

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-273
District Docket No. XIV-2010-256E

IN THE MATTER OF
DANIEL JAMES FOX
AN ATTORNEY AT LAW

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Decision

Decided: December 22, 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). It arises out of respondent's failure to file an affidavit of compliance with R. 1:20-20(b)(15), following a temporary suspension imposed on him in February 2010, which remains in effect.

The OAE requests the imposition of a three-month suspension. For the reasons set forth below, we determine to impose a censure for respondent's violations of RPC 8.1(b) (failure to cooperate with disciplinary authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

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

Respondent has no disciplinary history. As indicated previously, however, he was temporarily suspended on February 1, 2010, following his guilty plea in the United States District Court for the District of New Jersey to one count of making a false, fictitious, and fraudulent statement to the United States Department of Housing and Urban Development, a violation of 18 U.S.C. § 1001. In re Fox, 201 N.J. 158 (2010). He remains suspended.

Service of process was proper. On March 1, 2011, the OAE sent a copy of the formal ethics complaint to respondent's last known home and business addresses listed in the attorney registration records, 232 Sumner Avenue, Plainfield, New Jersey 07062, and 339 Main Street, Suite 2K, Orange, New Jersey 07050-2737, by regular and certified mail, return receipt requested.

The certified letter sent to respondent's home address was returned to the OAE marked "Unclaimed." The letter sent by regular mail was not returned. The certified letter sent to respondent's business address was returned to the OAE marked "Not Deliverable As Addressed." The letter sent by regular mail also was returned to the OAE, marked "Insufficient Address."

On April 8, 2011, the OAE sent a letter to respondent at his Plainfield home address, by regular and certified mail, return receipt requested. The letter directed respondent to file an answer within five days and informed him that, if he failed to do so, the record would be certified directly to us for the imposition of sanction. On April 19, 2011, respondent signed for the certified letter. The letter sent by regular mail was not returned.

As of July 28, 2011, respondent had not filed an answer to the complaint. Accordingly, on that date, the OAE certified this matter to us as a default.

According to the single-count complaint, the Court's February 1, 2010 order temporarily suspending respondent from the practice of law required him to comply with R. 1:20-20, which, in turn, obligated him, within thirty days, to file with the OAE Director "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 did not file the affidavit within the required time.

On September 2, 2010, the OAE sent a letter to respondent's last known home and business addresses, by regular and certified mail, return receipt requested. The letter advised respondent of his responsibility to file the affidavit, pursuant to R. 1:20-20, and requested its immediate submission. The certified letter sent to respondent's home address was returned to the OAE marked "Unclaimed." The letter sent by regular mail was not returned. Both letters sent to respondent's office address were returned. The certified letter was marked "Unclaimed. The letter sent by regular mail was marked "Insufficient Address."

According to the complaint, respondent called the OAE, on September 9, 2010, and left a voicemail message, stating that he was incarcerated but scheduled for release to a halfway house on October 21, 2010. He asserted that he would file the R. 1:20-20 affidavit within five-to-ten days after his release.

On October 21, 2010, respondent was "released from custody." However, he neither contacted the OAE upon his release nor filed the required affidavit.

The complaint alleged that respondent "willfully violated the Supreme Court's order" and "has failed to take the steps required of all suspended or disbarred attorneys, including notifying clients and adversaries of the suspension and providing pending clients with their files." Respondent was charged with failure to cooperate with disciplinary authorities (RPC 8.1(b)) and conduct prejudicial to the administration of justice (RPC 8.4(d)).

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).

R. 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 existence of a 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, discipline greater than a reprimand was imposed in the following cases: In re Sirkin, ___ N.J. ___ (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); In re Gahles, 205 N.J. 471 (2011) (in a default, censure imposed on attorney who failed to comply with R. 1:20-20 after a temporary suspension; the attorney had received a reprimand in 1999, an admonition in 2005, and a temporary suspension in 2008 for failure to pay a fee arbitration award, as well as a \$500 sanction; the attorney remained suspended at the time of the default); In re Garcia, 205 N.J. 314 (2011) (in a default, three-month suspension for attorney's failure to comply with R. 1:20-20; her disciplinary history consisted of a fifteen-month suspension); In re Berkman, 205 N.J. 313 (2011) (three-month suspension in a default matter where attorney had a prior nine-month suspension); In re Battaglia, 182 N.J. 590 (2006) (three-month suspension, 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) (the Court imposed a three-month suspension where the attorney's 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 Rosanelli, 208 N.J. 359

(2011) (in a default, six-month suspension for attorney who failed to comply with R. 1:20-20 after a temporary suspension in 2009 and after a three-month suspension in 2010; respondent also had received a six-month suspension in 2003); In re Sharma, 203 N.J. 428 (2010) (six-month suspension; 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], and his repeated failure to cooperate with disciplinary authorities); In re LeBlanc, 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 Wargo, 196 N.J. 542 (2009) (one-year suspension for failure to file the R. 1:20-20 affidavit; 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 proceedings proceeded on a default basis); In re Wood, 193 N.J. 487 (2008) (in a default, one-year suspension imposed on attorney who failed to file an R. 1:20-20 affidavit following a three-month suspension; 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 McClure, 182 N.J. 312 (2005) (attorney received a one-year suspension; his disciplinary history consisted of a prior admonition and two concurrent six-month suspensions, one of which was a default; the attorney failed to cooperate with disciplinary authorities in the matter before us, including failing to abide by his promise to the OAE to complete the affidavit; we also noted the need for progressive discipline); In re King, 181 N.J. 349 (2004) (in a default, one-year suspension imposed on attorney with an extensive ethics history of a reprimand, a temporary suspension, a three-month suspension in a default matter, and a one-year suspension; in two of the matters, the attorney failed to cooperate with disciplinary authorities and ignored the OAE's attempts to have her file an affidavit of compliance; she remained suspended since 1998, the date of her temporary suspension); In re Brekus, DRB No. 11-104 (August 15, 2011) (in a default, two-year suspension imposed on attorney with significant ethics history: a 2000 admonition, a 2006 reprimand, a 2009 one-year suspension, a 2009 censure, and a 2010 one-year suspension, also by default); 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 ethics 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, and his "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)).


Respondent's lack of a disciplinary history distinguishes this case from Garcia, Berkman, Girdler, Battaglia, and Raines, where three-month suspensions were imposed on attorneys who had rather serious disciplinary records, either in number or degree. We, therefore, determine that a censure is the appropriate form of discipline here.

Member Wissinger 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
Chief Counsel

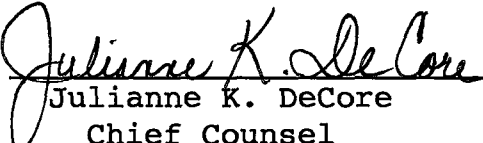
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daniel J. Fox
Docket No. DRB 11-273

Decided: December 22, 2011

Disposition: Censure

<i>Members</i>	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Wissinger						X
Yamner			X			
Zmirich			X			
Total:			7			1


Julianne K. DeCore
Chief Counsel