

Supreme Court Of New Jersey
Disciplinary Review Board
Docket No. DRB 18-284
District Docket No. XIV-2017-0433E

In The Matter Of
Daniel James Fox
An Attorney At Law

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Decision

Decided: January 28, 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 failure to cooperate with the OAE (RPC 8.1(b)) in its investigation of a grievance. For the reasons set forth below, we determine that respondent violated the Rule and impose a censure on him.

Respondent was admitted to the New Jersey bar in 1986 and to the New York bar in 1987. At the relevant times, he maintained an office for the practice of law in Orange.

On February 1, 2010, after respondent pleaded guilty to one count of making a false, fictitious, and fraudulent statement to the Department of Housing and Urban Development, in violation of 18 U.S.C. §§ 1001 and 2, he was temporarily suspended, pending the final resolution of ethics proceedings against him. In re Fox, 201 N.J. 158 (2010). Subsequently, on April 23, 2015, the Court imposed a one-year suspension on respondent, based on his federal criminal conviction. In re Fox, 221 N.J. 263 (2015). The suspension was retroactive to February 1, 2010, the effective date of respondent's temporary suspension. Ibid. Respondent remains suspended.

On June 7, 2012, respondent was censured, in a default matter, for failure to cooperate with disciplinary authorities and conduct prejudicial to the administration of justice. In re Fox, 210 N.J. 255 (2012). Specifically, he had failed to file an affidavit of compliance with R. 1:20-20 after the 2010 temporary suspension, which remained in effect. Ibid.

Service of process was proper. On June 28, 2018, the OAE sent a copy of an amended formal ethics complaint to respondent's home address, by

regular and certified mail, return receipt requested.¹ The letter sent by regular mail was not returned.

There is no proof that the United States Postal Service (USPS) attempted to deliver the certified letter. As of August 9, 2018, the date of the certification of the record, the most recent entry on the USPS tracking system stated that, as of July 3, 2018, the item was "currently in transit to the next facility." As of the date of this decision, the USPS tracking system contained no further update.

That the USPS may not have even attempted to deliver the certified letter has no bearing on whether the OAE effected service of the amended complaint. Service was effected on mailing of the letter by regular mail, which was not returned to the OAE. R. 1:5-4(b).²

On July 25, 2018, the OAE sent another letter to respondent, at the same address, by regular mail. The letter informed respondent that, if he failed to file an answer within five days, the allegations of the amended complaint

¹ The certification provides no information about the initial complaint, including whether it was served or why and how it was amended.

² Although R. 1:20-7(h) requires that service of a formal ethics complaint be made by either personal service or by certified mail (return receipt requested) and regular mail, it is not unusual for certified letters to be returned as "unclaimed." In such instances, service is "deemed complete on mailing of the ordinary mail." R. 1:5-4(b).

would be deemed admitted, the record would be certified directly to us for the imposition of a sanction, and the amended complaint would be deemed amended to include a charge of a violation of RPC 8.1(b).

The certification of the record does not state whether the letter sent by regular mail was returned. Because the letter was sent to the address listed in the records of the New Jersey Lawyers' Fund for Client Protection, service was complete on mailing.

As of August 9, 2018, respondent had not filed an answer to the complaint, and the time within which he was required to do so had expired. Accordingly, the OAE certified this matter to us as a default.

According to the single-count formal amended ethics complaint, on July 12, 2017, Mwansa Chipepo filed a grievance against respondent, alleging that he had failed to turn over \$12,161.17 due to Chipepo pursuant to the terms of an October 20, 2006 amended dual final judgment of divorce, entered in the Superior Court of New Jersey, Chancery Division – Family Part, Essex County.

On August 10, 2017, the OAE sent a copy of the grievance to respondent's home address, by regular and certified mail, return receipt requested, and requested respondent to provide a written reply on or before August 25, 2017. The certified letter was marked "unclaimed – unable to

forward" and, thus, returned to the OAE. The letter sent by regular mail was not returned. Respondent did not reply to the letter.

On August 29, 2017, the OAE sent another letter to respondent's home address, by regular and certified mail, return receipt requested, noting that he had failed to reply to the August 10 letter, and requesting a reply by September 5, 2017. As before, the certified letter was marked "unclaimed – unable to forward" and, thus, returned to the OAE. The letter sent by regular mail was not returned. Respondent did not reply to the letter.

On September 11, 2017, the OAE sent a third letter to respondent's home address, by regular and certified mail, return receipt requested, noting respondent's failure to reply to the OAE's prior correspondence, requesting respondent's production of certain records, and informing him that he would be required to attend an October 3, 2017 demand audit at the OAE. Yet, again, the certified letter was marked "unclaimed – unable to forward" and, thus, returned to the OAE. The letter sent by regular mail was not returned. Respondent neither replied to the letter, nor appeared for the demand audit.

On January 19 and 23, 2018, the OAE called respondent's cell phone, and left voice mail messages requesting that he return the calls. Respondent did not do so.

At some point, the OAE learned that the August 10, August 29, and September 11, 2017 letters had been sent to Union, New Jersey, rather than Plainfield. Consequently, on January 25, 2018, the OAE sent copies of those letters to respondent's home address, this time in Plainfield, by regular and certified mail, return receipt requested. The OAE requested respondent to submit a written reply to the grievance by February 2, 2018. Neither the certified letter nor the letter sent by regular mail were returned to the OAE. Respondent did not reply to the January 25, 2018 letter.

On February 6, 2018, the OAE sent copies of its prior correspondence to respondent's home address, in Plainfield, by regular and certified mail, return receipt requested. The OAE noted respondent's failure to reply to those letters and asked him to submit a written reply to the grievance by February 16, 2018. Neither the certified letter nor the letter sent by regular mail were returned to the OAE. Respondent did not reply to the February 6, 2018 letter.

On February 22, 2018, the OAE sent its last letter to respondent, by regular and certified mail, return receipt requested. The letter again noted respondent's failure to reply to the OAE's previous correspondence and informed him that he would be required to attend a demand audit at the OAE, on March 6, 2018. The unsigned green card for the letter sent by certified mail was returned to the OAE with no explanation. The letter sent by regular mail

was not returned to the OAE. Respondent did not appear for the March 6, 2018 demand audit.

Based on the above allegations, the amended complaint charged respondent with having violated RPC 8.1(b).

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

Rule 1:20-3(g)(3) requires every attorney to cooperate in a disciplinary investigation and to reply, in writing, within ten days of receipt of a request for information. A violation of this Rule constitutes a violation of RPC 8.1(b), which prohibits a lawyer, in connection with a disciplinary matter, from knowingly failing to respond to a lawful demand for information from a disciplinary authority.

Here, respondent violated both the Rule and the RPC, by ignoring the OAE's January 25 and February 6 and 22, 2018 letters, by failing to return the OAE's telephone calls, and by failing to submit a written reply to the grievance or to appear for the March 6, 2018 demand audit. See, e.g., In the Matter of Jaime Merrick Kaigh, DRB 16-282 (March 31, 2017) (slip op. at 5-6) (failure to submit a written reply to the grievance).

Respondent also violated RPC 8.1(b), by failing to file an answer to the formal amended ethics complaint. In re Gonzalez, 230 N.J. 55 (2017).

Failure to cooperate with an ethics investigation, without more, usually results in an admonition. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (attorney failed to reply to the district ethics committee investigator's repeated requests for information regarding his representation of a client in three criminal defense matters, a violation of RPC 8.1(b)), 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)).

However, reprimands have been imposed in cases such as this, in which the attorney fails to cooperate with an arm of the disciplinary system, such as the OAE, which, for example, uncovers recordkeeping improprieties in a trust account and requests additional documentation. See, e.g., In re Del Tufo, 210 N.J. 183 (2012) (following an overdraft in the attorney's trust account, an OAE audit uncovered several recordkeeping violations, including the absence of client funds on deposit when the overdraft occurred, the deposit of personal and business funds into the trust account, including legal fees, and the payment of personal and business expenses from the trust account, among other

deficiencies, a violation of RPC 1.15(d); in addition, the attorney did not reply to the OAE's initial request for a detailed explanation about the trust account overdraft for two months and hampered the OAE's efforts to schedule a demand audit by failing to return telephone calls or to reply to its correspondence, a violation of RPC 8.1(b); after a 2006 random audit, the OAE had advised the attorney that his practice of commingling personal and client funds was a violation of the recordkeeping rules), 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 certification addressing the steps he had taken to correct thirteen recordkeeping deficiencies noted during a random audit; the attorney also failed to file an answer to the complaint).

Here, the grievance alleged that respondent had failed to turn over to Chipepo more than \$12,000, in compliance with a judgment of divorce. Respondent ignored the OAE's request for an explanation and supporting documentation related to this allegation, and he failed to appear for a scheduled demand audit. Thus, a reprimand is in order for the RPC 8.1(b) violation.


In our view, a reprimand would be sufficient for respondent's failure to cooperate, which was a single event, albeit on a long continuum, from the

investigation stage to the default. Yet, respondent has a serious ethics history, which consists of a one-year suspension and a censure in a default matter. We, therefore, determined to enhance the reprimand and impose a censure. See, e.g., In re Larkins, 217 N.J. 20 (2014) (default; attorney did not reply to the ethics investigator's attempts to obtain information about the grievance and failed to file an answer to the formal ethics complaint; we imposed a reprimand based on a prior admonition and, more significantly, a 2013 censure, also in a default matter, in which the attorney had failed to cooperate with an ethics investigation).

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

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Docket No. DRB 18-284

Decided: January 28, 2019

Disposition: Censure

<i>Members</i>	Censure	Recused	Did Not Participate
Frost	X		
Clark	X		
Boyer	X		
Gallipoli	X		
Hoberman	X		
Joseph			X
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8	0	1



Ellen A. Brodsky
Chief Counsel