

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 14-190  
District Docket No. XIV-2013-0073E

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IN THE MATTER OF  
ARTHUR E. SWIDLER  
AN ATTORNEY AT LAW

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Decision

Decided: October 23, 2014

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 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 his failure to file the required R. 1:20-20 affidavit, following his suspension from the practice of law.

The OAE filed a memorandum, in lieu of a formal brief, recommending the imposition of either a six-month or a one-year suspension. For the reasons detailed below, we determine that an indefinite suspension is appropriate in this matter.

Respondent was admitted to the New Jersey bar in 1985. In 2007, in a default matter, he was reprimanded for gross neglect in a foreclosure proceeding and failure to cooperate with disciplinary authorities. In re Swidler, 192 N.J. 80 (2007).

In 2009, respondent was temporarily suspended for less than a month for failure to comply with a fee arbitration determination, directing him to refund \$700 to a client.

In 2010, respondent was suspended for three months for negligent misappropriation of client funds; numerous recordkeeping deficiencies; failure to collect funds required in two separate closings; failure to properly make payments, following one of the closings; and failure to cooperate with the OAE, during its investigation. That matter proceeded on a default basis. In re Swidler, 202 N.J. 334 (2010).

In 2011, in yet another default matter, respondent received a six-month suspension, which stemmed from his representation of a real estate client. He was found guilty of gross neglect, conflict of interest, failure to hold funds of third persons separately from his own property, failure to disclose a material fact to a third person to avoid assisting a criminal or fraudulent act by a client, failure to disclose that a mortgage loan had not been satisfied, and failure to cooperate with disciplinary authorities. In re Swidler, 205 N.J. 260 (2011). In

acting as the attorney for the buyer and the seller, he failed to record the mortgage, improperly deposited funds into his business account, rather than his trust account, failed to reply to requests for information from a disciplinary authority, failed to file an answer to the ethics complaint, and failed to obtain informed, written consent from the buyer and seller, in representing them simultaneously.

In 2012, in another default matter, respondent was suspended for an additional three months, effective July 18, 2012, for failure to file a detailed affidavit of compliance with R. 1:20-20, following his 2010 and 2011 suspensions. Respondent remains suspended to date.

Service of process was proper in this matter. On December 10, 2013, the OAE sent a copy of the complaint, by regular and certified mail, to respondent's last known home address, listed in the attorney registration records. The certified mail receipt was returned, showing delivery on December 11, 2013. The signature of the recipient is illegible. The regular mail was not returned. Respondent did not file an answer.

On May 15, 2014, the OAE sent a letter to respondent's home address, by regular and certified mail. The letter informed him that, if he did not file an answer within five days of the date of the letter, the allegations of the complaint would be deemed

admitted, the matter 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 USPS website shows delivery of the letter on May 17, 2014. Neither the certified nor the regular mail has been returned.

As of the date of the certification of the record, June 11, 2014, respondent had not filed an answer to the complaint.

As indicated above, the Court suspended respondent for three months, effective July 18, 2012, and ordered that he continue to comply with R. 1:20-20, dealing with suspended attorneys (the underlying suspension stemmed from respondent's failure to file the R. 1:20-20 affidavit of compliance). Respondent did not apply for reinstatement and remains suspended to date.

The 2012 order of suspension required respondent, within thirty days, to comply with R. 1:20-20, which mandates the filing 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 again failed to file the affidavit. By letter dated April 3, 2013, sent by certified and regular mail to respondent's home address, the OAE reminded respondent of his

responsibility to file the affidavit, pursuant to R. 1:20-20, and requested a reply by April 17, 2013.

The complaint in the current matter, thus, charged respondent with having violated RPC 8.1(b) and RPC 8.4(d) for willfully violating the Court's order by failing "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."

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).

R. 1:20-20(b)(15) requires a suspended attorney to file an affidavit of compliance with the rule within thirty days of the order of suspension. That requirement is also clearly stated in the Court's orders of suspension or disbarment. In the absence of an extension by the Director of the OAE, an attorney's failure to file the R. 1:20-20 affidavit 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 for an attorney's failure to file a R. 1:20-20 affidavit is a reprimand. In re

Girdler, 179 N.J. 227 (2004). The actual discipline imposed may be different, however, if the record demonstrates mitigating or aggravating circumstances. Examples of aggravating factors include the attorney's failure to comply with 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. All three aggravating factors are present in this case.

Since Girdler, discipline greater than a reprimand has been imposed in the following cases: In re Terrell, 214 N.J. 44 (2013) (in a default matter, censure imposed on attorney who did not file the R. 1:20-20 affidavit following a temporary suspension); In re Fox, 210 N.J. 255 (2012) (censure following a temporary suspension); In re Sirkin, 208 N.J. 432 (2011) (censure after the attorney received a three-month suspension; default); In re Garcia, 205 N.J. 314 (2011) (three-month suspension for the attorney's failure to comply with the OAE's specific request that she file the affidavit; her disciplinary history consisted of a fifteen-month suspension; default); In re Battaglia, 182 N.J. 590 (2006) (non-default case; 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 Rosanelli, 208 N.J. 359 (2011) (in a default,

six-month suspension after a temporary suspension; the attorney ignored the OAE's specific request that he submit the affidavit; the attorney had a disciplinary history consisting of a three-month suspension in a default matter and a six-month suspension); In re Sharma, 203 N.J. 428 (2010) (six-month suspension in a default matter for attorney whose ethics history included a censure for misconduct in two default matters and a three-month suspension; the attorney failed to comply with the OAE's request that he file the affidavit and repeatedly failed to cooperate with disciplinary authorities); In re Wargo, 196 N.J. 542 (2009) (in a default, one-year suspension for attorney whose ethics history included a temporary suspension for failure to cooperate with the OAE, a censure, and a one-year suspension for the combined misconduct in two separate matters; all disciplinary matters proceeded on a default basis); In re Wood, 193 N.J. 487 (2008) (default matter; one-year suspension following a three-month suspension; the attorney also failed to comply with the OAE's request that he file the R. 1:20-20 affidavit; the attorney's disciplinary history consisted of an admonition, a reprimand, a censure, and a three-month suspension; two of those matters proceeded on a default basis); In re King, 181 N.J. 349 (2004) (in a default, one-year suspension for attorney whose ethics history consisted of a

reprimand, a temporary suspension for failure to return an unearned retainer, 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; the attorney remained suspended since 1998, the date of her temporary suspension); and In re Brekus, 208 N.J. 341 (2011) (two-year suspension in a default matter for attorney whose ethics history included an admonition, a reprimand, a censure, and two one-year suspensions, one of which proceeded as a default).

Recently, this Board has seen a few cases addressing an attorney's continuing failure to file the R. 1:20-20 affidavit, following subsequent suspensions. In those cases, the attorney had not filed the affidavit after an initial suspension, which, in turn, netted the attorney another term of suspension and, later, another term of suspension for not having filed the affidavit after the last suspension. In such cases, we view the attorney's conduct as a continuing failure to file the required affidavit.

To avoid taxing the disciplinary system with repetitious filings of R. 1:20-20 cases, we believe that an indefinite suspension, until such time as the attorney complies with the



Court's orders, is the appropriate resolution in such situations. We determine to do so in this instance. We note that this approach is already utilized when an attorney fails to pay a fee arbitration award. The attorney is temporarily (indeed, indefinitely) suspended, until such time as the attorney satisfies the award. Similarly, in civil matters, for example, an individual who has been ordered to pay child support and who disobeys the court order may be temporarily/indefinitely incarcerated until payment is made. The same approach makes sense in serial R. 1:20-20 cases, which also involve the violation of a court order.

Should a concern about such a resolution be that nothing prevents the recalcitrant attorney from being reinstated from the indefinite suspension a day or two after compliance, thereby suffering either no or minor consequences from a persistent failure to comply with R. 1:20-20, the answer is that it is not so. Indeed, R. 1:20-20(c) provides that failure to file the affidavit on time shall preclude the Board from "considering a petition for reinstatement until the expiration of six months from the date of filing proof of compliance in accordance with R. 1:20-20(i)(A)."


Member Gallipoli voted to recommend disbarment, based on respondent's disdain for the disciplinary process and for the

responsibilities attendant to the privilege of being permitted to practice law. Member Zmirich concurred with Member Gallipoli's recommendation for disbarment, but his decision to disbar was based on respondent's egregious disciplinary history and record of defaults.

Members Yamner and Rivera 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

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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Arthur E. Swidler  
Docket No. DRB 14-190


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Decided: October 23, 2014

Disposition: Indefinite suspension

<i>Members</i>	Disbar	Indefinite Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Gallipoli	X					
Hoberman		X				
Rivera						X
Singer		X				
Yamner						X
Zmirich	X					
Total:	2	5				2

  
Ellen A. Brodsky  
Chief Counsel