

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 18-104
District Docket No. XIV-2017-0143E

IN THE MATTER OF
RICHARD B. KELLY
AN ATTORNEY AT LAW

:
:
:
:
:
:
:
:
:
:

Decision

Decided: September 6, 2018

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

This matter was before us on a certification of the record filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The two-count formal ethics complaint charged respondent with violations of RPC 8.1(b) (failure to cooperate with disciplinary authorities) and RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer).

For the reasons set forth below, we determine to impose a six-month prospective suspension.

Respondent earned admission to the New Jersey and New York bars in 1993. During the relevant time frame, he maintained neither a New Jersey law office nor New Jersey attorney trust and business accounts. Effective August 28, 2017, respondent's law license was administratively revoked, pursuant to R. 1:28-2(c), for his failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection (CPF) for a period of seven consecutive years.¹

Service of process was proper in this matter. On January 8, 2018, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's home address in Vermont, which the OAE found via a search of public databases.² The certified mail sent to respondent's home address was returned marked "Return to Sender Unclaimed." The regular mail was not returned. Respondent failed to file an answer to the complaint.

On February 5, 2018, the OAE sent a "five-day" letter to respondent, by regular mail, at his home address, informing him

¹ Respondent's misconduct herein predated the effective date of the Court's Order of revocation. We, therefore, may exercise jurisdiction over this matter.

² New Jersey attorneys have an affirmative obligation to inform the CPF and the OAE of changes to their home and primary law office addresses, "either prior to such change or within thirty days thereafter." R. 1:20-1(c). Respondent did not satisfy this obligation.

that, unless he filed a verified answer to the complaint within five days, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to charge a willful violation of RPC 8.1(b). The regular mail was not returned.

Moreover, on January 29 and February 19, 2018, the OAE effected service of the complaint by publication, in Vermont's Burlington Free Press, and in the New Jersey Law Journal, respectively.

Respondent failed to file a verified answer to the complaint. Accordingly, on March 16, 2018, the OAE certified the record to us as a default.

We now turn to the allegations of the complaint.

On August 30, 2010, at 8:48 p.m., respondent was arrested by the Bernards Township Police Department for possession of methamphetamine, a controlled dangerous substance (CDS). Upon searching respondent, the police found a glass pipe containing a white residue, which respondent admitted was "crystal meth." After he provided written consent for the police to search his vehicle, the police found a plastic bag containing a suspicious substance, which respondent admitted was methamphetamine.

The New Jersey State Police Office of Forensic Sciences confirmed that the substance seized from respondent's vehicle was 1.37 grams of methamphetamine. On October 28, 2010, respondent was indicted, in Somerset County, for third-degree possession of methamphetamine, in violation of N.J.S.A. 2C:35-10(a)(1). On December 17, 2010, respondent was admitted into Somerset County's Pre-Trial Intervention Program (PTI). On July 20, 2012, however, a notice of intent to terminate PTI was sent to respondent, due to his failure to report as required and to complete fifty hours of community service. On August 13, 2012, respondent was terminated from PTI, after he failed to appear at a violation of probation hearing before the Honorable Robert B. Reed, J.S.C.

On February 1, 2013, Judge Reed issued a warrant for respondent's arrest. As of the date of the OAE's certification of the record, that arrest warrant remained active.

On February 16, 2017, respondent was suspended from the practice of law in New York, in connection with an Attorney Grievance Committee investigation of his 2010 New Jersey arrest. Respondent informed the OAE of neither his 2010 indictment nor his 2017 New York suspension, as required pursuant to R. 1:20-13 and R. 1:20-14, respectively. By letter dated March 22, 2017, the OAE informed respondent that it had docketed an ethics case

against him as a result of his 2010 indictment and his 2017 New York suspension.

From March 28 through September 8, 2017, the OAE sent respondent numerous letters, at multiple addresses found via public records searches, including his Vermont address, requiring him to provide an explanation and documents concerning the ethics charges, and to appear for a demand interview. Respondent neither replied to the letters nor appeared for the demand interview.

The facts recited in the formal ethics complaint support both of the charges of unethical conduct set forth therein. Respondent's failure to file a verified answer to the complaint 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).

In 2010, respondent admitted to the Bernards Township police that he possessed methamphetamine, a third-degree crime, in violation of N.J.S.A. 2C:35-10(a)(1). A search of his vehicle and subsequent State Police forensic examination proved that he possessed over a gram of that CDS, and, consequently, he was indicted for third-degree possession of methamphetamine, in violation of N.J.S.A. 2C:35-10(a)(1). Respondent failed to fulfill his PTI conditions, resulting in the issuance of notice

of intent to terminate PTI. When he subsequently failed to appear for a violation of probation hearing, he was terminated from PTI and a warrant issued for his arrest, which remains outstanding. Although respondent has not been convicted of a crime, he is, nevertheless, guilty of a violation of RPC 8.4(b), as an actual criminal conviction is not necessary to establish a violation of that Rule. See, e.g., In re Kornreich, 149 N.J. 346 (1997) and In re Rigolosi, 107 N.J. 192 (1987).

In 2017, respondent failed to provide the OAE with a required explanation and documents concerning his indictment and New York suspension, and failed to appear for a demand interview. He then defaulted in respect of the formal ethics complaint. Respondent, thus, violated RPC 8.1(b).

We now address the appropriate quantum of discipline to be imposed for respondent's violations of RPC 8.1(b) and RPC 8.4(b).

A three-month suspension is generally the measure of discipline for possession of a CDS. In re Musto, 152 N.J. 165, 174 (1997). See, e.g., In re Holland, 194 N.J. 165 (2008) (three-month suspension for possession of cocaine); In re Sarmiento, 194 N.J. 164 (2008) (three-month suspension for possession of ecstasy, a CDS) and In re McKeon, 185 N.J. 247 (2005) (three-month suspension for possession of cocaine).

Some offenses attributable to drug addiction may warrant stronger disciplinary measures. In re Musto, 152 N.J. at 174. See, e.g., In re Stanton, 110 N.J. 356 (1988) (six-month suspension for possession of cocaine where attorney had acknowledged ten years of drug abuse); In re Pleva, 106 N.J. 637 (1987) (six-month suspension for attorney who pleaded guilty to possession of nine and one-half grams of cocaine, eleven grams of hashish, and fifty-two grams of marijuana; the attorney was a regular drug user and had been arrested previously; the Court further imposed a three-month suspension for the attorney's guilty plea to the charge of giving false information about drug use, when completing a certification required before purchasing a firearm); In re Kaufman, 104 N.J. 509 (1986) (six-month suspension for attorney who pleaded guilty to two separate criminal indictments for possession of cocaine and methaqualude; the attorney had a prior drug-related incident and a long history of drug abuse); In re Rowek, 220 N.J. 348 (2015) (one-year retroactive suspension for attorney who pleaded guilty to possession of Vicodin, GBL, Percocet, a device used to assist him in fraudulently passing a drug urinalysis, and driving under the influence of GBL; the attorney had a long history of drug abuse and, after being admitted to PTI, continued to use drugs and attempted to improperly pass his court-mandated drug test;

we emphasized the attorney's lack of respect for the criminal justice system as an aggravating factor warranting enhanced discipline); and In re Salzman, 231 N.J. 2 (2017) (two-year suspension for attorney who engaged in "blatant drug abuse" and criminal conduct, despite having been placed on supervised probation for a heroin conviction; enhanced discipline imposed based on egregious aggravation, including attorney's extensive criminal history, "sheer disdain" for court appearances and court orders, and life-long drug addiction and abuse).

Ordinarily, admonitions are imposed for failure to cooperate with disciplinary authorities, even if accompanied by other infractions, if the attorney does not have an ethics history. See, e.g., 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); the attorney had an unblemished disciplinary record since his 1990 admission to the bar); 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)); and In re Gleason, 220 N.J. 350 (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)).

Here, we consider, in aggravation, the default status of this matter. "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).

In further aggravation, respondent failed to report to the OAE either his New Jersey indictment or his New York suspension, as required by R. 1:20-13 and R. 1:20-14, respectively. Specifically, R. 1:20-13(a)(1) requires attorneys to report to the OAE, in writing, when they have been charged with an indictable offense. R. 1:20-14(a)(1) requires attorneys to report to the OAE, in writing, when they have been disciplined in other jurisdictions. Respondent not only was charged with an indictable offense, but also was indicted for third-degree

possession of methamphetamine. Yet, he failed to report that indictment or to report his New York suspension.

The only mitigation we consider is respondent's lack of a disciplinary history.

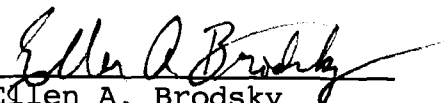
Absent the additional misconduct and aggravating factors in this case, a three-month suspension would be a sufficient sanction for respondent's CDS crime. Given his failure to cooperate with the OAE, plus the noted aggravating factors, including the default status of this case, we determine to enhance the sanction to a six-month suspension.

Member Joseph voted to impose a one-year suspension.

Member Hoberman did not participate.

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

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard Brett Kelly
Docket No. DRB 18-104

Decided: September 6, 2018

Disposition: Six-month Prospective Suspension

Members	Six-month Prospective Suspension	One-year Suspension	Recused	Did Not Participate
Frost	X			
Clark	X			
Boyer	X			
Gallipoli	X			
Hoberman				X
Joseph		X		
Rivera	X			
Singer	X			
Zmirich	X			
Total:	7	1	0	1


Ellen A. Brodsky
Chief Counsel