

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-339
District Docket No. XIV-2013-0597E

IN THE MATTER OF
ANDRES J. DIAZ
AN ATTORNEY AT LAW

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Decision

Decided: July 27, 2016

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

This matter was before us on a certification of the record filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The complaint charged respondent with violations of RPC 8.1(b) (failure to cooperate with disciplinary authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice) for his failure to file the required R. 1:20-20(e)(15) affidavit, following his temporary suspension.

The OAE requests the imposition of a censure. For the reasons set forth below, we determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1981. At the relevant times, he maintained an office for the practice of law in West Orange, New Jersey.

Effective April 1, 2013, the Court temporarily suspended respondent from the practice of law for failing to timely comply with a fee arbitration determination directing that he refund \$7,200 to a former client. The Order required respondent to comply with R. 1:20-20 and to pay a \$500 sanction to the Disciplinary Oversight Committee. In re Diaz, 213 N.J. 245 (2013). He remains suspended to date.

Service of process was proper in this matter. On September 4, 2014, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent at his address on file with the New Jersey Lawyers' Fund for Client Protection (CPF). The certified mail was returned, marked "Unclaimed," and the regular mail was not returned. Respondent did not timely file a verified answer to the complaint.

Accordingly, almost one year later, on August 3, 2015, the OAE sent a second letter to respondent, by certified and regular mail, at his last known address, informing him that, unless he filed a verified answer to the complaint within five days, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of

discipline, and the complaint would be deemed amended to charge a willful violation of RPC 8.1(b). Once again, the certified mail was returned, marked "Unclaimed," and the regular mail was not returned. Respondent did not timely file a verified answer to the complaint.

Because respondent had not filed an answer to the complaint by September 10, 2015, the OAE certified the record to us as a default.

The Court's February 28, 2013 Order of suspension provided: "this Order shall be vacated automatically 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 . . ." The Order also required respondent to comply with R. 1:20-20.

Respondent failed to timely 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 February 12, 2014, almost one year later, the OAE sent letters, by certified and regular mail, to respondent's address on file with the CPF, reminding him of the R. 1:20-20 affidavit requirement, requesting a response by February 26, 2014, and informing him of the potential disciplinary consequences should he fail to

comply. The certified mail sent to respondent's address was returned marked "Insufficient Address," with a handwritten notation stating "Deceased." The regular mail was not returned.

The OAE investigated, but found no confirmation, that respondent is deceased. The United States Post Office in Orange, New Jersey, verbally confirmed to the OAE that mail is delivered to respondent at the address used for service in this case.

On August 12, 2014, the OAE went to respondent's last known address on file with the CPF - 670 Prospect Avenue, West Orange, New Jersey. No one was present at the location at the time of the visit. At the front door of the house, the OAE left an envelope, addressed to respondent, containing copies of the OAE's February 12, 2014 letters, the temporary suspension Order, R. 1:20-20, and OAE contact information. As of the date of the complaint, August 27, 2014, respondent had neither filed a R. 1:20-20 affidavit nor contacted the OAE regarding this matter.

The facts recited in the complaint support the charges of unethical conduct set forth therein. Respondent's failure to file a verified answer to the complaint 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). Notwithstanding that rule, each charge in an ethics

complaint must be supported by sufficient facts for us to determine that unethical conduct occurred.

On February 28, 2013, the Court suspended respondent from the practice of law, effective April 1, 2013, and imposed a \$500 sanction. Respondent neither refunded the fee to his former client nor paid the sanction. Thus, the suspension Order became effective on April 1, 2013.

The Court's Order required respondent to comply with R. 1:20-20, governing suspended attorneys. He did not do so, despite repeated efforts by the OAE, up to and including the August 12, 2014 visit to respondent's last known address, which he used for delivery of his mail.

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 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 following a temporary suspension for failure to satisfy a fee arbitration award; no prior discipline); In re Fox, 210 N.J. 255 (2012) (in a default matter, censure imposed on attorney who failed to file the R. 1:20-20 affidavit following a temporary suspension for federal conviction; no prior discipline); 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 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 Battaqlia, 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 had 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 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, to craft the appropriate discipline, we consider, in mitigation, respondent's lack of prior formal discipline since his admission to the bar in 1981 (34 years), and in aggravation, the default status of this matter. "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).


Like the attorneys in Terrell, Fox, and Gahles (censure cases), respondent was temporarily suspended. Attorneys who have received discipline harsher than a censure had prior fixed-term suspensions in their disciplinary histories. Accordingly, we determine that a censure is the proper measure of discipline for respondent's misconduct.

Member Gallipoli voted for respondent's disbarment and has filed a separate dissenting decision.

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 Matter of Andres J. Diaz
Docket No. DRB 15-339

Decided: July 27, 2016

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Boyer			X			
Clark			X			
Gallipoli	X					
Hoberman			X			
Rivera			X			
Singer			X			
Zmirich			X			
Total:	1		8			


Ellen A. Brodsky
Chief Counsel