SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 24-106
District Docket No. VI-2022-0002E

In the Matter of Darryl George Smith
An Attorney at Law

Decided
October 17, 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 VI 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 1.16(d) (upon termination of representation, failing to protect the client's interests and to refund unearned portion of a fee); RPC 8.1(b) (two instances – failing to cooperate with disciplinary authorities); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).[1]

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 additional RPC 8.1(b) charge and the RPC 8.4(d) charge.

Ethics History

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. He has prior discipline in New Jersey.

Smith I

On March 10, 2020, the Court censured respondent for having violated RPC 1.1(a); RPC 1.3; RPC 1.4(b) (failing to communicate with a client); RPC 1.4(c) (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); RPC 8.1(a) (knowingly making a false statement of material fact to disciplinary authorities); RPC 8.1(b); and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). In re Smith, 241 N.J. 250 (2020) (Smith I).

In that matter, respondent was retained to seek the expungement of the criminal record of his client's son. He undertook the representation knowing that the expungement was necessary for the son to continue his educational endeavors. Respondent filed the expungement petition with the Superior Court and, following a hearing, it was orally granted. 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 steps to ensure the expungement

was completed. Instead, he assured his client that he would provide her with the order.

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 there was an expungement order and that he would provide her a copy. However, he failed to rectify the dismissal of the matter or to obtain an expungement order. Thereafter, he altogether stopped communicating with his client. He also misrepresented to the ethics investigator that he had, in fact, submitted a proposed order to the court and, thereafter, failed to cooperate with the investigation. In determining to impose a censure, we accorded 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.

Smith II

On April 13, 2023, the Court reprimanded respondent, in a default matter, for having violated RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6) and RPC 8.1(b). In re Smith, 253 N.J. 543 (Smith II).

In that matter, the Office of Attorney Ethics (the OAE) conducted a random audit, in May 2018, which revealed several recordkeeping deficiencies, including respondent's failure to (1) deposit earned legal fees in his attorney business account (ABA), (2) maintain separate attorney trust account (ATA) and ABA, (3) maintain ABA receipts and disbursements journals, and (4) maintain ATA and ABA records for seven years.

Although respondent cooperated with the underlying investigation and corrected his recordkeeping deficiencies prior to the OAE's filing of the formal ethics complaint, he failed to file a verified answer and allowed the matter to proceed as a default. Thereafter, he filed with us a motion to vacate the default, asserting that he mistakenly had assumed that an answer was not required because he had cooperated with the investigation and, based on the recordkeeping violations, understood he would be disciplined. We denied that motion and, in view of respondent's heightened awareness of his obligations under the Rules of Professional Conduct, determined that a reprimand was the appropriate quantum of discipline for misconduct that typically is met with an admonition. In the Matter of Darryl George Smith, DRB 22-033 (August 9, 2022) at 15-16.

We now turn to the matter currently before us.

Service of Process

Service of process was proper.

On May 19, 2023, 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 to the DEC, indicating delivery on May 24, 2023. Although the certified mail receipt was signed, the signature is illegible. The regular mail was not returned to the DEC.

On July 11 and November 21, 2023, the DEC sent a second and third letter, 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 was deemed amended to including a willful violation of RPC 8.1(b) and RPC 8.4(d).

The certified mail receipt for the July 11, 2023 letter was returned to the DEC, indicating delivery on July 19. Although the certified mail receipt was signed, the signature is illegible. The November 21, 2023 certified mail was not returned to the DEC and, according to the United States Postal Service tracking, it "was delivered to the front desk, reception area, or mail room at 2:11 p.m. on November 24, 2023 in EAST RUTHERFORD, 07073."

As of March 27, 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 June 7, 2024, Chief Counsel to the Board sent respondent a letter, by certified and regular mail, to his address of record, with another copy sent via electronic mail, to his e-mail address of record, informing him that the matter was scheduled before us on July 25, 2024, and that any motion to vacate the default must be filed by June 24, 2024. The certified mail receipt was returned to the Office of Board Counsel (the OBC), signed and dated June 12, 2024. The regular mail was not returned to the OBC, and delivery to respondent's e-mail was complete, although no delivery notification was sent by the destination server.

Moreover, on June 10, 2024, the OBC published a notice in the New Jersey Law Journal, stating that we would review this matter on July 25, 2024. The notice informed respondent that, unless he filed a successful motion to vacate the default by June 24, 2024, his prior failure to answer would remain deemed an admission of the allegations of the complaint.

Respondent did not file a motion to vacate the default.

Facts

We now turn to the allegations of the complaint.

In or around November 2020, Cynthia S. Stokes contacted respondent in connection with a pending municipal court traffic matter. Stokes also forwarded to respondent a copy of the police report and asked him to handle her case.

Thereafter, respondent provided Stokes with an engagement letter, via e-mail, requesting that she sign and return it to him. According to the engagement letter, respondent charged a non-refundable flat fee of $500 for the representation. The scope of services included "all necessary court appearances, research, investigation, correspondence, preparation and drafting of pleadings and other legal documents, conferences in person and by telephone with [client] and others, and related work to properly represent [client] in this matter." Stokes executed the engagement letter and returned the signed copy to respondent. She did not, however, retain a copy for herself. Stokes also paid respondent $500 toward the representation.

In early December 2020, respondent and Stokes communicated, via text messages, regarding the representation. Specifically, respondent advised Stokes that he had communicated with her current attorney regarding a substitution of counsel, so that he could assume the representation. In another text message, Stokes informed respondent that she had sent him an e-mail on December 6,

2020 with an attached audio recording relative to the traffic matter. Over the next few days, respondent advised her that the municipal court date would be changed and that "a new date would be sent in the mail." Meanwhile, Stokes informed respondent that she had sent him the $500 legal fee, to which respondent replied that he had not received it. Additionally, in a December 14, 2020 text message to Stokes, respondent referred to a letter he had purportedly prepared and sent to the municipal court seeking an adjournment of her case.

Subsequently, respondent ceased communication with Stokes, despite her attempts to contact him. According to Stokes, their last communication occurred in December 2020. Moreover, respondent failed to appear in municipal court on Stokes's behalf, which forced her to hire another attorney. Respondent eventually refunded the $500 fee to Stokes, but only after her "persistent demands for return of same."

On February 17, 2022, Stokes filed an ethics grievance against respondent. Respondent, however, failed to reply to the DEC investigator's requests for information relating to the allegations. Specifically, on March 9, 2022, the investigator forwarded a copy of the grievance, via certified and regular mail, to respondent's former office address of record, located in Jersey City, New Jersey. The letter directed respondent to submit his written reply to the grievance within ten days. The certified mail receipt was returned to the DEC

investigator, indicating delivery on March 23, 2022. The regular mail was not returned to the investigator.

On April 11, 2022, the DEC investigator sent a second letter, again by certified and regular mail, to respondent's former office address of record. Although the certified mail receipt was not returned to the DEC, the regular mail was not returned indicating effective service.

On May 11, 2022, the DEC sent a third letter to respondent, by certified and regular mail, to his current office address of record, located in East Rutherford, New Jersey. The certified mail receipt was returned to the investigator, signed and dated May 16, 2022. The regular mail was not returned.

On June 23, 2022, the DEC sent a fourth and final letter, via certified and regular mail, to respondent's current office address of record. Neither the certified mail nor the regular mail was returned.

Respondent failed to submit a reply to the grievance.

Based on the foregoing, the formal ethics complaint charged respondent with having violated RPC 1.1(a) by failing to respond or communicate with Stokes and, further, by failing to appear in court on her behalf, and RPC 1.3 by ignoring Stokes's matter and wholly failing to perform the services for which he was retained. Additionally, the complaint charged respondent with having violated RPC 1.16(d) by failing to "take steps reasonably practicable to return

the flat fee" and failing to "properly terminate the attorney-client relationship." Further, the complaint alleged that respondent violated RPC 8.1(b) by failing to submit a written reply to the grievance or otherwise cooperate with the investigation. Moreover, by way of amendment, the complaint charged respondent with a second violation of RPC 8.1(b), as well as a violation of RPC 8.4(d), based on his failure to file a verified answer to the complaint.

Analysis and Discipline

Violations of the Rules of Professional Conduct

Follow our review of the record, 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 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, 224 (2000) (describing 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").

The record before us clearly and convincingly establishes respondent's violation of RPC 1.1(a), which prohibits an attorney from grossly neglecting a matter entrusted to them, and RPC 1.3, which requires an attorney to act with reasonable diligence and promptness in their representation of a client. Specifically, after accepting the representation and his $500 fee, respondent altogether failed to take any meaningful steps to defend Stokes in connection with her municipal court matter. Making matters worse, respondent failed to appear in court, on Stokes' behalf, and to reply to her repeated attempts to contact him. Ultimately, Stokes was required to hire another attorney to represent her interests in court.

Next, respondent violated RPC 1.16(d), which 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 advise Stokes that he was terminating the representation and, further, by delaying the return of his unearned legal fee. Although respondent eventually refunded Stokes's payment, he did so only after her repeated attempts to reach him.

Respondent also violated RPC 8.1(b), which requires an attorney to "respond to a lawful demand for information from . . . [a] disciplinary authority," in two respects. First, respondent wholly failed to cooperate with the DEC's investigation, despite multiple opportunities to do so and, subsequently, failed to file a verified answer to the complaint.

By contrast, however, we determine to dismiss the RPC 8.4(d) charge, which was added contemporaneously with the RPC 8.1(b) charge, with both charges stemming from respondent's failure to answer the formal ethics complaint. Although failing to file an answer to a complaint constitutes a well-settled violation of RPC 8.1(b), it is not a per se violation of RPC 8.4(d). See In re Ashley, 122 N.J. 52, 55 n. 2 (1991) (following the attorney's failure to answer the formal ethics complaint and cooperate with the investigator, the DEC charged her with violating RPC 8.4(d); the Court expressly adopted our finding that, "[a]lthough the committee cited to RPC 8.4(d) for failure to file an answer to the complaint, RPC 8.4(d) deals with prejudice to the administration of justice. RPC 8.1(b) is the correct rule for failure to cooperate with disciplinary authorities."). Moreover, we consistently have dismissed RPC 8.4(d) charges that are based solely upon an attorney's failure to file an answer to the complaint. See In the Matter of Richard Donnell Robinson, DRB 23-032 (July 5, 2023) at 12-13, and In the Matter of John Anthony Feloney, IV, DRB 22-179 (March 23,

2023) at 9-10. Consequently, consistent with disciplinary precedent, we determine to dismiss the RPC 8.4(d) charge.

In sum, we find that respondent violated RPC 1.1(a); RPC 1.3; RPC 1.16(d); and RPC 8.1(b) (two instances). However, we determine to dismiss the RPC 8.4(d) charge as a matter of law. 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 (a charge not present here) 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 J. 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 Barron, __ N.J. __ (2022), 2022 N.J. LEXIS 660 (reprimand for an attorney who engaged in gross neglect in one client matter; lacked diligence in three client matters; failed to communicate in three client matters; and failed to set forth, in writing, the basis or rate of his fee in one client matter; in aggravation, we considered the quantity of the attorney's ethics violations, and the harm caused to multiple clients (which included allowing a costly default judgment to be entered against two clients and failing to oppose summary judgment motions, resulting in the dismissal of another client's case); in mitigation, we considered the attorney's cooperation, his nearly unblemished career in more than forty years at the bar, and his testimony concerning his mental health condition).

The quantum of discipline is enhanced, however, when additional aggravating factors are present. See In re Witherspoon, 249 N.J. 537 (2022) (censure for an attorney, in a default matter, who took little or no action to settle a client's brother's estate; the attorney also failed to reply to the client's repeated inquiries regarding the status of her matter, prompting the client to retain new counsel to protect her interests; although the attorney had no prior discipline, the attorney's failure to take any action in furtherance of the representation

caused the client significant financial harm), and In re Levasseur, __ N.J. ___ (2022), 2022 N.J. LEXIS 457 (three-month suspension for an attorney, in a default matter, who failed to timely prosecute his client's lawsuit concerning an insurance dispute arising out of damage to her home caused by Super Storm Sandy; the attorney's failure to prosecute the litigation resulted in the dismissal of the client's claim and the likely loss of the client's potential avenues for relief; the attorney intentionally failed to advise his client of the dismissal of her matter and failed to attempt to reinstate the litigation; the attorney also repeatedly ignored the client's numerous requests for information regarding her matter; the attorney had a 2020 reprimand for similar misconduct and, thus, possessed a heightened awareness of his obligation to cooperate with disciplinary authorities; nevertheless, the attorney neither submitted a written reply to the grievance nor filed an answer to the complaint).

Standing alone, an admonition is the appropriate sanction for an attorney's failure to promptly refund the unearned portion of a fee. See In re Gourvitz, 200 N.J. 261 (2009), and In the Matter of Larissa A. Pelc, DRB 05-165 (July 28, 2005).

When an attorney fails to cooperate with disciplinary authorities, and previously has been disciplined, but the attorney's ethics record is not serious, reprimands or censures have been imposed. See In re Howard, 244 N.J. 411

(2020) (reprimand for attorney who altogether failed to respond to the DEC'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; however, the record contained insufficient information for us to determine the extent to which the client may have been harmed by the attorney's conduct; the attorney received a prior 2017 censure for similar misconduct in which he had also failed to cooperate with disciplinary authorities; in mitigation, the attorney ultimately retained ethics counsel and stipulated to some of his misconduct), and In re Nussey, __ N.J. __ (2023), 2023 N.J. LEXIS 149 (censure for attorney who altogether ignored the DEC investigator's request 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 DEC's initial request that he reply to the grievance; the attorney also failed to timely produce a copy of his client's file as directed; moreover, the attorney repeatedly failed to provide his client with a single invoice in a divorce matter, despite her dogged requests that he do so during an eighteen-month period; in aggravation, this matter represented the attorney's third disciplinary proceeding in less than four years;

we also found that the attorney had a heighted awareness of his obligations to adhere to the RPCs considering the timing of his prior 2020 reprimand).

In our view, respondent's conduct is most analogous to that of the censured attorney in Witherspoon, who, in a default matter, ignored his client's requests for information and took little or no action to settle the client's matter, forcing the client to retain new counsel. Like the attorney in Witherspoon, respondent accepted the representation and then failed to take any meaningful steps to defend Stokes in her municipal court matter. Unlike the attorney in Witherspoon, however, respondent does not enjoy the benefit of a lengthy unblemished career at the bar. Rather, as discussed below, respondent was censured in connection with Smith I, and reprimanded in connection with Smith II.

Based on the foregoing disciplinary precedent, and Witherspoon in particular, we determine that the baseline discipline for respondent's misconduct is a censure. However, to craft the appropriate discipline, we also consider mitigating and aggravating factors.

There is no mitigation to consider.

In aggravation, we accord significant weight to respondent's recent disciplinary history and the similarities to the instant default matter. This matter

represents respondent's third disciplinary proceeding in just four years, and the second proceeding as a default.

Specifically, the misconduct underlying the instant matter represents a continuation of the mishandling of client matters that respondent demonstrated in Smith I, for which he was censured. Consistently, the Court has signaled an inclination toward progressive discipline and stern treatment of repeat offenders. In such a scenario, 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).

Further, respondent's failure to cooperate with the disciplinary authorities, which was present in both Smith I and Smith II, continued here, unabated. In addition to his failure to cooperate with the investigations underlying Smith I and Smith II, he allowed Smith II to proceed as a default. Thus, as we concluded in Smith II, respondent had a heightened awareness of his obligations pursuant to the Rules of Professional Conduct, including his obligation to fully cooperate with disciplinary authorities seeking to address his conduct.

Further, respondent allowed this matter to proceed as a default, an aggravating factor that ordinarily results in enhanced discipline. See In re Kivler, 193 N.J. 332, 342 (2008) ("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"). However, because we already factored respondent's default status into the baseline discipline of a censure, we do not accord this aggravating factor additional weight.

Conclusion

On balance, considering the significant and compelling aggravating factors, we determine that a three-month suspension is the appropriate quantum of discipline necessary to protect the public and preserve confidence in the bar.

Chair Cuff, Vice-Chair Boyer, and Member Spencer voted to impose a censure.

Member Hoberman 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 Darryl George Smith
Docket No. DRB 24-106

Decided: October 17, 2024

Disposition: Three-month suspension

Members	Three-Month Suspension	Censure	Absent
Cuff		X	
Boyer		X	
Campelo	X		
Hoberman			X
Menaker	X		
Petrou	X		
Rivera	X		
Rodriguez	X		
Spencer		X	
Total:	5	3	1

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