of the certification of the record, November 2, 2012, respondent had not filed an answer to the ethics complaint.

Count one alleged that, on January 16, 2004, respondent represented grievant Kazimiera Castelo and her husband in the refinancing of mortgages on two parcels of land. Castelo owned property in Montville, New Jersey. She refinanced three mortgages on the property with a \$300,000 loan from the Selfreliance Ukrainian American Federal Credit Union. After paying closing expenses, she took a "cash out sum" of \$4,901.65.

Castelo's husband, Gilberto Castelo, had owned property in West Orange, New Jersey, and had refinanced two mortgages on the property with a \$300,000 mortgage from Selfreliance Ukrainian American Federal Credit Union.

Gilberto died in 2008. The Morris County Surrogate's Court probated his Last Will and Testament on October 3, 2008, and appointed Kazimiera as the "administrator" of his estate.

In 2007, Kazimiera tried to telephone respondent to obtain the final title policies and cancelled mortgages for Gilberto's and her refinances. The attorney for Gilberto's estate, Barry Mandelbaum, wrote to respondent, on December 15 and 19, 2008 and June 8, 2009, requesting the final title policies. Respondent did not reply to either Kazimiera or Mandelbaum.

Count one charged respondent with having violated RPC 1.4 for not communicating with his client.

Count two alleged that respondent violated RPC 1.3 for failing to obtain the final title policies and mortgage discharges for the refinance transactions.

DRB 13-047 - DISTRICT DOCKET NO. XII-2011-0029E

The complaint in this matter charged respondent with having violated RPC 1.5(b) (failure to provide a writing setting forth the basis or rate of the fee), and RPC 8.1(b) (failure to cooperate with ethics authorities).

Service was proper in this matter. The certification of the record is the same as in DRB 12-395.

In November 2010, Andrew Yearde retained respondent for representation in his divorce matter. By letters dated December 12, 2011 and January 20, 2012, sent to respondent's office, the DEC investigator requested a copy of Yearde's file. On February 3, 2012, the DEC investigator left a telephone message with respondent's staff, requesting that respondent contact him. As of the date of the complaint, May 23, 2012, respondent had neither forwarded Yearde's file nor contacted the DEC investigator.

Count two charged respondent with having violated RPC 1.5(b). It alleged that respondent failed to provide proof that he had "obtained a retainer agreement" from Yearde, as required by R. 5:3-5.³

DRB 13-048 - DISTRICT DOCKET NO. XII-2011-0050E

The complaint in this matter charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter or to comply with reasonable requests for information), RPC 1.5(a) (charging an unreasonable fee), RPC 1.5(b) (failure to provide a writing setting forth the basis or rate of the fee), and RPC 5.3, presumably (b) (failure to supervise a non-lawyer assistant to insure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer).

³ That rule states that, except where no fee is charged, "every agreement for legal services to be rendered in a civil family action shall be in writing signed by the attorney and the client, and an executed copy of the agreement shall be delivered to the client. . . . and shall include . . . (3) the method by which the fee will be computed; (4) the amount of the initial retainer and how it will be applied"

Service of process was proper in this matter. On March 9, 2012, the DEC sent a copy of the complaint to respondent's office address by regular mail only. The mail was not returned.

On April 5, 2012, the DEC sent a "five-day letter" by regular mail to the same address. The letter was not returned. Thereafter, service of this complaint was made with the complaints in DRB 12-395 and DRB 13-047.

In December 2010, Veronica Maciolek retained respondent for representation in an interstate child custody and support matter, a civil family action under R. 5:3-5. She paid respondent \$1,500.

In an email, Maciolek asked respondent numerous questions about the details of the representation, including information required to be disclosed under R. 5:3-5. Respondent did not answer the inquiries Maciolek posed in her email regarding her fee concerns and he did not provide her with a written retainer agreement, as required under R. 5:3-5 and Appendix XVIII to the Court Rules.⁴

⁴ Paragraph A of the appendix, Client Rights, provides at paragraph 3 that "[c]lients have the right to have a written retainer agreement describing the financial terms of the relationship between the client and the attorney."

Respondent told Maciolek that the case would be "scheduled" in February or March 2011, and that it would involve two or three court appearances.

On December 8, 2010, Maciolek completed, signed, and returned forms to respondent and gave him information needed in connection with the proceeding. On the afternoon of February 4, 2011, respondent sent two emails from his blackberry, promising to speak to Maciolek "days later," but he never did.

On February 4, 2011, respondent's secretary, Ana Rivera, emailed a draft motion to Maciolek. Maciolek corrected the many errors that appeared in the draft. On February 11, 2011, emailed it back to respondent. Respondent's two brief emails and the email from Rivera were the only communications respondent's office had with Maciolek.

According to the complaint, respondent admitted that he prepared Maciolek's preliminary motion; reviewed and considered her comments; and instructed Rivera, his trusted, part-time secretary to make the changes and to contact Maciolek. However, Rivera "did not do what he requested and obscured that fact by not updating his diary to track the status of the case."

By letter date June 24, 2011, sent by regular and certified mail, Maciolek terminated respondent's representation. The

certified mail was returned to her marked "unclaimed." The regular mail was not returned.

As a result of respondent's conduct, Maciolek's child support portion of her case was delayed for many months and, as of February 16, 2012, had not been completed.

Although respondent promised to refund Maciolek's \$1,500 retainer, he never did so.

The facts recited in the complaints in DRB 12-395, DRB 13-047, and DRB 13-048 support the charges of unethical conduct. Respondent's failure to file answers is deemed an admission that the allegations of the complaints are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f).

The facts in the Castelo matter (DRB 12-395, District Docket No. XII-2010-007E) establish that respondent failed to communicate with the client, a violation of RPC 1.4(b), and failed to provide her with the final title policies and discharges of the mortgages, a violation of RPC 1.3.

In the Yearde matter (DRB 13-047, District Docket No. XII 2011-0029E), the allegations in count one of the complaint establish that respondent failed to cooperate with the DEC's investigation. While the allegations of count two are somewhat conclusory, they are sufficient to find that respondent failed

to provide Yearde with a required writing setting forth legal services to be rendered and the basis or rate of his fee.

In the Maciolek matter (DRB 13-048, District Docket No. XII-2011-0050E), by failing to finalize the child support portion of Maciolek's case for more than one year, respondent is guilty of having violated RPC 1.1(a) and RPC 1.3. He also failed to communicate with Maciolek by not replying to her requests for information (RPC 1.4(b) and failed to provide her with a writing setting forth the basis or rate of his fee (RPC 1.5(b)). Respondent's failure to refund Maciolek's fee, as he promised, is a violation of RPC 1.16(d),⁵ as he charged her for services that he did not provide. Finally, respondent failed to properly supervise his non-lawyer assistant, thereby violating RPC 5.3(b).

The only issue left for our determination is the proper quantum of discipline for these three cases, in which respondent is guilty of gross neglect in one matter (Maciolek), lack of diligence in two matters (Castelo and Maciolek), failure to

⁵ We are aware that the complaint cited RPC 1.5(a), rather than RPC 1.16(d). Nevertheless, a finding of a violation of RPC 1.16(d) will not violate respondent's due process rights. The facts alleged in the complaint gave him sufficient notice that he was being charged with failure to refund an unearned retainer to the client, a violation of RPC 1.16(d), instead of RPC 1.5(a).

communicate in two matters (Castelo and Maciolek), failure to refund an unearned retainer (Maciolek), failure to provide a client with a writing setting forth the basis or rate of the fee in two matters (Yearde and Maciolek), failure to supervise a non-lawyer assistant in one matter (Maciolek), and failure to cooperate with disciplinary authorities in one matter (Yearde).

Generally, failure to cooperate with an ethics investigation results in an admonition, if the attorney does not have a disciplinary history. See, e.g., In the Matter of Lora M. Privetera, DRB 11-414 (February 21, 2012) (attorney submitted an inadequate reply to an ethics grievance; thereafter, she failed to cooperate in the ethics investigation until she finally retained counsel to assist her); In the Matter of Douglas Joseph Del Tufo, DRB 11-241 (October 28, 2011) (attorney did not reply to the ethics investigator's request for information about the grievance and did not communicate with the client), In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (attorney failed to comply with ethics investigator's request for information about the grievance; the attorney also violated RPC 1.1(a) and RPC 1.4(b)); In the Matter of Marvin Blakely, DRB 10-325 (January 28, 2011) (after his ex-wife filed a grievance against him, attorney ignored numerous letters from the district ethics committee seeking information about the

matter; the attorney's lack of cooperation forced ethics authorities to obtain information from other sources, including the probation department, the ex-wife's former lawyer, and the attorney's mortgage company); In re Ventura, 183 N.J. 226 (2005) (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); and In the Matter of Kevin R. Shannon, DRB 04-152 (June 22, 2004) (attorney did not promptly reply to the district ethics committee's investigator's requests for information about the grievance).

Conduct involving a violation of RPC 1.5(b), even when accompanied by other, non-serious ethics offenses, may also result 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); 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).

Generally, an admonition, too, is the appropriate discipline for lack of diligence and failure to communicate with the client. See, e.g., In the Matter of Edward Benjamin Bush, DRB 12-073 (April 24, 2012) (attorney failed to reply to his client's multiple telephone calls and letters over an eleven-month period and lacked diligence in handling the matter, as he failed to follow through on his agreement to file a complaint, an order to show cause, and other pleadings); In the Matter of Rosalyn C. Charles DRB 08-290 (February 11, 2009) (attorney failed to respond to his client's attempts to communicate with him about the status of her divorce matter; his inaction led to the dismissal of the client's complaint for failure to prosecute; mitigating factors included the attorney's unsuccessful attempt to have the complaint reinstated and his admission of wrongdoing); In the Matter of James C. Richardson, DRB 06-010 (February 23, 2006) (attorney lacked diligence in an estate matter and did not reply to the beneficiaries' requests for information about the estate); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (attorney did not disclose to the client that the file had been lost, canceled

several appointments with the client for allegedly being unavailable or in court when, in fact, the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file); and In the Matter of John F. Coffey, DRB 04-419 (January 21, 2005) (attorney did not file a bankruptcy petition until nine months after being retained and did not keep the client informed of the status of the case; only after the client contacted the court did she learn that the petition had not been filed).

In a somewhat similar case, an attorney received a three-month suspension in a default matter. In re Misci, 205 N.J. 90 (2011) (attorney found guilty of gross neglect, lack of diligence, failure to communicate with the client, charging an unreasonable fee, and failure to provide the client with a writing setting forth the basis or rate of the fee). Misci, however, had an ethics history, a prior reprimand, but he was not guilty of failure to supervise a non-lawyer employee, as is this respondent.


Had these matters been considered independently, we would have imposed reprimands in the Castelo and Yearde matters and a censure in the Maciolek matter. For the totality of respondent's ethics violations in the three matters, bearing in mind that the default nature of the proceedings warrant enhanced discipline

(See, e.g., In re Kivler, 193 N.J. 332, 342 (2008); and In re Nemshick, 180 N.J. 304 (2004)), we determine that a three-month suspension is appropriate discipline, given respondent's continued failure to cooperate with disciplinary authorities.

Vice-Chair Frost and Member Baugh 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

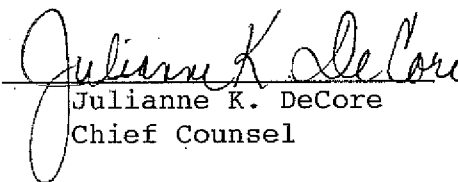
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Sergio R. Pastor
Docket No. DRB 13-020

Decided: April 23, 2013

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost						X
Baugh						X
Clark	X					
Doremus	X					
Gallipoli	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	7					2


Julianne K. DeCore
Chief Counsel

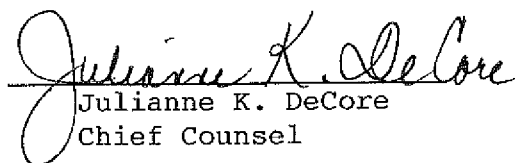
**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

In the Matters of Sergio R. Pastor
Docket No. DRB 12-395, DRB 13-047 and DRB 13-048

Decided: April 23, 2013

Disposition: Three-month suspension

Members	Disbar	Three-month suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost						X
Baugh						X
Clark		X				
Doremus		X				
Gallipoli		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		7				2


Julianne K. DeCore
Chief Counsel