

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-274
District Docket No. XIV-2018-0625E

In the Matter of
Keith T. Smith
An Attorney at Law

:
:
:
:
:
:
:
:
:
:
:

Decision

Decided: February 27, 2020

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 having violated RPC 8.1(b) (failure to cooperate with disciplinary authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice), based on his failure to file an affidavit of compliance with R. 1:20-20(b)(15), following his suspensions from the practice of law.

For the reasons set forth below, we determine to impose a two-year suspension.

Respondent was admitted to the New Jersey bar in 1989. He formerly maintained an office for the practice of law in Egg Harbor Township, New Jersey. He has an extensive disciplinary history.

In October 2008, respondent received an admonition for gross neglect (RPC 1.1(a)); lack of diligence (RPC 1.3); failure to communicate with a client (RPC 1.4(b) and (c)); and improper fee-sharing (RPC1.5(e)). In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008). In December 2009, the Court found that respondent exhibited gross neglect, lack of diligence, and failure to communicate. In re Smith, ___ N.J. ___ (2009). No additional discipline was imposed, however, because the misconduct was of the same time and type which resulted in the 2008 admonition.

In June 2011, respondent received a censure in two client matters for gross neglect; pattern of neglect (RPC 1.1(b)); lack of diligence; failure to communicate with a client; failure to expedite litigation (RPC 3.2); practicing law while ineligible (RPC 5.5(a)); and failure to cooperate with ethics authorities. In re Smith, 206 N.J. 137 (2011).

On February 28, 2017, respondent was temporarily suspended for failing to comply with a fee arbitration determination, from which he was reinstated on March 27, 2017. In re Smith, 228 N.J. 2 (2017); In re Smith, 228 N.J. 308 (2017). On January 11, 2018, respondent was censured for recordkeeping violations (RPC 1.15(d) and R. 1:21-6) and failing to cooperate with ethics authorities. In re Smith, 231 N.J. 397 (2018).

Effective October 19, 2018, respondent was suspended for three months for engaging in ex parte communications (RPC 3.5(b)); communicating with a represented person (RPC 4.2); and practicing law while ineligible. In re Smith, 235 N.J. 165 (2018).

Also, effective January 21, 2019, respondent was suspended for six months for violating RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), following his guilty plea to simple assault. In re Smith, 235 N.J. 169 (2018).

Service of process was proper. On April 10, 2019, prior to respondent's three-month suspension, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to his office address of record. The undated return receipt was returned to the OAE, with an illegible signature, and the United States Postal Service (USPS) tracking

printout showed that delivery occurred on April 13, 2019. The letter sent by regular mail was not returned.

On May 10, 2019, the OAE sent a letter to respondent, by certified and regular mail, to the office address, informing him that, unless he filed a verified 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 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 certified letter was returned to the OAE marked “NOT DELIVERABLE AS ADDRESSED.” According to the USPS tracking printout, on May 13, 2019, a notice was left for respondent, and the letter was mailed back to the OAE marked “UNCLAIMED.” The letter sent by regular mail was not returned.

As of July 16, 2019, 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.

We now turn to the allegations of the complaint.

As set forth above, effective October 19, 2018, respondent was suspended for three months, and, effective January 21, 2019, he was suspended for six months. Respondent remains suspended to date.

The Court's Orders suspending respondent from the practice of law required him to comply with R. 1:20-20, which, in turn, obligated respondent, within thirty days, to file with the OAE Director "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 [O]rder." Respondent did not file the affidavit within the required time.

On February 5, 2019, the OAE sent respondent a letter, by certified and regular mail, reminding him of his obligation to file the affidavit and requesting a reply by February 19, 2019. On February 8, 2019, the certified letter was returned to the OAE as "UNCLAIMED." The letter sent by regular mail was not returned.

On February 28, 2019, the OAE mailed respondent a second letter, by certified and regular mail, warning him that his failure to file the R. 1:20-20 affidavit by March 14, 2019 may result in the OAE's filing a disciplinary complaint against him. On March 19, 2019, the OAE received the undated green certified mail return receipt, bearing an illegible signature. The letter sent by regular mail was not returned.

Respondent neither replied to the OAE's letters nor filed the required affidavit. Further, he has "failed to take the steps required of all suspended or

disbarred attorneys,” such as notifying clients and adversaries of his suspension and providing his clients with their files.

Based on the above allegations, the complaint charged respondent with failure to cooperate with disciplinary authorities and conduct prejudicial to the administration of justice.

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).

R. 1:20-20(b)(15) requires a suspended attorney, within thirty days of the 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 [O]rder.” 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).

In sum, respondent’s failure to file the affidavit constitutes per se violations of RPC 8.1(b) and RPC 8.4(d). The sole issue left for us to determine is the appropriate quantum of discipline for respondent’s misconduct.

The threshold measure of discipline to be imposed for an attorney's failure to file a R. 1:20-20(b)(15) affidavit is a reprimand. 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, 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. The attorney's disciplinary history consisted of a prior private reprimand, a reprimand, and a three-month suspension in a default matter.

Since Girdler, the discipline imposed on attorneys who have failed to comply with R. 1:20-20 and who have defaulted, has ranged from a censure to a six-month suspension, if they do not have an egregious ethics history. See, e.g., In re Stasiuk, 235 N.J. 327 (2018) (censure; 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 Kinnard, 220 N.J. 488 (2015) (censure; ethics history included admonition and temporary suspension; no prior defaults); In re Rak, 214 N.J. 5 (2013) (three-month suspension; aggravating factors included three default matters against the attorney in three years (two of the defaults were consolidated and resulted in a three-month suspension, the third resulted in a reprimand) and the OAE personally left additional copies of its previous letters about the affidavit, as well as the OAE's contact information, with the attorney's office assistant, after which the attorney still did not comply); and In re Rosanelli, 208 N.J. 359 (2011) (six-month suspension for attorney who failed to file the affidavit after a temporary suspension in 2009 and after a three-month suspension in 2010, which proceeded as a default; prior six-month suspension).

A one-year suspension has been imposed in default matters where the attorneys' ethics histories were more egregious. See, e.g., In re Rifai, 213 N.J. 594 (2013) (following two three-month suspensions in early 2011, one of which proceeded as a default, attorney failed to file the affidavit; his ethics history also included two reprimands) and 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 matters proceeded on a default basis).

More serious discipline, a two- and three-year suspension, respectively, was imposed in the following default cases: In re Brekus, 208 N.J. 341 (2011) (significant ethics history: a 2000 admonition, a 2006 reprimand, a 2009 one-year suspension, a 2009 censure, and a 2010 one-year suspension; the 2010 discipline was based on a default); and In re Brekus, 220 N.J. 1 (2014) (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, which also resulted from a default); see also In re Kozlowski, 192 N.J. 438 (2007) (two-year suspension; 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 his "repeated indifference towards the ethics system" was found to be "beyond forbearance;" In the Matter of Theodore F. Kozlowski, DRB 06-211 (November 16, 2006) (slip op. at 11-12)).


As noted, the default status of the present matter must be considered as an aggravating factor. "[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) (citations omitted).

In this instance, respondent failed to file the required affidavit following two Orders of suspension, one for three months and one for six months. Moreover, as previously stated, he has an extensive and egregious ethics history, comprising an admonition, two censures, a temporary suspension, and the three-month and six-month suspensions. His circumstances are similar to those of the attorneys in Brekus and Kozłowski, who also had extensive and egregious ethics histories, including past suspensions, and received two-year suspensions or greater. In further aggravation, many of respondent's past infractions were repeated, and his blatant disregard of the Rules is evident as the case at issue is his seventh encounter with the disciplinary system since 2008. It is clear that respondent has failed to learn from past mistakes and that the need for progressive discipline, particularly in default cases, requires enhancement of the sanction to be imposed.

Accordingly, we determine to impose a two-year suspension on respondent. Members Joseph and Petrou voted to impose a one-year suspension. Vice-Chair Gallipoli voted to recommend respondent's disbarment and filed a 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, Chair

By: 
Ellen A. Brodsky
Chief Counsel


SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Keith T. Smith
Docket No. DRB 19-274

Decided: February 27, 2020

Disposition: Two-Year Suspension

<i>Members</i>	Two-Year Suspension	One-Year Suspension	Disbar	Recused	Did Not Participate
Clark	X				
Gallipoli			X		
Boyer	X				
Hoberman	X				
Joseph		X			
Petrou		X			
Rivera	X				
Singer	X				
Zmirich	X				
Total:	6	2	1	0	0


Ellen A. Brodsky
Chief Counsel