

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-096
District Docket No. XA-2014-0020E;
XA-2014-0027E; XA-2014-0028E; and
XA-2014-0035E

IN THE MATTER OF
DAVID CHARLES BERMAN
AN ATTORNEY AT LAW

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Decision

Decided: November 18, 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 default,
filed by the District XA Ethics Committee (DEC), pursuant to R.
1:20-4(f). The four-count complaint charged respondent with having
violated RPC 1.1(a) (gross neglect); RPC 1.1(b) (pattern of
neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to keep
a client reasonably informed about the status of a matter); RPC
1.4(c) (failure to explain a matter to the extent reasonably
necessary to allow the client to make informed decisions); RPC
1.16(a)(1) (failure to withdraw from a representation if that
representation would result in the violation of the Rules of

Professional Conduct); RPC 1.16(a)(2) (failure to withdraw from a representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client); RPC 3.3(a)(5) (failure to disclose to the tribunal a material fact); RPC 3.4(c) (knowingly disobey an obligation under the rules of a tribunal); RPC 5.5(a)(1) (practicing while ineligible); RPC 8.1(b) and R. 1:20-3(g)(3) (failure to cooperate with disciplinary authorities); RPC 8.4(a) (knowingly violate the Rules of Professional Conduct); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (engage in conduct prejudicial to the administration of justice). For the reasons set forth below, we determine to impose a two-year suspension.

Respondent was admitted to the New Jersey bar in 1986 and the New York bar in 1990. He has no history of discipline in New Jersey. He, however, he has been ineligible to practice law since September 24, 2012, based on his failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection (the Fund). In addition, on October 22, 2012, respondent was declared ineligible to practice, based on his failure to comply with the provisions of R. 1:28A-2(2) (IOLTA). He remains ineligible to date.

Service of process was proper in this matter. On December 21, 2015, the DEC mailed a copy of the complaint to respondent's post office box and his home address, in accordance with the provisions of R. 1:20-4(d) and R. 1:20-7(h). The certified letters sent to both addresses were returned as unclaimed. The post office box was marked "closed" by the post office. The regular mail sent to respondent's home address also was returned.

On February 9, 2016, the DEC sent a second letter to respondent, by regular and certified mail, to his home address only. The letter informed respondent that, if he failed to file a verified answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the entire record would be certified directly to us for the imposition of discipline, and the complaint would be deemed amended to include a violation of RPC 8.1(b). The certified return receipt was signed, illegibly, and returned to the DEC; the regular mail was not returned.

As of March 2, 2016, the date of the certification of the record, respondent had not filed an answer to the complaint.

The four-count complaint charged respondent with misconduct in four matters.

Practicing While Ineligible

In three of the matters in which respondent was charged with misconduct, the complaint alleged that respondent continued to practice law, despite being ineligible to do so. Specifically, after he had been declared administratively ineligible, respondent failed to withdraw as counsel in two federal court class action matters, and in a matter for Jomax Recovery Services (Jomax), as discussed below.

The Barton and Welling grievances arose from respondent's conduct as local counsel for two attorneys who were admitted pro hac vice in Kenneth A. Barton, et al. v. RCI, LLC, Civil Action No. 10-3657 (D.N.J.), and in John J. Morano v. BMW of North America, LLC, Civil Action No. 12-0606 (D.N.J.).¹

After respondent certified that his law firm was serving as counsel of record for the plaintiffs in Barton, the Honorable Esther Salas, U.S.M.J., issued a September 30, 2010 order, requiring respondent to sign "all pleadings, briefs, and other papers filed with the Court" as the plaintiffs' attorney of record, "who is admitted to the Bar of this Court," and holding respondent

¹ It appears that both Barton and Welling filed grievances against respondent for his conduct in the Barton matter. Welling also filed a grievance against respondent in the Morano matter.

responsible for the conduct of the attorneys admitted pro hac vice.

On September 24, 2012, when respondent became ineligible to practice law in New Jersey, he was obligated to inform the federal district court that he was no longer eligible to serve as local counsel in the Barton matter. He failed to do so.

Moreover, during his period of ineligibility, for a one-year period between May 14, 2013 and May 21, 2014, respondent submitted two briefs and five letters to the court and participated in five conferences and hearings in the matter.

Janelle Welling, one of the lead (pro hac) counsel in the federal court litigation, filed a grievance against respondent on September 9, 2014, in which she stated:

It has come to my attention that [Respondent], who serves as my local counsel for two matters pending in federal court in the district of New Jersey, has been administratively ineligible to practice since September 24, 2012. This attorney has appeared in court with me and/or on behalf of his clients, however, during the past two years. I am making this report pursuant to RPC 8.3.²

² The court was notified of counsel's discovery the next day, the clients and opposing counsel were notified of respondent's ineligibility, and substitute local counsel was secured.

Welling eventually spoke with respondent in mid-October 2014, at which time he admitted he had not paid his IOLTA fee. At Welling's request, respondent signed substitutions of counsel and withdrew from the representation.

During the same period of ineligibility, respondent served as plaintiffs' local counsel in the Morano case. On November 7, 2012, after respondent was declared administratively ineligible by the Court, he submitted a "Substitution of New Address for Plaintiffs' Counsel" to the federal district court, identifying himself as plaintiffs' counsel, and setting forth a Morristown office address. Further, during the period between October 28, 2012 and March 25, 2014, respondent submitted four letters to the court in the Morano case and participated in at least two conferences and hearings.

Similarly, in the Jomax matter, the complaint alleged that respondent became ineligible to practice during the representation. He neither notified Jomax of his ineligibility nor withdrew from his representation of that client.

The complaint alleged that respondent's continued representation in the Barton, Morano, and Jomax matters after he had been declared ineligible to practice, by Order of the Supreme Court, violated RPC 5.5(a), RPC 8.4(a), and RPC 8.4(d). The

complaint further alleged that respondent's failure to notify the court, his clients, and opposing counsel of his ineligibility violated RPC 3.3(a)(5), RPC 3.4(c), and RPC 8.4(c).

Neglect, Lack of Diligence, and Failure to Communicate

In his grievance against respondent, Barton stated:

without any notification to myself (lead plaintiff in the class action against RCI) [respondent] closed his practice and his office. Phone is constantly busy!! He also has closed down his e-mail - letters not returned or delivered. I have been abandoned!

Barton, who had retained respondent sometime between 2012 and 2013, explained that, from May through July 2014, he was unable to contact respondent, despite numerous efforts to do so by letter, e-mail, and telephone. Specifically, respondent's office voicemail message box was full and, eventually, the phone number was disconnected. Therefore, on August 28, 2014, Barton retained Welling as counsel. Welling then contacted the Office of Attorney Ethics and learned that respondent had not been authorized to practice law in New Jersey for two years.

During the course of their relationship, Welling could not contact respondent; respondent promised to make, but missed, court deadlines repeatedly; and, eventually, respondent became completely unavailable when his e-mail address returned messages

and his cell phone was disconnected. In fact, in connection with the Barton case, the judge sent an e-mail communication to New Jersey counsel only, and the e-mail to respondent was returned as undeliverable.

In the Jomax matter, respondent had been retained to handle three separate collection matters. Despite requests from Jomax, respondent produced neither status reports nor an accounting of the funds forwarded to him in connection with the collection services he performed. In one matter, respondent failed to provide a copy of the domesticated judgment to the client. In two of the matters, he failed to provide status reports and an accounting of the funds he spent in attempting to collect judgments for Jomax, despite returning \$302 in one of them. In its grievance, Jomax wrote:

[w]e have been unable to reach you for several months now. Your phone numbers are no longer working, and e-mails have not been responded to. We have contacted the Forwarders List of Attorneys, whom we have our files bonded through, and they have also been unable to reach you.

Finally, in a grievance filed by Mark Goldmunz, he wrote:

[I] paid [respondent] for him to prepare a Will and Medical Power of Attorney. I need to obtain those documents. My mother, who is now infirm, may also have paid him to do the same. She needs that document. My father, who is now deceased, had [respondent] prepare a Will and that Will was not

provided to us. Despite months of attempting to get [respondent] on the phone, and having another attorney, Cary Sternback, . . . , contact him by phone and in writing, I just cannot get a response from [respondent]. Mr. Sternback believes that [respondent] is ill. However there does not appear to be a bona fide (sic) law office and there is no one to speak to or get a call back from. It just seems like a ghost ship. There must be a way to legally get someone into [his] office to oversee his affairs as he is clearly unable to handle them. I cannot be the only one who has complained about [respondent] over the last few months.

Ultimately, Goldmunz, unsuccessful in his efforts to reach respondent, was forced to hire another attorney, Cary Sternback, to try to secure his mother's will. Sternback, however, was similarly unsuccessful in his efforts to communicate with respondent, prompting him to reach out to the then Assignment Judge Thomas L. Weisenbeck, to request his assistance. Judge Weisenbeck wrote to respondent, who then provided the will.

The complaint alleged that respondent was guilty of RPC 1.1(a), RPC 1.3, and RPC 1.4 in at least three of the four matters. In addition, based on respondent's pattern of neglect in at least three of the matters, the complaint alleged that respondent violated RPC 1.1(b).

Failure to Decline or Terminate Representation

The complaint alleged that, in response to requests for status updates from pro hac vice counsel in the class action matters and from Jomax, respondent advised that he had been ill. The complaint further alleged that the disciplinary investigation into these matters disclosed that respondent's health and physical condition made it difficult for him to practice law on a daily basis. Notwithstanding respondent's illness, he failed to withdraw as counsel in these matters.

Based on these facts, the complaint charged respondent with violations of RPC 1.16(a)(1) and RPC 1.16(a)(2).

Failure to Cooperate

The complaint alleged that the DEC had notified respondent that he was the subject of four ethics grievances and directed him to participate in the ensuing disciplinary investigations in the following matters:

1. Docket No. XA-2014-0020E (the Goldmunz matter);
2. Docket No. XA-2014-0027E (the Jomax matter);
3. Docket No. XA-2014-0028E (the Barton matter); and
4. Docket No. XA-2014-0035E (the Welling matter).

Between August 26, 2014, and July 20, 2015, the DEC investigator sent respondent a total of nine letters, three in each of the Barton, Jomax, and Goldmunz grievances. The letters in the Barton and Jomax matters were sent both to respondent's post office box and his home address, by certified and regular mail. The certified mail was not claimed and the regular mail was not returned. The letters in the Goldmunz matter were sent to respondent's post office box, his home address, and his office address, by certified and regular mail. The certified mail was not claimed and the regular mail was not returned. Respondent failed to reply to any of these grievances.

On July 28, 2015, almost one year after the first grievance was filed and after many unsuccessful attempts to reach respondent, the DEC investigator finally interviewed him. The investigator sought an accounting of funds collected and remitted by respondent for collection work in the Jomax matters. Respondent confirmed that he maintained client trust accounts and promised to provide the investigator with the information for those accounts to permit the investigator to determine the status of the funds.

On August 31, September 11, and October 22, 2015, the investigator sent letters to respondent at an address respondent had provided during the July 28, 2015 interview. These letters,

sent by certified and regular mail, requested trust account information. Two of the certified letters were returned marked "unclaimed" or "undeliverable as addressed," and the third was not claimed and could not be forwarded. All of the letters sent by regular mail came back as "undeliverable." Respondent never provided information to the DEC investigator regarding the client trust accounts and the Jomax funds. Nor did he provide written responses to the grievances, as had been requested.

Based on these facts, the complaint charged respondent with a failure to cooperate with a disciplinary authority, in violation of both RPC 8.1(b) and R. 1:20-3(g)(3).

* * *

The complaint alleges sufficient facts to 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).

Respondent violated RPC 1.1(a) and RPC 1.3 in the Barton, Jomax, and Goldmunz matters. He missed court deadlines in the Barton matter, failed to deliver a domesticated judgment in one of the Jomax matters, and failed to deliver a will and medical

power of attorney to Goldmunz, for his infirm mother. Because respondent lacked diligence and neglected these matters, he is also guilty of a pattern of neglect, in violation of RPC 1.1(b).

Respondent violated RPC 1.4(b) and (c) in the Barton, Welling, Goldmunz, and Jomax matters. In all of these cases, respondent was completely inaccessible to his clients. He failed to respond to mail, ignored requests for status updates, and failed to produce a requested accounting for the work he had done and the monies he had received and/or remitted in behalf of his client, Jomax. His phone was either busy or disconnected, his voice mailbox full, and, eventually, his phone was disconnected and his office was closed.

Respondent violated RPC 5.5(a)(1) by continuing to actively participate as counsel in the Barton and Morano cases between 2012 and 2014. He signed letters, participated in conferences, and attended hearings. Respondent violated RPC 3.3(a)(5) by his failure to notify the court of his ineligibility, an omission of a material fact to a tribunal. Additionally, respondent violated RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) by practicing in federal court, knowing that he was ineligible to practice in New Jersey.

Respondent also violated RPC 1.16(a)(1) by his failure to withdraw from the Barton and Morano cases, as well as from the Jomax matters, on becoming administratively ineligible to practice law in New Jersey. However, the facts alleged in the complaint do not support a finding that respondent violated RPC 1.16(a)(2) for failing to withdraw from these same matters based on his "illness." The complaint is devoid of any facts that establish the nature of the alleged illness, the effect it had on respondent's ability to practice law, or even whether respondent was aware of an illness that impaired his ability to represent his clients. We, therefore, dismiss that alleged violation.

Respondent violated RPC 8.1(b) by failing to respond, in writing, to the grievances in these matters and by failing to provide specific financial documentation requested by the investigator. Respondent only once dipped his toe into the investigations by participating in a single interview more than a year after the first grievance had been initiated – and only after multiple attempts by the DEC investigator to communicate with him to solicit a response to the grievances.

Respondent also violated RPC 8.4(a) in that he knowingly violated the Rules of Professional Conduct by practicing while ineligible for several years. Further, respondent knew he was

ineligible to practice; however, he failed to notify his clients, pro hac vice counsel, or the court of his status. His conduct, as such, is a misrepresentation by silence, a violation of RPC 8.4(c).

Finally, by practicing while ineligible as local counsel in federal court for pro hac vice counsel, respondent also engaged in conduct prejudicial to the administration of justice, a violation of RPC 8.4(d).

In sum, by his conduct, respondent violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(b) and (c), RPC 1.16(a)(1), RPC 3.3(a)(5), RPC 3.4(c), RPC 5.5(a)(1), RPC 8.1(b), RPC 8.4(a), RPC 8.4(c), and RPC 8.4(d). The only issue remaining is the appropriate quantum of discipline for respondent's misconduct.

Attorneys who mishandle multiple client matters generally receive suspensions of either six months or one year. See, e.g., In re LaVergne, 168 N.J. 410 (2001) (six-month suspension for attorney who mishandled eight client matters; the attorney exhibited lack of diligence in six of them, failure to communicate with clients in five, gross neglect in four, and failure to turn over the file upon termination of the representation in three; in addition, in one of the matters the attorney failed to notify medical providers that the cases had been settled and failed to pay their bills; in one other matter, the attorney misrepresented

the status of the case to the client; the attorney was also guilty of a pattern of neglect and recordkeeping violations); In re Pollan, 143 N.J. 305 (1996) (attorney suspended for six months for misconduct in seven matters, including gross neglect, pattern of neglect, failure to communicate with clients, failure to deliver a client's file, misrepresentation, recordkeeping improprieties, and failure to cooperate with ethics authorities; clinical depression alleged); In re Chamish, 128 N.J. 110 (1992) (six-month suspension imposed for misconduct in six matters, including failure to communicate with clients and lack of diligence; in one of the matters, the attorney represented both driver and passenger in a motor vehicle case and then filed suit on behalf of the driver through the unauthorized use of another attorney's name and forgery of that attorney's signature on the complaint); In re Brown, 167 N.J. 611 (2001) (one-year suspension for attorney who, as an associate in a law firm, mishandled twenty to thirty files by failing to conduct discovery, to file pleadings, motions and legal briefs, and to generally prepare for trials; the attorney also misrepresented the status of cases to his supervisors and misrepresented his whereabouts to conceal the status of matters entrusted to him; the disciplinary matter proceeded as a default; prior reprimand); In re Marum, 157 N.J. 625 (1999) (attorney

suspended for one year for serious misconduct in eleven matters, including lack of diligence, gross neglect, failure to communicate with clients, failure to explain the matter to clients in detail to allow them to make informed decisions about the representation, misrepresentation to clients and to his law partners, which included entering a fictitious trial date on the firm's trial diary, and pattern of neglect; the attorney also lied to three clients that their matters had been settled and paid the "settlements" with his own funds; the attorney's misconduct spanned a period of eleven years; in aggravation, the attorney had two prior admonitions, and failed to recognize his mistakes, instead blaming clients and courts therefor); In re Lawnick, 162 N.J. 113 (1999) (one-year suspension for attorney who agreed to represent clients in six matters and took no action, despite having accepted retainers in five of them; the attorney also failed to communicate with the clients and to cooperate with the investigation of the ethics grievances; the matter proceeded on a default basis; on the same date that the attorney was suspended for one year, the Court suspended him for three months for lack of diligence, failure to communicate with the client, failure to surrender documents and failure to cooperate with disciplinary authorities; that disciplinary matter also proceeded as a

default); and In re Herron, 140 N.J. 229 (1995) (one-year suspension for attorney who engaged in unethical conduct in seven matters; the attorney either grossly neglected them or failed to act with diligence, failed to keep the clients informed of the progress of their matters and, in two cases, misrepresented their status to the clients; the attorney also failed to cooperate with disciplinary authorities; in a subsequent matter, In re Herron, 144 N.J. 158 (1996), the Court suspended the attorney for one year, retroactive to the starting date of the first one-year suspension, for misconduct in two matters, including gross neglect, lack of diligence, failure to communicate with clients and failure to cooperate with disciplinary authorities; the attorney's conduct in that subsequent matter occurred after he was on notice that his conduct in the prior seven matters was under scrutiny by ethics authorities).

But, see, In re Tarter, 216 N.J. 425 (2014) (three-month suspension for attorney who was guilty of misconduct in eighteen matters - one each for three clients and fifteen for another client; specifically, he was guilty of lack of diligence and a pattern of neglect in fifteen cases, gross neglect in one, and failure to withdraw from or to decline representation and failure to properly terminate the representation in all eighteen matters;

mitigating factors included respondent's claim of alcoholism; the relatively short period within which most of his misconduct took place - three months; and his previous unblemished eight-year career, although he had been temporarily suspended, effective May 1, 2013, for failure to comply with a fee arbitration determination).

Here, like the attorney in Lawnick, supra, 162 N.J. 113 (one-year suspension), respondent mishandled six matters - Barton, Morano, Goldmunz, and the three collection matters for Jomax - and failed to cooperate with the investigation of the ethics grievances. Respondent, however, has additional ethics violations.

A reprimand is usually imposed for practicing law while ineligible, when the attorney has an extensive ethics history, is aware of the ineligibility and practices law nevertheless, has committed other ethics improprieties, or has been disciplined for conduct of the same sort. See, e.g., In re Frayne, 220 N.J. 23 (2014) (default; attorney practiced law while ineligible; there was no evidence that he knew that he was ineligible at the time; the attorney also failed to communicate with the client); In re Fell, 219 N.J. 425 (2014) (attorney who was ineligible for a five-month period represented a matrimonial client knowing of his ineligibility; in aggravation, the attorney had received a prior

reprimand; in mitigation, the attorney readily admitted his conduct and serviced his community).

Further, an attorney, who, like respondent, was guilty of conduct prejudicial to the administration of justice and knowingly disobeying an obligation under the rules of a tribunal, received a reprimand. In re Gellene, 203 N.J. 443 (2010). Gellene was also guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients. Several mitigating factors were considered, including the attorney's financial problems, his battle with depression, and his significant family problems. His ethics history included two private reprimands and an admonition. In the Matter of Alfred V. Gellene, DRB 10-026 (May 26, 2010) (slip op. at 16 and 23-24).

Finally, failure to cooperate with a DEC's investigation generally results in an admonition, if the attorney does not have an ethics history. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (attorney failed to reply to repeated requests for information from the District Ethics Committee investigator regarding his representation of a client in three criminal defense matters, a violation of RPC 8.1(b)); In re Gleason, 220 N.J. 350 (2015), In the Matter of Martin A. Gleason, DRB 14-139 (February 3, 2015) (attorney did not file an answer to

the formal ethics complaint and ignored the district ethics committee investigator's multiple attempts to obtain a copy of his client's file, a violation of RPC 8.1(b); the attorney also failed to inform his client that a planning board had dismissed his land use application, a violation of RPC 1.4(b)); In the Matter of Jeffrey M. Adams, DRB 14-243 (November 25, 2014) (attorney failed to cooperate with the district ethics committee's attempts to obtain information from him about his representation of a client in connection with the sale of a house, a violation of RPC 8.1(b); in mitigation, we considered that he had no prior final discipline since his 2000 admission to the New Jersey bar); and In the Matter of Raymond A. Oliver, DRB 12-232 (November 27, 2012) (attorney failed to submit a written, formal reply to the grievance and a copy of the filed pleadings in the underlying case, despite repeated assurances that he would do so, a violation of RPC 8.1(b); we took into consideration that the attorney's failure to cooperate was confined to the period during the investigation and that, thereafter, he appeared at the DEC hearing and participated fully during the disciplinary process).

Respondent's mishandling of the multiple matters entrusted to him merits a one-year suspension. His additional misconduct, however, serves to enhance this otherwise appropriate discipline,


as does the default status of this matter. "A respondent's default or failure to cooperate with the investigative authorities operates 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).

Thus, under the totality of the circumstances, we determine that a two-year suspension is warranted for respondent's serious misconduct. We further determine to require respondent to submit medical proof of fitness prior to his reinstatement.

Member Gallipoli was recused. Members Rivera and Hoberman 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


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David C. Berman
Docket No. DRB 16-096

Decided: November 18, 2016

Disposition: Two-year suspension

<i>Members</i>	Two-year Suspension	Recused	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman			X
Rivera			X
Singer	X		
Zmirich	X		
Total:	6	1	2


Ellen A. Brodsky
Chief Counsel