

Supreme Court Of New Jersey
Disciplinary Review Board
Docket No. DRB 18-277
District Docket No. XIV-2017-0265E

In The Matter Of
David Charles Berman
An Attorney At Law

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Decision

Decided: January 23, 2019

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 formal ethics complaint charged respondent with violating RPC 8.1(b) (failure to cooperate) 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 two-year suspension from the practice of law.

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

Respondent was admitted to the New Jersey bar in 1986 and the New York bar in 1990. He was ineligible to practice law from September 24, 2012 to May 3, 2017, based on his failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection (the Fund).

On October 22, 2012, respondent was declared administratively ineligible to practice law in New Jersey, for failing to comply with R. 1:28A, in respect of the Court's mandatory IOLTA program.

On May 4, 2017, respondent was suspended for two years for violating RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter), RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to allow the client to make informed decisions), RPC 1.16(a)(1) (failure to withdraw from a representation if that representation would result in the violation of the Rules of Professional Conduct), RPC 1.16(a)(2) (failure to withdraw from a representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client), RPC 3.3(a)(5) (failure to disclose to the tribunal a material fact), RPC 3.4(c)

(knowingly disobeying an obligation under the rules of a tribunal), RPC 5.5(a)(1) (practicing while ineligible), RPC 8.1(b) (failure to respond to a lawful demand for information from disciplinary authorities), RPC 8.4(a) (knowingly violate the Rules Of Professional Conduct), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d). That matter, too, was before us by way of default.

In that case, respondent mishandled six client matters and failed to cooperate with the investigation of the ethics grievances. Additionally, he blatantly disobeyed court rules, committed conduct prejudicial to the administration of justice, and practiced law while ineligible to do so. In the Matter of David Charles Berman, DRB 16-096 (November 18, 2016) (slip op. at 19-20).

Service of process was proper in this matter. On April 30, 2018, the OAE mailed a copy of the complaint to respondent in accordance with R. 1:20-7(h), by regular and certified mail, return receipt requested, to the address respondent provided to the OAE during an April 11, 2018 telephone call. The certified mail receipt was returned to the OAE indicating delivery on May 2, 2018. The signature on the receipt is illegible. The regular mail was not returned.

On May 30, 2018, the OAE sent a second letter to respondent, at the same address, informing 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, the record would be certified directly to us for the imposition of discipline pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), and the complaint would be deemed amended to include a violation of RPC 8.1(b). The certified mail return receipt was returned to the OAE indicating delivery on June 1, 2018. The signature on the receipt is illegible. The regular mail was not returned.

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

We now turn to the allegations of the complaint.

As mentioned above, on May 4, 2017, the Court entered an Order suspending respondent for two years. The Order required respondent, pursuant to R. 1:20-20, "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] has complied with each of the provisions of this rule and the Supreme Court's order." Respondent failed to do so.

On October 31, 2017, the OAE sent a letter, by certified and regular mail, to respondent's office address in Morristown, New Jersey, his home address, and the address listed with the Fund, reminding him of his responsibility to file the affidavit. The letter requested a response by November 14, 2017.

The certified and regular mail letters sent to respondent's office address were returned marked "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." The certified and regular letters sent to his home address also were returned marked "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." The certified mail sent to the servicing address respondent listed with the Fund was returned marked "Unclaimed." The regular mail to that address was returned marked "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." The United States Postal Service (USPS) letter carrier for respondent's servicing address informed the OAE that respondent had moved from the premises approximately two years earlier and had left no forwarding address.

On January 11, 2018, the OAE sent another letter to respondent, by certified and regular mail, to an additional address for respondent, reminding him of his responsibility to file the affidavit and requesting a response by

January 25, 2018. The certified letter was returned marked "Refused" and the regular mail was not returned. Respondent did not reply.

During an April 11, 2018 telephone conversation, the OAE advised respondent of his failure to file the required affidavit.¹ During that same conversation, respondent confirmed that the address on the OAE's January 11, 2018 letter was his correct mailing address. Respondent asked the OAE to e-mail to him copies of the January 11, 2018 correspondence, the Order of suspension, and R. 1:20-20. The OAE notified respondent that his affidavit must be received by April 20, 2018.

On April 11, 2018, the OAE sent respondent an e-mail with the requested documents attached, confirming that his affidavit must be received by April 20, 2018. Respondent acknowledged receipt of the OAE's e-mail that day, but failed to file the affidavit.

In an August 3, 2018 memorandum brief to us, the OAE identified the threshold sanction for an attorney's failure to file a R. 1:20-20 affidavit as a reprimand. In re Girdler, 179 N.J. 227 (2004). The OAE argued for an enhancement to a censure, based on respondent's failure to reply to the OAE's

¹ The record does not explain the circumstances by which the OAE came to have a telephone conversation with respondent.

specific request to file the affidavit, and on the default. In re Vreeland, 221 N.J. 206 (2015) and In re Fox, 210 N.J. 255 (2012).

Following a review of the record, we find that the facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer to the complaint is deemed an admission that the allegations are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Rule 1:20-20(b)(15) requires a suspended attorney, within thirty days of the Court's Order of suspension, to "file with the Director [of the OAE] the original of a detailed affidavit specifying by correlatively numbered paragraphs how the disciplined attorney has complied with each of the provisions of this rule and the Supreme Court's order." In the absence of an extension by the Director of the OAE, failure to file an affidavit of compliance pursuant to R. 1:20-20(b)(15) within the time prescribed, "constitute[s] a violation of RPC 8.1(b) . . . and RPC 8.4(d)." R. 1:20-20(c).

The OAE accurately identified a reprimand as the threshold measure of discipline to be imposed for an attorney's failure to file a R. 1:20-20(b)(15) affidavit. 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 answer the complaint, the existence of a disciplinary history, and the attorney's failure to follow through on his or her promise to the OAE that the affidavit would be forthcoming. Ibid.

In Girdler, for example, 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, he failed to produce the affidavit of compliance, even though he had agreed to do so. The attorney's disciplinary history consisted of a public reprimand, a private reprimand, and a three-month suspension in a default matter.

Since Girdler, attorneys who default in matters involving failure to file a R. 1:20-20 affidavit, despite OAE requests to do so, have received censures. See, e.g., In re Stasiuk, 235 N.J. 327 (2018) (attorney failed to file the affidavit after he had been temporarily suspended for failure to comply with the Court's Order requiring him to return a client's fee; he also ignored the OAE's request that he do so; prior censure in a default matter); In re Vreeland, 221 N.J. 206 (censure imposed in a default matter on attorney who, following his temporary suspension, failed to file the mandatory R. 1:20-20 affidavit, despite the OAE's

specific request that he do so; no prior final discipline); and In re Goodwin, 220 N.J. 487 (2015) (default; attorney failed to file the affidavit after the Court had temporarily suspended him for his failure to pay the disciplinary costs associated with a 2010 reprimand; violations of RPC 8.1(b) and RPC 8.4(d); in addition to the attorney's disciplinary history and the default, he also had ignored the OAE's request that he file the affidavit).

Suspensions of varying terms have been imposed on attorneys with a significant ethics history or multiple defaults.

Three-month suspensions were imposed in the following cases: In re Rak, 214 N.J. 5 (2013) (default; aggravating factors included three default matters against attorney in three years and attorney's visit from the OAE about the affidavit, after which he still did not comply); In re Swidler, 210 N.J. 612 (2012) (attorney failed to file the affidavit after two suspensions, and even after the OAE had requested him to do so; it was the attorney's fourth default; his prior three defaults resulted in a reprimand, a three-month suspension, and a six-month suspension); and In re Garcia, 205 N.J. 314 (2011) (default; disciplinary history consisted of a fifteen-month suspension).

Six-month suspensions were imposed in the following cases: In re Rosanelli, 208 N.J. 359 (2011) (default, attorney failed to file the affidavit after

a temporary suspension in 2009 and after a three-month suspension in 2010; prior six-month suspension); In re Sharma, 203 N.J. 428 (2010) (default; the attorney's ethics history included a censure in two default matters and a three-month suspension; his repeated failure to cooperate with disciplinary authorities was considered in aggravation); and In re LeBlanc, 202 N.J. 129 (2010) (default matter; ethics history included a censure, a reprimand, and a three-month suspension; two of the prior disciplinary matters proceeded on a default basis).

One-year suspensions resulted in the following cases: In re Rifai, 213 N.J. 594 (2013) (default; following two three-month suspensions in early 2011, attorney failed to file the affidavit; ethics history also included two reprimands); In re Wargo, 196 N.J. 542 (2008) (attorney's ethics history included a temporary suspension for failure to cooperate with the OAE, a censure, and a combined one-year suspension for misconduct in two separate matters; all disciplinary proceedings proceeded on a default basis); and In re Wood, 193 N.J. 487 (2008) (default, attorney failed to file the affidavit following a three-month suspension; attorney had an extensive disciplinary history: an admonition, a reprimand, a censure, and a three-month suspension; two of those matters proceeded on a default basis).

Two-year suspensions were imposed in the following cases: In re Brekus, 208 N.J. 341 (2011) (Brekus I) (default; significant ethics history: a 2000 admonition, a reprimand, a censure, and two one-year suspensions, also by default); and In re Kozlowski, 192 N.J. 438 (2007) (default; attorney's significant ethics history included a private reprimand, an admonition, three reprimands, a three-month suspension, and a one-year suspension; the attorney defaulted in six disciplinary matters, and we found his "repeated indifference toward the ethics system" to be "beyond forbearance;" In the Matter of Theodore F. Kozlowski, DRB 06-211 (November 16, 2006) (slip op. at 11-12)).

A three-year suspension was imposed in In re Brekus, 220 N.J. 1 (2014) (Brekus II) (default; attorney failed to file an affidavit, following his October 2011 suspension from the practice of law; egregious disciplinary history consisted of an admonition; a reprimand; a censure; two one-year suspensions, one of which proceeded as a default; and a two-year suspension, also a default).

Here, respondent has failed to file the required affidavit following an Order of suspension for two years. That matter, too, was before us by way of default. Respondent's suspension, however, was his first instance of final discipline, which sets him apart, to some extent, from the attorneys who have received greater discipline than a censure for their failure to file the affidavit.

Nevertheless, respondent spoke directly with the OAE, confirmed his mailing address, provided an e-mail address, and acknowledged receipt of documents sent by the OAE to that e-mail address. Yet, respondent did nothing to comply with his obligation. This conduct is not new to respondent.

In his previous matter, during the investigation of four grievances filed against respondent, between August 2014 and July 2015, the investigator for the District Ethics Committee (DEC) sent respondent nine letters. These letters were sent to various addresses, with the same results. The certified mail was unclaimed and the regular mail was not returned. Respondent failed to reply, in writing, to the grievances against him. In the Matter of Charles Berman, DRB 16-096 at 11.


Finally, after a year had passed since the first grievance had been filed, the DEC was able to interview respondent, who promised the investigator that he would provide records for his attorney accounts to permit the DEC to ascertain the status of particular client funds. At the meeting, respondent also provided the investigator an address to which correspondence should be sent. However, all subsequent attempts to communicate with respondent at the address he had specifically provided were unsuccessful, and respondent never provided the records he had promised to submit.

Thus, in our view, respondent has a history of "burying his head in the sand," until he has no choice but to confront disciplinary authorities, and then promising compliance in an apparent effort to buy time in order for him to disappear again. In this context, a censure is insufficient. Therefore, we determine to impose a six-month suspension, to run consecutively to respondent's current two-year suspension.

Vice-Chair Clark and Member Boyer voted for a three-month suspension. Member Gallipoli voted for disbarment and filed a separate dissent. Member Joseph 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 David Charles Berman
Docket No. DRB 18-277

Decided: January 23, 2019

Disposition: Six-Month Suspension

<i>Members</i>	Six-Month Suspension	Three-Month Suspension	Disbar	Recused	Did Not Participate
Frost	X				
Clark		X			
Boyer		X			
Gallipoli			X		
Hoberman	X				
Joseph					X
Rivera	X				
Singer	X				
Zmirich	X				
Total:	5	2	1	0	1


Ellen A. Brodsky
Chief Counsel