SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-140
District Docket No. XB-2015-0015E

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| IN THE MATTER OF | |
| NELSON GONZALEZ | |
| AN ATTORNEY AT LAW | |

Decision

Decided: November 23, 2016

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

This matter was before us on a certification of default filed by the District XB Ethics Committee (DEC), pursuant to R. 1:20-4(f). The complaint charged respondent with violations of RPC 1.5(b) (failure to set forth in writing the basis or rate of the fee) and RPC 1.2(c) (unilaterally limiting the scope of the representation without the client's informed consent). We determine to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1997. He has no history of discipline.

Service of process was proper in this matter. On February 2, 2016, the DEC sent respondent a copy of the complaint, and service letter, in accordance with R. 1:20-4(d) and R. 1:20-7(h), by

regular and certified mail. The certified mail was accepted on February 10, 2016, but the signature on the green return receipt card is illegible. The regular mail was not returned.

On March 10, 2016, the DEC sent a second letter to respondent, at the same address, by both certified and regular mail. The letter informed respondent that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted and the record would be certified directly us for the imposition of discipline. The letter further informed respondent that the complaint was amended to include a charge of RPC 8.1(b) (failure to cooperate). The certified mail was accepted on March 5, 2016, but the signature on the green return receipt card is illegible. The regular mail was not returned.

As of March 22, 2016, the date of the certification of the record, respondent had not filed an answer to the ethics complaint.

On July 11, 2016, respondent filed a motion to vacate the default. In order to vacate a default, 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,

through counsel, filed a certification in which he claimed that, after filing a five-page reply to the ethics grievance, he was "waiting for a response," but heard nothing further about the investigation.

Respondent stated that, in May 2016 (mistakenly referred to as 2015), he received a document titled "OAE Transmittal Checklist to DRB," with which he was not familiar. Respondent did not state how he came into possession of that document, which he then gave to counsel. Sometime later, counsel provided respondent with "the documents," presumably a copy of the complaint.

Thereafter, respondent discovered that, although his secretary, Gail Little, had signed the Certified Return Receipts, she had not given the mail to him. Respondent offered no explanation for Little's failure to inform him of her receipt of the mail. According to respondent, Little is the only person authorized to receive mail in the office and, since this event, is required to telephone respondent when she receives certified mail in his absence.

Respondent's certification did not address the fact that the DEC also served the complaint and the five-day letter by regular mail at his office – envelopes that were not returned to the DEC.

In respect of prong two, meritorious defenses, respondent urges that he prepared the bankruptcy petition for which he was

retained, and that the long-time client, who was frequently seen in the office during the representation, always knew that the petition would not be filed until respondent received full payment. The client paid small amounts toward the balance from time to time, but never paid the total balance due. A client intake sheet, attached as an exhibit to the motion to vacate default, contains a handwritten notation about the fee ($750) and bankruptcy filing fee ($300), as well as a comment that the total amount must be paid prior to filing. Respondent contends that, because the client was a long-time client, a written fee agreement was not necessary.

In a July 15, 2016 letter-brief in reply to respondent's motion to vacate default, Office of Attorney Ethics (OAE) Assistant Ethics Counsel stated that, in 2014, during an ethics investigation, the OAE filed a motion for respondent's temporary suspension, after he failed to cooperate with the OAE investigation in that matter. The Court issued an Order requiring respondent to reply to the grievance and to appear for a demand OAE interview.

On September 12, 2014, respondent replied to the grievance investigated by the OAE, claiming that his wife/paralegal, Anicia Gonzalez, had received the certified mail in that matter and hidden it from him. Respondent explained the corrective measures that he immediately put in place:

> As of September 5, 2014 I implemented a new policy whereas **I am the only one that gets the**

> **mail**, and office mail gets held by the post office and I am the only one authorized to get it from the post office, I then open it and disperse to the office staff if further attention is needed [Exhibit 1].
>
> [OAEb2.][1]

According to the OAE, as a result of respondent's 2014 "near brush with suspension," he assured the OAE that he would be "singularly responsible" for the future handling of all law office mail. The OAE noted that, in the motion to vacate the default in this matter, respondent was "entirely silent" in his brief about his wife's alleged previous interference with office mail and about his representation that he had taken full control over mail intake.

It is clear to us that respondent's office received both the certified and regular mail copies of the complaint and the five-day letters in this matter. Respondent's claim, for a second time in two years, that someone in his office (this time his secretary, Little), diverted mail sent by ethics authorities, so that he would not receive it, is not credible. Moreover, respondent neither provided an explanation for Little's alleged concealment of the mail, nor presented a certification from her that would support his version of events.

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[1] OAEb refers to the OAE's July 15, 2016 letter-brief in reply to respondent's motion to vacate default.

Because respondent has not satisfied the first prong of the test to vacate a default – a reasonable explanation for not filing an answer, we determine to deny the motion to vacate the default. We now turn to the allegations of the complaint.

In 2005, Carlos Suarez retained respondent on a contingent fee basis for two workers' compensation claims. At some point during the pendency of those cases, respondent and Suarez discussed a possible bankruptcy filing for Suarez. In January 2009, Suarez retained respondent to file a Chapter 7 bankruptcy petition, for which he agreed to pay a total of $1,050 for fees and costs. Respondent did not prepare a written fee agreement for the representation, but claimed to have told Suarez that he would not commence work on the bankruptcy petition until the entire $1,050 was paid.

Between January 2009 and October 2, 2013, Suarez paid respondent $700 on account of the bankruptcy matter. In April 2009, he provided respondent with required tax returns for the preceding three years, creditor information, and other documents.

From April 9, 2009 to May 25, 2011, the date on which Suarez went to respondent's office to take a mandatory credit-counseling

course, respondent allegedly had performed no legal work on the bankruptcy matter.[2]

A year later, on June 18, 2012, respondent sent a letter to Suarez, requesting additional documentation to support the bankruptcy filing. Hearing nothing, he sent Suarez a second letter, dated July 5, 2012, again requesting those documents.

Apparently because the credit-counseling certificate was not filed with the bankruptcy court within one year, the certificate expired. Therefore, on January 18, 2013, Suarez repeated the course, presumably at respondent's office. On that same date, respondent's secretary told Suarez that the petition had been prepared, but not yet filed. According to the ethics complaint, Suarez had expected respondent to file the bankruptcy petition after receiving only partial payment of his fee. The complaint did not specify the basis for Suarez' belief in that regard. Rather, the complaint stated that respondent had not "reasonably or adequately" explained to Suarez that he would not file the petition without full payment.

The complaint alleged that respondent's failure to set forth in writing the rate or basis of his fee violated RPC 1.5(b) and

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[2] The bankruptcy rules require the debtor to take a certified credit-counseling course prior to filing a petition. A certificate obtained from the counseling company is then attached to the petition when it is filed.

his failure to "reasonably or adequately" explain to Suarez that he would not file the petition, until he received his full fee, placed a limitation on the scope of the representation, a violation of RPC 1.2(c).

* * *

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 in an ethics complaint must be supported by sufficient facts for us to determine that unethical conduct occurred.

RPC 1.5(b) states as follows:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing before or within a reasonable time after commencing the representation.

According to the complaint, respondent was in the midst of representing Suarez in two workers' compensation matters when they first discussed a bankruptcy representation. It would appear, therefore, that Suarez may have been a regular client at the time he retained respondent for the bankruptcy matter. Thus, under the plain language of RPC 1.5(b), because respondent "regularly represented" Suarez, a fee writing was not required. The complaint does not set forth any other facts to establish a duty on

respondent's part to reduce to writing the basis of his fee in the bankruptcy matter, other than to remark that the fee structures among the three matters were different. We note that, in its report, the Debevoise Committee commented

> when a lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. It is on that basis that the directive of this paragraph is made applicable only to those situations in which the lawyer has not regularly represented the client, *i.e.*, in which there is not a preexisting understanding as to the fee rate or basis.
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> [Debevoise Committee Report, N.J.L.J. July 28, 1983, supp. at 11.]

Nonetheless, we discern no such qualifier in the RPC itself and we decline to impute one in the face of the clearly stated standard therein. Thus, for lack of clear and convincing evidence that a written fee agreement was required, we determine to dismiss the RPC 1.5(b) charge.

RPC 1.2(c) provides that:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

In our view, RPC 1.2(c), is not applicable to respondent's conduct here. Even if Suarez' version of events is true, respondent's decision not to perform legal services until paid in full did not place a limitation on the scope of the representation. Rather, it dictated when respondent would commence work – upon

payment of his entire fee. Therefore, we also dismiss the RPC 1.2(c) charge, as inapplicable.

Although the two cited RPC violations warrant dismissal, there remains respondent's alleged failure to cooperate with ethics authorities, based solely on his failure to file an answer to the complaint. As previously noted, the DEC's March 10, 2016 letter to respondent served as an amendment to the complaint, charging him with failure to cooperate with an ethics investigation, in violation of RPC 8.1(b).

The complaint itself did not charge respondent with a failure to cooperate with the ethics investigation. Indeed, respondent provided the investigator with a detailed letter-reply to the underlying grievance. Thereafter, the DEC filed a complaint containing only the RPC 1.2(c) and RPC 1.5(b) charges – both of which, in our view, cannot be sustained under the clear and convincing evidence standard.

Thus, the question becomes whether respondent's failure to file an answer to the complaint may serve as a basis for finding that he violated RPC 8.1(b). We answer that inquiry in the negative.

RPC 8.1(b), in relevant part, prohibits a lawyer from knowingly failing to respond to a lawful "demand for information" from a disciplinary authority. We do not view a failure to file

an answer to a formal ethics complaint to constitute a failure to respond to a demand for information. Indeed, our Court Rules contemplate the circumstance that a respondent may not file an answer to the complaint and set forth certain consequences for that failure.

Specifically, R. 1:20-4(f)(1) provides that a failure to file a verified answer shall be deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. That Rule does not provide that such a failure shall also constitute a violation of RPC 8.1(b), as is the case in other Court Rules. See R. 1:20-20(c) (providing that a failure to comply with that Rule shall also constitute violations of RPC 8.1(b) and RPC 8.4(d)) and R. 1:21-6(i) (providing that a failure to comply with the requirements of the recordkeeping rule or to respond to a request to produce such records shall be deemed a violation of RPC 1.15(d) and RPC 8.1(b)).

In our view, respondent's failure to file an answer to the complaint did nothing more than trigger the consequences contained in R. 1:20-4(f): deeming the allegations of the complaint to be true and allowing the matter to be certified directly to us for the imposition of discipline. Indeed, respondent took a risk by not filing an answer to the complaint. Had we found the misconduct charged in the complaint, we would have considered respondent's

default as an aggravating factor, and could have imposed a higher level of discipline on that basis. See 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"). Here, however, we have dismissed those charges, leaving no basis for enhancement based on the default posture of this matter.

For these reasons, although respondent did not file an answer to the complaint, as required, we do not find that he violated RPC 8.1(b) and, therefore, determine to dismiss the complaint in its entirety.

Members Gallipoli and Zmirich voted to find a violation of RPC 1.5(b) and to impose an admonition. They would find that, because the fee structures of the matters for which respondent had been retained were varied, an understanding as to the basis or rate of the fee had not evolved between respondent and Suarez and that respondent, thus, was not exempt from the writing requirement.

Vice-Chair Baugh did not participate.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Nelson Gonzalez
Docket No. DRB 16-140

Decided: November 23, 2016

Disposition: Dismiss

| ***Members*** | Admonition | Dismiss | Did not participate |
|---|---|---|---|
| Frost | | X | |
| Baugh | | | X |
| Boyer | | X | |
| Clark | | X | |
| Gallipoli | X | | |
| Hoberman | | X | |
| Rivera | | X | |
| Singer | | X | |
| Zmirich | X | | |
| Total: | 2 | 6 | 1 |

Ellen A. Brodsky
Chief Counsel