

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-310
District Docket No. XIV-2009-0376E

IN THE MATTER OF
KATHLEEN F. GAHLES
AN ATTORNEY AT LAW

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Decision

Decided: February 28, 2011

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

This matter came before us on a certification of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The complaint charged respondent with violating RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) and RPC 8.4(d) (conduct prejudicial to the administration of justice) for failure to file an affidavit of compliance, required by R. 1:20-20, following her temporary suspension.

Respondent filed a motion to vacate the default, to which the OAE objected. For the reasons expressed below, we determine to deny respondent's motion and to impose a censure.

Respondent was admitted to the New Jersey bar in 1982. In 1999, she was reprimanded for gross neglect and lack of diligence in an estate matter. Specifically, she failed to file inheritance tax returns, causing the estate to be assessed penalties; she refused to resign as executrix, necessitating court action; and she failed to promptly comply with a court order directing her to submit an informal accounting of the estate's assets. Numerous personal mitigating factors were considered, as well as respondent's lack of experience in estate matters. In re Gahles, 157 N.J. 639 (1999).

In 2005, respondent was admonished for failure to treat with courtesy and consideration all persons involved in the legal process. During oral argument in a divorce matter, she made degrading statements about an opposing party, her client's wife, with no substantial purpose other than to embarrass the wife. In re Gahles, 182 N.J. 311 (2005).

By order dated September 23, 2008, respondent was temporarily suspended, effective October 23, 2008, for her failure to pay a fee arbitration award and a \$500 sanction to

the Disciplinary Oversight Committee (DOC). She remains suspended to date. In re Gahles, N.J. (2008).

On November 17, 2010, respondent filed a motion to vacate the default. She claimed that she did not receive any of the OAE letters (presumably requesting her to file an affidavit of compliance and serving the complaint); that the signature on the certified mail receipt for the letters sent by the OAE was not hers; that, because of her inability to navigate the stairs at her home due to her health problems, either her daughter or son-in-law retrieved the mail; that her son-in-law either threw the mail away or placed it in "a pile of junk;" and that it was in that "junk pile" that she found "the latest letter," the Office of Board Counsel (OBC) letter dated October 4, 2010, about the deadline for her to file a motion to vacate the default.

Respondent claimed that, on an unspecified date, she spoke to a female OAE "investigator," who stated that "someone" was sending her an "affidavit." When she heard nothing further, she assumed that the matter had been resolved and then forgot about it.

Respondent claimed further that, in 2007, she no longer had any clients and that, as of January 2, 2008, she was working full-time for a New York judge. Therefore, she no longer maintained a law practice in New Jersey. Because, she claimed,

she had no clients at the time of her suspension, she did not have to notify any clients or return any client files. She could not recall when, but at some point, she closed her business and escrow accounts. Thus, respondent argued, "in all other ways [she has been] in compliance with the Rule."

According to respondent, over a period of time, she developed serious medical problems that impaired her ability to walk or climb stairs. After consulting with various doctors, in November, presumably 2008, her condition deteriorated. She was informed that she was "a hair away from becoming paralyzed from the neck down and immediate surgery was necessary." On December 10, 2008, she had a "laminectomy and reduction at C3-4, f-6." Afterwards, from May to October 2009, she stayed at her sister's house "at the beach."

The New York judge terminated her employment when, because of her medical condition, she was unable to return to work by December 23, 2008.

Respondent did not recall receiving the Court's order of temporary suspension because, after her surgery, she was in a great deal of pain, took pain killers for months, and was "very foggy about that time period." She maintained that she is still "fuzzy" about things in general, probably because of the surgery and depression and also because her memory "isn't what it used

to be." She added that she has not fully recovered from the surgery, can barely walk, only for short distances, and only with the aid of a cane or walker; her "COPD" further limits her activity.

According to respondent, she has not practiced law since 2007, but would like to practice on a part-time basis, if she is able to resolve this matter. However, she does not believe that her medical condition will permit her to do so. In addition, she claimed, her finances prohibit her from paying the \$500 Court ordered sanction or the "misguided fee arbitration award."

By letter dated November 24, 2010, the OAE opposed respondent's motion to vacate the default. The OAE argued that respondent failed to meet the two-pronged test, which requires that a respondent provide a reasonable basis for failing to file a timely answer to the ethics complaint and meritorious defenses to the charges.

As to the first prong, the OAE noted that the complaint was served on respondent at her home, the same address listed by her as her address on her motion to us. The OAE also noted respondent's admission that her family received mail addressed to her at her home. Therefore, the OAE concluded that its service was proper.

As to the second prong of the test, the OAE argued that respondent had failed to provide a meritorious defense to the allegations of the complaint. The OAE characterized as not credible respondent's assertions that she did not recall receiving the Court's order requiring her to file the affidavit of compliance with R. 1:20-20 and that she believed that someone from the OAE would be sending her an affidavit. The OAE noted that respondent had admitted speaking to someone from the OAE, but still had failed to file the required affidavit.

The OAE stressed that remanding the matter to allow respondent to file an answer and participate in a hearing is unwarranted and "risks a waste of disciplinary resources for no good cause."

We agree with the OAE. As the OAE noted, to succeed on such a motion, a respondent must satisfy a two-pronged test: (1) explain why the respondent failed to file an answer to the ethics complaint, and (2) provide specific, meritorious defenses to the ethics charges. Respondent's proffer failed as to both prongs.

As to the first prong of the test, respondent's claim that she did not receive the complaint strains credulity. The complaint was sent, on May 28, 2010, to the same address provided by respondent on her motion to vacate the default; this

same address was used by OBC staff for service of the notice of default. Her motion is proof that she received the notice of default at that address.

Nevertheless, respondent claimed that her son-in-law either disposed of her mail or put it in a pile of junk and that she, therefore, never received the complaint. Even if we were to accept as true respondent's assertions about her non-receipt of mail from the OAE, thus satisfying the first prong of the test, she, nevertheless, failed to satisfy the second prong of the test. Respondent did not assert a meritorious defense.

Specifically, respondent claimed that she did not recall receiving the Court's order requiring her compliance with the provisions of R. 1:20-20. The Supreme Court Clerk's standard office procedure is, on the date an order is filed, to send it to a respondent by facsimile (fax) transmission, regular and certified mail, and to publish it in the New Jersey Law Journal. The order was filed on September 23, 2008. Our records indicate that the Clerk's office mailed a copy of the order to respondent's Neshanic Station address on September 23, 2008. In addition, respondent herself admitted that she spoke with an OAE representative on May 21, 2010, at which time she was reminded of her responsibility to file the required affidavit. At her request, the OAE faxed to her copies of its September 4, 2009

letter, a copy of R. 1:20-20, and the Court's order of September 23, 2008. Respondent still did not file the required affidavit. If, as she claims, she did not receive the requested faxed materials, it was incumbent upon her to pursue the matter further with the OAE.

Respondent also claimed that she did not recall receiving the Court's order because, after her surgery, her memory was foggy/fuzzy. As indicated previously, however, the Court's order was filed on September 23, 2008, almost two months before her December 2008 surgery.

Respondent also claimed that, because she had no clients since sometime in 2007 and had closed her attorney bank accounts on an unknown date, in "all other ways" she was in compliance with the rule. Respondent is mistaken. The fact that she no longer had a New Jersey law practice did not absolve her of her obligation to file the affidavit of compliance with R. 1:20-20.

In view of the foregoing, we determine to deny her motion to vacate the default and to proceed with our review of this matter as a default.

Service of process was proper. On May 28, 2010, the OAE mailed copies of the complaint, by certified and regular mail, to respondent's last known address listed in the New Jersey Lawyers' Fund for Client Protection (CPF) records, 121 Fairview

Drive, Neshanic Station, New Jersey 08853. The certified mail receipt indicated delivery on June 1, 2010. The signature of the recipient is illegible. The regular mail was not returned.

Respondent did not file an answer within the allotted time. Therefore, on August 2, 2010, the OAE sent a second letter by regular and certified mail, to the same address. The letter informed respondent that, if she did not file an answer within five days, 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 certified mail was returned stamped "Unclaimed." The regular mail was not returned. As of the date of the certification of the record, respondent had not filed an answer to the ethics complaint.

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

As noted above, the Court temporarily suspended respondent, effective October 23, 2008, for her failure to satisfy a fee arbitration award and to pay a \$500 sanction to the DOC.

Respondent remains suspended to date. The CPF records show that, prior to her suspension, respondent maintained her law office at her home, the address to which the complaint was mailed.

The Court's order of suspension also directed respondent to comply with R. 1:20-20, which, among other things, required her, within thirty days of the date of the order, to file with the OAE Director "the original of a detailed affidavit specifying by correlatively numbered paragraphs how the disciplined attorney has complied with each of the provisions of this rule and the Supreme Court's order." Respondent failed to comply with that order.

By letter dated September 4, 2009, sent by certified and regular mail addressed to her home, the OAE notified respondent of her responsibility to file the affidavit required by R. 1:20-20. The letter requested that she reply by September 18, 2009. For respondent's convenience, the OAE enclosed a copy of R. 1:20-20.

The certified mail receipt indicated delivery of the letter on September 8, 2009. The signature of the recipient was illegible. The regular mail was not returned.

Respondent neither replied to the OAE's letter nor did she file the required affidavit.

On May 21, 2010, an OAE representative telephoned respondent about her failure to file the affidavit. During that conversation, respondent requested and was provided, via fax, copies of the OAE's September 4, 2009 letter, a copy of the provisions of R. 1:20-20, and the order of suspension. The fax transmittal sheet instructed respondent to file the affidavit immediately by both fax and regular mail to avoid having a complaint filed against her. It also instructed her to call the OAE if she had any questions.

As of the date of the complaint, May 26, 2010, respondent had neither contacted the OAE nor filed the required affidavit.

According to the complaint, respondent "willfully violated the Supreme Court's order and . . . failed to take the steps required of all suspended or disbarred attorneys, including notifying clients and adversaries of the suspension and providing clients with their files."

The OAE's memorandum of September 1, 2010, attached to the certification of the record, urged us to impose a three-month suspension for respondent's willful failure to timely file the affidavit required by R. 1:20-20.

We find that respondent violated RPC 8.1(b) and RPC 8.4(d) by failing to file the required affidavit of compliance, despite the OAE's requests for her to do so and despite the OAE

supplying her with documentation to assist her in preparing the affidavit: copies of the Court's order, the OAE's September 4, 2009 letter, and R. 1:20-20.

The threshold measure of discipline imposed for an attorney's failure to file an R. 1:20-20(b)(15) affidavit is a reprimand. In re Girdler, 179 N.J. 227 (2004); In the Matter of Richard B. Girdler, DRB 03-278 (November 20, 2003) (slip op. at 6). The actual discipline imposed may be different, however, if the record demonstrates mitigating or aggravating circumstances. Ibid. Examples of aggravating factors include the attorney's failure to respond to the OAE's specific request that the affidavit be filed, the attorney's failure to answer the complaint, and the existence of a disciplinary history. Ibid.

In the following cases, discipline greater than a reprimand was imposed: In re Battaqlia, 182 N.J. 590 (2006) (three-month suspension imposed in a non-default matter; the suspension was made retroactive to the date that the attorney filed the affidavit of compliance; the attorney's ethics history included two concurrent three-month suspensions and a temporary suspension); In re Raines, 181 N.J. 537 (2004) (three-month suspension for attorney whose ethics history included a private reprimand, a three-month suspension, a six-month suspension, and a temporary suspension for failure to comply

with a previous Court order); In re Girdler, 179 N.J. 227 (2004) (three-month suspension in a default matter where the attorney failed to produce the affidavit after prodding by the OAE and after agreeing to do so; the attorney also failed to file an answer to the ethics complaint; the attorney's disciplinary history consisted of a public reprimand, a private reprimand, and a three-month suspension in a default matter); In re Sharma, 203 N.J. 428 (2010) (six-month suspension in a default; aggravating factors included the default nature of the proceedings, the attorney's ethics history (censure for misconduct in two default matters and a three-month suspension), his failure to comply with the OAE's request that he file the affidavit in compliance with R. 1:20-20, and his repeated failure to cooperate with disciplinary authorities); In re Le Blanc, 202 N.J. 129 (2010) (six-month suspension imposed in a default matter where the attorney's ethics history included a censure, a reprimand, and a three-month suspension; two of the prior disciplinary matters proceeded on a default basis); In re Wood, 193 N.J. 487 (2008) (one-year suspension; attorney failed to file an R. 1:20-20 affidavit after a three-month suspension; the attorney also failed to comply with the OAE's request that he do so; the attorney had an extensive disciplinary history: an admonition, a reprimand, a censure, and a three-month

suspension; two of those matters proceeded on a default basis); and In re McClure, 182 N.J. 312 (2005) (one-year suspension; the attorney's disciplinary history consisted of an admonition and two concurrent six-month suspensions, one of which was a default; the attorney also failed to abide by his promise to the OAE that he would file the affidavit).

Respondent's ethics history is not as serious as that of any of the attorneys' cited above. Her case is most similar to the Girdler matter (three-month suspension), which also proceeded as a default and, in which, even after prodding by the OAE, the attorney still failed to file the affidavit and an answer to the ethics complaint. Girdler had been privately reprimanded, reprimanded, and suspended for three months in another default matter.

Here, respondent's ethics history consists of an admonition and a reprimand, a disciplinary record not as serious as Girdler's. The threshold discipline (a reprimand) would be insufficient, however, because respondent failed to file the affidavit even after the OAE specifically requested her to do so and faxed the pertinent documents to her to help her draft it. In addition, the excuses set forth in her motion/certification lacked credibility and were not supported by any documentation.

We, therefore, find that a censure is the appropriate discipline in this case.

One more point deserves mention. Respondent asserted that she is limited by her physical disability and that her memory "is not what it used to be." Because we recognize that respondent's temporary suspension could be vacated immediately upon her compliance with the fee arbitration award and payment of sanctions to the DOC, we determine to require respondent to provide to the OAE, within ninety days of the date of the Court order disciplining her in this matter, proof of fitness to practice law, as attested by an OAE-approved mental health professional. We also determine that, upon reinstatement, respondent should practice under the supervision of an OAE-approved proctor for a two-year period.

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
Louis Pashman, Chair

By: 
for Julianne K. DeCore
Chief Counsel

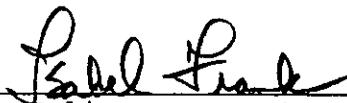
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kathleen F. Gahles
Docket No. DRB 10-310

Decided: February 28, 2011

Disposition: Censure

Members	Disbar	Censure	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				

By 
Julianne K. DeCore
Chief Counsel