

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-265
District Docket Nos. VIII-04-061E
and VIII-04-065E

IN THE MATTER OF :
 :
 :
A. KENNETH WEINER :
 :
 :
AN ATTORNEY AT LAW :
 :

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

Decided: December 27, 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 VIII Ethics Committee (DEC), pursuant to R. 1:20-4(f).

On October 4, 2005, respondent sent a facsimile transmission to Office of Board Counsel ("OBC") that, for the most part, was illegible. It appeared that respondent was asking us to vacate this default, citing that he had been disabled for some time due to his drug- and alcohol-addictions. It further appeared that he was claiming that (1) because of his "total" disability he could

not respond to the ethics charges against him; (2) that he had undergone in-patient treatment in New York and was only released on September 23, 2005; and (3) that he was in after-care treatment.

By letter dated October 21, 2005, sent by regular and certified mail, return receipt requested to respondent's Highlands, New Jersey address, we gave him an additional fifteen days to submit a legible, conforming motion to vacate the default. The certified mail was returned unclaimed. The regular mail was not returned. Because we heard nothing further from respondent, we deemed his transmission deficient and determined to consider the merits of the complaint.

Respondent was admitted to the New Jersey bar in 1970. At the relevant times, he maintained a law office in East Brunswick, New Jersey.

Respondent was privately reprimanded in 1988, for failure to properly safeguard a client's funds and to return the balance at the end of the representation. In the Matter of A. Kenneth Weiner, Docket No. DRB 86-118 (May 5, 1988). In 1995, respondent was reprimanded for failure to properly supervise his non-lawyer staff through his excessive delegation of authority, and by condoning the staff's signing of clients' names to documents. In re Weiner, 140 N.J. 621 (1995).

On July 22, 2004, respondent was temporarily suspended. Thereafter, in a 2005 default, the Court imposed a six-month suspension for respondent's gross neglect and lack of diligence in an estate matter for failure to institute an appropriate investigation or litigation; failure to comply with his clients' requests for information; failure to supervise the succession of attorneys involved in the matter; misrepresentations to the clients that their case was proceeding properly, even though no action had been taken; and failure to cooperate with disciplinary authorities. The Court also ordered that respondent not be reinstated until all matters pending against him were resolved. In re Weiner, 183 N.J. 262 (2005).

On January 20, 2005, the DEC sent a copy of the complaint in this matter to respondent's attorney, David B. Rubin, by regular mail. By letter dated January 27, 2005, Rubin acknowledged receipt of the complaint and explained that, pursuant to a court order, respondent's files had been taken over by a trustee. Rubin added that, nevertheless, they would attempt to answer the complaint in a timely manner.

On May 25, 2005, the DEC sent an amended complaint to Rubin by regular mail. By letter dated June 6, 2005, Rubin notified the DEC that he had been relieved as counsel, and that all

communications should be directed to respondent at 21 4th Street, Highlands, New Jersey 07732-1619.

On June 17, 2005, the DEC wrote to Rubin, informing him that it was his obligation to advise respondent that he was required to file a verified answer and that the DEC would not serve respondent directly. A copy of the letter was also forwarded to respondent at his home address by regular and certified mail, return receipt requested. The certified mail was returned marked unclaimed. The regular mail was not returned.

By letter dated June 27, 2005, Rubin notified the DEC that, on or about May 31, 2005, he had forwarded all ethics complaints and related correspondence to respondent. As of the date of the certification of the record, August 28, 2005, respondent had not filed an answer to the complaint.

The three-count amended complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to inform a prospective client about how, when, and where the client may communicate with lawyer), RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter and to promptly comply with reasonable requests for information), RPC 1.4(c) (failure to explain a matter to the extent necessary to permit the

client to make informed decisions about the representation),¹ RPC 1.5(a) (charging an unreasonable fee), RPC 1.16(d) (upon termination of representation, failure to surrender a client's file or to return an unearned fee), RPC 7.1(a) (making false or misleading communications about the lawyer's services), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority), and RPC 8.4(d) (conduct prejudicial to the administration of justice for failure to comply with R. 1:20-20(b)(11) and (b)(15)).

The Behnke Matter

In August 2002, Martin J. Behnke retained respondent to represent his son Thomas on pending criminal charges. Behnke paid respondent a \$5,000 retainer. Behnke understood that respondent would personally appear on Thomas's behalf. Respondent, however, failed to appear at a scheduled status conference, sending an associate in his place. Thomas was "dissatisfied with the associate" but, nevertheless, entered a guilty plea pursuant to negotiations that, presumably, the associate had with the Middlesex County Prosecutor.

¹ Some of respondent's conduct occurred prior to the 2004 Rule amendments. Therefore, the complaint should have charged him under the rules then in effect.

When Behnke complained to respondent about his failure to personally appear at the status conference, he obtained respondent's guarantee that he would be present at Thomas's sentencing hearing. At respondent's insistence, Behnke paid him an additional \$2,500 to secure his appearance, which Behnke considered to be extortion.

Prior to the hearing, Behnke scheduled a number of meetings with respondent, which were all canceled. Despite respondent's assurances to Behnke, he did not appear at Thomas's sentencing hearing, sending a different associate in his place.

Behnke was dissatisfied with the associate's handling of the matter. Acting on his son's behalf, Behnke requested, verbally and in writing, that respondent turn over Thomas's file. Respondent failed to surrender the materials.

The complaint charged that respondent's failure to personally appear at Thomas's hearings on multiple occasions, despite agreeing to do so, violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.1(b) (pattern of neglect); that his frequent refusal to meet with Behnke violated RPC 1.4(a) (failure to fully inform prospective clients of how, when and where the client may communicate with the lawyer), and RPC 1.4(b) (failure to promptly comply with reasonable requests for information); that his repeated failure to provide Thomas's file further violated RPC 1.4(b), in addition to RPC 1.16(d) (upon termination of

representation, failure to surrender a client's file); that his absence from Thomas's hearings precluded him from providing Thomas information sufficient to enable him to make informed decisions about the representation, a violation of RPC 1.4(c) (failure to explain a matter to the extent necessary to permit client to make informed decisions about the representation); that his demand for an additional fee violated RPC 1.5(a) (requiring a lawyer's fee to be reasonable); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and that his false assurances to Behnke that he would appear in court were false and misleading communications about his services, a violation of RPC 7.1(a) (making false or misleading communications about the lawyer's services).

The Armellino Matter

In January and May 2004, Paul Armellino retained respondent to represent him in separate matters in Howell and Matawan Municipal Courts. Armellino paid respondent retainers totaling \$2,305. Respondent did little or no work in either matter, and failed to appear in court on the scheduled return dates.

On numerous occasions, Armellino attempted to reach respondent, who was never available to speak or meet with Armellino. According to the complaint, Armellino went to

respondent's office to speak to him, but "found the office locked." When Armellino requested a refund of the retainers, respondent "failed and refused to do so."

The complaint charged that respondent's failure to perform legal work on behalf of Armellino constituted gross neglect (RPC 1.1(a)), pattern of neglect (RPC 1.1(b)), and a lack of diligence (RPC 1.3); that his repeated refusal or unavailability to meet with Armellino violated the requirement that he inform prospective clients of how, when, and where Armellino could communicate with him, violating RPC 1.4(a); that his failure to return the unearned fees violated RPC 1.16(d) (refunding any advance payment of a fee that has not been earned or incurred); and that his acceptance of funds for which he provided little or no services and his failure or refusal to return those funds or any portion thereof constituted conduct involving dishonesty, fraud, deceit, or misrepresentation (RPC 8.4(c)).

Failure to Cooperate

Count three of the amended complaint alleged that the DEC mailed copies of the grievances in the above matters to respondent, by regular and certified mail, to his office and last-known home address. The post office returned all of the letters to the DEC as undeliverable.

After the Court temporarily suspended respondent on July 22, 2004, he failed to provide to his clients, adversaries, or courts the notification of his suspension, as required by R. 1:20-20(b)(11), and failed to file an affidavit with the Office of Attorney Ethic's ("OAE") Director, as required by R. 1:20-20(b)(15).

The complaint charged respondent with violations of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority) because of his "unavailability to receive and respond to ethics grievances," and RPC 8.4(d) (conduct prejudicial to the administration of justice) for failing to comply with R. 1:20-20(b)(15).

Service of process was properly made. Respondent's counsel forwarded the copies of the complaints to respondent after he was discharged from the representation. The amended complaint contains sufficient facts to support a finding of unethical conduct. Because respondent failed to answer the amended complaint, the allegations are deemed admitted. R. 1:20-4(f).

In the Behnke matter, respondent accepted a fee to represent Behnke's son and assured Behnke that he would personally attend to the matter. Later, he exacted an additional fee from Behnke to ensure his appearance at Thomas's sentencing. Nevertheless, respondent failed to personally appear either at the status conference or at the sentencing hearing. Respondent's conduct in

this matter violated 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.5(a) (charging an unreasonable fee) by demanding an additional fee to guarantee his appearance at the sentencing hearing, particularly since he failed to appear even after having been paid.

The complaint also charged respondent with violations of RPC 1.4(a) (failure to inform a prospective client of how, when, and where the client may communicate with the lawyer), (b) (failure to promptly comply with reasonable requests for information), and (c) (failure to explain a matter to the extent reasonably necessary to permit client to make informed decisions about the representation) under the new rules. Because respondent's conduct in this matter occurred in 2002, he should have been charged under the controlling RPCs at the time. Here, respondent failed to meet with Behnke and cancelled all of his scheduled appointments with him, thereby violating former RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information). By failing to meet with his client, he also violated former RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation). Under the facts set out in the complaint, the new RPC 1.4(a), (b), and (c) do not apply to respondent's conduct. However, respondent

violated RPC 1.4(a) and (b) under the former rules. The complaint alleged sufficient facts to give respondent notice of such charges and an opportunity to defend against them.

Respondent also violated RPC 1.16(d) by failing to turn over Thomas's file, despite Behnke's oral and written requests to that end.

The amended complaint charged that respondent's false assurances that he would personally appear on Thomas's behalf violated RPC 7.1(a). We dismiss this charge because it typically relates to false advertising. Respondent's conduct in this regard was more properly a misrepresentation (RPC 8.4(c)), the RPC under which he was charged in connection with his demands for additional funds. As noted previously, that demand for more money was a violation of RPC 1.5(a). Because the complaint alleged sufficient facts to give respondent notice of this charged violation (misrepresentation), and, in fact, charged it in a different context, we find respondent guilty of misrepresentation under RPC 8.4(c).

The complaint also charged respondent with a pattern of neglect. Such a finding is generally reserved for neglect in three or more cases. Because respondent was grossly negligent in the Armellino matter, as discussed more fully below, as well as

in his prior ethics matter, we find respondent guilty of a pattern of neglect, a violation of RPC 1.1(b).

In the Armellino matter, respondent took retainers to represent Armellino in two separate municipal court matters, then did little or no work on Armellino's behalf, and failed to appear on the return dates of the matters. We find, thus, that respondent violated RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence). As noted above, his conduct in these two matters, as well as in his prior ethics matters, constituted a pattern of neglect (RPC 1.1(b)).

Respondent also violated the 2004 version of RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter and to promptly reply to reasonable requests for information) by failing to communicate with his client. The amended complaint alleged sufficient facts to give respondent notice of this charge, which is absent from the complaint, and an opportunity to defend against it.

The amended complaint also charged that

Respondent's repeated refusal or unavailability to meet with Armellino violated the requirements of RPC 1.4(a), that a lawyer fully inform prospective clients of how, when, and where the client may communicate with the lawyer.

[C5¶26.]²

² C refers to the May 19, 2005 amended complaint.

Armellino was no longer a "prospective client," as he had already retained respondent. Therefore, RPC 1.4(a) does not apply. We, thus, dismiss this charge. More appropriately, respondent's misconduct in this regard falls under the above-found violation of new RPC 1.4(b). Also, respondent's failure to return the unearned fees at Armellino's request violated RPC 1.16(d). On the other hand, we find no violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) for respondent's accepting fees, but providing little or no services, and refusing to return any portion of the fees. The complaint does not allege that respondent took the fees under false pretenses and never intended to provide the services for which he was retained. Therefore, the facts alleged do not support a finding of a violation of RPC 8.4(c) in this context.

Respondent also violated RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority) by failing to reply to the ethics grievances and complaints in this matter, and RPC 8.4(d) (conduct prejudicial to the administration of justice) by failing to comply with the requirements of R. 1:20-20. Indeed, he failed to notify his clients, adversaries, and the courts of his suspension, and failed to file the required affidavit with the OAE.

The only issue left for determination is the quantum of discipline for respondent's violations of RPC 1.1(a), RPC 1.1(b), RPC 1.3, RPC 1.4(a) and (b) under the former rules, RPC 1.4(b) under the current rules, RPC 1.5(a), RPC 1.16(d), RPC 8.1(b), and RPC 8.4(c) and (d).

In default matters involving similar ethics violations, the discipline has varied, depending on the number of cases involved, the severity of the violations, and the attorney's ethics history. See, e.g., In re Hoffman, 156 N.J. 579 (1999) (three-month suspension for gross neglect, failure to communicate with clients, and misrepresentation; the attorney had a prior reprimand); In re Paskey, 174 N.J. 562 (2002) (six-month suspension where in three matters the attorney engaged in gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to cooperate with disciplinary authorities; attorney had two prior three-month suspensions and an admonition); In re Malfara, 164 N.J. 551 (2000) (six-month suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate with a client, failure to reduce the basis of a fee in writing, failure to return a client file or otherwise protect the client's interest on termination of the representation, and failure to cooperate with disciplinary authorities; the attorney had a prior reprimand); In re Lester, 165 N.J. 510 (2000) (one-year suspension

for attorney who failed to attend to the client's matters for eight years, failed to surrender the client's file to new counsel, and failed to cooperate with disciplinary authorities; ethics history included a private reprimand, two public reprimands, and a six-month suspension); and In re Herron, 144 N.J. 158 (1996) (one-year suspension where, in two matters, the attorney displayed gross neglect, failure to communicate with clients, and failure to cooperate with disciplinary authorities; the attorney had a prior one-year suspension).

Here, the seriousness of respondent's misconduct is heightened by his refusal to comply with the requirements of R. 1:20-20 – his obligation to notify the legal community and his clients of his inability to practice law. His defiance of the Court Order requiring him to comply with this rule underscores his disregard for his ethics obligations.

The only issue left for determination is the quantum of discipline. As to respondent's willful failure to file an affidavit in compliance with R. 1:20-20, presumptively a reprimand is appropriate discipline. That sanction has been enhanced when an attorney has defaulted in the ethics matter or has an extensive ethics history. Recent cases, most of which are defaults, have generally resulted in suspensions. See, e.g., In re Raines, 181 N.J. 537 (2004) (three-month suspension in a non-default matter,


where the attorney's ethics history included a private reprimand, a three-month suspension, a six-month suspension, and a temporary suspension for failure to comply with a previous Court Order); In re Girdler, 179 N.J. 227 (2004) (three-month suspension in a default matter; ethics history included a private reprimand, a public reprimand, and a three-month suspension); In re McClure, 182 N.J. 312 (2005) (one-year suspension where the attorney's ethics history included an admonition and two concurrent six-month suspensions; the matter proceeded as a default); In re King, 181 N.J. 349 (2004) (one-year suspension where the attorney had an extensive ethics history, including a reprimand, a temporary suspension for failure to return an unearned retainer, a three-month suspension in a default matter, and a one-year suspension; the attorney remained suspended since 1998, the date of the temporary suspension; default matter); and In re Mandle, 180 N.J. 158 (2004) (one-year suspension in a default case where the attorney's ethics history included three reprimands, a temporary suspension for failure to comply with an order requiring that he practice under a proctor's supervision, and two three-month suspensions; in three of the matters, the attorney failed to cooperate with disciplinary authorities). But see In re Moore, 181 N.J. 335 (2004) (reprimand in a default matter, where the attorney's disciplinary history included a one-year suspension).

In this matter, the totality of the circumstances - respondent's ethics history (private reprimand, reprimand, temporary suspension, and a six-month suspension), his ethics offenses, and his indifference toward ethics authorities (twice allowing matters to proceed on a default basis and failing to comply with R. 1:20-20), underscore his total disregard for his clients and the disciplinary system as a whole. Under these circumstances, we find that a two-year suspension is warranted for his serious ethics transgressions. We also determine that all pending disciplinary matters against respondent must be resolved prior to his reinstatement.

Chair Maudsley and Vice-Chair O'Shaughnessy did not participate.

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

Disciplinary Review Board
Louis Pashman, Esq.

By: 
for Julianne K. DeCore
Chief Counsel

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

In the Matter of A. Kenneth Weiner
Docket No. DRB 05-265

Decided: December 27, 2005

Disposition: Two-year suspension

Members	Two-year 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:	7				2

for Ellen A. Brodzky
Julianne K. DeCore
Chief Counsel