

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

On April 12, 2022, respondent filed a motion to vacate the default (MVD), which we denied on May 18, 2022. For the reasons set forth below, we determine that a reprimand is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 1997. At all relevant times, he maintained a practice of law in East Rutherford, New Jersey.

On March 10, 2020, respondent was censured for having violated RPC 1.1(a) (gross 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 a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 8.1(a) (false statement of material fact to disciplinary authorities); RPC 8.1(b); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). In re Smith, 241 N.J. 250 (2020).

In that matter, a client retained respondent to seek the expungement of the criminal record of the client's son. Respondent undertook the representation

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

knowing that the expungement was necessary for the son to continue his educational endeavors. Respondent filed the expungement petition with the Superior Court, which was orally granted following a hearing. Respondent, however, failed to submit to the Superior Court a proposed order, despite his representation that he would do so. Respondent then failed to take any reasonable steps to ensure the expungement was completed. Instead, he assured his client that he would provide her with the order “A.S.A.P.”

Five months after the hearing, the client, who was frustrated with respondent’s lack of communication, contacted the Superior Court and learned that the expungement matter had been dismissed. When she confronted respondent, he continued to misrepresent to her that the expungement order had been entered and that he would provide her with a copy. Respondent, however, failed to rectify the dismissal of the case, failed to obtain an expungement order, and stopped communicating with his client. Respondent also misrepresented to the ethics investigator that he had, in fact, submitted a proposed order to the court, and then ceased cooperating with the underlying investigation. We determined to impose a censure, assigning, in aggravation, “significant weight to the wholly avoidable harm respondent caused to [his client’s son],” balanced against his lack of prior discipline in his twenty years at the bar. In the Matter of Darryl George Smith, DRB 19-108 (October 23, 2019) at 21.

Service of process was proper. On September 2, 2021, the OAE 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 to the OAE, indicating delivery on September 16, 2021. Although the certified mail receipt was signed, the signature is illegible. The regular mail sent to respondent's office address was not returned to the OAE.

On October 20 and November 19, 2021, the OAE sent a second and third letter to respondent, by certified and regular mail, to the same office address. Both letters informed respondent that, unless he filed a verified answer 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 October 20, 2021 certified mail was not returned to the OAE, and United States Postal Service (USPS) tracking indicated that “[y]our item was delivered to the front desk, reception area, or mail room at 12:28 pm on November 2, 2021 in EAST RUTHERFORD, NJ 07073.” Likewise, the November 19, 2021 certified mail was not returned to the OAE, and USPS tracking indicated that “[y]our item arrived at the Post Office at 8:18 a.m. on

January 7, 2022 in EAST RUTHERFORD, NJ 07073.” The letters sent by regular mail to respondent’s office address were not returned to the OAE.

On February 22, 2022, the OAE sent a fourth letter to respondent, by regular, to the same office address as the previous letters. The OAE also sent the letter, by electronic mail, to respondent’s e-mail address of record. The OAE informed respondent that the matter had been reassigned to a different OAE staff attorney. Like the October 20 and November 19, 2021 correspondence, that letter again informed 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 to the OAE, and respondent acknowledged receipt of the OAE’s e-mail.

As of March 17, 2022, 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.

On March 30, 2022, Chief Counsel to the Board sent a letter to respondent’s current and former office addresses, by certified and regular mail, with a third copy by electronic mail, informing him that the matter was scheduled before us on May 12, 2022, and that any motion to vacate must be

filed by April 13, 2022. According to the USPS tracking printout, the certified mail sent to respondent's former office address was returned to the Office of Board Counsel (the OBC) because "the address was vacant or the business was no longer operating at the location and no further information was available." The certified mail sent to respondent's current office address was being held at the post office "at the request of the customer." The letter sent by regular mail was not returned to the OBC and delivery to respondent's e-mail address was complete, although no delivery notification was sent by the destination server.

Moreover, on April 4, 2022, the OBC published a notice in the New Jersey Law Journal, stating that we would review this matter on May 12, 2022. The notice informed respondent that, unless he filed a successful motion to vacate the default by April 13, 2022, his failure to answer would remain deemed an admission of the allegations of the complaint. On April 12, 2022, respondent filed an MVD. Following our review, we issued a letter decision denying that motion on May 18, 2022.

We now turn to the allegations of the complaint.

Respondent maintained an account at Wells Fargo bank that he improperly operated as both his attorney trust account (ATA) and attorney business account (ABA). Respondent also maintained a second ABA at Wells Fargo bank.

On May 22, 2018, the OAE conducted a random audit of respondent's financial records. The OAE's audit revealed the following recordkeeping deficiencies:

- a) Earned legal fees not deposited in ABA (R. 1:21-6(a)(2));
- b) Failure to maintain an ATA (R. 1:21-6(a)(1));
- c) Failure to maintain an ABA (R. 1:21-6(a)(2));
- d) Failure to maintain ABA receipts and disbursements journals (R. 1:21-6(c)(1)(A));
- e) Failure to maintain ABA and ATA records for seven years (R. 1:21-6(c)(1)).

On November 12, 2019, as the result of unresolved recordkeeping issues that were identified during the audit, the OAE docketed this matter for investigation. On March 12, 2020, the OAE directed respondent to produce the following documents for the time period January 1, 2019 through March 12, 2020:

- a) Attorney bank account disclosure form;
- b) ATA and ABA receipts and disbursements journals;
- c) monthly three-way reconciliations of his ATA;
- d) client ledger cards; and
- e) ATA bank statements.

Subsequently, on April 9, 2020, the OAE conducted a telephonic interview of respondent regarding his recordkeeping practices. The OAE also directed respondent to open an ATA and provide proof of same to the OAE. Respondent was delayed in opening his ATA because his driver's license, which the bank required, had expired. Due to COVID-19 restrictions imposed by the New Jersey Motor Vehicle Commission, respondent was unable to immediately renew his expired driver's license.

According to the OAE, respondent has corrected all his recordkeeping deficiencies.

As previously mentioned, on April 12, 2022, respondent filed an MVD in this matter. 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. Here, respondent failed to satisfy either prong.

Specifically, as to the first prong, respondent failed to offer a reasonable explanation for his failure to file an answer to the formal ethics complaint. Rather, he acknowledged that he had participated in the underlying OAE audit and expressed a belief that, by having corrected all the recordkeeping deficiencies, that he had fulfilled his obligations. Respondent further admitted to having "received notification that [he] would be disciplined" for his

recordkeeping deficiencies. Despite the language of the letter, he “mistakenly assumed [he] did not have any redress for the disciplinary action.” Respondent acknowledged that he failed to timely file an answer but indicated that it was not willful because of his “mistaken impression that the disciplinary action was being enforced.”

In its April 14, 2022 letter opposing respondent’s MVD, the OAE argued that respondent had offered no reasonable explanation for his failure to file a timely and conforming answer. The OAE noted that respondent did not deny having received a copy of the complaint, which was accompanied by the OAE’s cover letter instructing him that his verified answer was due within twenty-one days. Indeed, as the OAE notes, the letter cited R. 1:20-4(e) and instructed respondent that his answer should be filed directly with the OAE. Nor did respondent deny having received the OAE’s October 20, November 19, 2021, and February 22, 2022 letters, warning him that his failure to file an answer would result in the matter being certified to us and that the complaint would be deemed amended to include a violation of RPC 8.1(b).

Respondent’s mistaken understanding of the disciplinary process does not absolve him of his professional obligations under the Rules. Further, the OAE exhaustively explained that Rule-based process to him in its correspondence. Accordingly, respondent’s MVD failed the first prong of the analysis.

Regarding the second prong, respondent failed to assert a meritorious defense to the underlying charges. In fact, respondent admitted the recordkeeping allegations set forth in the complaint, asserting only that he had not willfully neglected to file an answer; rather, he was mistaken regarding the disciplinary process and, if granted leave to file an answer, he would do so. He therefore raised no meritorious defense to the RPC 1.15(d) charge.

He likewise raised no meritorious defense to the RPC 8.1(b) charge. As the OAE correctly observed, respondent's mistaken understanding of the disciplinary process is not a meritorious defense to an RPC 8.1(b) charge.

New Jersey attorneys are subject to the disciplinary jurisdiction of the Court and, thus, charged with knowledge of the governing Rules. R. 1:20-1(a). See In re Berkowitz, 136 N.J. 134, 147 (1994) (“[l]awyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct”); In re Goldstein, 116 N.J. 1, 5 (1989) (holding that “[i]gnorance of ethics rules and case law does not diminish responsibility for an ethics violation”) (citations omitted). Further, nothing prevented respondent from taking steps to ensure he understood the disciplinary proceeding and his obligations thereunder. Instead, respondent opted to do nothing.

Having conceded the absence of any defense to the RPC 1.15(d) charge and having expressed no meritorious defense to the RPC 8.1(b) charge, respondent's MVD thus failed the second prong of the analysis. Accordingly, we determined to deny respondent's MVD.

Moving to our review of the record, we find that the facts recited in the complaint support the allegations that respondent violated RPC 1.15(d) and RPC 8.1(b). 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 of discipline. R. 1:20-4(f)(1).

Specifically, the record supports the allegation that respondent violated RPC 1.15(d), which requires an attorney to comply with the recordkeeping provisions of R. 1:21-6. The OAE's random audit revealed multiple recordkeeping deficiencies, including respondent's (1) failure to deposit earned legal fees in his ABA; (2) failure to maintain separate ATA and ABA; (3) failure to maintain ABA receipts and disbursements journals; and (4) failure to maintain ATA or ABA records for seven years. Accordingly, the charge that respondent violated RPC 1.15(d) is proper and supported by clear and convincing evidence.

RPC 8.1(b) requires an attorney to "respond to a lawful demand for information from . . . [a] disciplinary authority." Respondent was demonstrably aware of this obligation to respond to the disciplinary complaint under the terms

of the OAE's service letter and the plain language of R. 1:20-4(e). He nonetheless failed to file an answer and allowed this matter to proceed as a default. Thus, respondent violated RPC 8.1(b).

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

Recordkeeping irregularities ordinarily are met with an admonition where, as here, they have not directly caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of Andrew M. Newman, DRB 18-153 (July 23, 2018) (the attorney failed to maintain attorney 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) (following an overdraft in the attorney trust account, an OAE demand audit revealed that the attorney: (1) did not maintain trust or business receipts or disbursements journals, or client ledger cards; (2) made disbursements from the trust account against uncollected funds; (3) withdrew cash from the trust account; (4) did not properly designate the trust account; and (5) did not maintain an attorney business account, in violation of RPC 1.15(d) and R. 1:21-6); In the Matter of Leonard S. Miller, DRB 14-178 (September 23, 2014) (after the attorney made electronic transfers

from his attorney trust account to cover overdrafts in his attorney business account, a demand audit uncovered several recordkeeping deficiencies: (1) errors in information recorded in client ledgers; (2) lack of fully descriptive client ledgers; (3) lack of running balances for individual clients on the clients' ledgers; (4) failure to promptly remove earned fees from the attorney trust account; and (5) failure to perform monthly three-way reconciliations, in violation of RPC 1.15(d) and R. 1:21-6).

Censures may be imposed, however, where, in addition to recordkeeping violations, the attorney fails to cooperate with the underlying ethics investigation and fails to file an answer to the disciplinary complaint. Recently, the Court censured an attorney who, following an OAE audit, failed to reply to the OAE's seven letters and eight telephone calls, and failed to produce the requested documents. In re Tobin, 249 N.J. 96 (2021). The attorney also failed to file an answer to the complaint. We acknowledged that admonitions typically are imposed for violations of RPC 1.15(d) and RPC 8.1(b), but that reprimands may result where the attorney, like Tobin, failed to cooperate with the OAE's underlying audit concerning the identified recordkeeping deficiencies in a trust account. In the Matter of Irving Tobin, DRB 20-213 (April 28, 2021) at 17-19. We, thus, determined that a reprimand was the baseline discipline for Tobin's combined violations of RPC 1.15(d) and RPC 8.1(b). Id. at 19.

We further weighed, in aggravation, Tobin's prior reprimand for similar recordkeeping violations, and the default status of the matter. We, thus, determined that, pursuant to In re Kivler, 193 N.J. 332, 342 (2008), as well as the principles of progressive discipline, the enhanced sanction of a censure was warranted. In the Matter of Irving Tobin, DRB 20-213 at 20.

Here, like the attorney in Tobin, respondent engaged in recordkeeping violations and allowed this matter to proceed as a default. Also like Tobin, respondent has a limited disciplinary history, albeit one unrelated to recordkeeping violations. Unlike Tobin, however, respondent fully cooperated with the underlying investigation and corrected his recordkeeping deficiencies prior to the OAE's filing of the complaint. He was charged with only one instance of having violated RPC 8.1(b), after he failed to respond to the OAE's letter notifying him of that the complaint would be deemed amended if he failed to file his answer within five days. In this respect, respondent's misconduct is less serious than that of Tobin. In fact, in Tobin, we determined that the baseline discipline for Tobin's misconduct was a reprimand, rather than an admonition, as a result of his failure to cooperate with the OAE's audit, a fact not present here. To the contrary, respondent cooperated and corrected his recordkeeping deficiencies.

Thus, based upon our reasoning in Tobin, respondent's misconduct could be met with an admonition for his combined violations of RPC 1.15(d) and RPC 8.1(b). In crafting the appropriate discipline, however, we also must consider mitigating and aggravating circumstances.

There is no mitigation to consider.

In aggravation, this matter represents respondent's second disciplinary proceeding in two years. Although the prior misconduct did not stem from recordkeeping deficiencies, respondent had a heightened awareness of his obligations pursuant to the Rules of Professional Conduct as a result of the prior proceedings and the timing of the misconduct. Specifically, respondent was the subject of disciplinary proceedings which began in 2013, for misconduct that occurred in 2012, resulting in the Court's 2020 Order imposing a censure. In re Smith, 241 N.J. 250. The misconduct in that matter occurred from 2012 through 2013, thus predating the misconduct in the instant matter.

Further, the disciplinary proceedings in that prior matter were protracted, spanning approximately seven years, from 2013 through 2020, thus, overlapping with the ethics investigation in this matter. The initial disciplinary hearing occurred in 2014 and the matter was transmitted to us. We determined to remand the case for a supplemental hearing concerning respondent's misrepresentation to the ethics investigator, a charge that had been dismissed. Following a


supplemental investigation, respondent again was charged pursuant to RPC 8.1(a) and RPC 8.4(c) for telling the ethics investigator that he had submitted an order to the Superior Court for the court's belated execution, a statement he admitted was false. Respondent participated in both proceedings, submitted answers to both the original and amended complaints, and, accordingly, was well aware of his obligations under the Rules.

On balance, and consistent with disciplinary precedent, we determine that a reprimand is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Chair Gallipoli and Member Joseph voted to impose a censure.

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 Darryl George Smith
Docket No. DRB 22-033

Decided: August 9, 2022

Disposition: Reprimand

<i>Members</i>	Reprimand	Censure
Gallipoli		X
Boyer	X	
Campelo	X	
Hoberman	X	
Joseph		X
Menaker	X	
Petrou	X	
Rivera	X	
Singer	X	
Total:	7	2



Johanna Barba Jones
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