

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 07-078

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IN THE MATTER OF  
RUSSELL KIVLER  
AN ATTORNEY AT LAW

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

Argued: June 21, 2007.

Decided: August 7, 2007

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

This matter was before us on a certification of default filed by the District VII Ethics Committee (DEC), pursuant to R. 1:20-4(f). The complaint alleged that respondent mishandled a personal injury case. The complaint charged violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.4(b) (failure to communicate with the client), RPC 3.2 (failure to expedite litigation), RPC 8.1(b) (failure to cooperate with ethics authorities in the investigation of the grievance), and RPC 8.4(c) (misrepresentation). For the reasons

expressed below, we determine to impose a one-year prospective suspension.

Respondent was admitted to the New Jersey bar in 1973. On April 29, 2005, he received a reprimand for gross neglect, failure to communicate with clients, and failure to supervise a junior attorney. Respondent's misconduct spanned three matters involving the same client. In re Kivler, 183 N.J. 220 (2005). On December 5, 2006, respondent received another reprimand for failure to return an unearned retainer and failure to cooperate with ethics authorities. That disciplinary matter proceeded on a default basis. In re Kivler, 188 N.J. 586 (2006). On February 5, 2007, in another default matter, respondent was suspended for three months for gross neglect, failure to return an unearned retainer, and failure to cooperate with ethics authorities. In re Kivler, 189 N.J. 192 (2007).

In addition, on October 13, 2006, respondent was temporarily suspended for failure to comply with a May 3, 2005 Court order, requiring him to submit to the Office of Attorney Ethics a report by a mental health professional, attesting to his fitness to practice law. In re Kivler, 188 N.J. 342 (2006). Respondent was reinstated on November 2, 2006. In re Kivler, 188 N.J. 477 (2006).

Service of process was proper in this matter. On December 13, 2006, the DEC sent a copy of the complaint, by both certified and regular mail, to respondent's last known office address, listed in the records of the Lawyers' Fund for Client Protection, 1699 Route 33, Trenton, New Jersey 08690, and to his home address, 118 Castleton Road, Delran, New Jersey 08075. The certified mail was accepted in both locations, on December 15, 2006. The regular mail was not returned.

On January 8, 2007, the DEC sent respondent a "five-day letter" to the same two addresses, notifying him that, unless he filed an answer within five days, the record would be certified directly to us for the imposition of discipline. The certified mail was received at both the office and home addresses, on January 10, 2007. The regular mail was not returned.

Respondent did not file an answer to the complaint.

The facts are as follows:

On January 14, 2002, eighty-nine year old Edith Helfrick, the grievant in this matter, retained respondent to represent her in connection with injuries arising out of a November 22, 2001 slip-and-fall incident.

Over the next four years, respondent failed to file suit on Helfrick's behalf or to take any action to preserve her claims. In March 2006, Helfrick traveled to New Jersey for a pre-

arranged meeting with respondent to discuss her case. At that time, respondent was unable to produce either a copy of the complaint or a court docket number. He told Helfrick that he "could not locate [her] file." He promised to send her a copy of the complaint and docket information, but did not do so. He also misrepresented to her that the suit was proceeding apace when, in fact, the statute of limitations had long since expired.

In addition to the above improprieties, respondent failed to return Helfricks's calls seeking information about her case.

On March 22, 2006, the DEC forwarded Helfrick's grievance to respondent and asked for a reply. He did not comply with the DEC's request. On April 18 and May 12, 2006, the DEC sent additional written requests, which respondent ignored. Also, the DEC investigator made several telephone calls to spur respondent to action, before sending him a final September 26, 2006 letter, reiterating the need for a written reply. Respondent never complied with the DEC's numerous requests for information about the grievance.

Following a review of the record, we find that the complaint contains sufficient facts to support a finding of unethical conduct. Because respondent failed to answer the complaint, the allegations are deemed admitted. R. 1:20-4(f).

Respondent was retained to file a personal injury suit for his elderly client, but failed to do so. Instead of protecting his client's interests, he grossly neglected the case over the course of four years, allowing the statute of limitations to expire without filing a complaint on his client's behalf.

Respondent's neglect in this case, when combined with two instances of neglect present in his prior disciplinary matters, forms a pattern of neglect. 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). When an attorney's single instance of neglect is considered in conjunction with other instances found in prior disciplinary matters involving the attorney, a pattern emerges. In the Matter of Jeffry Nielsen, DRB 04-023 (April 29, 2004) (slip op. at 15); In re Nielsen, 180 N.J. 302 ((2004).

Respondent's unethical conduct did not end there. He also failed to apprise Helfrick of the status of the matter and to return her telephone calls seeking information about her case. On one occasion, in 2006, he met with Helfrick, at which time he misrepresented to her that the case was progressing. Finally, he failed to cooperate with the DEC's investigation of the grievance and to file an answer to the formal ethics complaint.

Altogether, respondent's conduct violated RPC 1.1(a), RPC 1.1(b), RPC 1.4(b), RPC 8.1(b), and RPC 8.4(c).

We dismiss, however, the charge of a violation of RPC 3.2 (failure to expedite litigation), inasmuch as litigation was never instituted.

Ordinarily, the level of discipline for the combination of violations present in this case is a reprimand, if the attorney does not have a history of discipline and the matter does not proceed as a default. See, e.g., In re Tunney, 176 N.J. 272 (2003) (reprimand for attorney who, in three matters involving the same client, was found guilty of gross neglect, lack of diligence, failure to communicate with the client, failure to turn over a file to the client, failure to cooperate with the ethics investigator, and misrepresentation; no prior discipline) and In re Porwich, 159 N.J. 511 (1999) (reprimand for attorney who, in one matter, failed to file a complaint, failed to reply to the client's request for information, misrepresented to the client the status of the case, and failed to cooperate with disciplinary authorities; in a second matter, the attorney failed to file a brief, resulting in the dismissal of an appeal, failed to communicate with the client, and failed to cooperate with disciplinary authorities; in the final matter, the attorney failed to file a personal injury complaint, failed to reply to

his client's requests for information, and failed to cooperate with disciplinary authorities; the attorney was found guilty of gross neglect, pattern of neglect, lack of diligence, failure to communicate with a client, failure to cooperate with ethics authorities, and misrepresentation; mitigation considered; no prior discipline).

In a default matter, the appropriate 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. Thus, if the attorney defaults, the discipline for ethics transgressions that would generally lead to a reprimand is ratcheted up to the next degree of sanction, provided that the attorney does not have an ethics history. See, e.g., In re Wargo, N.J. (2007) (censure for attorney who exhibited lack of diligence, gross neglect, failure to communicate with the client, failure to cooperate with disciplinary authorities, and misrepresentation; the appropriate discipline was enhanced from a reprimand to a censure because the attorney defaulted in the ethics matter; no prior final discipline).

The presence of a disciplinary record, particularly if it is considerable, will normally require more than a one notch-enhancement in a default matter. See, e.g., In re Page, 165 N.J.

512 (2000) (one-year suspension, in a default case, for attorney who accepted a fee, did not provide the client with a fee agreement, took no action on the client's behalf, refused to return the client's telephone calls, and ignored the ethics investigator's requests for a reply to the grievance; the attorney violated RPC 1.5(b), RPC 1.3, RPC 1.1(a), RPC 1.4(a), and RPC 8.1(b), respectively; prior discipline included an admonition, a reprimand, a three-month suspension, and a six-month suspension; our decision remarked that, if not for respondent's extensive ethics history and demonstrated disregard for the disciplinary system, a three-month suspension would have been appropriate; In the Matter of Raymond T. Page, DRB 99-327 (July 12, 2000) (slip op. at 5-6)); and In re Girdler, 182 N.J. 40 (2004) (attorney suspended for one year for lack of diligence and failure to communicate with a client in a real estate matter; the attorney also failed to cooperate with disciplinary authorities during the investigation of the grievance; the disciplinary matter was the attorney's third default; his extensive ethics history included a private reprimand, a public reprimand, and two three-month suspensions).

This respondent, too, has amassed a significant ethics history, much of it while in the midst of Helfrick's slip-and-fall representation. He neglected her matter through



April 2005, when he received a reprimand for gross neglect and failure to cooperate with ethics authorities in another ethics matter. In January 2006, he was served with a complaint in yet another ethics matter, which resulted in a December 2006 reprimand, but did nothing to protect Helfrick's claim. Rather, he met with her in March 2006, at which time he misrepresented to her that her case was on track. Finally, in February 2007, he received a three-month suspension for gross neglect and failure to cooperate with ethics authorities in a third ethics matter.

Respondent's failure to learn from prior mistakes is compounded by the fact that he has now allowed three consecutive disciplinary matters to proceed as defaults. His failure to abide by the Court's directive that he submit to the OAE a report attesting to his fitness to practice law -- a failure that caused the Court to issue an order for his temporary suspension -- is yet another example of his willful indifference toward the entire disciplinary system.

Because respondent has accumulated a significant disciplinary record, has "thumbed his nose" at the system, and has failed to learn from his prior mistakes, we conclude that nothing short of a lengthy suspension will serve to remind him of his duty to adhere to the standards of the profession. We,

thus, determine to impose a one-year suspension on respondent, to be served prospectively.

Member Stanton dissented, noting that respondent has shamefully neglected to protect the interests of a number of his clients during the past four years. In 2006 and 2007, he was determined to have failed to cooperate with ethics authorities in two separate matters. See In re Kivler, supra, 188 N.J. 586, and In re Kivler, supra, 189 N.J. 192. In addition, in 2006 he was temporarily suspended for failing to comply for seventeen months with an order to submit a report from a mental health professional attesting to his fitness to practice law. See In re Kivler, supra, 188 N.J. 342 (2006).


The present case involves the gross neglect of a tort claim of an eighty-nine year old client who was injured in a slip-and-fall accident. Respondent eventually destroyed the claim by allowing the statute of limitations to run. He refused to communicate with his client on many occasions, and, when he did communicate with her, he lied about the status of the case. The present case is respondent's third straight default in a formal ethics proceeding against him.

Member Stanton finds that respondent has repeatedly been irresponsible, neglectful and dishonest in representing his clients, and he has repeatedly been irresponsible and

disrespectful in failing to deal with the requirements of the disciplinary system. Member Stanton believes that the discipline that the majority would impose upon respondent does not adequately address the menace that he poses to the public. He believes that respondent should be disbarred.

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  
William O'Shaughnessy, Chair

By:   
Julianne K. DeCore  
Chief Counsel

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**SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

In the Matter of Russell T. Kivler  
Docket No. DRB 07-078

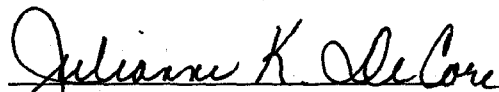
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Decided: August 7, 2007

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh		X			
Boylan		X			
Frost		X			
Lolla		X			
Neuwirth		X			
Stanton	X				
Wissinger		X			
<b>Total:</b>	1	8			

  
Julianne K. DeCore  
Chief Counsel