

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-067
District Docket No. IIIA-08-0029E

IN THE MATTER OF
JOSEPH DOCHNEY
AN ATTORNEY AT LAW

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Decision

Decided: September 3, 2009

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

This matter came before us on a certification of default filed by the District IIIA Ethics Committee ("DEC"), pursuant to R. 1:20-4(f). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.4(a), more properly (b) (failure to keep a client adequately and accurately informed about the status of the matter), RPC 1.5(b) (failure to provide a client with a writing setting forth the basis or rate of the fee), RPC 3.2 (failure to expedite litigation), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent filed a motion to vacate the default, which Office of Board Counsel received on July 6, 2009. In his motion, respondent argued that he did not file a timely answer because he "unwisely decided to represent" himself, but has since decided to retain counsel. Respondent attributed his failure to timely file an answer to his current workload, personal matters, and his tendency to give personal concerns a low priority.

For the reasons expressed below, we denied respondent's motion to vacate the default and determined to reprimand him.

Respondent was admitted to the New Jersey bar in 1981. He maintains a law office in Toms River, New Jersey. He has no history of discipline.

Service of process was proper. On December 11, 2008, the DEC mailed a copy of the complaint by regular and certified mail to respondent's last known office address, as listed in the New Jersey Lawyers' Diary and Manual. The certified mail receipt, signed by Dottie Dochney, shows delivery on December 12, 2008. The regular mail was not returned. Respondent did not file an answer.

On January 30, 2009, the DEC sent a second letter to the same address by regular mail. The letter notified respondent that, if he did file an answer to the complaint within five days, the allegations of the complaint would be deemed admitted

and the record would be certified to us for the imposition of sanction. The letter also served to amend the complaint to include a willful violation of RPC 8.1(b). The regular mail was not returned.

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

The complaint alleges that, in April 2006, Jeffrey Fedak retained respondent in connection with an employment matter against his employer and other potential parties responsible for his 2006 termination of employment. Respondent failed to file a lawsuit on Fedak's behalf. Instead, he misrepresented to Fedak that the matter was proceeding properly, even though he had not conducted an investigation in the matter and the statute of limitations on Fedak's claim had expired.

In July 2008, Fedak sought the advice of new counsel. He learned that respondent had never filed a lawsuit on his behalf and that, because the statute of limitations had run, "his rights were compromised seriously, perhaps irrevocably, by Respondent's failure to undertake the timely investigation of the facts."

Respondent also failed to provide Fedak with any type of writing setting forth the basis or rate of his fee. The

investigative report clarified that Fedak paid respondent an initial fee of \$5,000.

The investigative report stated that, during an October 3, 2008 conference between the investigator and respondent, respondent admitted that he did not file the complaint on Fedak's behalf. In a letter to the investigator, respondent also admitted that he had not provided Fedak with a retainer agreement, but was willing to refund the entire fee.

As noted above, respondent's explanation for failing to file an answer to the ethics complaint was that he had decided to represent himself and that he had given his ethics problems a low priority because of his workload and personal matters.

In respondent's certification in support of his motion, he admitted that he had allowed the statute of limitations to run on Fedak's claim. He asserted further that he relied on the representations of a former employee that the complaint that he had drafted on Fedak's matter had been filed. He also indicated that he had had several conferences with Fedak and had kept him "informed."

Respondent admitted his culpability in this matter, but denied that his conduct rose to the level of gross neglect. He requested that the default be vacated to permit him to retain an attorney to defend him against the ethics charges.

Respondent attached to his motion a "proposed" answer to the ethics complaint, in which he admitted failing to file the lawsuit on Fedak's behalf, but denied purposely misleading him or engaging in unethical conduct.

To succeed on a motion to vacate a default in a disciplinary matter, an attorney must satisfy a two-prong test. First, the attorney must provide a valid reason for failing to file a timely answer to the complaint; second, the attorney must set forth any meritorious defenses to the ethics charges. Respondent has failed to satisfy the first prong of the test. Simply put, he did not find the time to file an answer or to request an extension of time, even though he had been in contact with the DEC investigator. We, therefore, denied respondent's motion and determined to proceed with our review of this matter on a default basis.

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)(1).

We dismiss, however, the charged violations of RPC 1.1(b) and RPC 3.2. As to the former, for a finding of a pattern of neglect at least three instances of neglect are required. In the

Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). As to the latter, because respondent never started litigation on Fedak's behalf, he cannot be found guilty of failure to expedite litigation.

On the other hand, the record before us establishes that respondent failed to provide his client with a writing setting forth the basis or rate of his fee, thereby violating RPC 1.5(b); failed to conduct an investigation in the matter and permitted the statute of limitations to run, violating RPC 1.1(a); failed to keep his client informed about the status of the matter and did not tell him that the statute of limitations had expired, violating RPC 1.4(b); and misrepresented to Fedak that the matter was proceeding properly, thereby violating RPC 8.4(c). Also, the DEC's second letter to respondent served to amend the complaint to include a willful violation of RPC 8.1(b) (failure to comply with a lawful request for information from a disciplinary authority).

Attorneys who defaulted in ethics matters and were found guilty of misconduct similar to that of respondent have received censures. See, e.g., In re Wargo, 192 N.J. 41 (2008) (the attorney accepted a \$2,000 fee, filed a complaint, but failed to prosecute it, causing it to be dismissed with prejudice (RPC 1.1(a) and RPC 1.3), failed to keep the client informed about

the status of the matter and to comply with her reasonable requests for information (RPC 1.4(b)), and engaged in a misrepresentation by silence (RPC 8.4(c)) by failing to inform the client that the complaint had been dismissed); In re Aratow, 185 N.J. 319 (2005) (attorney was guilty of gross neglect, lack of diligence, failure to communicate with a client, and misrepresentation; the attorney filed a dental malpractice complaint, failed to serve the defendant, permitted the complaint to be dismissed for lack of prosecution, and obtained an order reinstating the case, only to allow it to be dismissed a second time; he also failed to reply to his client's inquiries about the status of the case, led her to believe that he had served the defendant, and failed to inform her about the dismissal); and In re Gottesman, 185 N.J. 318 (2005) (attorney was guilty of a lack of diligence, failure to communicate with a client, and misrepresentation; the attorney permitted a complaint to be dismissed for failure to file answers to interrogatories, failed to inform his client about the dismissal, and misrepresented to the client that the matter had been adjourned). Neither Wargo, Aratow nor Gottesman had a history of final discipline.

Respondent's misconduct closely resembles that of the attorneys in Wargo, Aratow and Gottesman. In addition, he was also guilty of failing to provide his client with a writing

setting forth the basis or rate of his fee. However, respondent's misconduct significantly differs from the above defaulting attorneys in that he did not entirely ignore the ethics process. The investigative report established that respondent had a conference with the DEC investigator about the grievance and admitted to the investigator that he did not file a complaint on behalf of his client. He later wrote to the investigator admitting that he had not provided his client with a retainer agreement, but was willing to refund the client's fee.

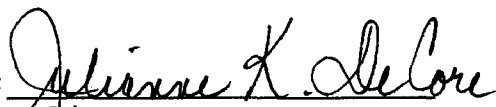
One more observation on this point warrants mention. Prior to this matter, respondent fully participated in another ethics matter (DRB 09-153; District Docket No. IIIA-07-031E).¹ The grievance in that matter was filed on November 20, 2007, nine months prior to the filing of the grievance in the instant matter (July 23, 2008). We recognize the anomaly of respondent's having participated in that matter and having allowed this matter to proceed to the default stage. This factor bolsters our conclusion that respondent was not attempting to "thumb his nose" at the disciplinary system, as did the above defaulting attorneys, by frustrating the investigators' efforts to properly

¹ Oral argument on that case has been scheduled for September 17, 2009.

evaluate the allegations of impropriety leveled against them. The discipline in those cases was increased from a reprimand to a censure because of the attorney's failure to file an answer to the formal ethics complaint. Here, respondent did not completely thwart the DEC's efforts. We, thus, find that this is not a situation where the default nature of the proceedings warrants enhanced discipline and determine that a reprimand is sufficient discipline for this respondent.

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 Joseph Dochney
Docket No. DRB 09-067

Decided: September 3, 2009

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			


Julianne K. DeCore
Chief Counsel