

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-165
District Docket No. XIV-2015-0199E

IN THE MATTER OF
ANDREY V. ZIELYK
AN ATTORNEY AT LAW

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Decision

Decided: January 11, 2017

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

This matter was before us on a certification of default filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with having violated RPC 8.1(b) (failure to cooperate with disciplinary authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice). The OAE submitted a memorandum recommending a three-month suspension.

For the reasons set forth below, we find that respondent violated the charged RPCs. Given the default nature of this proceeding, we determined to impose a censure on respondent for his conduct.

Respondent was admitted to the New Jersey bar in 1986. At the relevant times, he maintained an office for the practice of law in Parsippany.

On June 26, 2013, respondent received an admonition for lack of diligence (RPC 1.3), failure to communicate (RPC 1.4(b)), and failure to set forth, in writing, the rate or basis of his legal fee (RPC 1.5(b)) in an estate matter. In the Matter of Andrey V. Zielyk, DRB 13-023 (June 26, 2013).

On October 29, 2014, the Court ordered respondent to appear for an audit at the OAE and provide certain records and information that the OAE had requested previously, within thirty day of the filing of the Order. In re Zielyk, ___ N.J. ___ (2014) (unpublished Order). On February 10, 2015, the Court temporarily suspended respondent for his failure to comply with the Order. In re Zielyk, 220 N.J. 466 (2015). He remains suspended to date.

Finally, on September 8, 2016, respondent was censured, in a default matter, for his violation of RPC 8.1(b) and R. 1:20-3(g)(3), arising from his failure to appear for the audit and to provide the requested records and information, as ordered by the Court. In re Zielyk, 226 N.J. 472 (2016).

Service of process was proper in this matter. On February 1, 2016, the OAE sent a copy of the formal ethics complaint to

respondent's last known home address, by regular and certified mail, return receipt requested. The receipt for the certified letter was returned to the OAE marked "unclaimed." The letter sent by regular mail was not returned.

Respondent was served by publication in the following newspapers on the following dates: Morris County's Daily Record, on February 2, 2016; Essex County's Star-Ledger, on February 3, 2016; and the New Jersey Law Journal, on March 7, 2016.

As of May 2, 2016, respondent had not filed an answer to the complaint. Accordingly, on that date, the OAE certified this matter to us as a default.

As stated above, respondent was temporarily suspended on February 10, 2015. According to the formal ethics complaint, the Order of temporary suspension required respondent to comply with R. 1:20-20, which provides that respondent "shall within 30 days after the date of the order of suspension (regardless of the effective date thereof) file with the 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 this provision of the Order.

On August 4, 2015, the OAE sent a letter to respondent, by regular and certified mail, return receipt requested, to his

last known office address and his home address listed with the Lawyers' Fund for Client Protection, informing him of his responsibility to file the affidavit. The letter requested a reply by August 18, 2015.

The letters sent to respondent's office address were returned to the OAE. The certified letter was marked "Vacant Unable To Forward," and the letter sent by regular mail was marked "Not Deliverable As Addressed Unable To Forward."

The certified letter sent to respondent's home address was returned to the OAE marked "Not Deliverable As Addressed Unable To Forward." The letter sent by regular mail was not returned to the OAE.

Thereafter, the OAE obtained a new home address for respondent from a national records search of the CLEAR database available through Thomson Reuters. On September 10, 2015, the OAE sent another letter to respondent, by regular and certified mail, return receipt requested, at this new home address, informing him of his responsibility to file the affidavit. The letter requested a reply by September 24, 2015.

Both letters were returned to the OAE. The certified letter was marked "Unclaimed." The letter sent by regular mail was marked "Insufficient Address Unable To Forward." The envelope

contained a hand-written note stating "Does Not Live Here Do Not Know Forwarding Address."

Since then, the OAE has been unsuccessful in its attempts to determine from the United States Post Office whether respondent still receives mail at this address. The OAE has located no other address for respondent.

Based on the above facts, the OAE charged respondent with having violated RPC 8.1(b) and RPC 8.4(d).

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

Rule 1:20-20(b)(15) requires a suspended attorney, within thirty days of the Order of suspension, to "file with the Director [of the OAE] 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." In the absence of an extension by the Director of the OAE, failure to file an affidavit of compliance pursuant to R. 1:20-20(b)(15) within the time prescribed "constitute[s] a violation of RPC 8.1(b) . . . and RPC 8.4(d)." R. 1:20-20(c).

The threshold measure of discipline to be imposed for an attorney's failure to file a R. 1:20-20 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 extent of the disciplinary history. Ibid.

In Girdler, the attorney received a three-month suspension, in a default matter, for his failure to comply with R. 1:20-20(e)(15). Specifically, after prodding by the OAE, he failed to produce the affidavit of compliance, even though he had agreed to do so. The attorney's disciplinary history consisted of a public reprimand, a private reprimand, and a three-month suspension in a default matter.

Since Girdler, the discipline imposed on attorneys in default cases who have failed to comply with R. 1:20-20, and whose disciplinary history consisted only of a temporary suspension and/or discipline short of a fixed suspension, has been a censure. See, e.g., In re Kinnard, 220 N.J. 488 (2015) (attorney failed to file affidavit after the Court had

temporarily suspended him for his failure to pay the disciplinary costs associated with a 2008 admonition; in addition to the attorney's disciplinary history and the default, he also ignored the OAE's request that he file the affidavit); In re Goodwin, 220 N.J. 487 (2015) (attorney failed to file affidavit after the Court temporarily suspended him for his failure to pay the disciplinary costs associated with a 2010 reprimand; he also ignored the OAE's request that he file the affidavit); In re Boyman, 217 N.J. 360 (2014) (attorney did not file the R. 1:20-20 affidavit after his temporary suspension for failure to pay administrative costs associated with his 2010 censure); and In re Gahles, 205 N.J. 471 (2011) (attorney did not file the required affidavit following a temporary suspension for failure to comply with a fee arbitration determination; prior reprimand and admonition).

Here, respondent did not answer the complaint, has a prior censure, admonition, and a temporary suspension on his ethics record, and failed to file an answer to the complaint. In each of the above cases, the attorneys also defaulted and did not have a serious ethics history. Some of them also disregarded the

OAE's specific efforts to obtain compliance with the rules governing suspended attorneys.¹ They all received censures.

In support of its recommendation of a three-month suspension, the OAE cited In re Girdler, *supra*, and In re Raines, 181 N.J. 537 (2004). However, the attorney in Girdler had an ethics history that included a public reprimand, a private reprimand, and a three-month suspension. The disciplinary history of the attorney in Raines included a private reprimand, a three-month suspension, a six-month suspension, and a temporary suspension.

Moreover, two attorneys with prior three-month suspensions also received only a censure for their failure to comply with R. 1:20-20. In re Powell, 219 N.J. 128 (2014) (censure imposed on attorney in a non-default case who, following a three-month suspension, filed the affidavit, but did not fully comply with the requirements of R. 1:20-20, violations of RPC 8.1(b) and RPC 8.4(d)), and In re Sirkin, 208 N.J. 432 (2011) (in a default, censure imposed on attorney who failed to file affidavit of compliance with R. 1:20-20 after he received a three-month suspension; an aggravating circumstance was the fact that the

¹ Because the OAE was not able to identify a current address for respondent, we cannot conclude that he received the OAE's request to file the affidavit and, therefore, cannot conclude that respondent ignored that request.

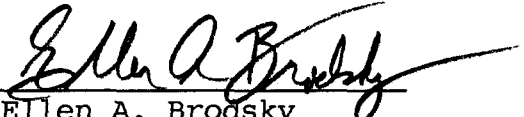
attorney ignored the OAE's reminder that the affidavit was due and its request that he file it immediately).

Thus, in our view, because respondent has only a prior censure, admonition, and temporary suspension, a censure is warranted.

Member Gallipoli voted to recommend respondent's disbarment and filed a separate dissent. Vice-Chair Baugh 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

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Disposition: Censure

Members	Censure	Disbar	Did not participate
Frost	X		
Baugh			X
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	7	1	1


Ellen A. Brodsky
Chief Counsel