SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-034
District Docket No. IIIA-2016-0006E

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| IN THE MATTER OF | |
| WILLIAM E. WACKOWSKI | |
| AN ATTORNEY AT LAW | |

Decision

Decided: July 12, 2017

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 IIIA Ethics Committee (DEC), pursuant to R. 1:20-4(f). The complaint charged respondent with having violated RPC 1.1(a) (gross neglect); RPC 1.1(b) (pattern of neglect); RPC 1.3 (lack of diligence); RPC 1.4 (presumably (b)) (failure to communicate with the client); RPC 1.5 (presumably (a)) (unreasonable fee); and RPC 8.1(b) (failure to cooperate with disciplinary authorities). We determined to impose a reprimand.

Respondent was admitted to the New Jersey bar in 2001. On November 25, 2009, he received an admonition for his failure to take steps to document and correct a court error that resulted in

the administrative dismissal of his client's complaint, a violation of RPC 1.3. He also failed to promptly notify his client of the dismissal, a violation of RPC 1.4(b). In the Matter of William E. Wackowski, DRB 09-212 (November 25, 2009).

Service of process in this matter was proper. On September 22, 2016, the DEC sent a copy of the complaint to respondent at his office address by both certified mail, return receipt requested, and by regular mail. The regular mail envelope was not returned. Respondent received and signed for the certified mail.

On October 20, 2016, the DEC forwarded a second letter to respondent at his office address, by regular mail, informing him that, if he failed to file a verified answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the entire record would be certified directly to us for the imposition of discipline, and the complaint would be deemed amended to include a violation of RPC 8.1(b). The letter was not returned.

The time within which respondent may answer has expired. As of the date of the certification of the record, no answer had been filed by or on behalf of respondent.

On March 24, 2017, respondent filed a motion to vacate the default (MVD). For the reasons set forth below, we determined to deny the motion.

A respondent must meet a two-pronged test to succeed on a motion to vacate default. First, a respondent must offer a reasonable explanation for his or her failure to answer the ethics complaint. Second, a respondent must assert meritorious defenses to the underlying charges.

As to the first prong of the test, respondent explains that, although he received the grievance, and although he discussed with the investigator the grievance and his plan to provide a written reply to it, he was unable to bring himself to respond. As a result, in August 2016, he sought psychological counseling. Shortly thereafter, respondent was diagnosed with major depression, a condition, as it turns out, that he has endured for some time. He remains in treatment for his depression and is regularly taking medication. Respondent submits that his depression is the cause for his failure to respond, not only to the grievance, but also to the complaint.

As to the second prong, in December 2014, respondent was retained by grievant, N.D., to obtain an expungement. In March 2015, respondent filed a petition for an expungement on behalf of

N.D. During that time, respondent had several conversations with N.D., and his mother. It became apparent that N.D. sought services beyond those that were the subject of the original retention. Specifically, N.D. sought expungement of prior arrests and convictions that had not been dismissed via pre-trial intervention. Respondent believed such relief was not possible. Although he explained this limitation to N.D., he failed to document these conversations in a confirming letter.

Finally, respondent added that his depression prevented him from further contacting N.D. Nonetheless, he has since agreed to pay the amount N.D. sought through fee arbitration.

Respondent did not submit documents in support of his diagnosis and treatment with his motion. On the day before the scheduled date for our consideration of this matter, however, respondent delivered several pages of medical records purporting to support both his diagnosis and treatment. Even if we were to determine that respondent has satisfied the first prong of the test, his motion offers little in the way of meritorious defenses.

As noted below, the only allegation in the complaint that is supported is respondent's failure to communicate with his client. The complaint alleges that N.D. contacted respondent over fifty times, to no avail. Although respondent admits that he failed to

communicate, he blames his illness for that failure. However, respondent offered no evidence, medical or otherwise, to support that conclusion. Thus, although his depression may serve as a mitigating factor, it cannot serve as a meritorious defense in satisfaction of the second prong of the test. Hence, we determined to deny the motion.

We now turn to the facts alleged in the complaint. Nicholas N.D., grievant, paid respondent either $2,500 or $3,000 to obtain an expungement of dismissed indictable charges.[1] To date, the complaint alleges, respondent has yet to obtain the expungement or to file a petition toward that purpose. The complaint further alleges that respondent's fee for the expungement was unreasonable.

Over the course of several months, N.D. left as many as fifty phone messages with respondent and visited his office nearly one dozen times. Respondent never replied to any of the grievant's attempts to communicate with him.

By letter dated March 28, 2016, the DEC notified respondent of N.D.'s grievance and provided him ten days to submit his written response. On April 20, 2016, after respondent had informed the DEC

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[1] The complaint lists respondent's fee as $2,500 in one instance and $3,000 in another. It is unclear which is the accurate amount.

that he had received the grievance but that it had been damaged in the mail, the DEC faxed respondent a second copy. Several weeks later, on May 15, 2016, respondent informed the DEC that he had provided his response to the grievance via e-mail. On May 18, 2016, the DEC notified respondent that it had not received that e-mail. On June 1, 2016, the DEC sent a second letter notifying respondent that his response still had not been received. As of the date of the complaint, September 20, 2016, respondent had not submitted a reply to the grievance.

* * *

The complaint alleges sufficient facts to support some 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). Notwithstanding that Rule, each charge in an ethics complaint must be supported by sufficient facts for us to determine that unethical conduct occurred.

At the outset, we determined to dismiss the alleged violation of RPC 1.1(a) and RPC 1.3. The complaint alleges that N.D. paid respondent either $2,500 or $3,000 to obtain an expungement of dismissed indictable charges, and that respondent failed to obtain the expungement or to file a petition therefor on his client's

behalf. Without more, the complaint fails to allege facts to support a conclusion, by clear and convincing evidence, that respondent neglected the matter or lacked diligence.

Similarly, we determined to dismiss the alleged violation of RPC 1.1(b). Even if we were to find gross neglect in this matter, a minimum of three instances of neglect is necessary to establish a pattern of neglect. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12).

Finally, we determined to dismiss the alleged violation of RPC 1.5(a). The complaint lacks any detail to support the conclusion that either $2,500 or $3,000 constitutes an unreasonable fee for an expungement. Respondent's failure to obtain an expungement alone does not establish that his fee was unreasonable. If respondent accepted a fee, performed no services for the grievant, and kept the fee, such conduct would amount to a violation of RPC 1.16(d) (failure to refund an unearned retainer). The complaint did not allege a violation of RPC 1.16(d). Accordingly, we make no finding in respect of that Rule. See R. 1:20-4(b).

The complaint, however, alleged sufficient facts to conclude that respondent violated RPC 1.4(b) by failing to communicate with his client over several months, despite fifty phone messages and almost a dozen visits to his office. He also violated RPC 8.1(b)

by failing to submit a written response to the grievance, despite a lawful demand from ethics authorities to do so. Although respondent acknowledged receipt of the grievance and claimed to have submitted his response by e-mail, the DEC received no such response. Respondent failed to communicate further with the DEC, even after the DEC twice more reached out to him to obtain a reply to the grievance.

Thus, respondent violated both RPC 1.4(b) and RPC 8.1(b). The only issue remaining is the appropriate quantum of discipline to be imposed for respondent's misconduct.

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Sean Lawrence Branigan, DRB 14-088 (June 23, 2014) (attorney failed to send the client an invoice for the time spent on her matrimonial case and ignored her e-mail and telephone calls seeking an accounting of the work he had performed and the amount she owed; a violation of RPC 1.4(b); we considered that the attorney had an unblemished record in fourteen years at the bar, and that the matter seemed to be an isolated event that may have been exacerbated by the confluence of several random events, including the flooding of his office, in the wake of hurricane Irene, the hacking of his e-mail system, and the fact that his firm was undergoing a change of

the program and process to track and bill for its time); and In the Matter of Dan S. Smith, DRB 12-277 (January 22, 2013) (attorney failed to inform his client that his case had been dismissed on summary judgment, as had the appeal from that order; a violation of RPC 1.4(b)).

An admonition still may be appropriate if an attorney, in addition to a failure to communicate with the client, fails to cooperate with disciplinary authorities. See, e.g., In the Matter of Thomas E. Downs, IV, DRB 12-407 (April 19, 2013) (admonition imposed on attorney who admittedly failed to communicate with his client, a violation of RPC 1.4(b), and who, 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); the attorney had an unblemished disciplinary history since his 1975 admission to the New Jersey bar).

Although, based on precedent, an admonition ordinarily would suffice for respondent's misconduct, there is also the aggravating factor of his default. In re Kivler, 183 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.") Thus, in assessing the appropriate quantum of discipline, in this matter, a reprimand is our starting point.

As noted, in 2009, respondent received an admonition for lack of diligence and failure to communicate with his client. That behavior occurred from 2005 to 2006. In the Matter of William E. Wackowski, supra, DRB 09-212 (November 25, 2009). Although respondent has been disciplined previously for a failure to communicate with the client, that conduct occurred over ten years ago and, in our view, is too remote in time to be considered in aggravation here.

We do not consider, in aggravation, the fact that respondent dipped his toe in the water, claiming he sent his response to the grievance by way of e-mail. While the DEC did not receive his response, the record does not establish that respondent did not send it or that respondent made a misrepresentation. Further, the complaint did not allege that respondent had made a misrepresentation in this respect.

Hence, based on precedent, and the fact that the matter has proceeded by way of default, we determine to impose a reprimand on respondent for his misconduct.

Member Gallipoli 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William E. Wackowski
Docket No. DRB 17-034

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Disposition: Reprimand

| ***Members*** | Reprimand | Did not participate |
|---|---|---|
| Frost | X | |
| Baugh | X | |
| Boyer | X | |
| Clark | X | |
| Gallipoli | | X |
| Hoberman | X | |
| Rivera | X | |
| Singer | X | |
| Zmirich | X | |
| Total: | 8 | 1 |

Ellen A. Brodsky
Chief Counsel