SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 13-112 and 13-133
District Docket Nos. XIV-2012-0208E,
XIV-2012-0256E; and I-2012-0014E

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

Decision

Decided: November 7, 2013

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

These matters were before us on two certifications of default, pursuant to R. 1:20-4(f). One, docketed as DRB 13-133, was filed by the District I Ethics Committee (DEC), the other, docketed as DRB 13-112, was filed by the Office of Attorney Ethics (OAE).

The two-count complaint in DRB 13-133 charged respondent with having violated RPC 1.3 (lack of diligence), 1.4(b) (failure to communicate with the client), and RPC 8.1(b) (failure to comply with a lawful demand for information from a disciplinary authority). The two-count complaint in DRB 13-112

charged respondent with having violated RPC 5.5(a) (practicing law while suspended).

On August 23, 2013, respondent filed a motion to set aside the defaults. For the reasons expressed below, we determine to deny respondent's motion and impose a three-month suspension for his combined rule violations.

Respondent was admitted to the New Jersey bar in 1993. He maintains a law office in Galloway, 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, in a default, where two ethics complaints involving two client matters were consolidated, respondent received a censure for lack of diligence in pursuing a consumer fraud action against a business school, failure to communicate with the clients, misrepresentations to them that their case was progressing even though he had not filed a complaint, and failure to cooperate with the ethics investigation. In re Phillips, 208 N.J. 205 (2011).

In 2013, respondent received another censure in a second default matter. As in the prior matter, he lacked diligence in pursuing an action against the same business school; failed to

adequately communicate with the client; on the rare occasion he did communicate with her, he misrepresented that he had filed an amended complaint and that the case was progressing; and he failed to cooperate with the ethics investigation. In re Phillips, 213 N.J. 83 (2013). We determined that respondent's pattern of unethical conduct required additional discipline even though the matter occurred during the same time frame as the matter that led to his first censure. We found that respondent's disciplinary history and continuing failure to cooperate with disciplinary authorities warranted another censure.

Respondent was temporarily suspended on January 23, 2012, for failure to pay administrative costs and expenses in connection with a disciplinary proceeding. In re Phillips, 208 N.J. 543 (2011). He was reinstated on May 17, 2012.

Service of process was proper in DRB 13-333. On January 16, 2013, the DEC sent a copy of the complaint, by regular and certified mail, to respondent's office address, 355 East Jimmie Leeds Road, Suite D, Galloway, New Jersey. The certified mail receipt was signed by respondent. The certification of the record made no mention of the regular mail.

On March 11, 2013, 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 of

the date of the letter, 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, known as a "five day letter," also served to amend the complaint to charge a willful violation of RPC 8.1(b) for respondent's failure to file an answer. The certified mail receipt was signed by respondent. The certification did not mention the regular mail.

As of the date of the certification of the record, April 12, 2013, respondent had not filed an answer to the complaint.

Service of process was also proper in DRB 13-112. On February 21, 2013, the OAE sent a copy of the complaint, by regular and certified mail, to respondent's Galloway office address. The certified mail was delivered on February 25, 2013. Respondent's signature is on the certified mail receipt. The regular mail was not returned.

On March 26, 2013, the OAE sent a "five day letter" to the same address, by regular and certified mail. The certified mail was delivered on April 1, 2013. The certified mail receipt was signed by respondent. The regular mail was not returned.

As of the date of the certification of the record, April 10, 2013, respondent had not filed an answer to the complaint.

Respondent filed a motion to vacate the defaults. He explained that he had not filed answers to the ethics complaints because he had lost faith in the ethics system, alleging that it "works for some people and does not work for others." He protested that the court system works for a "favored few" and that he and his clients have suffered when he appears before certain judges.

Respondent asserted that his friend, Thomas Cocco, Sr., filed ethics grievances against several attorneys over a failed real estate deal. He claimed further that no action has been taken on those grievances. Respondent set forth the facts of Cocco's case, and complained about the local DEC secretary, two judges and another attorney. He stated, "when you review my cases, ask yourself if you would want to be in my position. I question authority. I paid a price for it and am continuing to pay a price." Finally, he asked, "Why am I expected to participate in a system that I have proved to you with the facts above to be fundamentally flawed?."

As to the allegation that he practiced law while suspended (the OAE complaint), respondent claimed that he mistakenly paid the wrong bill for costs. He thought that he had paid the correct bill and was "active." It was "a stupid mistake." He had confused two docket numbers. When he checked the "attorney

system" online, he discovered that he was still suspended, realized that he had made a mistake, promptly corrected the mistake, and was then reinstated by the Court.

As to the DEC's complaint, respondent explained that he did not promptly turn over his client's file because it was misplaced while he was moving his office. In addition, he claimed that, although he had requested additional information from his client about her husband's pension, she did not comply with his request. Therefore, he could not send the information to the accountant for the preparation of a Qualified Domestic Relations Order (QDRO).

By letter date August 26, 2013, the OAE urged us to deny respondent's motion to vacate the defaults because he did not supply a reasonable explanation for failing to file answers and did not assert meritorious defenses to the underlying charges.

The OAE noted that respondent was properly served with both complaints and had sufficient opportunity to file verified answers. According to the OAE, respondent failed to provide us with any reason for not filing answers to the complaints, other than his criticism of the attorney disciplinary system, other attorneys, and judges. In addition, the OAE contended that he failed to provide any meritorious defenses to the underlying ethics charges, but "presented circumstances and events that

might be relevant for purposes of mitigation in determining an appropriate sanction."

We deny respondent's motion to vacate the defaults. 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 did not provide a reasonable explanation for failing to file an answer. He asserted that he had lost faith in the system and questioned why he should be expected to participate in a system that was "fundamentally flawed." Thus, he failed the first prong of the test. Respondent intentionally, nay defiantly, chose to disregard his duty to file answers to the ethics complaints, just as he had done in his first two defaults. In those matters, too, rather than provide a reasonable explanation for failing to file an answer, he accused the committee of bias. We determined in those matters that respondent should have either sought the removal of a committee member, a change of venue, or direction from the OAE. He did none of those things and failed to provide a meritorious defense to the charges in the matters. In fact, in one of the matters, respondent conceded that the grievants had been correct.

Because respondent is no stranger to default proceedings, the only logical conclusions to be drawn here are that respondent either has an abiding disrespect for the ethics system or he is simply incapable of following rules.

As to respondent's meritorious defense, his explanation for the unauthorized practice of law, was that he mistakenly believed that he had paid the bill. The ethics complaint states specifically that "[a]lthough no Supreme Court Order reinstated him to the practice of law, respondent erroneously concluded that he had been reinstated with the January 27, 2012, payment." Thus, he did provide a defense for practicing while suspended. He did not, however, provide a meritorious defense to the allegations in the DEC matter. There, he claimed only that he did not promptly turn over his client's file because it had been misplaced when he moved his office and that his client had failed to provide him the information he had requested.

DRB 13-133

Count one alleged that, in 2004, Tracie Jones retained respondent in connection with her divorce. Respondent prepared a "Dual Judgment of Divorce" and filed it on April 21, 2004. The judgment provided that Jones was entitled to the marital portion

of her husband's Local 54 severance and pension as well as his military pension.

Jones received the judgment about two months later and called respondent shortly thereafter to inquire about the QDRO. He did not reply. Over the following seven years, Jones tried to contact respondent periodically about the QDRO, to no avail.

Eventually, in October 2011, respondent informed Jones that he thought he had "done the Order," and would send it to her. However, she never received a copy of it. Thereafter, from October 2011 through April 2012, Jones called respondent approximately three times per month. Each time she left voicemail messages, to no avail. On occasion, respondent's voice mailbox would not accept the messages.

Finally, when Jones reached respondent, in April 2012, he told her that he would look into the matter and call her back, but he did not do so. From April 2012 to August 2012, Jones continued to call respondent regularly, two to three times per week, but was only able to leave voicemail messages. Respondent did not reply to her messages until August 2012, when he informed her that he was relocating his office and would call her back. He failed to do so.

Jones retained another attorney to prepare the QDRO. Respondent informed that attorney that Jones could retrieve her

file. When she did, respondent told her that "he did not know what happened."

The complaint alleged that respondent's failure to inform Jones that he had not prepared the order and his failure to reply to her requests for information violated RPC 1.4(b) and his failure to prepare the order violated RPC 1.3.

Count two alleged that, on September 28, 2012, by regular and certified mail, the DEC requested a written reply to Jones' September 5, 2012 grievance. The returned certified mail receipt showed delivery of the letter. The regular mail was not returned. On October 3, 2012, respondent informed the DEC investigator that he had "not received a copy of the grievance in the certified mail." Although the investigator confirmed that the grievance had been sent and received by respondent in the regular mail, he faxed and mailed another copy of the grievance to respondent. As of the date of the complaint, December 19, 2012, respondent had not replied to the grievance, a violation of RPC 8.1(b).

DRB 13-112

After respondent was admonished on February 26, 2010, he failed to comply with the requirement that he pay the disciplinary costs associated with the matter. By order filed on

December 21, 2011 (D-39 September Term 2011), the Court temporarily suspended him, effective January 23, 2012. The order provided, however, that the suspension would be automatically vacated if, prior to its effective date, we reported to the Court that respondent had made the required payment.

In the interim, by order filed on September 21, 2011 (D-136 September Term 2010), the Court imposed a censure on respondent and required him to pay administrative costs and actual expenses incurred in the prosecution of the matter.

Because respondent did not pay the costs and expenses associated with the admonition before January 23, 2012, he was temporarily suspended on that date. However, under cover letter dated January 27, 2012, respondent paid the costs and expenses associated with the censure. In that letter, he requested that he be reinstated.

According to the complaint, "[a]lthough no Supreme Court Order reinstated him to the practice of law, respondent erroneously concluded that he had been reinstated with the January 27, 2012, payment."

It was not until April 2012, when respondent reviewed the Court's electronic attorney index that had recently been made available on the Court's website, that he discovered that he was

still suspended. He then contacted Board counsel and, on April 10, 2012, paid the costs associated with the 2010 admonition.

On April 16, 2012, respondent petitioned the Court to be reinstated. By order filed April 17, 2012, the Court reinstated him.

During the three-month period between his suspension, on January 23, 2012, and his reinstatement, on April 17, 2012, respondent continued to practice law.

On December 30, 2011, Virginia Wallace retained respondent for representation in her divorce action. Thereafter, on January 19, 2012, before the effective date of his suspension, respondent filed a complaint for divorce on Wallace's behalf. On February 12, 2012, after the effective date of his suspension, respondent personally served the divorce complaint on Wallace's husband; on February 24, 2012, he filed proof of service with the court; by letter dated February 23, 2012, he sent to the husband a quitclaim deed that he had prepared to be executed, by which his interest in real property would be transferred to Wallace; he prepared a discharge of mortgage on an unknown date; on March 25, 2012, he notarized Wallace's signature, as an attorney-at-law, on the discharge of mortgage; and, on March 25, 2012, he turned over Wallace's documents when she informed him that she was terminating the representation.

In a second case (not identified in the record), respondent notarized a signature, as an attorney-at-law, on behalf of a litigant in a motion for child support that was filed in Atlantic County in February 2012. The judge in the matter looked in to respondent's license status. Upon learning of respondent's suspension, the judge referred the matter to the Supreme Court Committee on the Unauthorized Practice of Law (UPL).

On March 29, 2012, when that same Atlantic County judge called a different case, Grant v. Frame, respondent rose and announced that the case was ready. After the judge inquired whether respondent was "authorized to be here," respondent replied that he was and that there was no problem with his license. Respondent went on to argue the matter on his client's behalf.

The judge, regretting his referral to the UPL, contacted the OAE to confirm that respondent had been reinstated, but was informed that respondent remained suspended. The judge then referred both Atlantic County matters to the OAE.

The complaint alleged that respondent's conduct violated RPC 5.5(a).

The facts recited in the complaints 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)(1).

The allegations of the complaints clearly and convincingly establish that respondent practiced law while suspended (RPC 5.5(a)) and that, in the Jones matter, he failed to communicate with his client (RPC 1.4(b)), failed to prepare an order in her divorce case (RPC 1.3), and failed to cooperate with the disciplinary investigation (RPC 8.1(b)).

The only issue left for determination is the appropriate level of discipline for respondent's third and fourth defaults.

As seen below, the discipline for practicing law while suspended is severe. However, in this matter, there is no clear and convincing evidence that respondent did so knowingly. Because of the default nature of the case, we are left only with the allegations of the complaint that support a finding that respondent did not knowingly practice while suspended. The allegations establish that, when respondent paid the costs and expenses in his second disciplinary matter, his letter to us requested that he be reinstated. It was only after he appeared in court, was questioned about his license status, and then checked the Court's electronic attorney index, that he discovered that he was still suspended. He then contacted Board counsel, paid the full amount associated with his admonition

case, and petitioned the Court to be reinstated. Respondent's certification, appended to his motion to vacate the defaults, also supports this position. Under these circumstances, despite our finding that respondent violated RPC 5.5(a), although not knowingly, we determine that the level of discipline for the combined matters should not reflect the typical discipline for such a violation.

The level of discipline for practicing law while suspended ranges from a lengthy suspension to disbarment, depending on the presence of other misconduct, the attorney's disciplinary history, and aggravating or mitigating factors. See, e.g., In re Bowman, 187 N.J. 84 (2006) (one-year suspension for attorney who, during a period of suspension, maintained a law office where he met with clients, represented clients in court, and acted as Planning Board solicitor for two municipalities; prior three-month suspension; extremely compelling circumstances considered in mitigation); In re Lisa, 158 N.J. 5 (1999) (one-year suspension for attorney who appeared before a New York court during his New Jersey suspension; in imposing only a one-year suspension, the Court considered a serious childhood incident that made the attorney anxious about offending other people or refusing their requests; out of fear of offending a close friend, he agreed to assist as "second chair" in the New

York criminal proceeding; there was no venality or personal gain involved; the attorney did not charge his friend for the representation; prior admonition and three-month suspension); In re Saint-Cyr, 210 N.J. 615 (2012) (two-year suspension in a default for attorney who practiced law while suspended, and, in two matters, was guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities; prior censure and temporary suspension); In re Wheeler, 140 N.J. 321 (1995) (two-year suspension imposed on attorney who practiced law while serving a temporary suspension for failure to refund a fee to a client; the attorney also made multiple misrepresentations to clients, displayed gross neglect and pattern of neglect, engaged in negligent misappropriation and in a conflict of interest situation, and failed to cooperate with disciplinary authorities)[1]; In re Marra, 183 N.J. 260 (2005) (three-year suspension for attorney found guilty of practicing law in three matters while suspended; the attorney also filed a false affidavit with the Court stating that he had refrained from

[1] In that same order, the Court imposed a retroactive one-year suspension on the attorney, on a motion for reciprocal discipline, for his retention of unearned retainers, lack of diligence, failure to communicate with clients, and misrepresentations.

practicing law during a prior suspension; the attorney's ethics history included a private reprimand, two three-month suspensions, a six-month suspension, and a one-year suspension also for practicing law while suspended); In re Cubberley, 178 N.J. 101 (2003) (three-year suspension for attorney who solicited and continued to accept fees from a client after he had been suspended, misrepresented to the client that his disciplinary problems would be resolved within one month, failed to notify the client or the courts of his suspension, failed to file the affidavit of compliance required by Rule 1:20-20(a), and failed to reply to the OAE's requests for information; the attorney's disciplinary history included an admonition, two reprimands, a three-month suspension, and two six-month suspensions); In re Beltre, 130 N.J. 437 (1992) (three-year suspension for attorney who appeared in court after having been suspended, misrepresented his status to the judge, failed to carry out his responsibilities as an escrow agent, lied to the Board about maintaining a bona fide office, and failed to cooperate with an ethics investigation; prior three-month suspension); and In re Walsh, Jr., 202 N.J. 134 (2010) (attorney disbarred on a certified record for practicing law while suspended by attending a case conference and negotiating a consent order on behalf of five clients and making a court

appearance on behalf of seven clients; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities during the investigation and processing of these grievance; the attorney failed to appear on an order to show cause before the Court; extensive disciplinary history: reprimanded in 2006, censured in 2007, and suspended twice in 2008).

Typically, in default matters, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities, or similar violations, result in reprimands. See, e.g., In re Rak, 203 N.J. 381 (2010) (reprimand for gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with the investigation of the grievance); and In re Van de Castle, 180 N.J. 117 (2004) (reprimand for gross neglect, failure to communicate with the client, and failure to cooperate with disciplinary authorities).

Aggravating factors such as additional violations, the number of client cases involved or the attorney's ethics history can elevate the level of discipline. See, e.g., In re Gross, 210 N.J. 115 (2012) (censure for gross neglect and failure to cooperate with disciplinary authorities; prior censure); In re Felsen, ___ N.J. ___ 2013) (three-month suspension for lack of

diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities; prior reprimand, censure and three-month suspension); In re Furino, 210 N.J. 124 (2012) (three-month suspension for simply failing to cooperate with disciplinary authorities; prior reprimand and three-month suspension; an additional aggravating factor was the attorney's failure to learn from prior mistakes for his non-cooperation); and In re Rak, 205 N.J. 261 (2011) (three-month suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities; prior reprimand).

Had this been respondent's first brush with the ethics system, we would have deemed a reprimand to be the appropriate quantum of discipline. Instead, we find that his serial defaults and his failure to learn from prior mistakes warrant increasing the discipline to a three-month suspension. A four-member majority so voted. Although we find that respondent practiced law while suspended, there is no evidence in the record that he did so knowingly. We, thus, determine that the discipline need not be enhanced beyond a three-month suspension.

Chair Frost and Members Gallipoli and Zmirich believe that discipline greater than a three-month suspension is warranted. These members were offended by respondent's utter disdain for

the disciplinary process as evidenced by his continuing failure to cooperate with ethics authorities, as well as his scorn for the judiciary and its members. Respondent's arrogance was reflected in his certification where he questioned, "Why am I expected to participate in a system that I have proved to you with the facts above to be fundamentally flawed?"

These members compared this case to In re Kantor, 180 N.J. 226 (2004), where the Court found that the attorney had shown "an utter disregard for the disciplinary process as evidenced by his decision not to cooperate with the ethics investigation, to answer the complaint, to submit evidence to the DRB, or the Court's Order to Show Cause." The Court disbarred Kantor for abandoning his law practice in which he had ten active files without notifying his clients or making provisions for the transfer of his files. The members concluded that this respondent's conduct was by no means as egregious as Kantor's but, nevertheless, his conduct warranted discipline greater than three-months. These members voted to impose a six-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
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Duane T. Phillips
Docket Nos. DRB 13-112 and DRB 13-133

Decided: November 7, 2013

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Six-month Suspension	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh		X				
Clark		X				
Doremus		X				
Gallipoli			X			
Yamner		X				
Zmirich			X			
Total:		4	3			

Isabel Frank
Acting Chief Counsel