

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-437
District Docket No. XIV-2017-0516E

IN THE MATTER OF
MATTHEW I. COHEN
AN ATTORNEY AT LAW

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Decision

Argued: March 15, 2018

Decided: June 26, 2018

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent failed to appear, despite proper notice.

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), following an order from the Supreme Court of Pennsylvania suspending respondent for two years, effective October 20, 2016. Respondent was found guilty of violating the equivalents of New Jersey RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to

communicate with a client); RPC 1.4(c) (failure to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 1.15(b) (failure to promptly notify clients of receipt of funds and to promptly disburse those funds); RPC 1.16(a)(1) (failure to withdraw when the representation will result in a violation of the RPCs); RPC 1.16(d) (upon termination of the representation, failure to take steps reasonably practicable to protect a client's interests); RPC 5.5(a)(1) (unauthorized practice of law); RPC 8.1(b) (failure to cooperate with disciplinary authorities); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The OAE recommended the imposition of a reprimand or a censure. For the reasons detailed below, we determine to impose a censure.

Respondent earned admission to the New Jersey bar in 1995 and to the Pennsylvania bar in 1994. He has no prior discipline in New Jersey. On September 25, 2013, however, the Court entered an Order declaring respondent ineligible to practice, based on

his failure to pay his annual registration fee to the New Jersey Lawyers' Fund for Client Protection (CPF). He remains ineligible to date.¹

On October 8, 2015, the Pennsylvania Office of Disciplinary Counsel (PODC) filed a formal ethics complaint against respondent, after he twice failed to appear for the imposition of private discipline. Thereafter, respondent neither filed an answer to the complaint nor appeared at the ethics hearing, which proceeded in his absence.

The Disciplinary Board of the Supreme Court of Pennsylvania issued a report (DBR), dated August 22, 2016, on which the Supreme Court of Pennsylvania relied in determining to suspend respondent.

On July 12, 2017, the United States Patent and Trademark Office imposed identical reciprocal discipline on respondent, a two-year prospective suspension.

The facts of the case are as follows. In June 2012, Evandy Gibson retained respondent to register a trademark on her behalf. On July 11, 2012, respondent sent an e-mail to Gibson,

¹ According to the Central Attorney Management System, as of January 2, 2018, respondent is also "non-compliant" with his IOLTA requirements.

confirming both the representation and his receipt of \$1,075 in satisfaction of his legal fee and the trademark filing fees, providing a written retainer agreement, and promising to perfect the trademark "the following week at the latest." After receipt of respondent's e-mail, Gibson repeatedly attempted to reach respondent, by both telephone and e-mail, without success. On November 8, 2012, Gibson wrote to respondent, via certified mail, documenting her repeated, unsuccessful attempts to reach him and requesting an update on the status of her trademark. Respondent received Gibson's letter, but failed to respond.

Also in November 2012, Charles Klitsch, the Director of Public and Legal Services for the Philadelphia Bar Association, asked respondent to contact Gibson. Subsequently, Jim Moss, an attorney, also communicated with respondent and requested an update on Gibson's trademark. Respondent failed to respond to either Gibson or Moss.

~~Effective January 5, 2013, the Supreme Court of Pennsylvania issued an Order suspending respondent from the practice of law for noncompliance with continuing legal~~

education (CLE) requirements.² Almost one month before the effective date, the Pennsylvania Attorney Registrar notified respondent, via a certified letter, of his impending suspension. Respondent failed to correct his CLE deficiency. He also failed to inform Gibson that he had been suspended, as Pennsylvania Rule of Disciplinary Enforcement (Pa.R.D.E.) 217(a) requires.

On April 10, 2013, Gibson sent an e-mail to respondent, informing him that she had a business promotion event planned for May, and requesting an update on the status of her trademark. The next day, respondent replied that he would check the status of the trademark "to find out what was taking so long," and advising her that she possessed her desired trademark rights by virtue of her application. Respondent failed to inform Gibson of his suspension/ineligibility to practice law.

More than a year later, on April 17, 2014, Gibson sent an e-mail to respondent, requesting documentary proof of her trademark. Respondent failed to reply to Gibson.

On February 24, 2014, the PODC personally served respondent with a "DB-7 letter" for Gibson's matter, which warns an

² Although termed a "suspension," the order is equivalent to an order deeming an attorney ineligible to practice law for failure to comply with an administrative requirement.

attorney of a possible violation of the RPCs, and requires an explanation of the possible violations alleged.³ Respondent failed to reply to the PODC's request, in violation of Pa.R.D.E. 203(b)(7). Consequently, via a June 23, 2015 letter, the PODC offered respondent the option of participating in an Informal Admonition proceeding for his misconduct in Gibson's matter. The Informal Admonition was contingent on respondent's refunding the legal fee that Gibson had paid and providing proof of the disgorgement to the PODC. Although respondent received the PODC's letters, he again failed to reply.

On July 24 and September 23, 2015, the PODC informed respondent, in writing, that Informal Admonition proceedings had been scheduled in his disciplinary matter, on August 4 and September 30, 2015, respectively. Respondent neither replied to the PODC nor appeared at either of the scheduled Informal Admonition proceedings.

Subsequently, on a date not identified in the record, the PODC served the formal ethics complaint on respondent and provided notice of both the prehearing conference and the

³ The PODC's DB-7 letter is the equivalent of a request for a response to a grievance under New Jersey's disciplinary framework.

disciplinary hearing. Respondent failed to appear at either the December 15, 2015 prehearing conference or the January 26, 2016 disciplinary hearing. Moreover, he never refunded the legal fee to Gibson.

As noted above, the Disciplinary Board of the Supreme Court of Pennsylvania determined that respondent violated the equivalents of New Jersey RPC 1.3, RPC 1.4(b), RPC 1.4(c), RPC 1.15(b), RPC 1.16(a)(1), RPC 1.16(d), RPC 5.5(a)(1), RPC 8.1(b), RPC 8.4(c), and RPC 8.4(d). The PODC viewed respondent's misconduct, exacerbated by his failure to respond to the disciplinary process, harshly:

The evidence of record leaves no doubt that Respondent was aware of the efforts to contact him. He received notice of each stage of the proceedings by certified and first class mail or personal service. His failure to participate in the process exhibits an utter lack of respect for his professional duties and for the disciplinary process in general. Respondent has made no effort to confront and address his disciplinary issues and has provided no evidence that he values his privilege to practice law. He has forfeited any opportunity to make his client whole and to accept responsibility and express remorse

Although Respondent's underlying misconduct in connection with his representation of Ms. Gibson was isolated and relatively minor, as reflected by the original disposition of an Informal Admonition, Respondent's misconduct has been significantly aggravated by his failure to appear for the Informal Admonition and failure to comply with the condition to

refund his client's monies, and thereafter by his total and complete failure to participate in the disciplinary process. The only mitigating factor of record is that respondent has no history of discipline

[DBR13-17.]

The Disciplinary Board of the Supreme Court of Pennsylvania recommended respondent's disbarment to the Supreme Court of Pennsylvania. Although the Supreme Court of Pennsylvania appears to have adopted the RPC violations found by the Disciplinary Board of the Supreme Court of Pennsylvania, it determined, without explanation, to impose only a two-year suspension on respondent.

* * *

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

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.

Subsection (E) applies in this matter because the unethical conduct warrants substantially different discipline.

"[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, therefore, adopt the Supreme Court of Pennsylvania's factual findings. Specifically, in June 2012, Gibson retained respondent to complete a singular task – the registration of a

trademark. Respondent confirmed the representation and his receipt of \$1,075 to cover his legal fees and costs, provided Gibson a retainer agreement, and promised to perfect the trademark within two weeks. Immediately thereafter, respondent ceased communicating with Gibson and ignored her repeated efforts to contact him by various means to learn the status of the trademark registration. In November 2012, two attorneys reached out to respondent on Gibson's behalf, to no avail.

Effective January 5, 2013, respondent was suspended from the practice of law in Pennsylvania. He failed to inform Gibson that he had been suspended, as required pursuant to Pa.R.D.E. 217(a). Moreover, on April 11, 2013, he sent an e-mail to Gibson, presumably in his capacity as her attorney, promising to check the status of the trademark, but advising her that, by virtue of her application, she had obtained trademark rights.⁴ Respondent never followed up on that promise. Then, more than a

⁴ Respondent's statement in this regard appears to be incorrect and may have amounted to a misrepresentation. A review of the United States Patent and Trademark Office's (USPTO) website reveals that all trademark applications undergo a review by a USPTO examining attorney, the application is published, and, only if approved, the trademark is registered, and the owner issued a certificate. Thereafter, the owner must file documents "to keep the registration live." www.uspto.gov/trademarks

year later, respondent ignored Gibson's request for documentary proof of her trademark.

Finally, Gibson turned to the Pennsylvania attorney discipline system. On February 24, 2014, the PODC personally served respondent with a demand for an explanation of his conduct in Gibson's matter. Because respondent failed to reply, the PODC offered respondent the option of participating in an informal disciplinary proceeding for his misconduct. However, respondent failed to reply and failed to appear at scheduled informal proceedings. Moreover, he neither completed the contracted legal service nor refunded the legal fee to Gibson.

As a consequence, a formal ethics complaint was served on respondent, along with notices for both the prehearing conference and the disciplinary hearing. Nevertheless, respondent failed to appear at either event.

Based on these factual findings, we determine that respondent violated the following New Jersey rules: RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with a client); RPC 1.4(c) (failure to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 1.16(a)(1)

(failure to withdraw when the representation will result in a violation of the RPCs); RPC 1.16(d) (upon termination of the representation, failure to take steps reasonably practicable to protect a client's interests); RPC 5.5(a)(1) (unauthorized practice of law); RPC 8.1(b) (failure to cooperate with disciplinary authorities); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The record, however, does not support the alleged violations of RPC 1.15(b) (failure to promptly notify clients of receipt of funds and to promptly disburse those funds) and RPC 8.4(d) (conduct prejudicial to the administration of justice) to a clear and convincing standard, and we, thus, determine to dismiss them. Specifically, respondent's failure to return the legal fee to Gibson is properly captured by the RPC 1.16(d) violation. Moreover, in respect of the RPC 8.4(d) charge, the record is devoid of any facts to indicate that court resources were impacted by respondent's misconduct.

We now address the appropriate quantum of discipline for respondent's violations. Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the

number of client matters involved, the harm to the clients, the attorney's disciplinary history, and the presence of aggravating or mitigating factors. See, e.g., In the Matter of Clifford Gregory Stewart, DRB 14-014 (April 22, 2014) (admonition; attorney who was not licensed to practice law in Washington, D.C. filed an employment discrimination case in the United States District Court for the District of Columbia and obtained local counsel to assist him in handling the matter; after the defendant filed a motion to dismiss the complaint, however, the attorney failed to provide local counsel with written opposition to the motion until after the deadline for doing so had expired, resulting in the granting of the motion as unopposed; violations of RPC 1.1(a) and RPC 1.3; in addition, the attorney failed to keep his client informed about various filing deadlines and about the difficulty he was having meeting them, particularly with the deadlines for filing an objection to the motion to dismiss the complaint, violations of RPC 1.4(b) and (c); we considered the attorney's exemplary, unblemished career of twenty-eight years at the time of the incident); In the Matter of Robert A. Ungvary, DRB 13-099 (September 30, 2013) (admonition; due to the attorney's failure to comply with

discovery, his client's civil rights complaint was dismissed; the attorney's motion to vacate the default was denied and a subsequent appeal was dismissed for his failure to timely prosecute it; the attorney neither informed the client of the dismissal of the appeal nor discussed with him his decision not to pursue it; violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b) and (c); although the attorney had been admonished previously, we noted that his conduct in the present matter predated the conduct in the prior matter, and that the client and his family had continued to use the attorney's legal services, despite his shortcomings in the civil rights matter); In re Burstein, 214 N.J. 46 (2013) (reprimand for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; although the attorney had no disciplinary record, the significant economic harm to the client justified a reprimand); and In re Kurts, 206 N.J. 558 (2011) (attorney reprimanded for mishandling two client matters; in one matter, he failed to complete the administration of an estate, causing penalties to be assessed against it; in the other, he was retained to obtain a reduction in child support payments but, at some point, ceased working on the case and closed his office; the client, who was

unemployed, was forced to attend the hearing pro se, at which time he obtained a favorable result; in both matters, the attorney was found guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to memorialize the basis or rate of his fee; mental illness considered in mitigation; no prior discipline).

Ordinarily, when an attorney practices while ineligible, an admonition will be imposed, if he or she is unaware of the ineligibility. See, e.g., In the Matter of Jonathan A. Goodman, DRB 16-436 (March 22, 2017) (attorney practiced law during two periods of ineligibility; he was unaware of his ineligibility); In the Matter of James David Lloyd, DRB 14-087 (June 25, 2014) (attorney practiced law during an approximate thirteen-month period of ineligibility; among the mitigating factors considered was his lack of knowledge of the ineligibility); and In the Matter of Adam Kelly, DRB 13-250 (December 3, 2013) (during a two-year period of ineligibility for failure to pay the annual assessment to the CPF, the attorney handled at least seven cases that the Public Defender's Office had assigned to him; the record contained no indication that the attorney was aware of his ineligibility and

he had no history of discipline since his 2000 admission to the New Jersey bar).

A reprimand or greater discipline may be imposed when the attorney has an extensive ethics history, has been disciplined for conduct of the same sort, has committed other ethics improprieties, or is aware of the ineligibility and practices law nevertheless. See, e.g., In re Moskowitz, 215 N.J. 636 (2013) (reprimand; attorney practiced law knowing that he was ineligible to do so); In re Jay, 210 N.J. 214 (2012) (reprimand; attorney was aware of ineligibility and practiced law nevertheless; prior three-month suspension for possession of cocaine and marijuana); In re (Queen) Payton, 207 N.J. 31 (2011) (reprimand; attorney who practiced law while ineligible was aware of her ineligibility and had received an admonition for the same violation); In re D'Arienzo, 217 N.J. 151 (2014) (censure for attorney whose recklessness in not ensuring that payment was sent to the CPF was deemed "akin to knowledge on his part"; in aggravation, the attorney had an extensive disciplinary history, which included a 2013 reprimand for practicing while ineligible); In re Macchiaverna, 214 N.J. 517 (2013) (attorney censured for practicing law while ineligible,

knowing that he was ineligible, and for recordkeeping violations; an aggravating factor was the attorney's prior reprimand for recordkeeping violations that led to the negligent misappropriation of client funds; the attorney also did not appear on the return date of the Court's Order to Show Cause); In re Lynch, 186 N.J. 246 (2006) (censure for attorney who, aware of his ineligibility, practiced law during that period; the attorney had a prior admonition and a reprimand); In re Horowitz, 180 N.J. 520 (2004) (three-month suspension for attorney who practiced law while ineligible and failed to cooperate with disciplinary authorities during the investigation of the matter; the attorney also lacked diligence in the representation of the client and did not inform the client of the dismissal of the complaint; default matter); and In re Raines, 176 N.J. 424 (2003) (in a default case, three-month suspension for attorney who practiced law while ineligible and failed to cooperate with disciplinary authorities in the investigative stage of the matter; the attorney also lacked diligence in the client's case and failed to properly communicate with the client).

Here, in light of the Pennsylvania Attorney Registrar's notice to respondent, by certified mail, of his impending suspension, and the issuance of the order of suspension, respondent is presumed to have knowledge of his ineligible status.

Respondent is also guilty of violating RPC 8.1(b). Failure to cooperate with a disciplinary investigation may result in an admonition if the attorney does not have an ethics history (even when accompanied by other, less serious, infractions). See, e.g., 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 the Matter of Richard D. Koppenaar, DRB 13-164 (October 21, 2013) (the attorney admittedly failed to cooperate with the district ethics committee's attempts to obtain information about his representation of a client in an expungement matter, a violation of RPC 8.1(b); the attorney had had no other final discipline since his 1983 admission to the New Jersey bar); and In the Matter of Raymond 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 ethics hearing and participated fully during the disciplinary process).

Usually, however, when combined with other violations, a failure to cooperate results in elevated discipline. 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, though no trust funds were in the account at the time; 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); and 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).


Here, respondent's gross neglect, failure to communicate with a client, practicing while ineligible, and failure to cooperate with ethics authorities is deserving of a reprimand. His misconduct was serious and caused harm to his client, who was forced to retain other counsel, at her own expense, to complete the task for which she had retained respondent. In addition, respondent defaulted in respect of the Pennsylvania disciplinary proceedings, failing to offer any excuse or mitigation for his serious misconduct. Such additional misconduct beckons enhanced discipline. Specifically, "[a] respondent's default or failure to cooperate with the investigative authorities acts as an aggravating factor, which

is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332, 342 (2008). The only mitigation for us to consider is respondent's lack of prior discipline. On balance, we determine that a censure is the appropriate quantum of discipline in this matter.

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

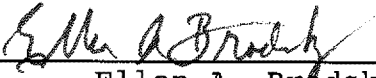
In the Matter of Matthew I. Cohen
Docket No. DRB 17-437

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Disposition: Censure

<i>Members</i>	Censure	Recused	Did Not Participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0



Ellen A. Brodsky
Chief Counsel