

justice) by refusing to obey to several court orders entered in the malpractice action (third count); and RPC 8.1(b) (failure to cooperate with disciplinary authorities) by failing to reply to the DEC investigator's requests for information about the grievance.

We determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1972. At the relevant time, he maintained an office in Verona, New Jersey. He has no history of discipline.

Service of process was proper. On July 26, 2007, the DEC mailed a copy of the complaint to respondent's office, 685 Bloomfield Avenue, Suite 203, Verona, New Jersey 07044, by regular and certified mail. Respondent signed the certified mail receipt. The regular mail was not returned.

On January 30, 2008, the DEC sent a letter to the same address, by regular and certified mail, notifying respondent that, if he did not file an answer within five days, the allegations of the complaint would be admitted, he could be temporarily suspended, and the record would be certified directly to the Board for the imposition of sanction. Once again, respondent signed the certified mail receipt. The regular mail was not returned.

Respondent did not file an answer to the complaint. As a result, the DEC certified the matter to us as a default, pursuant to R. 1:20-4(f). As is our practice in default cases, our office published a notice in the New Jersey Law Journal and in the New Jersey Lawyer, notifying respondent that we would be reviewing his default case on October 17, 2008, and giving him a deadline of October 6, 2008 to file a motion to vacate the default. The notice stated, "MOTIONS RECEIVED AFTER THE DEADLINE WILL NOT BE REVIEWED BY THE BOARD." Respondent did not file a motion within the set deadline.

On the morning of October 17, 2008, respondent appeared in the Supreme Court courtroom to argue his case. He was informed that default cases were reviewed on the papers. That afternoon, Office of Board Counsel ("OBC") received a two-page letter from him, asking that the letter be accepted as a motion to vacate the default. In that letter, respondent focused on the legal work that he had performed for the client, providing no explanation for his failure to answer the ethics complaint. He merely stated, "I apologize for my failure to timely respond to the complaint against me. I have had great difficulty dealing with this matter." He said nothing else about why he had defaulted.

Despite respondent's non-adherence to the deadline for filing a motion to vacate the default, OBC wrote him a letter stating that, although there was no assurance that we would consider his request at this late hour, he first had to submit a proper motion, with a detailed certification explaining why he had not filed an answer on time, asserting meritorious defenses to the charges, and also explaining why he had not timely filed a motion to vacate the default.

On November 7, 2008, respondent submitted his motion. In his proposed answer, he merely either admitted or denied the charges, with no further explanation. His single defense was, "I have [not] been able to deal with this matter because I felt I did a good job for Gabe's [Towing Company] ["Gabe's"] and felt that Ray and John of Gabe's and I had become friends. I am not in a position financially to hire counsel to represent me in this matter. I have made a motion in the underlying malpractice action and hopefully will be allowed my day in Court."

As to the requested explanation for not having filed an answer to the complaint, respondent simply stated, "I have been so upset since I have been sued by Gabe's that I have not been able to respond properly. I felt I did a good job for Gabe's and felt that I had become friends with its partners, Ray and John." The balance of his succinct (two and a half-page) certification

was devoted to addressing the details of the client's underlying case. Respondent did not explain why he did not timely file a motion to vacate the default.

In order to prevail in a motion to vacate a default, a respondent must satisfy a two-prong test: provide a reasonable explanation for the failure to file an answer to the complaint and assert meritorious defenses to the ethics charges. Here, respondent's out-of-time motion does not provide a reasonable explanation for his failure to answer the complaint, does not assert meritorious defenses to the ethics charges, and does not address why he did not file a motion to vacate the default before October 6, 2008, a deadline known to him. We, therefore, determined to deny the motion and to proceed with our review of this matter as a default.

The facts that gave rise to the charges against respondent are as follows:

In March 1998, respondent was retained by Gabe's, a towing company, in connection with the relocation of its business from its premises and with related eminent domain litigation against the City of Linden. Prior to being retained, respondent informed John Kocinski, one of Gabe's principals, that he operated as a registered professional corporation and had liability insurance. That was untrue.

Kocinski complained that respondent had mishandled Gabe's case. Gabe's, therefore, filed a malpractice action against respondent on November 11, 2004.

When respondent did not file an answer to the malpractice complaint, default was entered against him. A proof hearing was scheduled for January 25, 2005. After respondent announced his willingness to enter an appearance, Gabe's counsel gave him two weeks to file an answer. On March 18, 2005, the court vacated the default and allowed respondent to file an answer.

On March 28, 2005, Gabe's counsel served on respondent a request for the production of documents and first set of interrogatories. On June 10, 2005, Gabe's filed a motion to compel respondent to produce documents and to answer interrogatories. On June 21, 2005, the court granted the motion and ordered respondent to pay attorney's fees and costs associated with Gabe's motion.

After respondent failed to produce documents and answer interrogatories, Gabe's counsel filed another motion, which was granted. On July 22, 2005, the court held respondent in contempt for failure to obey the June 21, 2005 order, suppressed respondent's answer, entered default against him, and scheduled a proof hearing.

On September 14, 2005, the court entered a final judgment against respondent in the amount of \$322,713.74. Gabe's counsel then began supplemental proceedings in the malpractice action against respondent.

On December 2, 2005, the court found that respondent had violated Gabe's rights as litigant and directed respondent to provide answers, as required by an information subpoena served on respondent. Respondent did not comply with that order, prompting Gabe's counsel to file an application for respondent's arrest on January 3, 2006. On February 24, 2006, respondent was arrested.

While in custody, respondent filled out some information on the information subpoena, but did not provide bank account numbers or tax return information, as required. Later that day, he was served with a subpoena duces tecum and ad testificandum, requiring him to appear for a deposition. He did not. On March 31, 2006, he was found in contempt and again ordered to appear for a deposition and to bring copies of his individual and business tax returns for the last five years.

On April 19, 2006, respondent appeared at the deposition, but failed to produce his tax records and refused to answer whether he had filed income tax returns for the last five years. As a result, on June 9, 2006, the court ordered him to produce

his business and individual tax records within twenty days. When respondent failed to comply with that order, another warrant for his arrest was issued.

As of the date of the formal ethics complaint, July 25, 2007, respondent had not complied with the court orders.

The complaint charged that respondent's conduct in the malpractice action violated RPC 8.4(c) and (d). Without providing any factual basis, the complaint also charged respondent with violating RPC 1.1(b) in his handling of Gabe's case.

Finally, the complaint charged that respondent's failure to reply to numerous inquiries by the DEC investigator and to produce to the investigator any portion of Gabe's file constituted a violation of RPC 8.1(b).

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). The facts recited in the complaint, however, support some, but not all, of the charges of unethical conduct.

First, other than a brief reference that Kocinski, one of Gabe's principals, had claimed that respondent had "mishandled his case," there is no factual support for the charge of a

pattern of neglect. Second, the complaint provides no factual basis for the charge that respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in the malpractice action against him. We, therefore, dismiss the charged violations of RPC 1.1(b) and RPC 8.4(c).

Unquestionably, however, respondent violated five court orders, dated June 21, 2005, July 22, 2005, December 2, 2005, March 31, 2006, and June 9, 2006, compelling him to either provide documents, answer interrogatories, or appear for depositions. As a result of respondent's failure to comply with the court orders, the court issued a warrant for his arrest on two occasions. As of the date of the formal ethics complaint, respondent had not complied with the court orders and with an information subpoena issued by Gabe's counsel. His conduct in this regard violated RPC 8.4(d) (conduct prejudicial to the administration of justice). He also failed to comply with the DEC's investigator's requests for information about the grievance and the production of his file, a violation of RPC 8.1(b). Finally, he violated RPC 4.1 when he misrepresented to his client that his office operated as a professional corporation and that he maintained liability insurance.

What caused this respondent to violate five court orders, to cause warrants for his arrest to be issued twice, to ignore

the DEC, and to fail to file an answer to the ethics complaint is not apparent. Until these incidents, his disciplinary record was unblemished for thirty-three years. He furnished no reasonable explanation for his conduct. For instance, at his deposition, respondent told Gabe's counsel that his tax returns were "not available." Asked to explain what that meant, respondent replied, "[n]ot available means not available." Also, he refused to answer questions, on constitutional grounds, as to whether he had filed tax returns.

Attorneys who have failed to obey court orders have been reprimanded. See, e.g., In re Holland, 164 N.J. 246 (2000) (attorney who was required to hold in trust a fee in which she and another attorney had an interest took the fee, in violation of a court order); In re Milstead, 162 N.J. 96 (1999) (attorney disbursed escrow funds to his client, in violation of a court order); and In re Hartmann, 142 N.J. 587 (1995) (attorney intentionally and repeatedly ignored four court orders to pay opposing counsel a fee, resulting in a warrant for the attorney's arrest; the attorney also displayed discourteous and abusive conduct toward a judge with intent to intimidate her).

A reprimand, too, is the ordinary degree of discipline for attorneys who make misrepresentations to clients. In re Kasdan, 115 N.J. 472, 488 (1989). See, e.g., In re Wiewiorka, 179 N.J.

225 (2004) (attorney misled the client that a complaint had been filed; in addition, the attorney took no action on the client's behalf, and did not inform the client about the status of the matter and the expiration of the statute of limitations); In re Onorevole, 170 N.J. 64 (2001) (attorney made misrepresentations about the status of the case; he also grossly neglected the case, failed to act with diligence, and failed to reasonably communicate with the client; prior admonition and reprimand); In re Till, 167 N.J. 276 (2001) (over a nine-month period, attorney lied to the client about the status of the case; the attorney also exhibited gross neglect; no prior discipline); and In re Riva, 157 N.J. 34 (1999) (attorney misrepresented the status of the case to his clients; he also grossly neglected the case, thereby causing a default judgment to be entered against the clients and failed to take steps to have the default vacated). But see In re Blacker, 185 N.J. 600 (2006) (admonition for attorney who made numerous misrepresentations to his client and lacked diligence; compelling mitigation considered) and In the Matter of Joseph M. Clark, DRB 94-302 (November 2, 1994) (admonition for attorney who did not disclose to his client that her claim against four defendants had been dismissed; the attorney also neglected the case, lacked diligence in its

handling, and ignored new counsel's requests for the file; no mitigation cited in the letter of admonition).

Finally, failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history, usually leads to an admonition. See, e.g., 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).

Guided by the above precedent, we find that the appropriate discipline for the totality of respondent's ethics

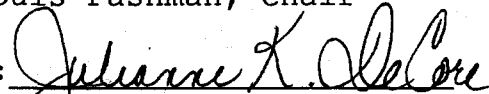
transgressions -- repeated failure to obey a series of court orders, misrepresentation to his client, and failure to cooperate with the DEC's investigation of Gabe's grievance -- is a censure. That discipline, however, must be increased to the next level by respondent's failure to file an answer to the formal ethics complaint, thereby allowing this matter to proceed on a default basis. In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6). We, therefore, determine that the suitable degree of discipline for respondent's underlying ethics violations and for his failure to file an answer to the complaint is a three-month suspension.

Members Baugh and Clark would have imposed a censure. Members Boylan and Doremus 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
Louis Pashman, Chair

By:


Julianne K. DeCore
Chief Counsel

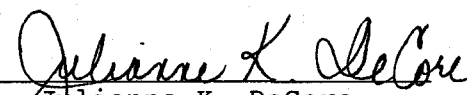
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Matthew M. Millichap
Docket No. DRB 08-200

Decided: December 4, 2008

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh			X			
Boylan						X
Clark			X			
Doremus						X
Lolla		X				
Stanton		X				
Wissinger		X				
Total:		5	2			2


Julianne K. DeCore
Chief Counsel