SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 15-069 and 15-321
District Docket Nos. XIV-2013-0011E,
XIV-2013-0134E, and XIV-2014-0473E

IN THE MATTER OF

FRANK A. VITERITTO

AN ATTORNEY AT LAW

Decision

Decided: June 15, 2016

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

These matters were before us on certifications of the record, filed by the Office of Attorney Ethics (OAE) and the District VB Ethics Committee, pursuant to R. 1:20-4(f). Three ethics complaints, docketed as XIV-2013-0011E, XIV-2013-0134E, and XIV-2014-0473E,[1] respectively, comprise these matters.

The first complaint (XIV-2013-0011E) charged respondent with violating RPC 8.1(b) (failure to cooperate with

[1] The procedural history of this complaint, originally docketed as VC-2013-0003E, is set forth below.

disciplinary authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The second complaint (XIV-2013-0134E) charged respondent with violating RPC 5.5(a) (practicing law while suspended – three client matters) and RPC 8.4(d).

The third complaint (XIV-2014-0473E) charged respondent with violating R. 1:20-20(b)(1), (3), (4), and (6) (rules governing suspended attorneys), RPC 1.5(b) (failure to set forth in writing the basis or rate of a fee), RPC 3.3(a)(1) (false statement of material fact to a tribunal), RPC 5.5(a), RPC 8.1(b) and R. 1:20-3(g)(3), RPC 8.4(a) (violating or attempting to violate the RPCs), RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d).

For the reasons set forth below, we determine to impose a one-year suspension.

Respondent was admitted to the New Jersey bar in 1975. At the relevant times, he maintained an office for the practice of law in Irvington, New Jersey.

On May 23, 2012, the Court temporarily suspended respondent from the practice of law for failing to comply with a fee

arbitration determination that he refund $800 to a former client. The suspension order required respondent to comply with R. 1:20-20 and to pay a $500 sanction to the Disciplinary Oversight Committee. In re Viteritto, 210 N.J. 186 (2012). He remains suspended to date.

SERVICE OF PROCESS (DRB 15-069)

Docket No. XIV-2013-0011E

Service of process was proper in this matter. On November 24, 2014, the OAE sent a copy of the ethics complaint, by certified and regular mail, to respondent's home address on file with the New Jersey Lawyers' Fund for Client Protection (CPF). The certified mail was returned marked "return to sender – unclaimed – unable to forward" and the regular mail was not returned. On December 16, 2014, respondent filed a handwritten answer that did not comply with R. 1:20-4(e).

Subsequently, on December 23, 2014, the OAE sent another letter to respondent, by certified and regular mail, to his home address, re-serving the ethics complaint, informing respondent that his answer was deemed deficient for not complying with the requirements of R. 1:20-4(e)(1) and In re Gavel, 22 N.J. 248, 263 (1996), and extending to January 9, 2015 his time to file a conforming answer. Once again, the certified mail was returned

marked "return to sender – unclaimed – unable to forward" and the regular mail was not returned.

Docket No. XIV-2013-0134E

Service of process also was proper in this matter. On July 18, 2014, the OAE sent a copy of the ethics complaint, by certified and regular mail, to respondent's home address on file with the CPF. The certified mail was returned marked "return to sender – unclaimed – unable to forward" and the regular mail was not returned. On August 8, 2014, respondent filed a handwritten answer that did not comply with R. 1:20-4(e).

Subsequently, on December 10, 2014, the OAE sent another letter to respondent, by certified and regular mail, to his home address, re-serving the ethics complaint, informing respondent that his answer was deemed deficient for not complying with the requirements of R. 1:20-4(e)(1) and In re Gavel, supra, and extending to December 19, 2014 his time to file a conforming answer. The green card for the certified mail was returned, unsigned, and the regular mail was not returned. The United States Postal Service website indicated that the certified mailing was delivered on December 17, 2014.

On January 22, 2015, the OAE sent two more letters, enclosing additional copies of both formal ethics complaints in

XIV-2013-0011E and XIV-2013-0134E, by certified and regular mail, to respondent's home address on file with the CPF. These letters informed respondent that his conforming answers were overdue, further extended his time to file conforming answers to February 6, 2015, and cautioned respondent that, if he failed to file the conforming answers, the matters would be certified to us as defaults. The United States Postal Service website indicated that a notice of the certified mailing had been left at respondent's home address on January 28, 2015, but that the mailing was unclaimed and "returned to sender" as of February 17, 2015. As of February 27, 2015, neither the certified mail nor the regular mail had been returned to the OAE.

Because respondent had not filed conforming answers to the ethics complaints by February 27, 2015, on that date, the OAE certified the records to us as defaults.

SERVICE OF PROCESS (DRB 15-321)

Docket No. XIV-2014-0473E

Service of process also was proper in this matter. On August 19, 2013, the District VC Ethics Committee filed a complaint against respondent. After several attempts to serve the complaint on respondent, including service by publication, District VC certified the matter to us as a default. On August

27, 2014, we administratively dismissed that matter, without prejudice, because the complaint had been served on respondent only at his office address, at a time when he was temporarily suspended. Our dismissal letter instructed District VC to re-serve the complaint on respondent at his home address of record.[2]

Accordingly, on November 24, 2014, the OAE re-served a copy of the ethics complaint, by certified and regular mail, to respondent's home address on file with the CPF. On December 16, 2014, the OAE received respondent's verified answer to this complaint, dated December 8, 2014.

On March 2, 2015, the OAE forwarded the complaint and respondent's answer in this matter to the District VB Ethics Committee (DEC) for appointment of a hearing panel. Thereafter, on numerous dates in April 2015, the DEC hearing panel chair attempted to contact respondent by telephone in an effort to schedule a prehearing conference. In her certification, the hearing panel chair (HPC) stated that it appeared that her calls were being answered, but were then disconnected once she identified herself. On April 21, 2015, the HPC left respondent a detailed telephone message, specifying that the purpose of the

[2] The OAE re-docketed this matter under docket number XIV-2014-0473E.

call was to schedule a prehearing conference. Respondent never returned the HPC's calls.

On April 22, 2015, the HPC sent letters to both respondent and the presenter, by UPS, informing them that a telephonic prehearing conference was scheduled for April 27, 2015. Respondent signed a confirming receipt for that letter. On April 27, 2015, despite the HPC's efforts to telephone respondent, he failed to participate in the prehearing conference.

On April 28, 2015, the HPC sent additional letters to respondent and the presenter, again by UPS, informing them that the telephonic prehearing conference had been rescheduled to May 8, 2015. In her letter, the HPC specifically warned respondent that his failure to participate in the prehearing conference would result in the suppression of his answer and the certification of the record to us as a default.[3] Although respondent signed a receipt for the April 28, 2015 letter and despite the HPC's efforts to telephone respondent, he failed to participate in the prehearing conference on May 8, 2015.

Accordingly, on May 8, 2015, the HPC executed a Case Management Order (1) suppressing respondent's answer to the complaint, pursuant to R. 1:20-5(c); and (2) allowing this

[3] R. 1:20-5(b) makes clear that attendance at the prehearing conference is "mandatory by all parties" and that prehearing conferences may be held by telephone.

matter to proceed directly to us for the imposition of discipline. The DEC submitted its certification of the record to us on August 10, 2015.

ALLEGATIONS OF THE COMPLAINTS

I. Docket No. XIV-2013-0011E

This complaint charged respondent with violating RPC 8.1(b) and RPC 8.4(d), based on his failure to comply with R. 1:20-20.[4] The underlying facts are as follows.

On or about November 16, 2011, the District VB Fee Arbitration Committee ordered respondent to refund $800 to a former client. Respondent failed to timely comply with the committee's order. The OAE, thus, filed a motion for respondent's temporary suspension and for the imposition of a monetary sanction, which we heard on April 19, 2012. On April 20, 2012, we recommended to the Court that respondent be suspended and that a $500 sanction be imposed for his failure to comply with the fee arbitration award.

On April 24, 2012, the Court filed an Order suspending respondent from the practice of law, effective May 23, 2012, and imposing a $500 sanction, payable to the Disciplinary Oversight

[4] R. 1:20-20(c) specifically provides that failure to comply with the requirements of the rule "shall also constitute a violation of RPC 8.1(b) . . . and RPC 8.4(d)."

Committee. See Viteritto, supra, 210 N.J. 186. The Order provided for the automatic vacation of the suspension "if prior to the effective date of the suspension, the Disciplinary Review Board reports to the Court that respondent has satisfied all obligations under this Order . . ." Ibid. The Court's Order also required respondent to comply with R. 1:20-20. Ibid.[5]

Respondent did not comply with R. 1:20-20, which requires the filing of the prescribed affidavit "within thirty days after the date of the order of suspension (regardless of the effective date thereof)." Accordingly, on January 17, 2013, the OAE sent letters, by certified and regular mail, to respondent's home and office addresses on file with the CPF, reminding him of the R. 1:20-20 affidavit requirement, requesting a response by January 31, 2013, and informing him of the potential disciplinary consequences should he fail to comply. The certified mail sent to respondent's home address was returned with the address information obscured, and the regular mail was returned marked "return to sender – unclaimed – unable to

[5] On April 19, 2012, the very date we heard the OAE's motion for temporary suspension, respondent submitted the $800 refund to the client, through the OAE. Respondent's bank records (subpoenaed during the OAE investigation) confirmed that the check was deposited by the former client in April 2012, without incident, one day after the filing of the Court's suspension order. Respondent, however, did not pay the $500 sanction, and, did not file the R. 1:20-20 affidavit. Thus, respondent did not satisfy all obligations under the Court's Order.

forward." The certified mail sent to respondent's office address was returned marked "return to sender – unclaimed – unable to forward" and the regular mail was not returned.

On September 26, 2013, the OAE went to respondent's office address on file with the CPF – 664 Stuyvesant Avenue, First Floor, Irvington, New Jersey. Although no signage for respondent's law office was observed at the premises, the OAE determined that respondent maintained an office and received mail at that address.[6] The OAE left, on respondent's desk in his office, an envelope, addressed to him, containing copies of the OAE's January 17, 2013 letters, the temporary suspension order, a copy of R. 1:20-20, and OAE contact information. As of the date of the complaint, October 10, 2013, respondent had neither filed a R. 1:20-20 affidavit nor contacted the OAE regarding this matter.

II. Docket No. XIV-2013-0134E

This complaint charged respondent with violating RPC 5.5(a) and RPC 8.4(d). The underlying facts are as follows.

On September 17, 2013, the OAE interviewed respondent's landlord, Neil Dworkin, Esquire, at 664 Stuyvesant Avenue in

[6] The complaint did not explain how the OAE reached this determination.

Irvington, New Jersey. Dworkin informed the OAE that respondent had last paid rent for his office space in August 2012, more than one year earlier; that he was not aware that respondent had been temporarily suspended from the practice of law; and that respondent received mail from various courts and attorneys at the Stuyvesant Avenue office. Further, the OAE's investigation revealed that respondent engaged in the practice of law in at least three client matters after the effective date of his suspension, as described below. Finally, respondent's bank records, subpoenaed during the OAE's investigation, revealed that respondent received and deposited legal fees into his business account after the effective date of his suspension, specifically between June and December 2012, including fees from at least one of the client matters described below.

The Smith/Mitchell Matter

On April 27, 2012, after the filing of the suspension order, but before its effective date, respondent agreed, via written retainer agreement, to represent Charles Smith and Larry Mitchell, the defendants in a foreclosure matter. On June 12, 2012, subsequent to the effective date of his suspension, respondent sent a letter, on his law firm letterhead, to Mitchell, seeking his "verbal authorization" in respect of a contested issue in the foreclosure matter. On August 11, 2012,

almost three months after the effective date of his suspension, respondent sent a letter, on his law firm letterhead, to Ocwen Loan Servicing, LLC (presumably, the plaintiff in the foreclosure matter), inquiring about repayment of the loan at issue in the foreclosure matter.

The Quedraogo Matter

On November 21, 2012, six months after the effective date of his suspension, respondent sent a letter, on his law firm letterhead, to the Honorable Anthony J. Frasca, J.S.C., with a copy to his client, Boukare Quedraogo. The letter requested that a French interpreter be present on November 30, 2012, when respondent and his client were scheduled to appear in court for a criminal matter.

The Thomas Matter

On January 3, 2013, more than a year after the effective date of his suspension, respondent filed a motion to dismiss a civil complaint, on behalf of his client Lorraine Thomas, the defendant in the litigation. The motion identified respondent as the attorney for Thomas, setting forth an office address of 664 Stuyvesant Avenue, Irvington, New Jersey. Respondent signed the motion and a supporting certification, both dated December 20,

2012. The certification stated: "I, Frank A. Viteritto . . . am the attorney for defendant Lorraine Thomas."

By letter dated February 5, 2013, the Honorable Kenneth S. Levy, P.J.Ch., who presided in Essex County, notified the OAE of respondent's practice of law while suspended. The court's letter included, as enclosures, respondent's motion on behalf of Thomas, a February 5, 2013 letter from the court to respondent, alerting him that the court would be notifying the OAE of his unethical conduct, and the court's February 5, 2013 order dismissing the defendant's motion, due to respondent's appearance in the matter while suspended.

III. Docket No. XIV-2014-0473E

This complaint charged respondent with violating R. 1:20-20(b)(1), (3), (4), and (6), RPC 1.5(b), RPC 3.3(a)(1), RPC 5.5(a), and RPC 8.1 (b) and R. 1:20-3(g)(3), and RPC 8.4(a) through (d). The facts underlying the complaint are as follows.

In 2012, Mario Mendoza was referred to respondent, whom Mendoza believed was an attorney licensed to practice law in New Jersey. On or about September 6, 2012, more than three months after the effective date of his suspension, respondent filed a lawsuit on behalf of Mendoza in the Superior Court of New Jersey, Law Division. The complaint listed respondent as counsel

for the plaintiff, and was filed under his law firm letterhead. Respondent did not provide Mendoza with a writing setting forth the basis or rate of his fee.

On or about November 27, 2012, again under his law firm letterhead, respondent filed a request to enter a default judgment in Mendoza's action, supported by his certification, stating that he was the attorney for plaintiff Mendoza. Subsequently, on March 11, 2013, again under his letterhead, respondent filed an affidavit of merit in Mendoza's case. Finally, on April 4, 2013, respondent executed a substitution of attorney in Mendoza's matter, in which respondent was identified as the "withdrawing attorney."

Despite six attempts by the District VC Ethics Committee to communicate with respondent regarding this matter, between March 11 and May 15, 2013, respondent provided only one letter in reply, stating that he had no intention of participating in the ethics investigation.

* * *

The facts recited in all three complaints support all of the charges of unethical conduct set forth therein. We deem respondent's failure to file verified answers to two of the complaints as an admission that the allegations of the complaints are true and that they provide a sufficient basis for

the imposition of discipline. R. 1:20-4(f)(1). Moreover, the HPC properly suppressed respondent's answer to the third complaint (XIV-2014-0473E), based on his failure to participate in the prehearing conference, as required by R. 1:20-5(b)(1), and despite ample opportunity to do so, resulting in a default status in that matter, as well. Notwithstanding, each charge in an ethics complaint must be supported by sufficient facts for us to determine that unethical conduct occurred.

The facts set forth in the first complaint (Docket No. XIV-2013-0011E) support the conclusion that respondent violated both RPC 8.1(b) (failure to cooperate with disciplinary authorities) and 8.4(d) (conduct prejudicial to the administration of justice). The Court entered an Order temporarily suspending respondent, effective May 23, 2012. The Order specifically required respondent to comply with R. 1:20-20, governing suspended attorneys. He never did so, despite repeated prompts and reminders from the OAE.

Respondent's failure to file the R. 1:20-20 affidavit required of all suspended attorneys, which includes notification of such suspension to clients, courts, and adversaries, violated both RPC 8.1(b) and 8.4(d).

The facts set forth in the second complaint (Docket No. XIV-2013-0134E) support the conclusion that respondent violated

both RPC 5.5(a) (practicing law while suspended – three client matters) and 8.4(d) (conduct prejudicial to the administration of justice). After the effective date of his suspension, respondent practiced law in at least three client matters.

In the Smith/Mitchell matter, respondent sent two letters, dated June 12 and August 11, 2012, on his law firm letterhead, in connection with the foreclosure matter – all after the effective date of his suspension.

In the Quedraogo matter, on November 21, 2012, respondent sent a letter, on his law firm letterhead, to a Superior Court judge, with a copy to his client, requesting a French interpreter for a November 30, 2012 criminal hearing.

In the Thomas matter, on January 3, 2013, respondent filed a motion to dismiss a civil complaint on behalf of his client, the defendant in the litigation. The motion identified respondent as the attorney for Thomas. He also signed the motion and a certification in support, identifying himself as the attorney of record for defendant Lorraine Thomas. Respondent's suspended status required the court to dismiss the motion he had previously filed in his client's behalf, thereby impacting judicial resources and disrupting the court's process.

Finally, respondent's bank records, gathered during the OAE's investigation into the allegations of this complaint,

revealed that respondent received and deposited legal fees into his business account after the effective date of his suspension.

The facts, thus, support the conclusion that respondent practiced law while suspended, in three client matters, violations of both RPC 5.5(a) and RPC 8.4(d).

The facts set forth in the third complaint support the conclusion that respondent violated R. 1:20-20(b)(1), (3), (4), and (6), RPC 1.5(b), RPC 3.3(a)(1), RPC 5.5(a), RPC 8.1(b) and R. 1:20-3(g)(3), and RPC 8.4(a) through RPC 8.4(d).

Despite respondent's May 23, 2012 suspension, he was retained by Mendoza and ultimately filed and prosecuted a civil action on his behalf. Specifically, between September 6, 2012 and April 4, 2013, respondent filed a lawsuit, filed a request for entry of default judgment accompanied by a certification (identifying himself as the plaintiff's attorney), filed an affidavit of merit, and executed a substitution of attorney. All of respondent's submissions to the Superior Court of New Jersey were filed under his law firm letterhead.

Respondent's actions in the Mendoza matter, specifically practicing law while suspended, occupying office space where an attorney practices law, furnishing legal services to Mendoza, using his law firm letterhead in the Mendoza matter, and procuring Mendoza's legal business, violated R. 1:20-20(b)(1),

(3), (4), and (6), respectively. Respondent's statements to the court that he was authorized to practice law, made in connection with a certification to the pleadings he filed on behalf of Mendoza, and the substitution of attorney he executed in connection with Mendoza's matter, violated both RPC 3.3(a)(1) and RPC 8.4(c). Moreover, his representation of Mendoza, while suspended, violated RPC 5.5(a), RPC 8.4(a), RPC 8.4(b),[7] and RPC 8.4(d).

Respondent's repeated failure to cooperate with the ethics investigation in this case, culminating in his affirmative statement, made in writing to the DEC, that he had no intention of participating in the ethics investigations, violated both RPC 8.1(b) and R. 1:20-3(g)(3).

Finally, respondent's failure to set forth, in writing, the basis or rate of his fee violated RPC 1.5(b).

The facts, thus, support the conclusion that respondent committed all of the charges levied against him in the third complaint.

The only remaining issue is the appropriate quantum of discipline to be imposed. The level of discipline for practicing law while suspended ranges from a lengthy suspension to

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[7] In New Jersey, the unauthorized practice of law is a criminal offense. See N.J.S.A. 2C:21-22.

disbarment, depending on the presence of other misconduct, the attorney's disciplinary history, and aggravating or mitigating factors. See, e.g., In re Brady, 220 N.J. 212 (2014) (one-year, retroactive suspension; after a Superior Court judge appointed a trustee for the attorney's law practice, the attorney consented to the entry of an order restraining him from practicing law; he then represented a client in two separate municipal court matters; a few months later, the Court temporarily suspended the attorney in an unrelated matter; aware that the Court had suspended him, the attorney thereafter represented a third client, on three occasions, before a municipal court; the attorney also failed to comply with the requirements of R. 1:20-20, governing suspended attorneys; prior three-month suspension and temporary suspension; considerable mitigation included the attorney's diagnosis with a catastrophic illness, followed by a failed marriage, failed business, collapse of his personal life, and eventual homelessness); In re Bowman, 187 N.J. 84 (2006) (one-year suspension for attorney who, during a period of suspension, maintained a law office where he met with clients, represented clients in court, and acted as Planning Board solicitor for two municipalities; prior three-month suspension; extremely compelling circumstances considered in mitigation); In re Marra, 170 N.J. 411 (2002) (Marra I) (one-year suspension for

attorney who practiced law in two cases while suspended and committed substantial recordkeeping violations, despite having previously been the subject of a random audit; on the same day that the attorney received the one-year suspension, he received a six-month suspension and a three-month suspension for separate violations, having previously received a private reprimand, a reprimand, and a three-month suspension); In re Macchiaverna, 218 N.J. 166 (2014) (two-year suspension, on a certified record, for attorney who, fewer than two weeks after accepting delivery of the Supreme Court's temporary suspension order, represented a client in a municipal zoning board matter; in aggravation, the attorney knew, at the time, that a complaint had been filed in another matter, charging him with practicing while suspended; that complaint addressed his failure to pay the administrative costs in connection with an earlier disciplinary matter; prior reprimand and censure); In re Wheeler, 140 N.J. 321 (1995) (Wheeler I) (two-year suspension imposed on attorney who practiced law while serving a temporary suspension for failure to refund a client's fee; the attorney also made multiple misrepresentations to clients, engaged in gross neglect, a pattern of neglect, negligent misappropriation, and a conflict of interest, and failed to cooperate with disciplinary authorities); In re Marra, 183 N.J. 260 (2005) (Marra II)

(three-year suspension for attorney found guilty of practicing law in three matters while suspended; the attorney also filed a R. 1:20-20 affidavit in which he falsely stated that he had refrained from practicing law during a prior suspension; the attorney had received a private reprimand, a reprimand, two three-month suspensions, a six-month suspension, and a one-year suspension (also for practicing law while suspended)); In re Cubberley, 178 N.J. 101 (2003) (three-year suspension for attorney who solicited and continued to accept fees from a client after he had been suspended, misrepresented to the client that his disciplinary problems would be resolved within one month, failed to notify the client or the courts of his suspension, failed to file the R. 1:20-20 affidavit, and failed to reply to the OAE's requests for information; the attorney had an egregious disciplinary history: an admonition, two reprimands, a three-month suspension, and two six-month suspensions); and In re Wheeler, 163 N.J. 64 (2000) (Wheeler II) (attorney received a three-year suspension for handling three matters without compensation, with the knowledge that he was suspended, holding himself out as an attorney, and failing to comply with Administrative Guideline No. 23 (now R. 1:20-20) relating to suspended attorneys; prior one-year suspension on a

motion for reciprocal discipline and, on that same date, two-year consecutive suspension for practicing while suspended).

In addition to practicing law while suspended, respondent failed to file the required R. 1:20-20 affidavit. The threshold measure of discipline to be imposed for a suspended attorney's failure to comply with R. 1:20-20 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. In the Matter of Richard B. Girdler, DRB 03-278 (November 20, 2003) (slip op. at 6). 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, the attorney failed to produce the affidavit of compliance in accordance with that Rule, 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.

After Girdler, discipline greater than a reprimand was imposed in the following cases: In re Terrell, 214 N.J. 44 (2013) (in a default matter, censure imposed on attorney who failed to file the R. 1:20-20 affidavit); In re Gahles, 205 N.J. 471 (2011) (in a default matter, censure for an attorney who failed to file the R. 1:20-20 affidavit following a temporary

suspension and then again after being prompted by the OAE to do so; 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; she remained suspended at the time of the default); In re Garcia, 205 N.J. 314 (2011) (in a default matter, three-month suspension for attorney's failure to comply with the OAE's specific request that she file the R. 1:20-20 affidavit; her disciplinary history consisted of a fifteen-month suspension); In re Berkman, 205 N.J. 313 (2011) (in a default matter, three-month suspension where the 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, which he submitted contemporaneously with his answer to the complaint; 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 matter, six-month suspension for attorney who failed to comply with R. 1:20-20 after a temporary suspension; the attorney ignored the OAE's specific request that he submit the affidavit; disciplinary history consisted of a three-month suspension in a default matter and a six-month suspension); In re Wargo, 196 N.J. 542 (2009) (in a default matter, 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); and In re Brekus, 208 N.J. 341 (2011) (in a default matter, two-year suspension imposed on attorney with a 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).

Here, in determining the appropriate discipline for respondent, we give serious weight to his lack of prior discipline since his admission to the bar in 1975 (40 years), as a mitigating factor. In aggravation, however, we consider the default status of these matters. "A respondent's default or failure to cooperate with the investigative authorities acts as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332, 342 (2008).

On balance, given respondent's lack of prior discipline, this case is less serious than the precedent detailed above wherein the attorneys received two-year and three-year suspensions for their misconduct. Although respondent's utter failure to cooperate with the OAE, to comply with the Court's

Order to pay a monetary sanction, and to file a R. 1:20-20 affidavit are inexcusable, the aggravating and mitigating factors are arguably in equipoise. In our view, a one-year suspension, thus, is appropriate for respondent's unethical conduct in these matters. We further recommend that the Court's Order contain a provision that, prior to his reinstatement, respondent must comply with the conditions enumerated in the temporary suspension order.

Member Boyer abstained. Member Gallipoli voted to recommend respondent's disbarment and filed a separate dissent.

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

In the Matters of Frank A. Viteritto
Docket Nos. DRB 15-069 and DRB 15-321

Decided: June 15, 2016

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Abstained	Did not participate
Frost		X				
Baugh		X				
Boyer					X	
Clark		X				
Gallipoli	X					
Hoberman		X				
Rivera		X				
Singer		X				
Zmirich		X				
Total:	1	7			1	

Ellen A. Brodsky
Chief Counsel