

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 17-343 and 17-354
District Docket Nos. XIV-2016-0480E;
XIV-2016-0432E; and XIV-2017-0231E

IN THE MATTER OF
WAYNE A. AUTRY
AN ATTORNEY AT LAW

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Decision

Decided: April 2, 2018

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

These matters were before us on two separate certifications of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). We determined to consolidate them for disposition. In DRB 17-343, a one-count complaint charged respondent with having failed to comply with the OAE's requests for information about a trust account overdraft and failure to appear for a demand audit, in violation of RPC 8.1(b) (failure to cooperate with an ethics investigation). In DRB 17-354, a one-count complaint alleged that respondent violated RPC 8.1(b) and RPC 8.4(d) (conduct prejudicial to the administration of

justice) for his failure to file the required R. 1:20-20 affidavit, following his temporary suspension from the practice of law.

We determine to impose a three-month suspension for the totality of respondent's misconduct in these two matters.

Respondent was admitted to the New York and New Jersey bars in 2001. On July 2, 2015, he was reprimanded in a default matter for recordkeeping violations and for failure to respond to ethics authorities' requests for information. In re Autry, 222 N.J. 5 (2015).

Effective April 11, 2016, respondent was temporarily suspended for failure to pay administrative costs associated with the above reprimand matter. In re Autry, 224 N.J. 385 (2016).

Effective March 1, 2017, respondent was again temporarily suspended, this time for failure to cooperate in the matter under DRB 17-343. In re Autry, 228 N.J. 109 (2017). He remains suspended to date.

DRB 17-343

Service of process was proper in this matter. On July 6, 2017, the OAE sent respondent a copy of the complaint at his last known home address listed in the attorney registration

records, by certified mail, return receipt requested, and by regular mail. The certified mail receipt was returned, marked "Return to Sender, Not Deliverable As Addressed Unable to Forward." The regular mail was not returned.

On August 22, 2017, the OAE sent a second mailing to respondent, to the same home address, also by certified and regular mail, notifying him that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted; that, pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), the record in the matter would be certified directly to us for imposition of sanction; and that the complaint would be amended to include a charge of a violation of RPC 8.1(b).

The green certified mail return receipt was returned signed, indicating delivery on August 25, 2017. The signature is illegible. The regular mail was not returned.

The time within which respondent was required to answer the complaint has expired. As of September 18, 2017, the date of the certification of the record, respondent had not filed an answer.

We now turn to the allegations of the complaint. On August 4, 2016, TD Bank notified the OAE that respondent's attorney trust account had been overdrawn on August 3, 2016. Accordingly, by letters dated August 11 and September 8, 2016, the OAE

directed respondent to provide a written explanation for the overdraft. Respondent failed to do so.

On October 3, 2016, the OAE sent respondent a letter directing him to appear at the OAE's offices for an October 24, 2016 demand audit. Respondent failed to appear on the audit date.

Thereafter, the OAE subpoenaed respondent's attorney account records from TD Bank. Meanwhile, on August 11, 2016, respondent filed for bankruptcy, listing the same home address that the OAE had used in its attempts to contact him.

On October 25, 2016, the OAE sent a fourth letter to respondent's home address, requesting a written explanation for the overdraft, and directing that he contact the OAE by November 2, 2016 to reschedule the demand audit. Again, respondent failed to reply.

On December 8, 2016, the OAE filed a petition for respondent's temporary suspension for his failure to cooperate with its investigation.

By Order dated January 12, 2017, the Court directed respondent to comply with the OAE requests within thirty days. By letter of even date, the OAE sent respondent the Order and directed him to appear at the OAE offices on February 1, 2017 to explain the August 3, 2016 trust overdraft.

Respondent failed to appear at the OAE's office on February 1, 2017. Consequently, the OAE filed a supplemental affidavit in support of the petition for his temporary suspension, which was granted on March 1, 2017.

DRB 17-354

Service of process was proper in this matter. On May 8, 2017, the OAE sent a copy of the complaint to respondent, by regular and certified mail, in accordance with R. 1:20-7(h), at his last known home address as listed in the attorney registration records.

The green certified mail return receipt was returned to the OAE indicating delivery on May 10, 2017, having been signed by respondent. The regular mail was not returned.

On June 22, 2017, the OAE sent respondent a second mailing, also by certified and regular mail, to the same home address, notifying him that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted; that, pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), the record in the matter would be certified directly to us for imposition of sanction; and that the complaint would be amended to include a charge of a violation of RPC 8.1(b).

The certified mail was returned to the OAE marked "Unclaimed." The regular mail was not returned.

The deadline for respondent to answer the complaint has expired. As of September 24, 2017, the date of the certification of the record, respondent had not filed an answer.

We turn to the allegations of the complaint. By Orders effective April 11, 2016 and March 1, 2017, respondent was temporarily suspended from the practice of law and ordered to comply with R. 1:20-20, which required respondent, within 30 days after the date of the order of suspension (regardless of the effective date thereof), to file with the Director the original of a detailed affidavit specifying, by correlatively numbered paragraphs, how he had complied with each of the provisions of the Rule and the Supreme Court's Order. Respondent failed to do so.

On August 5, 2016, the OAE sent respondent a letter, by certified and regular mail, directed to his office address (One Gateway Center, Newark, New Jersey 07106) and home address, as listed in the attorney registration records, alerting him to his responsibility to file the R. 1:20-20 affidavit, and requesting a reply by August 19, 2016.

The green certified mail return receipt for the letter sent to respondent's home address was returned to the OAE, signed by

respondent, with a USPS delivery date of August 9, 2016. The regular mail sent to the home address was not returned.

The certified mail sent to respondent's office address was returned marked "Insufficient Address." The regular mail was returned marked, "Attempted Not Known." Respondent neither replied to the OAE's letters nor filed the required affidavit.

The OAE also sent an October 25, 2016 letter to respondent, by certified and regular mail, directed to an office address "that was printed on checks recently issued to respondent," at 41 Highway 34, Colts Neck, New Jersey 07722, again notifying him of his duty to comply with R. 1:20-20, and requesting a reply by November 9, 2016. The certified mail was returned marked "Not Deliverable As Addressed." The regular mail was returned marked "Vacant."

As of May 3, 2017, the date of the certification of the record, respondent had not filed the required affidavit.

In a September 26, 2017 memorandum brief to us, the OAE urged the imposition of a censure for respondent's failure to file the required affidavit, citing In re Zielyk, 229 N.J. 331 (2017); In re Kinnard, 220 N.J. 488 (2015); In re Goodwin, 220 N.J. 487 (2015); In re Boyman, 217 N.J. 360 (2014); and In re Gahles, 205 N.J. 471 (2011). In each of those cases, the presumptive reprimand for failure to file the R. 1:20-20

affidavit was enhanced to a censure based on the presence of a default. In re Girdler, 179 N.J. 227 (2004).

* * *

The facts recited in the two subject complaints support the charges of unethical conduct. Respondent's failure to file an answer to each is deemed an admission that the allegations of the complaints are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

In DRB 17-343, between August 11, 2016 and January 12, 2017, respondent ignored numerous letters from the OAE directing him to furnish that office with a written explanation for an overdraft that had occurred on August 3, 2016 in his attorney trust account, and to appear thereafter for a demand audit. Respondent also ignored a January 12, 2017 Supreme Court Order specifically requiring him to comply with all outstanding OAE requests. Respondent's misconduct in this regard constituted a violation of RPC 8.1(b).

Failure to cooperate with an ethics investigation, without more, results in an admonition. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015); In the Matter of Martin A. Gleason, DRB 14-139 (February 3, 2015); and In the Matter of Jeffrey M. Adams, DRB 14-243 (November 25, 2014).

A reprimand may result if the failure to cooperate is with an arm of the disciplinary system, such as the OAE, which uncovers recordkeeping improprieties in a trust account and requests additional documentation. See, e.g., In re Picker, 218 N.J. 388 (2014) (reprimand; an OAE demand audit, prompted by a \$240 overdraft in the attorney's trust account, uncovered the attorney's use of her trust account for the payment of personal expenses; violation of RPC 1.15(a); in addition, the attorney failed to comply with the OAE's request for documents in connection with the overdraft and failed to appear at the audit; violations of RPC 8.1(b); the attorney explained that health problems had prevented her from attending the audit and that she had not submitted the records to the OAE because they were in storage at the time; although the attorney had a prior three-month suspension and was temporarily suspended at the time of the decision in this matter, we noted that the conduct underlying those matters was unrelated to the conduct at hand); In re Macias, 121 N.J. 243 (1990) (reprimand for failure to cooperate with the OAE; the attorney ignored six letters and numerous phone calls from the OAE requesting a certified explanation on how he had corrected thirteen recordkeeping deficiencies noted during a random audit; the attorney also failed to file an answer to the complaint).

Furthermore, "[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, for the infractions in DRB 17-343 alone, without regard to the default status of the matter, a reprimand is required.

In DRB 17-354, respondent violated a Supreme Court Order mandating that he comply with the provisions of R. 1:20-20, which required him, among other things, to notify clients and adversaries of his suspension, and to provide pending clients with their files. In doing so, respondent violated RPC 8.1(b) and RPC 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. 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). 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 attorney's disciplinary

history. Ibid. 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, Girdler failed to produce the affidavit of compliance in accordance with that Rule, even though he had agreed to do so. Girdler had a prior public reprimand, private reprimand, and three-month suspension.

Since Girdler, attorneys who default in matters involving failure to file a R. 1:20-20 affidavit, despite OAE requests to do so, and who have no prior final discipline, have received censures. See, e.g., In re Vreeland, 221 N.J. 206 (2015); In re Terrell, 214 N.J. 44 (2013); In re Fox, 210 N.J. 255 (2012); and In re Saint-Cyr, 210 N.J. 254 (2012).

As in Vreeland, Terrell, Fox, and Saint-Cyr, respondent failed to file the required affidavit in a default matter, despite a specific request by the OAE that he do so. Therefore, at least a censure is warranted here for that misconduct alone.

In summary, respondent's misconduct in DRB 17-343 warrants, at least, a reprimand, while his infractions in DRB 17-354 warrant, at least, a censure.

In aggravation, respondent has prior discipline — a reprimand in 2015 for misconduct that included some of the same

violations present in both of these matters – a failure to cooperate with ethics authorities.

In further aggravation, these matters represent respondent's second and third consecutive defaults, the 2015 reprimand having also been presented to us on a default basis.

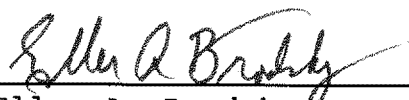
For the presence of the above aggravating factors, not the least of which is respondent's burgeoning pattern of defaults, we determine to impose a three-month suspension, retroactive to March 1, 2017, the date of his temporary suspension, which remains in effect.

Chair Frost and Member Zmirich did not participate.

Member Gallipoli voted for respondent's disbarment and filed a separate dissent.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
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 Wayne Antonio Autry
Docket Nos. DRB 17-343 and 17-354

Decided: April 2, 2018

Disposition: Three-month Suspension, Retroactive

<i>Members</i>	Three-month Suspension, Retroactive	Disbar	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