SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-187
District Docket No. VII-05-13E

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

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

Decided: November 1, 2006

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 Office of Attorney Ethics ("OAE") pursuant to R. 1:20-4(f). It arises out of respondent's retention as counsel in a divorce proceeding, the client's termination of the representation five days later, and respondent's failure to return the client's $1750 retainer. The ethics complaint charged respondent with having violated RPC 1.5 (unreasonable

fee), R. 1:20-3(g)(3) (failure to cooperate with the investigation, more properly a violation of RPC 8.1(b)), and RPC 1.1(b) (pattern of neglect). For the reasons expressed below, we determine to impose a reprimand.

At the relevant times, respondent, who was admitted to the New Jersey bar in 1973, maintained an office for the practice of law in Hamilton Square. On May 3, 2005, he 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 necessary for the client to make an informed decision, and failure to expedite litigation in three client matters, as well as failure to supervise a junior attorney. In re Kivler, 183 N.J. 220 (2005). In addition, respondent 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. Ibid.

Respondent did not provide the required proof of fitness. On October 10, 2006, the Supreme Court temporarily suspended him from the practice of law until he provides the OAE with a report of a mental health professional attesting to his fitness to practice law.

Service of process was proper. On January 30, 2006, the District VII Ethics Committee (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, a "J. Kalisch" signed for the certified letter. The letter sent via regular mail was not returned.

On May 12, 2006, the DEC sent a letter to respondent at the same address, via regular and certified mail, return receipt requested. The letter directed respondent 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 May 15, 2006, the certified mail receipt was returned with an illegible signature. The letter sent via regular mail was not returned.

As of June 12, 2006, respondent had not filed an answer to the complaint. Accordingly, on that date, the DEC certified this matter to us as a default.

On September 7, 2006, respondent timely faxed to Office of Board counsel a motion to vacate the default. As discussed below, we determined to deny the motion.

According to the allegations of the first count of the complaint, on November 3, 2004, Domingo Tanco retained respondent to represent him in a divorce proceeding. He paid respondent a $1750 retainer.

Five days later, on November 8, 2004, Tanco telephoned respondent "to notify" him that his services were no longer required. Tanco also demanded a refund of his retainer "per the retainer agreement." As of the date of the complaint, January 30, 2006, respondent had not refunded Tanco's retainer, despite "repeated promises" to do so.

On January 31, 2005, Tanco filed a grievance against respondent. Respondent did not reply to the grievance until June 2, 2005, four months after the DEC deadline had expired. In his reply, respondent stated that Tanco was due only a partial refund.

On June 22, 2005, Tanco answered respondent's reply and denied that respondent had performed any services for him. Five days later, respondent agreed to refund the full amount of Tanco's retainer. He was given until August 10, 2005 to do so. As of January 30, 2006, respondent had not refunded Tanco's retainer.

Based upon these allegations, the first count alleged that respondent charged an unreasonable fee, failed to promptly reply to the grievance, and engaged in a pattern of neglect.

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.

In the motion to vacate the default, respondent offered his version of what transpired between him and his client, Domingo Tanco. Respondent claimed that, on November 8, 2004, Tanco called him and stated that he was "thinking about" not using respondent's services. A month later, Tanco confirmed that he wanted respondent to continue with the representation, at which time respondent began to draft a complaint for divorce.

According to respondent, Tanco did not terminate the representation until more than a year later, on December 15, 2005. At that time, respondent informed Tanco that he would be entitled only to a partial refund of the $1750 retainer. When Tanco insisted that he was entitled to a full refund, respondent informed him of his right to seek fee arbitration.

According to respondent, $682.58 of the retainer had been earned; therefore, Tanco was entitled to a refund of $1,067.50.[1] Tanco disputed respondent's claim and filed a grievance on January 31, 2005. In respondent's tardy June 2, 2005 reply to the grievance, he maintained his position that Tanco was not entitled to a full refund, but only $1,067.50.

On June 30, 2005, a Deputy Attorney General from the Governor's Office of Recovery and Victim Assistance, informed respondent via email that Tanco would withdraw the grievance if respondent refunded the retainer in full. Seven months later, on January 30, 2006, the formal ethics complaint was served on respondent. On March 21, 2006, almost nine months after the Deputy Attorney General's offer, respondent returned the entire $1750 retainer to Tanco. According to respondent: "It was my understanding that my response had been forwarded onto [sic] to Mr. Tanco and that he was satisfied with that and that no additional filings were necessary." Apparently, respondent believed that, once he refunded the full retainer to Tanco, an answer to the formal ethics complaint was not required.

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[1] To be precise, the balance due would be $1,067.42.

To vacate a default, a respondent must meet a two-pronged test: offer a reasonable explanation for the failure to answer the ethics complaint and assert respondent meritorious defense to the underlying charges. Respondent has offered no reasonable explanation for his failure to answer the ethics complaint. Although he claimed that Tanco offered to withdraw the grievance, upon receipt of the $1750 refund, Tanco had no such power. Once a grievance is filed, a disciplinary matter proceeds, regardless of the grievant's change of heart. Moreover, respondent's answer was already late by the time Tanco made the offer to withdraw the grievance. Respondent has offered us no explanation for his failure to answer up until that point.

Finally, on May 12, 2006, the DEC sent respondent a five-day letter, warning him about the consequences of failing to answer the complaint. If respondent truly believed that the payment to Tanco two months earlier had rendered unnecessary the filing of an answer, then this letter should have alerted respondent that he had misunderstood the procedure. Yet, he made no effort to contact the DEC for an explanation of why the May 12 letter had been issued. Thus, it was unreasonable for respondent to continue to ignore the DEC and to proceed on the

more unreasonable assumption that this case had simply gone away.

In short, respondent has offered us no reason that supports a finding of excusable neglect on his part in failing to file a timely answer to the complaint. Accordingly, we concluded that there is no need to address the second prong of the test and denied his motion to vacate the default.

Following a review of the record, we conclude that respondent engaged in unethical conduct. Because of his failure to file an answer, the allegations of the complaint are deemed admitted. R. 1:20-4(f).

The allegations of the first count establish that respondent violated RPC 1.16(d) when, despite his promise, he failed to return the full amount of the retainer to Tanco. RPC 1.16(d) provides that, upon termination of the representation, a lawyer is required to refund "any advance payment of fee that has not been earned or incurred." Moreover, R. 5:3-5(b) prohibits non-refundable retainers in civil family actions. Given the prohibition of non-refundable retainers, Tanco's termination of respondent's representation five days after his retention, the unrefuted claim that respondent provided no services to Tanco, and respondent's promise to refund all of the

$1750, his failure to return the money to Tanco violated RPC 1.16(d).

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. Yet, in this case, no work was done. Moreover, the record does not identify the agreed-upon fee. Instead, a retainer was paid, which respondent failed to refund. Thus, the facts here fall squarely within RPC 1.16(d), not RPC 1.5(a).

Respondent also violated RPC 8.1(b) when he failed to timely reply to the grievance. The complaint charged a violation of R. 1:20-3(g)(3), which requires a lawyer to reply to a DEC's request for information within ten days. Respondent failed to do so. The more applicable rule, however, is RPC 8.1(b).

The OAE's transmittal letter to Office of Board Counsel requested that we "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. Nevertheless, for all intents and purposes, disciplinary consequences will fall upon respondents who fail to file an answer, inasmuch as the discipline we determine to impose is enhanced to reflect their lack of cooperation.

The allegations of the first count of the complaint cannot sustain the conclusion that respondent engaged in a pattern of neglect. The complaint alleges no facts that support the conclusion that respondent was negligent in any respect. In the absence of at least three acts of negligence, we are unable to conclude that respondent engaged in a pattern of neglect.

As to 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 for failure to cooperate with disciplinary authorities 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 violations of RPC 1.16(d) and RPC 8.1(b). 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 03-137 (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 request 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).

If the attorney has been disciplined before, but the attorney's ethics record is not serious, then reprimands have been imposed. See, e.g., In re Devin, 172 N.J. 321 (2002) (reprimand for attorney who ignored five requests for information from the DEC 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 DEC 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

DEC 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).

Although respondent was reprimanded just last year, the violations there were unrelated to those before us now. In our view, thus, respondent's prior reprimand should not serve to increase what would ordinarily be an admonition. Nevertheless, an admonition is insufficient discipline in this case because of respondent's default. In a default matter, we enhance the discipline 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). Accordingly, we determine to impose a reprimand for respondent's ethics violations in this default case.

Member Baugh voted to vacate the default. Members Boylan, Stanton, and Wissinger did not participate.

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
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 06-187

Decided: November 1, 2006

Disposition: Reprimand

Members	Suspension	Reprimand	Vacate the Default	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh			X		
Boylan					X
Frost		X			
Lolla		X			
Neuwirth		X			
Stanton					X
Wissinger					X
Total:		5	1		3

Julianne K. DeCore
Chief Counsel