

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 24-049
District Docket No. IIIA-2022-0012E

In the Matter of Marc A. Spielberg
An Attorney at Law

Decided
September 4, 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 District IIIA Ethics Committee (the DEC), pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with having violated RPC 1.1(a) (engaging in gross neglect); RPC 1.3 (lacking diligence); RPC 1.4(b) (failing to communicate with a client); RPC 1.16(d) (failing to protect the client's interests upon termination of representation); RPC 8.1(b) (failing to cooperate with disciplinary authorities);¹ and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).²

For the reasons set forth below, we determine that a three-month suspension is the appropriate quantum of discipline for respondent's misconduct.

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

² Although the formal ethics complaint did not specify the charged subsections of RPC 1.1, RPC 1.4, and RPC 8.4, respondent had proper notice regarding which subsections were implicated based upon the factual allegations contained in the complaint.

Ethics History

Respondent earned admission to the New Jersey bar in 1976. Until May 2017, when he relocated to Nevada, he maintained a practice of law in Barnegat Light, New Jersey.

Effective November 5, 2018, the Court declared respondent administratively ineligible to practice law for failing to comply with continuing legal education requirements.

On September 10, 2020, the Court temporarily suspended respondent for failing to cooperate with the Office of Attorney Ethics (the OAE) in connection with its investigation of his recordkeeping and trust account practices. In re Spielberg, 243 N.J. 545 (2020).

To date, respondent remains administratively ineligible and temporarily suspended from the practice of law.

On June 30, 2022, the Court, in another default matter, imposed a reprimand for respondent's violations of RPC 1.4(b); RPC 1.15(b) (failing to promptly deliver to the client or third person any funds the client or third person is entitled to receive); RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6); and RPC 8.1(b) (two instances). In re Spielberg, ___ N.J. ___ (2022), 2022 N.J. LEXIS 666 (Spielberg I).

In that matter, respondent committed serious recordkeeping errors before he, essentially, “retired,” in May 2017, without having filed a required certification of retirement with the New Jersey Lawyers’ Fund for Client Protection (the CPF).³ At the time he closed his practice, he was still improperly holding \$42,213.90 in client funds in his attorney trust account. Compounding matters, respondent not only failed to communicate with his clients, fellow attorneys, and disciplinary authorities regarding the outstanding client funds, but he also failed to disburse client funds in a real estate transaction until more than sixteen months after the closing. In the Matter of Marc A. Spielberg, DRB 21- 089 (October 4, 2021).

On September 14, 2022, in a second default matter, the Court reprimanded respondent for failing to file, following his September 10, 2020 temporary suspension, an affidavit of compliance with the Rules governing suspended attorneys, as R. 1:20-20(b)(15) requires. In re Spielberg, 255 N.J. 469 (2022) (Spielberg II).

³ Pursuant to R. 1:28-2(b), an attorney may request an exemption from payment to the CPF by submitting a certification of retirement indicating that he or she is “retired completely from the practice of law” in every jurisdiction.

Service of Process

Service of process was proper.

On December 4, 2018, the DEC forwarded to respondent, at his Nevada address of record, a copy of the ethics grievance underlying this matter.⁴ On or about December 13, 2018, respondent replied to the DEC, via a handwritten note, stating that he no longer had a law office or a copy of the client file. He did not, however, provide the DEC with any additional or updated contact information.

On May 30, 2019, the DEC sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's New Jersey address of record.⁵

On August 14, 2019, the DEC sent a letter, by certified and regular mail, to respondent's Nevada address of record. The letter informed respondent that, unless he filed a verified answer to the complaint within twenty-one 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

⁴ New Jersey attorneys have an affirmative obligation to inform both the CPF and the OAE of changes to their billing, home, and primary law office addresses, "either prior to such change or within thirty days thereafter." R. 1:20-1(c). To date, the Court's attorney database continues to list respondent's Nevada address as his billing and service address of record and his New Jersey address as his home and office address of record.

⁵ The record does not indicate whether the certified or regular mail was returned.

8.1(b). The signed certified mail receipt was returned to the DEC, although it was undated, and the signature was illegible.

On November 10, 2022 and October 19, 2023, the DEC again sent letters, by certified and regular mail, to respondent's Nevada address of record. The October 19, 2023 certified mail was returned to the DEC as undeliverable.⁶

Further, on November 29, 2023, after being informed that respondent had moved to a different address in New Jersey, the DEC sent a letter, by certified and regular mail, to respondent's second New Jersey address. Both the certified and regular mail were returned to the DEC as undeliverable.

On January 24, 2024, the Asbury Park Press published the DEC's public notice informing respondent that a formal ethics complaint had been filed against him. The notice informed respondent that he was required to file a verified answer to the complaint within twenty-one days.

As of March 8, 2024, 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.

On April 1, 2024, Chief Counsel to the Board sent respondent a letter, by certified and regular mail, to his New Jersey address of record, with an

⁶ The record does not indicate whether the November 10, 2022 certified or regular mail was returned to the DEC.

additional copy sent by electronic mail, informing him that the matter was scheduled before us on May 24, 2024, and that any motion to vacate the default must be filed by April 22, 2024. Both the regular mail and the certified mail were returned to the Office of Board Counsel (the OBC) marked “Box Closed Unable to Forward.”

Moreover, on that same date, the OBC published a notice in the New Jersey Law Journal, stating that we would consider this matter on May 24, 2024. The notice informed respondent that, unless he filed a successful motion to vacate the default by April 22, 2024, his prior failure to answer the complaint would remain deemed an admission of the allegations of the complaint.

Respondent failed to file a motion to vacate the default.

Facts

We now turn to the allegations of the complaint.

On May 13, 2013, F. Archer Develin, Jr. retained respondent to assist him in seeking appointment as the administrator of the estate of his late cousin, Charles Walnut, Jr. (the decedent), who died intestate. On August 9, 2013, the Ocean County Surrogate’s Court appointed Develin the administrator of the estate. Following his successful appointment, Develin requested that respondent assist him with the administration of the estate.

On July 1, 2015, after a two-year delay with the administration of the estate, three beneficiaries of the estate, through their counsel, filed a verified complaint and order to show cause, in the Superior Court of New Jersey, Ocean County, Chancery Division – Probate Part, to compel Develin to produce a formal accounting of the estate, and seeking other, related relief.

On August 3, 2015, the Honorable John A. Peterson, Jr., J.S.C., granted the requested relief and ordered Develin to produce, by August 18, 2015, a formal accounting of the estate, along with (1) state and federal fiduciary tax returns for years 2012, 2013, and 2014; (2) the source of all deposits made in the estate bank account, including any funds received from the Estate of A. Jerome Walnut; (3) all documentation related to the decedent’s bank accounts, life insurance policies, stocks, and mutual funds; and (4) appraisals for all real and personal property of the estate.

On August 24, 2015, having received no update from respondent regarding the information due to the court, Develin sent an e-mail to respondent, stating, “[y]ou said you would be sending information to the other attorneys. I have not had any copies. When is something going to happen?” Respondent failed to reply to Develin’s e-mail.

Three days later, on August 27, 2015, Develin sent another e-mail to respondent, this time stating, “I have not received any correspondence that you

have sent [to] the other attorneys which you said you would be forwarding to me. I should know what is transpiring. There is no excuse it is taking this long. What is the latest on the accounting and tax situation?” Respondent failed to reply.

Finally, on August 31, 2015, Develin wrote, “I cannot understand why I have not heard from you as your wife said you would get back to me. I should know what is going on.”

On September 2, 2015, respondent finally replied to Develin, via e-mail, and promised that he was “putting together a package for the other attorney. It should be out tomorrow.” On that same date, Develin replied, stating, “I will expect a copy [of] this sent to me as I have no idea what is going on with the estate.”

On September 8, 2015, Develin sent an e-mail to respondent, stating that he had not heard from him since September 2 and that “it is time I should find out what I need to do to get the information I have been asking for.”

Respondent failed to comply with the probate court’s order or to produce the required documentation. Consequently, the beneficiaries to the estate filed a motion to enforce litigants rights against Develin, which was scheduled to be heard on November 5, 2015. On October 8, 2015, Develin notified respondent, via e-mail, that he had received a copy of the motion and informed respondent

that the motion sought Develin's immediate removal as administrator to the estate, based upon his failure to comply with the probate court's August 3, 2015 order. Additionally, the motion sought to preclude Develin from collecting any administrator fees and, further, sought attorneys' fees and costs. Develin demanded that respondent follow-up immediately. That same date, respondent replied, stating that he would review the motion over the weekend and respond the following Tuesday. Develin immediately replied, stating "I expect you to get back to me before that. I think I will have to get further advice." One day later, on October 9, 2015, Develin sent respondent another e-mail, stating that he expected "a written opposition [to the motion] filed before the other side automatically gets what they are asking. I want this done immediately!"

On October 14, 2015, respondent advised Develin that he did not need to appear for the motion hearing.

The next day, on October 15, 2015, Develin informed respondent, in writing, that he was terminating his representation and, further, that Thomas Begley, III, Esq., would be replacing him as counsel.

That same date, Begley sent respondent a letter, informing him that he had been retained by Develin and requesting a copy of Develin's client file by October 22, 2015. Respondent failed to produce the requested records or to otherwise reply. Accordingly, on October 23, 2015, Begley notified respondent,

in writing, that if Develin's file was not produced by October 30, 2015, he would file a motion with the Superior Court to compel its production.

On November 3, 2015, respondent replied to Begley, stating:

I apologize for not getting back to you before this, I have been trying to put together the file in this matter. Unfortunately, I have run out of time before I could complete this. My office is about to close for 13 days, returning Nov. 18. When I return I will complete putting the file together and will have it sent to you overnight going out either Friday Nov. 20 or Monday Nov. 23. If you have already filed papers, please let me know the costs involved and I will send you a check with the file.

[Ex. I.]⁷

Despite his promise, respondent failed to provide Begley with Develin's client file.

Consequently, on December 23, 2015, Begley filed a motion to enforce litigant's rights against respondent, seeking to obtain the files that were in respondent's possession. On February 10, 2016, Judge Peterson entered an order directing that respondent provide Begley with Develin's client file, including records for the estate of the decedent and the Estate of A. Jerome Walnut. Further, Judge Peterson ordered respondent to pay Begley \$2,055 in fees and costs.

⁷ "C" refers for the formal ethics complaint, dated May 19, 2019. "Ex." refers to exhibits appended to the complaint.

Develin incurred substantial legal fees hiring Begley to correct the mistakes and inaction of respondent.

Three years later, on December 17, 2018, in response to the DEC's request that he submit a written reply to the grievance in this matter, respondent replied with a handwritten note, stating:

As I no longer have an office or office equipment I am hand writing my response. I cannot provide my file as it was given to Mr. Begley and I did not keep a copy. I did not tell Mr. Develin I had filed the estate return as I had not done so. I did say I would be filing it, but I failed to do so. I did not handle this matter in a proper fashion and did violate the code of professional conduct with regard to this matter. I regret my actions, or more properly, my inactions and offer no excuse.

[C¶15;Ex.L.]

Based on the foregoing, the DEC charged respondent with having violated RPC 1.1(a) and RPC 1.3 by failing to comply, on Develin's behalf, with the August 3, 2015 probate court order and, further, by failing to do the work necessary to complete the administration of the estate; RPC 1.4(b) by failing to communicate with Develin regarding the status of the representation or to respond to Develin's repeated requests for information; RPC 1.16(d) by failing to turn over Develin's client file to successor counsel, despite his obligation and promise to do so; RPC 8.1(b) by failing to file a verified answer to the formal

ethics complaint; and RPC 8.4(c) by misrepresenting to Develin that he would respond to various motions, yet, failing to do so.

Analysis and Discipline

Violations of the Rules of Professional Conduct

We determine that the facts set forth in the formal ethics complaint support most, but not all, of 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 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) (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 [ethics] 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 will, 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 facts recited in the complaint support the allegations that respondent violated RPC 1.1(a); RPC 1.3; RPC 1.4(b); RPC 1.16(d); and RPC 8.1(b). We determine, however, that the evidence does not clearly and convincingly support the charged violation of RPC 8.4(c).

Specifically, respondent violated RPC 1.1(a), which prohibits an attorney from grossly neglecting a matter, and RPC 1.3, which requires a lawyer to “act

with reasonable diligence and promptness in representing a client,” by altogether failing to take any action to comply with the probate court’s August 3, 2015 order, which directed his client to produce various documents related to the administration of the estate, including a formal accounting. Despite his assurances that he would assist Develin in complying with the court’s order, respondent utterly failed to take any significant steps towards doing so, such as preparing or arranging to prepare, the accounting. Further, respondent admittedly failed to file the required inheritance and estate tax returns. Consequently, as a direct result of respondent’s inaction, Develin was forced to retain new counsel, at a significant cost, to correct respondent’s mistakes and settle the estate.

Respondent also violated RPC 1.4(b), which requires that an attorney keep their client “reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” Respondent repeatedly failed to respond to Develin’s reasonable inquiries about the status of the estate and his efforts to gather the records ordered by the court. Indeed, on three different occasions, August 24, August 27, and August 31, 2015, Develin requested from respondent the information that was due to the court. Although respondent eventually replied, he promised Develin that the package containing all the required documents and information would be sent out the next day then, in fact,

he failed to do so. Consequently, Develin was unable to comply with the August 5, 2015 order.

RPC 1.16(d) provides that, upon termination of representation:

A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred.

Respondent violated this Rule by failing to turn over Develin's client file to Begley. Specifically, on October 15, 2015, Develin notified respondent that Begley would be replacing him as attorney and requested that respondent send Begley a copy of the file. That same date, Begley wrote to respondent requesting a copy of Develin's file. On October 23, 2015, after respondent failed to turn over the client file, Begley again requested a copy of the file. Again, respondent failed to reply. Consequently, Begley was forced to file a motion to enforce litigants rights against respondent to compel the production of the file. As such, respondent violated RPC 1.16(d).

Last, respondent violated RPC 8.1(b) by failing to file a verified answer to the complaint, thus, allowing the matter to proceed as a default.

By contrast, however, we determine to dismiss the allegation that respondent violated RPC 8.4(c) by engaging in conduct involving dishonesty

and misrepresentation. Although respondent repeatedly assured Develin that he would, in fact, file the appropriate paperwork related to his matter, and failed to do so, the facts set forth in the formal ethics complaint, while troubling, are insufficient to reach the conclusion that respondent knowingly intended to deceive Develin by failing to respond to various motions. See In the Matter of Ty Hyderally, DRB 11-016 (July 12, 2011) (a violation of RPC 8.4(c) requires a finding that an attorney engaged in a knowing act of deception by clear and convincing evidence). As such, we determine that respondent's misconduct and inaction is more appropriately addressed by RPC 1.1(a) and RPC 1.3.

In sum, we find that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.16(d), and RPC 8.1(b). We determine to dismiss the remaining charge that respondent violated RPC 8.4(c). The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

Quantum of Discipline

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, the presence of additional violations, and the attorney's disciplinary history. See In the Matter of Mark A. Molz, DRB 22-102

(September 26, 2022) (admonition for an attorney whose failure to file a personal injury complaint allowed the applicable statute of limitations for his clients' cause of action to expire; approximately twenty months after the clients had approved the proposed complaint for filing, the attorney failed to reply to the clients' e-mail, which outlined the clients' unsuccessful efforts, spanning three months, to obtain an update on their case; the record lacked any proof that the attorney had advised his clients that he had failed to file their lawsuit prior to the expiration of the statute of limitations; in mitigation, the attorney had an otherwise unblemished thirty-five-year career), and In re Burro, 235 N.J. 413 (2018) (reprimand for an attorney who grossly neglected and lacked diligence in an estate matter for ten years and failed to file New Jersey Inheritance Tax returns, resulting in the accrual of \$40,000 in interest and the imposition of a lien on property belonging to the executrix; the attorney also failed to keep the client reasonably informed about events in the case, to return the client file upon termination of the representation, and to cooperate with the ethics investigation; in aggravation, we considered the significant harm to the client and the attorney's prior private reprimand (now, an admonition); in mitigation, the attorney expressed remorse and had suffered a stroke that forced him to cease practicing law).

Admonitions have been imposed on attorneys who have failed to turn over their clients' files to new counsel, even when accompanied by additional misconduct. See In the Matter of Joel C. Seltzer, DRB 21-155 (October 25, 2021) (the attorney admittedly failed to return the client's file to either the client or the client's new attorney, forcing the new attorney to file an order to show cause to obtain the file; the attorney also violated RPC 1.5(b) (failing to set forth, in writing, the basis or rate of the legal fee), and RPC 1.5(c) (failing to enter into a written contingent fee agreement, improperly calculating a contingent fee, and failing to provide the client with an accurate settlement on conclusion of a contingent fee matter).

Moreover, when an attorney fails to cooperate with disciplinary authorities, and previously has been disciplined, reprimands or censures have been imposed. See In re Howard, 244 N.J. 411 (2020) (reprimand for an attorney who altogether failed to respond to the investigator's four requests for a written reply to an ethics grievance; additionally, during a two-year period, the attorney grossly neglected his client's appeal of an adverse social security administration determination; the attorney also failed to communicate with his client and failed to promptly refund an unearned portion of his fee until the client was forced to seek redress through fee arbitration; prior censure for similar misconduct in which he had also failed to cooperate with disciplinary authorities; in mitigation,

the attorney stipulated to some of his misconduct), and In re Nussey, ___ N.J. ___ (2023), 2023 N.J. LEXIS 149 (censure for an attorney who ignored the investigator's requests for a reply to the ethics grievance; although the attorney eventually filed an answer to the formal ethics complaint, that answer came ten months after the investigator's initial request that he reply to the grievance; the attorney also failed to produce a copy of his client's file, as directed, for a prolonged period; moreover, the attorney repeatedly failed to provide his client with a single invoice in a divorce matter, despite her repeated requests that he do so, during an eighteen-month period; in aggravation, the matter represented the attorney's third disciplinary proceeding in less than four years; we also found that the attorney had a heightened awareness of his obligations to adhere to the RPCs considering the timing of his prior 2020 reprimand).

In our view, respondent's misconduct is most analogous to the attorney in Burro, who was reprimanded for his gross mishandling of an estate matter, along with his failure to turn over the client's file and to cooperate with disciplinary authorities. Accordingly, we determine that the baseline discipline for respondent's misconduct is a reprimand. However, to craft the appropriate discipline, we also consider mitigating and aggravating factors.

There are no mitigating factors to consider.

In aggravation, this matter represents respondent's third disciplinary matter, and third consecutive default. In Spielberg I, like here, respondent failed to cooperate with the underlying investigation and allowed the matter to proceed as a default. Thus, it is evident that respondent has failed to learn from his past mistakes. His prior encounters with the disciplinary system should have engendered heightened awareness of his obligations. "[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).

Further, respondent's misconduct caused demonstrable harm to his client, who was forced to retain new counsel, at a significant cost, to correct respondent's mistakes and to conclude the administration of the estate.

Conclusion

On balance, we conclude that the aggravating factors are so significant as to necessitate an upward departure from the baseline discipline. Consequently, we determine that a three-month suspension is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Member Campelo 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. Mary Catherine Cuff, P.J.A.D. (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 Marc A. Spielberg
Docket No. DRB 24-049

Decided: September 4, 2024

Disposition: Three-Month Suspension

<i>Members</i>	Three-Month Suspension	Absent
Cuff	X	
Boyer	X	
Campelo		X
Hoberman	X	
Menaker	X	
Petrou	X	
Rivera	X	
Rodriguez	X	
Spencer	X	
Total:	8	1

/s/ Timothy M. Ellis

Timothy M. Ellis
Chief Counsel