

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M78517
E/cb

A. GAIL PRUDENTI, P.J.
REINALDO E. RIVERA
ROBERT A. SPOLZINO
PETER B. SKELOS
STEVEN W. FISHER, JJ.

2008-07948

DECISION & ORDER ON MOTION

In the Matter of Michael J. Kaper,
admitted as Michael Jonathan Kaper,
an attorney and counselor-at-law.

Grievance Committee for the Tenth
Judicial District, petitioner;
Michael J. Kaper, respondent.

(Attorney Registration No. 1261049)

Motion by the Grievance Committee for the Tenth Judicial District for an order: 1) suspending the respondent from the practice of law pending consideration of charges of professional misconduct against him, pursuant to 22 NYCRR 691.4(l)(1)(i) and (iii), upon a finding that he is guilty of professional misconduct immediately threatening the public interest based on his failure to cooperate with the Grievance Committee and uncontroverted evidence of professional misconduct; 2) authorizing the Grievance Committee to institute and prosecute a disciplinary proceeding against him based on a petition dated August 18, 2008; and 3) referring the issues raised to a Special Referee to hear and report. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the First Judicial Department on February 25, 1974, under the name Michael Jonathan Kaper.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that pursuant to 22 NYCRR 691.4(l)(1)(i) and (iii), the respondent,

November 14, 2008

MATTER OF KAPER, MICHAEL J.

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Michael J. Kaper, admitted as Michael Jonathan Kaper, is immediately suspended from the practice of law in the State of New York, pending further order of the court; and it is further,

ORDERED that the respondent, Michael J. Kaper, admitted as Michael Jonathan Kaper, shall promptly comply with this court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law §90, during the period of suspension and until further order of this court, the respondent, Michael J. Kaper, admitted as Michael Jonathan Kaper, is commanded to desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that the Grievance Committee for the Tenth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding in this court, against Michael J. Kaper, admitted as Michael Jonathan Kaper, based on the petition dated August 18, 2008; and it is further,

ORDERED that the Grievance Committee shall serve the petition upon the Special Referee and file the original petition in the office of the Clerk of this court within 20 days after receipt of a copy of this decision and order on motion; and it is further,

ORDERED that Rita E. Adler, Chief Counsel, Grievance Committee for the Tenth Judicial District, 150 Motor Parkway, Suite 102, Hauppauge, N.Y. 11788, is hereby appointed as attorney for the petitioner in such proceeding; and it is further,

ORDERED that within 20 days after service upon him of a copy of this order, the respondent, Michael J. Kaper, admitted as Michael Jonathan Kaper, shall serve an answer upon the petitioner and the Special Referee, and shall file the original answer with this court; and it is further,

ORDERED that the issues raised by the petition and any answer thereto are referred to the Honorable Geoffrey J. O'Connell, a retired Justice of the Supreme Court, 10th Judicial District, 617 DuBois Avenue, Valley Stream, N.Y. 11581, as Special Referee to hear and report, together with his findings on the issues, and to submit a report within 60 days after the conclusion of the hearing or the submission of post-hearing memoranda; and it is further,

ORDERED that if the respondent, Michael J. Kaper, admitted as Michael Jonathan Kaper, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f).

We find, *prima facie*, that the respondent is guilty of professional misconduct immediately threatening the public interest based upon his failure to cooperate with the Grievance

Committee for the Tenth Judicial District and other uncontroverted evidence of professional misconduct.

The Grievance Committee's request for the respondent's interim suspension is predicated upon the respondent's pattern and practice of failing to respond to its lawful requests concerning five investigations into allegations of professional misconduct, which include his failure to submit written answers to complaints of professional misconduct, failure to respond to requests for information and documents, and failure to comply with two judicial subpoenas duces tecum, and uncontroverted evidence that he failed to re-register as an attorney, failed to act competently and neglected client matters, and exhibited a pattern and practice of failing to cooperate with the Nassau County Fee Arbitration Committee. The five complaints against the respondent were filed between May 27, 2003, and July 7, 2005. The Grievance Committee alleges that the respondent failed to cooperate with each investigation by failing to submit answers and failing to respond to requests for information and records.

I. Sua Sponte Complaint

The respondent failed to re-register with OCA from the 1994-1995 registration period through the present. By letter dated June 3, 2003, the Grievance Committee apprised the respondent of its sua sponte investigation based on his failure to re-register as required by Judiciary Law § 468-a. The Grievance Committee directed him to re-register and to submit a written response within 30 days explaining his failure to re-register as required. The Grievance Committee apprised the respondent that an unexcused failure to reply constituted professional misconduct irrespective of the merits. Although that letter was not returned as undeliverable, the respondent failed to comply.

By letter dated December 19, 2003, sent via certified mail, the Grievance Committee reminded the respondent that his failure to cooperate constituted professional misconduct and requested his reply within 10 days. Notwithstanding proof of delivery of that letter, the respondent failed to comply.

By certified letter dated January 16, 2004, the Grievance Committee demanded a response within 5 days and warned the respondent that remedial action would be pursued to compel his cooperation. Notwithstanding proof of delivery of that letter, the respondent failed to comply.

By letter dated July 28, 2004, which was personally delivered to the respondent's home on August 17, 2004, the Grievance Committee afforded the respondent a final opportunity to comply within 10 days. Although an individual named Eric Parlatore accepted the letter at the respondent's home, he failed to comply. On March 23, 2005, the respondent appeared at the Grievance Committee's offices pursuant to judicial subpoena and acknowledged his failure to register and his delinquency. He agreed to re-register.

By letters dated April 4, 2005 and February 2, 2006, the Grievance Committee requested, inter alia, proof of the respondent's conformity with the attorney registration requirements. The respondent still failed to comply.

During an examination under oath on May 16, 2006, the respondent again acknowledged his failure to re-register and his delinquent registration. On November 1, 2007, the Grievance Committee personally served him with a letter dated October 26, 2007 demanding his written response to the failure to re-register complaint, as well as four other complaints, within 7 days. The Grievance Committee emphasized that no further extensions would be granted. To date, the respondent has failed to provide proof that his registration has been updated for the periods 1994 through 2008. Nor has he provided a written explanation for his failure to re-register.

II. Complaint of Wanda Diakun

This complaint involving neglect of a client matter and conduct involving dishonesty, fraud, deceit, or misrepresentation was filed on July 24, 2003.

Wanda Diakun retained the respondent to commence divorce proceedings on her behalf on or about September 9, 2002, and paid him a \$7,500 retainer. In October 2002, Ms. Diakun requested a copy of the documents allegedly prepared and filed by the respondent. He failed to provide same. In the spring of 2003, Ms. Diakun learned that the Matrimonial Division of the Nassau County Supreme Court had no record of her case. On or about June 4, 2003, the respondent falsely advised her that he had two tentative dates to attend a meeting in the judge's chambers with respect to this case.

On or about June 8, 2003, Ms. Diakun discharged the respondent as her attorney and requested the return of her file and her retainer fee. By certified letter dated June 20, 2003, Ms. Diakun confirmed the discharge and demanded the return of her retainer by July 11, 2003. The letter was returned unclaimed. On July 9, 2003, Ms. Diakun telephoned the respondent and repeated her demand. She subsequently went to the respondent's office to retrieve her case file but the retainer fee was not refunded.

The respondent failed to purchase an index number and commence an action on Ms. Diakun's behalf.

By certified letter dated July 29, 2003, the Nassau County Fee Arbitration Committee advised the respondent that Ms. Diakun had filed for arbitration and gave instructions on how to proceed. Although the return receipt card confirms delivery of that letter to the respondent, he failed to answer. An arbitration date was scheduled for October 15, 2003. The respondent's eleventh hour request for an adjournment was denied. Upon the respondent's default, an arbitration award of \$7,500 was issued in favor of Ms. Diakun. The Fee Arbitration Committee apprised the respondent of the award on October 28, 2003. On or about April 5, 2004, Ms. Diakun filed a petition to convert that award to a judgment. The respondent moved to vacate the award on the ground that he had been denied an adjournment. The award was converted to a judgment in May 2004. On June 6, 2005, the respondent paid the judgment in full.

By letter dated July 30, 2003, the Grievance Committee requested an answer to the Diakun complaint within 15 days. Although that letter was not returned as undeliverable, the

respondent failed to reply.

By certified letter dated October 12, 2004, sent to the respondent's home address, the Grievance Committee directed him to submit a reply within 5 days. That letter was returned as undeliverable based on the Post Office's three unsuccessful attempts at delivery. By letter dated November 10, 2004, the Grievance Committee again directed the respondent to submit a reply within 5 days and advised that his failure to respond or otherwise cooperate constitutes professional misconduct irrespective of the merits of the underlying complaint. Although that letter was not returned as undeliverable, the respondent failed to comply.

By letter dated January 5, 2005, which was hand delivered to respondent at his home address on January 6, 2005, the Grievance Committee demanded the respondent's answer within 5 days and warned that his failure to comply would result in a motion for his suspension. The respondent still failed to comply.

On February 16, 2005, the Grievance Committee personally served the respondent with a judicial subpoena. The respondent appeared at the Grievance Committee's offices on March 9, 2005, for an examination under oath. He claimed that the Diakun case file was in storage. The respondent was directed to return with the file on March 23, 2005, and to produce all time records for his services on the Diakun matter. On March 23, 2005, the respondent produced only the time records for the period September through November 2002 and failed to produce the complete case file. The respondent claimed that he had returned the file to Ms. Diakun in 2003 and did not keep a copy. Although directed to do so, the respondent failed to produce complete time records or records of his purported payments to Ms. Diakun pursuant to her 2004 judgment.

Notwithstanding the respondent's receipt of the Grievance Committee's letters dated April 4, 2005, and November 22, 2005, which requested specifically enumerated records within 5 days, he failed to comply.

III. Complaint of Patricia Foronjy

This complaint involving neglect of a client matter was filed on January 20, 2004.

Patricia Foronjy retained the respondent on or about May 17, 2003 for a fee of \$1,500 to represent her in a post-divorce proceeding regarding unpaid spousal maintenance. She discharged the respondent on or about November 15, 2003, for failing to move forward on her behalf. Despite Ms. Foronjy's demands, the respondent failed to refund the retainer fee. By letter dated January 27, 2004, the Grievance Committee referred her complaint to the Nassau County Fee Arbitration Committee.

By letter dated February 17, 2004, the Nassau County Fee Arbitration Committee advised the respondent to complete a response form and to submit an answer to the Foronjy complaint for fee arbitration. Upon his failure to do so, a second copy was sent, via certified mail, to the respondent's place of business. Notwithstanding delivery of that letter, the respondent failed to comply. By letter dated March 26, 2004, the Fee Arbitration Committee apprised the Grievance

Committee of the respondent's non-compliance.

An arbitration hearing was scheduled for May 11, 2004. On May 10, 2004, the respondent faxed an affirmation of engagement seeking an adjournment on the ground that he was scheduled to appear in the Supreme Court, Suffolk County, on May 11, 2004, before Justice Sandra Sgroi. The administrator of the Fee Arbitration Committee contacted the court and ascertained that the respondent's court appearance would be brief. Accordingly, the arbitration was rescheduled to 11:00 A.M. on May 11, 2004. The Respondent failed to appear. Ms. Foronjy was awarded a refund of \$1,500. The award was converted to a judgment and enforced through the Nassau County Sheriff's Department.

IV. Complaint of Alison Mogollon

This complaint involving neglect of a client matter and failure to provide the client with updated contact information was filed on July 7, 2005.

Alison Mogollon retained the respondent to initiate an uncontested divorce on her behalf on or about October 22, 2003, for a fee of \$850 plus \$310 in court costs. Ms. Mogollon and her husband had agreed to the terms of their divorce prior to retaining attorneys. The respondent failed to initiate an action. He subsequently advised Ms. Mogollon that her husband's attorney would be drafting and filing the paperwork, making her the defendant in that action.

Between late 2003 and early 2005, the respondent relocated his office twice but neglected to give Ms. Mogollon his new business telephone number or address. After unsuccessfully attempting to reach the respondent on his cell phone, Ms. Mogollon resorted to contacting him at home. She discharged him by letter dated March 22, 2005, and retained new counsel. Ms. Mogollon demanded a refund of her \$850 retainer and \$310 payment for court fees. During the ensuing 10 weeks, the respondent repeatedly scheduled and cancelled meetings with Ms. Mogollon regarding the refund. When he ultimately met with her, he informed her that he had not brought his checkbook.

V. Complaint of Diane Dadone

This complaint involving failure to act competently was filed on or about February 2, 2004.

In or about June 2003, Diane Dadone retained respondent to represent her in a matrimonial proceeding for a fee of \$2,200. She revealed that her previous attorney had filed a summons and complaint on her behalf and had served her husband on or about May 24, 2002. She offered to provide the respondent with the paperwork but he declined to review it.

In or about late 2003, the respondent served a summons without contacting Ms. Dadone's prior attorney or reviewing documents prepared and filed on her behalf. He failed to ascertain that a matrimonial action was already pending on her behalf under a previously purchased index number.

After being advised by the attorney for Ms. Dadone's husband that a matrimonial action had already been commenced, the respondent filed a stipulation of discontinuance and failed to take any further action. By letter dated February 20, 2004, the Grievance Committee referred Ms. Dadone's complaint to the Nassau County Fee Arbitration Committee for resolution.

By letter dated March 16, 2004, the Nassau County Fee Arbitration Committee advised the respondent to complete a response form and to submit an answer to Ms. Dadone's request for fee arbitration. Notwithstanding delivery of that letter, the respondent failed to comply. The Fee Arbitration Committee sent the Grievance Committee a letter, dated April 14, 2004, apprising it of the respondent's failure to reply and noting that the case had been assigned to an arbitrator.

On or about April 20, 2004, a notice of arbitration hearing was sent to the respondent advising him that the hearing was scheduled for 4:00 P.M. on May 19, 2004. The respondent called the arbitrator at 1:00 P.M. that day stating that he could not appear because he was moving his office. Although the arbitrator offered to hold the hearing at 5:00 P.M. to accommodate the respondent, the respondent declined and stated that he was in court. The respondent failed to appear at the hearing. An award of \$2,210 was made to Ms. Dadone. The decision of the arbitrator noted that no billing records, work product, or statement under oath was ever submitted in advance of the hearing. The only document submitted was an unsigned, unverified complaint. The respondent failed to satisfy the arbitration award.

On December 1, 2005, the Grievance Committee delivered to the respondent's home a judicial subpoena and a subpoena duces tecum with respect to the Foronjy, Mogollon, and Dadone matters. Although the respondent appeared for an examination under oath on December 19, 2005, he failed to produce the subpoenaed documents. After repeated adjournments, the respondent appeared for an examination under oath on May 16, 2006. He again failed to produce the requested documents. He was directed to produce the requested materials by June 1, 2006, as adjourned to June 9, 2006. He still failed to comply.

By letter dated July 6, 2006, sent via regular and certified mail, the Grievance Committee sent the respondent the transcript of his testimony from May 16, 2006, relating to his production of documents and demanding his response within 5 days. The certified letter was returned unclaimed after three unsuccessful attempts at delivery. The letter sent via regular mail was not returned as undeliverable.

On November 1, 2007, a letter demanding written answers to the pending complaints within 7 days was hand delivered to the respondent's place of business. Although the respondent acknowledged receipt, he failed to submit answers to any of the five pending complaints. Accordingly, the Grievance Committee submits that he constitutes an immediate threat to the public interest and moves for his interim suspension.

A petition dated August 18, 2008, containing 12 charges of professional misconduct based on the foregoing allegations, was submitted with the Grievance Committee's order to show cause.

The respondent has submitted an answer and affirmation in opposition in which he chooses not to “reply seriatum to the Petition and Affirmation in Support” but generally addresses the cases cited by the Grievance Committee. He generally states that his former clients were fully compensated.

The respondent further explains that during the periods encompassed in the petition, he was undergoing severe matrimonial problems and had moved on more than one occasion. This resulted in severe financial problems as well as mail delivery issues. The respondent requests an opportunity to appear before a Special Referee to be afforded time to thoroughly review the records and fully explain the circumstances.

Although the respondent has proffered an excuse for his conduct, he has not controverted the allegations of the petition and has engaged in a pervasive pattern of failing to cooperate with both the Grievance Committee for the Tenth Judicial District and the Fee Dispute Committee. Under the circumstances, the Grievance Committee’s motion is granted; the respondent is immediately suspended, pursuant to 22 NYCRR 691.4(l)(1)(i) and (iii), on the ground that he constitutes an immediate threat to the public interest based on his persistent failure to cooperate and other uncontroverted evidence; the Grievance Committee is authorized to institute and prosecute a disciplinary proceeding against the respondent based on the petition dated August 18, 2008; the respondent is directed to submit an answer within 20 days; and this matter is referred to a Special Referee to hear and report.

PRUDENTI, P.J., RIVERA, SPOLZINO, SKELOS and FISHER, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court