SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-339
District Docket No. XIV-2016-0091E

IN THE MATTER OF	
ROBERT J. BERNOT	
AN ATTORNEY AT LAW	

Decision

Decided: April 3, 2018

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

This matter was before us by way of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The complaint charged respondent with violations of RPC 5.5(a)(1) and R. 1:20-20(b)(1) (engaging in the unauthorized practice of law), RPC 8.1(b) (failing to cooperate with disciplinary authorities), and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice). For the reasons set forth below, we determined to impose a two-year suspension.

Respondent was admitted to the New Jersey bar in 1982.

On May 2, 2012, respondent received a reprimand for violating RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation) and RPC 1.5(b) (failure to communicate in writing the basis or rate of the fee). In re Bernot, 210 N.J. 117 (2012).

On April 3, 2013, respondent was temporarily suspended by the Court, effective May 3, 2013, for failing to pay disciplinary costs assessed in his May 2, 2012, disciplinary matter. In re Bernot, 213 N.J. 541 (2013). On October 4, 2013, respondent was reinstated, having paid in full the monies owed. In re Bernot, 215 N.J. 634 (2013).

On October 22, 2012, the Court declared respondent administratively ineligible to practice law, pursuant to R. 1:28A-2(d), based on his failure to comply with the Court's Interest on Lawyers Trust Accounts requirements. On November 17, 2014, the Court declared him ineligible to practice law, for failure to satisfy his continuing legal education requirements. He remains ineligible pursuant to that Order.

Additionally, the Court entered an Order, effective September 12, 2016, declaring respondent ineligible to practice law for failure to pay the annual attorney assessment to the New Jersey

Lawyers' Fund for Client Protection. He remains ineligible to date.

Service of process in this matter was proper. On May 25, 2017, the OAE sent a copy of the complaint to respondent at his last known office address by regular and certified mail, return receipt requested. The regular mail was not returned. On May 30, 2017, respondent signed the certified mail receipt.

On August 23, 2017, the OAE sent respondent a letter, to the same address, by regular and certified mail, return receipt requested, informing him that, if he failed to file a verified answer to the complaint within five days of the date of the letter ("the five-day 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). On August 29, 2017, respondent signed the certified mail receipt for that letter.

The time within which respondent may have answered has expired. As of the date of the certification of the record, no answer had been filed by or on behalf of respondent.

We now turn to the allegations of the complaint. In 2011, respondent represented grievant, Penelope Barsky (Penelope), in a

post-judgment matrimonial matter. In August 2011, Penelope entered into a property settlement agreement (PSA) with her former husband, Jack Barsky (Jack).

On August 29, 2013, respondent faxed three letters from his law office, using his office stationery, which identified respondent as an "attorney at law." The first of these letters was sent to the human resources department of the New York Independent System Operator (NYISO), where Jack was employed. In that letter, respondent asserted that he represented Penelope, requested "Mr. Barsky's address, his employment contract, his 2012 1099 form, itemization of any and all bonuses paid him in this calendar year, as well as, a copy of his most recent paystub," and outlined what respondent interpreted as numerous violations of the August 2011 PSA. The second letter, sent directly to Jack, again outlined alleged violations of the PSA. The third letter, also directly to Jack, was a handwritten fax detailing additional PSA violations and threatening to issue subpoenas to Jack's employer and to institute litigation.

On September 4 and September 12, 2013, respectively, respondent faxed a fourth and fifth letter to Jack, on respondent's office stationery, requesting Jack's home address and seeking compliance with the PSA. In the September 12, 2013 letter,

respondent also indicated that he was in the process of preparing a motion to enforce litigant's rights. Four days later, on September 16, 2013, respondent faxed a sixth letter to Jack, again on his law office stationery, regarding the preparation of a motion to enforce litigant's rights to restore alimony and to impose sanctions.

Between August 29, 2013, when he faxed a memorandum to the human resources department of NYISO, and September 16, 2016, the date of his sixth letter to Jack, respondent was temporarily suspended from the practice of law by Order of the Court. Additionally, effective October 22, 2012, he was administratively ineligible to practice, based on his failure to comply with the mandatory IOLTA requirements.

On February 18, 2014, an investigator from the District XIII Ethics Committee (DEC), sent a letter to respondent by regular and certified mail, return receipt requested, notifying him of the docketing of this matter, and requesting a response within ten days. Although he signed the certified mail receipt accepting delivery of the letter, respondent did not reply. On April 11, 2014, the DEC investigator sent respondent a second letter, to no avail. Then, on May 19, 2014, the DEC investigator sent respondent a final letter, by regular and certified mail, return receipt

requested, seeking a response to the grievance. Again, respondent accepted and signed for the certified mail, but, still, failed to reply.

Eventually, on September 12, 2014, the DEC secretary served respondent with a copy of a complaint in this matter, by regular and certified mail, return receipt requested. Once again, respondent signed the certified mail receipt but did not file an answer or otherwise reply. Finally, on December 3, 2014, the secretary sent a "five-day letter" to respondent by regular and certified mail, return receipt requested. Respondent signed the certified mail receipt for delivery of the "five-day letter," but did not file an answer to the complaint.[1]

* * *

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).

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[1] On February 29, 2016, this matter was transferred to the OAE, based on respondent's practice of law during a period of suspension, as opposed to administrative ineligibility. The complaint was refiled by the OAE.

In violation of Court Orders, respondent practiced law while temporarily suspended for failure to pay costs associated with a previous disciplinary matter, and while ineligible for failure to comply with the Court's mandatory IOLTA program. Specifically, between August 29 and September 16, 2013, respondent sent six letters on behalf of his client to her former husband regarding compliance with a PSA. He faxed each of these letters from his law office, using his office stationery, which identified him as an attorney in good standing. Further, in his first letter, he asserted that he represented Penelope. By doing so, respondent violated RPC 5.5(a)(1).

We decline, however, to find a violation of RPC 8.4(d) for this conduct. Although the violation of a court order – and certainly the violation of the Supreme Court's Order of ineligibility – may prejudice the administration of justice, the complaint is bereft of any facts to establish that respondent's conduct in this matter required the expenditure of any judicial resources or otherwise prejudiced the administration of justice. Rather, the complaint established only that respondent, while ineligible to practice, wrote to his client's former husband and his employer, seeking information and threatening to file a motion in aid of litigant's rights, should they fail to forward the

requested information. Thus, in the absence of any such facts indicating either the expenditure of judicial resources or prejudice to the administration of justice, we determine to dismiss the alleged violation of RPC 8.4(d). See, e.g., In re Colby, D-210 September Term 2016; In the Matter of Maxwell X. Colby, DRB 17-082 (August 29, 2017) (slip op. at 15-16, 20) (one-year suspension for attorney who had agreed to represent his client in an estate matter while he was ineligible and who, subsequently, failed to enter an appearance or to file any responsive pleadings to a complaint seeking, among other things, removal of his client as the trustee of a decedent's trust; although the attorney appeared in the courthouse on the date of a scheduled order to show cause and spoke with his adversary in an attempt to settle the matter, he did not enter the courtroom or take any other action that required court action or that affected the outcome of the proceeding on the order to show cause; in another matter, the attorney was retained to probate a will and settle an estate; the attorney took no action in the matter and, further, failed to file an answer to a competing claim for appointment as the estate administrator; once again, the attorney appeared in the courthouse to attempt to negotiate the matter with opposing counsel, who refused to entertain any discussion in light of the attorney's

ineligible status; because there was no evidence that respondent's actions required any court response or the expenditure of court resources, or that his actions affected the outcome of the proceedings, we determined to dismiss the alleged violation of RPC 8.4(d)). But see In re Kates, 162 N.J. 10 (1999), In the Matter of Brett K. Kates, DRB 98-046 (April 5, 1999) (slip op. at 6)(suspended attorney represented two clients in separate, non-litigated, transactions; by virtue only of the attorney's practice of law while suspended, we found a violation of RPC 5.5(a) and RPC 8.4(d)).

Additionally, respondent repeatedly accepted and signed for letters from the DEC requesting that he reply to the grievance, and file an answer to the complaint, but failed to do either. Subsequently, the OAE filed a disciplinary complaint. Despite a second opportunity to cooperate, respondent again rebuked the requests. Respondent's conduct brazenly violated RPC 8.1(b).

Although practicing while ineligible and practicing while suspended are two different forms of misconduct, they generally are classified as the unauthorized practice of law. Practicing while suspended, the more serious misconduct of the two, is met with more severe discipline. Specifically, the level of discipline for practicing law while suspended ranges from a lengthy suspension

to 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 (2015) (one-year retroactive suspension imposed on attorney who, after a Superior Court judge had restrained him from practicing law, represented two clients in municipal court, and, in addition, appeared in a municipal court on behalf of a third client, after the Supreme Court had temporarily suspended him; the attorney also failed to file the required R. 1:20-20 affidavit following the temporary suspension; significant mitigating factors, including the attorney's diagnosis of a catastrophic illness and other circumstances that led to the dissolution of his marriage, the loss of his business, and the ultimate collapse of his personal life, including becoming homeless, and, in at least one of the instances of his practicing while suspended, his desperate need to provide some financial support for himself; prior three-month suspension); 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 served as planning board solicitor for two municipalities; prior three-month suspension; extremely compelling circumstances considered in mitigation); In re Lisa, 158 N.J. 5 (1999) (one-year

suspension for attorney who appeared before a New York court during his New Jersey suspension; in imposing only a one-year suspension, the Court considered a serious childhood incident that made the attorney anxious about offending other people or refusing their requests; out of fear of offending a close friend, he agreed to assist as "second chair" in the New York criminal proceeding; there was no venality or personal gain involved; the attorney did not charge his friend for the representation; prior admonition and three-month suspension); 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 fee to a client; the attorney also made multiple misrepresentations to clients, displayed gross neglect and pattern of neglect, engaged in negligent misappropriation and in a conflict of interest situation, and failed to cooperate with disciplinary authorities);[2] In re Marra, 183 N.J. 260 (2005) (three-year suspension for attorney found guilty of practicing law in three matters while suspended; the attorney also filed a false affidavit

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[2] In that same Order, the Court imposed a retroactive one-year suspension on the attorney, on a motion for reciprocal discipline, for his retention of unearned retainers, lack of diligence, failure to communicate with clients, and misrepresentations.

with the Court stating 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 affidavit of compliance required by Rule 1:20-20(a), 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); 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 re Walsh, Jr., 202 N.J. 134 (2010) (attorney disbarred in a default

case for practicing law while suspended by attending a case conference and negotiating a consent order on behalf of five clients and making a court appearance on behalf of seven clients; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities during the investigation and processing of these grievances; the attorney failed to appear on an order to show cause before the Court; extensive disciplinary history: reprimanded in 2006, censured in 2007, and suspended twice in 2008); In re Olitsky, 174 N.J. 352 (2002) (disbarment for attorney who agreed to represent four clients in bankruptcy cases after he was suspended, did not notify them that he was suspended from practice, charged clients for the prohibited representation, signed another attorney's name on the petitions without that attorney's consent and then filed the petitions with the bankruptcy court; in another matter, the attorney agreed to represent a client in a mortgage foreclosure after he was suspended, accepted a fee, and took no action on the client's behalf; in yet another matter, the attorney continued to represent a client in a criminal matter after the attorney's suspension; the attorney also made misrepresentations to a court and was convicted of stalking a woman with whom he had had a romantic relationship; prior private

reprimand, admonition, two three-month suspensions, and two six-month suspensions); and In re Costanzo, 128 N.J. 108 (1992) (attorney disbarred for practicing law while serving a temporary suspension for failure to pay administrative costs incurred in a prior disciplinary matter and for misconduct involving numerous matters, including gross neglect, lack of diligence, failure to keep clients reasonably informed and to explain matters in order to permit them to make informed decisions about cases, pattern of neglect, and failure to designate hourly rate or basis for fee in writing; prior private reprimand and reprimand).

Thus, the threshold discipline for practicing while suspended is a one-year suspension. Clearly, respondent's misconduct does not rise to the level of the disbarment cases, including Costanzo. Although Costanzo was also practicing while temporarily suspended for failing to pay costs, he was guilty of other egregious misconduct. Similarly, the three-year suspension cases also involved more extensive and egregious misconduct, as well as more substantial ethics histories. In Wheeler I, the attorney was suspended for two years, for practicing while under Order of a temporary suspension, and had other significant violations. At the time, however, he had no ethics history. Conversely, the attorney in Brady had a much more serious ethics history than respondent,

and represented three clients while temporarily suspended or otherwise enjoined from the practice of law. Brady, however, offered overwhelming factors in mitigation, resulting in a one-year suspension.

Here, there are no mitigating factors to consider. Although respondent's misconduct is limited to practicing while suspended and ineligible and a failure to cooperate, he has a prior reprimand. Indeed, his failure to pay costs associated with that matter triggered the series of events that brought him before us, yet again.

Respondent's flagrant disregard for the disciplinary system operates as a significant aggravating factor. He personally signed for several certified letters and simply chose to ignore his obligation to respond to those demands for information. Moreover, respondent has allowed this matter to proceed by way of default. "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, 183 N.J. 332, 342 (2008). Hence, on balance, we determine to impose a two-year suspension for respondent's misconduct.

Vice-Chair Baugh and Members Gallipoli, Rivera, and Zmirich 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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert J. Bernot
Docket No. DRB 17-339

Decided: April 3, 2018

Disposition: Two-year Suspension

Members	Two-Year Suspension	Did not participate
Frost	X	
Baugh		X
Boyer	X	
Clark	X	
Gallipoli		X
Hoberman	X	
Rivera		X
Singer	X	
Zmirich		X
Total:	5	4

Ellen A. Brodsky
Chief Counsel