

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-148
District Docket No. IIA-2008-0007E

IN THE MATTER OF
KENNETH P. SIRKIN
AN ATTORNEY AT LAW

Decision

Decided: August 12, 2009

This matter was before us on a certification of default filed by the District IIA Ethics Committee ("DEC"), pursuant to R. 1:20-4(f)(2). The complaint charged violations of RPC 1.1, RPC 1.3, RPC 1.4, and R. 1:20-3.¹ We determine that respondent should receive a three-month suspension for his infractions.

Respondent does not maintain an office in New Jersey. He currently practices law in Florida. He was admitted to the New Jersey bar in 1999 and has no disciplinary record. On two

¹ Although the complaint does not specifically indicate which RPC 1.1 and RPC 1.4 paragraphs respondent allegedly violated, a reading of the charges allows the conclusion that the applicable paragraphs are (a) (gross neglect) and (b) (failure to adequately communicate with the client), respectively. Also, RPC 8.1(b) is the appropriate rule for the charge of failure to cooperate with disciplinary authorities, rather than R. 1:20-3.

occasions, however, he was ineligible to practice law for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection: from September 24, 2001 to March 21, 2002 and from September 15, 2003 to May 12, 2006. There are no allegations that he practiced law during those periods of ineligibility.

Service of process was proper in this matter. On December 15, 2008, the DEC sent a copy of the complaint, by regular and certified mail, to respondent's office address in Florida, 4055 Artesa Drive, Boynton Beach, 33435. The certified mail receipt was signed by, apparently, respondent himself. The regular mail was not returned. Respondent did not file an answer to the complaint.

According to the formal ethics complaint, in August 2005, former counsel for Cheryl Rife, the grievant in this matter, filed a lawsuit arising out of a motor vehicle accident. In August 2006, Rife, a New Jersey resident, discharged her attorney and hired respondent who, at the time, was primarily doing business in Florida.

In March 2007, the defendant made a motion to deposit the full amount of the policy, minus the firm's expenses, into court. In May 2007, respondent had a conference with Rife and indicated to her that all that was available to settle the case was

\$47,000. Rife authorized respondent to settle the case.

In July 2007, the court entered an order of dismissal. Counsel for the defendant offered to prepare a release and other necessary documents. Counsel sent the release to respondent in August 2007. According to the complaint, "[t]he release was not tendered despite demands for same."

In November 2007, counsel filed a motion to compel the production of the settlement documents so that the matter could be closed. Apparently, the motion was granted, as the complaint states that the court ordered Rife to pay a \$300 penalty.

Respondent never sent the settlement documents to Rife, who was unaware of the defendant's motion.

The complaint states that, as of its date, November 26, 2008, Rife had not received the settlement proceeds.² Although Rife repeatedly called respondent to inquire about them, respondent never returned her phone calls.

According to the complaint, "[r]espondent is fully aware that the case is marked as settled, and the money is in court and needs to be withdrawn from the court, and he has failed to do so."

The complaint charged respondent with gross neglect, lack of

² Upon inquiry to the Superior Court Clerk's Office, Office of Board Counsel was informed that the funds still have not been withdrawn from its Trust Funds Unit.

diligence, and failure to communicate with Rife.

The complaint also charged respondent with failure to cooperate with the DEC investigation of the grievance. According to the complaint, respondent did not comply with the investigator's request for a written reply to the grievance and the production of the Rife file, despite having assured the investigator that he would do so within ten days. Respondent told the investigator that he was "in the middle of a federal brief that needed to be filed, and was under a great deal of pressure."

When respondent did not submit a reply and a copy of the Rife file, the investigator called him, in June 2008, and asked whether he had taken any action to have the funds released from court. Respondent replied that he had not done so because he was "in the middle of another matter and was busy and could not speak to the investigator." Respondent assured the investigator, however, that he would send his reply and a copy of the file in four days. He did not do so.

On July 17, 2008, the investigator again called respondent about the missing reply and a copy of the file. At first, respondent told the investigator that he had already sent out the requested information. When pressed about the date of his submission, respondent acknowledged that his staff had not sent it yet and promised the investigator that the information would

be in the investigator's hands on July 21, 2008 at 9:30 a.m.

As of the date of the complaint, respondent had not made good on his promise to the investigator.

We find that the facts recited in 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).

In August 2006, Rife retained respondent to represent her in a lawsuit arising out of a motor vehicle accident. Following settlement negotiations, the case was resolved in July 2007, with Rife's consent. Even before the case was settled, the defendant had deposited in court the full amount of the policy.

Thereafter, counsel for the defendant prepared the release and other incidental documents, which were forwarded to respondent in July 2007, presumably for his review and signature. Respondent never returned them. Even after counsel filed a motion seeking the return of the settlement documents and the court assessed a \$300 penalty against Rife – who was unaware of the motion – respondent did not react.

As of the date of our review of this case, June 18, 2009, respondent still had not taken steps to obtain the funds deposited with the court, despite their obvious availability. Not

even after Rife filed a grievance against him and the DEC investigator prodded him to wrap up the case did respondent take any action. The record is devoid of any explanation for respondent's inertia - no illnesses, no dire straits, no special circumstances were ever raised.

In the interim, his client still has not received her funds, despite the passage of two years since the settlement of her claim. Her requests for information about the progress of the case were unavailing; respondent ignored her phone calls. We find that his conduct in this regard constituted an inexcusable disregard for the needs of his client.

To the DEC investigator, too, respondent turned a deaf ear. Despite respondent's several assurances to the investigator that he would reply to the grievance and send him a copy of the file (even specifying the date and time of the delivery), he never did so. We find that his conduct in this context was worse than that of attorneys who do not participate in the investigative phase of a grievance because of panic or a head-in-the-sand attitude. This respondent virtually strung the investigator along, stifled a full investigation of the grievance, and then made a conscious decision not to answer the formal ethics complaint.

Altogether, respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep the

client adequately informed of the status of the case and to comply with the client's requests for a status update), and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history. See, e.g., In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (admonition imposed on attorney whose inaction in a personal injury action caused the dismissal of the client's complaint; the attorney took no steps to have in reinstated; the attorney to communicate with the client about the status of the case); In re Darqay, 188 N.J. 273 (2006) (admonition for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior admonition for similar conduct); In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (admonition for attorney whose inaction caused a trademark application to be deemed abandoned on two occasions; the attorney also failed to comply with the client's requests for information about the case); In the Matter of Vincenza Leonelli-Spina, DRB 02-433 (February 14, 2003) (admonition for gross neglect, lack of diligence, and failure to communicate with the client); In re

Aranguren, 172 N.J. 236 (2002) (reprimand for attorney who failed to act with diligence in a bankruptcy matter, failed to communicate with the client, and failed to memorialize the basis of the fee; prior admonition and six-month suspension); In re Zeitler, 165 N.J. 503 (2000) (reprimand for attorney guilty of lack of diligence and failure to communicate with clients; extensive ethics history); In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with the clients in two matters; in one of the matters, the attorney also failed to return the file to the client; prior reprimand); and In re Wildstein, 138 N.J. 48 (1994) (reprimand for misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients).

Ordinarily, admonitions, too, are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In re Ventura, 183 N.J. 226 (2005) (attorney did not comply with DEC's investigator's repeated requests for a reply to the grievance; default case); In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the DEC's investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to the DEC's requests for information about two

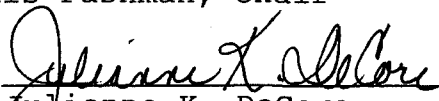
grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the DEC's numerous communications regarding a grievance); In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance); In the Matter of Andrew T. Brasno, DRB 97-091 (June 25, 1997) (attorney failed to reply to the ethics grievance and failed to turn over a client's file); and In the Matter of Mark D. Cubberley, DRB 96-090 (April 19, 1996) (attorney failed to reply to the ethics investigator's requests for information about the grievance).

Respondent's overall ethics transgressions, thus, viewed in isolation, might have merited a reprimand. Two significant, troubling factors, however, require that the otherwise appropriate reprimand be increased by two levels. First, in default matters, the proper discipline for the found ethics violations is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6). Second, we view respondent's conduct toward the DEC investigator as an attempt to "pull the wool over the investigator's eyes" and, as such, more troubling than the conduct of those attorneys who simply do not respond to a

disciplinary official's requests for information because of a mental block caused by fear or panic. In our opinion, respondent's cavalier attitude toward his client's well-being and toward the ethics authorities justifies no less than a three-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
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

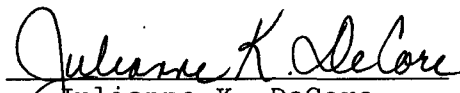
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kenneth P. Sirkin
Docket No. DRB 09-148

Decided: August 12, 2009

Disposition: Three-Month Suspension

Members	Disbar	Three- Month Suspension	Admonition	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