

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 15-117  
District Docket No. VIII-2013-0040E

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IN THE MATTER OF :  
THOMAS E. DOWNS, IV :  
AN ATTORNEY AT LAW :  
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Decision

Decided: November 16, 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 VIII Ethics Committee (DEC), pursuant to R. 1:20-4(f). A seven-count amended complaint charged respondent with violations of RPC 1.4(b) (failure to keep the client reasonably informed about the status of the case and to comply with the client's reasonable requests for information), RPC 1.5(b) (failure to set forth in writing the rate or basis of the attorney's fee), RPC 1.15(b) (failure to promptly deliver funds to a third party), RPC 1.16(d) (failure to return an unearned retainer), RPC 8.1(b) (failure to cooperate with disciplinary

authorities), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1975. On April 19, 2013, he received an admonition for failure to communicate with the client and failure to cooperate with an ethics investigation. In the Matter of Thomas E. Downs, IV, DRB 12-407 (April 19, 2013).

Service of process was proper in this matter. On June 4, 2014, the DEC sent a copy of the complaint, by both certified and regular mail, to respondent's office address, as listed in the attorney registration records. The certified mail return receipt, indicating delivery on June 9, 2014, bore the signature "Kristin Stromenger." The regular mail was not returned.

On August 1, 2014, the DEC sent respondent a copy of the amended complaint, at the same office address, by both certified and regular mail. The certified mail return receipt, indicating delivery on August 5, 2014, was signed by Kristin Stromenger. The regular mail was not returned.

The time within which respondent may answer the complaint expired. As of April 1, 2015, the date of the certification of the record, respondent had not filed an answer.

On June 15, 2015, respondent's counsel filed a motion to vacate the default in this matter. For the reasons stated below, we denied the motion.

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

In support of the motion to vacate the default, counsel submitted his own June 9, 2015 certification (RCert). It neither mentions respondent's failure to answer the complaint nor offers an explanation, reasonable or otherwise, therefor. The certification, however, provides:

13. Mr. Downs regrets this matter now revolves around his failure to timely turn over the \$2,500.00 and has no excuse for his conduct. He has tried to explain his conduct to himself but without success. He has been a lawyer for many years, soon to be 65 and realizes the return of the \$2,500.00 and his cooperation should have been immediate and thorough.

14. He will be seeking professional assistance to try and understand why this happened and to ensure it does not happen in the future.

[RCert.¶13-¶14.]

In respect of meritorious defenses to the charges, the certification asserts that respondent had a prior attorney/client relationship with the client, Shyamal Deb, who moved to India in 2007. In 2012, Deb retained him in this matter to address child support and alimony arrearages owed to his former wife in the United States. His friend, Dr. Chattopadhyay, furnished respondent's \$2,500 retainer.

As to respondent's alleged failure to prepare a written fee agreement, the certification indicates that respondent twice sent a fee agreement to Deb for his review, execution, and return. It is silent about whether Deb signed and returned either agreement to respondent. A copy of a fee agreement, attached to counsel's certification as an exhibit, is unsigned.

Counsel maintains that respondent performed legal services on Deb's behalf, but a disagreement arose between attorney and client, when respondent expressed his doubts that the permanent alimony award to Deb's former wife could be reduced or eliminated. At that point, Deb requested the return of the retainer to Chattopadhyay and respondent immediately sent a \$2,500 check to Chattopadhyay.

According to counsel, the check was sent to a Philadelphia address, per Deb's email instructions. When Chattopadhyay later reiterated the fee-return request, he furnished respondent with

the same street address, but attributed it to Glenolden, Pennsylvania not Philadelphia.

Counsel stated that the mail envelope enclosing the original check was never returned and respondent subsequently voided that check. On June 8, 2015, at counsel's direction, respondent sent a new check to Chattopadhyay for the return of the \$2,500 fee, at the Glenolden, Pennsylvania address.

Counsel has offered no explanation for respondent's failure to answer the ethics complaint. The certification simply states respondent's regret that the matter now revolves around his failure to return the fee, for which respondent "has no excuse."

According to counsel, respondent has searched for an explanation for his actions, has not found one, but realizes that he should have returned the fee and cooperated with the DEC, and that his cooperation "should have been immediate and thorough." Counsel also refers to respondent's intention to seek professional assistance to try to understand "why this happened" and to prevent its reoccurrence.

Counsel concedes that respondent has no excuse for his inaction and cannot "find an explanation" for it. Respondent has, thus, failed to satisfy the first prong of the default test.

Respondent also failed to provide meritorious defenses to the underlying charges.

Specifically, respondent did not address the RPC 1.4(b) charge. As explained below, we are left to conclude that respondent failed to communicate with his client.

In respect of RPC 1.16(d), it appears that respondent did send Chattopadhyay a check for the return of the \$2,500 fee. That check was never negotiated, perhaps because of a mix-up in the Pennsylvania address to which it was sent (Philadelphia instead of Glenolden). Respondent provided no explanation, however, for his failure to replace that check promptly, once he concluded that it had not been negotiated.

Respondent also did not refute the allegation in the amended complaint regarding the alleged violation of RPC 1.5(b) – specifically, that respondent told Deb that he need not sign and return the fee agreement. Moreover, respondent did not maintain that he had obtained his client's signature and furnished him with a fully executed copy of the agreement, as required in all civil family actions. R. 5:3-5. Indeed, he attached to his motion an unsigned copy of the purported fee agreement.

Respondent further offered no explanation for his failure to reply to the ethics investigator's letters, voicemail messages, and entreaties for cooperation, as explained more fully below. Rather, counsel's certification stated simply that respondent would be seeking professional assistance to "try and understand why this happened," and to prevent its recurrence. Yet, there is no indication of a problem for which a professional might be needed, such as ill health, depression, alcohol or drug abuse, or gambling. Indeed, if such a problem existed, we would have expected respondent to raise it in the motion to vacate the default. In the absence of any evidence that a problem beset respondent, we conclude that he simply made promises of cooperation that he chose not to keep.

Although respondent did not address the RPC 1.15(b) and RPC 8.4(c) charges, for the reasons stated below, we dismiss them as inapplicable.

Because respondent failed to satisfy both prongs of the default test, we determine to deny his motion to vacate. We now turn to the allegations of the complaint.

In September 2012, Shyamal Deb, a former client and the grievant in this matter, retained respondent to represent him in a civil family action involving child-support and alimony arrearages.

In October 2012, respondent sent Deb, a United States citizen residing in India at the time, a written fee agreement. On December 5, 2012, he sent Deb a revised agreement, "due to concerns regarding the scope of work" to be performed.

Presumably due to the geographic distances involved, Deb arranged for a friend in Philadelphia, Swapan Chattopadhyay, to pay respondent's \$2,500 retainer: \$1,500 on November 14, 2012 and \$1,000 on December 1, 2012.

According to the amended complaint, because respondent told his client that he need not execute the fee agreement, Deb neither signed nor returned it to him.

Thereafter, from mid-December 2012 through July 5, 2013, respondent performed no legal services on Deb's behalf and failed to communicate with him about the status of the case.

On July 5, 2013, after seven months without word from respondent, Deb faxed a letter to respondent, directing him to return the unearned \$2,500 legal fee to Chattopadhyay in Philadelphia and, presumably, terminating the representation.<sup>1</sup>

In a July 18, 2013 reply e-mail, respondent notified Deb that he had sent to Chattopadhyay that day check number 6425 for

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<sup>1</sup> In his termination letter, Deb also noted that he needed medical treatment that required his return to the United States, but was not comfortable doing so while the arrearages issue remained unresolved. Thus, the matter was urgent to him.



\$2,500. Respondent attached a copy of the cover letter that he purportedly sent along with the check, using the Philadelphia address that Deb had provided.

On July 30, 2013, Deb notified respondent that Chattopadhyay never received the check. Respondent's secretary, Kristin Stromenger, replied that, on July 18, 2013, "Jessica" (presumably respondent's employee) had sent the check to Chattopadhyay.<sup>2</sup>

In July and August 2013, Deb made numerous inquiries of respondent about the check to Chattopadhyay, but respondent never replied. According to the amended complaint, respondent also provided no proof that he ever mailed check number 6425 and further "refused" to cancel that check and issue a replacement.

As of May 5, 2014, the date of the amended complaint, Chattopadhyay had not received check number 6425.

The amended complaint also charged respondent with having failed to cooperate with disciplinary authorities. On November 13, 2013, the DEC sent respondent a copy of the ethics grievance, directing him to submit a written reply. Although

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<sup>2</sup> In a February 14, 2014 e-mail, Chattopadhyay provided the DEC investigator with his contact address, which was the same street and street number that Deb had given to respondent, but in Glenolden, Pennsylvania, not Philadelphia.

respondent called the investigator on November 22, 2013 and promised to send his written reply "shortly," he never did so.

On December 10, 2013, the investigator sent respondent another letter. Again, respondent did not reply. Over the remainder of that month, the investigator left several voicemails for respondent. He replied to none of them.

On March 10, 2014,<sup>3</sup> the DEC chair spoke with respondent by telephone, at which time respondent promised to contact and cooperate with the ethics investigator. Again, he never did so.

The facts recited in the complaint support some, but not all, of the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1). Nevertheless, each charge must contain sufficient facts to support a finding of unethical conduct.

Respondent was retained to represent Deb in a civil family action regarding child support and alimony arrearages. For seven months (December 2012 to July 2013), respondent failed to communicate with his client, despite Deb's numerous attempts to

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<sup>3</sup> The amended complaint erroneously cited the year "2013." The grievance was not filed until August 2013.

obtain information about the status of his case, a violation of RPC 1.4(b).

RPC 1.16(d) requires an attorney, upon termination of the representation, to return any unearned portion of the fee. Because respondent earned no portion of the fee, he was required to return the entire \$2,500. Respondent claimed to have sent check number 6425 to Chattopadhyay at the Philadelphia address that Deb provided for that purpose, but Chattopadhyay never received it. After a reasonable amount of time elapsed with no receipt by Chattopadhyay, and after having been specifically informed that Chattopadhyay had not received the check, respondent could only have concluded that the check had become lost. He promptly should have stopped payment on the check and issued a replacement. Instead, he did nothing, effectively keeping the unearned fee, a violation of RPC 1.16(d).

Respondent also failed to cooperate with the ethics investigation, ignoring letters, voicemail messages, and personal entreaties from both the investigator and the DEC chair for his cooperation. Despite promises of cooperation, respondent never did so, a violation of RPC 8.1(b).

RPC 1.5(b) requires an attorney to provide the client with a written agreement setting forth the basis or rate of the legal fee. R. 5:3-5 further provides, among other things, that "every

agreement for legal services to be rendered in a civil family action shall be in writing, signed by the attorney and the client, and an executed copy of the agreement shall be delivered to the client."

Here, respondent provided Deb with a revised fee agreement in December 2012. After receiving that agreement, Deb did not sign or return it. Because respondent did not obtain his client's signature on the agreement and furnish him with a fully executed version of it, the fee agreement was deficient under R. 5:3-5. In In re Kardash, 210 N.J. 116 (2012), the attorney prepared a written fee agreement in a civil family action that did not comply with the requirements of R. 5:3-5, for which he was found guilty of an RPC 1.5(b) violation.

The amended complaint also charged respondent with a violation of RPC 1.15(b) for failing to return the fee to Chattopadhyay. RPC 1.16(d), however, is the appropriate rule addressing failure to return an unearned fee. We, thus, dismiss the RPC 1.15(b) charge as inapplicable.

The amended complaint charged respondent with conduct involving dishonesty, fraud, deceit or misrepresentation, for falsely claiming that he sent a check to Chattopadhyay in return of the fee. In support of the charge, the amended complaint cites respondent's "failure to provide proof" that he mailed the

check, his "refus[al] to cancel the check," and his "failure to reissue another check." Even if true, those acts do not necessarily denote dishonesty, fraud, deceit or misrepresentation.

It appears that respondent did, in fact, send the fee check with the July 18, 2013 cover letter. He then did nothing more. Deb had directed respondent to send the refund to Chattopadhyay in Philadelphia, yet Chattopadhyay later furnished the DEC with the same street address, but located in Glenolden, Pennsylvania. Check number 6425 may well have become lost in the mail. For lack of clear and convincing evidence of any dishonesty or intent to deceive on respondent's part, we dismiss the RPC 8.4(c) charge.

Lastly, in cases such as this, where there is clear and convincing evidence that the attorney collected a retainer from a client and performed no services, we direct the attorney to refund the retainer. We rely on counsel's certification in support of the motion to vacate the default that, on June 8, 2015, respondent refunded the fee.

In summary, respondent is guilty of violations of RPC 1.4(b), RPC 1.5(b), RPC 1.16(d), and RPC 8.1(b).

In a similar case, an admonition was imposed where the attorney failed to reply to the client and prior counsel's

numerous requests for information about the client's two matters and, several months after final judgment was entered against the client, failed to turn over the file to appellate counsel; violations of RPC 1.4(b) and RPC 1.16(d); the attorney also lacked diligence, a charge not present here. In the Matter of Gary A. Kraemer, DRB 14-085 (June 24, 2014).

Respondent also failed to memorialize the rate or basis of his fee (RPC 1.5(b)). Admonitions generally have been imposed for failure to memorialize the rate or basis of one's fee, in violation of RPC 1.5(b). See, e.g., In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009); In the Matter of Alfred V. Gellene, DRB 09-068 (June 9, 2009); and In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007).

Finally, without more, an admonition will ordinarily result for an attorney's failure to cooperate with ethics authorities (RPC 8.1(b)). See, e.g., In the Matter of Jeffrey M. Adams, DRB 14-243 (November 25, 2014); In the Matter of Richard D. Koppenaar, DRB 13-164 (October 21, 2013); and In the Matter of Raymond Oliver, DRB 12-232 (November 27, 2012).

However, aggravating factors here require harsher discipline than an admonition. Respondent allowed the matter to proceed to us as a default. "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." In re Kivler, 193 N.J. 332, 342 (2008). For this reason, we conclude that the threshold discipline is a reprimand.

In further aggravation, respondent received an admonition on April 19, 2013, also for failing to communicate with the client and to cooperate with an ethics investigation. The admonition letter was sent to respondent during the seven-month period that he was ignoring his client in this matter. It warned him that, should he become the subject of any further discipline, the prior discipline would be taken into consideration. Yet, during this same time period, respondent continued to ignore his client's status requests. Thus, he clearly has failed to learn from those prior mistakes.

In addition, the client was harmed. Deb sought to return to the United States for medical treatment, but believed that he could not do so until the arrearages issue was resolved. Taking into consideration all of the aggravating factors, we determine to impose a censure.

Member Rivera 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  
Ellen A. Brodsky  
Chief Counsel



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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Thomas E. Downs, IV  
Docket No. DRB 15-117


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Decided: November 16, 2015

Disposition: Censure

<b>Members</b>	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera						X
Singer			X			
Zmirich			X			
<b>Total:</b>			7			1

  
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Ellen A. Brodsky  
Chief Counsel