

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-213
District Docket No. XIV-2019-0241E

In the Matter of
Irving Tobin
An Attorney at Law

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Decision

Decided: April 28, 2021

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 1.15(d) (failure to

comply with the recordkeeping provisions of R. 1:21-6) and RPC 8.1(b) (two instances – failure to cooperate with disciplinary authorities).¹

On October 27, 2020, respondent filed a motion to vacate the default, which we denied on November 24, 2020. For the reasons set forth below, we now determine to impose a censure, with conditions.

Respondent earned admission to the New Jersey bar in 1957. At the relevant times, he maintained an office for the practice of law in Hillside, New Jersey.

In November 2001, respondent received a reprimand, via a disciplinary stipulation, for his misconduct in four matters, including violating RPC 1.7 (conflict of interest); RPC 1.8(a) (improper business transaction with client); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 1.15(a) (negligent misappropriation of client funds); RPC 1.15(a) and (d) and R. 1:21-6(a)(1) (commingling of funds); and RPC 1.15(d) and R. 1:21-6(b)(8) and (c) (recordkeeping violations). In re Tobin, 170 N.J. 74 (2001).

In 2006, respondent received a censure for violating RPC 1.8(c) (a lawyer shall not prepare an instrument giving the lawyer any substantial gift from a

¹ Due to respondent's failure to file an answer to the formal ethics complaint, the OAE amended the complaint to include a second RPC 8.1(b) charge.

client, including a testamentary gift, except where the client is related to the lawyer). In re Tobin, 186 N.J. 67 (2006).

On October 21, 2019, the OAE filed a motion for respondent's temporary suspension in connection with the instant matter. On November 4, 2020, the Court issued an Order to Show Cause as to why respondent should not be immediately temporarily suspended from the practice of law, returnable on December 1, 2020.

On December 1, 2020, the Court denied the OAE's motion for respondent's immediate temporary suspension; prohibited respondent from taking on any new client matters; and referred the matter to the Assignment Judge of Union County for the appointment of an attorney-trustee for respondent's law practice, pursuant to R. 1:20-19(a)(2), to have exclusive authority and control over respondent's attorney trust and business accounts and financial matters involving the office. In re Tobin, No. M-297 September Term 1999 (December 1, 2020).

Service of process was proper. On May 28, 2020, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's office address of record. According to the United States Postal Service (USPS)

tracking printout, on June 10, 2020, the certified letter was delivered and was “Left with Individual.” The regular mail was not returned.

On July 2, 2020, the OAE sent a letter to respondent, by certified and regular mail, to his 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). According to the USPS tracking printout, on July 9, 2020, the certified letter was “Delivered, Front Desk/Reception/Mail Room.” The regular mail was not returned.

As of August 6, 2020, 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.

On December 5, 2017, the OAE sent a letter to respondent informing him that, on January 4, 2018, he would be subject to a random audit. The OAE rescheduled the audit for January 18, 2018, and it was conducted on that date. A continuation of the audit was scheduled for February 28, 2018. On February 26, 2018, respondent sent the OAE a letter, via facsimile, requesting an

adjournment of the audit, representing that he had suffered a serious medical incident and was in the hospital. The OAE rescheduled the audit for May 17, 2018, and it was conducted on that date.

By letter dated June 18, 2018, the OAE identified seven recordkeeping deficiencies and directed respondent to produce additional financial records by July 27, 2018. Specifically, the audit revealed the following deficiencies: failure to maintain a running cash balance in the attorney trust account (ATA) checkbook (R. 1:21-6(c)(1)(G)); client ledger cards with debit balances (R. 1:21-6(d));² permitting inactive trust ledger balances to remain in the ATA for an extended period of time (R. 1:21-6(d)); failing to resolve old, outstanding checks (R. 1:21-6(d)); permitting the ATA to be used to account for funds unrelated to the legal practice (R. 1:21-6(a)(1)); commingling personal and client trust funds (RPC 1.15(a));³ and failing to prepare and reconcile a schedule of client ledger accounts to the ATA bank statement (R. 1:21-6(c)(1)(H)).

² Specifically, twenty-one negative balances totaling \$818,221.88 were discovered in the ATA.

³ Although the enumerated recordkeeping violations in the complaint included commingling, and referred to RPC 1.15(a), the complaint failed to charge a violation of RPC 1.15(a). Therefore, we may not consider that charge.

Respondent also failed to prepare monthly, three-way reconciliations of his ATA.

The OAE prepared a reconciliation of respondent's ATA for November 30, 2017, which revealed that respondent maintained \$818,221.88 in negative client balances, as reflected by his client ledger cards.⁴

On August 7, 2018, the OAE telephoned respondent's office and spoke to his bookkeeper, Larissa Sufani, who claimed that respondent had not received the OAE's June 18, 2018 letter, and that the person who signed for it was not with respondent's office. The OAE then sent a copy of the June 18, 2018 letter to respondent, via facsimile, and instructed him to provide the requested documents by September 7, 2018. Respondent failed to reply to the request.

On September 20, 2018, the OAE again spoke to Sufani, who claimed that she had sent the OAE a letter requesting an extension to October 12, 2018 to submit the requested documents. Sufani disclosed that she would be out of the office until October 8, 2018 due to a health issue and that both of the office's accountants had been hospitalized. Sufani expressed the belief that the requested documents had been prepared, but wanted to review the records with the

⁴ Respondent was not charged with negligent misappropriation of client funds in respect of these significant, negative client trust fund balances.

accountants prior to submitting them to the OAE. When the OAE informed Sufani that she could have submitted the bank statements in the interim, she replied that she was not aware she could submit the documents in parts. The OAE asked Sufani who had been managing the ATA while everyone was out of the office. She answered that she was not computer savvy but had “a handle on the ATA.” Although the OAE granted the extension to October 12, 2018, and warned Sufani that no further extensions would be granted, the OAE received neither Sufani’s letter requesting an extension nor any of the requested documents from respondent.

From October 25 to December 17, 2018, the OAE sent multiple letters requesting proof of corrective action and left a corresponding voicemail. On December 13, 2018, the OAE called respondent’s office, spoke to an employee, and warned her that, if respondent failed to submit the requested documents, the OAE might move for respondent’s suspension from the practice of law due to his failure to cooperate. Respondent failed to reply.

On January 11, 2019, the OAE called respondent’s office and spoke to Sufani, who claimed that, on October 25, 2018, she mailed the documents to the OAE’s post office box, but that she did not yet have the tracking information. Sufani had no explanation for respondent’s failure to reply to the OAE’s letters,

but claimed that she would resend the documents to the OAE, via messenger, by January 18, 2019. On January 25, 2019, the OAE again spoke to Sufani, who claimed that the OAE should have received the documents by January 18, 2019, and that she would submit the tracking information that day. The OAE instructed her to arrange for the documents to be hand-delivered by February 15, 2019. As of the date of the complaint, the OAE had not received respondent's submission, or the tracking information.

On January 28, 2019, the OAE issued a subpoena for respondent's ATA and attorney business account records, dating back to January 1, 2016. Although the November 2017 ATA statement revealed an ending balance of \$401,110.39, comprising unidentified client funds, the client ledgers reflected negative client balances totaling \$818,221.88. The cause and nature of this discrepancy are unknown, due to respondent's failure to cooperate with the OAE.

On June 4, 2019, after the OAE had docketed the grievance, an OAE investigator called respondent's office and spoke to Sufani, who disclosed that respondent had experienced multiple health issues, and that the median age of office staff was seventy-plus years old. Sufani explained that respondent was still out of the office due to his health issues; suggested that the OAE call back in one month; and asserted that respondent needed to evaluate his ability to

continue practicing law. She further disclosed that respondent's practice was "slowly dwindling;" that respondent may not return to the practice; and that she will know his status within the next two months. Sufani stated that she was the office assistant, and was not supposed to be "doing more than that," but that she was "thrown into things she should not be doing," due to respondent's absence. She added that she might discuss with respondent's family how to proceed.

By letters dated June 6 and July 2, 2019, sent to respondent by certified and regular mail, the OAE requested documentation verifying that the recordkeeping deficiencies had been cured. Despite proper service, respondent failed to reply.

On August 21, 2019, two OAE disciplinary investigators visited respondent's office to discuss his failure to cooperate with the OAE. After meeting with respondent, his secretary, and Sufani, the investigators determined that, while respondent had been absent from his office due to illness, Sufani had been running the office. Sufani claimed that she had provided the three-way reconciliations to the OAE in October 2018, and would locate the mailing receipt and provide it to the OAE.

Respondent admitted that the random audit had been a "low priority," due to his medical condition, vacations, and staffing problems, but claimed that it

was now a “high priority.” He asked the OAE to extend to September 30, 2019 his deadline to provide the documents and to cure the deficiencies, and memorialized that request in an August 21, 2019 letter. Although, by letter dated August 30, 2019, the OAE granted respondent’s extension request and warned him that no further extensions would be granted, he again failed to comply with the OAE’s deadline.

On September 26, 2019, when the OAE investigator called respondent’s firm, Sufani claimed that the client files for some matters were missing, but represented that she would cooperate with the OAE to find a resolution, and that the OAE would have “something” on September 30, 2019. As of the date of the complaint, the OAE had not received any documents.

Consequently, on October 21, 2019, the OAE filed a petition for respondent’s temporary suspension from the practice of law, and for an Order prohibiting the disbursement of all funds in any banking institution relating to respondent’s law practice, except by Court Order. The affidavit in support of the petition detailed that respondent repeatedly had failed to cooperate with the OAE and that his ATA had an ending balance of \$401,110.39.

That same day, the OAE left a voicemail notifying respondent of the petition for temporary suspension. On October 23, 2019, respondent asked the

OAE for an additional fifteen to twenty days to submit his answer to the OAE's petition. The OAE suggested that respondent contact the Court to request additional time to reply.

By letter dated October 30, 2019, respondent asked the Court to delay ruling on the OAE's petition until November 20, 2019, by which date he hoped "to have a complete correction of this matter," and represented that he had hired a certified public accountant to correct the deficiencies. He explained that the client balances in his ATA were old because his clients had asked him to retain the funds in his ATA. Respondent maintained that he has a good history as an attorney in New Jersey in his almost sixty-two years at bar; that he served in the military during World War II, from 1942 to early 1946; that he is ninety-five years old; that he has a serious medical condition that requires frequent monitoring; and that his two key employees who are of advanced age were absent from work for the past few months for various health and other reasons. The Court did not rule on respondent's extension request. Respondent failed to provide the OAE with any further financial records.

On February 18, 2020, the OAE filed a supplemental affidavit in support of its motion for respondent's temporary suspension, which again detailed respondent's repeated refusal to provide the OAE with the requested

information; emphasized the twenty-one negative balances totaling \$818,221.88 in his ATA, his commingling of personal and client funds, and the absence of monthly three-way ATA reconciliations; and concluded that he poses “a substantial financial threat to his clients and the public at large.”

As stated above, the OAE’s motion for respondent’s temporary suspension ultimately was denied.

Based on the above allegations, the complaint charged respondent with having violated RPC 1.15(d) by failing to comply with numerous recordkeeping requirements of R. 1:21-6, and RPC 8.1(b) (two instances) by failing to cooperate with the OAE’s audit and by failing to answer the complaint.

As stated previously, respondent, through counsel, filed a motion to vacate the default, which the OAE opposed. In order to successfully vacate a default, a respondent must meet a two-pronged test by offering both a reasonable explanation for the failure to answer the ethics complaint and asserting meritorious defenses to the underlying charges.

As to prong one, respondent failed to offer a reasonable explanation for his failure to timely answer the ethics complaint. Respondent asserted that he experienced several significant health issues, which occurred between July 2018 and July 2019, that explained his failure to cooperate with the OAE. Also, on

January 1, 2020 his secretary of fifteen years suffered an illness, resulting in her death seven days later, and within the last two years, his sister and brother-in-law died, which has been difficult for respondent to accept. Respondent attempted to handle the instant matter himself, but was physically and emotionally unable to do so, and recently engaged counsel to represent him. He claimed the intent to wind down his practice and to retire from the practice of law within the next three to six months, at the urging of his family and counsel.

Respondent apologized for his failure to cooperate with the disciplinary process; maintained that he would comply timely with his ethics responsibilities, emphasizing that he now has the assistance of counsel; and requested that the discipline imposed, if any, be an admonition. He claimed that he feels “completely normal both mentally and physically.” Respondent’s counsel also submitted a certification that mirrored the information set forth in respondent’s certification, requesting that we vacate the default and allow respondent to retire within three to six months, with honor and dignity.

The timeline of respondent’s health and personal issues do not comport with the service of the instant complaint and respondent’s failure to timely answer it. On June 10, 2020, more than one year after his most recent health issue, the OAE served the complaint and, on August 6, 2020, it certified this

matter to us as a default. Moreover, respondent's health and personal issues did not prevent him from discussing his failure to cooperate with the OAE investigators during their August 21, 2019 office visit, at which time he agreed to provide the requested documents, but then failed to do so; nor did it prevent him from writing to the Court on October 30, 2019 to request a delay, until November 20, 2019, of its ruling on the OAE's motion for temporary suspension, at which time he hoped to correct the deficiencies, which he again failed to do.

Although the OAE acknowledged respondent's age, length of time at the bar, and his medical and personal issues, the OAE contended that he failed to provide a satisfactory explanation for his failure to file a timely answer to the complaint. Thus, the OAE argued that respondent failed to meet the first prong.

Based on the facts set forth by respondent and his counsel, we conclude that respondent's explanation for his failure to file a conforming answer is not reasonable, and that he has not satisfied the first prong of the test.

As to prong two, respondent has failed to assert a meritorious defense to all the underlying charges. To the contrary, respondent has admitted all the charges, except he claimed that the \$401,110.39 in unaccounted client balances and \$818,221.88 in debit balances were the result of bookkeeping errors, and

not misappropriation. He provided documents demonstrating his post-complaint efforts to cure the recordkeeping deficiencies, but such post-complaint cooperation does not satisfy the second prong. The fact remains that respondent admitted having violated RPC 1.15(d) and RPC 8.1(b).

The OAE asserted that respondent failed to provide specific and meritorious defenses to the charges, because he admitted the majority of the allegations in the complaint, and he conceded that he violated the RPCs. Therefore, the OAE asserted that respondent failed to meet the second prong.⁵

We, thus, determined that respondent failed to assert a meritorious defense to the underlying charges and failed to satisfy the second prong of the test. Accordingly, we determined to deny respondent's motion and entered a letter decision to that effect on November 24, 2020.

Moving to our review of the record, we find that the facts recited in the complaint support all the charges of unethical conduct. Respondent's failure to file an 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

⁵ On November 12, 2020, respondent, through counsel, submitted a supplemental certification for our consideration in further support of the motion to vacate the default. By letter dated November 13, 2020, the OAE objected to our consideration of respondent's certification because it was late and unsolicited. Nothing contained in respondent's certification affected our determinations.

of discipline. R. 1:20-4(f)(1).

Specifically, respondent violated RPC 1.15(d) by failing to maintain a running cash balance in the ATA checkbook; permitting inactive trust ledger balances to remain in the ATA for an extended period of time; failing to resolve old outstanding checks; permitting the ATA to be used to account for funds unrelated to the legal practice; commingling personal and client trust funds; and failing to prepare and reconcile a schedule of client ledger accounts to the ATA bank statement. Further, he failed to prepare monthly, three-way reconciliations of his ATA. Moreover, his ATA had twenty-one negative client balances totaling \$818,221.88, and \$401,110.39 in unidentified client balances. The origin and nature of these discrepancies are unknown, due to respondent's failure to cooperate with the OAE.

Respondent violated RPC 8.1(b) by failing to cooperate with disciplinary authorities. Specifically, he failed to reply and to provide the documents requested in the OAE's seven letters from June 18, 2018 to August 30, 2019, and eight telephone calls from August 7, 2018 to September 26, 2019. In addition, on August 21, 2019, two OAE investigators met with respondent in-person and requested information, which was not provided. Finally, respondent failed to file a verified answer to the complaint.

In sum, we find that respondent violated RPC 1.15(d) and RPC 8.1(b) (two instances). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

An admonition is the usual form of discipline for recordkeeping violations, so long as negligent misappropriation did not result. See, e.g., In the Matter of Andrew M. Newman, DRB 18-153 (July 23, 2018) (attorney failed to maintain trust or business account cash receipts and disbursements journals, proper monthly trust account three-way reconciliations, and proper trust and business account check images); In the Matter of Eric Salzman, DRB 15-064 (May 27, 2015) (attorney did not maintain trust or business receipts or disbursements journals, or client ledger cards; did not properly designate the trust account; made disbursements from the trust account against uncollected funds; withdrew cash from the trust account; and did not maintain a business account); and In the Matter of Leonard S. Miller, DRB 14-178 (September 23, 2014) (attorney recorded erroneous information in client ledgers, which also lacked full descriptions and running balances; failed to promptly remove earned fees from the trust account; and failed to perform monthly three-way reconciliations; violations of R. 1:21-6 and RPC 1.15(d)).

Admonitions typically are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history or, as here, the attorney's ethics history is remote. See, e.g., 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)); 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)); and In the Matter of Raymond A. 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)).

A reprimand may result if the failure to cooperate is with an arm of the disciplinary system, such as the OAE, which uncovers recordkeeping improprieties in a trust account and requests additional documentation. 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; 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); 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).

Pursuant to the above precedent, a reprimand is the appropriate quantum of discipline for respondent's combined violations of RPC 1.15(d) and RPC 8.1(b). To craft the appropriate discipline, however, we also must consider aggravating and mitigating factors.

In aggravation, respondent previously has been disciplined for recordkeeping violations and, thus, has demonstrated his failure to learn from past mistakes. The Court has signaled an inclination toward progressive discipline and stern treatment of repeat offenders. In such situations, enhanced discipline is appropriate. See In re Kantor, 180 N.J. 226 (2004) (disbarment for abandonment of clients and repeated failure to cooperate with the disciplinary system).

Finally, we must consider 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) (citations omitted). In light of respondent’s failure to learn from past mistakes and the default status of this matter, the enhanced sanction of a censure is warranted.

In mitigation, respondent has been practicing law for sixty-three years; is a World War II veteran; and suffered a serious health condition a few days prior to the date of the continuation of the random audit. His health and personal issues may mitigate at least a portion of his misconduct regarding his failure to cooperate with the OAE audit.

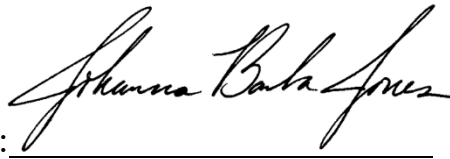
On balance, however, the aggravating factors outweigh the mitigation. Accordingly, we determine to deny the motion to vacate the default and impose a censure as the quantum of discipline necessary to protect the public and preserve confidence in the bar. Additionally, we determine to impose the conditions that respondent (1) identify and disburse all client trust funds in his ATA within six months of the date of the Court's Order in this matter, and promptly place any funds that he cannot so disburse with the Superior Court Trust Fund Unit; and (2) immediately cooperate with the OAE's audit of his attorney accounts.

Member Petrou voted to impose a three-month suspension, with the same conditions.

Member Joseph voted to impose no discipline, but, rather, to refer the matter to the Assignment Judge of Union County for the appointment of an attorney-trustee to assist respondent in winding down his law practice.

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: 

Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Irving Tobin
Docket No. DRB 20-213

Decided: April 28, 2021

Disposition: Censure

<i>Members</i>	Censure	No Discipline	Three-Month Suspension	Recused	Did Not Participate
Clark	X				
Gallipoli	X				
Boyer	X				
Hoberman	X				
Joseph		X			
Petrou			X		
Rivera	X				
Singer	X				
Zmirich	X				
Total:	7	1	1	0	0



Johanna Barba Jones
Chief Counsel