

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 01-393 & 01-423

IN THE MATTER OF
FRANCIS X. GAVIN
AN ATTORNEY AT LAW

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

Decided: March 15, 2002

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

Pursuant to R.1:20-4(f), the District XIII Ethics Committee (“DEC”) certified these matters directly to us for the imposition of discipline, following respondent’s failure to file an answer to the formal ethics complaints.

Respondent was admitted to the New Jersey bar in 1981. During the relevant times, he maintained an office in Hackettstown, New Jersey.

In 1998, respondent was reprimanded for gross neglect, lack of diligence and failure to adequately communicate with a client, in violation of RPC 1.1(a), RPC 1.3 and

RPC 1.4(a). In re Gavin, 153 N.J. 356 (1998). In June 2001 respondent was reprimanded for gross negligence in a personal injury matter, failure to communicate with a client, failure to refund an unearned fee and failure to cooperate with an ethics investigation, in violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(d) and RPC 8.1(b). In re Gavin, 167 N.J. 606 (2001). That matter proceeded on a default basis. On February 22, 2002 in another default matter, the Court suspended respondent for a six-month period for gross neglect, failure to communicate with a client, failure to turn over the client's file to new counsel and failure to reply to the grievance in violation of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(d), RPC 8.1(b) and RPC 8.4(d). In re Gavin, N.J. (2002).

I - DRB Docket No. 01-423

The Petry Matter – District Docket No. XIII-01-015E

On September 20, 2001, the DEC mailed a copy of the complaint to respondent's office by certified and regular mail. The certified mail receipt showed delivery on October 6, 2001. It contained an illegible signature. The regular mail was not returned. When respondent did not file an answer, a second letter was sent to him by certified and regular mail. The certified mail receipt indicated delivery on October 29, 2001 and was signed by a D. J. Kelleher. The regular mail was not returned. Respondent did not file an answer to the complaint.

The three-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 8.1(b) (failure to comply with requests for information from a disciplinary authority) and RPC 1.1(b) (pattern of neglect).

The complaint charged that respondent was retained by Russell Petry in late 1998 in connection with a matrimonial matter. Russell was served with a summons and complaint on January 30, 1999. Russell then turned the documents over to respondent. Thereafter, on March 5, 1999, Gwen Petry's attorney filed and served on respondent a notice of motion for pendente lite relief. According to the ethics complaint, respondent did not file an answer to the divorce complaint or reply to the plaintiff's motion for pendente lite relief, which was returnable on March 26, 2000.

On March 25, 1999, respondent confirmed to the court that he represented Russell, acknowledged receipt of the summons and complaint and asserted that he had prepared a certification for a cross-motion on Russell's behalf. Respondent also told the court that the case information statement had not yet been completed and requested that the motion be adjourned.

By March 26, 1999, the return date of Gwen's motion, the court had not received a reply from respondent and, therefore, entered an order for pendente lite relief. The order was marked "unopposed." Gwen's attorney served respondent with a copy of the order on April 7, 1999.

On May 17, 1999, Gwen's attorney filed and served a notice of motion for enforcement of litigant's rights, with a return date of June 4, 1999. Respondent was served with the notice of motion and supporting papers on May 19, 1999, by regular mail and by "fax." He failed to reply to the enforcement motion. Therefore, on June 4, 1999, the court held Russell in violation of litigant's rights and granted the requested relief to Gwen.

On May 25, 1999, Gwen's attorney filed a request and certification to have a default entered against Russell, which was granted. On July 1, 1999 the court ordered Russell to pay attorney's fees and costs in the amount of \$270.

On July 27, 1999, Gwen's attorney consented to the entry of an order vacating the default and requiring Russell to file a responsive answer to the complaint within twenty days. Respondent failed to file a responsive pleading.

A case management conference was held on November 15, 1999. Presumably, either a default had again been entered against Russell or he had never filed a consent order vacating the default because, at the conference, respondent was ordered to file a motion to vacate the default by November 29, 1999, lest an uncontested hearing be held on that date. On November 22, 1999, respondent filed a notice of motion to vacate the default and for leave to file responsive pleadings. Respondent submitted a certification claiming that "other office commitments" had prevented him from filing the answer within the required time. Gwen's attorney filed a cross-motion on December 8, 1999, asking for the denial of the requested relief, the enforcement of the pendente lite orders, the payment of alimony arrearages and the payment of attorney fees and costs.

On December 17, 1999, the court vacated the default against Russell and ordered him to file by January 3, 2000, among other things, a completed case information statement and an answer. The court's order also stated that, unless support arrearages were paid by December 29, 1999, a warrant would issue for Russell's arrest, upon the filing of a certification of non-compliance. The order also awarded counsel fees to Gwen's attorney.

More than one year after Russell was served with the summons and complaint, respondent finally filed an answer and counterclaim, a case information statement and a notice of motion. On February 9, 2000, respondent began requesting discovery and preparing the divorce case.

On February 18, 2000, the court entered an order denying respondent's request to vacate all pendente lite orders, requiring Russell to provide current income information, suspending Russell's obligation to pay alimony because of contributions to Gwen's living expenses by her paramour and directing Russell to satisfy overdue support obligations at the rate of \$250 per week.

In late March 2000, Russell retained a new attorney.

The ethics complaint alleged that, because of respondent's inaction, Russell's divorce was delayed for more than one year and Russell faced the possibility of incarceration. The complaint charged respondent with violations of RPC 1.1(a) and RPC 1.3.

The complaint further charged respondent with a violation of RPC 8.1(b) for his failure to reply to the grievance.

Finally, the third count charged respondent with a pattern of neglect for his neglect in handling legal matters in general.

II - DRB Docket No. 01-393

The Rapp Matter – District Docket No. XII-00-036E

On June 1, 2001, the DEC mailed a copy of the complaint to respondent's office by certified and regular mail. The certified mail was returned as unclaimed. The regular mail was not returned. When respondent did not file an answer, a second letter was sent to him by certified and regular mail. The regular mail was not returned. The certified mail receipt was returned on September 10, 2001, bearing an illegible signature. Respondent did not file an answer to the complaint.

On November 7, 2001, Office of Board Counsel received respondent's motion to vacate the Rapp default. In his certification, respondent acknowledged that he did not cooperate with the DEC in a timely fashion. Respondent admitted that he "procrastinated" and "put off dealing with the matter" because he was dealing with his clients' affairs, instead of his own matter. Respondent professed to be extremely embarrassed for being involved in this and other disciplinary matters. He pledged to deal with this and other matters "in a responsive and upright fashion." Respondent, thus, requested that this matter be deferred so that he could deal with it properly.

By letter dated November 17, 2001, the OAE filed its opposition to respondent's motion. The letter outlined the history of respondent's failure to reply to the grievance, the DEC's telephone calls, a subpoena duces tecum and letters forwarding the complaint. The OAE further stressed respondent's failure to provide a valid reason for not filing an answer to the complaint and failure to present a meritorious defense to the charges.

The three-count complaint charged respondent with violations of RPC 1.4(a) (failure to communicate with client), RPC 1.15(b) (failure to promptly deliver to a client or third person funds or property to which they are entitled), RPC 8.4(d) (conduct prejudicial to the administration of justice), RPC 8.1(b) (failure to comply with reasonable requests from a disciplinary authority) and RPC 1.1(b) (pattern of neglect).

At some unknown point, Jeffrey M. Rapp retained respondent to pursue a divorce from Robin E. Rapp. A seven-day trial followed in early 1999. On July 27, 1999, the court entered a “dual” judgment of divorce ordering, among other things, that Jeffrey secure life insurance policies for the benefit of Robin and their daughter, Emily. Respondent was holding joint funds of Jeffrey and Robin in his trust account.

Robin authorized respondent to pay from the trust fund the premiums on the life insurance policies for her and Emily’s benefit. Respondent mistakenly paid the premium on a policy naming Jeffrey’s mother as the beneficiary. Although Robin notified respondent of the mistake, he failed to take any action to correct it. The policies for Robin’s and Emily’s benefit were, thereafter, cancelled for lack of payment.

On January 21, 2000 the court ordered payment from respondent’s trust account of Emily’s \$3,000 orthodontic bill. According to the complaint, respondent failed to “duly attend to this payment.”

Thereafter, the court issued an order on January 27, 2000, directing respondent to pay forthwith, out of his trust account, Robin’s former attorney’s fees, in the amount of \$1,905.45. The former attorney, however, had already been paid by Robin’s new attorney, who then requested reimbursement from respondent. The complaint alleged

that respondent “failed to duly and diligently make the reimbursement payment” and charged that respondent’s failure to promptly make payments from the trust fund for Emily’s orthodontic bill and for Robin’s legal fees was a violation of RPC 1.15(b) and 8.4(d).

At some point, Robin requested an accounting of the funds deposited in respondent’s trust account. Despite her request and a court-ordered mandate, respondent failed to provide her with an accounting. Therefore, on January 21, 2000, the court ordered Jeffrey to give Robin a copy of respondent’s trust account ledger card every thirty days. However, respondent failed to cooperate and deliver the trust account information to Robin. The complaint charged that respondent’s conduct violated RPC 1.15(b) and RPC 8.4(d).

The complaint further charged that respondent’s failure to make the required payments from his trust account on Robin’s behalf violated RPC 1.3 and his failure to keep her advised of the status of her trust funds violated RPC 1.4(a).

Count two charged that respondent failed to file an answer to the grievance, failed to return the investigator’s telephone message and failed to comply with a subpoena duces tecum served on March 6, 2001, requiring him to turn over his case file and trust account records in this matter. The complaint charged respondent with a violation of RPC 8.1(b) and 8.4(d).

Finally, the third count charged respondent with a violation of RPC 1.1(b) for his pattern of neglect in this and other matters.

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Respondent's certification annexed to his motion to vacate the default did not provide a meritorious defense to the charges in the complaint. Respondent merely stated that Robin had been deceitful and had lied to him and the court. Respondent claimed that he was required to obtain her approval before disbursing funds from his trust account and that, at all times, he provided Robin with copies of the relevant trust account deposits and disbursements. He also claimed that he periodically provided Robin with copies of client ledger cards, diligently disbursed the funds at all times and communicated always with Robin, in writing. As to the mistake with regard to the insurance premium payment, respondent admitted that the wrong policy was paid, but added that "[t]hat was clarified in Court." Respondent stated that the complaints made by Robin were groundless.¹

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Service of process was properly made. Following a de novo review of the record, we found that the facts recited in the complaint support a finding 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 the Petry matter, respondent failed to act with reasonable diligence and grossly neglected his client's matter. He repeatedly failed to take action on Russell's behalf,

¹ The matrimonial judge was the complainant in this ethics matter.

requiring his adversary to file several motions. Respondent's inaction resulted in a court order for Russell's payment of counsel fees and, more seriously, exposed Russell to the possibility of incarceration. Also, respondent's failure to reply to the grievance violated RPC 8.1(b). Finally, his conduct in this, the Rapp matter (below) and in his earlier disciplinary matters establishes a pattern of neglect, in violation of RPC 1.1(b).

Respondent filed a motion to vacate the Rapp default. In order for us to grant such a motion, an attorney must provide good cause for failing to timely file an answer and present a meritorious defense to the charges. Respondent's motion was deficient in both respects. He acknowledged that he did not cooperate with the DEC. Moreover, although he alleged that he made payments and provided Robin with an accounting, he did not specify when these actions were taken or whether they were taken solely as a result of court orders requiring him to do so. He also acknowledged his failure to make the appropriate premium payments for the insurance policies, but did not take any action to remedy the mistake. We, therefore, unanimously determined to deny respondent's motion.

In Rapp, respondent failed to pay the appropriate insurance policy, failed to timely pay for Emily's orthodontist bill and attorney's fees and failed to provide Robin with an accounting of the trust fund or to comply with court orders requiring him to take these actions, in violation of RPC 1.3, RPC 1.15(b) and RPC 8.4(d).

The complaint charged respondent with a violation of RPC 1.4(a) for his failure to keep Robin advised of the status of her and Jeffrey's trust funds. Because, however, respondent was obligated by court order to so apprise Robin and because respondent

violated the court order, the more applicable rule is RPC 8.4(d), already charged in the complaint. We, thus, found that respondent's failure to inform Robin of the status of her trust funds more properly violated RPC 8.4(d) instead of RPC 1.4(a).

We also found violations of RPC 8.1(b) and RPC 8.4(d) for respondent's continued failure to file a reply to the grievance, failure to reply to the investigator's telephone message and failure to comply with a subpoena duces tecum.

Finally, in light of respondent's gross neglect in this matter, the Petry matter and his earlier disciplinary matters, we also found a violation of RPC 1.1(b).


The only issue left for determination is the appropriate discipline to impose. These are respondent's third and fourth defaults. He, therefore, has shown a continuing indifference to the disciplinary system. We note, however, that the misconduct in these two matters occurred around the same time period as his misconduct in the default that led to our determination to impose a six-month suspension. We, therefore, find that respondent's ethics transgressions here are part of the same overall pattern of misconduct, rather than the product of a failure to learn from prior mistakes. In fashioning the appropriate degree of discipline, here, we have considered what discipline would have been appropriate, had the two matters been heard together.

Generally, in default matters involving similar violations and a prior disciplinary history, short-term suspensions have been imposed. See in re Davis, 162 N.J. 7 (1999) (three-month suspension in a default matter involving gross neglect, lack of diligence, knowingly disobeying the rules of a tribunal and failure to cooperate with disciplinary authorities, in violation of RPC 1.1(a), RPC 1.3, RPC 3.4(c) and RPC 8.1(b); attorney

had prior admonition); In re Banas, 157 N.J. 18 (1999) (three-month suspension in a default matter involving gross neglect, lack of diligence, failure to communicate, failure to reduce fee agreement to writing and failure to cooperate with disciplinary authorities; attorney had prior reprimand); But see In re West, 156 N.J. 451 (1998) (six-month suspension in a default matter for misconduct in three matters, including gross neglect, pattern of neglect, lack of diligence, failure to communicate, failure to return client's funds and papers and failure to cooperate with disciplinary authorities, in violation of RPC 1.1(a), RPC 1.1(b), RPC 1.3, RPC 1.4(a), RPC 1.16(d) and RPC 8.1(b); attorney had prior admonition).

After consideration of the relevant circumstances, five members determined that a three-month consecutive suspension should be imposed. Three members agreed that a three-month suspension is the appropriate measure of discipline, but believed that it should be served concurrently with the six-month suspension imposed in the earlier default matter. One member recused herself.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: 
ROCKY L. PETERSON
Chair
Disciplinary Review Board