

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-306

IN THE MATTER OF :
 :
MARK D. CUBBERLEY, :
 :
AN ATTORNEY AT LAW :
 :

Decision
Default [R. 1:20-4(f)(1)]

Decided: April 5, 1999

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

Pursuant to R. 1:20-4(f)(1), the District VII Ethics Committee ("DEC") certified the
record in this matter directly to the Board for the imposition of discipline, following
respondent's failure to file an answer to the formal ethics complaint.

On April 28, 1998, the DEC sent a copy of the complaint to respondent's last known
office address by certified mail. The certified mail return receipt was returned indicating
delivery on April 29, 1998; the signature does not appear to be respondent's. On June 2,
1998, a second letter was mailed to the same address by certified and regular mail. The

certified mail envelope was returned as "unclaimed." The regular mail envelope was not returned. Respondent did not file an answer to the complaint.

On July 22, 1998, the day before the Board hearing, respondent filed a motion to vacate all defaults pending against him and to allow him to file answer. The day before the Board's September 1998 hearing, respondent filed a supplemental certification to his motion to vacate all defaults pending against him. Although the Board denied the motion for lack of a meritorious defense, both as to respondent's failure to answer the complaint and as to the underlying ethics charges, the Board determined to treat the information contained therein for purposes of mitigation of the disciplinary charges.

Respondent was admitted to the New Jersey bar in 1984. At the relevant times he maintained an office in Lawrenceville, New Jersey.

On April 19, 1996, respondent was admonished for failing to reply to the DEC investigator's request for information until a subpoena was issued, in violation of RPC 8.1(b). In July 1998, the Board determined to reprimand respondent for gross neglect, lack of diligence and failure to communicate in two matters, in violation of RPC 1.1(a), RPC 1.3, and RPC 1.4(a), respectively.

I. Count One - The Fasenella Matter

According to the first count of the complaint, in late 1994, Shirley Fasenella retained respondent to handle the estate of George E. Bednak. Respondent was to prepare and

execute an executor's deed to real estate property owned by the decedent. On August 15, 1995, the co-executors signed the Consent and Release of Executors and the informal accounting.

Once the forms were signed, Fasenella repeatedly called respondent, in an attempt to find out the status of her case. Fasenella was never able to reach respondent, who failed to return her telephone messages.

On November 27, 1997, four months after Fasenella filed a grievance against respondent, respondent contacted the DEC and claimed that he had resolved the matter with Fasenella. However, when the DEC called Fasenella, she denied that the matter had been resolved.

II. Count Two - The Walton Matter

According to the second count of the complaint, in late 1995, Daniel Walton retained respondent to prepare and file a deed to his mother's home. On December 29, 1995, the deed was signed to be recorded at Hamilton Township on January 4, 1996. In early January 1997, Walton called respondent's office six times. Walton did not receive a return call. On February 20, 1997, Walton met with another attorney, who advised him that the deed was never filed.

After additional telephone calls to respondent's office, on March 3, 1997, Walton received a voice mail message from respondent advising him that the deed would be filed.

On March 7, 1997, Walton left a voice mail message for respondent requesting a written explanation as to why the deed, which was expected to be filed January 4, 1996, was actually filed March 4, 1997. After several more telephone calls by Walton, respondent left Walton a voice mail message advising that the original deed and an explanatory letter would be sent to Walton. As of November 24, 1997, Walton had not received the letter. At an unstated date, Walton received a bill from respondent stating that the deed was filed January 4, 1996.

On November 25, 1997, Janetta Marbrey, a member of the DEC, spoke with respondent via telephone. Respondent stated that he had resolved the problem with Walton and would send a letter to that effect. As of April 20, 1998, the DEC had not received a letter from respondent.

Both counts of the complaint charged respondent with violations of RPC 1.3 (failure to act with reasonable diligence), RPC 1.4(a) (failure to communicate with the client) and RPC 1.1(b) (pattern of neglect).

* * *

Following a de novo review of the record, the Board deemed the allegations of the complaint admitted. R. 1:20-4(f)(1). Respondent's failure to execute and file the deeds in the two matters constituted a lack of diligence, in violation of RPC 1.3. In addition,

respondent's failure to reply to Fasenella's and Walton's attempts to contact him constituted a failure to keep his clients reasonably informed about the status of their matters, in violation of RPC 1.4(a). Finally, respondent's misconduct in these two matters, combined with respondent's misconduct in previous matters for which he was disciplined, constituted a pattern of neglect, in violation of RPC 1.1(b).

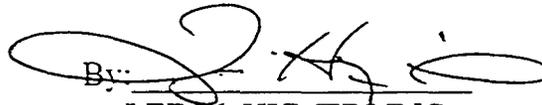
This leaves only the issue of appropriate discipline. While ordinarily a reprimand would be sufficient discipline, *see In re Gordon*, 139 N.J. 606 (1995) (reprimand for gross neglect, lack of diligence, failure to keep client informed and failure to return file to client) and *In re Carmichael*, 139 N.J. 390 (1995) (reprimand for lack of diligence and failure to communicate with client), because of respondent's ethics history and failure to file an answer in the present matter, a three-month suspension is in order. *See In re Marra*, 149 N.J. 650 (1997) (three-month suspension for lack of diligence, gross neglect and failure to communicate with client; the attorney had previously received a private and a public reprimand); *In re Ortopan*, 143 N.J. 586 (1996) (three-month suspension for gross neglect, failure to communicate with client, failure to turn over the client's file and failure to participate in the disciplinary proceeding against him) and *In re Saginario*, 142 N.J. 424 (1995) (three-month suspension where the attorney grossly neglected a matter and had been privately reprimanded on two previous occasions).

Accordingly, a four-member majority of the Board determined to suspend respondent for three months. Three members voted to impose a reprimand. One member recused

herself and one member did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 4/5/99

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Mark D. Cubberley
Docket No. 98-306

Decided: April 5, 1999

Disposition: Three-Month Suspension

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling			X				
Zazzali			X				
Brody		X					
Cole							X
Lolla		X					
Maudsley			X				
Peterson						X	
Schwartz		X					
Thompson		X					
Total:		4	3			1	1

Robyn M. Hill 5/25/99
Robyn M. Hill
Chief Counsel