

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 23-180
District Docket No. XIV-2022-0080E

In the Matter of Michael A. Gorokhovich
An Attorney at Law

Decided
February 7, 2024

Certification of the Record

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Introduction

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

For the reasons set forth below, we determine that a reprimand, with conditions, is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 2004 and to the New York bar in 2005. During the relevant period, he maintained a practice of law in Blackwood, New Jersey.

Respondent has no prior discipline in New Jersey.

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

Service of Process

Service of process was proper. On June 2, 2023, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's office address of record. In the accompanying cover letter, the OAE informed respondent that, pursuant to R. 1:20-4(e), he was required to file his written, verified answer within twenty-one days of receipt. The letter further stated:

TAKE NOTICE THAT YOUR FAILURE TO FILE A TIMELY, VERIFIED ANSWER WILL CONSTITUTE AN ADMISSION OF THE CHARGES. SUCH FAILURE MAY ALSO RESULT IN YOUR IMMEDIATE TEMPORARY SUSPENSION FROM PRACTICE. IN EITHER EVENT, NO FURTHER HEARING NEED BE HELD AND THE ENTIRE RECORD, OR A RECORD SUPPLEMENTED BY THE PRESENTER, IN THIS MATTER CAN BE CERTIFIED DIRECTLY TO THE DISCIPLINARY REVIEW BOARD FOR IMPOSITION OF SANCTION, ALL PURSUANT TO *R.1:20-6(c)(1)*[,] *R.1:20-4(e) and (f)*[,] AND *R.1:20-11*.

[Ex. A.]²

The certified mail receipt was returned to the OAE bearing respondent's signature and indicating delivery on June 7, 2023. The regular mail was not returned to the OAE.

² "Ex." refers to the exhibits attached to the August 11, 2023 certification of the record.

On July 11, 2023, the OAE sent a second letter, by certified and regular mail, to respondent's office address of record, 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 directly 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 United States Postal Service (the USPS) tracking system, the USPS could not access the delivery location to deliver the certified mail. The letter sent by regular mail was not returned to the OAE.

As of August 11, 2023, 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 August 28, 2023, Acting Chief Counsel to the Board sent respondent a letter, by certified, regular, and electronic mail, informing him that the matter was scheduled before us on October 19, 2023, and that any motion to vacate the default must be filed by September 18, 2023. Respondent acknowledged receipt of this letter via reply e-mail. Further, the certified mail receipt was returned to the Office of Board Counsel (the OBC) bearing respondent's signature and

indicating delivery on September 15, 2023. The regular mail was not returned to the OBC.

Moreover, on September 4, 2023, the OBC published a notice in the New Jersey Law Journal, stating that we would consider this matter on October 19, 2023. The notice informed respondent that, unless he filed a successful motion to vacate the default by September 18, 2023, his failure to answer would remain deemed an admission of the allegations of the complaint.

In reply to respondent's August 28, 2023 e-mail seeking clarification of the OBC's scheduling letter of that same date, Acting Chief Counsel informed respondent that the OAE had filed a formal ethics complaint against him and, according to the OAE, he had defaulted, and he could file with us, by September 18, 2023, a motion to vacate the default.

Respondent did not file a motion to vacate the default.

Instead, on October 18, 2023, the day before we were scheduled to review the matter, respondent sent an e-mail to Acting Chief Counsel requesting that the matter be adjourned. Respondent asserted that he had not received the complaint until September 15, 2023 and that, subsequently, he had twice attempted to contact the OAE, without success.

On the same date, the OAE notified the OBC that it opposed respondent's adjournment request.

The next morning, October 19, 2023, at 3:52 a.m. and 4:54 a.m., respondent sent two additional e-mails to Acting Chief Counsel, acknowledging that he had signed the certified mail for the complaint but stating that he must have misplaced the mail because he had no recollection of it; thus, according to him, September 15, 2023 "was the first time I actually saw and took actual note of this complaint." He further stated that misplacing mail was "consistent with ADHD, with which I was diagnosed in June [2023], shortly prior to [the complaint's] mailing." Among other assertions, not detailed here, he argued that the complaint should have been sent to him by e-mail; claimed to not have contact information for the OAE attorney assigned to handle the matter; and asserted that proceeding on the matter as a default would be inappropriate and unwarranted. In closing, he urged us to adjourn our review to provide him additional time to respond on the merits. In the alternative, he asked that we weigh the information he provided in his October 18 and 19, 2023 e-mails in our "decision as to whether or not I failed to cooperate with the OAE and whether or not my non-response to [opposing counsel's] mail constitutes any ethical violation."

We reviewed the matter, as scheduled, on October 19, 2023.

Facts

We now turn to the allegations of the complaint.

On March 8, 2022, the OAE received a notice from Wells Fargo indicating that, on March 1, 2022, respondent's attorney trust account (ATA) had been overdrawn in the amount of \$18.90. Consequently, on March 9, 2022, the OAE notified respondent of his ATA overdraft and directed him to provide a written explanation by April 8. Further, the OAE directed respondent to provide (1) information regarding the ATA check that had resulted in the overdraft, (2) his client ledgers, and (3) copies of his monthly ATA bank statements for the last three months. Respondent denied having received the OAE's March 2022 letter.

On April 14, 2022, the OAE again directed respondent to provide his explanation for the overdraft no later than April 21, 2022. Respondent admittedly received this correspondence but failed to reply, claiming that he erroneously calendared the deadline for his response as May 21, not April 21, 2022. He represented that, upon discovering this error, he contacted the OAE and obtained an extension, until May 11, 2022, to submit his reply.

On May 11, 2022, respondent provided the OAE, via e-mail, with his written explanation for the overdraft. Specifically, respondent acknowledged that the overdraft resulted from a \$19.99 charge made to his ATA by PayPal Business but asserted that he had not authorized either PayPal to charge his ATA or the bank to pay such electronic charges. He stated that, after he became aware of the charge that caused the overdraft, he immediately closed his PayPal Business account to prevent future charges associated with that account. In addition, he contacted the bank to address its allegedly erroneous payment of the charge.³

Moreover, respondent informed the OAE that he had reviewed his ATA bank statements and discovered that PayPal similarly had charged his ATA twice before, in August and November 2021. Addressing why he had failed to detect the prior charges, he stated that he had “no client transactions of any kind in that time period and had no charges of any kind ever scheduled against the Trust account,” and, thus, in his view, “had no reason to review any of those statements when they came in.”

³ Pursuant to R. 1:21-6(c)(1)(A), “[e]ach electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution.”

Importantly, respondent asserted (and the OAE did not ultimately contest the fact) that he held no client funds in his ATA when the electronic PayPal charges were paid. Consequently, none of those charges, including the overdraft, invaded client funds.

Also on May 11, 2022, respondent provided the OAE with copies of his ATA bank statements from July 2021 to April 2022.

On June 13, 2022, respondent sent a follow up e-mail to the OAE. The following month, respondent spoke with an OAE investigator by telephone. Subsequently, the investigation was delayed due to circumstances attributable to the OAE.

On December 28, 2022, the OAE directed respondent to provide, by January 13, 2023, his ATA and attorney business account (ABA) bank statements; monthly three-way reconciliations; client ledger cards; and receipts and disbursements journals for the period spanning April 2020 to April 2022. Respondent confirmed receipt of the OAE's correspondence, yet, he failed to comply.

On February 8, 2023, the OAE again directed respondent to produce the outstanding records, by February 22. Respondent failed to provide the documents by that date. Consequently, on February 22, 2023, the OAE – having

received no additional records from respondent – directed him to provide, by March 10, records for his trust and business accounts, for the period spanning January 2021 through the date of its letter. The OAE also required him to appear, on March 23, 2023, for a demand audit.

On March 13, 2023, because respondent still had not provided the requested documents, the OAE sent him a fourth written demand for his firm’s financial records and also left him a voicemail message regarding the matter. On the same date, respondent notified the OAE, via e-mail, that he would “review and provide whatever documents I have by the end of business tomorrow.” Nevertheless, the next day, he failed to provide any materials or to contact the OAE.

Finally, on March 20, 2023, respondent provided the OAE with some, but not all, of the requested documents. Specifically, he produced his ABA and ATA bank statements, along with a photograph documenting his ATA checkbook. In his accompanying letter, respondent admitted that he did not have any additional responsive documentation. Further, he represented that, due to illness, he had not actively practiced law between late fall 2020 and early spring 2022; he claimed that, during this period, he had used his ATA for only one client matter, for which he received and distributed settlement proceeds between November

2020 and June 2021. Thus, he stated, “I do not perform and need not perform any trust accounting because I have no trust transactions at all.”

On March 23, 2023, the OAE conducted its demand audit, during which respondent acknowledged his failure to maintain his books and records in accordance with R. 1:21-6. On that same date, the OAE notified respondent, in writing, of its audit results and directed him to take corrective action to cure each deficiency and provide to the OAE a written response, along with all outstanding books and records, by April 24, 2023. Specifically, the OAE identified numerous recordkeeping deficiencies, including his failure to maintain (1) ATA and ABA receipts and disbursements journals; (2) individual ledger cards for each client; (3) monthly reconciliations of his client ledgers, journals, and ATA checkbook (three-way reconciliations); and (4) a running cash balance in his ATA checkbook, in violation of R. 1:21-6(c)(1)(A), (B), (G), and (H), respectively. In addition, electronic transfers had been made from his ATA without proper authorization, in violation of R. 1:21-6(c)(1)(A). Finally, he had failed to retain his ATA and ABA records for seven years, in violation of R. 1:21-6(c)(1). Respondent confirmed receipt of the OAE’s deficiency letter.

On April 17, 2023, the OAE reminded respondent, via e-mail, that his response to the deficiency letter was due the following week and offered to

address any questions. Respondent failed to submit either a written reply or the requested documents by the April 24 deadline.

On April 27, 2023, following a telephone conversation, the OAE investigator granted respondent's request for an extension, until May 8, 2023, to produce to the OAE his proof of corrective action and the outstanding documents. In a confirming e-mail, the investigator again encouraged respondent to contact her with any questions, reiterating that she and respondent had "discussed the fact that because your accounts are not very active, the reconstruction would most likely be very straightforward and not too time consuming."

Respondent failed to provide, by May 8, 2023 or thereafter, either the specified documents or proof that he had brought his recordkeeping into compliance with R. 1:21-6. As of the date of the OAE's complaint (May 30, 2023), respondent's recordkeeping practices did not conform with the Rules.

Based on the foregoing, the OAE charged respondent with having violated RPC 1.15(d). The OAE also charged respondent with having violated RPC 8.1(b), based on his ongoing failure to produce his financial books and records, despite multiple requests and opportunities to do so and, separately, by failing to file an answer to the formal ethics complaint.

Analysis and Discipline

Violations of the Rules of Professional Conduct

Following a review of the record, we determine that the facts recited in the formal ethics complaint support two of the three charged RPC violations by clear and convincing evidence. Respondent's failure to file an answer to the complaint is deemed an admission that the allegations are true and 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. See In re Pena, 164 N.J. 222 (2000) (stating that the Court's "obligation in an attorney disciplinary proceeding is to conduct an independent review of the record, R. 1:20-16(c), and determine whether the ethical violations found by the [Board] have been established by clear and convincing evidence"); see also R. 1:20-4(b) (entitled "Contents of Complaint" and requiring, among other notice pleading requirements, that a complaint "shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct").

We, therefore, decline to find a violation of a Rule of Professional Conduct where the facts within the certified record do not constitute clear and convincing evidence that an attorney violated a specific Rule. See, e.g., In the

Matter of Philip J. Morin, III, DRB 21-020 (September 9, 2021) at 26-27 (declining to find a charged RPC 3.3(a)(4) violation based upon insufficient evidence in the record), so ordered, 250 N.J. 184 (2022); In the Matter of Christopher West Hyde, DRB 16-385 (June 1, 2017) at 7 (declining to find a charged RPC 1.5(b) violation due to the absence of factual support in the record), so ordered, 231 N.J. 195 (2017); In the Matter of Brian R. Decker, DRB 16-331 (May 12, 2017) at 5 (declining to find a charged RPC 8.4(d) violation due to the absence of factual support in the record), so ordered, 231 N.J. 132 (2017).

Here, we conclude that the record clearly and convincingly demonstrates that respondent violated RPC 1.15(d) and RPC 8.1(b). We determine, however, that the evidence does not support the second charged violation of RPC 8.1(b).

Specifically, respondent violated RPC 1.15(d), which requires an attorney to comply with the recordkeeping provisions of R. 1:21-6. Respondent violated this Rule by failing to maintain receipts and disbursements journals; conduct monthly, three-way ATA reconciliations; maintain individual client trust ledgers; maintain a running cash balance in his ATA checkbook; and retain ABA and ATA records for seven years. Moreover, because of his inept recordkeeping practices, he failed to notice, let alone put a stop to, allegedly unauthorized

electronic charges to his ATA until after the third such charge caused an overdraft in that account.

Next, respondent violated RPC 8.1(b), which requires an attorney to “respond to a lawful demand for information from . . . [a] disciplinary authority.” Respondent, despite initially engaging with the OAE and attending the demand audit, ultimately stopped replying to the OAE’s repeated requests for his financial records. Further, following the OAE’s audit, respondent failed to provide proof of the corrective action he undertook to cure the identified recordkeeping deficiencies, despite the OAE’s specific directive that he do so. Respondent also failed to produce documents and reconstructed records that the OAE required to ensure that he had brought his recordkeeping into compliance with R. 1:21-6. Thus, there can be no doubt that respondent’s conduct in this regard fell short of the full cooperation contemplated by the Rules and constitutes a violation of RPC 8.1(b). See In re Wolfe, 236 N.J. 450 (2019); In the Matter of Marc Z. Palfy, DRB 15-193 (March 30, 2016) at 48 (we viewed the attorney’s partial “cooperation as no less disruptive and frustrating than a complete failure to cooperate[,]” noting that “partial cooperation can be more disruptive to a full and fair investigation, as it forces the investigator to proceed in a piecemeal and disjointed fashion”), so ordered, 225 N.J. 611 (2016).

We conclude, however, that respondent did not separately violate RPC 8.1(b) by failing to timely answer the formal ethics complaint. To be certain, the record clearly establishes that respondent received the formal ethics complaint in June 2023 and failed to answer it. However, we are unable to determine by clear and convincing evidence, based on the record before us, whether he also received the OAE's July 11, 2023 letter, wherein the OAE provided notice of the second charged violation of RPC 8.1(b). Accordingly, we determine to dismiss that charge.

In sum, we find that respondent violated RPC 1.15(d) and RPC 8.1(b). For the reasons stated above, we determine to dismiss the charge that respondent violated RPC 8.1(b) a second time. The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

Quantum of Discipline

Recordkeeping irregularities ordinarily are met with an admonition where, as here, they have not caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of David Stuart Bressler, DRB 22-157 (November 21, 2022) (the attorney commingled and committed several recordkeeping violations, including failure to perform three-way reconciliations, improper account

designation, and failure to preserve images of processed checks); In the Matter of Grant J. Robinson, DRB 21-059 and DRB 21-063 (July 16, 2021) (the attorney failed to properly designate his trust account and to maintain trust account ledger cards for bank charges, allowed an inactive balance to remain in the trust account, and did not maintain business receipts or disbursements journals; the attorney's recordkeeping deficiencies resulted in the return of more than twenty checks, issued to the Superior Court, for insufficient funds; we found that the attorney's recordkeeping failures were neglectful, but not purposeful; in imposing an admonition, we weighed the fact that the attorney corrected his recordkeeping errors, took remedial measures to decrease the likelihood of a future recordkeeping violation, had no disciplinary history, and did not injure any client through his misconduct); In the Matter of Andrew M. Newman, DRB 18-153 (July 23, 2018) (the 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; although the attorney responded to the OAE's requests for additional documentation, his three-way trust account reconciliations were still not in compliance at the time of argument before us; in imposing an admonition, we weighed the fact that the attorney had no disciplinary history in thirty-three years

at the bar and cooperated with ethics authorities to the extent that he admitted his misconduct in the matter).

Admonitions typically are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history, if the attorney's ethics history is remote, or if compelling mitigation is present. The quantum of discipline is enhanced, however, 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 Crook, 255 N.J. 357 (2023) (in a default matter, reprimand for an attorney who committed multiple recordkeeping violations, including permitting inactive balances and old outstanding checks in his ATA; the attorney also failed to attend a demand interview and only partially complied, after many months' delay, with the OAE's record requests; in compelling mitigation, the attorney had no disciplinary history in almost forty years at the bar; in aggravation, he failed to bring his records into compliance and permitted the matter to proceed as a default); In re Schlachter, 254 N.J. 375, 376 (2023) (reprimand for an attorney who committed recordkeeping violations, including failure to maintain adequately descriptive receipts and disbursements journals, ledger cards, and checkbooks with running balances; the attorney also

failed to properly designate his attorney trust account and to retain checks for seven years; the attorney repeatedly failed, for almost a year, to comply with the OAE's numerous record requests and ultimately provided only a portion of the requested records; although the OAE attempted to help the attorney take corrective action, he remained non-compliant with recordkeeping Rules; in mitigation, his misconduct resulted in no harm to his clients and he had no disciplinary history in sixteen years at the bar); In re Tobin, 249 N.J. 96 (2021) (in a default matter, censure for an attorney who, following an OAE random audit that uncovered several recordkeeping deficiencies (including more than \$800,000 in negative client balances), failed to provide documents requested by the OAE in multiple letters and telephone calls; in aggravation, the attorney had a prior reprimand for recordkeeping violations; in mitigation, the attorney had been practicing law for sixty-three years and suffered serious health problems prior to the continuation date of the random audit).

Pursuant to the above disciplinary precedent, and Crook and Schlachter in particular, we conclude that a reprimand is the baseline level 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 consider aggravating and mitigating factors.

In aggravation, respondent allowed this matter to proceed as a default. R. 1:20-4(f). “[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).

In mitigation, this matter represents respondent’s first brush with the disciplinary system in his nineteen years at the bar, a factor the Court typically accords significant weight. In re Convery, 166 N.J. 298 (2001). Further, his misconduct resulted in no harm to his clients.

Conclusion

On balance, we determine that the aggravating and mitigating factors are in equipoise and, thus, a reprimand remains the appropriate quantum of discipline to protect the public and to preserve confidence in the bar.

As conditions to his discipline, we recommend that respondent be required to: (1) complete a recordkeeping course, pre-approved by the OAE, within sixty days of the Court’s issuance of its disciplinary Order in this case; (2) submit proof to the OAE, within sixty days of the Court’s issuance of a disciplinary Order in this case, that he has corrected the recordkeeping deficiencies identified

during its audit; and (3) provide to the OAE monthly reconciliations of his attorney accounts, on a quarterly basis, for a two-year period following the Court's issuance of a disciplinary Order in this case.

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: /s/ Timothy M. Ellis
Timothy M. Ellis
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael A. Gorokhovich
Docket No. DRB 23-180

Decided: February 7, 2024

Disposition: Reprimand

<i>Members</i>	Reprimand
Gallipoli	X
Boyer	X
Campelo	X
Hoberman	X
Joseph	X
Menaker	X
Petrou	X
Rivera	X
Rodriguez	X
Total:	9

/s/ Timothy M. Ellis

Timothy M. Ellis
Chief Counsel