

B.

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-068
District Docket No. IIB-03-029E

IN THE MATTER OF
HOWARD M. DORIAN
AN ATTORNEY AT LAW

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

Decided: **06-21-2005**

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 IIB Ethics Committee ("DEC"), pursuant to Rule 1:20-4(f).

Respondent was admitted to the New Jersey bar in 1978. He has a lengthy disciplinary history. In 1995, he received an admonition for gross neglect, failure to communicate with a client, failure to withdraw as counsel, failure to promptly turn

over his client's file to a new attorney, and failure to reply to requests for information from a disciplinary authority. In the Matter of Howard M. Dorian, Docket No. DRB 95-216 (August 1, 1995).

In 2001, respondent was reprimanded for gross neglect, lack of diligence, and failure to communicate with a client. In re Dorian, 166 N.J. 558 (2001). He received another reprimand in 2003 for failure to promptly deliver funds to a third person and failure to cooperate with disciplinary authorities. In re Dorian, 176 N.J. 124 (2003).

On April 25, 2005, respondent was suspended for three months in a default matter in which he agreed to represent a client in a personal injury case, and then terminated the representation, failed to file a lawsuit on the client's behalf, allowed the statute of limitations on her claim to expire, and moved his office, all without notice to the client. In re Dorian, 183 N.J. 33 (2005).

On July 29, 2004, the DEC sent a complaint by certified and regular mail to respondent's office address in Cliffside Park, New Jersey. The certified return receipt, indicating delivery on July 30, 2004, was signed by a Robin Restivo; the regular mail was not returned. On September 21, 2004, the DEC sent a second

letter by regular mail, advising respondent that, unless he filed an answer, the allegations of the complaint would be deemed admitted and the record in the matter would be certified directly to us for the imposition of discipline. The letter further informed respondent that the complaint was deemed amended to include a charge of failure to cooperate with a disciplinary authority, based on his failure to answer the complaint. That letter was not returned.

Respondent did not file an answer to the complaint. The DEC certified the record directly to us for the imposition of discipline, pursuant to Rule 1:20-4(f).

In 2001, James Fucci, the grievant, retained respondent to represent him and his company, Villa Construction, as plaintiffs in a lawsuit to be filed against homeowners who apparently did not pay for work that Fucci had performed on their behalf. Respondent did not file the complaint; instead, the homeowners sued Fucci. Respondent did not file an answer to the complaint, permitted the entry of a default against Fucci, and did not move to vacate the default. Respondent then settled the lawsuit without Fucci's knowledge or consent, using his own funds. The record does not disclose the amount of the settlement.

The complaint charged respondent with violating RPC 1.1(a) (gross neglect); RPC 1.4(a) and (b)¹ (failure to communicate with a client and failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); and RPC 8.4, presumably (c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Service of process was properly made. The complaint contains sufficient facts to support findings of the violations charged in the complaint. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. Rule 1:20-4(f).

The record demonstrates that respondent acutely mishandled Fucci's case. After agreeing to represent Fucci as a plaintiff in a lawsuit, respondent not only failed to file the complaint on Fucci's behalf, but he also failed to file an answer to the complaint against his client, allowed the entry of a default, failed to vacate the default, and failed to file a counterclaim advancing Fucci's affirmative claim for damages. Respondent's conduct amounted to a violation of RPC 1.1(a).

¹ Because the complaint was filed after January 1, 2004, the effective date of an amendment to the rule redesignating these subsections, the appropriate charges are RPC 1.4(b) and (c).

Respondent then compounded his misconduct, which up to this point consisted of gross neglect, by settling the litigation without informing Fucci or obtaining his client's consent, a violation of RPC 1.2(a) (a lawyer shall abide by a client's decisions concerning the scope and objectives of the representation and concerning whether to settle a matter) and RPC 1.4(b) and (c). Fucci retained respondent to file a claim against the homeowners, seeking damages from them. Instead, respondent settled a complaint filed by the homeowners by agreeing to pay damages to them, a result clearly contrary to Fucci's expectations. Although the complaint did not specifically charge respondent with violating RPC 1.2(a), the facts recited therein gave him sufficient notice of this allegedly improper conduct and of a potential finding of a violation of that RPC. We, therefore, deem the complaint amended to include a violation of RPC 1.2(a).

By settling the lawsuit without informing Fucci, respondent also violated RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984). Respondent also violated RPC 8.4(c) by using his own money to fund the settlement.

Finally, by failing to file an answer to the complaint, respondent failed to cooperate with disciplinary authorities.

In sum, respondent violated RPC 1.1(a), RPC 1.2(a), RPC 1.4(b) and (c), RPC 8.4(c), and RPC 8.1(b).

The remaining issue is the quantum of discipline to be imposed. Ordinarily, the level of discipline for the combination of violations presented in this case ranges from a reprimand to a short suspension. Reprimands were imposed in In re Kane, 170 N.J. 625 (2002) (reprimand imposed on attorney who, without his client's knowledge or consent, settled a lawsuit to recover damages from tenants, received a check, put it in his file, and took no further action on the client's behalf; the attorney then moved his practice to Philadelphia, Pennsylvania, without informing the client; the attorney also misrepresented the status of the case to the client and failed to set forth in writing the basis of the fee); In re Resnick, 154 N.J. 6 (1998) (reprimand for attorney who, in defiance of a client's decision to reject a settlement offer, accepted the settlement, deposited the check in his trust account, and withdrew his fee); and In re Major, 149 N.J. 243 (1997) (reprimand where attorney failed to conduct any discovery in a litigation matter, failed to prepare the case for trial, failed to communicate with his client, agreed to a voluntary dismissal of the complaint without notifying his client or obtaining consent, and never informed

his client of the dismissal; attorney had a prior private reprimand for repeatedly failing to produce a client for deposition, in violation of a court order).

Attorneys received suspensions for their conduct in In re Wood, 174 N.J. 507 (2002) (three-month suspension imposed in a default case on attorney who settled a products liability case for \$2,000, but misrepresented to his client that the case had settled for \$25,000, obtained his client's signature on a blank release, ignored his client's repeated telephone inquiries about the status of the settlement, and allowed the complaint to be dismissed with prejudice) and In re Grossman, 140 N.J. 39 (1995) (three-month suspension where the attorney grossly neglected a matter, settled the case without his clients' consent, failed to communicate with his clients, and misrepresented the status of the case to them; the attorney also engaged in a conflict of interest by representing both the driver and passenger in a personal injury lawsuit).

A three-month suspension was also imposed in In re Bowman, 179 N.J. 367 (2004), although the attorney's misconduct encompassed six matters: in two matters, he settled cases without the client's knowledge or consent; in a third matter, he misrepresented to the client that the adversary had accepted a

\$2,000 settlement, when he had settled the case for more than \$17,000, then, after receiving \$2,000 from the client, the attorney used some of his own funds to partially satisfy the settlement; in a fourth matter, the attorney failed to inform the client that summary judgment had been entered against the client; and, in two other matters, the attorney allowed the statute of limitations on the client's claim to lapse, without telling the client. The attorney was guilty of gross neglect, pattern of neglect, failure to abide by a client's decision concerning whether to settle a matter, lack of diligence, failure to communicate with a client, failure to decline or withdraw from representation when the attorney's physical or mental condition materially impaired his ability to represent the client, and conduct involving dishonesty, fraud, deceit or misrepresentation. The attorney suffered from alcoholism and depression and had no prior disciplinary history.

Although respondent's misconduct in this matter is no more serious than that of the attorneys in the above cases (and is less serious than Bowman's), this matter represents respondent's fifth encounter with the disciplinary system and his second default. His ethics history includes an admonition, two reprimands, and a three-month suspension. In addition, the

default nature of this proceeding is an aggravating factor. We, thus, determine that a six-month consecutive suspension is the appropriate level of discipline to be imposed on respondent.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

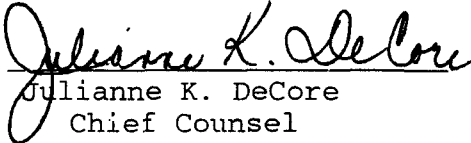
**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

In the Matter of Howard Dorian
Docket No. DRB 05-068

Decided: June 21, 2005

Disposition: Six-month suspension

Members	Six-month Suspension	Reprimand	Admonition	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan	X				
Holmes	X				
Lolla	X				
Neuwirth	X				
Pashman	X				
Stanton	X				
Wissinger	X				
Total:	9				


Julianne K. DeCore
Chief Counsel