Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-348
District Docket No. XIV-2016-0710E

In the Matter of

Howard J. Burger

An Attorney at Law

Decision

Argued: January 16, 2020

Decided: April 7, 2020

Amanda Figland appeared on behalf of the Office of Attorney Ethics.

Petar Kuridza appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter originally was before us on a recommendation for an admonition filed by the District XII Ethics Committee (DEC), which we determined to treat as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4).

The formal ethics complaint charged respondent with having violated RPC 1.7(a)(2) (conflict of interest); RPC 1.8(a) (improper business transaction with a client); RPC 8.4(b) (commission of criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to impose a two-year suspension.

Respondent earned admission to the New Jersey bar in 1974 and to the New York bar in 1970. During the relevant time frame, he maintained an office for the practice of law in Kenilworth, New Jersey.

This matter constitutes respondent's second encounter with the disciplinary system. In 2018, he was reprimanded for negligent misappropriation of trust funds, recordkeeping infractions, and deceitful conduct – specifically, disbursing more than $56,000 in legal fees to himself from estate funds, despite two court orders expressly prohibiting him from doing so – violations of RPC 1.15(a) and (d) and RPC 8.4(c). In re Burger, 235 N.J. 216 (2018).

The facts of this matter are as follows. In the early 1980s, respondent began representing Al Amjady. In 1990, respondent and Amjady's relationship

evolved into a close friendship. Prior to 1997, respondent had served as Amjady's attorney in at least fourteen matters; according to respondent, he did not bill Amjady in most of those matters, in light of their friendship. Between 1997 and 2014, respondent represented Amjady and his family in more than thirty legal matters. It is undisputed that respondent did not bill Amjady in any of those matters. Respondent considered Amjady one of his best friends, and, by way of example, respondent noted that Amjady's family attended his daughters' weddings.

In 1992, Amjady filed for personal bankruptcy and lost his primary residence. Respondent did not represent him in that bankruptcy, but, rather, referred him to another attorney. In 1997, due to the effect of that bankruptcy on his credit history, Amjady began discussing private financing options with respondent, who had extensive experience in respect of commercial loans and transactions. In addition to his legal experience, respondent has a master's degree in corporate law from New York University, and is a founding member of The Enterprise Bank, a commercial financial institution. Amjady sought to purchase the real property in Elizabeth that he had been renting, for approximately $3,600 per month, to operate his used car business, All Cars Corp., which respondent had incorporated for Amjady in 1985.

Both respondent and Amjady recognized that Amjady could significantly reduce overhead costs for his business if he purchased the Elizabeth property, rather than continuing to rent it. Respondent represented Amjady in the purchase of the Elizabeth real estate, while also serving as a lender for Amjady to finance the transaction. Specifically, by letter dated May 9, 1997, respondent offered to loan Amjady $150,000, advised him to seek "independent legal counsel and financial advice before going ahead with the transaction," and warned Amjady that such a loan "would alter [their] relationship of attorney and client to that of borrower and lender."

During the ethics hearing, respondent denied knowledge of RPC 1.8 at the time he made these loans to Amjady, and stated that, had he known of the Rule, he would have required Amjady to sign the required, written conflict waivers. Amjady borrowed $100,000 from respondent, and $50,000 from respondent and Marcia Falk, the spouse of respondent's college roommate, to finance the $185,000 purchase of the Elizabeth property and the operation of the business thereon; the financing was evidenced by two interest-only, demand "mortgage notes," dated September 16, 1997 (Mortgage A and Mortgage B). The Elizabeth real estate served as the collateral securing those mortgage notes and all the subsequent mortgage loans that respondent made to Amjady.

During the ethics hearing, in defense of his role as Amjady's lender, respondent emphasized that, because he was loaning money to his friend, he had not required Amjady to pay for the costly items commercial lenders would normally require, including payment of points and other fees; environmental studies; and title insurance. He further asserted that he had employed the simplest forms of financing documents to memorialize the transactions. As an example, respondent noted that the mortgage notes did not even provide for a default interest amount. He also testified that he never charged Amjady a late fee, despite his many tardy interest payments.

According to respondent, Amjady required the private financing not only because he had poor credit, due to his prior bankruptcy, but also because he systematically failed to report on his tax returns all of his annual income of $200,000 to $300,000, and, thus, would not have qualified for a commercial loan to purchase the Elizabeth property.

Amjady never signed written informed consent or a waiver of conflicts in respect of the loans from respondent. Moreover, it is undisputed that Amjady did not seek the advice of independent counsel regarding these mortgage loans, or any subsequent mortgage loans between them. Respondent claimed that he verbally advised Amjady to seek independent counsel for each subsequent loan transaction, and that Amjady was a "very sophisticated businessman" and a

"math wizard," who was intimately familiar with financing, given his chosen profession of used car sales and financing.

On January 14, 2005, the 1997 mortgages, along with other, unsecured monies that respondent had loaned to Amjady in the interim, were refinanced between respondent and Amjady, into a new, $165,000 interest-only, demand mortgage loan on the Elizabeth property (Mortgage C). Mortgages A and B were then respectively discharged of record. Respondent testified that he viewed this new loan as a continuation of the 1997 loans, akin to an interest-only, demand line of credit for Amjady.

On February 26, 2007, an additional $100,000 was loaned to Amjady by respondent's daughters' irrevocable trusts, for which respondent served as the trustee (Mortgage D). Respondent testified that he had recommended that Amjady refinance his primary residence to obtain these new funds, rather than obtain an additional mortgage loan, but that Amjady rejected that advice, in light of his wife's reservations, which stemmed from the 1992 foreclosure of their prior primary residence.

About seven months later, on October 1, 2007, an additional $100,000 was loaned to Amjady by respondent (75% interest as lender) and Suzanne and Leon Feuerstein (25% interest as lender) (Mortgage E). This, too, was an interest-only, demand loan.

Since he began practicing law in New Jersey, in 1974, respondent has dedicated roughly twenty-five percent of his practice to estate planning and litigation. In October 2007, at Amjady's request, respondent drafted Amjady's Last Will and Testament (the Will). The Will named respondent as the Executor of Amjady's estate, and Trustee of a testamentary trust established for Amjady's children. The Will purportedly granted respondent, as Executor and Trustee, "full power to do anything deemed advisable, even though it would not be authorized or appropriate for a fiduciary (but for this power) under any statutory or other rule of law," and gave him the power to sell or otherwise dispose of realty, to engage in business with the property of the trusts, and to pay debts. During the ethics hearing, respondent sought to minimize the import of that language, asserting that, despite the express language of the Will, he still would have been required to comply with applicable law. He maintained that the language was simply an artifact from documents he routinely used during his prior employment with a Manhattan law firm. Respondent conceded that he did not advise Amjady to consult independent counsel in respect of naming respondent his Executor and Trustee, despite his role as Amjady's attorney and creditor.

On October 2, 2009, an additional $45,000 was loaned to Amjady by respondent and his daughters' irrevocable trusts (each party with a 33 1/3%

interest as lender) (Mortgage F). Again, this financing was an interest-only, demand loan.

On April 20, 2015, Amjady signed an Affidavit to Acknowledge Debts (the Affidavit) that respondent prepared, wherein Amjady acknowledged owing the various lenders for Mortgages C through F, all of which were eight-percent, interest-only, demand-mortgage loans, a total outstanding principal amount of $410,000, and agreed to "toll any statute of limitations that may apply to said instruments." The Affidavit also stated that Amjady was current in respect of all interest owed on each mortgage. Respondent confirmed that he had prepared Mortgages A through F, and that he had not advised Amjady to consult independent counsel in respect of the Affidavit.

Beginning in 2013, Amjady experienced health issues that negatively impacted his business revenue. According to respondent, in 2013, as a result of their discussions, respondent and Amjady completed an application for a life insurance policy, resulting in the issuance of a $410,000 policy on Amjady, which named respondent as the sole beneficiary and owner. On the application, Amjady claimed an annual income of $120,000, and a total net worth of $1.4 million. Respondent received the annual bills for the policy, but Amjady paid the policy premiums. Respondent explained that the purpose of the policy was to serve as "keyman" insurance, in order to pay off the mortgages in the event

of Amjady's death, so that respondent would not have to "deal with" Amjady's wife, and so that Amjady's family would own the Elizabeth property free and clear. Respondent testified that he perceived no conflict of interest in respect of the life insurance, and, thus, did not inform Amjady to seek the advice of independent counsel regarding the life insurance policy.

Although respondent admitted that no writing required him to apply the insurance proceeds to the outstanding mortgage balance, he asserted that the insurance was for the exact amount of the mortgage debt, and that "there's not a court in the world" that would have allowed him to keep the insurance proceeds and not satisfy the mortgages. Moreover, he reiterated that he and Amjady were still close personal friends at the time that the policy was obtained, and, thus, claimed no desire to adversely impact Amjady or his family.

As mentioned above, in addition to his law practice, respondent is a founding director of The Enterprise Bank, which was formed in or about 1998. In that role, he helped to manage the bank and to ensure its compliance with applicable laws and regulations. Respondent was aware that cash deposits into banks triggered the filing of currency transaction reports with government authorities, and claimed that he had been trained, by outside financial advisors, to never make cash deposits.

It is undisputed that, from 2010 through 2015, respondent received approximately $122,400 in interest income from Amjady, paid in cash. Amjady paid approximately $2,732 in cash to respondent every month. Respondent neither deposited that cash in a bank nor reported it as income on his New Jersey state or his federal income tax returns, until he filed amended state and federal tax returns, on January 24, 2017. Respondent was aware that Amjady made the interest payments in cash, because Amjady systematically failed to report his true income to New Jersey tax authorities and to the Internal Revenue Service (IRS), and did not want to issue checks to respondent, creating a paper trail regarding his income. Specifically, in 2009, Amjady claimed an annual income of only $39,000, despite gross sales of more than $1 million for his used car business. During the relevant time, Amjady never claimed more than $48,595 in income. Respondent was also aware that, as of 2009, Amjady illegally had obtained three separate home equity lines of credit totaling $600,000 on his primary residence.

Respondent gave Amjady's monthly cash interest payments to respondent's wife, who then distributed the monies among respondent and his children. In his amended tax return filings, respondent claimed that he had inadvertently omitted the interest income from his original returns, despite the fact that he had claimed other interest income on them. Respondent paid more

than $43,000 in back taxes to the federal government and $7,500 in back taxes to the State of New Jersey. Respondent claimed that he had paid back taxes even for years that were beyond the applicable statutes of limitation and noted that he was neither audited nor criminally charged for tax evasion. According to respondent, he simply had made a mistake, in light of the fact that the more than $20,000 in annual interest payments from Amjady represented a "small fraction" of his income during those years. During oral argument before us, respondent admitted, through counsel, that he filed these belated tax returns after the ethics grievance underlying this matter had been filed.

In September 2014, respondent represented Amjady for the final time, in a debt collection matter. When Amjady's children filed the ethics grievance against respondent, Amjady was obligated to pay four mortgage notes, with a total principal balance of $410,000, to respondent and the other lenders.

In 2016, Amjady began pursuing the sale of the Elizabeth property. Respondent attempted to assist him in the marketing of the property, in respondent's words, "to maximize [the] sale price and get [respondent's] family's money back as soon as possible." In December 2016, however, Amjady stopped paying his obligations under the mortgages. On December 14, 2016, respondent warned Amjady that, if he did not bring the loans current, pay the property tax arrearages on the Elizabeth property, and list the property for sale,

respondent would commence a foreclosure action. Respondent further stated, via e-mail, that "when you owe a friend money and you can't pay him, the friend becomes the enemy."

On January 20, 2017, respondent filed a foreclosure action against the Elizabeth property, under the Mortgage D loan (the loan funded by respondent's daughters' trusts), citing Amjady's December 2016 default. Amjady, through counsel, filed an answer and counterclaim, seeking to nullify the mortgage loans, primarily due to respondent's alleged unethical conduct, and under other contractual and equitable defenses. Specifically, Amjady's counterclaim alleged that the loans he had entered into with respondent were "not fair or reasonable and were not fully disclosed to or understood" by Amjady, and that respondent had failed to secure Amjady's waiver of conflict and informed consent, as RPC 1.7 and RPC 1.8(a), respectively, require. In turn, respondent contended that, because Amjady did not have the money to satisfy the mortgages, he employed the counterclaims in an attempt to cancel the debt.

The foreclosure trial began on January 22, 2018. During his case-in-chief, respondent presented expert testimony that the Mortgage D loan he made to Amjady had not violated any applicable banking or lending regulations, including usury laws, and was considered, in market parlance, to be a private loan, which would be exempt from most, if not all, regulations governing

commercial lenders. Respondent's expert further testified that the value of the Elizabeth property likely was only $396,722, less than the amount of Amjady's debt to respondent and the other lenders. In summary, respondent's expert testified that the mortgage loans between respondent and Amjady were "fair and reasonable," and that respondent had not taken advantage of Amjady.

Amjady's expert witness confirmed that, given the private nature of the mortgage loans between respondent and Amjady, they would be exempt from most, if not all, regulations governing commercial lenders. In turn, however, Amjady's expert opined that the mortgage loans were not "fair and reasonable," because they were in the nature of demand notes, which the lenders could call, or accelerate, at any time. Moreover, Amjady's expert cited the fact that mortgage interest payments were required to be made in cash; that respondent never gave Amjady documentation evidencing the amount he had paid, and the principal amount owed; that respondent performed no due diligence regarding the nature and value of the collateral; and that the "interest rate [of eight percent] was higher than it should have been."

Respondent suspected that Amjady's children had orchestrated the adverse testimony against him during the foreclosure trial, noting that they, not Amjady, had filed the ethics grievance. Amjady testified that respondent had forced him to accept the mortgage loans, and that he was required to follow his

attorney's directives. Amjady denied that respondent had explained the terms of the loans or the Affidavit to him, but maintained that he signed them because respondent, his attorney, told him to do so. He claimed that he paid the interest in cash because respondent did not want the IRS to know about his investment income. In respect of the life insurance policy, Amjady claimed that the beneficiary was supposed to be "his kid," but that respondent had seized the insurance for himself.

On May 1, 2018, the Superior Court ruled overwhelmingly in favor of respondent, as the plaintiff. The court found that Amjady was "completely familiar" with the world of finance, having successfully operated a used car business for decades, in which he financed his own business operations as well as the purchase of vehicles by his customers, and held a New Jersey banking license that was required to engage in retail installment contracts. The court, thus, found Amjady to be a sophisticated businessman who grossed more than $1 million per year, but reported income of only $39,000 for tax purposes. The court further ruled that Amjady's testimony was not credible; that he had affirmatively sought the loans; that he owed respondent the debt; that the mortgage on the Elizabeth property was valid; and that he had taken advantage of respondent, "his lawyer, his longtime friend, and his angel." In conclusion, the court found that the loans from respondent to Amjady were "fair and

reasonable," and rejected Amjady's argument that they should be rendered null and void simply due to the attorney-client relationship between the parties, finding that Amjady sought to use the RPCs as a sword to avoid the payment of lawful debts. The court, thus, entered a judgment of foreclosure in respondent's favor.

Amjady was in the process of appealing the court's adverse ruling during the pendency of the ethics hearing. Respondent emphasized that, during depositions and at the civil trial, Amjady referred to respondent as his "angel," and that the trial court had concluded that Amjady had taken advantage of respondent – not the other way around.

In respect of mitigation, respondent represented that he had performed pro bono work in connection with the Surrogate Courts in Union and Essex Counties, including assisting victims of the 9/11 terrorist attacks, and in behalf of his synagogue; was extensively involved in his local Rotary Club; and had been an Eagle Scout.

Multiple character witnesses testified that respondent enjoyed a good reputation in the community, was truthful, and was of high character.

The DEC found clear and convincing evidence that respondent violated RPC 1.7(a)(2) (conflict of interest) and RPC 1.8(a) (improper business transaction with a client). However, the panel determined to dismiss the

allegations that respondent violated RPC 8.4(b) and (c), finding a lack of clear and convincing evidence to support those charges.

Specifically, the DEC determined that, at the time respondent made the multiple mortgage loans to Amjady, an attorney-client relationship existed between them. The DEC agreed with the Superior Court that the mortgage loans were fair and reasonable, and that Amjady was unlikely to have been able to obtain financing from commercial lenders, given his financial status at the time the loans were made. The DEC concluded, however, that respondent's repeated failure to obtain Amjady's written, informed consent in connection with the mortgage loans, the Will, and the life insurance policy constituted multiple violations of RPC 1.8(a).

Based on the same logic, the DEC concluded that respondent's conduct in connection with his business transactions with Amjady further violated RPC 1.7(a)(2), in light of respondent's repeated failure to secure Amjady's written, informed consent waiving the ongoing conflict of interest created by their dealings as lender and borrower.

In respect of the RPC 8.4(b) and (c) charges, the DEC concluded that, although it was unlikely that an individual with respondent's banking and business experience would simply forget to report interest income, the Office of

Attorney Ethics (OAE) had failed to prove the required mens rea element of tax evasion – that respondent had intentionally evaded income tax.

Finding no aggravating factors, and citing, in mitigation, the complex, personal history between respondent and Amjady; respondent's extensive pro bono work; respondent's volunteerism at his synagogue; and respondent's reputation for good character, the DEC recommended the imposition of an admonition.

In briefs submitted to us, respondent asserted that we should affirm the DEC's finding that he violated RPC 1.7(a)(2) and RPC 1.8(a), and the dismissal of the RPC 8.4(b) and (c) charges. Moreover, respondent agreed with the DEC's recommended quantum of discipline, an admonition.

In respect of the tax evasion allegations levied by the OAE, respondent claimed that he had inadvertently failed to pay income taxes in connection with the Amjady loans interest payments. Moreover, he noted that he has paid all back taxes owed to the State of New Jersey and the IRS, including interest owed on the unpaid amounts. Respondent also represented that, on May 24, 2019, the Appellate Division affirmed the trial court's ruling in his favor.

In turn, in its brief to us, the OAE contended that it had proven all four charges against respondent, by clear and convincing evidence. Specifically, in respect of the DEC's recommendation that the RPC 8.4(b) and (c) charges be

dismissed, the OAE noted that the DEC itself found it to be "extremely unlikely," in light of respondent's extensive business and banking experience, that he simply forgot to pay taxes on more than $100,000 in interest income received from the mortgage loans to Amjady, over a six-year period. The OAE argued that it had presented enough circumstantial evidence to meet its burden that respondent had intentionally evaded income taxes in respect of those funds.

The OAE highlighted several of the DEC's factual findings that support its contention that the RPC 8.4(b) and (c) charges were proven by clear and convincing evidence. Those findings include:

1. Respondent, who was a founding member of The Enterprise Bank, was "sophisticated about financial matters;"

2. Respondent received $20,388 in interest income, annually, from Amjady from 2010 through 2015, for a total of $122,328;

3. Respondent received the interest payments in cash;

4. Respondent did not deposit that cash in any financial institution;

5. Respondent did not keep records of the interest payments until 2016, when Amjady's children began demanding documentation;

6. Respondent admitted that he memorialized all of his financial matters using Quicken software, with the exception of the Amjady interest payments;

7. Respondent neither declared any of that interest income on his state and federal tax returns for those years nor advised his accountant of the existence of the interest payments;

8. Respondent claimed that he never reviewed his tax returns before filing them, and did not understand them;

9. Respondent received a copy of the Amjady grievance on January 5, 2017; and

10. On January 24, 2017, respondent filed amended state and federal tax returns for 2010 through 2015, remitting the back taxes and interest owed.

The OAE, thus, asserted that the clear and convincing evidence supported findings that respondent had willfully evaded payment of income taxes in respect of the Amjady mortgage loans, and, thus, violated RPC 8.4(b) and (c).

Moreover, the OAE argued that the DEC failed to properly consider disciplinary precedent in recommending only an admonition for respondent's violations of RPC 1.7(a)(2) and RPC 1.8(a). The OAE noted that terms of suspension are warranted when an attorney's conflict of interest is motivated by pecuniary gain. The OAE, thus, recommended a three-month suspension for respondent's violations of RPC 1.7(a)(2), RPC 1.8(a), and RPC 8.4(b) and (c).

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

As respondent now concedes, the DEC's determination that he violated RPC 1.8(a) and RPC 1.7(a)(2) is supported by clear and convincing evidence. Moreover, contrary to the DEC's conclusion and respondent's arguments, we

find that the record contains clear and convincing evidence that respondent also violated RPC 8.4(b) and (c).

RPC 1.7(a)(2) prohibits a lawyer from representing a client if "there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or **by a personal interest of the lawyer**." (emphasis added)

In order to represent a client, despite a concurrent conflict of interest, an attorney must comply with RPC 1.7(b)(1), which states:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation . . . .

Here, it is undisputed that multiple, impermissible conflicts of interest existed in respect of respondent's ongoing financial dealings with his client, Amjady. Although respondent testified that, at the time he entered into these financial transactions, he was unfamiliar with the relevant RPCs, he clearly recognized the implications of taking a personal interest in his client's financial affairs, as evidenced by his May 9, 1997 written offer of financing to his client and then best friend, Amjady, wherein he advised Amjady to seek independent counsel, and warned that the mortgage loans would alter their attorney-client

relationship and create a scenario whereby Amjady was financially obligated to respondent. Respondent, however, by his own admission, did not comply with the mandate of RPC 1.7(a)(2) in respect of the initial loan to Amjady, or any of the subsequent loans, the Will, or the insurance policy, because he never secured written, informed consent from Amjady for any of those financial transactions, all of which created a personal interest and pecuniary benefit for respondent. Respondent, thus, is guilty of multiple violations of RPC 1.7(a)(2).

The same facts establish respondent's repeated violation of RPC 1.8(a). From 1997 to 2009, respondent participated in loaning Amjady a total of $410,000. Moreover, respondent engaged in both the Will and life insurance policy transactions, from which he received personal benefit. Amjady willingly borrowed these funds from creditors, including respondent; yet, respondent only once, in 1997, advised Amjady to seek the advice of independent counsel, and never obtained his written, informed consent regarding these business transactions, in repeated violation of RPC 1.8(a). Respondent admitted that he never advised Amjady to seek independent counsel regarding the Will and insurance transactions. Respondent, thus, committed multiple violations of RPC 1.8(a).

The next question we address is whether the OAE proved, by clear and convincing evidence, the charges that respondent violated RPC 8.4(b) and (c).

An attorney's violations of either state or federal tax laws constitute serious ethics breaches. In re Queenan, 61 N.J. 579, 580 (1972), and In re Duthie, 121 N.J. 545 (1990). "[D]erelictions of this kind by members of the bar cannot be overlooked. A lawyer's training obliges him to be acutely sensitive of the need to fulfill his personal obligations under the federal income tax law." In re Gurnik, 45 N.J. 115, 116-17 (1965).

Although respondent was not criminally charged in connection with failure to pay income taxes, we may, nevertheless, find a violation of RPC 8.4(b). See In re Garcia, 119 N.J. 86 (1990). In that case, the Court declared that, even in the absence of a criminal conviction, the willful failure to file an income tax return requires the imposition of a suspension. Willfulness does not require "any motive, other than a voluntary, intentional violation of a known legal duty." In the Matter of Eugene F. McEnroe, DRB 01-154 (January 29, 2002) (slip op. at 2); In re McEnroe, 172 N.J. 324 (2002). Accordingly, the complaint charged respondent with having violated N.J.S.A. 54:52-9, N.J.S.A. 54:52-10, and 26 U.S.C. §§ 7201 and 7206, by filing false tax returns and evading tax laws.

N.J.S.A. 54:52-9(a) provides that

> A person is guilty of a crime of the third degree if he fails to pay or turn over when due any tax, fee, penalty or interest or any part thereof required to be paid . . . with the intent to evade, avoid or otherwise not make timely payment or deposit of any tax, fee, penalty or interest or any part thereof.

Similarly, N.J.S.A. 54:52-10 provides that

> A person is guilty of a crime of the third degree if he files, prepares, causes to be filed or assists in the preparation or filing of a false or fraudulent return, report, statement, or application . . . with the intent to evade, avoid or otherwise not make timely payment of any tax, fee, penalty or interest, or any part thereof.

A recent New Jersey case, State v. Cobbs, 451 N.J. Super. 1 (App. Div. 2017), provides, in respect of the "intent to evade" element, that

> No affirmative act of evasion or avoidance is required, other than non-payment of taxes when due. The taxpayer's "intent to evade, avoid or otherwise not make timely payment," N.J.S.A. 54:52-9(a), may certainly manifest itself in other affirmative acts of evasion or avoidance—such as unkept promises to pay, hiding of assets, or underreporting of income. However, those are not elements of the crime, although they may be circumstantial evidence of the taxpayer's requisite intent.

Similarly, 26 U.S.C. § 7201 provides that

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Applicable federal case law provides that willfulness is specific intent involving bad purpose and evil motive to evade or defeat payment of tax. See Tomlinson v. Lefkowitz, 334 F.2d 262 (1964).

We determine that there is clear and convincing evidence that respondent willfully evaded income tax and filed false income tax returns. Specifically, for at least six years, if not since 1997, Amjady made cash interest payments of more than $2,700 per month to respondent, on which he did not pay income tax until January 2017.

We considered the following facts in respect of circumstantial proof of respondent's intent to willfully evade income taxes:

- Respondent was aware of and complicit in Amjady's tax evasion. He testified that one of the reasons that Amjady could not qualify for a commercial loan was that he systematically failed to report all of his annual income on his tax returns; rather than counsel his client otherwise, respondent, instead, saw the opportunity to become Amjady's lender of last resort, for the pecuniary benefit of himself, his daughters, and his acquaintances;

- Respondent was aware that Amjady had committed mortgage fraud, securing home equity lines of credit totaling $600,000 from three separate banks, without disclosing the existence of the competing liens to the banks;

- When respondent sought to benefit from the $410,000 insurance policy, he sanctioned Amjady's misrepresentations, by which Amjady now stated that his annual income was $120,000 (despite the much lower amounts that he systematically reported on his income tax returns) and had a net worth of $1.4 million; simply put, when it advanced his pecuniary interests, respondent was complicit in tax evasion and, arguably, in light of his knowledge of Amjady's financial distress, insurance fraud;

- Respondent is the founding member of a bank, helped ensure that the bank complied with applicable law, and has a master's degree in corporate law, and extensive business experience; yet, despite his financial acumen, respondent purposely avoided depositing any of Amjady's cash interest payments in a financial institution, and failed to report the interest income on his tax returns; during the relevant tax years, respondent reported interest income from financial brokerages, which had sent him tax documents reflecting that interest income;

- Respondent used Quicken for his finances, yet, did not input any of Amjady's cash payments of interest into the software, and, thus, provided no information regarding those interest payments to his CPA for the preparation of income taxes;

- Respondent admittedly paid the back taxes he owed to state and federal authorities only after the ethics grievance underlying this matter was filed, wherein Amjady had publicly disclosed the unreported cash interest payments he had been making, for years, to respondent and his family members.

We, thus, determine that, for at least years 2010 to 2016, respondent willfully evaded income taxes and filed false returns, in violation of RPC 8.4(b) and (c).

In sum, we find that respondent is guilty of multiple violations of RPC 1.7(a)(2); RPC 1.8(a); RPC 8.4(b); and RPC 8.4(c). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

It is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). See, also, In re Rajan, 237 N.J. 434 (2019) (the attorney engaged in a conflict of interest and an improper business

transaction with a client by investing in a hotel development project spearheaded by an existing client; no prior discipline); In re Drachman, 239 N.J. 3 (2019) (the attorney engaged in a conflict of interest by recommending that his clients use a title insurance company, in eight, distinct real estate transactions, without disclosing that he was a salaried employee of that company; there was no evidence of serious economic injury to the clients; the attorney also violated RPC 5.5(a)(1) by practicing law while ineligible to do so; no prior discipline); and In re Allegra, 229 N.J. 227 (2017) (the attorney engaged in a conflict of interest by engaging in a sexual relationship with an emotionally vulnerable client; the attorney also engaged in an improper business transaction with the same client by borrowing money from her; respondent promptly repaid all the funds and had no prior discipline).

When an attorney enters into a loan transaction with a client without observing the safeguards of RPC 1.8(a), the ordinary measure of discipline is an admonition. See, e.g., In the Matter of David M. Beckerman, DRB 14-118 (July 22, 2014) (during the course of the attorney's representation of a financially-strapped client in a matrimonial matter, he loaned the client $16,000, in monthly increments of $1,000, to enable him to comply with the terms of a pendente lite order for spousal support; further, to secure repayment for the loan, the attorney obtained a note and mortgage from the client on his share of the marital home,

but the mortgage turned out to be invalid; the attorney also paid for the replacement of a broken furnace in the client's marital home; by failing to advise the client to consult with independent counsel, failing to provide the client with written disclosure of the terms of the transactions, and failing to obtain his informed written consent to the transactions and to the attorney's role in them, the attorney violated RPC 1.8(a); by providing financial assistance to the client, he violated RPC 1.8(e)); In the Matter of John W. Hargrave, DRB 12-227 (October 25, 2012) (attorney obtained from his clients a promissory note in his favor secured by a mortgage on the clients' house, in the amount of $137,000, representing the amount of legal fees owed to him; the attorney did not advise his clients to consult with independent counsel before they signed the promissory note and mortgage in his favor); and In the Matter of April L. Katz, DRB 06-190 (October 5, 2006) (attorney solicited and received a loan from a matrimonial client; the attorney did not comply with the mandates of RPC 1.8(a)).

The existence of aggravating factors, such as multiple prohibited transactions, additional ethics infractions, economic harm to the client, or prior discipline often results in the imposition of greater discipline. See, e.g., In re Amato, 231 N.J. 167 (2017) (reprimand imposed on attorney who made more than $525,000 in loans to a client, via three separate transactions, and engaged

in an additional, prohibited currency transaction with the same client; in aggravation, we considered the multiple transactions, versus a single, aberrant act; no harm to the client and no prior discipline); In re Stanziola, 233 N.J. 401 (2018) (censure imposed on attorney who agreed to provide legal services to a client, via an improper barter agreement, in return for the rent-free lease of office space in the client's commercial building; in aggravation, the client believed that the attorney represented him in connection with the lease and suffered demonstrable economic injury; we also considered that the attorney was less than forthright at the ethics hearing and had instituted criminal proceedings against his client; no prior discipline); and In re Kim, 227 N.J. 455 (2017) (three-month suspension for attorney who borrowed $9,000 from a client without observing the safeguards of RPC 1.8(a), and failed to preserve the client's case files, among other recordkeeping infractions, in violation of RPC 1.15(d); the attorney also committed misconduct, involving misleading letterhead, in violation of RPC 7.1(a) and RPC 7.5(a) and (b); aggravating factors were the attorney's failure to repay the client loans, despite the passage of eleven years; his improper use of his trust account in connection with the client loans; and his disciplinary record, consisting of a prior admonition for recordkeeping violations, which demonstrated his failure to learn from past mistakes and justified the enhancement of the sanction).

Here, respondent's most egregious misconduct was his repeated, willful violation of state and federal tax laws. Cases involving an attorney's attempted or actual income tax evasion have resulted in suspensions ranging from six months to three years, although two-year suspensions have been imposed most often. See, e.g., In re Kleinfield, 58 N.J. 217 (1971) (six-month suspension following a plea of nolo contendere to one count of tax evasion, for which a fine was paid; unspecified mitigating circumstances considered); In re Hand, 235 N.J. 367 (2018) (one-year suspension for attorney who pleaded guilty to two misdemeanor counts of failure to file income tax returns for two consecutive years, causing a stipulated $50,588 tax loss to the government; in exchange for her plea, the government agreed to forgo further criminal charges for tax offenses for years 2006 through 2012; attorney was sentenced to three years' federal probation, five months of home confinement; and $50,588 in restitution; two prior admonitions for unrelated conduct and a temporary suspension for her guilty plea); In re Landi, 65 N.J. 322 (1974) (one-year suspension for filing a false and fraudulent joint income tax return for one calendar year; the attorney was found guilty of income tax evasion; twenty-nine-year career without a disciplinary record considered in mitigation, along with other unspecified factors); In re D'Andrea, 186 N.J. 586 (2006) (eighteen-month suspension imposed on attorney who pleaded guilty to willfully subscribing to a false

federal income tax return; the attorney was sentenced to one year of probation, including six months of house arrest and fifty hours of community service; the attorney also was ordered to pay a $10,000 fine and $34,578 in restitution to the IRS; mitigating factors were the attorney's unblemished disciplinary history, his genuine remorse, the deficiencies in his law office's accounting system, and the passage of ten years since he had filed the return); In re Kirnan, 181 N.J. 337 (2004) (eighteen-month retroactive suspension for filing a joint individual tax return that deliberately did not report the receipt of income from the attorney's law practice, resulting in the nonpayment of $31,000 for two tax years; the attorney's cooperation with the criminal authorities was considered in mitigation); In re Rich, 234 N.J. 21 (2018) (two-year suspension for attorney who pleaded guilty to only one count of criminal tax fraud; a criminal complaint had charged him with four counts of second-degree tax fraud and four counts of fifth-degree criminal tax fraud for failure to file state income tax returns for the years 2008 through 2013; later, upon waiver of indictment, a nine-count information charged him with multiple counts of criminal tax fraud; the attorney admitted that he failed to file income tax returns for years 2008 through 2013, and for each year had a tax liability of more than $50,000; he agreed to pay $1.2 million in back taxes and was sentenced to a one-year conditional discharge; the attorney notified the OAE of his conviction and had no ethics history in New

Jersey); In re Rubin, 227 N.J. 229 (2016) (two-year suspension imposed on attorney who pleaded guilty to one count of tax evasion, under New York law, arising out of his failure to remit the appropriate taxes for a three-year period in amounts totaling $26,742; the attorney had an unblemished ethics history; aggravating factors included his failure to notify the OAE or New York authorities of his criminal conviction, and his failure to reply to the OAE's request for information); In re Gottesman, 222 N.J. 28 (2015) (three-year retroactive suspension for attorney guilty of tax evasion and willful failure to remit payroll taxes that he withheld from his employees' wages; he used his trust account to conceal the true extent of his income; he was sentenced to concurrent six-month terms of imprisonment on both counts and three years of supervised release; prior censure); In re Bozeman, 217 N.J. 613 (2014) (three-year suspension imposed on attorney who pleaded guilty to one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; the conspiracy involved his evasion of federal income tax payments by filing false tax returns for the years 2000 through 2007; he was required to make restitution of more than $137,000; the attorney had no disciplinary record, except for the temporary suspension imposed following his guilty plea); and In re Klein, 209 N.J. 234 (2012) (three-year suspension imposed on attorney who pleaded guilty to one count of tax evasion (26 U.S.C. § 7201), and one count of criminal conspiracy

to defraud the United States (18 U.S.C. § 371); aggravation included the attorney's failure to report his indictment to the OAE and his assistance of other clients in similar conduct).

We, thus, determine that respondent engaged in numerous improper mortgage loan transactions with Amjady, spanning more than nineteen years from September 1997 through December 2016. Moreover, he engaged in conduct that arguably constituted insurance fraud. Respondent committed all this misconduct for the pecuniary benefit of himself, his family, and other investors, operating exclusively in cash, reaping a significant profit, and then willfully evading income taxes on that very profit from at least 2010 through 2016. In fact, respondent finally admitted, during oral argument before us, after multiple prior denials during the course of these ethics proceedings, that he paid his back-tax obligations only after the ethics grievance was filed in this case. We emphasize this fact because we deduce that respondent paid his back-taxes only because he knew that Amjady had finally exposed his misconduct, which beckoned respondent's potential state and federal criminal prosecution. Despite the absence of criminal charges, such willful evasion of income taxes and the filing of false tax returns are egregious infractions under New Jersey's ethics jurisprudence.

Pursuant to the above disciplinary precedent, for the totality of respondent's misconduct, we determine that a two-year term of suspension is the quantum of discipline required to protect the public and preserve confidence in the bar.

Vice-Chair Gallipoli and Members Hoberman and Zmirich voted to recommend respondent's disbarment, citing his prolonged violations of RPC 1.7 and RPC 1.8, in connection with his business dealings with Amjady, whereby he repeatedly violated the RPCs for his and his family's pecuniary gain, as exacerbated by his repeated, willful tax evasion. Member Boyer did not participate.

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
Bruce W. Clark, Chair
For Ellen A. Brodsky

By: _____
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Howard J. Burger
Docket No. DRB 19-348

Argued: January 16, 2020

Decided: April 7, 2020

Disposition: Two-Year Suspension

Members	Two-Year Suspension	Disbar	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer				X
Hoberman		X		
Joseph	X			
Petrou	X			
Rivera	X			
Singer	X			
Zmirich		X		
Total:	5	3	0	1

Ellen A. Brodsky
Chief Counsel