UPREME COURT OF NEW JERSEY
isciplinary Review Board
ocket Nos. DRB 03-429 and
DRB 03-437

IN THE MATTER OF	
THEODORE KOZLOWSKI	
AN ATTORNEY AT LAW	

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

Decided: April 21, 2004

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

Pursuant to R.1:20-4(f), the District X Ethics Committee ("DEC") certified the records in these matters directly to us for the imposition of discipline, following respondent's failure to file answers to the formal ethics complaints.

Respondent was admitted to the New Jersey bar in 1978. On May 28, 1992, he was privately reprimanded for lack of diligence and failure to cooperate with ethics authorities. In the Matter of Theodore Kozlowski, Docket No. DRB 92-104.

On February 18, 1998, he received an admonition for lack of diligence and failure to communicate with the client in two matters. In the Matter of Theodore Kozlowski, Docket No. DRB 96-460. On October 27, 2003, the Supreme Court imposed a reprimand in a default matter for practicing law while ineligible to do so for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF"). In re Kozlowski, 178 N.J. 3 (2003). On January 27, 2004, the Court imposed another reprimand for respondent's failure to cooperate with disciplinary authorities in the investigation of a bankruptcy matter. In re Kozlowski, 178 N.J. 326 (2004).

The Katt and Marte Matters - Docket No. DRB 03-429

The Katt Matter

In July 1999, Karen L. Katt, the grievant, retained respondent to represent her in the purchase of a house in Denville. On numerous occasions after the closing, Katt requested the real estate closing documents from respondent, but he failed to comply.

In August 1999, respondent attempted to record documents, presumably the deed and the mortgage, with the

Morris County Clerk. The documents were returned, however, for failure to pay the proper recordation fees.

On October 13, 1999, respondent wrote to Katt, providing her with copies of the RESPA and other closing documents. He also promised to send her recorded copies of the deed and the mortgage, in addition to the title insurance binder. Hearing nothing from respondent, Katt made several requests of respondent for those documents. He did not reply. Five months later, on March 27, 2000, Katt filed an ethics grievance. A subsequent DEC investigation revealed that respondent did not record the documents until May 20, 2000.

Thereafter, on September 20, and November 10, 2000, the DEC investigator requested respondent's entire file in the Katt matter. When respondent failed to comply with the investigator's requests for information, the OAE determined to conduct a demand audit of respondent's attorney trust and business accounts.

By letter dated January 18, 2001, the OAE ordered respondent to appear at its offices on February 8, 2001, with his trust and business account records. At that time, the OAE auditors found the following irregularities: trust account checks lacked sufficient detail; client ledger

sheets lacked sufficient detail; closed client ledger sheets were not properly maintained; failure to prepare "three-way" reconciliations of trust account activity; failure to maintain running checkbook balance; inactive trust ledger balances remained in the trust account for extended periods of time; failure to maintain trust receipts disbursements journals; and improper business account designation.

The OAE audit also revealed that, as of December 31, 2000, respondent was unable to identify to whom the $12, 358.07 balance in his trust account belonged.

By letter dated April 6, 2001, the OAE directed respondent to correct the recordkeeping deficiencies within forty-five days. Respondent ignored further requests from the OAE for proof of compliance, prompting another audit almost two years later, on January 14, 2003. At that time, respondent furnished proof that his books and records were in substantial compliance with R. 1:21-6.

Respondent never provided a reasonable explanation for his failure to record the Katt documents immediately after the July 1999 closing.

The complaint alleged that respondent violated RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate

with the client), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), and RPC 8.1(b) (failure to cooperate with ethics authorities).

The Marte Matter

Respondent was retained by Rafael and Elizabeth Marte to file a Chapter 13 bankruptcy petition. On February 10, 1999, the matter was dismissed for the Martes' failure to make plan payments to the Chapter 13 trustee.

Thereafter, in July 1999, the Martes retained respondent to file a second Chapter 13 petition. Respondent affixed the Martes' signatures to the second petition, without their authority to do so.

The second petition was dismissed on August 11, 1999, for respondent's failure to file a bankruptcy Rule 2016(b) statement of fees, and other schedules required by the court.

Thereafter, respondent filed a third petition in the Martes' names, again affixing their signatures to the petition without their authority to do so. This petition, too, was dismissed, for errors by respondent.

At an undisclosed time thereafter, the Martes retained a new attorney, who appealed the dismissal on May 11, 2000.

Respondent appeared at the May 18, 2000, bankruptcy court hearing, and admitted that he had signed the Martes' names to the subsequent petitions, claiming that he had their authorization to do so. Mrs. Marte testified at the hearing that she and her husband never authorized respondent to do so.

The bankruptcy judge issued an opinion in which she found that respondent had improperly signed the Martes' names to the latter two bankruptcy petitions. Under cover letter dated April 3, 2002, the judge ordered respondent to reimburse the Chapter 13 trustee for costs and expenses, and then referred the matter to the OAE for investigation.

On July 12, 2002, respondent replied in writing to the OAE investigator.

The complaint alleged that respondent violated RPC 1.1(a) (gross neglect), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

On October 22, 2003, the DEC sent a copy of the complaint to respondent's last known office address listed in the New Jersey Lawyers' Diary and Manual, 20 Park Place, Suite 200, Morristown, New Jersey, 07960, by certified and regular mail (Exhibit A). The certified mail receipt was returned signed by "C. Walbaum" (Exhibit B). The regular

mail was not returned.

On November 21, 2003, a second letter was sent to the above address, by certified and regular mail, advising respondent that, if he did not file an answer to the complaint within five days, the record would be certified directly to us for the imposition of discipline. The certified mail receipt was returned unsigned on December 9, 2003 (Exhibit D). The regular mail was not returned.

Respondent did not file an answer to the complaint.

We received a February 3, 2004, motion to vacate default in the above matters, as well as a February 10, 2004, letter-brief from the DEC, in opposition to respondent's motion.

In order to vacate default matters, a respondent must overcome a two-pronged test. First, a respondent must offer a reasonable explanation for his/her failure to answer the ethics complaint. Second, a respondent must assert a meritorious defense to the underlying charges.

As to his failure to answer the ethics complaint, respondent advanced almost identical reasons to those advanced in matters that we considered in June 2003 (DRB 03-155) and January 2004 (DRB 03-358). We denied respondent's motions in those prior defaults because he

failed to satisfy the default test. The same is true here.

Respondent claimed that he missed the deadline to file an answer in the Katt and Marte matters partially because his son was diagnosed with juvenile diabetes on February 9, 2003. Thereafter, respondent and his wife (who also acted as his secretary) spent five or six full days in training to understand the disease. Respondent also offered the unfortunate death of his mother eight months later, on October 11, 2003, as a contributing factor in his inability to answer the complaint.

Respondent was served with the complaint in the Katt and Marte matters on or about October 22, 2003. Certainly, his mother's death may have affected his ability to file an answer for a short time. A reasonable grieving period would have been appropriate, had respondent requested it. He did not. Thereafter, on or about November 21, 2003, respondent received a "five-day letter," giving him an additional and final opportunity to file an answer. By that time, sufficient time had elapsed for him to refocus on the requirement that he answer the complaint. In the alternative, respondent could have requested additional time to do so. Instead, respondent chose to ignore the matter, and allow it to proceed as a default.

With regard to the meritorious defense requirement, respondent acknowledged that, in Katt, he has no defense to certain allegations, such as his failure to comply with his client's requests for information about the case, and for copies of documents.

Respondent denied that he neglected the Marte matter, and asserted that bankruptcy case law permitted him to sign the debtors' names to bankruptcy filings. That claim, however, is in direct conflict with the bankruptcy judge's findings, as contained in a written opinion in the Marte bankruptcy proceeding, which respondent included as an exhibit to his motion. The judge found that the Martes did not authorize respondent to affix their names to bankruptcy filings. According to the bankruptcy judge, the Martes could not have given that authority to respondent, because they were unaware of respondent's filings in that regard. In fact, the bankruptcy court was so disturbed by respondent's conduct, that it imposed sanctions, thereby requiring respondent to reimburse the Chapter 13 trustee and the Martes for costs associated with the case. Finally, the judge referred the matter to ethics authorities for investigation.

We find respondent's case to vacate default weak. He

had ample time to file an answer to the complaint, or to request more time to do so, family problems notwithstanding. With respect to the meritorious defense requirement, respondent admitted some culpability in Katt, but ignored obvious misconduct in Marte. We deny the motion to vacate default on the basis that respondent has not overcome either prong of the test.

Service of process was properly made in these matters. Following a review of the record, we find that the facts recited in the complaint support the charges of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R.1:20-4(f).

In Katt, respondent exhibited a lack of diligence by failing to record the deed and mortgage documents for almost a year, and failing to provide his client with copies of those documents, in violation of RPC 1.3. Respondent also failed to communicate with Katt or reply to her reasonable requests for information about the matter, in violation of RPC 1.4(a). In addition, the OAE investigation revealed numerous recordkeeping violations, in contravention of RPC 1.15(d) and R. 1:21-6. Finally, respondent failed to cooperate with the DEC and OAE in the

processing of the ethics matter, and allowed it to proceed on a default basis, in violation of RPC 8.1(b).

In Marte, respondent grossly neglected the bankruptcy matter, allowing repeated dismissals for his failure to prosecute the matter, in violation of RPC 1.1(a). In addition, respondent fraudulently affixed the signatures of his clients on two separate bankruptcy petitions, without their authorization, in violation of RPC 8.4(c).

The Cunningham-Hill Matter – Docket No. DRB 03-437

Respondent was retained by Dorothy Cunningham-Hill, the grievant, to file a Chapter 13 bankruptcy petition.

On or about July 18, 2002, the bankruptcy court entered an order dismissing the petition.

Thereafter, Cunningham-Hill made several telephone calls to respondent in order to obtain information about the status of her case.

On February 10, 2003, Cunningham-Hill received a notice that her house was to be sold at a sheriff's sale on March 23, 2003. Therefore, on March 18, 2003, Cunningham-Hill retained another attorney to represent her. The new attorney successfully re-filed the petition and avoided the sheriff's sale.

The complaint alleged that respondent violated RPC 1.3 (lack of diligence) and RPC 8.1(b) (failure to cooperate with ethics authorities).

On October 8, 2003, the DEC sent a copy of the complaint to respondent's last known office address listed in the New Jersey Lawyers' Diary and Manual, 20 Park Place, Suite 200, Morristown, New Jersey, 07960, by certified and regular mail. The certified mail receipt was returned signed by "C. Walbaum." The whereabouts of the regular mail are not known.

On November 17, 2003, a second letter was sent to the above address, by certified and regular mail, advising respondent that, if he did not file an answer to the complaint within five days, the record would be certified directly to us for the imposition of discipline. The certified mail receipt was returned signed on November 24, 2003. The signature is illegible. The certification is silent about the regular mail.

Respondent did not file an answer to the complaint.

We received a motion to vacate default and supporting certification in the matter, as well as a February 10, 2004, letter-brief from the DEC, in opposition to respondent's motion. Respondent again used the same family-

related excuses to explain his failure to file an answer in this matter. Respondent received a copy of the complaint on or about October 8, 2003.[1] He did not file an answer. Thereafter, on or about November 17, 2003, he received a five-day letter giving him an additional opportunity to answer. He did not do so.

Respondent's certification did not directly address his failure to answer the Cunningham-Hill ethics complaint. Rather, he addressed only his failure to reply to the initial grievance, which he claimed to have received at about the time of his son's diabetes diagnosis in February 2003. We find, however, that his son's illness has no bearing on the events here, as the within ethics complaint was served many months later, on October 8, 2003. Here, too, due to his mother's death, a reasonable delay in filing his answer would have been forgivable, had respondent attempted to file it thereafter. Respondent had until about November 22, 2003, to do so – ample time to file an answer or request additional time to do so. Again, respondent chose to ignore the matter.

With regard to the merits of the case, we find

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[1] Respondent mistakenly believed that he received the complaint on September 10, 2003.

respondent's defense untenable. He blamed Cunningham-Hill for problems in the case, claiming that she fell behind in payments to the bankruptcy trustee. He directed us to an exhibit, the bankruptcy court's docket sheet in the case, hoping to show all of the good work that he performed for his client. However, on the critical issue of his failure to appear at a court hearing, which resulted in the dismissal of the bankruptcy case, respondent stated simply that he was unable to appear. He claimed that thereafter he wished to file a motion to vacate dismissal, "but events prohibited me from doing so." Respondent did not elaborate for us what events may have prevented him from filing such a motion. We find, then, that there were none.

Service of process was properly made. Following a review of the record, we find that the facts recited in the complaint support the charges of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R.1:20-4(f).

Here, respondent allowed Cunningham-Hill's matter to be dismissed, in violation of RPC 1.3. In addition, he failed to cooperate with ethics authorities in the investigation of the matter and allowed it to proceed on a default basis, thereby violating RPC 8.1(b). We note that,

although the complaint cites facts that suggest that respondent failed to communicate with the client, those facts do not constitute clear and convincing evidence of an RPC 1.4(a) violation.

In summary, in Katt, respondent violated RPC 1.3, RPC 1.4(a), RPC 1.15(d) and R. 1:21-6, and RPC 8.1(b). In Marte, respondent violated RPC 1.1(a) and RPC 8.4(c). In Cunningham-Hill, respondent violated RPC 1.3 and RPC 8.1(b).

Respondent's most egregious conduct took place in Marte, wherein he forged his client's signatures on two bankruptcy petitions, in order to conceal his own failure to prosecute their bankruptcy matter. The bankruptcy judge took the extraordinary steps of issuing an opinion ordering respondent to reimburse the trustee for costs and expenses, and of alerting the OAE to respondent's conduct.

Ordinarily, affixing false signatures to documents will warrant at least a reprimand. See, e.g., In re Giusti, 147 N.J. 265 (1997) (reprimand for attorney who forged his client's name on a medical release form, forged the signature of a notary public to the jurat and used the notary's seal); In re Simms, 151 N.J. 480 (1997) (reprimand for attorney who signed a client's name on both a

settlement check and a release and then acknowledged the "signature" on the release, albeit with the client's authorization); and In re Robbins, 121 N.J. 454 (1990) (reprimand for attorney who, for the sake of expediency, affixed the signature of two grantors to a deed and then notarized the signatures). Because of the default nature of the proceeding, enhanced discipline, at least a three-month suspension, is required. See, e.g., In re Adelle, 174 N.J. 348 (2002) (three-month suspension in a default matter where the attorney fabricated and sent to the defendant in a litigated matter a notice of motion, which was never filed with the court; the fabrication was an attempt to compel the defendant to execute a certification of parentage; prior reprimand).

In aggravation, we have considered respondent's burgeoning ethics history, which includes a private reprimand, an admonition, and two recent reprimands, both of which were issued out of defaults. For these reasons, we determine that a three-month suspension is the appropriate measure of discipline in these matters. Two members did not participate.

We also determine to 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 Matters of Theodore Kozlowski
Docket No. DRB 03-429 and DRB 03-437

Decided: April 26, 2004

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy		X					
Boylan		X					
Holmes		X					
Lolla							X
Pashman							X
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		7					2

Julianne K. DeCore
Chief Counsel