

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-358
District Docket No. XIV-2017-0084E

IN THE MATTER OF :
:
KEVIN C. FOGLE :
:
AN ATTORNEY AT LAW :
:

Decision

Argued: January 18, 2018

Decided: April 11, 2018

Joseph A. Glyn appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear for argument, despite proper service.

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

This matter was before us on a motion for reciprocal discipline, filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-14, following respondent's one-year-and-one-

day suspension¹ in Pennsylvania for his violation of multiple RPCs and Pa.R.D.E.s. The OAE seeks a three-month suspension.

For the reasons set forth below, we determine to grant the motion for reciprocal discipline and impose a three-month prospective suspension on respondent for his violation of New Jersey RPC 1.4(b) (failure to communicate with the client), RPC 1.15(a) (failure to safeguard funds), RPC 1.15(b) (failure to promptly notify client of receipt of funds and to promptly deliver the monies), RPC 1.15(d) (failure to comply with the recordkeeping requirements of R. 1:21-6(c)), RPC 1.16(a)(1) (failure to withdraw from representation of a client when the representation will result in the violation of the RPCs), RPC 1.16(d) (failure to protect the client's interest on termination of representation), RPC 4.2 (communication with a person represented by counsel), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and RPC 8.4(d) (conduct prejudicial to the administration of justice). Although respondent violated a number of Court Rules that are similar to the Pa.R.D.E.s,

¹ The extra day requires the suspended attorney to file a petition for reinstatement. Pa.R.D.E. 218(a)(1). At the reinstatement proceeding, the attorney must prove fitness to practice law. Pa.R.D.E. 218(c)(3). Pa.R.D.E. is the abbreviation for the Pennsylvania Rules of Disciplinary Enforcement.

those violations do not constitute grounds for imposing discipline beyond the RPCs.

Respondent was admitted to the New Jersey and New York bars in 2014. In 2013, he was admitted to the Pennsylvania bar. At the relevant times, he maintained an office for the practice of law in Harrisburg, Pennsylvania.

Respondent has no history of discipline in New Jersey. However, the Court entered an Order, effective October 30, 2017, declaring him ineligible to practice based on his failure to comply with the mandatory continuing legal education requirements. He remains ineligible to date.

On September 21, 2015, the Supreme Court of Pennsylvania (Pennsylvania Court) administratively suspended respondent, effective October 21, 2015, for his failure to comply with the annual registration requirements set forth in Pa.D.R.E. 219. On August 11, 2016, the Pennsylvania Office of Disciplinary Counsel (ODC) issued a Petition for Discipline, charging respondent with unethical conduct in two client matters, plus non-compliance with a number of Pa.R.D.E.s, following his administrative suspension. Respondent did not file an answer to the petition and, thus, the allegations were deemed admitted.

Despite respondent's default, on November 14, 2016, he appeared at, and participated in, a pre-hearing conference. He

also entered into a Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d) (Joint Petition) with the ODC, which was approved by the Disciplinary Board of the Pennsylvania Court (Pennsylvania Board) on an unidentified date. The Joint Petition formed the basis for the Pennsylvania Court's February 24, 2017 suspension order. Thus, we rely on the facts set forth in the Joint Petition.

As stated above, on September 21, 2015, the Pennsylvania Court administratively suspended respondent for his failure to comply with Pa.R.D.E. 219 (September 2015 order). The effective date of the suspension was October 21, 2015.

Also, on September 21, 2015, Pennsylvania's Attorney Registrar, Suzanne E. Price, sent a certified copy of the September 2015 order to respondent, together with a copy of Pa.R.D.E. 217² and 219 and the "relevant" Pennsylvania Board rules governing formerly admitted attorneys. Respondent failed to comply with any of those rules. In particular, he did not notify his litigation clients, Michael G. Hagar and Eileen Tomeo, whom he ultimately "abandon[ed]," of the suspension. He also failed to notify opposing counsel and the Montgomery County

² Pa.R.D.E. 217 applies to formerly admitted attorneys.

Court of Common Pleas. Finally, respondent failed to file the required "Statement of Compliance."

MICHAEL G. HAGAR MATTER

On June 3, 2014, Michael G. Hagar retained respondent to represent him in a wrongful eviction action against his former landlord, who also had retained Hagar's \$625 security deposit. Pursuant to the terms of a written fee agreement, Hagar paid respondent a \$1,000 flat fee, which he agreed to hold in trust until the fee was earned.

On an unidentified date, the landlord refunded \$477 of the security deposit. Although respondent agreed to hold the funds in trust, he did not deposit the monies in an attorney trust account.

On September 4, 2014, respondent filed suit against Hagar's former landlord in the Montgomery County Court of Common Pleas. In October 2014, respondent informed Hagar that he had charged him too little for the representation. In March 2015, respondent proposed that he and Hagar enter into a new fee agreement. Hagar refused.

Respondent and Hagar continued to have regular communication about the matter until mid-April 2015. By June 2015, however, respondent had ignored all of Hagar's text and

voice mail messages seeking information about depositions, updates, and the status of the \$477 refund.

Since March 23, 2015, the court's docket has reflected no activity in the litigation. Although respondent remained counsel of record for Hagar, he "abandoned" his client and never disbursed the \$477 to him.

On an unidentified date, Hagar filed a grievance against respondent. On February 17, 2016, ODC sent a DB-7 letter³ to respondent, by certified mail, return receipt requested, notifying him of the grievance, in addition to his disregard of the September 2015 administrative suspension order. Although respondent signed the return receipt card, he did not submit a reply to the letter or contact ODC.

On June 24, 2016, ODC sent respondent a DB-7A letter, by regular and certified mail, return receipt requested, notifying him of "additional rule violations" and requesting the production of "Required Records," pursuant to Pennsylvania RPC 1.15(e). Although the certified letter was returned to the ODC with a label stating "return to sender, not deliverable as addressed, unable to forward," respondent received the letter sent by regular mail.

³ A DB-7 letter, also known as a letter of inquiry, seeks the attorney's version of the facts alleged in a grievance.

Respondent ignored the DB-7A letter and did not produce the "Required Records."

EILEEN TOMEO MATTER

On January 25, 2015, respondent agreed to represent Eileen Tomeo in an appeal from an eviction, but he did not memorialize their agreement in writing. On that same date, Tomeo paid respondent a \$1,500 advance retainer, which, she understood, he would bill against at a \$195 hourly rate. Respondent deposited Tomeo's check into an unidentified, non-trust account with Citizens Bank.

On February 2, 2015, respondent appealed the eviction order to the Montgomery County Court of Common Pleas. Attorney David W. Conver represented the landlord, Jefferson Apartments, Inc. (Jefferson).

On March 24, 2015, respondent wrote to Conver and suggested that their clients resolve the action by entering into a new lease agreement. Without Conver's consent, respondent copied Jefferson on the letter.

Tomeo rejected the new lease terms. Having now exhausted the advance retainer, respondent billed her for additional services rendered. Tomeo paid him \$1,000 in April and May 2015. Respondent's last contact with Tomeo was in August 2015.

On October 19, 2015, Conver mailed a trial praecipe to respondent's office. Shortly thereafter, the court mailed respondent a notice of a pre-trial hearing scheduled for February 12, 2016.

Respondent failed to notify Tomeo, Conver, and the court of his September 2015 administrative suspension. When he failed to provide the court with the required pre-conference submissions, court personnel attempted to contact respondent, without success, and later learned of his suspension. Accordingly, on February 8, 2016, the court cancelled the pre-trial hearing, permitted Tomeo time to retain a new attorney, and returned the matter to the trial pool. A copy of the order was mailed to respondent, Conver, Tomeo, and court personnel.

Although respondent remained counsel of record for Tomeo, he "abandoned" her. On an unidentified date, Tomeo filed a grievance against him.

On March 11, 2016, ODC sent a DB-7 letter to respondent, by certified mail, return receipt requested, notifying him of the grievance and his disregard of the September 2015 order. Because respondent did not sign for the certified letter, it was served on him personally. Respondent did not submit a reply to the letter.

On June 24, 2016, ODC sent respondent a DB-7A letter, by regular and certified mail, return receipt requested, notifying him of "additional rule violations" and requesting the production of "Required Records," pursuant to Pennsylvania RPC 1.15(e). Although the certified letter was returned to the ODC with a label stating "return to sender, not deliverable as addressed, unable to forward," respondent received the letter sent by regular mail.

Respondent ignored the DB-7A letter and did not produce the "Required Records."

Based on the above facts, the parties agreed that respondent had violated the following Pennsylvania RPCs (with the corresponding New Jersey RPCs and Court Rules noted in bold):

- RPC 1.4(a)(3), which states that "a lawyer shall keep the client reasonably informed about the status of the matter" (**RPC 1.4(b)**);
- RPC 1.4(a)(4), which states that "that a lawyer shall promptly comply with reasonable requests for information" (**RPC 1.4(b)**);
- RPC 1.5(b), which states that "when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation" (**RPC 1.5(b)**);
- RPC 1.15(c), which states that "[c]omplete records of the receipt, maintenance and

disposition of Rule 1.15 Funds and property shall be preserved for a period of five years after termination of the client-lawyer or Fiduciary relationship or after distribution or disposition of the property, whichever is later. A lawyer shall maintain the writing required by Rule 1.5(b) (relating to the requirement of a writing communicating the basis or rate of the fee) and the records identified in Rule 1.5(c) (relating to the requirement of a written fee agreement and distribution statement in a contingent fee matter). A lawyer shall also maintain . . . books and records for each Trust Account and for any other account in which Fiduciary Funds are held pursuant to Rule 1.15(1)" (R. 1:21-6(c)(1)(A)-(I) and RPC 1.15(d));⁴

- RPC 1.15(d), which states, in pertinent part, that "upon receiving Rule 1.15 Funds or property which are not Fiduciary Funds or property, a lawyer shall promptly notify the client or third person, consistent with the requirements of applicable law" (RPC 1.15(b));
- RPC 1.15(e), which states, in pertinent part, that "except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property" (RPC 1.15(b));⁵

⁴ In New Jersey, the records must be maintained for seven years. R. 1:21-6(c)(1).

⁵ New Jersey RPC 1.15(b) does not require an accounting.

- RPC 1.15(i), which states that "a lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner;"⁶
- RPC 1.15(1), which states that "all Fiduciary Funds shall be placed in a Trust Account (which, if the Fiduciary Funds are also Qualified Funds, must be an IOLTA Account) or in another investment or account which is authorized by the law applicable to the entrustment or the terms of the instrument governing the Fiduciary Funds" (RPC 1.15(a));
- RPC 1.16(a)(1), which states that "except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law" (RPC 1.16(a)(1));
- RPC 1.16(d), which states that "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests such as . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expenses that has not been earned or incurred" (RPC 1.16(d));

⁶ New Jersey does not, as a matter of course, require fees paid in advance to be safeguarded in a trust account until earned. Rather, unless the attorney and the client agree otherwise, a New Jersey lawyer is permitted to deposit the advance payment of fees and expenses in an attorney business account.

- RPC 4.2, which states that "in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order" (RPC 4.2); and
- RPC 8.4(d), which states that "it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice" (RPC 8.4(d)).

In addition to the above RPC violations set forth in the Joint Petition, the OAE asserts that respondent violated New Jersey RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.15(d), RPC 8.1(b), and RPC 8.4(a) (violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another).

The parties also agreed that respondent had violated the following Pa.R.D.E.s (again, the corresponding New Jersey Court Rules are noted in bold):

- Pa.R.D.E. 203(b)(3), which states that "willful violation of any other provision of the Enforcement Rules, shall be grounds for discipline;"
- Pa.R.D.E. 203(b)(7), which states that "failure by a respondent-attorney without good cause to respond to Disciplinary Counsel's request or supplemental request under Disciplinary Board Rules, § 87.7(b) for a statement of respondent-attorney's position" shall be grounds for discipline (**R. 1:20-3(g)(4)**);

- Pa.R.D.E. 217(c)(2), which states that "a formerly admitted attorney shall promptly notify, or cause to be notified, of the disbarment, suspension, administrative suspension or transfer to inactive status, by registered or certified mail, return receipt requested: all other persons with whom the formerly admitted attorney may at any time expect to have professional contacts under circumstances where there is a reasonable probability that they may infer that he or she continues as an attorney in good standing. The responsibility of the formerly admitted attorney to provide the notice required by this subdivision shall continue for as long as the formerly admitted attorney is disbarred, suspended, administratively suspended or on inactive status" (R. 1:20-11(d); R. 1:20-20(b)(11) and (12));
- Pa.R.D.E. 217(e), which states that, "within ten days after the effective date of the disbarment, suspension, administrative suspension or transfer to inactive status order, the formerly admitted attorney shall file with the Board a verified statement showing: (1) that the provisions of the order and these rules have been fully complied with; and (2) all other state, federal and administrative jurisdictions to which such person is admitted to practice. Such statement shall also set forth the residence or other address of the formerly admitted attorney where communications to such person may thereafter be directed" (R. 1:20-20(b)(15));⁷
- Pa.R.D.E. 217(i), which states that "a formerly admitted attorney shall keep and maintain records of the various steps taken

⁷ The language does not track the Pa.R.D.E.

by such person under these rules so that, upon any subsequent proceeding instituted by or against such person, proof of compliance with these rules and with the disbarment, suspension, administrative suspension or transfer to inactive status order will be available" (R. 1:20-20(b)(14));

- Pa.R.D.E. 217(j)(4), which states that "a formerly admitted attorney may not engage in any form of law-related activities in this Commonwealth except in accordance with the following requirements: Without limiting the other restrictions in this subdivision (j), a formerly admitted attorney is specifically prohibited from engaging in any of the following activities . . . (x) receiving, disbursing or otherwise handling client funds;" (R. 1:20-16(h); R. 1:20-20(b));⁸ and
- Pa.R.D.E. 219(e), which provides that "upon receipt of a form, or notice of change of information contained therein, filed by an attorney in accordance with the provisions of subdivision (d) of this rule (attorney registration requirements), and of payment of the required annual fee to practice law in this Commonwealth, receipt thereof shall be acknowledged on a certificate or license."⁹

The Joint Petition also states that respondent "has a drinking problem that he must address before he seeks to regain his license through a reinstatement proceeding." Further, the

⁸ Under both R. 1:20-16(h) and R. 1:20-20(b)(5), a suspended attorney is not automatically restrained from disbursing funds from his or her attorney accounts, unless the Court imposes that restriction.

⁹ This Pa.R.D.E. appears to apply to the Pennsylvania Attorney Registrar, not attorneys.

Joint Petition identifies the following aggravating circumstances: (1) his misconduct began two years after he was admitted to the bar; (2) he did not respond to the petition for discipline; and (3) he did not disburse the \$477 to Hagar. In mitigation, the Joint Petition lists respondent's unblemished disciplinary history and his "belated[]" cooperation with ODC.

The parties consented to a suspension of one year and one day. On February 24, 2017, the Pennsylvania Court imposed the suspension.

The record contains no evidence that respondent notified the OAE of his suspension, and the OAE's brief does not address the issue.

* * *

Following a review of the record, we determine to grant the OAE's motion.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). However, subsection (E) applies because respondent's conduct in Pennsylvania does not warrant a one-year-and-one-day suspension in New Jersey. Instead, a three-month suspension is appropriate for respondent's misconduct.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

We begin with the violations arising out of respondent's representation of Hagar and Tomeo. Preliminarily, we note that Pennsylvania characterized respondent's total lack of communication with his clients as "abandonment," a very serious ethics infraction in New Jersey. In this state, however, client abandonment requires a clear and convincing showing that the attorney disappeared and cannot be found. See, e.g., In re O'Hara, 224 N.J. 225 (2016) (attorney completely abandoned his practice, as well as hundreds of clients in the midst of litigation); In re Kantor, 180 N.J. 226 (2004) (attorney failed to communicate with ten clients for whom he had active files and abandoned his practice, without completing the matters for which he had been retained); In re Holman, 156 N.J. 371 (1998) (attorney collected a fee from fifteen clients, without any intention of providing any services to them, and disappeared); In re Golden, 156 N.J. 365 (1998) (attorney failed to reply to seven clients' attempts to communicate with him and then disappeared); and In re Clark, 134 N.J. 522 (1993) (attorney abandoned seven clients when, without notice to them, he closed his office and disconnected his telephone). Although respondent's total failure to communicate with his clients and to take action on their cases suggests that he abandoned them, in the absence of any evidence that he had closed shop and

disappeared, or accepted retainers without any intent to render services, we do not find client abandonment. This is not to say, however, that respondent did not commit other acts of misconduct.

According to the Joint Petition, respondent violated Pennsylvania RPC 1.4(a)(3) and (4). That Rule is equivalent to New Jersey RPC 1.4(b), which requires an attorney to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information.

Here, one year after Hagar had retained respondent, who filed suit against the landlord and collected a partial refund of Hagar's security deposit, respondent ceased all communication with his client and ignored Hagar's inquiries into the status of the \$477 refund. Respondent's inaction was a clear violation of RPC 1.4(b).

Respondent violated the same Rule in respect of Tomeo. It appears that, after the effective date of the 2015 administrative suspension, respondent stopped doing anything in his client's case. More importantly, he failed to inform Tomeo that he was now barred from representing her, thus denying her the opportunity to seek new counsel.

We do not find a violation of RPC 8.4(a). Not only is the RPC not identified in the Joint Petition, but also it is based

on respondent's mere violation of other, more specific RPCs. In the past, we have declined to find a violation of this Rule, except where the attorney has, through the acts of another, violated or attempted to violate the RPCs or where the attorney himself has attempted, but failed, to violate the RPCs. Thus, it would be superfluous to find a violation here, where no such conditions exist and where we are able to find more specific violations.

We also do not agree with the OAE's position that respondent violated RPC 1.1(a) and RPC 1.3 in his handling of the Hagar and Tomeo matters. RPC 1.1(a) prohibits an attorney from grossly neglecting a client's matter. RPC 1.3 requires an attorney to act with reasonable diligence and promptness in representing a client.

In Hagar, the record contains no evidence that respondent neglected the matter or engaged in delay in the representation of his client. He filed suit in September 2014. The docket reflected activity through March 23, 2015. Respondent ceased communication with Hagar in mid-April of that year. Yet, nothing in the facts suggests that there was anything that respondent should have done, but failed to do, in the interim, other than communicate with Hagar. Thus, we find no basis on which to conclude that respondent violated RPC 1.1(a) or RPC 1.3.

Similarly, in respect of Tomeo, there is no evidence that respondent neglected or tarried in handling his client's matter, prior to the October 2015 effective date of his administrative suspension. His last contact with his client was in August 2015. There is no evidence of anything that respondent should have done, but failed to do, after that date, except for appearing at a pre-trial conference on February 12, 2016. By that time, however, he had been suspended for months and, thus, could not have appeared. Thus, these failings on his part do not constitute gross neglect or lack of diligence. Rather, as shown below, they represent respondent's failure to comply with the obligations imposed on an attorney who is suspended from the practice of law.

In the Hagar matter, prior to respondent's administrative suspension, he violated RPC 1.15(a) and (b). RPC 1.15(a) requires a lawyer to safeguard a client's funds, by depositing the monies in a trust account. Respondent failed to deposit the \$477 security deposit in his trust account. Further, RPC 1.15(b) provides that, upon receipt of funds belonging to a client, the lawyer shall promptly notify the client and promptly deliver the

funds to him or her. It appears that Hagar knew of the refund, but respondent never delivered the funds to him.¹⁰

In the Tomeo matter, the RPC 1.5(b) violation cannot stand. In Pennsylvania and New Jersey, the Rule requires a lawyer to reduce to writing the basis or rate of the fee for clients not regularly represented by the attorney. The Joint Petition contains no facts on which to conclude that respondent previously had not represented Tomeo. Thus, despite his admission of the violation, that charge cannot be sustained, based on this record.

Respondent violated RPC 4.2 in the Tomeo matter. The Pennsylvania version of the Rule prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. New Jersey RPC 4.2 is similar, except that the prohibition also applies when the lawyer "by the exercise of reasonable diligence should know" that the person is represented by another lawyer in the matter. Respondent violated the Rule when, without Conner's

¹⁰ The record is silent in respect of the disposition of those funds. Respondent was not charged with misappropriation of client or escrow funds in Pennsylvania, and the OAE has not raised the issue before us.

consent, he copied Jefferson, the defendant-landlord, on a letter to Conver proposing a settlement.

Effective October 21, 2015, respondent was administratively suspended from the practice of law in Pennsylvania and, thus, was obligated to notify his clients, Hagar and Tomeo, as well as the court and opposing counsel, of that event.¹¹ He failed to do so. Thus, by continuing as counsel of record for Hagar and Tomeo, following the suspension, and by failing to provide either client with notice of the suspension, thus depriving them of notice and an opportunity to retain other counsel, respondent violated RPC 1.16(a)(1) and (d).

Respondent violated RPC 8.1(b) and RPC 8.4(d) by failing to file a "Statement of Compliance," which is Pennsylvania's equivalent to New Jersey's affidavit of compliance. New Jersey R. 1:20-20(c) states that failure to file the affidavit "constitute[s] a violation of RPC 8.1(b) . . . and RPC 8.4(d)." Respondent also violated RPC 8.1(b) by ignoring the ODC's DB-7 and DB-7A letters in the Hagar and Tomeo matters.

¹¹ The Joint Petition, perhaps mistakenly, cited Pa.R.D.E. 217(c)(2) for the proposition. It appears that the more appropriate provision is Pa.R.D.E. 217(b), which addresses a lawyer's obligation to notify clients and attorneys in pending litigation matters.

Finally, respondent's violation of Pennsylvania RPC 1.15(c) was tantamount to a violation of New Jersey RPC 1.15(d). Both RPCs pertain to a lawyer's recordkeeping obligations. In this case, respondent failed to maintain a number of records required by R. 1:21-6, such as copies of fee agreements and trust account records.

To conclude, we find that respondent violated RPC 1.4(b); RPC 1.15(a), (b), and (d); RPC 1.16(a)(1) and (d); RPC 4.2; RPC 8.1(b); and RPC 8.4(d).

There remains for determination the appropriate measure of discipline to impose for respondent's ethics infractions.

In seeking a three-month suspension, the OAE relies on cases involving multiple RPC violations similar to those present here. Most of those cases involved attorneys with disciplinary histories, or who defaulted, or presented other aggravating factors. See e.g., In re Berson, 172 N.J. 99 (2002) (default; three-month suspension imposed on attorney who engaged in gross neglect, lack of diligence, failure to communicate and failure to expedite litigation in one client matter; a pattern of neglect was found, based on the attorney's prior instances of gross neglect; suspension imposed because the case represented the third consecutive default matter; the attorney also had an extensive disciplinary history of two three-month suspensions in

default matters, an admonition, and a temporary suspension for failure to comply with a fee arbitration award, which had been in effect for more than two years); In re Saavedra, 147 N.J. 269 (1997) (three-month suspension imposed on attorney who failed to appear on an order to show cause issued against him after he failed to satisfy a judgment entered against him in a court reporter's action for payment of a transcript, a violation of RPC 8.4(d); he also engaged in gross neglect, lack of diligence, and failure to communicate in two client matters; in connection with a prior violation, a pattern of neglect was found; the attorney also failed to return an unearned retainer; prior reprimand and admonition); In re Chen, 143 N.J. 416 (1996) (three-month suspension imposed on attorney for gross neglect, lack of diligence, and failure to communicate in two client matters and failure to cooperate with disciplinary authorities; the attorney also made multiple misrepresentations to one of her clients; pattern of neglect was found when prior violations were considered; prior reprimand); and In re Marlowe, 121 N.J. 236 (1990) (three-month suspension imposed on attorney who engaged in a pattern of neglect over a period of six years; in aggravation, the attorney had a prior reprimand, made misrepresentations to one of the clients, and failed to cooperate with the ethics investigation).

We recognize that, ordinarily, most of respondent's infractions, standing alone, or in various combinations, have resulted in the imposition of an admonition:

- RPC 1.4(b): In the Matter of William Robb Graham, DRB 13-274 (January 23, 2014) (attorney filed a claim with the Veterans' Administration on behalf of his client, but failed to notify the client that the claim had been dismissed and failed to discuss the options available to the client, specifically, to file either a request for reconsideration or a lawsuit; further, the client's attempts to obtain information about the case, including the return of his file and medical records, from the attorney were unavailing; a violation of RPC 1.4(b));
- RPC 1.15(a), (b), and (d): In the Matter of Vincent L. Galasso, DRB 13-132 (October 23, 2013) (attorney failed to disburse funds to a medical provider, failed to perform monthly three-way reconciliations, and, in an unrelated matter, negligently misappropriated funds by inadvertently making a deposit in his business, rather than his trust, account; violations of RPC 1.15(a), (b), and (d));
- RPC 1.15 and other, non-serious infractions: In the Matter of Craig Joseph Kobrin, DRB 15-308 (February 2, 2016) (attorney failed to satisfy medical lien for several years

and then only after the provider had obtained a judgment against him, a violation of RPC 1.15(b); in addition, when the client's matter had settled, the attorney failed to segregate the funds until the lien was resolved, choosing instead to disburse them to his client, a violation of RPC 1.15(c)); In the Matter of John Joseph Hutt, DRB 15-037 (May 27, 2015) (after the attorney had settled his client's personal injury claim, he failed to resolve outstanding medical liens for more than one year, a violation of RPC 1.3 and RPC 1.15(b)); the attorney also failed to reply to his client's inquiries about the status of the liens, a violation of RPC 1.4(b)); In the Matter of David J. Percely, DRB 08-008 (June 9, 2008) (for three years, attorney did not remit to client the balance of settlement funds to which the client was entitled, a violation of RPC 1.15(b); the attorney also lacked diligence in the client's representation, failed to cooperate with the investigation of the grievance, and wrote a trust account check to "cash," violations of RPC 1.3, RPC 8.1(b), and R. 1:21-6(c)(1)(A); significant mitigation presented, including the attorney's unblemished twenty years at the bar); In the Matter of Anthony J. Giampapa, DRB 07-178 (November 15, 2007) (attorney did not promptly disburse to a client the

balance of a loan that was refinanced; in addition, the attorney did not adequately communicate with the client and did not promptly return the client's file; violations of RPC 1.15(b), RPC 1.4(b), and RPC 1.16(d));

- RPC 8.1(b) and other, non-serious infractions: In the Matter of Carl G. Zoecklein, DRB 16-167 (September 22, 2016) (attorney lacked diligence in the representation of his client, by failing to file a complaint on the client's behalf, failed to communicate with his client, and failed to cooperate with the ethics investigation, violations of RPC 1.3, RPC 1.4(b), and RPC 8.1(b)); in mitigation, we considered the attorney's unblemished disciplinary record since his 1990 admission to the bar, his ultimate cooperation with the district ethics committee, and his admission of guilt and entry into a disciplinary stipulation, which saved disciplinary resources); 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 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); we considered, in mitigation, the attorney's acceptance of full responsibility for the dismissal of his client's application, the fact that he had refunded the entire legal fee to the client, and that he had erroneously believed that his reply to the grievance and a subsequent letter to the district ethics committee secretary, admitting the allegations of the complaint, satisfied his obligation to file a formal answer); and 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 respect of RPC 4.2, attorneys found guilty of communicating with represented persons have received discipline ranging from an admonition to a censure, depending on the presence of other violations, and/or aggravating and mitigating factors. See, e.g., In the Matter of Mitchell L. Mullen, DRB 14-

287 (January 16, 2015) (admonition for attorney who, in the course of an e-mail chain, communicated directly with the grievant in at least three e-mails in the underlying matter, when he knew or should have known that the grievant was represented by counsel; the communications involved the subject of the representation; the attorney also sent a notice of deposition directly to the grievant and never attempted to notify the other attorney of the deposition date; in mitigation, we considered that the attorney's conduct was minor and caused no harm to the grievant, and that he had been a member of the bar for thirty-nine years, with no disciplinary record); In the Matter of Charlene Cathcart, DRB 96-088 (May 2, 1996) (admonition for attorney who sent a letter directly to a represented defendant in a personal injury case in which she represented the plaintiff); In re Tyler, 204 N.J. 629 (2011) (reprimand for attorney who, in one of six bankruptcy matters, communicated directly with the client about a disgorgement order in one matter, although she knew or should have known that subsequent counsel had already been engaged, a violation of RPC 4.2; gross neglect and pattern of neglect, lack of diligence, and failure to communicate with the clients also found; in mitigation, the attorney had no prior discipline and was struggling with medical issues at the time of the misconduct);

and In re Veitch, 216 N.J. 162 (2013) (censure for attorney who, in a criminal matter, communicated with his client's co-defendant, who had pleaded guilty, about the merits of the criminal case, even though counsel for the co-defendant had previously denied the attorney's request to talk to his client, a violation of RPC 4.2; the attorney's unblemished disciplinary history of thirty-eight years militated against a term of suspension, particularly because neither any party nor the judicial system had suffered any actual harm).

The threshold measure of discipline to be imposed for an attorney's failure to file a R. 1:20-20(b)(15) affidavit is a reprimand. In re Girdler, 179 N.J. 227 (2004); In the Matter of Richard B. Girdler, DRB 03-278 (November 20, 2003) (slip op. at 6). The actual discipline imposed may be different, however, if the record demonstrates mitigating or aggravating circumstances. Ibid. Examples of aggravating factors include the attorney's failure to respond to the OAE's specific request that the affidavit be filed, the attorney's failure to answer the complaint, and the extent of the disciplinary history. Ibid.

In our view, despite the absence of a disciplinary history, a censure would be the minimum measure of discipline given the number and variety of respondent's ethics infractions. We are hard-pressed, however, to impose anything less than a


suspension. Respondent's disregard of the disciplinary system began very early in his career and reflects an arrogance that we cannot countenance.

Respondent was admitted to the Pennsylvania bar in 2013. His unethical conduct began soon into his career – in the spring of 2015, when he copied Jefferson on the letter to Conner, in March, and ceased communication with Hagar, in mid-April. Although one could attribute these lapses to inexperience, there is no excuse for his failure to ignore (1) his obligation to comply with the annual attorney registration requirements, just two years into his career, or (2) the requirements imposed on attorneys who are administratively suspended for that reason, or (3) the DB-7 and DB-7A letters in the Hagar and Tomeo matters; or for defaulting after he was served with the Pennsylvania disciplinary complaint. Thus, notwithstanding respondent's ultimate cooperation by participating in a pre-hearing conference and entering into the Joint Petition, given the multitude of RPC violations and respondent's disregard of authority, we determine to impose a three-month prospective suspension for his violations of New Jersey RPC 1.4(b), RPC 1.15(a), (b), and (d), RPC 1.16(a)(1) and (d), RPC 4.2, RPC 8.1(b), and RPC 8.4(d).

Vice-Chair Clark and Members Boyer and Singer voted to impose a censure. Chair Frost and Member 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
Bruce W. Clark, Vice-Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of Kevin C. Fogle
Docket No. DRB 17-358

Argued: January 18, 2018

Decided: April 11, 2018

Disposition: Three-Month Suspension

<i>Members</i>	Three-Month Suspension	Censure	Did not participate
Frost			X
Baugh	X		
Boyer		X	
Clark		X	
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer		X	
Zmirich			X
Total:	4	3	2


Ellen A. Brodsky
Chief Counsel