SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 17-431 and 17-432
District Docket Nos. VA-2016-0016E
and IV-2016-0009E

IN THE MATTERS OF	:
ANDREW WILLIAM DWYER	:
AN ATTORNEY AT LAW	:

Decision

Decided: July 26, 2018

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

These matters were before us on separate certifications of default filed by the District IV and District VA Ethics Committees (DEC), pursuant to R. 1:20-4(f), which we determined to consolidate for disposition. In DRB 17-431, a three-count District VA complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4 (b) and (c) (failure to keep the client adequately informed about the status of the case and to reply to reasonable requests for information and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), and RPC

8.1(b) (failure to cooperate with a disciplinary investigation). In DRB 17-432, a one-count District IV complaint charged respondent with failure to comply with the DEC's requests for information about respondent's handling of an employment lawsuit, in violation of RPC 8.1(b).

We determine to impose a three-month suspension for the totality of respondent's misconduct in these two matters.

Respondent was admitted to the New Jersey bar in 1990 and the New York bar in 1991. On September 25, 2015, he was reprimanded for misconduct that took place in 2008 and 2009, specifically, gross neglect, lack of diligence, failure to communicate with the client, failure to expedite litigation (RPC 3.2), and misrepresentation to the client (RPC 8.4(c)). In re Dwyer, 223 N.J. 240 (2015).

DRB 17-431 – District Docket No. VA-2016-0016E

Service of process was proper in this matter. On October 26, 2016, the DEC sent respondent a copy of the complaint at his office address listed in the attorney registration records, by certified mail, return receipt requested, and by regular mail. Neither the certified mail receipt nor the regular mail were returned.

On January 10, 2017, the DEC sent a second letter to respondent, by certified and regular mail, to the same office address, notifying him 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; that, pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), the record in the matter would be certified directly to us for imposition of discipline; and that the complaint would be amended to include a charge of a violation of RPC 8.1(b).

The green certified mail return receipt was returned signed by "R. Wilson," indicating delivery on January 13, 2017. The regular mail was not returned.

The time within which respondent may answer the complaint has expired. As of November 6, 2017, the date of the certification of the record, respondent had not filed an answer. Therefore, the DEC certified the record to us as a default.

The Motion to Vacate Default

On February 15, 2018, respondent filed a motion to vacate the default. In order to prevail on such a motion, a respondent must satisfy a two-pronged test. First, he must offer a reasonable explanation for his failure to answer the ethics complaint. Second, he must assert a meritorious defense to the underlying charges.

In his certification in support of the motion, respondent admitted the core misconduct charged in the complaint – that he neglected the employment action of Doreen Longo. Respondent stated:

> [I]n the fall of 2014, I was having a series of personal crises, which lead [sic] me to substantially neglect my work. I was going through a divorce and losing my home. I was also in a relationship with an individual who - it turned out – was a heroin addict, and as a result I was spending most of my time trying to get this person into and to remain in a drug rehabilitation facility. Basically my life was completely falling apart.

In addition, respondent's certification revealed various health issues, although he did not suggest that these illnesses were responsible for his failure to answer the within complaints. He claimed that, as a result of his personal circumstances described above, he failed to file an appeal for Doreen Longo.

Respondent further stated that Longo filed a malpractice claim against him, which led him to conclude that, "the parties were going to resolve all of their disputes in the context of that lawsuit. . . . I did not believe that Ms. Longo was continuing to pursue her grievance against me."

Respondent further stated that, "[i]f the default in this matter were vacated, I would not contest that I improperly neglected Ms. Longo's file, about which I feel remorseful. But I would raise defenses related to mitigation."

Despite the admission that he neglected Longo's case in 2014, respondent did not address his prong-one failure to answer the formal ethics complaint, from late October 2016, when he was first served, to November 6, 2017, the date of the certification of the record to us. His reasoning – that he thought Longo was abandoning her grievance – makes little sense to us. Once respondent was aware that an ethics complaint, had been filed against him, he knew that he had an obligation to answer it. Had respondent believed that the complaint was somehow moot, he should have confirmed that understanding with ethics authorities. He did not do so.

Because respondent failed prong one of the default test (a reasonable explanation for his failure to answer the Longo complaint), we determine to deny the motion to vacate the default.

We turn to the facts alleged in the complaint.

In the summer of 2006, Doreen Longo retained respondent to represent her in an action against her employer, under the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1-34:18-14.

Longo's CEPA claims went to trial, and resulted in a jury award of $120,000 for economic loss, $30,000 for emotional distress, and $500,000 in punitive damages.

The defendant/employer appealed the punitive damages award, which was reversed and remanded for a new punitive damages trial "on the grounds that the trial court had failed to give a proper [jury] instruction."

Respondent represented Longo for the second punitive damages trial in July 2014, which resulted in a $40,000 jury award to Longo. Rather than accept the award, Longo instructed respondent to file a motion for a third punitive damages trial, based on alleged witness-tampering and perjury by the defendant's witnesses.

On September 12, 2014, the trial court sent respondent an e-mail in an effort to facilitate a settlement between the parties. On September 16, 2014, respondent sent an e-mail reply to the court indicating that his client: (1) refused to accept the compromise settlement amount proposed by the court; (2) would not lower her settlement demand; (3) believed that her motion for a new trial would be granted; and (4) had other meritorious claims against the involved individuals.

After September 16, 2014, however, respondent took no further action to: (1) appeal the verdict rendered at the second trial; (2) file a motion for attorneys' fees; (3) pursue a settlement with the defendant; or (4) take action in respect of the $40,000 in punitive damages that Longo was awarded at the second trial.

From September 16, 2014 through March 18, 2016, the date of Longo's grievance, respondent also failed to reply to the "vast majority" of Longo's telephone, e-mail, and text requests for information about the case.

Specifically, Longo sent respondent numerous text messages between April 9, 2015 and December 10, 2015, seeking information about the status of the case and asking respondent to contact her. Respondent replied by telephone on April 13, August 3, and August 20, 2015. The complaint alleged that, during the August 3, 2015 call, "upon information and belief," respondent told her that he would appeal the second punitive damages award and file a motion for attorneys' fees, "which was supposed to be made returnable October 9, 2015."[1]

In an attempt to prod respondent to act, Longo also e-mailed the attorney who had referred her to respondent, respondent's law partner, and trial court personnel. On January 4, 2016, court personnel notified Longo that respondent had been contacted and had been informed to contact Longo. Respondent did not contact Longo.

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[1] The complaint catalogued sixteen e-mail communications to respondent between July 10, 2015 and January 8, 2016, as well as twenty-six texts from April 9, 2015 to December 10, 2015.

In her final, January 16, 2016 letter to respondent, Longo complained that he had "abandoned" her case, and that, if he did not "submit papers to the court" within thirty days, she would file an ethics grievance. Respondent did not reply.

In respect of the non-cooperation charge, respondent failed to reply to DEC letters dated April 15 and May 24, 2016, as well as telephone messages, all requesting information and a written reply to the grievance.

DRB 17-432 – District Docket No. IV-2016-0009E

Service of process was proper in this matter. On July 18, 2017, the DEC sent respondent a copy of the complaint, by regular and certified mail, in accordance with R. 1:20-7(h), at his office address listed in the attorney registration records.

The green certified mail receipt was returned to the DEC indicating delivery on July 21, 2017, having been signed by "LaToya Barrett." The regular mail was not returned.

On November 17, 2017, the DEC sent respondent a second letter, to the same office address, by regular mail, notifying him 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; that, pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), the record in the matter would be certified directly to

us for imposition of sanction; and that the complaint would be amended to include a charge of a violation of RPC 8.1(b). The regular mail to respondent was not returned.

The deadline for respondent to answer the complaint has expired. As of November 29, 2017, the date of the certification of the record, respondent had not filed an answer. The DEC, therefore, certified the record to us as a default.

The Motion to Vacate Default

On February 15, 2018, respondent filed a motion to vacate the default. In his certification in support of the motion, respondent stated his "understanding" that his client, Marisa Huerta, had "decided on her own" to discontinue or withdraw her ethics grievance against him. She sent respondent two e-mails to that effect, the first dated April 10, 2017, which read, in its entirety:

> I am going to formally withdraw ethics charges. I am glad now you let get deposed Marc and Minna.[2] I will need legal advice and maybe a lawyer for a civil suit that looks like it will be complex. (I

[2] According to respondent, Marc was Huerta's boyfriend and Minna Baker was a therapist.

don't know how much you know, but I can tell you more if you want to know.)

[RC¶6;Ex.B.][3]

The second e-mail, sent about six hours later, stated, "Please do not reply to this. I just remembered that as a potential witness, you should not be in direct contact with me."

Respondent certified that he did not reply to either e-mail. In fact, he claimed to have had no contact with Huerta after September 2014, more than two years prior to his receipt of the e-mails.

According to respondent, after he received Huerta's e-mails, he assumed that she had withdrawn her grievance, and that he need do nothing further. He then received what he termed a "notice of the default" from DEC Secretary John Palm, prompting him to send Palm a December 8, 2017 letter in which he stated his belief that the grievance had been withdrawn, and that he would like to discuss the matter with the Secretary.[4]

Respondent claimed that, in a subsequent telephone conversation, Palm told him that he, too, believed that the grievance had been "withdrawn or dropped." Respondent's certification does not reveal

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[3] RC refers to respondent's February 15, 2018 certification in support of the motion to vacate default.

[4] Respondent had been served with the complaint on July 18, 2017.

any discussion he and Palm might have had during their telephone conversation that day regarding respondent's intention to answer the then six-month-outstanding ethics complaint.

Respondent also commented that the ethics complaint did not "actually raise any grievance by Ms. Huerta." Rather, it was based on his alleged failure to cooperate with the investigation:

> Again, I thought the investigation into Ms. Huerta's grievance was closed (I still believe that is true). If the default in this matter were vacated, I would raise as a meritorious defense that I genuinely believed no investigation was pending, because Ms. Huerta told me she was withdrawing the grievance.
>
> [RC¶14.]

Respondent also raised meritorious defenses to the underlying issues in Huerta's original grievance, which are now moot, because the sole charge in the ethics complaint stemmed from respondent's failure to answer the complaint.

Respondent's explanation for his inaction in this matter is similar to the one offered in the Longo matter – he believed that the grievant had withdrawn the ethics grievance.

Even if Huerta had decided to withdraw the ethics grievance, respondent's explanation fails to address why he did not answer the formal ethics complaint's sole charge based on his failure to cooperate with the ethics investigation, in violation of RPC 8.1(b).

As in the Longo matter, upon his receipt of the ethics complaint, respondent knew that he was required to file an answer. There was no basis in fact to believe otherwise. Indeed, we find it difficult to imagine a scenario where a district ethics secretary and a respondent discuss an ethics complaint with a grossly overdue answer, that would leave a respondent with the impression that no answer was necessary.

In any event, we determine to deny respondent's motion to vacate the default, for failure to provide a prong-one, reasonable explanation for his failure to answer the Huerta complaint.

We turn to the facts alleged in the complaint. On April 16, 2015, Marisa Huerta filed an ethics grievance against respondent that was initially assigned to District VA for investigation, but later transferred to District IV, due to a conflict.

On April 8, 2016, the District IV investigator forwarded the grievance to respondent, who answered by e-mail that he would submit a written reply to the grievance, and deliver the client file to the investigator by "the middle of May" 2016.

Respondent did not deliver the file or reply to the grievance, prompting the investigator to send him a letter dated June 8, 2016, once again requesting information and a reply to the grievance.

By letter dated June 22, 2016, the investigator informed respondent that, if he did not furnish the requested information and reply to the grievance by June 29, 2016, the investigation would proceed without him, and he would be charged with a violation of RPC 8.1(b).

On October 7, 2016, the investigation was reassigned to a third investigator. On November 9, 2016, the investigator sent respondent a letter renewing earlier requests for information and reminding respondent of his duty to cooperate with ethics authorities. Respondent did not reply to that letter or otherwise contact the DEC.

* * *

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

In DRB 17-431, in 2006, Longo retained respondent in connection with CEPA claims against her employer. The first trial resulted in a favorable jury award of $120,000 in damages for economic loss, $30,000 for emotional distress, and $500,000 in punitive damages.

The employer appealed the punitive damages award and, on remand, a second trial resulted in a much lower award. Thereafter, the court e-mailed the parties on September 12, 2016, urging them to reach a settlement. In a September 16, 2014 e-mail, respondent replied that his client was unwilling to compromise on her demands. Thereafter, respondent failed to: (1) appeal the verdict rendered at the second trial; (2) take action in respect of the lower punitive damages awarded Longo at the second trial; (3) pursue a settlement with the defendant; or (4) file a motion for attorneys' fees.

Respondent's failure to take any action after September 16, 2014 to protect his client's claims amounted to gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3, respectively.

After respondent's September 16, 2014 e-mail to the court, he communicated with Longo only sporadically through August 20, 2015, when he told her that he intended to file an appeal and a motion for attorneys' fees. Thereafter, he failed to reply to Longo's numerous, documented letters, e-mails, and texts, through March 2016, in which she sought information about the status of her case. Longo even contacted the court for help in reaching respondent. Respondent, however, failed to heed the court's direction that he contact his client.

Respondent's failure to keep Longo adequately informed about the status of her claims, to reply to her reasonable requests for information, and to explain the status of the matter to the extent reasonably necessary to allow his client to make informed decisions regarding the representation violated RPC 1.4(b) and (c).

In DRB 17-432, between April 8 and November 9, 2016, respondent ignored several letters and telephone communications from the DEC seeking information, and a written reply to the Huerta grievance. As of July 12, 2017, the date of the formal ethics complaint, respondent had failed to do so. His failure to cooperate with ethics investigators in that matter constituted a violation of RPC 8.1(b).

In summary, in DRB 17-431, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), and RPC 8.1(b). In DRB 17-432, respondent violated RPC 8.1(b). The only issue remaining is the appropriate quantum of discipline for respondent's misconduct.

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history. See, e.g., In the Matter of Craig C. Swenson, DRB 16-278 (January 20, 2017) (admonition for attorney who filed four workers'

compensation claims for his client and, after the client agreed to accept the workers' compensation carrier's $5,000 settlement offer for two of them, failed to obtain Social Security/Medicare approval or to monitor the client's matters; the attorney also failed to oppose a motion to dismiss three of the claims, resulting in their dismissal; the remaining claim was dismissed for failure to provide medical information; the attorney also failed to inform his client of the dismissals and failed to take action to have the petitions reinstated; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b); we considered, in mitigation, that the attorney stipulated to the violations, had no prior discipline in twenty-eight years at the bar, and entered into therapy for "the causes and consequences" of his actions); In the Matter of Walter N. Wilson, DRB 15-338 (November 24, 2015) (admonition for attorney who neither filed his client's tax appeal from the loss of a special assessment, nor advised the client of the deadline to do so, thus foreclosing any opportunity to perfect an appeal; violations of RPC 1.1(a) and RPC 1.3; in mitigation, we considered that the attorney had no prior discipline; his misconduct involved only one client matter, and did not result in significant injury to the client; the misconduct was not for personal gain; and, at the time of the misconduct, the attorney was caring for his girlfriend, who was seriously ill); In the Matter of Josue Jean Baptiste, DRB 15-

211 (September 21, 2015) (admonition for attorney who, due to an error, had a $1.5 million default judgment entered against his client and his client's employer; throughout the representation, the attorney failed to inform his client of events in the case, such as the default judgment, a subpoena seeking information in connection with the default judgment, and a warrant for the client's arrest issued as a result of the attorney's failure to honor the subpoena; seven months later, the attorney succeeded in a motion to vacate the judgment, but the client elected to proceed pro se; the case was later dismissed on summary judgment; in mitigation, we considered that the misconduct involved a single client matter, that the attorney had no prior discipline, that he readily admitted misconduct, and that he exhibited genuine contrition and remorse; in aggravation, the client suffered mental and economic hardships as a result of the misconduct); In re Sachs, 223 N.J. 241 (2015) (reprimand for attorney who had represented two sisters in the sale of a home, against which two liens had attached; the title company required the amount of the liens to be held in escrow, and the sisters provided the funds; the attorney thereafter failed to negotiate the payoff of the judgments, leaving the title company to do so using the escrowed monies, and retaining the balance as its fee; the attorney neither obtained a bill from the title company justifying its fee, nor told his clients that

the title company had taken a fee; he also failed to return one of the client's telephone calls for several years after the escrow funds had been disbursed; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b); reprimand imposed due to economic loss suffered by the clients); and In re Calpin, 217 N.J. 617 (2014) (reprimand for attorney who failed to oppose the plaintiff's motion to strike his client's answer, resulting in the entry of a final judgment against his client; the attorney never informed his client of the judgment; notwithstanding the presence of some mitigation in the attorney's favor, the attorney received a reprimand because of the "obvious, significant harm to the client," that is, the judgment).

Failure to cooperate with an ethics investigation, without more, usually results in an admonition. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015); In the Matter of Martin A. Gleason, DRB 14-139 (February 3, 2015); and In the Matter of Jeffrey M. Adams, DRB 14-243 (November 25, 2014).

However, "[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).

Thus, the infractions in either DRB 17-431 or DRB 17-432, warrant the imposition of a reprimand, inasmuch as respondent permitted two, separate matters to proceed to us by way of default.

In further aggravation, in September 2015, respondent received a reprimand for misconduct that included some of the same violations present here – gross neglect, lack of diligence, and failure to communicate with the client. That misconduct took place in 2008 and 2009. Apparently, respondent has learned little from those prior mistakes.

Finally, there was obvious harm to the client. Longo's CEPA claims had value, yet respondent let them languish, unresolved.

In In re Sirkin, 200 N.J. 271 (2009), the attorney received a three-month suspension in a default case for similar misconduct. In June 2007, Cheryl Rife authorized Sirkin to settle her personal injury case for the total policy amount of $47,000, which defense counsel immediately placed in court. In July 2007, defense counsel prepared settlement documents, including a release for Rife's signature, and sent them to Sirkin for review, execution, and return. In the Matter of Kenneth P. Sirkin, DRB 09-148 (August 12, 2009) (slip.op. at 3).

Hearing nothing from Sirkin thereafter, in November 2007, defense counsel filed a motion to compel production of the

settlement documents, which was granted, along with a $300 fine against Rife. Sirkin had neither sent Rife the settlement documents for her signature, nor informed her about the motion and fine. He also failed to return her telephone calls requesting information about her case. Ibid.

After Rife filed her grievance, Sirkin repeatedly promised ethics investigators a written reply to the grievance and a copy of the client file, but produced neither. As of June 2009, the settlement funds remained in court. Sirkin, who had no prior final discipline, was found guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with an ethics investigation. Id. at 4-5.

Here, for the presence of the aggravating factors – two defaults, prior discipline, failure to learn from prior mistakes, and harm to the client, we determine that a three-month suspension is the appropriate sanction for the totality of respondent's misconduct.

Members Gallipoli and Zmirich voted to impose a six-month suspension.

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 Andrew William Dwyer
Docket Nos. DRB 17-431 and 17-432

Decided: July 26, 2018

Disposition: Three-month Suspension

Members	Three-month Suspension	Six-month Suspension	Recused	Did Not Participate
Frost	X			
Baugh	X			
Boyer	X			
Clark	X			
Gallipoli		X		
Hoberman	X			
Rivera	X			
Singer	X			
Zmirich		X		
Total:	7	2	0	0

Ellen A. Brodsky
Chief Counsel