SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-358

IN THE MATTER OF :
THEODORE KOZLOWSKI :
AN ATTORNEY AT LAW :

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

Decided: March 10, 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 record in this matter directly to us for the imposition of discipline, following respondent's failure to file an answer to the formal ethics complaint.

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, N.J. (2004).

In late October or early November 1998, Mr. and Mrs. Mark Twarinski, the grievants, retained respondent to represent them in their own bankruptcy matter, which had been handled previously by another attorney. At the time, the Twarinskis' house was scheduled for a sheriff's sale several days later.

On or about November 1, 1998, respondent filed a motion in the bankruptcy court, which resulted in a cancellation of the sale and reinstatement of the stay.

On May 13, 1999, the bankruptcy court dismissed the case for failure to prosecute. The foreclosure sale was rescheduled for September 7, 1999.

On August 25, 1999, respondent filed a motion to vacate the dismissal, which was granted on or about October 26, 1999. However, no order was entered restoring the case.

On or about January 13, 2000, the Twarinskis were notified that the bankruptcy trustee could not accept their plan payments because he had no order of restoration. Therefore, on February 28, 2001, respondent filed another motion to vacate the dismissal. Respondent failed to appear at oral argument on the motion. Therefore, on or about April 24, 2001, the bankruptcy court denied the motion.

On July 3, 2001, respondent filed a third motion to vacate the dismissal. The motion was granted on January 8, 2002.

On March 27, 2002, the bankruptcy trustee filed a certification in support of an order dismissing the case. Shortly after, in April 2002, the bankruptcy court once again dismissed the case.

The complaint charged respondent with a violation of RPC 1.3 (lack of diligence).

On July 9, 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 "Paul A. Woodford." The whereabouts of the regular mail is not known.

On September 18, 2003, the DEC sent a second letter 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 September 19, 2003, by "C. Walbaum." The certification is silent about the regular mail.

On or about January 5, 2004, respondent filed with us a motion to vacate default in the above matter.

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 largely the same personal reasons that he presented in a motion to vacate default in a matter reviewed by us in June 2003, under Docket No. DRB 03-155. There, we denied respondent's motion because he had failed to satisfy either prong of the test. The same is true here.

Respondent claims that he missed the deadline to file an answer 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. However,

respondent was served with the complaint on or about July 9, 2003. On or about September 18, 2003, he received a "five-day letter." Respondent did not reply to either of those DEC inquiries, claiming that, at the time, he was busy replying to other disciplinary inquiries. Once those matters were resolved, respondent "needed a rest" and vacationed in Florida the week of September 17, 2003. It was his intent, he claimed, to file a formal answer immediately upon his return to New Jersey.

Respondent claimed that, upon his return from Florida, he attended to his ill mother, who had been in a nursing home for some time. Respondent gave no further details in that regard, other than to state that she passed away on October 11, 2003. Respondent failed to file an answer thereafter.

Despite the upheaval in respondent's personal life, we find that he had ample time to file an answer. The son's brief hospitalization and respondent's subsequent diabetes training in February 2003 have little bearing here, as the within ethics complaint was served months later, in July 2003. Thereafter, respondent vacationed in Florida in September 2003, knowing that his answer was severely overdue. He should have either requested additional time to file his answer, postponed his trip, or prepared the answer while on vacation. He elected not to do so.

Once again, upon respondent's return on or about September 24, 2003, he failed to give the ethics matter his immediate attention, despite his stated intention to do so. The passing of his mother the following month was no doubt difficult; however, respondent shed no light on how it affected his ability to file an answer. Between his September 24, 2003, return from vacation and his mother's October 11, 2003 death, respondent had an obligation — at a minimum — to alert ethics authorities to his situation before the matter was certified directly to us as a default. Had respondent done so, an accommodation might have been made for him, even at that late date.

With regard to the meritorious defense requirement, respondent alleged that the Twarinskis'

financial situation had improved so dramatically that he recommended to them that they dismiss their bankruptcy matter. That is not a viable defense to lack of diligence. Moreover, respondent furnished no support for the notion that he had advised his clients to voluntarily request the dismissal of their bankruptcy matter.

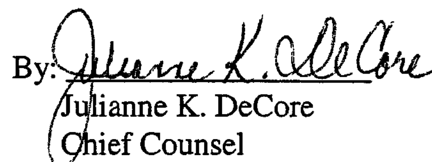
We believe that respondent had ample opportunity to file an answer to the complaint or request more time to do so, family problems notwithstanding. Moreover, we find respondent's defense to the allegation of lack of diligence flimsy and unsupported. Therefore, we deny respondent's motion to vacate default.

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).

Had this been respondent's first brush with the ethics authorities, an admonition may have been sufficient. See, e.g., In the Matter of Angela C. W. Belfon, Docket No. DRB 00-157 (January 11, 2001) (admonition for gross neglect, lack of diligence, failure to communicate with client, failure to expedite litigation, and failure to promptly deliver funds to a client); In the Matter of Michael A. Amantia, DRB Docket No. 98-402 (September 22, 1999) (admonition for gross neglect, lack of diligence, and failure to communicate with client); and In re DeBosh, 164 N.J. 618 (2000) (reprimand for gross neglect, failure to communicate with client, failure to provide client with written fee agreement, and failure to cooperate with disciplinary authorities). However, because of respondent's prior discipline, and the default nature of the matter before us, we unanimously determine to impose a reprimand. Respondent is forewarned that any future misconduct on his part will result in more severe discipline. 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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

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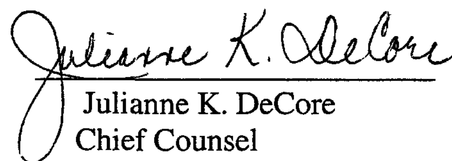
Disposition: Reprimand

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:			7				2



Julianne K. DeCore
Chief Counsel