SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-208

IN THE MATTER OF

THEODORE KOZLOWSKI

AN ATTORNEY AT LAW

Decision

Argued: September 11, 2003

Decided: November 12, 2003

William Sanderlands appeared on behalf of the District X Ethics Committee.

Respondent appeared pro se .

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

This matter was before us on a recommendation for discipline by the District X Ethics Committee ("DEC").

The complaint alleged that respondent lacked diligence and failed to cooperate with ethics authorities in its investigation of a bankruptcy matter.

Respondent was admitted to the New Jersey bar in 1978. On May 28, 1992, he

was privately reprimanded for failure to execute a warrant to satisfy judgment for more than a year and failure to cooperate with the district ethics committee's investigation, in violation of RPC 1.3 and RPC 8.1(b), respectively. On February 18, 1998, he received an admonition for failure to diligently represent the interests of two clients and failure to communicate with them, in violation of RPC 1.3 and RPC 1.4(a), respectively. On September 8, 2003, we recommended the imposition of a reprimand in a default matter for practicing law while ineligible for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection. In the Matter of Theodore Kozlowski, Docket No. DRB 03-155.

This matter was twice before the Board on a default basis. The Board vacated the first default on motion by respondent and remanded the matter for hearing. Respondent was required to file an answer with the DEC on remand before a date certain. Because respondent did not file an answer, the DEC again certified the matter to the Board as a default.

Respondent then filed a motion to vacate the second default, claiming surprise at receipt of the DEC's second certification of the record, because he had sent an answer to the DEC shortly after it first certified the record to the Board. The Board denied respondent's motion, reasoning that the instructions to respondent had been made clear in correspondence to him, and proceeded to enter default.

Thereafter, respondent filed a petition for review with the Supreme Court. The Court vacated the default and remanded the matter once again to the DEC for hearing. It

specifically required respondent to re-file his answer and to address the reasons for his failure to respond as required in the second default. The Board now considers the matter after the DEC hearing.

The complaint alleged violations of RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client), RPC 1.5(b) (failure to utilize retainer agreement), and RPC 8.1(b) (failure to cooperate with ethics authorities).

These charges stem from respondent's representation of the grievants, Dominic and Sharon Fruges, who retained respondent to represent them in a bankruptcy. In January 1998, respondent filed a bankruptcy petition in their behalf.

The Fruges failed to appear at the DEC hearing. Therefore, respondent was the DEC's sole witness. With regard to the allegation that he lacked diligence in his representation of the Fruges, respondent testified as follows:

> As you can see, the witnesses in this case don't bother to show up. I anticipated that, because there's really no merit in the allegations. So basically, what I have here is two people who wanted a return of money, and when they made the demand on me, I refused, because there was competent legal work done, and when I refused, they — we had conversations, and they said they would threaten an Ethics Complaint, and I just on principal would not bow down to that.
>
> And the history of them not showing up just bears out the fact that they were basically using it to extort a refund. Otherwise they'd be here today. They gave up that house because it no longer made economic sense for them to keep it. If you look at my Certifications, these people got the benefit of living in their home for years without making any mortgage payments, and the house was totally under water. It was probably two,

> two hundred fifty thousand dollars owed on it, and it had — it was a condominium in Edison, it had a fair market value of maybe $80,000. So, basically what these folks were doing were just saying that they wanted to make a Chapter 13 plan, but in essence when it came down to do what they were obligated to do, they never had the money. Again, the Chapter 7 that we filed in front of them wiped out all their obligations on the mortgage, so that freed them to basically stay there as long as they wanted. So they didn't lose anything. They knew exactly what they were doing in the case.

With regard to the allegation that he failed to communicate with his clients, respondent testified that a volume bankruptcy practice, where fees are low, breeds that type of complaint. He further explained that, because the bankruptcy court issues all notices to all parties in a matter, there is not as much correspondence between attorney and client as that seen in other practice areas. Moreover, respondent claimed that he always kept the Fruges informed about matters in his care.

With respect to the charge that he failed to utilize retainer agreements in the Fruges' bankruptcy matters, respondent testified that every bankruptcy petition must be filed with a "Rule 2016 (b)" disclosure statement signed by the debtor's attorney. That statement, which respondent moved into evidence, contained the details of his payment in the case. Respondent also stated that it is common in the practice of bankruptcy law for the disclosure statement to take the place of a separate retainer agreement. We found no reason to disbelieve respondent in this regard.

Finally, respondent testified about the allegation that he had failed to cooperate with ethics authorities in the matter. According to respondent, any failure on his part was

unintentional and offset by the mitigation that he presented to the Board and the Court in his motions to vacate default. As previously noted, this matter was twice before the Board on a default basis. In the first default, the Board granted respondent's motion to vacate and remanded the matter for a hearing by letter, which required respondent to file an answer by October 16, 2001. He did not do so. Therefore, the DEC again certified the matter to the Board as a default.

Respondent testified that he did not re-file his answer in the second default, believing at the time that the Board had included that language in the letter in the mistaken belief that he had never filed an answer with the DEC. Therefore, he filed another motion to vacate default on the basis that his prior answer, which he had sent to the DEC shortly after it had first certified the record to the Board, should have been accepted. The Board concluded that its instructions to file an answer had been clear, denied respondent's motion, and proceeded with the default.

Respondent claimed that the Supreme Court had agreed with him in its September 5, 2002 order, in which it granted his petition for review and remanded the matter to the DEC yet, again, for a hearing. That order stated, in part, that the matter was

> ...summarily remanded to the District X Ethics Committee for consideration of respondent's answer to the complaint (which respondent shall re-file with the committee) and for a hearing on the merits, in connection with which respondent shall address the reasons for his failure to respond as required in the second default.

With respect to the Court's requirement that respondent re-file his answer with the

DEC, he argued that the Court may have been mistaken or used the wrong "form Order," because he had requested that his answer be deemed admitted. Respondent further explained as follows:

> I don't — again, you know, the common theme here is the production of paper for a little office is a major ordeal. So anytime I don't have to send another original and eleven copies out to all these different people with different addresses, I won't do it. I have a tendency to interpret it my way. So that's what happened. I don't think I filed anything after that.

With regard to the Court's requirement that he explain his failure to respond in the second default, respondent reiterated his belief that the DEC had his answer all along, because he had forwarded it on March 26, 2001. Again, respondent pointed to the Board's original vacation of the default and the later Court Order as evidence that he was correct in that regard.

We note that the record does not reveal when respondent filed the lone answer now before us. That answer is undated. It bears the original district docket number from the first default and, handwritten below it, the district docket number for the within matter. Moreover, respondent did not recall filing any answers after the original answer on March 26, 2001. Presumably, then, this answer was not filed in response to the Court's September 5, 2002, mandate.

The DEC dismissed all of the substantive allegations arising from the Fruges' representation for lack of clear and convincing evidence. The DEC found respondent

guilty, however, of failure to cooperate with ethics authorities, in violation of RPC 8.1(b). The DEC recommended a reprimand for respondent's misconduct, pointing out that "his attitude toward the panel and the ethics process and his arrogance were intolerable."

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

The DEC correctly dismissed the charges of violations of RPC 1.3, RPC 1.4(a), and RPC 1.5(b), related to the bankruptcy matters. Without the Fruges' testimony, there was no clear and convincing evidence of wrongdoing in the bankruptcies. Respondent's explanations in that regard were reasonable and unchallenged. Therefore, we, too, dismissed those charges.

The remaining charge against respondent is failure cooperate with ethics authorities in the processing of the case. This matter took a needlessly tortuous path to conclusion. Obviously, had respondent filed a timely answer to the complaint in February 2001, much of the subsequent energy expended by the disciplinary system could have been conserved. Also, since the DEC's first letter to respondent about the grievance (May 19, 2000), he dropped the ball several times. Nevertheless, we did not consider any of respondent's actions prior to the Court's September 5, 2002, Order against him. Those actions were substantially absolved by his motions to vacate and petition for review. However, the September Court order remanding the matter out of the second default specifically required two things of respondent on remand.

The Court first required an explanation for respondent's failure to respond in the second default. His explanation, that the Board mistakenly thought that he had not yet furnished an answer to the DEC and could not have meant for him to re-file it, stretches credulity. Nevertheless, giving respondent the benefit of the doubt for the moment, on that point, the Court subsequently and affirmatively required him to re-file the answer in the matter now before us. Respondent testified that he did not recall having done so. He also intimated that the Court may have been mistaken when requiring the new filing because he had requested in his petition that his answer be "deemed filed." Apparently, it escaped respondent that the Court, like the Board before it, actually wanted him to re-file his answer. By respondent's own account, he had instead chosen to "interpret it [his] way." The Court's instructions to respondent were clear, yet he flouted them. So, too, his explanation there has shed new light on his failure to file the answer in the second default as well. He chose to read it his way on both occasions. In so doing, respondent took a chance that the matter would proceed directly to the Board for a second time on a default basis — which is exactly what transpired. In so doing, respondent violated RPC 8.1(b).[1]

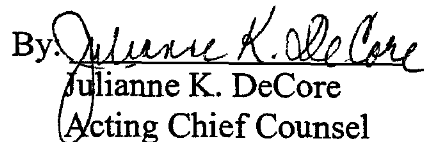
Ordinarily, for conduct of this nature, either an admonition or a reprimand would be the proper discipline. See, e.g., In the Matter of Arnold Abramowitz, Docket No. DRB 97-150 (July 25, 1997) (admonition where attorney failed to cooperate with reasonable requests for information by the DEC); In the Matter of Mark D. Cubberly,

[1]Respondent is fortunate that the DEC did not certify the matter directly to us a third time for failure to abide by the Supreme Court's mandate to re-file the answer.

Docket No. DRB 96-090 (April 19, 1996) (admonition where attorney failed to cooperate with ethics authorities during investigation); In re Macias, 121 N.J. 243 (1990) (reprimand where respondent failed to cooperate with the Random Audit Compliance Program by correcting accounting deficiencies required to bring him into compliance with the record keeping rules and failed to file a formal answer to the ethics complaint); and In re Burnett-Baker, 153 N.J. 357 (1998) (reprimand for respondent who failed to cooperate with a district ethics committee during the investigation and processing of a grievance; prior reprimand and three-month suspension). Here, respondent has a history of failure to cooperate with ethics authorities, having received a private reprimand for such misconduct in 1992. In addition, the Board just considered a matter in June 2003 that proceeded on a default basis, further evidence of a disregard for the disciplinary system. Although an admonition would normally be associated with such behavior, we found it almost willful in nature here. Thus, we determined to impose a reprimand. One member did not participate.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: 
Julianne K. DeCore
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

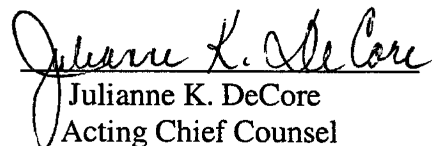
In the Matter of Theodore Kozlowski
Docket No. DRB 03-208

Argued: September 11, 2003

Decided: November 12, 2003

Disposition: Reprimand

Members	*Disbar*	*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:			8				1


Julianne K. DeCore
Acting Chief Counsel