In re Brian David Pondenis
Respondent-Appellant

Commission No. 2020PR00048

Synopsis of Review Board Report and Recommendation
(May 2021)

The Administrator filed a three-count complaint against Respondent, charging him with making improper and abusive statements to others in connection with two matters, in violation of Rule 4.4(a) of the Illinois Rules of Professional Conduct; revealing information pertaining to his representation of a former client in one of the matters, in violation of Rule 1.9(c)(2); and neglecting and failing to return unearned fees in a third matter, in violation of Rules 1.3, 1.4(a)(3), 1.4(a)(4), and 1.16(d).

Respondent participated in one pre-hearing conference and provided deposition testimony, but he failed to answer the complaint, respond to the Administrator's motion to deem the allegations of the complaint admitted, or appear for a second pre-hearing conference. The allegations of the complaint were deemed admitted. Respondent also failed to appear for his disciplinary hearing, which was conducted by videoconference.

Following the hearing, the Hearing Board issued a report and recommendation, filed as a default proceeding, in which it found that Respondent had engaged in the charged misconduct. It recommended that he be suspended for one year and until further order and until he made restitution of $1,500 to the former client whose case he neglected.

Respondent appealed, challenging the Hearing Board's sanction recommendation, and asking the Review Board to recommend dismissal, reprimand, censure, or a suspension of not more than 60 days.

The Review Board agreed with the Hearing Board that Respondent's misconduct, coupled with his untreated mental-health issues and other aggravating factors, warranted a suspension of one year and until further order of the Court. However, the Review Board declined to recommend restitution as an element of the sanction. Based on information that the parties provided during oral argument, the Review Board found that Respondent had already satisfied the restitution requirement by sending a check to the ARDC, which sent it to his former client, who acknowledged receiving it.

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

FILED
May 27, 2021
ARDC CLERK

In the Matter of:

BRIAN DAVID PONDENIS,

Respondent-Appellant,

No. 6291212.

Commission No. 2020PR00048

REPORT AND RECOMMENDATION OF THE REVIEW BOARD

SUMMARY

In July 2020, the Administrator filed a three-count complaint against Respondent, charging him with making improper and abusive statements to others in connection with two matters, in violation of Rule 4.4(a) of the Illinois Rules of Professional Conduct; revealing information pertaining to his representation of a former client in one of the matters, in violation of Rule 1.9(c)(2); and neglecting and failing to return unearned fees in a third matter, in violation of Rules 1.3, 1.4(a)(3), 1.4(a)(4), and 1.16(d).

Throughout his disciplinary proceedings, Respondent received appropriate notice as required by the Rules of the ARDC. Nonetheless, Respondent failed to answer the complaint, respond to the Administrator's motion to deem the allegations of the complaint admitted, or appear for a pre-hearing conference.[1] The allegations of the complaint were deemed admitted. Thereafter, Respondent also failed to appear for his disciplinary hearing, which was conducted by videoconference.

Following the hearing, the Hearing Board issued a report and recommendation, filed as a default proceeding, in which it found that Respondent had engaged in the charged

misconduct. It recommended that he be suspended for one year and until further order and until he made restitution of $1,500 to the former client whose case he neglected.

Respondent appealed, challenging the Hearing Board's sanction recommendation, and asking this Board to recommend dismissal, reprimand, censure, or a suspension of not more than 60 days.

For the following reasons, we recommend that Respondent be suspended for one year and until further order of the Court.

BACKGROUND

Respondent's Misconduct[2]

As alleged in Count I of the Complaint, after Respondent had withdrawn from representing a client in a child custody matter, he communicated by text with his former client's girlfriend. The text messages revealed information regarding his representation of his former client without the former client's consent. In those texts, he also made derogatory and abusive comments, which had no other purpose than to harass and embarrass his former client's girlfriend.

As alleged in Count II, Respondent similarly engaged in a series of texts with his landlord and the landlord's wife in connection with a pending eviction notice against Respondent. In those texts, he made abusive and derogatory comments to and about the landlord and his wife, which had no other purpose than to harass and embarrass them.

As alleged in Count III, Respondent neglected a child custody matter and ignored his client's requests for information about the matter. The client eventually hired another attorney. Despite failing to perform the legal work that Respondent had agreed to perform, as of the date the Complaint was filed, Respondent had not refunded the $1,500 fee the client had paid.

Respondent's Failure to Participate in his Proceedings

After receiving the Complaint, Respondent failed to file an answer to it, which resulted in the Administrator filing a Motion to Deem the Allegations of the Complaint Admitted Pursuant to Commission Rule 236. Then, after appearing *pro se* at the initial pre-hearing conference on August 5, 2020, and being granted additional time to answer the Complaint, Respondent still did not file an answer, respond to the Administrator's continued motion, or attend a second pre-hearing conference on August 26, 2020, at which the Administrator sought and obtained a ruling that the allegations of the Complaint were deemed admitted.[3]

On October 29, 2020, the Hearing Board held a videoconference hearing, of which Respondent received notice but at which he did not appear. The hearing proceeded in his absence as a default proceeding, and solely on the issue of sanction, as provided in Commission Rule 236.

Dr. Jeckel's Testimony

At the October 29 hearing, the Administrator presented the testimony of Laurence L. Jeckel, M.D., a psychiatrist who examined Respondent at the Administrator's request. Dr. Jeckel diagnosed Respondent with major depressive disorder, single episode, severe, with intense anxiety; probable alcohol use disorder, severe; and unspecified personality disorder. Although Dr. Jeckel asked Respondent to return for further consultation, Respondent failed to do so. In Dr. Jeckel's opinion, Respondent is incapacitated and seriously impaired from practicing law effectively due to his mental health issues, and is in need of intensive treatment.

Hearing Board's Report and Recommendation

On November 17, 2020, the Hearing Board issued a three-page Report and Recommendation, finding that Respondent had engaged in the charged misconduct and thereby violated Rules 1.3, 1.4(a)(3), 1.4(a)(4), 1.9(c)(2), 1.16(d), and 4.4(a). It found Respondent's failure

to file an answer and appear for his disciplinary proceeding to be seriously aggravating factors. It also accepted Dr. Jeckel's opinion that Respondent was incapacitated and seriously impaired from practicing law effectively.

Based on these findings, the Hearing Board recommended that Respondent be suspended for one year and until further order, and until he made restitution of $1,500 to his client in the neglected matter.

Further Relevant Proceedings

On December 10, 2020, the Administrator filed a Petition for Interim Suspension Pursuant to Supreme Court Rule 774, asking the Court to issue a rule to show cause why Respondent should not be suspended from the practice of law effective immediately and until further order of the Court. Respondent did not respond. On January 25, 2021, the Supreme Court issued an order enforcing the rule to show cause and suspending Respondent effective immediately and until further order of the Court.

On March 12, 2021, the Review Board held a videoconference oral argument on this matter, with Respondent attending by telephone. During his argument, Respondent claimed that he attempted to attend the October 29, 2020 hearing, but he was unsuccessful because of alleged technology problems. He cited two emails that he sent to the Administrator's hearing counsel on November 1 and 2, 2020, regarding his unsuccessful attempt to log in to the videoconference hearing. Respondent further stated that he sent a check for $1,500 to the Administrator's hearing counsel and asked her to forward it to his former client. The Administrator's appellate counsel confirmed that, at some point after hearing, Respondent sent a $1,500 check to the ARDC, and that the ARDC forwarded the check to the former client, who acknowledged receipt of it.

ANALYSIS

Before we address the issue of sanctions, we must address three ancillary issues that have arisen on appeal.

First, in support of his request for a lesser sanction, Respondent cites purported facts that are not part of the record on appeal. For example, he refers to his deposition testimony about personal issues that occurred around the time of his misconduct. He provides alleged details about his text communications with his former client's girlfriend and with his landlord and the landlord's wife, attempting to add context to those communications. He also refers to some of his public-service and volunteer activities, presumably as mitigating evidence. However, none of these purported facts were elicited at the October 29, 2020 hearing because Respondent failed to appear. Accordingly, they are not part of the record, and this Board may not consider them on appeal. *See, e.g., In re Coyle*, 2015PR00041, M.R. 28670 (May 18, 2017) (finding that Review Board could not consider respondent's claim that he was suffering from dementia because "that claim, and any evidence in support of it, were not presented to the Hearing Board and did not become part of the record on appeal"); *In re Paden*, 04 CH 116 (Review Bd., Oct. 5, 2007), at 10-11, *petition for leave to file exceptions denied*, M.R. 22089 (May 19, 2008) (attorney who failed to attend her disciplinary hearing could not challenge evidence on appeal, because it was admitted without objection at hearing); *In re Hubka*, 95 CH 205 (Review Bd., July 12, 1996), at 10, *approved and confirmed*, M.R. 12876 (Nov. 26, 1996) (giving "no weight" to Respondent's explanation for his delay in paying restitution, which he offered on appeal as mitigation, because it was "outside the record presented to the Hearing Board").

Second, Respondent argues that he failed to attend the October 29 hearing because of technology problems, and specifically, that he attempted to join the videoconference but "was

denied by the internet host." (Appellant's Br. at 5.) He acknowledged that, before the hearing, the Administrator's counsel told him that the hearing would proceed by video, and when that did not work, he did not know what to do; however, he later emailed the ARDC. (*Id*.)

Respondent raises a novel issue arising from the necessity of holding hearings by videoconference. If Respondent's claim was true, proceeding to a prove-up on a default because of technology difficulties could raise due process considerations. Significantly, however, nothing in the record contemporaneously supports Respondent's claim. Respondent failed to take any documented action on the October 29, 2020 hearing date, and he failed to move to vacate the default or supplement the record at that time with evidence of his alleged technical difficulties. His belatedly-written November 1 and 2, 2020 emails only underscore his tepid response to these entire ARDC proceedings.[4] Undoubtedly, attorneys who understand and take seriously their obligation to appear at a disciplinary hearing would take immediate action, such as calling the ARDC's general number or emailing Administrator's counsel, as soon as they discovered they could not access the videoconference platform. Respondent's failure to take such remedial action until two and one-half days after his scheduled hearing is most telling.

Third, we note that, throughout Respondent's disciplinary proceedings, the Administrator has taken the position that Respondent should be required to make restitution in the amount of $1,500 to his former client whose fee he kept but did not earn. On appeal, however, Respondent informed this panel that, just prior to his disciplinary hearing, he sent a $1,500 check to the Administrator's counsel to give to his former client, as a refund for the fee she paid and which he did not earn. The Administrator's counsel did not mention this information in the Petition for Interim Suspension filed with the Court on December 10, 2020, to which he attached the Hearing Board's Report and Recommendation in which the Hearing Board recommended that

restitution be required, nor in the Appellee's Brief filed on February 18, 2021, in which he continued to request that restitution be included in the sanction recommendation. However, the Administrator's counsel acknowledged during oral argument that Respondent sent a $1,500 check to the ARDC; that the ARDC forwarded the check to the former client; and that the former client acknowledged receiving it.

Based on the information that we received during the appellate process and which the Hearing Board did not have, we depart from its determination that restitution is required, and find that Respondent has already satisfied restitution by tendering a $1,500 check to the Administrator for Respondent's former client, who acknowledged receiving the check. Therefore, restitution is not included as part of our sanction recommendation.

SANCTION RECOMMENDATION

The Hearing Board recommended that Respondent be suspended for one year and until further order. Respondent argues that the Hearing Board's recommended sanction is disproportionately harsh in light of his conduct and legal precedent. He asks for a minimal sanction – no more than a suspension of 60 days. The Administrator, in turn, argues that a suspension of one year and until further order is warranted by Respondent's misconduct, the aggravating factors, and Respondent's mental health issues, and is consistent with precedent.

In making our own recommendation, we consider the nature of the proved misconduct, and any aggravating and mitigating circumstances shown by the evidence, *In re Gorecki*, 208 Ill. 2d 350, 360-61, 802 N.E.2d 1194, 1200 (2003), while keeping in mind that the purpose of discipline is not to punish the attorney but rather to protect the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach. *In re Timpone*, 157 Ill. 2d 178, 197, 623 N.E.2d 300 (1993). We also consider the deterrent value of

attorney discipline and "the need to impress upon others the significant repercussions of errors such as those committed by" Respondent. *In re Discipio*, 163 Ill. 2d 515, 528, 645 N.E.2d 906 (1994) (citing *In re Imming*, 131 Ill. 2d 239, 261, 545 N.E.2d 715 (1989)). Finally, we seek to recommend a sanction that is consistent with sanctions imposed in similar cases, *Timpone*, 157 Ill. 2d at 197, while also considering the unique circumstances of each case. *In re Witt*, 145 Ill. 2d 380, 398, 583 N.E.2d 526 (1991).

We find that relevant authority supports a one-year suspension for an attorney who made improper and abusive comments to others, neglected a client matter, failed to communicate with his client, engaged in other misconduct, and, in aggravation, failed to answer the complaint and appear at his hearing. *See, e.g., In re Cronin*, 08 CH 30 (Hearing Bd., Nov. 21, 2008), *approved and confirmed*, M.R. 22880 (March 16, 2009) (suspension of one year and until further order where attorney neglected two client matters, failed to respond to clients' requests for information, failed to return an unearned fee, and made false statements to client; and where attorney failed to answer complaint or appear for his hearing); *In re Gershon*, 06 CH 14 (Hearing Bd., Oct. 12, 2006), *approved and confirmed*, M.R. 21295 (Jan. 12, 2007) (suspension of one year and until further order where attorney neglected one client matter, failed to respond to client's request for information, failed to return an unearned fee, and failed to respond to Administrator's request for information about the matter; and where, in aggravation, attorney failed to participate in his disciplinary proceedings and had previously engaged in similar misconduct); *In re Vari*, 04 CH 100 (Hearing Bd. Report June 8, 2005), *approved and confirmed*, M.R. 20330 (Sept. 27, 2005) (suspension of one year and until further order where attorney neglected two matters, failed to return unearned fees in both matters, failed to respond to the Administrator's requests for information about those two matters, and failed to participate in his disciplinary proceedings).

Respondent's misconduct is comparable to that in the foregoing cases wherein the attorneys were suspended for one year and until further order. Respondent neglected one matter and failed to return the unearned fee until disciplinary proceedings were pending. He also engaged in the additional misconduct of sending abusive and demeaning texts to multiple individuals.

In addition, while Respondent attended one pre-hearing conference and provided deposition testimony, he did not answer the complaint or appear for his disciplinary hearing. Thus, as in the foregoing cases, he deprived the Hearing Board of an opportunity to determine his fitness to practice law. *See In re Ding*, 2018PR00069 (Review Bd., Oct. 2, 2019), at 9-10, *petition for leave to file exceptions denied*, M.R. 30117 (Jan. 17, 2020) (an attorney who fails to appear before the Hearing Board "deprives the trier of fact of the ability to determine whether he is fit to practice law," which warrants a suspension until further order).

Moreover, regardless of Respondent's failure to appear at his hearing, Dr. Jeckel's opinion alone supports a suspension until further order. In *In re Dees*, 2014PR00133 (Review Bd., Sept. 15, 2016), *approved and confirmed*, M.R. 28383 (Jan. 13, 2017), this Board noted that the Court has consistently imposed a suspension until further order when an attorney's misconduct is related to a mental health condition or drug or alcohol addiction, and the attorney has not proven that he has successfully completed a treatment program or is unlikely to harm the public during a period of treatment. In this matter, as in *Dees*, Respondent presented no evidence that he is currently in treatment for the mental health issues identified by Dr. Jeckel. Thus, we have no assurance that he is unlikely to harm the public if allowed to resume practicing law.

Accordingly, we agree with the Hearing Board's recommendation that Respondent be suspended for one year and until further order of the Court. We find this sanction to be commensurate with Respondent's misconduct, consistent with discipline that has been imposed

for comparable misconduct, and necessary to serve the goals of attorney discipline and deter others from committing similar misconduct.

CONCLUSION

For the foregoing reasons, we recommend that Respondent be suspended for one year and until further order of the Court.

Respectfully submitted,

Charles E. Pinkston, Jr.
Bradley N. Pollock
Scott J. Szala

CERTIFICATION

I, Kenneth G. Jablonski, Clerk of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and keeper of the records, hereby certifies that the foregoing is a true copy of the Report and Recommendation of the Review Board, approved by each Panel member, entered in the above entitled cause of record filed in my office on May 27, 2021.

/s/ Kenneth G. Jablonski
Kenneth G. Jablonski, Clerk of the
Attorney Registration and Disciplinary
Commission of the Supreme Court of Illinois

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[1] Respondent participated in an earlier pre-hearing conference and provided deposition testimony.

[2] Since the allegations in the complaint were deemed admitted under Commission Rule 236 (as addressed below), the facts forming the basis of the misconduct findings against Respondent are not at issue on appeal.

[3] Commission Rule 236 provides, in relevant part:

> When the respondent fails to answer the complaint … upon motion of the Administrator and notice to the respondent, all factual allegations shall be deemed admitted, and no further proof shall be required. … At any hearing in which the allegations of the complaint have been deemed admitted, the respondent and Administrator shall be limited to presenting evidence of aggravating and mitigating

> factors and arguments regarding the form and amount of discipline to be imposed … .

Under Commission Rule 236, Respondent had a right to file a motion to vacate the default order and to file an answer, but he did not do so.

[4] On March 30, 2021, the Review Board panel granted the Administrator's Motion to Strike Respondent's "Supplement," the latter filed without leave of the Board and cumulative of the oral statements made by Respondent in the March 13 hearing (which, for review purposes, this panel accepts).

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of: **BRIAN DAVID PONDENIS,** Respondent-Appellant, No. 6291212.	Commission No. 2020PR00048

PROOF OF SERVICE
OF THE REPORT AND RECOMMENDATION
OF THE REVIEW BOARD

I, Michelle M. Thome, hereby certify that I served a copy of the Report and Recommendation of the Review Board on Respondent-Appellant listed at the address shown below by e-mail service on May 27, 2021, at or before 5:00 p.m. At the same time, a copy was sent to Counsel for the Administrator-Appellee by e-mail service.

Brian David Pondenis
Respondent-Appellant
pondenis@gmail.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

Kenneth G. Jablonski,
Clerk

/s/ Michelle M. Thome
By: Michelle M. Thome
Senior Deputy Clerk

FILED

May 27, 2021

ARDC CLERK