

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-194
District Docket No. IV-2020-0012E

In the Matter of
Brian J. Smith
An Attorney at Law

Decision

Decided: February 18, 2022

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 District IV Ethics Committee (the DEC), pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with violations of 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 3.4(c) (knowing violation of the rules of a tribunal); RPC 3.4(d) (failure to

comply with discovery requests); RPC 5.5(a)(1) (unauthorized practice of law); RPC 1.16(a)(1) (failure to withdraw from a representation if the representation will result in violation of the Rules of Professional Conduct or other law); and RPC 8.1(b) (two instances – failure to cooperate with disciplinary authorities).¹

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

Respondent earned admission to the New Jersey bar in 1994 and to the Pennsylvania bar in 1993. During the relevant timeframe, he maintained a practice of law in Huntingdon Valley, Pennsylvania.

On June 20, 2019, the Supreme Court of Pennsylvania issued an order suspending respondent, by consent, for one year and one day. In turn, on July 28, 2021, we imposed a one-year suspension on respondent, pursuant to a motion for reciprocal discipline. We found that, in two client matters, respondent violated RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-6); RPC 3.1 (frivolous litigation); RPC 3.4(c); RPC 4.4(a) (conduct that has no substantial purpose other than to embarrass, delay, or burden a third person); RPC 8.1(b) (two instances); and RPC 8.4(d) (conduct prejudicial to the

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

administration of justice). In the Matter of Brian J. Smith, DRB 20-318 (July 28, 2021), so ordered __ N.J. __ (2022).

Effective November 4, 2019, the Court declared respondent administratively ineligible to practice law in New Jersey for his failure to comply with New Jersey's continuing legal education (CLE) requirements. According to Supreme Court records, respondent regained his eligibility to practice law in New Jersey on August 6, 2020.

Service of process was proper. On May 20, 2021, the DEC sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's office address of record. The certified mail receipt was returned with an illegible signature, indicating proper service. The regular mail was not returned.

On June 24, 2021, the DEC sent a second letter to respondent's office address, by regular mail, 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 regular mail was not returned.

As of August 23, 2021, respondent had not filed an answer to the complaint, and the time within which he was required to do so had expired. Accordingly, the DEC certified this matter to us as a default.

Moreover, on October 4, 2021, the Office of Board Counsel (the OBC) published a notice in the New Jersey Law Journal, stating that we would consider this matter on November 18, 2021. The notice informed respondent that, unless he filed a successful motion to vacate the default by October 12, 2021, his failure to answer would remain deemed an admission of the allegations of the complaint. The OBC received no such motion.

We now turn to the allegations of the complaint.

On April 9, 2018, respondent filed an answer and counterclaim on behalf of his clients, SJI Holding, LLC and Ramon Gaber, in connection with a civil action pending in the Superior Court of New Jersey, Camden County, Law Division, and docketed as Watson v. SJI Holdings, LLC. On May 20, 2019, the plaintiff, Derek M. Watson, through counsel, filed a motion to compel the production of documents. Respondent received notice of the motion via eCourts. However, he neither informed his clients nor filed opposition to the motion. Therefore, on June 10, 2019, the court granted the plaintiff's unopposed discovery motion.

On June 10, 2019, respondent received notice of the adverse order via eCourts; however, he neither informed his clients of the order nor complied with the order. Consequently, on July 24, 2019, plaintiff's counsel filed a second motion to compel discovery. Although there is no record in eCourts that

respondent received notice of the July 24, 2019 motion, plaintiff's counsel copied respondent, via facsimile, on the July 24, 2019 transmittal letter to the court, which noted that the attorney had included a courtesy copy of the motion for respondent. Respondent failed to respond to the motion, or to otherwise investigate or act on the information contained in the July 24, 2019 letter transmitting the motion to the court.

In an August 15, 2019 order, the court granted, as unopposed, the plaintiff's July 24, 2019 motion to compel discovery. The order further directed respondent's clients to reply to plaintiff's discovery requests within twenty days of the order. Respondent received notice of the August 15, 2019 order via eCourts; however, he neither informed his clients nor complied with the order.

On September 11, 2019, due to respondent's failure to comply with the August 19, 2019 order, plaintiff's counsel filed a motion to strike respondent's clients' answer and counterclaim. Respondent received notice of the motion via eCourts; however, he neither informed his clients of the motion nor filed opposition thereto.

On September 27, 2019, the court granted plaintiff's unopposed September 11, 2019 motion, struck the defendants' answer, and dismissed the defendants' counterclaim. Respondent received notice of the September 27, 2019 order; however, he neither informed his clients about the order nor

informed them that their answer had been stricken and their counterclaim had been dismissed.

As previously noted, effective November 4, 2019, the Court declared respondent administratively ineligible to practice law for failure to comply with CLE requirements. Respondent failed to inform his clients that he had been deemed administratively ineligible to practice, that they needed to retain new counsel, and that he would no longer be receiving notifications from eCourts in connection with the litigation. Because respondent had been declared administratively ineligible to practice law, respondent's clients also were removed from eCourts notifications of filings.

On December 13, 2019, plaintiff's counsel filed a motion to dismiss the defendants' answer, with prejudice, and to schedule a formal proof hearing. However, due to his administrative ineligibility to practice, neither respondent nor respondent's clients were notified, via eCourts, of that motion. On January 10, 2020, the court granted the unopposed motion to dismiss. Ultimately, a \$627,905 default judgment was entered against respondent's clients.

In October 2020, respondent's client, Gaber, received notification that plaintiff's counsel sought to transfer the default judgment to Pennsylvania. Prior to this notification, respondent's clients had no knowledge of the default

judgment. In response, respondent's clients secured new counsel, who vacated the default judgment and reinstated the clients' answer and counterclaim.

The plaintiff, Watson, filed an ethics grievance against respondent dated March 23, 2020. On February 22, 2021, the DEC requested from respondent, via e-mail, information and documentation concerning the grievance. The DEC requested that respondent provide the information within ten days. Respondent failed to reply.

On March 9, 2021, the DEC sent to respondent a follow-up letter, via e-mail, granting him an additional seven days, until March 16, 2021, to provide the documentation requested in the February 22, 2021 letter. The DEC's March 9, 2021 correspondence further cited the possibility of an RPC 8.1(b) charge against respondent should he fail to cooperate. Respondent failed to reply.

Thereafter, on March 18, 2021, the DEC sent another letter to respondent, via e-mail, Federal Express, and the United States Postal Service, advising him of the previous letters and granting him until March 25, 2021 to provide the requested information. That letter advised respondent that, should he fail to reply he would be subject to disciplinary action for violating RPC 8.1(b). Due to an administrative error, the Federal Express letter was not sent until March 29, 2021, but was delivered to respondent's address on March 30, 2021.

As of April 20, 2021, the date of the filing of the formal ethics complaint, respondent had not replied to any of the DEC's correspondence.

Based on the foregoing, the complaint charged respondent with having violated RPC 1.1(a); RPC 1.1(b); RPC 1.3; RPC 1.4(b); RPC 1.16(a)(1); RPC 3.4(c); RPC 3.4(d); RPC 5.5(a)(1); and RPC 8.1(b). As noted above, the DEC amended the complaint to add the second RPC 8.1(b) charge after respondent failed to file an answer to the formal ethics complaint.

The facts recited in the complaint support most of 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). Notwithstanding that Rule, each charge in the complaint must be supported by sufficient facts for us to determine that unethical conduct has occurred.

Specifically, the complaint supports the allegations that respondent committed gross neglect and lacked diligence by failing to oppose and failing to inform his clients of the May 20 and September 11, 2019 motions filed by plaintiff's counsel, and by subsequently failing to comply with and inform his clients of the trial court's June 10, August 15, and September 27, 2019 orders granting plaintiff's motions as unopposed. Respondent also was negligent and lacked diligence when he failed to investigate plaintiff's counsel's July 24, 2019

cover letter to the court, which stated that plaintiff's counsel was transmitting a courtesy copy of a motion to compel to respondent. Respondent's failure to take action in response to the September 27, 2019 entry of a final order striking his clients' answer with prejudice, and dismissing their counterclaim, was grossly negligent and also constituted a lack of diligence. Had respondent acted, he could have avoided the default judgment entered against his clients. By failing to timely inform his clients that he had been declared administratively ineligible to practice law, effective November 4, 2019, and by failing to inform his clients that they would need to retain substitute counsel, respondent put his clients' pending litigation at risk and left them unrepresented. The above-referenced failures and inaction demonstrated respondent's gross neglect and lack of diligence, in violation of RPC 1.1(a) and RPC 1.3.

Further, we determine that respondent failed to keep his clients reasonably informed about the status of their matter by omitting to inform them of the May 19 and September 11, 2019 motions, and the June 10, August 15, and September 27, 2019 orders. Moreover, by failing to inform his clients that he had been declared administratively ineligible to practice law, effective November 4, 2019, respondent deprived his clients of their ability to retain replacement counsel prior to the entry of the default judgment against them. The above failures and inaction violated RPC 1.4(b).

Moreover, by failing to make reasonably diligent efforts to comply with the plaintiff's discovery requests, necessitating the filing of the motions on their behalf, and by failing to comply with the court's June 10 and August 15, 2019 orders, respondent put his clients' litigation at risk, resulting in the striking of their answer and counterclaim and the entry of a default judgment against them. Respondent, thus, violated RPC 3.4(d).

Further, respondent's continued representation during his period of administrative ineligibility constituted additional misconduct. Particularly, RPC 1.16(a)(1) prohibits an attorney from representing a client if the representation will violate the Rules of Professional Conduct or other law. Therefore, by failing to withdraw from the case due to his ineligibility, respondent committed misconduct, in violation of RPC 1.16(a)(1). Likewise, respondent's representation of his clients, as the attorney of record in the ongoing litigation, constituted the unauthorized practice of law, in violation of RPC 5.5(a)(1). The complaint contains insufficient facts to support the allegation that respondent was aware of his ineligible status. Accordingly, we dismiss that charge.

Finally, by failing to reply to lawful demands from disciplinary authorities concerning the investigation of the ethics grievance, despite the DEC's numerous attempts to contact respondent and to follow-up for information,

respondent violated RPC 8.1(b). He again violated that RPC by failing to answer the formal ethics complaint.

However, we determine to dismiss the charge that respondent exhibited a pattern of neglect, in violation of RPC 1.1(b). To find a pattern of neglect, at least three instances of neglect, in three distinct client matters, are required. In the Matter of Stephanie Julia Brown, DRB 20-122; DRB 20-123; DRB 20-210; DRB 20-252; DRB 20-270; DRB 20-279; and DRB 20-327 (May 20, 2021) (slip op. at 76-77), so ordered, 248 N.J. 476 (2021); In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16), so ordered, 184 N.J. 287 (2005). Here, the allegations of neglect deal exclusively with one client matter. These instances of gross neglect, in a single client matter, are insufficient to support a finding that respondent engaged in a pattern of neglect, in violation of RPC 1.1(b). Accordingly, we dismiss that charge.

Moreover, even taking the allegations of the complaint as true, the complaint fails to demonstrate by clear and convincing evidence that respondent violated RPC 3.4(c). That Rule mandates that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.” Here, the complaint charges that respondent violated this Rule by failing to comply with the June 10 and August 15, 2019 court orders; however, the complaint does not set forth

sufficient facts to prove, by clear and convincing evidence, that respondent knowingly violated the orders. Thus, we determine to dismiss the charge that respondent violated RPC 3.4(c).

In sum, we find that respondent violated RPC 1.1(a); RPC 1.3; RPC 1.4(b); RPC 3.4(d); RPC 1.16(a)(1); RPC 5.5(a)(1); and RPC 8.1(b) (two instances). We determine to dismiss the charges that respondent further violated RPC 1.1(b) and RPC 3.4(c). The sole issue remaining for our determination is the appropriate quantum of discipline for respondent's misconduct.

Generally, in default matters, a reprimand is imposed for lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities, even if this conduct is accompanied by other ethics infractions, such as gross neglect. See, e.g., In re Cataline, 219 N.J. 429 (2014) (reprimand for attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with requests for information from the district ethics committee investigator), and In re Rak, 203 N.J. 381 (2010) (reprimand for attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with the investigation of a grievance).

Ordinarily, when an attorney practices law while ineligible, but is unaware of the ineligibility, an admonition will be imposed. See, e.g., In the Matter of Jonathan A. Goodman, DRB 16-436 (March 22, 2017) (attorney practiced law

during two periods of ineligibility; he was unaware of his ineligibility); In the Matter of James David Lloyd, DRB 14-087 (June 25, 2014) (attorney practiced law during an approximate thirteen-month period of ineligibility; among the mitigating factors considered was his lack of knowledge of the ineligibility); and In the Matter of Adam Kelly, DRB 13-250 (December 3, 2013) (during a two-year period of ineligibility for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection, the attorney handled at least seven cases that the Public Defender's Office had assigned to him; in mitigation, the record contained no indication that the attorney was aware of his ineligibility, and he had no history of discipline since his 2000 admission to the New Jersey bar). Here, there is no allegation in the complaint that respondent was aware of his ineligibility when he engaged in the misconduct under scrutiny. Consequently, an admonition is warranted for that misconduct.

When an attorney fails to cooperate with disciplinary authorities, and previously has been disciplined, but the attorney's ethics record is not serious, reprimands have been imposed. 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; although we noted that a single violation of RPC 8.1(b), in a default matter, does not necessitate enhancement of the discipline from an admonition

to a reprimand, a reprimand was imposed 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); In re Wood, 175 N.J. 586 (2003) (attorney failed to cooperate with disciplinary authorities; prior admonition for similar conduct); In re DeBosh, 174 N.J. 336 (2002) (failure to cooperate with disciplinary authorities; prior three-month suspension); and In re Williamson, 152 N.J. 489 (1998) (attorney failed to cooperate with disciplinary authorities; prior private reprimand for failure to carry out a contract of employment with a client in a matrimonial matter and failure to surrender the client's file to a new attorney).

Based on Cataline (which already weighs, in aggravation, respondent's default in this matter) and DeBosh, at least a reprimand is warranted for respondent's combined gross neglect; lack of diligence; failure to communicate with his clients; and failure to cooperate with disciplinary authorities. Considering respondent's additional misconduct – practicing law while ineligible – we determine to enhance that baseline quantum of discipline to a censure.

In crafting the appropriate discipline, however, we also consider aggravating and mitigating factors.

There is no mitigation to consider.

In aggravation, 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).

Here, respondent's misconduct occurred from 2018 through 2020, and the disciplinary action commenced against respondent in 2021. As noted above, on July 28, 2021, we determined to suspend respondent for one year after he stipulated, among other violations, to having violated Pa.R.D.E. 203(b) (two instances), the equivalent of New Jersey's RPC 8.1(b), for failing to cooperate with disciplinary authorities. The conduct in the two underlying Pennsylvania client matters occurred from 2013 through 2018, with disciplinary action commencing against respondent in 2015 in one matter and 2018 in the other. In the Matter of Brian J. Smith, DRB 20-318 (July 28, 2021). Respondent, thus, had a heightened awareness of his professional obligations and should have taken the initiative to correct his misconduct. Instead, he failed to cooperate with disciplinary authorities, and then defaulted.

Accordingly, we determine to further enhance the discipline to a term of suspension. Fortunately, respondent's misconduct affected only one client matter, and the clients were able to avoid substantial financial harm by promptly

hiring new counsel, who was able to vacate the \$627,905 default judgment directly caused by respondent's utter failure to advance his clients' interests.


On balance, considering the aggravation in this case, and the lack of any mitigation, we determine to impose a six-month suspension, to run consecutive to the term of suspension previously imposed in DRB 20-318.

Chair Gallipoli voted to impose a one-year suspension.

Member Boyer was absent.

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
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
Chair

By: 

Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Brian J. Smith
Docket No. DRB 21-194

Decided: February 18, 2022

Disposition: Six-Month Suspension.

<i>Members</i>	Six-Month Suspension	One-Year Suspension	Absent
Gallipoli		X	
Singer	X		
Boyer			X
Campelo	X		
Hoberman	X		
Joseph	X		
Menaker	X		
Petrou	X		
Rivera	X		
Total:	7	1	1



Johanna Barba Jones
Chief Counsel