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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-266
District Docket No. VII-05-31E

IN THE MATTER OF	
RUSSELL T. KIVLER	
AN ATTORNEY AT LAW	

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

Decided: December 1, 2006

To the 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). It arises out of respondent's representation of a client in a divorce matter. Respondent failed to provide any services or information to the client, despite the client's repeated requests, and failed to return the $2500 retainer to

the client on termination of the representation. Respondent also failed to reply to the ethics grievance.

The complaint charged respondent with having violated RPC 1.5 (unreasonable fee), RPC 8.1(b) (failure to cooperate with disciplinary authorities), RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), and RPC 1.4(a) (failure to communicate with the client). In light of respondent's disciplinary history and the default nature of this matter, we determine to impose a three-month suspension for his gross neglect, lack of diligence, failure to communicate with his client, failure to return the unearned retainer to his client, and failure to cooperate with disciplinary authorities.

Respondent was admitted to the New Jersey bar in 1973. At the relevant times, he maintained an office for the practice of law in Hamilton Square.

In 2005, respondent was reprimanded for gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, failure to explain the matter to the extent reasonably necessary for the client to make an informed decision about the representation, failure to expedite litigation in three client matters, and failure to supervise a junior attorney. In re Kivler, 183 N.J. 220 (2005). In addition, he

was ordered to provide proof of fitness to practice law, as attested to by a mental health professional, and to complete a course in law office management.

As a result of respondent's failure to provide proof of fitness to practice law, on October 10, 2006, the Supreme Court temporarily suspended him from the practice of law until he provided the OAE with a report of a mental health professional attesting to his fitness to practice law. The Supreme Court subsequently reinstated him to the practice of law on November 2, 2006.

On October 19, 2006, we imposed a reprimand for respondent's violations of RPC 1.16(d) (upon termination of representation, failure to refund unearned retainer) and RPC 8.1(b). That matter is pending review by the Supreme Court.

Service of process was proper. On January 30, 2006, the DEC transmitted a copy of the complaint to respondent's office address, 1669 Route 33, Hamilton, New Jersey 08690, via regular and certified mail, return receipt requested. On January 31, 2006, an individual named "J. Kalisch" signed for the certified letter. The letter sent via regular mail was not returned.

On June 22, 2006, the DEC sent a letter to respondent at the same address, via regular and certified mail, return receipt

requested. The letter directed him to file an answer within five days and informed him that, if he failed to do so, the record would be certified directly to us for the imposition of sanction. On June 27, 2006, the certified mail receipt was returned, bearing an illegible signature. The letter sent via regular mail was not returned.

As of September 14, 2006, respondent had not filed an answer to the complaint. On that date, the DEC certified this matter to us as a default.

According to the allegations of the complaint, on October 24, 2004, Jennifer Ribeca retained respondent to represent her in a divorce proceeding. She paid him a $2500 retainer. Thereafter, respondent failed to provide Ribeca with "any services or information in her matter despite her repeated phone calls, faxes and messages left with his assistant." On April 14, 2005, Ribeca filed a grievance against respondent.

On May 11, 2005, the DEC sent a copy of the grievance to respondent and requested a reply within ten days. On June 9, 2005, the DEC sent respondent a letter reminding him that he had not replied to the grievance, that he had a duty to cooperate in the investigation, and that, if he failed to do so, he could be

temporarily suspended. Respondent did not reply to the grievance.

On July 25, 2005, the DEC wrote to respondent again and gave him until August 10, 2005 to reply to the grievance. On September 14, 2005, "respondent was given a second ultimatum to submit a response." As of January 30, 2006 (the date of the ethics complaint), respondent had not replied to the grievance.

The complaint charged respondent with failure to cooperate with disciplinary authorities as a result of his failure to reply to the grievance. It also charged him with gross neglect, lack of diligence, and failure to communicate with the client, as a result of his failure to provide Ribeca with "any services." In addition, the complaint alleged that respondent charged an unreasonable fee by taking the $2500 retainer from Ribeca and failing to provide any legal services to her. Finally, the complaint charged respondent with a pattern of neglect for his "conduct in this matter when combined with other acts of neglect as set forth in this pleading."

The second count of the complaint sought respondent's temporary suspension based upon his failure to cooperate with the DEC's investigation of the grievance.

Inasmuch as service of process was proper, and respondent failed to file a verified answer to the complaint within the time prescribed, the allegations are deemed admitted. R. 1:20-4(f). Moreover, the allegations in the complaint support a finding that respondent engaged in unethical conduct.

The allegations of the first count of the complaint establish that respondent took Ribeca's money in October 2004, and that, as of six months later (when she filed the grievance), he had done nothing. Respondent's failure to perform any services for Ribeca during a six-month period constituted gross neglect and a lack of diligence. The allegations also establish that respondent failed to communicate with his client when he ignored her repeated requests for information about the matter during the same period.

The allegations of the first count also establish that respondent violated RPC 1.16(d). That rule provides, in relevant part, that, on termination of the representation, a lawyer is required to refund "any advance payment of fee that has not been earned or incurred." Given the prohibition against non-refundable retainers in family matters (R. 5:3-5(b)), respondent violated RPC 1.16(d) when, after Ribeca's termination of respondent's representation, he failed to refund the full

$2500 retainer, despite not having provided any legal services to her.

Although the complaint did not charge respondent with having violated RPC 1.16(d), the facts alleged therein gave him sufficient notice of the allegedly improper conduct and the potential finding of a violation of the rule. Moreover, RPC 1.16(d), rather than RPC 1.5, is applicable to the facts of this matter. RPC 1.5 prohibits the charging of an unreasonable fee. Here, the record does not identify the agreed-upon fee. Instead, a retainer was paid, which respondent failed to refund. Thus, the facts fall squarely within RPC 1.16(d), not RPC 1.5(a).

We further conclude that respondent violated RPC 8.1(b) when he failed to timely reply to the grievance, despite having been given a number of opportunities to do so.

The OAE's transmittal letter to Office of Board Counsel requested that "the Board amend the complaint to charge an additional violation of R.P.C. 8.1(b), Failure to Cooperate, in that Respondent has failed to an Answer to the Complaint." More properly, however, the OAE should have addressed that request to the DEC, the trier of fact in disciplinary matters. Ordinarily, we deem complaints amended to conform to the proofs only.

With respect to the complaint's pattern-of-neglect charge, when read literally, it is based solely on respondent's neglect in this matter. A pattern of neglect requires three acts of neglect. In re McClure, 180 N.J. 154 (2004); In re Nielsen, 180 N.J. 301 (2004). In this case, there is one act of neglect. Even if we were to consider respondent's conduct in his previous disciplinary matters, only one of them involved a finding of gross neglect. Thus, the number of matters that respondent neglected is insufficient to establish a pattern.

We dismiss the second count of the complaint. The DEC requested respondent's temporary suspension as a result of his failure to timely submit a reply to the grievance. However, a request for a temporary suspension must be in the form of a motion by the OAE Director to the Supreme Court. R. 1:20-3(g)(4) provides that, if an attorney fails to cooperate by not replying, in writing, to a request for information, the OAE may file with the Court a motion for the attorney's temporary suspension. Because the complaint's request that respondent be temporarily suspended does not conform to the procedure established by the rules, we determine to dismiss that count of the complaint.

There remains the quantum of discipline to be imposed for respondent's gross neglect, lack of diligence, failure to communicate with the client, failure to refund the full retainer, and failure to cooperate with disciplinary authorities.

Generally, conduct involving gross neglect, lack of diligence, and failure to communicate with clients results in either an admonition or a reprimand, depending on the gravity of the offenses, the harm to the clients, and the attorney's disciplinary history. See, e.g., In the Matter of Anthony R. Atwell, Docket No. DRB 05-023 (February 22, 2005) (admonition for attorney who did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court when, in fact, the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file; violations of RPC 1.4(a) and RPC 1.3 found); 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; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(a)); 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); and 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).

In a case where a lawyer with an unblemished disciplinary record failed to return the client's unearned retainer after the termination of the representation, we imposed an admonition. In the Matter of Stephen D. Landfield, DRB 03-138 (July 3, 2003) (in imposing only an admonition for the attorney's four-month delay in returning the unused portion of the retainer, we noted the attorney's unblemished disciplinary record). So, too, an admonition is imposed for failure to comply with a district ethics committee's requests for information about a grievance,

if the attorney does not have an ethics history. In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (admonition for attorney who did not promptly reply to the DEC investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (admonition for failure to reply to DEC's requests for information about two grievances); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (admonition for failure to reply to the district ethics committee's numerous communications regarding a grievance); and In the Matter of Mark D. Cubberley, DRB 96-090 (April 19, 1996) (admonition for failure to reply to the ethics investigator's requests for information about the grievance). When the attorney has a disciplinary history, however, a reprimand is often imposed. See, e.g., In re Devin, 172 N.J. 321 (2002) (reprimand for attorney who ignored five requests for information from the district ethics committee before finally filing a late answer to the ethics complaint; the attorney offered no excusable basis for his misconduct and had been disciplined previously for failure to cooperate with ethics authorities); In re Williamson, 152 N.J. 489 (1998) (reprimand for failure to cooperate with the committee during the investigation of a grievance; prior private reprimand for

failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney); and In re Fody, 148 N.J. 373 (1997) (reprimand for attorney who failed to cooperate with the committee during the processing of an ethics matter; the attorney had been reprimanded in 1995 for the same misconduct and had been temporarily suspended from the practice of law for failure to cooperate with the DEC and failure to account for estate funds).

Because respondent has a disciplinary history, a reprimand at best – more likely, a censure – would be the appropriate measure of discipline for the totality of his conduct: gross neglect, lack of diligence, failure to communicate with the client, failure to return the client's unearned retainer, and failure to cooperate with disciplinary authorities. However, we also considered that, just last month, we reprimanded respondent for two of the same infractions present in this case: failure to return the unearned retainer to another client, and failure to cooperate with disciplinary authorities. In the Matter of Russell T. Kivler, DRB 06-187 (October 19, 2006). In addition, there is the default nature of this matter to consider.

In a default matter, the discipline is enhanced to reflect a respondent's failure to cooperate with disciplinary

authorities as an aggravating factor. In re Nemshick, 180 N.J. 304 (2004) (conduct meriting reprimand enhanced to three-month suspension due to default; no ethics history).

In light of the foregoing, we determine to impose a three-month suspension for respondent's unethical conduct, which includes allowing this matter to proceed on a default basis. We also determine that respondent should forthwith return the $2500 retainer to Ribeca, if he has not already done so.

Member Baugh voted to censure respondent.

We further require respondent to reimburse the Disciplinary Oversight Committee for the costs incurred in connection with the prosecution of this matter.

Disciplinary Review Board
William J. O'Shaughnessy
Chair

By: _____
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Russell T. Kivler
Docket No. DRB 06-266

Decided: December 1, 2006

Disposition: Three-month suspension

Members	Three-month Suspension	Censure	Admonition	Disqualified	Did not participate
O'Shaughnessy	X				
Pashman	X				
Baugh		X			
Boylan	X				
Frost	X				
Lolla	X				
Neuwirth	X				
Stanton	X				
Wissinger	X				
Total:	8	1			

By Julianne K. DeCore
Chief Counsel