Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-092
District Docket Nos. IV-2017-0050E,
IV-2018-0005E, and IV-2018-0024E

In the Matter of	
Barry J. Beran	
An Attorney at Law	

Decision

Decided: October 17, 2019

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 IV Ethics Committee (DEC). The formal ethics complaint, comprising three client matters, charged respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter and to comply with reasonable requests for information), RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority).

On April 18, 2019, we received respondent's motion to vacate the default and a proposed answer to the ethics complaint. For the reasons set forth below, we determine to deny respondent's motion and impose a six-month suspension.

Respondent was admitted to the New Jersey bar in 1981 and the Pennsylvania bar in 1980. He maintains a law office in Cherry Hill, New Jersey.

Respondent has a significant history of discipline. In 2004, he received a reprimand for negligently misappropriating client trust funds, failing to comply with recordkeeping requirements, and advancing loans to clients while representing them in personal injury matters. In re Beran, 181 N.J. 535 (2004).

In 2009, respondent was admonished for failing to advise a client, for whom he was unable to negotiate credit card payoffs, of possible avenues available and of consequences that could result from the actions the client determined to take. Respondent also failed to communicate with the client or to provide her with a writing setting forth the basis or rate of his fee. In the Matter of Barry J. Beran, DRB 09-245 (November 25, 2009).

In 2016, respondent was censured, on a motion for discipline by consent, for advancing personal funds to three clients in connection with their pending or contemplated litigation, negligently misappropriating client funds due to his deficient records, failing to promptly disburse client funds, and violating the recordkeeping rules. In re Beran, 224 N.J. 388 (2016).

In 2017, respondent was censured again for lack of diligence and failure to communicate with a client in a personal injury matter. The client did not receive her settlement funds until six years after she had signed a release. Although only one client was involved, we considered, as aggravating factors, respondent's ethics history and failure to learn from prior mistakes. In re Beran, 230 N.J. 61 (2017).

Finally, respondent was suspended for three months, effective March 1, 2018. Respondent overdrew his trust account when he inadvertently withdrew more funds from the account, as legal fees, than were on deposit. He immediately replenished the funds when he discovered the error. At the time of the overdraft, no client funds were on deposit. The ensuing Office of Attorney Ethics (OAE) audit revealed several recordkeeping violations. Respondent was guilty of negligently misappropriating trust funds, commingling funds, and recordkeeping violations. The Court ordered respondent to submit monthly reconciliations of his attorney accounts to the OAE on a quarterly basis for a two-year period. In re Beran, 231 N.J. 565 (2018). He was reinstated on July 30, 2018. In re Beran, 234 N.J. 264 (2018).

Service of process was proper. On September 27, 2018, the DEC sent a copy of the complaint, by regular and certified mail, to respondent's Cherry Hill

office address. The signed certified mail receipt confirms delivery on October 2, 2018. The regular mail was not returned.

On December 20, 2018, the DEC sent a letter to respondent, by regular mail, to the same address. The letter notified respondent that, if he did not file an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to include a willful violation of RPC 8.1(b). The mail was not returned.

At the end of December 2018, respondent contacted the DEC secretary by telephone, representing that he would file an answer to the ethics complaint during the first week of January 2019, which he failed to do.

As of February 19, 2019, respondent had not filed an answer to the complaint, and the time within which he was required to do so had expired. Accordingly, the DEC certified this matter to us as a default.

We now turn to the allegations of the complaint.

The Adler Matter – District Docket No. IV-2017-0050E

Richard and Debra Adler retained respondent to file a Chapter 13 bankruptcy petition on their behalf, which he filed in December 2012. During

the pendency of the matter, the Adlers contacted respondent about the modification of their mortgage loan. The Adlers' mortgage company also contacted respondent to obtain trustee authorization for the loan modification.

Respondent failed to return the Adlers' telephone calls, text messages, or e-mails. On August 19, 2016, their bankruptcy petition was dismissed either for failure to meet filing deadlines or for nonpayment in accordance with the bankruptcy plan. Respondent offered to file another bankruptcy petition for an additional $1,500 fee. Presumably, the Adlers declined the offer.

Because of respondent's negligence, the mortgage company did not approve the Adlers' loan modification and ultimately instituted foreclosure proceedings against them. After the Adlers' Chapter 13 bankruptcy petition was dismissed, they were forced to file for Chapter 7 bankruptcy.

By letter dated January 16, 2018, the DEC sought respondent's written reply to the Adlers' grievance and copies of relevant documents. On January 29, 2018, respondent submitted a reply.

The complaint charged respondent with violations of RPC 1.3, for permitting the dismissal of the bankruptcy matter, which caused "great harm" to the Adlers; RPC 1.4(b), for failing to communicate with Richard Adler, despite his numerous attempts to contact respondent; and RPC 1.4(c), for failing to

explain to the Adlers their available options and the ramifications of those options.

The Tinsley Matter – District Docket No. IV-2018-0005E

Joan Tinsley retained respondent to file a bankruptcy petition on her behalf. Respondent neither filed it nor returned Tinsley's telephone calls "for months." Ultimately, Tinsley filed the petition pro se. According to the complaint, because the petition had not been filed timely, Tinsley's "income tax was offset." Presumably, her income tax refund was intercepted pursuant to a tax lien.

Initially, respondent filed a reply to the grievance in this matter. Thereafter, during respondent's three-month suspension, the matter was reassigned to a new investigator. The DEC investigator's April 19, 2018 letter, sent to respondent's home address, requested a written reply to the grievance and his original file in the matter, within ten days of his receipt of the letter. The letter was not returned.

Although respondent did not reply to the letter, on June 7, 2018, he appeared at the DEC secretary's office. At that time, the secretary confirmed respondent's home address, and informed him that the DEC could not mail correspondence to his office during the term of his suspension.

Thereafter, by letter dated June 18, 2018, the DEC investigator reiterated her request for the previously sought information and reminded respondent that he had not replied to her earlier letter. Respondent failed to reply to either letter.

The complaint alleged that respondent violated RPC 1.3, by failing to file Tinsley's bankruptcy petition, resulting in her filing it pro se, and resulting in Tinsley's income tax offset; RPC 1.4(b), by failing to comminicate with Tinsley about the substance of her case; RPC 1.4(c), by failing to explain the matter to her, "forcing her to act on her own;" and RPC 8.1(b), by failing to reply to the DEC's requests for information.

The Probasco Matter – District Docket No. IV-2018-0024E

In 2012, respondent had handled Marian Probasco's divorce. Thereafter, Probasco retained respondent to seek an increase in her child support and alimony, as well as health insurance payments. Respondent charged Probasco a $2,500 fee. He did not provide Probasco with a writing setting forth the basis or rate of the fee. Thereafter, respondent did not return Probasco's telephone calls and e-mails, and did not perform any work on her case.

Probasco filed a fee arbitration request. The fee arbitration committee ordered respondent to return his entire fee to Probasco and referred this matter to the DEC.

By letter dated June 18, 2018, the DEC investigator requested that respondent submit a written reply to the grievance and Probasco's complete file, within ten days. Respondent did not reply to the letter.

The complaint alleged that respondent violated RPC 1.3, for failing to take any action on Probasco's behalf, even though he had accepted a retainer;[1] RPC 1.4(b), for failing to communicate with Probasco about her matter and failing to reply to her multiple inquiries; RPC 1.4(c), for failing to explain the matter or important documents to her; and RPC 8.1(b) for failing to reply to the DEC's written requests for information sent to both his home and office addresses.

Motion to Vacate the Default

In respondent's April 19, 2019 certification in support of his motion to vacate the default, he claimed that he was extremely upset and distraught over receiving the ethics complaint. He asserted that he had performed a significant amount of work on behalf of the three clients, but because he had become overwhelmed trying to respond to the ethics complaint, he could not do so in a

[1] The complaint did not charge respondent with a violation of RPC 1.5(b) (failure to provide a client with a writing setting forth the basis or rate of the fee) or RPC 1.16(d) (failure to return an unearned fee).

coherent manner. He could not "offer any excuses," but, nevertheless, requested that we consider his motion and accept his response.

In respect of the Adler grievance, respondent claimed that he had worked ceaselessly on their bankruptcy petition, until it was dismissed because the Adlers' failed to make their required payments under their Chapter 13 Plan. Respondent maintained that he accepted little remuneration, or deeply discounted his fees, based on the Adlers' financial circumstances. He listed all of the actions he had taken in connection with the Adlers' bankruptcy, in addition to continually conferring with them throughout their bankruptcy proceedings.

As to the Adlers' mortgage modification, respondent claimed that they submitted two applications. The mortgage company denied their first application, which the Adlers completed largely on their own, with respondent's assistance. Respondent maintained that the second application was the subject of the complaint, and that he had discussed it with the Adlers, with the understanding that they would complete it themselves, but that he was available to discuss any issues with them. Throughout the process, respondent had not been aware of any problems with the application that required his assistance.

Respondent denied failing to return the Adlers' calls, text messages, or e-mails, claiming that he had frequent contact with them about their loan

modification and asserting that their Chapter 13 bankruptcy was dismissed for reasons other than their failure to obtain a mortgage loan modification.

For the Tinsley matter, respondent maintained that he had frequent contact with her about her petition and her financial situation, and that he researched the dischargability of her various debts.

Respondent had nearly completed Tinsley's bankruptcy petition when he began suffering from a "medical/cardiac" issue requiring his hospitalization for "a period of time" in August 2017. In September 2017, when he discussed his health issue with Tinsley, she informed him that she wanted to file the petition pro se, using the information and advice he had imparted.

When the Internal Revenue Service "intercepted" Tinsley's 2017 income tax return (presumably refund), respondent offered to help her recoup it through her bankruptcy filing. According to respondent, he continued to advise Tinsley, even after she filed the grievance against him, as he had developed a close relationship with her and wanted to help her "get back on her feet financially."

Respondent denied failing to communicate with Tinsley or failing to explain the matter to the extent reasonably necessary to enable her to make informed decisions about the representation. Moreover, he denied that his failure to act resulted in her proceeding pro se or caused her income tax offset.

Similarly, respondent claimed that he had performed services on Probasco's behalf, including engaging in lengthy consultations with her, exploring the resolution of various issues with opposing counsel, and preparing various documents to file a motion to enforce and modify a prior amended final judgment of divorce. However, without further explanation, Probasco instructed respondent not to file the motion.

Respondent denied that he failed to communicate with Probasco, failed to reply to her numerous inquiries, failed to take any action on her behalf, or failed to explain the matter to the extent reasonably necessary to permit her to make informed decisions about the representation. He further denied taking the $2,500 retainer, without acting on Probasco's behalf.

To prevail on a motion to vacate the default, a respondent must satisfy a two-prong test: (1) provide a reasonable explanation for the failure to file an answer to the complaint; and (2) present meritorious defenses to the ethics charges. Generally, if only one of the prongs is satisfied, the motion is denied. See, e.g., Supreme Court issued Order on September 6, 2019 In re Lindner, ___ N.J. ___ (2019); In the Matter of Michael David Lindner, Jr., DRB 18-254 (January 30, 2019) (motion denied because the attorney failed to assert a reasonable explanation for failing to answer the complaint); In re Porwich, 205 N.J. 230 (2011); In the Matter of Alan S. Porwich, DRB 10-279 (December 14,

2010) (motion denied; although the attorney's personal problems might have excused his failure to file an answer, he did not provide a meritorious defense to allegations of the complaint); In re Goldsmith, 201 N.J. 160 (2010); In the Matter of Jeff H. Goldsmith, DRB 09-230 (December 3, 2009) (motion denied because the attorney failed to satisfy the second prong of the test); and In re Abramowitz, 197 N.J. 504 (2009); In the Matter of Arnold M. Abramowitz, DRB 08-254 (December 10, 2008) (motion denied for failure to satisfy the first prong of the test).

Here, respondent's assertion, that he did not file an answer because he was too overwhelmed to try to reply to the complaint, does not constitute a reasonable explanation for failing to file a timely answer.

Respondent is no stranger to the disciplinary process. This is his sixth matter before us. He is, therefore, fully familiar with the required procedures. Moreover, he replied to the grievance in the Adler matter and submitted an initial reply in Tinsley, but, thereafter, failed to provide a subsequent reply. He provided no reply in the Probasco matter. Thus, respondent had ample opportunity, between the filing of the grievances and the filing of the complaint, to overcome his distress and to formulate a timely answer. We, therefore, deny respondent's motion to vacate the default.

The facts recited in the complaint support most of the charges of unethical conduct. A respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and provide a sufficient basis for the imposition of discipline under R. 1:20-4(f)(1). Notwithstanding that Rule, each charge must be supported by sufficient facts so that we may determine that unethical conduct has occurred. Here, the facts, although meager, support all of the allegations of unethical conduct, with the exception of the RPC 1.4(c) charges. The complaint failed to allege sufficient facts to support this violation in all three matters.

In the Adler matter, respondent failed to return his clients' telephone calls, text messages, or e-mails. Respondent's inaction led to the dismissal of the Adlers' bankruptcy petition and the denial of their loan modification, which ultimately resulted in foreclosure proceedings against them, violations of RPC 1.4(b) and RPC 1.3 respectively.

In Tinsley, as a result of respondent's lack of diligence, his client was forced to proceed pro se. Because the filing of the petition was delayed, she suffered an income tax offset. Respondent also failed to communicate with Tinsley and failed to provide the new investigator with a reply to the grievance. In all, respondent violated RPC 1.3, RPC 1.4(b), and RPC 8.1(b) in this matter.

Finally, in Probasco, respondent failed to take any action in his client's family law matter and did not return Probasco's attempts to communicate with him. Respondent also failed to submit a written reply to the grievance. A fee arbitration committee ordered the refund of the entire fee. In this matter, respondent violated RPC 1.3, RPC 1.4(b), and RPC 8.1(b).

In sum, the allegations establish that respondent violated RPC 1.3 and RPC 1.4(b) in all three matters, and RPC 8.1(b) in the Tinsley and Probasco matters.

Generally, in default matters, a reprimand is imposed for lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities, even if this conduct is accompanied by other ethics infractions, such as gross neglect. See, e.g., In re Cataline, 219 N.J. 429 (2014) (reprimand for attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with requests for information from the district ethics committee investigator); In re Rak, 203 N.J. 381 (2010) (reprimand for attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with the investigation of a grievance); In re Van de Castle, 180 N.J. 117 (2004) (reprimand for attorney who grossly neglected an estate matter, failed to communicate with the client, and failed to cooperate with disciplinary authorities); and In re Goodman, 165 N.J. 567

(2000) (reprimand for attorney who failed to cooperate with disciplinary authorities and grossly neglected a personal injury case for seven years by failing to file a complaint or to otherwise prosecute the client's claim; the attorney also failed to keep the client apprised of the status of the matter; prior private reprimand).

The discipline is enhanced when aggravating factors are present. See, e.g., In re Dwyer, 236 N.J. 9 (2018) (censure imposed for two consolidated default matters; the attorney grossly neglected and lacked diligence in one matter, when, among other things, he failed to appeal a verdict or pursue a settlement on behalf of the client; failed to communicate with her or explain the matter to the extent reasonably necessary to permit her to make informed decisions about the representation; and failed to cooperate with disciplinary authorities in both matters; aggravating factors were the attorney's prior reprimand for similar misconduct and, thus, his failure to learn from prior mistakes, and the harm to the client); In re Romaniello, 216 N.J. 248 (2007) (censure for attorney who grossly neglected and lacked diligence in his handling of a disability claim, failed to communicate with the client, failed to promptly disburse property belonging to a third party, failed to maintain a bona fide office, and failed to cooperate with disciplinary authorities; aggravating factors were the attorney's abandonment of his client after he had been designated the client's

representative, his inability to account for a disability payment into his business account, and the administrative revocation of his law license for nonpayment of the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection for seven years); In re Rosanelli, 203 N.J. 378 (2010) (three-month suspension for attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, failure to cooperate with disciplinary authorities, and failure to return the unearned portion of a fee advanced by a client; the attorney was temporarily suspended after he had failed to comply with a fee arbitration award in favor of the client and remained suspended at the time of the decision); In re Sirkin, 200 N.J. 271 (2009) (three-month suspension for attorney who failed to take steps to obtain his client's funds on deposit with the court, failed to communicate with the client, and failed to cooperate with the ethics committee investigator, despite his assurance that he would reply to the grievance and would submit a copy of the file, thereby stifling the investigation; discipline was enhanced because of the attorney's cavalier attitude toward his client's well-being and toward ethics authorities); In re Annenko, 167 N.J. 603 (2001) (six-month suspension for attorney who accepted a fee to file a motion to reopen a bankruptcy petition but failed to work on the file, to refund the retainer, or to keep the client informed about the status of the matter; ethics history included two private reprimands, a temporary suspension for failure to

comply with a fee arbitration award, a three-month suspension, and a six-month suspension); and In re Breingan, 165 N.J. 538 (2000) (six-month suspension for attorney who failed to cooperate with disciplinary authorities during the investigation of a grievance; ethics history included a private reprimand, a reprimand, and two three-month suspensions).

This case involved three clients who were in financial straits: two of the clients were involved in bankruptcies; the third client needed an increase in alimony, child support, and health insurance payments. Respondent failed to protect their interests by failing to act on their behalf, and, at least in the Adlers' case, caused "great harm." An additional aggravating factor here is respondent's significant ethics history: a 2004 reprimand; a 2009 admonition; a 2016 censure; a 2017 censure; and a 2018 three-month suspension. This is respondent's sixth time before us. Thus, it appears that he has not learned from his prior mistakes.

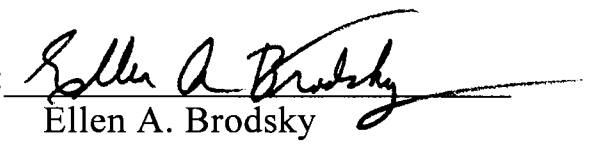
Because the case proceeded as a default, enhanced discipline is warranted. "[A] respondent's default or failure to cooperate with the investigative authorities operates as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332, 342 (2008). Based on respondent's ethics violations in three matters; his disciplinary history, which is comparable to the ethics histories in Annenko (six-month suspension) and Breingan (six-month

suspension); his failure to learn from prior mistakes, and the principle of progressive discipline, we determine to impose a six-month suspension.

Vice-Chair Gallipoli and Member Zmrich voted to impose a one-year suspension. Members Petrou, Rivera, and Singer 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
Bruce W. Clark, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Barry J. Beran
Docket No. DRB 19-092

Decided: October 17, 2019

Disposition: Six-Month Suspension

Members	Six-Month Suspension	One-Year Suspension	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman	X			
Joseph	X			
Petrou				X
Rivera				X
Singer				X
Zmirich		X		
Total:	4	2	0	3

Ellen A. Brodsky
Chief Counsel