

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket Nos. DRB 00-373 and 00-403

IN THE MATTER OF  
MARK D. CUBBERLEY  
AN ATTORNEY AT LAW

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

Decided: October 1, 2001

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

Pursuant to R.1:20-4(f), the District VII Ethics Committee (ADEC@) certified the record directly to us for the imposition of discipline, following respondent=s failure to file answers or verified answers to the formal ethics complaints.

On May 17, 2000, the DEC mailed a copy of the complaint in Docket No. VII-99-035E by certified and regular mail to respondent=s office address. On June 28, 2000, respondent submitted an unverified answer to the complaint. On July 7, 2000, the DEC notified respondent by certified and regular mail to respondent=s office address that he had to file a verified answer. The certified mail was returned unclaimed. The regular mail was not returned. By letter dated

returned. By letter dated November 2, 2000, the Office of Attorney Ethics ("OAE") notified respondent that he was required to file a verified answer and that, if he failed to file a verified answer, the matter would be certified to the Board pursuant to R.1:20-4(f). Again, the certified mail was returned as unclaimed and the regular mail was not returned.

On September 19, 2000, the DEC mailed a copy of the complaint in Docket No. VII-00-022E by certified and regular mail to respondent's office address. The certified mail was returned unclaimed. The regular mail was not returned. On October 13, 2000, a second letter was sent to respondent by certified and regular mail. Again, the certified mail was returned as unclaimed and the regular mail was not returned.

Respondent has not filed a verified answer to the complaint in Docket No. VII-99-035E and has not filed any answer to the complaint in Docket No. VII-00-022E.

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Respondent was admitted to the New Jersey bar in 1984. At the relevant times, he maintained an office in Hamilton, New Jersey.

On April 19, 1996, respondent was admonished for violating RPC 8.1(b) by failing to reply to the DEC investigator's request for information until a subpoena was issued.

On June 20, 2000, respondent was reprimanded for violations of RPC 1.3 and RPC 1.4(a) in one matter and of RPC 1.1(a), RPC 1.3 and RPC 1.4 in a second matter. In re

N.J. 363 (2000). On that same day, respondent was also reprimanded for violations of RPC 1.3 and RPC 1.4(a) in two matters as well as RPC 1.1(b) (pattern of neglect) for his misconduct in those two matters combined with his misconduct in the first reprimand matter. In re Cubberley, 164 N.J. 532 (2000). The Court also ordered that respondent practice under the supervision of a proctor for one year and that he enroll in the next offering of the legal education course of the Ethics Diversionary Program offered by the New Jersey State Bar Association.

On March 30, 2001, respondent was temporarily suspended for failing to cooperate with his supervising attorney.

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I. The Bennett/Procopio Matter, DRB 00-373 (VII-00-022E)

In June 1999, respondent was retained by Monica Procopio, as executrix of the estate of her father, to prepare an informal accounting of the estate. Procopio wanted to present the informal accounting to her sister, Henrietta Bennett, the only other beneficiary of the estate. The value of the estate was less than \$150,000.

Between June 1999 and August 1999, respondent prepared two drafts of an informal accounting, discussed the drafts with Procopio and forwarded them to Bennett. Thereafter, Bennett retained Thomas Begley to represent her with respect to the estate. By letter dated September 20, 1999, Begley informed respondent of inadvertent errors in the informal

Bennett retained Thomas Begley to represent her with respect to the estate. By letter dated September 20, 1999, Begley informed respondent of "inadvertent errors" in the informal accountings and requested that respondent forward to him certain estate documents. In his October 9, 1999 written reply to Begley's letter, respondent requested that Begley call him to schedule an appointment to discuss Begley's concerns. Respondent did not forward the documents requested by Begley.

Although Begley made "several efforts" to communicate with respondent, respondent did not return Begley's telephone calls or respondent's "voice mail box was full." Therefore, Begley again wrote to respondent, on December 1, 1999, requesting the relevant estate documents. When respondent did not reply to Begley's letter, Begley wrote a third letter to respondent, again requesting the same estate documents.

In January 2000, Bennett wrote to Procopio, complaining that respondent was unresponsive to Begley's questions and requests. Thereafter, Procopio obtained the documents from respondent's office and forwarded them to Bennett.

By letter dated March 17, 2000, Begley advised respondent that he had obtained the requested documents from Bennett and had determined that Bennett should receive \$44,276.11 from the estate.<sup>1</sup> Begley requested that respondent forward to him a check in that amount, payable to Bennett, along with a release and refunding bond to be executed by Bennett. It was

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<sup>1</sup> The complaint alleges that, in Begley's March 2000 letter, he stated that he had determined that Bennett's share of the estate was \$43,196.21. However, Begley also states that Bennett is entitled to interest, bringing the total to \$44,276.11.

not until June 26, 2000<sup>2</sup> that respondent forwarded a third informal accounting to Begley. Within a few weeks thereafter, the issue of the informal accounting was resolved and Bennett received her share of the estate.

The ethics complaint alleges that respondent violated RPC 1.3 (lack of diligence) in the Bennett/Procopio matter and that his lack of diligence in the matter, combined with his misconduct in earlier matters, violated RPC 1.1(b) (pattern of neglect).

## II. The Thomas Matter, DRB 00-403 (VII-99-035E)

After speaking with the grievant in the Thomas matter, the investigator found that respondent was not guilty of unethical conduct with regard to the grievance.

However, the DEC filed a complaint alleging that respondent failed to cooperate with its investigation of the Thomas grievance, in violation of RPC 8.1(b). According to the complaint, "on diverse dates" between November 18 and December 2, 1999, the DEC investigator attempted to contact respondent by telephone, "leaving numerous messages" that respondent should contact her. Because respondent did not reply to the telephone messages, the DEC investigator sent letters to him on December 2, 1999 and April 2, 2000. In her April 2, 2000 letter, the DEC investigator warned respondent that, if he did not contact her, she would "be left with no recourse except to file an ethics complaint against you for your failure to cooperate with this investigation." Respondent never replied to the investigator.

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<sup>2</sup> In the interim, Bennett had filed a grievance against respondent, which was forwarded to him on April 17, 2000.

Respondent filed an unverified answer to the Thomas complaint but failed to file a verified answer, despite two notices that a verified answer was required. In his unverified answer, respondent admitted that he received the investigator's December 2, 1999 letter but denied having received the April 2, 2000 letter.<sup>3</sup> As to the "numerous telephone messages," respondent stated that he was "without knowledge or information."

According to respondent, after he received the DEC investigator's December 1999 letter, he spoke with his investigator, "whom [the DEC investigator] wished to speak to regarding the Thomas matter and advising him of [the DEC investigator's] desire to speak with him. Thereafter, the respondent does not recall receiving any correspondence or telephone communications from [the DEC investigator]."

Respondent admitted that he never spoke with the DEC investigator but stated that he had forwarded an "extensive written response to the grievance"<sup>4</sup> and that he assumed that his investigator had spoken with the DEC investigator and "had addressed all of [the DEC investigator's] concerns."

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<sup>3</sup> Both letters were sent by certified and regular mail to respondent's office address. The certified mail receipt for the December 1999 letter was returned, signed by respondent. The certified mail receipt for the April 2000 letter was returned, unclaimed. Neither of the letters sent by regular mail was returned.

<sup>4</sup> Prior to sending the grievance to an investigator, the DEC secretary had forwarded the grievance to respondent for his reply.

However, in her letters to respondent, the DEC investigator did not mention any contact with or knowledge of respondent's investigator and the letters made it clear that the DEC investigator wished to speak with respondent personally about the grievance.

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Service of process was properly made in these matters. Following a de novo review of the record, we find sufficient evidence of unethical conduct. Because of respondent's failure to timely file an answer to the Bennett/Procopio ethics complaint, the allegations of the complaint are deemed admitted. R. 1:20-4(f)(1).

Between October 9, 1999 and June 26, 2000, respondent failed to reply to Begley's numerous request for documents regarding the informal accounting. Because respondent failed to send the documents or otherwise reply to Begley's telephone calls and letters, respondent's client was forced to obtain the documents from him and send them to Bennett. It was only after respondent received Bennett's grievance from the DEC that he completed an informal accounting of an uncomplicated estate worth less than \$150,000.

Respondent's failure to complete the informal accounting for more than eight months or to reply to Begley's numerous requests for documents violated RPC 1.3.

The complaint in the Bennett/Procopio matter also charged that respondent's lack of diligence in the matter, combined with his previous misconduct, constituted a pattern of

neglect. However, respondent has already been found to have violated RPC 1.1(b) in the prior matters. Therefore, we will not use those same matters to again find a pattern of neglect.

In the Thomas matter, the issue is whether the matter should be treated as a default since respondent filed an answer, albeit an unverified answer, to the complaint.

R. 1:20-4(e) states that an “answer that has not been verified within 10 days after the respondent is given notice of the defect shall be deemed a failure to answer as defined within these Rules.”<sup>5</sup> Despite having been given two notices that a verified answer was required, respondent did not file a verified answer, nor did he file an application to vacate the default.

We have previously vacated defaults and remanded for hearings, matters in which the attorneys filed unverified, unresponsive answers to the ethics complaints. See In the Matter of Sharon Hall, Docket No. DRB 99-202 (October 28, 1999). In Hall, the initial remand predated the amendment to R. 1:20-4(e). Furthermore, the attorney filed a motion to vacate the default and the matter involved extremely serious charges.

We also remanded In the Matter of Pasquale Cardone, Docket No. DRB 99-281 (December 18, 2000) after the amendment to R. 1:20-4(e). In Cardone, the attorney had submitted a hand-written letter in reply to the ethics complaint, explaining that he did not have a typewriter, computer or office and that he sometimes lived in his car or a motel room. The DEC concluded that the letter did not constitute a formal answer. Thereafter, the DEC

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<sup>5</sup> That sentence and one other sentence was added to R. 1:20-4(e) on July 5, 2000, effective September 5, 2000.



published legal notices in three newspapers that a complaint had been filed and that the attorney had to file an answer to the complaint.

We remanded the Cardone matter to the DEC for hearing because the attorney may not have been properly notified of the DEC's determination that his letter did not constitute an answer to the complaint. The DEC did not send notification of its determination to the attorney at his last known address. Furthermore, the legal notices did not indicate that the attorney's letter was insufficient to be deemed an answer. Therefore, even if the attorney had seen the notices, he could have concluded that he had complied with the requirement that he had to answer the ethics complaint.

Therefore, despite the amendment to R. 1:20-4(e), there may be matters in which we determine that a remand is necessary.

However, there are no circumstances in the Thomas matter that necessitate a remand. The complaint alleges that respondent failed to cooperate with the DEC investigator, in violation of RPC 8.1(b). In his unverified answer, respondent does not deny that he never replied to the DEC investigator's letters and telephone calls and only denies having received the April 2, 2000 letter. Moreover, his explanation that he did not reply to the DEC investigator because he told his own investigator to contact the DEC investigator is not credible. The DEC investigator made it very clear in her communications that she wanted to speak with respondent and did not even mention respondent's investigator. Therefore, we

proceeded with the Thomas matter as a default and find that respondent failed to cooperate with the DEC investigator.

In summary, respondent violated RPC 1.3 (lack of diligence) in one matter and RPC 8.1(b) (failure to cooperate with an ethics investigation) in a second matter. Ordinarily an admonition to a reprimand would be sufficient discipline for such misconduct. See In the Matter of David R. Bennett, Docket No. DRB 98-371 (November 24, 1998) (admonition where the attorney failed to act with reasonable diligence and failed to cooperate with the ethics investigation in one matter and grossly neglected a second matter); In the Matter of Gerald A. Nunan, Docket No. DRB 98-263 (October 20, 1998) (admonition where the attorney grossly neglected a matter, failed to keep his client reasonably informed about the status of the matter and failed to cooperate with the ethics investigation of the matter); In re Brooks, 157 N.J. 640 (1999) (reprimand where the attorney failed to cooperate with ethics authorities during the investigation of eight grievances); In re Yusem, 155 N.J. 595 (1998) (reprimand where the attorney failed to act diligently in representing a client in a collection matter, failed to keep the client reasonably informed about the status of the matter, failed to communicate with the client and failed to cooperate with disciplinary authorities during the investigation of the matter; the attorney had previously received a private reprimand); In re Dolan, 151 N.J. 324 (1997) (reprimand where the attorney grossly neglected an estate matter and failed to communicate with the beneficiary of the estate; the attorney had been previously reprimanded for similar misconduct).

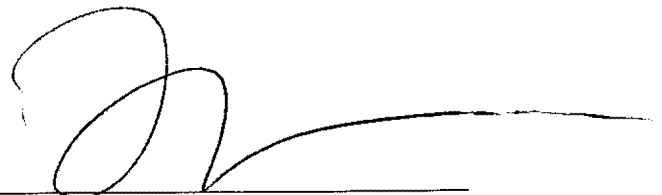
However, respondent has already received an admonition and two reprimands for similar misconduct. Furthermore, respondent's misconduct in these matters took place between September 1999 and June 2000, after respondent had already received our decisions in the two matters for which he received reprimands. Finally, these matters are proceeding as defaults. Therefore, we unanimously determined to suspend respondent for three months. See In re Gordon, 150 N.J. 204 (1997) (three-month suspension where the attorney grossly neglected a worker's compensation matter, failed to keep the client reasonably informed and failed to communicate with her; the attorney had been previously reprimanded on two occasions for similar violations); In re Saginario, 142 N.J. 424 (1995) (three-month suspension where the attorney grossly neglected a matter; he had been privately reprimanded on two prior occasions); In re Kates, 137 N.J. 102 (1994) (three-month suspension for lack of diligence, failure to communicate and failure to cooperate fully with the ethics authorities).

We also unanimously determined that, upon reinstatement, respondent must practice under the supervision of a proctor for two years.

One member recused himself.

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

By:



MARY J. MAUDSLEY  
Vice-Chair  
Disciplinary Review Board

**SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

In the Matter of Mark D. Cubberley  
Docket No. DRB 00-373 and 00-403

Decided: October 1, 2001

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		X					
Peterson						X	
Boylan		X					
Brody		X					
Lolla		X					
Maudsley		X					
O'Shaughnessy		X					
Schwartz		X					
Wissinger		X					
<b>Total:</b>		8				1	

*Robyn M. Hill* 11/20/01  
Robyn M. Hill  
Chief Counsel