SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-371
District Docket No. XIII-2010-0022E

IN THE MATTER OF

ROBERT J. BERNOT

AN ATTORNEY AT LAW

Decision

Argued: January 19, 2012

Decided: March 1, 2012

Tara Johnson appeared on behalf of the District XIII Ethics Committee.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter came before us on a recommendation for a six-month suspension filed by the District XIII Ethics Committee (DEC). The complaint charged respondent with having violated RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with a client), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons expressed below, we determine that a reprimand is the appropriate quantum of discipline.

Respondent was admitted to the New Jersey bar in 1982. He has no disciplinary history.

The ethics hearing in this case took place on September 13, 2011. The day before the hearing, respondent requested an adjournment, based on a fire that occurred at his home on August 24, 2011, about three weeks earlier. The panel chair, John Lanza, denied that request. Although respondent renewed his adjournment request at the hearing, it was again denied.

In addition, on July 14, 2011, about two months before the hearing took place, Lanza disclosed, in a letter to all parties, that, about twenty years earlier, respondent had been a law partner of Lanza's father and that, when Lanza became employed by the firm as a law clerk, in 1999, respondent was no longer connected with the firm. Lanza set a deadline of July 21, 2011 for objections to his participation in the ethics case, after which, he cautioned, the objection would be deemed waived. Although respondent did not reply to this letter, at the ethics hearing, he objected to Lanza's participation.

Respondent contended that, because he had filed a federal lawsuit against Lanza's father (which had been resolved many years previously) and because the grievant, Carl Berry,

currently resided on the same street as Lanza's father, Lanza should recuse himself. When respondent was asked why he had not previously objected to Lanza's presiding over the hearing, he replied that R. 1:12-2 (disqualification of judges) permits parties to make recusal motions at the time of the hearing.[1] The panel denied respondent's disqualification request.

In a January 13, 2012 brief submitted to us, which respondent acknowledged was "tardy,"[2] he asserted that, during a recent search at the county clerk's office, he discovered that, as recently as 2009, the Lanza law firm had filed UCC statements naming him as an indebted partner. He further declared that he had recently received a letter from the law firm concerning his 401k plan. He did not, however, ask us to consider his recusal motion.

The facts giving rise to the ethics complaint are as follows.

Grievant Carl Berry retained respondent, in October 2009, in connection with two credit card debts that he owed: $2,660 to Citibank and $5,125 to Capital One Bank (Capital One). Berry acknowledged that he had no defenses to the lawsuits filed by

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[1] R. 1:20-6(d) provides that, in ethics cases, disqualification motions shall be made before any prehearing conference, if possible, but, in any event, before the first day of hearing.

[2] The deadline for respondent's brief was December 19, 2011.

the credit card companies. Although respondent had not previously represented Berry, he did not prepare a writing setting forth the scope of the representation or the basis or rate of his fee. When asked whether it was his normal practice to refrain from preparing retainer agreements, respondent replied that "it's not normal but it's not unusual."

Berry understood that respondent had agreed to represent him fully, including filing an appearance in the litigation matters. Respondent, however, claimed that, although he had agreed to try to negotiate a settlement, he had made it clear to Berry that he would not represent him in the litigation because Berry had no defenses to the lawsuits and he could not file a frivolous pleading. He admitted that he had not prepared a writing limiting the scope of the representation. He further acknowledged that he had not explained to Berry that, as a consequence of his not filing an appearance in the litigation, a default and a default judgment could be entered against him.

Respondent further admitted that he had not discussed his legal fees with Berry. Although respondent intended to receive thirty-three percent of the debt from Berry, negotiate a settlement for twenty-five percent, and retain the difference as his fee, he did not convey this plan to Berry.

When Berry retained respondent, both Citibank and Capital One had filed lawsuits against him in Special Civil Part in Hunterdon County. Respondent's strategy was to attempt to settle the cases by offering twenty-five percent of the amounts due and to increase the offer to thirty-three percent of the debt, if necessary.

According to respondent, with Berry present in his office, he contacted Citibank's attorney, who agreed to extend the time to file an answer to the complaint to allow the parties time to negotiate a settlement. Respondent asserted that, while Berry was at his office, he was not able to reach Gary Lewis, Capital One's attorney. However, respondent spoke with Lewis later that day, who also agreed to an extension of time to file an answer.

On October 1, 2009, Berry provided respondent with a $3,200 check for the purpose of settling the two cases. By letter to Citibank's counsel, dated October 21, 2009, respondent proposed settling the $2,660 Citibank lawsuit for $656 (twenty-five percent). Although Citibank made a counter-offer of $1,370, it never pursued its claim against Berry, for unknown reasons. Neither Berry nor respondent heard from Citibank or its attorney. The complaint eventually was dismissed.

Also on October 21, 2009, respondent sent a letter to Lewis, offering twenty-five percent, or $1,282.16, to satisfy

the $5,125 Capital One obligation. Capital One, however, obtained a default judgment against Berry for the entire debt. Respondent claimed that, notwithstanding Lewis's agreement to extend the time to file an answer, Lewis arranged to have a default entered against Berry.

Respondent admitted that, because he had not prepared a stipulation extending the time to file an answer, a default or a default judgment could have been entered against Berry. He explained that, because he had tried to keep Berry's costs and fees to a minimum, he had not confirmed the extension in writing.

On February 14, 2010, after the entry of the default judgment against Berry, respondent sent another letter to Lewis, explaining that he had not filed an answer to the complaint because he had relied on Capital One's good faith in negotiating a settlement; acknowledging that, perhaps he "should have been more cognizant of time frames;" and asking whether Lewis would agree to vacate the default judgment and permit the filing of an answer. Respondent renewed his offer to settle the claim for $1,282.16.

Lewis called respondent upon receipt of the February 14, 2010 letter. Respondent alleged that, although Lewis agreed to send him documents, he never received anything from Lewis.

Meanwhile, in January 2010, Berry was served with a second lawsuit filed by Capital One, seeking collection of a $23,600 debt. Berry consulted respondent, who agreed to try to resolve that matter as well. Berry gave a $5,900 check to respondent for purposes of settling the second Capital One debt. Berry then asked respondent to incorporate his business and authorized him to remove $1,000 from the trust account for his fees and expenses. Respondent explained that, rather than depositing the entire $5,900 in his trust account, he deposited $4,900 in that account and placed $1,000 in his business account to cover the incorporation fees and expenses.

According to Berry, he contacted respondent on a regular basis to determine the status of the collection matters; he had difficulty reaching respondent; and respondent repeatedly represented that, although he had left messages for the attorneys representing the creditors, they had not replied to them. Berry acknowledged, however, that he and respondent met on an almost weekly basis.

At some later point, respondent proposed a new litigation strategy to Berry. Respondent told Berry that, by filing two separate complaints, Capital One had violated the entire controversy doctrine, which requires related matters between the same parties to be resolved in one lawsuit, rather than in a

piecemeal fashion. Respondent, thus, planned to satisfy the $5,125 Capital One debt that was the subject of the first lawsuit and, thereafter, file a motion to dismiss the second, and larger, Capital One complaint, on entire controversy grounds.

In April 2010, Berry received notice from the constable that, based on his failure to file an answer to the Capital One complaints, a writ of execution had been issued and that his assets, including his home, bank accounts, and other property, were subject to sale at a sheriff's auction. Although Berry claimed that he had difficulty reaching respondent, when he did, respondent assured him that he would resolve the matter.

In September 2010, five months later, pursuant to the writ of execution, $5,200 was seized from Berry's bank account, which he owned jointly with his mother. A portion of the seized funds represented monies from Berry's unemployment check and his mother's social security check. When Berry learned of the seizure of these funds, he visited respondent, who unsuccessfully attempted to contact the constable. Later, respondent told Berry that, because social security and unemployment monies are not subject to execution, the constable required proof that those types of funds were in the bank account at the time of the seizure. Although Berry claimed that

he had provided respondent with proof of the source of the funds, respondent denied that assertion.

Berry later pointed out to respondent that the $5,200 seized from his bank account was approximately the same amount owed on the first Capital One complaint ($5,125). He, thus, suggested that Capital One retain the seized funds, in satisfaction of the debt owed in the first complaint, and that respondent file a motion to dismiss the second Capital One complaint on entire controversy grounds, as respondent had proposed. Respondent told Berry that he would file the motion at a later date.

According to respondent, he had represented clients in Special Civil Part matters for many years. However, he was not familiar with the difference between a default and a default judgment; did not know whether the court rules permit a default to be entered upon a defendant's failure to file a responsive pleading, without the necessity of the plaintiff's request[3]; believed that the court rules permitted extensions of time to file answers in Special Civil Part cases[4]; and acknowledged that, if he had permitted a default to be entered against Berry in the

[3] R. 6:6-2 provides that the clerk shall enter default against a defendant who has not filed a timely pleading.

[4] R. 6:3-1 provides that extensions of time for response by consent shall not apply in Special Civil Part actions.

second Capital One lawsuit, he would have been precluded from filing any pleadings and, thus, may have waived the affirmative defense of the entire controversy doctrine.

Sometime in September 2010, dissatisfied with respondent's failure to file the motion to dismiss the second Capital One lawsuit, Berry retained another attorney, Jeffrey Bronson. In a September 17, 2010 letter to respondent, Bronson requested the return of all trust account funds held on Berry's behalf and a copy of his files in connection with the three collection matters.

On September 21, 2010, respondent provided Berry with a copy of the files. Although Bronson admitted that respondent had turned over a copy of the file within four days of Bronson's request, he opined that the delay was "inordinate" because he had tried to reach respondent by telephone, without success, Berry was struggling financially, and the matter required respondent's immediate attention.

Also on September 21, 2010, respondent gave Berry an accounting and a $3,100 check. According to respondent's accounting, he had disbursed a total of $4,900.90, as follows: $4,135, as directed by Berry (for Berry's personal expenses); $465.90 for incorporation costs; and $300 for his legal fees for the incorporation. He had retained $99.10 "as reimbursement for

the costs of reproducing the enclosed files and the work spent on them." He, thus, asserted that he had received $8,100, disbursed $4,900.90 on Berry's behalf, retained $99.10, and remitted the $3,100 balance to Berry. Although he estimated that he had spent forty to fifty hours on the Berry matters, he explained that he had charged only $99.10 because "it worked out to a nice $3,100 check back to" Berry.

On September 23, 2010, after Berry demanded a refund of $1,000, stating that he had given respondent $9,100, not $8,100, respondent provided Berry with a copy of his trust account statement reflecting that only $8,100 had been deposited in that account. Respondent indicated to Berry that he would look further into his records and report his findings the next week, if not sooner.

Although Berry sent a September 25, 2010 letter to respondent, enclosing copies of two canceled checks totaling $9,100, and an October 16, 2010 letter, indicating his intention to file an ethics grievance against respondent if the $1,000 were not returned, respondent did not refund $1,000 to Berry until November 24, 2010. By that time, Berry had filed the ethics grievance.

Respondent explained that, because he had forgotten that he had placed $1,000 in his business account, he believed that he

had refunded all of the monies that were owed to Berry. He admitted that, although he realized, in early October, that he owed an additional $1,000 to Berry, he did not refund it immediately because he was annoyed by Berry's threat to file an ethics grievance against him and because he had received threatening telephone calls from Bronson.[5] According to respondent, he "got pissed off" and decided to wait until Thanksgiving to return the funds to Berry.

At about the same time that respondent reimbursed Berry, November 2010, the constable returned to Berry all of the funds that had been seized from his bank account, pursuant to the writ of execution.

After Bronson undertook Berry's representation, Berry filed a bankruptcy petition, thus staying all collection efforts by his creditors.

In summary, Berry complained that respondent did not defend the collection lawsuits, did not disclose to him that he considered litigation services to be beyond the scope of the representation, and never revealed that Capital One had obtained a default judgment against him. According to Berry, he had retained respondent to handle the collection cases and to fully

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[5] According to Bronson, after several months passed without respondent having refunded the money to Berry, he may have left respondent messages that were not "conciliatory."

represent him in whatever manner was required to resolve them. Berry further protested that respondent had allowed the cases to linger for an entire year and never filed the motion to dismiss the second Capital One complaint, as promised.

Before the formal ethics complaint was filed, the DEC investigator sent two letters to respondent, dated December 6, 2010 and January 3, 2011, respectively, directing him to reply to the grievance. Respondent testified that he never received those letters. According to the investigator, the letters were not returned to her office.[6]

The DEC found that, although respondent violated RPC 1.3 and RPC 8.4(c), the RPC 1.4(b) charge could not be sustained.

Specifically, the DEC determined that respondent displayed a lack of diligence by failing to file responsive pleadings in three litigation matters and by failing to promptly deliver funds to a client, upon request. As to the latter misconduct, the DEC noted that, although it also constituted a violation of RPC 1.15, respondent had not been charged with a violation of that rule.

The DEC rejected respondent's defense that he had agreed to represent Berry only for settlement negotiations, not for litigation purposes. The DEC noted that, although an attorney

[6] The complaint did not charge respondent with having violated RPC 8.1(b) (failure to cooperate with disciplinary authorities).

may restrict the scope of representation, RPC 1.2(c) requires that the client give informed consent to the limitation. Instead, Berry believed that respondent had agreed to file the necessary documents in the collection lawsuits. The DEC further noted that respondent's February 14, 2010 letter to Capital One's attorney, in which he requested an extension of time to file an answer, undermined his contention that he had not agreed to represent Berry in the litigation.

The DEC also rejected respondent's assertion that he had permitted the entry of default against Berry in the first Capital One lawsuit so that the second complaint would be subject to dismissal, under the entire controversy doctrine. The DEC determined that, because the entire controversy doctrine is an affirmative defense that is likely waived if not pleaded, respondent lacked diligence by failing to file an answer in that lawsuit and subjecting Berry to the entry of another default and default judgment.

In addition, the DEC determined that respondent violated RPC 8.4(c) by placing trust funds of $1,000 in his business account, by providing Berry with an inaccurate accounting of funds, and by refusing to refund $1,000 to Berry, knowing that he was entitled to those monies.

The DEC dismissed the charge that respondent failed to communicate with Berry, finding that he regularly met with Berry, and that his delivery of Berry's file, four days after receiving a request therefor, was not unreasonable.

The DEC found, in mitigation, that respondent had been admitted to the bar for twenty-nine years without incurring a disciplinary record. The DEC found several aggravating factors. The DEC considered respondent's pattern of misconduct, in failing to file responsive pleadings in three matters. In addition, finding it unlikely that the postal service had failed to deliver both letters from the investigator to respondent, the DEC found that respondent "dodged" her attempt to contact him and, thus, failed to cooperate with disciplinary authorities. The DEC also determined that respondent lacked candor during his testimony at the ethics hearing. Finally, the DEC noted respondent's lack of remorse and failure to appreciate the seriousness of his misconduct.

Finding that the aggravating factors outweighed the mitigating factors, the DEC recommended a six-month suspension.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence. However,

we were unable to agree with several of the DEC's findings, as well as the recommended sanction.

In this case, respondent clearly displayed a lack of diligence. Berry initially retained him to resolve two disputes with Citibank and Capital One. In both of those matters, lawsuits were pending against Berry, when respondent undertook the representation. Thereafter, respondent agreed to represent Berry in a second lawsuit that Capital One had filed against him.

Although respondent initiated settlement negotiations with counsel for both creditors, he was not able to resolve any of the collection cases. Fortuitously, the Citibank lawsuit was dismissed. Respondent, therefore, was not responsible for this beneficial outcome for Berry.

In the initial Capital One case, respondent permitted both a default and a default judgment to be entered against Berry. Later, he took no action, when he was notified that a writ of execution had been issued, thus allowing the constable to seize Berry's assets, five months later. After the funds in Berry's bank account were seized, respondent made no effort to obtain a return of the monies that were not subject to confiscation, that is, funds from Berry's mother's social security and his own unemployment checks.

Respondent, thus, failed to file pleadings in three lawsuits against Berry, allowing one of them to proceed as far as seizure of funds in Berry's bank account to satisfy a writ of execution, after he permitted a default judgment to be entered against his client.

The DEC appropriately rejected respondent's defenses. Respondent claimed that he had agreed with Berry to limit the scope of representation to settlement negotiations only, and had made it clear to Berry that he would not appear in the litigation. Respondent, however, failed to prepare a writing setting forth either the scope of the representation, or the basis or rate of his fee, as required by RPC 1.5(b). One of the purposes of the requirement that fee agreements be in writing is to avoid misunderstandings. Starkey v. Estate of Nicolaysen, 172 N.J. 60, 69 (2002). Indeed, not only did Berry testify that the representation was to include the lawsuits, but respondent's own letter to Lewis, Capital One's attorney, requested an extension of time to file an answer. Berry, thus, reasonably expected that respondent would file an answer in that case.

Moreover, RPC 1.2(c) permits an attorney to limit the scope of the representation, so long as the client provides informed consent to such limitation. Respondent admitted that he had not explained to Berry that, upon the failure to file an answer to a

pending complaint, a default and, later, a default judgment, likely would be entered. We find that, even if Berry had agreed to retain respondent with the understanding that he would not appear in the litigation, Berry's consent was not informed.

In addition, in our view, respondent displayed a remarkable lack of familiarity with the Special Civil Part rules. Although he claimed that attorneys for both creditors had consented to extend the time to file an answer, he failed to confirm those agreements in writing. Furthermore, he was unaware that R. 6:3-1 precludes such agreements. He also did not understand the difference between a default and a default judgment and was not aware that defaults are entered automatically by the court clerk, upon the failure of a defendant to file a timely pleading, without the necessity of the plaintiff's application.

Perhaps most troubling in this case was respondent's strategy of invoking the entire controversy doctrine. After Capital One filed a second lawsuit against Berry, respondent devised a tactic whereby he would permit the first lawsuit to proceed uncontested and then move to dismiss the much larger second lawsuit, on the ground that the entire controversy doctrine required both complaints to be filed simultaneously. Whether that plan would have been effective is unknown. However, it had no chance of succeeding because respondent never filed a

pleading in the second case, thereby, waiving the right to raise the affirmative defense of the entire controversy doctrine. See Aikens v. Schmidt, 329 N.J. Super. 335 (App. Div. 2000) and Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 375 (App. Div. 1997), certif. den. 149 N.J. 409 (1997) (entire controversy doctrine is an affirmative defense that is waived if not timely raised). Both the implausible plan and respondent's failure to even attempt to execute it constitute a lack of diligence. We, thus, find that respondent violated RPC 1.3.

As to the charge that respondent failed to keep Berry adequately informed of the status of the matters, the record does not contain clear and convincing evidence that respondent failed to communicate with his client. Berry admitted that he met with respondent almost weekly to discuss his cases. We, therefore, dismiss the charged violation of RPC 1.4(b).

Similarly, we determine that the record does not contain clear and convincing evidence that respondent violated RPC 8.4(c). Although the DEC found that respondent had diverted $1,000 from Berry's funds by placing them in his business account, Berry testified that he had authorized respondent to use trust funds for the legal fees and expenses associated with incorporating Berry's business. Berry's consent to respondent's use of those funds, thus, permitted respondent to place them in

his business account. Indeed, R. 1:21-6(a)(2) mandates that attorneys deposit into their business accounts all funds received for professional services. Respondent's use of those funds, in accordance with his client's direction, was not improper.

In addition, the DEC found that respondent's inaccurate accounting and his refusal to return $1,000 to Berry for two months also violated RPC 8.4(c). The inaccurate accounting appears to have been inadvertent. Respondent testified, without rebuttal, that he had reviewed only his trust account records, when accounting for Berry's funds, forgetting that he had deposited $1,000 in his business account. Furthermore, the failure to promptly disburse funds to a client is a violation of RPC 1.15(b), not RPC 8.4(c). We, therefore, dismiss the charge that respondent violated RPC 8.4(c). As seen below, we view respondent's admitted deliberate withholding of funds as an aggravating factor.

In summary, we find respondent guilty of a lack of diligence only (RPC 1.3).

Generally, an admonition results for lack of diligence in the handling of a client's matter. See, e.g., In the Matter of Brian F. Fowler, DRB 11-234 (November 30, 2011) (attorney permitted client's civil lawsuit to be dismissed twice – first

without prejudice and later with prejudice – for failing to provide discovery; the attorney's depression, which impeded his ability to diligently represent his client, was a mitigating factor); In the Matter of Jonathan R. Lautman, DRB 11-107 (July 26, 2011) (after attorney settled a personal injury case, the client rejected the terms, refusing to sign the release; the attorney waited three years before filing a motion to enforce the settlement and depositing the funds with the court; several mitigating factors considered); In the Matter of Michelle Joy Munsat, DRB 09-207 (July 29, 2009) (attorney failed to file an appellate brief, causing the client's appeal of a felony conviction to be dismissed; subsequent counsel succeeded in reinstating the appeal; substantial mitigation); In the Matter of Fayth A. Ruffin, DRB 04-422 (February 22, 2005) (attorney who did not file an answer to a counterclaim, thereby causing a default judgment to be entered against the client, consented to admonition); and In the Matter of Ronald W. Spevack, DRB 04-405 (February 22, 2005) (attorney failed to ensure that the Social Security Administration (SSA) had received his request for appeal forms and was processing it in its regular course of business; because the attorney's letter to the SSA did not request appeal forms, the appeal was never processed).

Here, although respondent's prior twenty-nine year unblemished career constitutes a mitigating factor, aggravating factors abound. Respondent failed to prepare a writing memorializing the scope of the representation and the rate or basis of his fee. The lack of a writing was the cause of the dispute between respondent and Berry concerning whether respondent had agreed to represent Berry in the litigation matters. We also consider respondent's lack of familiarity with basic court rules as an aggravating factor.

Most troubling, respondent intentionally withheld $1,000 from Berry, funds that he knew were due and owing to his client, because he was "pissed off" by the letters and telephone messages that he had received from Berry and his new counsel. Even the threat of an ethics grievance did not convince him to refund Berry's money. Such conduct is at odds with the standards governing attorneys. Similarly, he displayed a lack of regard for the disciplinary system by waiting until the ethics hearing to move to disqualify the panel chair from the case, despite having received a letter, two months earlier, notifying him that his failure to file the motion by a date certain would be deemed a waiver.

In our view, based on the aggravating factors discussed above, an admonition is insufficient discipline in this case.

The DEC's recommendation of a six-month suspension, however, is not in line with precedent. We, thus, determine that a reprimand is the appropriate level of discipline in this matter.

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: Isabel Frank
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert J. Bernot
Docket No. DRB 11-371

Argued: January 19, 2012

Decided: March 1, 2012

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			

By Julianne K. DeCore
Chief Counsel