

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-037
District Docket No. XII-2012-0045E

IN THE MATTER OF
ALAN S. PORWICH
AN ATTORNEY AT LAW

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Decision

Argued: May 15, 2014

Decided: July 24, 2014

Anabela DaCruz-Melo appeared on behalf of the District XII Ethics Committee.

Gerald D. Miller appeared on behalf of respondent.

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

This matter was before us on a recommendation for a censure filed by the District XII Ethics Committee (DEC). The complaint charged respondent with violating RPC 3.2 (failure to expedite

litigation), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and RPC 8.4(d) (conduct prejudicial to the administration of justice).¹

Although, in respondent's answer, he admitted only that he had violated RPC 8.1(b), his counsel told the hearing panel that all three allegations were admitted.

We determine to impose an admonition.

Respondent was admitted to the New Jersey bar in 1979. In 1999, he was reprimanded for misconduct in three matters. There, he was found guilty of a combination of gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to cooperate with disciplinary authorities, and misrepresentation to one client. In re Porwich, 159 N.J. 511 (1999). The Court ordered respondent to complete ten hours of classes in law office management and to practice under the supervision of a proctor for two years and until further order

¹ The complaint mistakenly charged respondent with violating RPC 8.1(d). At the DEC hearing, the presenter clarified that RPC 8.1(b) was intended.

of the Court. According to the Office of Attorney Ethics, the proctorship requirement was vacated in July 2002.

In 2011, respondent was censured, in a default matter, for failure to communicate with a client, failure to turn over the client's file, and failure to cooperate with disciplinary authorities. In re Porwich, 205 N.J. 230 (2011).

In his answer to the ethics complaint, and again at the DEC hearing, respondent admitted all of the facts alleged in the complaint.

In or about July 2005, respondent and an unnamed client entered into a settlement agreement arising from a malpractice claim, whereby respondent was to pay the client \$50,000 by February 2009. If the client did not timely receive the payment, a consent judgment would be entered in favor of the client, in the amount of approximately \$118,000. Respondent failed to submit the payment by February 2009.² Consequently, a consent judgment was entered against him, in March 2009.

² The record does not reveal whether respondent communicated with the client about his failure/inability to pay the settlement amount.

In January 2011, the Hudson County Sheriff's Department served a wage execution on respondent's law firm, Feintuch, Porwich and Feintuch (the firm). In February 2012, the sheriff's department, having received no funds, sent an inquiry to the firm about the wage execution.

In May 2012, Thomas Welchman, Esq., the grievant herein and the attorney for the client, filed a motion to enforce litigant's rights against respondent. An order issued in June 2012 provided, in part, that 1) respondent had violated the client's rights as a litigant; 2) the law firm was to pay \$8,666.56 within ten days of the order; and 3) the law firm was to provide respondent's 2011 W-2 and/or 1099, in addition to all payroll records for 2012.

In July 2012, respondent forwarded \$5,000 to Welchman. In August 2012, Welchman advised respondent that he had not complied with the remainder of the directives from the June 2012 order. Welchman then filed an ethics grievance against respondent.

On September 24, 2012, the DEC investigator requested that respondent reply to the allegations of the grievance within ten days. Respondent did not submit a reply. By letter dated October 16, 2012, the investigator again asked that respondent

reply to the grievance. Respondent telephoned the investigator and requested additional time to reply, which was granted.

On October 25, 2012, the investigator received correspondence from respondent, indicating that he had complied with the June 2012 order and that the law firm and Welchman had agreed to a proposal resolving the matter.

Thereafter, the investigator sent another letter to respondent, by certified and regular mail, asking that he reply to the grievance.³ As of the date of the complaint, March 14, 2013, respondent had not submitted a reply.

As indicated previously, respondent admitted the violations charged in the complaint: RPC 3.2, RPC 8.1(b), and RPC 8.4(d).

In respondent's testimony, answer, and pre-hearing memorandum to the hearing panel, he set out a number of unfortunate events in his life, which he put forth as mitigation. Specifically, in November 2006, his younger sister died at the age of forty-seven, after lapsing into a coma a

³ The complaint states that the investigator's letter was mailed on November 19, 2012 and that respondent's reply was due on November 19, 2012. At least one of those dates is obviously incorrect. In addition, the complaint does not state whether the certified and regular mail were delivered to respondent.

month earlier. In the spring of 2008, respondent's mother was diagnosed with colon cancer and underwent surgery, followed by chemotherapy and radiation for a number of months. In March 2009, respondent's wife told him that she wanted a separation, leaving him primarily responsible for the care of his two children, who are now nineteen years old. In June 2009, respondent's father-in-law, who had been suffering from "Parkinsonian symptoms and other neurological disorders," died. At around the same time, respondent's mother learned that her cancer had spread. She passed away in November 2009. Respondent was left to handle her estate in Florida. In January 2010, respondent's wife filed for divorce.

According to respondent, financial difficulties prevented him from satisfying the judgment in favor of the client. He explained that his marital situation, as well as lowered law firm revenues, had altered his financial condition. In addition, in October 2011, his law partner, Howard Feintuch, died, putting a great emotional and financial strain on his office. Although he did not produce any records of his treatment, respondent claimed that the combination of these factors caused him to suffer from depression. He sought

psychiatric help, after he paid off the judgment against him in September 2013.

* * *

The DEC concluded that respondent violated RPC 8.1(b). The DEC noted the three letters that the investigator had sent to respondent, requesting a reply to the grievance, and respondent's telephone call requesting additional time to reply, which was granted. Nevertheless, respondent failed to reply to the grievance. The DEC also noted that respondent "has a history of failing to cooperate with disciplinary authorities," pointing to his 2011 censure and 1999 reprimand, both of which included violations of RPC 8.1(b). The DEC found it "particularly troubling" that respondent had received the initial letter from the investigator fewer than two years after he had been censured, in part, for a violation of RPC 8.1(b).

On the other hand, the DEC did not find clear and convincing evidence of a violation of RPC 3.2, since respondent was no longer representing the client, when he failed to pay the settlement, and since he had not delayed the entry of the judgment against him or the filing and determination of the motion to enforce litigant's rights. The DEC concluded that RPC 3.2 was not intended to apply to these facts.

The DEC found, however, that respondent violated RPC 8.4(d) by failing to meet the terms of a settlement agreement with a former client. In addition, after a judgment was entered against him, he failed to comply with a wage execution order, despite correspondence from the sheriff's office, forcing Welchman to file a motion to enforce litigant's rights. Still, other than forwarding partial payment, respondent failed to comply with the settlement agreement.

In the DEC's view, this case is analogous to In re Hecker, 109 N.J. 539 (1988). There, the attorney represented Dover Township. At one point, the township sought to recover excess fees that the attorney had billed. After the township obtained a judgment against the attorney, he took actions to thwart collection. In the present matter, the DEC found that "[r]espondent's disregard of the Order for Wage Execution, his disregard of the correspondence from the Sheriff and his failure to fully comply with the Order in Aid of Litigant's Rights caused a waste of judicial resources and these actions together constitute clear and convincing evidence of his violation of RPC 8.4(d)."

The DEC considered the mitigating factors that respondent put forth, specifically, the 2006 death of his sister; his mother's 2008 illness and subsequent death in 2009; the 2009 death of his father-in-law; his marital situation, which culminated in a 2010 divorce and which left him primarily responsible for his two children; the 2011 death of his law partner; and the downturn in the economy, which caused respondent a great deal of stress and a marked decrease in income. In addition, the DEC observed that, by the date of the ethics hearing, respondent had fully satisfied the judgment against him.

In aggravation, the DEC noted respondent's prior discipline. The DEC commented that, in both respondent's 1999 reprimand and his 2011 censure, he had been found guilty of failure to cooperate with disciplinary authorities.

As indicated previously, the DEC recommended a censure.

* * *

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

We disagree, however, with the DEC's conclusion that respondent violated RPC 8.4(d). Respondent's failure to comply with the settlement in the malpractice action is a civil matter, not a disciplinary matter. If respondent's actions in this context become fodder for a finding of misconduct, then every attorney-litigant who is unable to pay a civil judgment will face disciplinary charges. The floodgates will be opened.

Moreover, logic forces the conclusion that respondent was unable to timely pay the judgment against him. Had he timely paid, the amount due to his client would have been \$50,000. Otherwise, the figure would rise to \$118,000. Respondent testified that he ultimately paid \$93,766.34 to the former client. Clearly, it was in his interest to timely pay the amount due, had he been able to. But there is no indication that his failure to timely make the payment was an act of defiance. He indicated that there were payments made in addition to the \$5,000 referenced in the complaint, evidencing his attempt at compliance. To find that respondent was guilty of conduct prejudicial to the administration of justice implies a malevolent intent that the record does not support. The disciplinary system is not meant to function as a collection agency.

We agree, however, with the DEC's finding that respondent did not violate RPC 3.2. Respondent was no longer representing his client, when he failed to pay the settlement, and he took no action to delay resolution of the matter against him.

That leaves only the violation of RPC 8.1(b), which was clearly and convincingly established.

For a violation of RPC 8.1(b), standing alone, ordinarily an admonition is imposed. See, e.g., In the Matter of Richard D. Koppenaar, DRB 13-164 (October 21, 2013) (failure to cooperate with an ethics committee's attempts to obtain information about the attorney's representation of a client; remaining charges were dismissed); 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 finally retaining ethics counsel to assist her); 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 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 ethics investigator's requests for information about the grievance).

There is no doubt that respondent went through a number of very trying years. However, with the exception of the change in his financial circumstances, none of the events in question occurred during the time period in which he failed to reply to the DEC investigator's letters. The investigator sent his initial letter to respondent in September 2012. Although the multiple losses that respondent experienced had to be extremely difficult to face, they occurred years before he failed to cooperate with the investigation of the grievance. Having been reprimanded and censured for the same misconduct, respondent should have known better. He obviously failed to learn from his mistakes. A reprimand, thus, would seem appropriate for his pattern of failure to cooperate with disciplinary authorities.

On the other hand, this is not a case where an attorney totally ignored the DEC. Respondent contacted the investigator to request additional time to reply to the grievance and sent a

letter to the investigator, in which respondent informed the investigator that he had complied with the June 2012 order and that Welchman and respondent had agreed to a resolution of the matter. It is possible that respondent believed that this information was sufficient to satisfy his obligation to reply to the grievance. Moreover, the three letters from the investigator to respondent were sent in a short time period. The first letter was sent on September 24, 2012, the second in October 2012, and the third in or about mid-November 2012. This was not a long, drawn-out time period where respondent was ignoring the investigator. Also, respondent filed an answer to the complaint and conceded the factual allegations against him, as well as the alleged RPC violations.


Finally, it appears that respondent was suffering from depression, when he received the investigator's letters. When asked about his reaction to the letters, respondent replied, "I just had a panic attack, and I guess given my condition, I just stuck my head in the sand, which I shouldn't have done."

In light of the above, we are persuaded that an admonition is adequate discipline for respondent's violation of RPC 8.1(b).

Member Gallipoli 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of Alan S. Porwich
Docket No. DRB 14-037

Argued: May 15, 2014

Decided: July 24, 2014

Disposition: Admonition

Members	Disbar	Suspension	Admonition	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Gallipoli						X
Hoberman			X			
Singer			X			
Yamner			X			
Zmirich			X			
Total:			7			1


Ellen A. Brodsky
Chief Counsel