

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-229
District Docket No. XIV-2010-0202E

IN THE MATTER OF :
:
:
KENNETH PAUL SIRKIN :
:
:
AN ATTORNEY AT LAW :
:
:

Decision

Decided: October 26, 2011

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 complaint alleged that respondent failed to file
an affidavit of compliance with R. 1:20-20, following a three-
month suspension from the practice of law. The 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 urged us to impose a consecutive three-month suspension. We determine that a censure is the more appropriate level of discipline.

Respondent was admitted to the New Jersey bar in 1999. According to the attorney registration records, both his residence and his law office are in Boynton Beach, Florida.

In 2009, respondent received a three-month suspension for lack of diligence, gross neglect, failure to communicate with the client, and failure to cooperate with disciplinary authorities. Specifically, several years after he settled a motor vehicle case for the full amount of the policy (apparently, \$47,000) and after the defendant deposited the funds with the court, he did not sign the release and other documents incidental to the settlement and did not obtain the funds for his client, despite their obvious availability. The client's attempts to communicate with him were unavailing. He also did not cooperate with the investigation of the grievance that the client filed against him. In this regard, we found respondent's conduct particularly troubling:

Despite respondent's several assurances to the investigator that he would reply to the grievance and send him a copy of the file (even specifying the date and time of the delivery), he never did so. We find that his conduct in this context was worse than

that of attorneys who do not participate in the investigative phase of a grievance because of panic or a head-in-the-sand attitude. This respondent virtually strung the investigator along, stifled a full investigation of the grievance, and then made a conscious decision not to answer the formal ethics complaint.

[In the Matter of Kenneth P. Sirkin, DRB 09-148 (August 12, 2009) (slip op. at 6).]

Service of process was proper in this matter. On January 28, 2011, the OAE sent a copy of the complaint, by regular and certified mail, to respondent's home and office addresses listed in the attorney registration records, 4055 Artesa Drive, Boynton Beach, Florida 33426 and 2500 Quantum Lakes Drive, Suite 230, Boynton Beach, Florida 33426, respectively. The OAE also sent a copy of the complaint, by regular and certified mail, to an additional address obtained by the OAE, 8619 Daystar Ridge Point, Boynton Beach, Florida 33473.

The regular and certified mail sent to the Quantum Lakes Drive was returned to the OAE as "not deliverable as addressed." The certified mail sent to the Artesa Drive address was returned as unclaimed. The USPS website shows that the certified mail was undeliverable to that address, forwarded to an address with a 33473 zip code, and then unclaimed. The regular mail was not returned.

The certified mail to the Daystar Ridge Point address was returned as unclaimed. The regular mail was not returned.

On March 7, 2011, the OAE sent a letter, by regular and certified mail, to the Daystar Ridge Point address. The letter advised respondent that, unless he filed an answer within five days, the allegations of the complaint would be deemed admitted, pursuant to R. 1:20-4(f), and the record would be certified directly to the Board for the imposition of discipline. The letter served to amend the complaint to charge respondent with a willful violation of RPC 8.1(b) for his failure to file an answer.

The certified mail was returned to the OAE as unclaimed. The regular mail was not returned. Respondent did not file an answer to the complaint.

We now turn to the allegations of the complaint.

As indicated previously, on October 6, 2009, respondent was suspended from the practice of law. He remains suspended to date. The Court order directed him to comply with R. 1:20-20, which requires a suspended attorney to, among other things, file with the OAE Director a detailed affidavit, specifying, by correlatively numbered paragraphs, the steps that the attorney has taken to comply with each of the provisions of that rule and of the Court's order. Respondent did not do so.

By letter dated July 13, 2010, sent via regular and certified mail to respondent's home and office addresses (Artesa

Drive and Quantum Lakes Drive), the OAE reminded him of his obligation to file the required affidavit, urged him to file the affidavit immediately, and directed him to inform the OAE of (1) how and when he had apprised his clients of his suspension and (2) whether he had returned their files. The letter requested a reply by July 27, 2010.

The certified mail sent to the home address (Artesa Drive) was returned as unclaimed. The regular mail was not returned. The certified and regular mail sent to the office address (Quantum Lakes Drive) was returned as "not deliverable as addressed, unable to forward."

Respondent did not file the required affidavit and did not reply to the OAE's letter.

The complaint charged respondent with having willfully violated the Court's order and having failed to take the steps required of all suspended attorneys, including notifying clients and adversaries of the suspension and returning the client files, violations of RPC 8.1(b) and RPC 8.4(d).

The OAE filed a brief, urging the imposition of a consecutive three-month suspension. In the OAE's view, respondent is deserving of "stern discipline" because the fact that he defaulted twice; his continued failure to cooperate with disciplinary authorities; his failure to notify his clients,

courts, and adversaries of his suspension; and his failure to file the R. 1:20-20 affidavit "paint a very clear picture of an attorney who continues to 'thumb his nose' at the Supreme Court's disciplinary system."

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).

Failure to file an affidavit demonstrating compliance with R. 1:20-20 "constitute[s] a violation of RPC 8.1(b) . . . and RPC 8.4(d)." R. 1:20-20(c). The only remaining issue here is, thus, the measure of discipline.

The threshold discipline for an attorney's failure to file a R. 1:20-20 affidavit is a reprimand. In the Matter of Richard B. Girdler, DRB 03-278 (November 20, 2003) (slip op. at 6). The actual discipline imposed may be different, if the record demonstrates mitigating or aggravating circumstances. Ibid. Examples of aggravating factors include the attorney's failure to comply with the OAE's request that the affidavit be filed, the attorney's failure to answer the complaint stemming from the failure to file the affidavit, and the existence of a disciplinary history. Ibid.

In the following cases, discipline greater than a reprimand was imposed: In re Gahles, 205 N.J. 471 (2011) (censure in a default matter for attorney who did not file the required affidavit following a temporary suspension for failure to comply with a fee arbitration determination; prior reprimand and admonition); In re Battaglia, 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) (in a default matter, three-month suspension for attorney who failed to produce the affidavit after prodding by the OAE and after agreeing 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); In re Sharma, 203 N.J. 428 (2010) (six-month suspension in a default matter; the attorney did not comply with the OAE's specific request that he

file the affidavit of compliance with R. 1:20-20; prior censure for misconduct in two default matters and a three-month suspension); In re Le Blanc, 202 N.J. 129 (2010) (six-month suspension in a default matter; the attorney's disciplinary record 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 the affidavit after a three-month suspension and 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); In re Wargo, 196 N.J. 542 (2009) (one-year suspension for failure to file the R. 1:20-20 affidavit; default case; the attorney's ethics history included a temporary suspension for failure to cooperate with the OAE, a censure, and a combined one-year suspension for misconduct in two separate matters; all disciplinary matters proceeded on a default basis); and In re Kozlowski, 192 N.J. 438 (2007) (default matter; two-year suspension for attorney who failed to comply with R. 1:20-20; the attorney's significant disciplinary history included a private reprimand, an admonition, three reprimands, a three-month suspension, and a one-year suspension; the attorney

defaulted in six disciplinary matters; the "attorney's repeated indifference toward the ethics system" was found to be "beyond forbearance;" In the Matter of Theodore F. Kozlowski, DRB 06-211 (November 16, 2006) (slip op. at 11-12)).

Here, respondent ignored the OAE's request that he comply with R. 1:20-20, did not answer the complaint, and has a three-month suspension on his disciplinary record. Guided by the above cited precedent, we find that discipline more severe than a censure would be excessive in this case. Attorneys who received three-month suspensions had a more serious ethics history than respondent's. Battaglia had two concurrent three-month suspensions and a temporary suspension; Raines had a private reprimand, a three-month suspension, a six-month suspension, and a temporary suspension; and Girdler had a private reprimand, a public reprimand, and a three-month suspension. Even Gahles, who received only a censure, had an ethics history more serious than respondent's: an admonition, a reprimand, and a temporary suspension. The censure is premised on the violation itself (for which a reprimand is the threshold discipline), coupled with respondent's failure to comply with the OAE's direction that he file the overdue affidavit and the default nature of this proceeding.

Members Clark and Stanton 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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

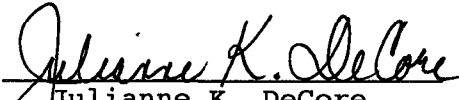
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

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Docket No. DRB 11-229

Decided: October 26, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark						X
Doremus			X			
Stanton						X
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			7			2


Julianne K. DeCore
Chief Counsel