

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-153

IN THE MATTER OF :
:
MARC MALFARA, :
:
AN ATTORNEY AT LAW :
:

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

Decided: December 6, 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 IV 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 complaints.

On February 4, 1999, the DEC served a copy of the complaint on respondent by regular and certified mail sent to his office address. The certified mail receipt was returned, signed "A. Malfara." The regular mail was not returned. On March 4, 1999, the DEC sent a second copy of the complaint to respondent's office address, informing him that, unless he filed an answer to the complaint within five days from the date of that letter, the allegations of the complaint would be

deemed admitted, pursuant to R. 1:20-4(f) and R. 1:20-(6)(c)(1). Again the certified mail receipt was returned, signed by "A. Malfara." The regular mail was not returned.

The DEC received correspondence from respondent, dated March 7, 1999, stating that it was his intention to deny all allegations of the complaint. By letter dated March 25, 1999, the DEC informed respondent that his correspondence was insufficient to qualify as an answer and that he had to file a formal answer within ten days or the matter would proceed to the Board as a default.

When respondent did not file an answer to the ethics complaint, the matter was certified directly to the Board for the imposition of discipline.

Respondent was admitted to the New Jersey bar in 1993. At the relevant times he maintained an office in Blackwood, New Jersey.

On March 23, 1999, respondent was reprimanded for gross neglect, failure to cooperate with disciplinary authorities and conduct prejudicial to the administration of justice, in violation of RPC 1.1(a), RPC 8.1(b) and RPC 8.4(d), respectively.

An additional default matter has just been concluded by the Board. That matter, Docket No. DRB 98-482, which has resulted in a decision to suspend respondent for six months, encompasses three cases where respondent's misconduct included gross neglect, pattern of neglect, lack of diligence, failure to communicate the basis or rate of a fee to a client, failure to return clients' files upon termination of representation and failure to cooperate with disciplinary authorities.

The Mason Matter

In January 1997, Elizabeth Mason retained respondent to represent her in a Chapter 13 bankruptcy proceeding. Mason paid respondent \$700 in cash, together with a check for \$160 for the bankruptcy filing fee. Respondent filed the Chapter 13 bankruptcy petition on January 13, 1997.

When Mason attempted to contact respondent about the status of her case, he did not return her telephone calls for weeks. On one occasion, when Mason's husband went to respondent's office, respondent refused to open the door. When Mason later learned that her petition had been dismissed, she called respondent, who did not return her telephone call for over a month. Shortly thereafter, Mason received a foreclosure notice.

Mason met with respondent in September 1997 and requested that he file a second bankruptcy petition on her behalf. At that time, Mason paid respondent \$160 for another filing fee. Respondent filed the second petition on October 9, 1997. The second petition was dismissed on March 19, 1998, however, for failure to attend a creditors' meeting and failure to make payments to the trustee. Mason then retained another attorney.

In a telephone interview with an Office of Attorney Ethics' ("OAE") investigator, respondent admitted that he had not kept track of the bankruptcy petitions once he had filed them. He also stated that he had received a telephone message from Mason's new attorney, requesting Mason's file. Based upon that call, respondent allegedly assumed that the petition had again been dismissed. Respondent never forwarded the file and never returned the telephone call.

The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) and RPC 1.16(d) (failure to protect a client's interest upon termination of representation).

The Caldwell Matter

In 1991, Lula Brown sold a parcel of real estate to Robert J. Wagner. Brown retained a note and mortgage on the property and hired D. Vincent Lazzaro, Esq. to collect the monthly mortgage payments. When Brown passed away, Fannie Caldwell was appointed executrix of her estate. After Wagner defaulted on the mortgage payments, on December 10, 1996, Richard C. Klein, Esq. (Caldwell's attorney) filed a foreclosure complaint on behalf of the Brown estate. Respondent was retained by Wagner, the mortgagor, to resolve the issue of the mortgage payments.

In March 1997, Lazzaro, suffering from a terminal illness, transferred the Brown file and all funds held in trust for the Brown estate (\$4,327.65) to respondent. On March 14, 1997, respondent transferred all funds into his attorney trust account. On April 14, 1997, respondent wrote to Klein advising him that Lazzaro had passed away and that the mortgage payments for the Brown estate had been transferred to his trust account.

On three occasions thereafter -- September 1997, December 1997 and March 1998 -- Klein requested that respondent provide an accounting of the funds and release to him the funds held in trust for the Brown estate. Respondent did not comply with Klein's requests. Accordingly, on June 9, 1999, Klein amended the foreclosure complaint to include respondent and Lazzaro's estate

as defendants. Ultimately, the parties settled their differences and respondent transferred the Brown estate funds to Klein.

The complaint charged respondent with violations of RPC 1.15(b) (failure to deliver funds to which a client or third person is entitled) and RPC 4.4 (using means with no substantive purpose other than to embarrass, delay or burden a third party).

The Scull Matter

On June 17, 1997, Cynthia Scull (a/k/a Cynthia Schlemback) retained respondent to represent her in a divorce proceeding. Scull paid respondent a flat fee of \$750. After respondent filed an answer and a counterclaim on Scull's behalf, he did no further work on the case. In or about October 1997, when Scull was eliminated from her husband's health insurance, she requested that respondent file a motion for pendente lite relief on her behalf. Respondent indicated that he would file the motion, but neglected to take action.

Furthermore, when respondent's adversary filed a motion for pendente lite relief on behalf of Scull's husband, respondent failed to appear or to oppose the motion. Respondent did not inform Scull of her husband's motion or its outcome. Scull first became aware of the judge's decision when an order for wage execution was sent to her supervisor.

Following respondent's failure to take action or appear on Scull's behalf, Judge Lihotz issued an order for respondent to appear before her, returnable on January 14, 1998. When respondent failed to appear on the return date, Judge Lihotz issued a bench warrant for his arrest.

When interviewed by an OAE investigator, respondent conceded that he had not informed Scull that he had ceased work on her case or advised her to retain other counsel.

The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 1.5(a) (charge of an unreasonable fee) and RPC 1.16(d) (failure to protect a client's interests upon termination of representation).

* * *

Service of process was proper in this matter. Following a review of the complaint, the Board found that the facts recited therein support a finding of unethical conduct. Because respondent failed to file an answer, the allegations of the complaint are deemed admitted. R. 1:20-4(f)(1).

In the Mason and Scull matters, respondent was guilty of gross neglect, lack of diligence, failure to communicate with his clients and failure to protect the clients' interests upon termination of the representation. In the Caldwell matter, respondent also failed to deliver funds to which a third person was entitled. Respondent's negligent conduct, when combined with his conduct in prior matters for which he was disciplined, constituted a pattern of neglect, in violation of RPC 1.1(b). Although respondent was not specifically charged with a violation of that rule, the facts recited in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that rule. Therefore, the Board deemed the complaint amended to conform

to the proofs. In re Logan, 70 N.J. 222, 232 (1976).

However, the facts alleged in the complaint did not support the charge that respondent's delay in transferring the funds in the Caldwell matter was to "embarrass, delay or burden a third person." Furthermore, a flat fee of \$750 for legal services in a divorce action is not unreasonable. If there were a disparity between the fee charged and the amount of work done in the Scull matter, fee arbitration would be the forum in which to resolve the fee dispute. Therefore, the Board dismissed the alleged violations of RPC 4.4 in the Caldwell matter and RPC 1.5(a) in the Scull matter.

This leaves only the issue of appropriate discipline. Ordinarily, a three-month suspension would be the appropriate discipline for similar misconduct. See, e.g., In re Ortopan, 143 N.J. 586 (1996) (three-month suspension for lack of diligence, failure to keep client informed and failure to cooperate with disciplinary authorities); In re Peluso, 156 N.J. 545 (1999) (three-month suspension for gross neglect, pattern of neglect, failure to abide by a client's decision, lack of diligence, failure to communicate, failure to explain matter to client in order to make an informed decision and failure to return client's file upon termination of representation) and In re West, 156 N.J. 391 (1998) (three-month suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate, failure to return client's funds and papers and failure to cooperate with ethics authorities in two matters).

Here, however, respondent has been previously reprimanded, and a six-month suspension has been ordered by the Board on a similar default. Furthermore, respondent was aware of the

prior ethics investigations when he neglected these matters. On notice that his conduct was under investigation, respondent still failed to conform his behavior to the standards of the profession.

In light of respondent's ethics history and the default posture of this proceeding, the Board unanimously determined that a six-month suspension was the appropriate discipline. See, e.g., In re Gertsacov-Smith, 151 N.J. 483 (1997) (six-month suspension for lack of diligence, failure to communicate, failure to return client's file and failure to cooperate; the attorney had been privately reprimanded on one prior occasion) and In re West, 156 N.J. 451 (1998) (six-month suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate, failure to return a client's funds and papers and failure to cooperate with ethics authorities in three matters in a default proceeding; attorney had a prior three-month suspension). The suspension is to be consecutive to the prior six-month suspension ordered by the Board in Docket No. DRB 98-482.

The Board also directed that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: _____

12/2/95

By: _____



LEE M. HYMERLING

Chair

Disciplinary Review Board