

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-133
District Docket No. XII-2014-0042E

IN THE MATTER OF
ERIC B. BAILEY
AN ATTORNEY AT LAW

Decision

Decided: October 27, 2015

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

This matter was before us on a certification of the record filed by the District XII Ethics Committee (DEC) pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to communicate with the client), and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

Following the certification of the record to us, respondent filed a motion to vacate the default, to impose a stay of this disciplinary proceeding, and to enter a protective order. We granted the motion for a protective order, but denied the other requested relief.

The terms of the protective order provide that the entire record in this matter, with the exception of the formal ethics complaint, the certification of the record, and our decision, is sealed as confidential and prohibits disclosure to any individual or entity, group or organization, other than District XII personnel, Office of Attorney Ethics personnel, Disciplinary Review Board members and personnel, the New Jersey Supreme Court and its personnel, and respondent or his counsel.

We declined to vacate the default on the ground that respondent had failed to (1) provide a reasonable explanation for the failure to file an answer to the complaint and (2) present meritorious defenses to the ethics charges. We denied the requested stay on jurisdictional grounds.

Respondent subsequently sought reconsideration of our decision to deny the motion to vacate the default, which we also denied because respondent had failed to identify any "matters or controlling decisions" that he believed we had overlooked or

improperly applied in denying the motion to vacate the default. R. 4:49-2. Further, respondent failed to present new or additional information that he could not have provided with the motion to vacate the default. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

For the reasons set forth below, we find that respondent violated all of the charged RPCs. Further, we determine to impose a reprimand on respondent for his conduct.

Respondent was admitted to the New Jersey bar in 2006. At the relevant times, he maintained an office for the practice of law in Springfield.

Service of process was proper in this matter. On February 6, 2015, the DEC sent a copy of the formal ethics complaint to respondent's office address, 871 Mountain Avenue, Suite 201, Springfield, New Jersey 07081, by regular and certified mail, return receipt requested. The receipt for the certified letter was returned bearing an illegible signature and confirming delivery on February 10, 2015. The letter sent by regular mail was not returned.

On March 18, 2015, the DEC sent a letter to the same address, by regular and certified mail, return receipt requested. The letter directed respondent to file an answer

within five days and informed him that, if he failed to do so, the DEC would certify the record directly to us for the imposition of discipline. The certified mail return receipt bears respondent's initials on the signature line but no date of delivery. The letter sent by regular mail was not returned to the DEC.

On March 24, 2015, respondent informed the DEC secretary, Michael F. Brandman, via e-mail, that he had not received the complaint. Brandman e-mailed a copy to him, which respondent acknowledged receiving.

On April 14, 2015, Brandman left a voicemail message for respondent and sent an e-mail to him, stating that respondent's answer to the complaint was due and that, if it were not received, the record would be certified to us. The next day, respondent e-mailed Brandman that "I will have an answer for you tomorrow," that is, April 16, 2015.

On April 17, 2016, respondent informed Brandman, by e-mail, that he had been called out of the office on an emergency the day before. Respondent claimed that he was "finishing the response today" and that he would deliver it to Brandman through Lawyers Service. In reply, Brandman notified respondent that, if

he did not receive the answer by 2:00 p.m., he would certify the record to the Board.

As of April 17, 2015, respondent had not filed an answer to the complaint. Accordingly, on that date, the DEC certified this matter to us as a default.

On August 28, 2013, grievant Kathy M. Gardner retained respondent to represent her and her spouse in a consumer fraud claim against Global Auto Mall. Between August 28 and October 1, 2013, Gardner sent respondent five e-mails and made numerous requests for a retainer agreement. On October 1, 2013, Gardner e-mailed respondent, seeking the return of her original paperwork, due to his failure to send her a retainer agreement and to communicate with her.

On October 3, 2013, respondent telephoned Gardner to apologize for the delays and requested "another chance." On that same date, he e-mailed Gardner a proposed retainer agreement and indicated that he "plan[ned] on having a draft demand for arbitration completed within a week of receiving the countersigned retainer." Gardner signed the proposed retainer agreement on October 7, 2013.

On October 22, 2013, in reply to Gardner's requests for an update on the draft arbitration demand, respondent sent her the following e-mail:

I'm progressing on it reasonably well. I anticipate having a draft for you soon – I wanted to have it to you already, but I am trying to pare down the details to something that the AAA will actually read rather than something that is too unwieldy [sic]. I expect to have the draft to you this week, though.

[C110.¹]

On November 4, 2013, respondent forwarded a demand notice, which did not include an actual demand for arbitration. The complaint does not identify the recipient of the notice, though, presumably, it was Gardner.

Gardner e-mailed respondent on seven occasions between November 25, 2013 and January 22, 2014. In each of those e-mails, she requested an update on the status of her matter. Respondent did not reply to any of Gardner's e-mails.

¹ "C" refers to the formal ethics complaint, dated February 4, 2015.

On February 4, 2014, Gardner left a voicemail message with respondent's office seeking a status update. He did not return her call.

On February 17, 2014, Gardner wrote a letter to respondent, expressing her disappointment in his failure to attend to her matter and requesting that, within seven days, he inform her of his position as to continuing her representation.

On February 22, 2014, respondent e-mailed the following to Gardner:

I am dreadfully sorry. I have had some serious unforeseen issues come up that prevented me from being able to do the things I had promised to do thus far. I don't know what to tell you besides the fact that I know I have screwed up with you and certainly don't blame you if you want me to send you back your documents and go our separate ways.

If you would like to speak, I will be happy to call you.

[C115.]

During a telephone conversation on an unidentified date, respondent told Gardner that he hoped to finalize a draft arbitration demand by March 15, 2014. On February 24, 2014, respondent sent Gardner a draft, which was incomplete and which

had not been proofread. Indeed, respondent never completed the draft.

On April 2, 2014, Gardner e-mailed respondent once again, requesting the completed arbitration demand. Respondent did not reply. On April 8, 2014 Gardner e-mailed respondent and demanded the return of her file.

Respondent complied with Gardner's request. On April 9, 2014, he e-mailed her the FedEx confirmation number for the mailing he had sent to her. In the e-mail, he stated "I am sorry that life got in the way of my being able to help you."

On May 13, 2014, Gardner filed a grievance with the DEC. On May 20, 2014, DEC Secretary Brandman sent a copy of the grievance to respondent and requested a reply within ten days. Respondent did not comply with his request.

By letter dated September 8, 2014, the DEC investigator informed Gardner and respondent of his assignment to the matter. The letter also requested that respondent reply to the grievance within ten days.

On September 26, 2014, respondent contacted the investigator and requested an extension of time within which to reply to the grievance. "After two additional letters" from the

investigator, respondent finally submitted a reply on October 24, 2014.

In respondent's written reply to the grievance, he claimed that "the case did not proceed as quickly as [Grievant] would have liked." He denied having ignored her voicemails, stating that he had experienced substantial telecommunication difficulties when he relocated his office. Respondent claimed that, in the February 22 e-mail to Gardner, he had apologized for the delay in preparing an arbitration demand. He acknowledged offering to return Gardner's file to her so that she could seek other representation, but asserted that she had declined the offer. Thereafter, he claimed, he "continued to work on the demand for arbitration," which he had "hoped" to have completed by March 15, but "was unable to complete it at that time." At Gardner's request, he returned her file on April 10, 2014. Finally, respondent claimed that Gardner was not "prejudiced in any way," because the statute of limitations for her claim would not expire until March 2019.

On November 6, 2014, the DEC investigator requested respondent's entire file. On December 10, 2014, the investigator left a voicemail message for respondent, again requesting a copy

of his full file. Respondent ignored the investigator's requests.

The complaint charged respondent with a violation of both RPC 1.1(a) and RPC 1.3 based on his seven-month delay in preparing an incomplete demand for arbitration. The complaint further charged respondent with a violation of RPC 1.4, presumably (b), based on his failure to reply to Gardner's numerous reasonable requests for status updates during that same period.

Finally, the complaint charged respondent with having violated RPC 8.1(b), based on his failure to reply to the DEC secretary's May 20, 2014 letter; on his failure to reply to the DEC investigator's letters of September 8 and November 6, 2014, to failure to produce the Gardner file; and on his failure to file an answer to the complaint.

The facts recited in the complaint support most of the charges of unethical conduct. Respondent's failure to file an answer to the complaint is deemed an admission that the allegations are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Respondent's failure to complete the task for which he was retained, during a seven-month period, constituted a lack of

diligence, a violation of RPC 1.3. It cannot be said, however, that respondent's failure to file an arbitration demand during that same timeframe, when the statute of limitations had not yet expired, constituted gross neglect. Therefore, we dismiss the RPC 1.1(a) charge.

Respondent's failure to reply to his client's numerous requests for information about the status of the matter, throughout that same period, violated RPC 1.4(b), which requires an attorney to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

Respondent also violated RPC 8.1(b), which prohibits an attorney from "knowingly fail[ing] to respond to a lawful demand for information from . . . [a] disciplinary authority." Here, respondent was charged with having violated this rule based on his failure to submit to the DEC secretary a written reply to the grievance within ten days and on his failure to turn over a copy of the Gardner file to the DEC investigator. As to the former, although respondent did not submit his written reply to the secretary within the ten-day period, he did submit it to the investigator, after having been granted some extensions of time. Thus, we dismiss the charge in that regard. His failure to turn

over the Gardner file is a clear violation of the RPC, however, as is his failure to file an answer to the complaint.

There remains for determination the appropriate measure of discipline for respondent's violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b). Ordinarily, lack of diligence and failure to communicate with the client results in the imposition of an admonition. See, e.g., In the Matter of Frances Ann Hartman, DRB 14-138 (July 22, 2014) (despite attorney's zealous representation at the beginning of the attorney's representation of her client in a medical malpractice action, she failed to act with diligence after the client's complaint was dismissed, a violation of RPC 1.3; the attorney also failed to return the client's repeated phone calls and emails for almost an entire year, a violation of RPC 1.4(b), and failed to explain to the client, in detail, what she considered to be problematic with the claim, so that the client could make an informed decision on whether to proceed with it, a violation of RPC 1.4(c)); In the Matter of Gary A. Kraemer, DRB 14-085 (June 24, 2014) (the attorney failed to file his appearance for several months in two litigation matters and, in one of the matters, he also failed to take prompt action to compel an independent medical examination of the plaintiff; violations of RPC 1.3; in addition, throughout the

representation, the attorney repeatedly failed to reply to his client's and his prior counsel's numerous requests for information about the two matters; violations of RPC 1.4(b); finally, several months after final judgment was entered against his client, the attorney failed to turn over the file to appellate counsel, a violation of RPC 1.16(d)); In the Matter of John David DiCiurcio, DRB 12-405 (July 19, 2013) (in a bankruptcy matter, and over a period of several months, the attorney did not file the petition and only had written one letter in the matter, a violation of RPC 1.3; the attorney did not file the petition because the client had not paid the filing fee, but he never communicated that to the client, a violation of RPC 1.4(b)); and In the Matters of Peter A. Cook, DRB 12-290 and DRB 12-331 (January 25, 2013) (in a trust matter, the attorney did little to move the case along and accomplished little more than legal research, once that matter had evolved into an estate case; he also failed to reply to his client's requests for information for a year; in a matter in which the attorney set up a non-profit entity for the client, he failed to prepare tax returns for the entity, as agreed, and failed to reply to requests for information about the matter; violations of RPC 1.3 and RPC 1.4(b)).

If, in addition to the above infractions, the attorney also fails to cooperate with disciplinary authorities, an admonition may still be imposed, so long as the attorney does not have an ethics history. See, e.g., In the Matter of Thomas E. Downs, IV, DRB 12-407 (April 19, 2013) (the attorney admittedly failed to communicate with his client, a violation of RPC 1.4(b), and, after the grievance was filed, failed to reply to the ethics investigator's numerous attempts to contact him, a violation of RPC 8.1(b)); In the Matter of Ronald L. Washington, DRB 12-138 (July 27, 2012) (the attorney failed to reply to the client's requests for information about the case for extended periods of time, failed to advise her about important aspects of the case, such as the need for an expert, and failed to correctly address a letter to the client about the dismissal of her appeal, which caused her to learn about the dismissal after it was too late to act on it; violations of RPC 1.4(b) and (c); the attorney also failed to cooperate with ethics investigators and appear at the DEC hearing, as required by R. 1:20-6(c)(2)(D), after the denial of his last-minute request to appear by telephone, a violation of RPC 8.1(b)); and In the Matter of Steven J. Plofsky, DRB 10-384 (March 7, 2011) (attorney failed to communicate with his clients in two different matters and failed to cooperate with


the DEC in its investigation of grievances filed by the two clients, plus four other clients; violations of RPC 1.4(b) and RPC 8.1(b)).

Although an admonition would be appropriate for respondent's violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b), because this case came before us as a default, we enhance the discipline to a reprimand. In re Kivler, 193 N.J. 332, 342 (2008) ("a respondent's default or failure to cooperate with the investigative authorities operates as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced").

Member Clark did not participate.

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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Eric B. Bailey
Docket No. DRB 15-133

Decided: October 27, 2015

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark						X
Gallipoli			X			
Hoberman			X			
Rivera			X			
Singer			X			
Zmirich			X			
Total:			7			1


Ellen A. Brodsky
Chief Counsel