SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-249
(District Docket No. VIII-2009-0011E), DRB 10-431 (formerly DRB 10-125)(District Docket No. VIII 2009-0016E), DRB 10-432 (formerly DRB 10-126) (District Docket No. VIII-2009-0025E), DRB 10-379 (District Docket Nos. VIII-2010-01E, VIII-2010-0031E, VIII-2010-0032E, and VIII-2010-0039E) DRB 11-287 (District Docket Nos. XIV-2010-0464E, XIV-2010-0038E, and XIV-2010-0039E)

IN THE MATTERS OF	:
JOHN A. TUNNEY	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 21, 2010[1]

Decided: December 21, 2011

Peter J. Hendricks appeared on behalf of the District VIII Ethics Committee.

Respondent did not appear for oral argument, despite proper notice.[2]

[1] Oral argument was held on DRB 10-249 only. The remaining cases proceeded on a default basis and were reviewed on the written record.

[2] On September 9, 2010, respondent informed Office of Board Counsel that he would be present for oral argument.

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

Nine of these ten matters were before us on certifications of default filed by either the District VIII Ethics Committee (DEC) or the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f)(2). DRB 10-249 was before us on the DEC's recommendation for a suspension of unspecified duration. For the reasons expressed below, we recommend that respondent be disbarred.

This respondent has an egregious disciplinary record. Including the current matters, he has been found guilty of ethics improprieties in a staggering number of disciplinary matters -- a total of twenty-five.

In 2003, respondent was reprimanded for mishandling four matters, three of which involved the same client. In the three matters, respondent was found guilty of gross neglect, lack of diligence, failure to communicate with the client, failure to turn over the client's files, misrepresentation of the status of the cases to the client, and failure to cooperate with disciplinary authorities. In the fourth matter, respondent failed to return the file to the client, after the termination of the representation, and failed to cooperate with ethics authorities. In addition to reprimanding respondent, the Court

required him to show proof of fitness to practice law. In re Tunney, 176 N.J. 272 (2003).

Effective October 29, 2004, respondent was suspended for six months for misconduct in six matters, including gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation, failure to promptly notify the client of the receipt of funds, failure to take steps to protect the client's interests on termination of the representation, knowing disobedience of an obligation under the rules of the tribunal, misrepresentations to three clients and to prior counsel, and conduct prejudicial to the administration of justice by requiring new counsel to seek court orders to compel respondent's surrender of the client's file. In re Tunney, 181 N.J. 386 (2004).

By order dated December 6, 2005, respondent received a concurrent six-month suspension, effective October 29, 2004, for mishandling three client matters. There, he was found guilty of gross neglect, lack of diligence, failure to adequately communicate with the clients, and failure to withdraw from the representation when his health problems materially impaired his ability to represent the clients. In re Tunney, 185 N.J. 398

(2005). Also on December 6, 2005, the Court issued an order for no additional discipline for respondent's gross neglect, lack of diligence, and failure to communicate with clients in two matters. In re Tunney, 196 N.J. 536 (2005).

By order dated December 7, 2005, respondent was reinstated to the practice of law. The order required him, for a period of two years and until further order of the Court, to practice under the supervision of a practicing attorney not associated with his law firm and approved by the OAE. On January 31, 2008, the Court discharged the proctorship requirement.

At our June 17, 2010 session, we determined to impose a one-year suspension on respondent for misconduct in two default matters. In the Matters of John A. Tunney, DRB 10-125 and DRB 10-126 (September 2, 2010) (now DRB 10-431 and 10-432). Specifically, respondent failed to turn over property to a third party in a real estate matter, failed to communicate with a client in a second real estate matter, and failed to cooperate with disciplinary authorities in both matters.

On November 29, 2010, the Court remanded the above two matters to us "to consider the issues presented by the letter from Michael D. Halbfish, Esquire, dated September 10, 2010, and to take such additional action as the Board deems appropriate, including but not limited to, directing additional investigation

and/or filing a revised decision." In a letter to the Office of Board Counsel (OBC) and to the OAE, Supreme Court Deputy Clerk Gail Haney expressed the Court's "interest in seeing that matters that are or come before the Board while the instant matter[s] [are] on remand are resolved together." In other words, the Court directed that all pending matters before us be consolidated for resolution. The Court did not retain jurisdiction.

The Court's remand was prompted by a letter from Halbfish, respondent's former law partner, complaining that respondent had forged his signature on a motion to vacate the default in DRB 10-125 and DRB 10-126. According to Halbfish, he did not "prepare, review, or authorize the response [sic], and [he] did not agree to represent [respondent]." Halbfish told the OAE that respondent had been forging his name on documents.

Halbfish's letter was not clear on whether respondent had also forged his signature on the certified mail receipt cards issued in connection with service of the complaints in DRB 10-125 and DRB 10-126. Halbfish was adamant, however, that he had given respondent "all Ethics letters that [Halbfish] received from the Post Office."

Consistent with the Court's order, by letter dated December 13, 2010 to the OAE, the OBC conveyed our direction that the OAE

"open an ethics investigation into the allegations made by Mr. Halbfish . . . and that it be completed as expeditiously as possible." The OBC's letter pointed out that, at the time, there were four consolidated defaults awaiting our review (DRB 10-379) and one other matter ready to be transmitted to the Court (DRB 10-249). The OBC informed the OAE that those matters, as well as the two on remand (DRB 10-125 and DRB 10-126), had been placed on inactive status, pending completion of the investigation into Halbfish's allegations of forgery and also pending completion of six other disciplinary matters under investigation at the time (three with the OAE and three with the DEC). On our behalf, the OBC requested that all of the pending matters be expedited for our review.

Following its investigation of Halbfish's allegations, the OAE filed a three-count complaint. Count one (District Docket No. XIV-2010-0464E) charged respondent with having forged Halbfish's signature in connection with the motion to vacate the defaults in DRB 10-125 and DRB 10-126; count two (District Docket Nos. XIV-2010-0038E and XIV-2010-0039E) charged respondent with failure to cooperate with disciplinary authorities by not submitting a written reply to the forgery allegations and either appearing at a demand audit scheduled by the OAE without the requested attorney records or not appearing

at all; and count three (District Docket Nos. XIV-2010-0038E and XIV-2010-0039E) charged respondent with failure to promptly deliver funds that two clients were entitled to receive, recordkeeping deficiencies, and negligent misappropriation of funds belonging to the two clients. The OBC docketed these matters as DRB 11-287.

Currently, respondent is temporarily suspended. In re Tunney, 205 N.J. 40 (2011). The Court order, filed on February 9, 2011, directed that all of his existing and future trust account funds "be transferred by the financial institution to the Clerk of the Superior Court, who is directed to deposit the funds in the Superior Court Trust Fund pending further Order of this Court." On March 15, 2011, the sum of $43,981.90 in trust funds was deposited in the Superior Court Trust Fund.

We now turn to the allegations of each of the complaints and to our findings. Although the facts underlying respondent's conduct in each matter and our corresponding findings will be addressed in separate headings, the fashioning of the appropriate quantum of discipline will take into account the aggregate of respondent's violations in all of the matters.

I. DRB 10-249 - THE MERGOTT MATTER (DISTRICT DOCKET NO. VIII-2009-0011E)

This matter was before us on a recommendation for a suspension of unspecified duration, filed by the DEC. The complaint charged respondent with violating RPC 1.4(b) (mistakenly cited as RPC 1.14(b)), failure to keep a client reasonably informed about the status of a matter, and RPC 8.4, presumably (c) (conduct involving dishonesty, fraud, deceit or misrepresentation). At the start of the DEC hearing, the presenter withdrew the charged violation of RPC 8.1(b) (failure to cooperate with disciplinary authorities).

The conduct that gave rise to this disciplinary matter was as follows:

In March 2008, Eileen S. Mergott retained the law firm of Tunney & Halbfish (the firm) to represent her in a consumer fraud matter against Kushner Companies, LLC, arising from water and mold damage to her residence. Mergott's initial meeting was with both respondent and Halbfish. She gave the firm a $10,000 retainer, pursuant to a fee agreement signed by Halbfish.

Mergott had three or four subsequent meetings with respondent and Halbfish, at which time they discussed her case. She understood from them that it would take two or three months before the firm would file a lawsuit on her behalf.

Between March and September 2008, Mergott did not receive any written communications from the firm about her case. On cross-examination, however, she acknowledged that her meetings with the firm, some of which lasted for several hours, "to some extent eliminated some of the need for correspondence." According to Mergott, for the first six months after she retained the firm, their "communication was [their] meetings.

In August or September 2008, Mergott began making more inquiries into the status of her case. At that time, she was advised (by whom it is not clear) that a complaint had been filed on her behalf. Specifically, she testified that she "was told not by [respondent and Halbfish], but I believe by the staff or I'm not really sure to be honest with you who I was told [sic] that there was a combination [sic], that it was filed, that the suit was filed." In fact, the complaint had not been filed.

Thereafter, Mergott made an unspecified number of attempts to communicate with either respondent or Halbfish. The firm's staff advised her that they were unavailable. Her calls were not returned.

Although Mergott had a meeting with respondent and Halbfish on October 22, 2008, at about that time she became frustrated with her inability to reach them. In October or November 2008,

she went to the firm's office and requested a copy of her file, which she was given. A staff member advised her that there was a copy of a complaint in her file, but that it had not been filed with the court. Mergott was not given a copy of the complaint.

In late November 2008, Mergott retained another attorney, Lawrence B. Sachs. Sachs wrote a letter to Halbfish, dated December 1, 2008, terminating the firm's representation of Mergott, requesting a copy of her file, and seeking the return of her $10,000 retainer. Sachs did not receive a reply to his letter.

Three days after the date of Sachs' letter, December 4, 2008, the firm filed the complaint on Mergott's behalf. The R. 4:5-1 certification accompanying the complaint, which was signed by Halbfish, is dated November 19, 2008. The record does not indicate when it was mailed.

The firm did not advise Mergott that the complaint had been filed. At an undisclosed time, Sachs learned that the complaint had been filed.

When asked why the firm had filed the complaint after Mergott had requested her file, Halbfish replied that there is a difference between a client's request for a copy of the file and a request for the file itself. He claimed that, when Mergott requested a copy of the file, he thought that she wanted to

maintain her records and did not realize, when she came to the office, "that that was it."

On December 17 and December 19, 2008, Sachs wrote additional letters to Halbfish, reiterating his request for Mergott's file and for the return of her retainer. Following that letter, respondent called Sachs and informed him that the file was forthcoming. Sachs did not receive the file, however. He then sent a fourth letter, this time to respondent and Halbfish, dated January 20, 2009.[3] In April 2009, the firm returned the $10,000 to Mergott.

As to the reason for the delay in returning the funds, Halbfish explained that the file had been misplaced. He added that, because the firm had moved and was having problems with its mail delivery, he and Tunney were not receiving court notices and were finding themselves in emergent situations that needed to be addressed.

Both respondent and Halbfish testified that the complaint had not been filed until December 2008 because Mergott had moved to another apartment. In addition, because repairs were being made, inspections were being performed, and the builder, Kushner, was paying Mergott's rent, it would have been "premature" to file the complaint. According to Halbfish, at the

[3] Only a part of the January 20, 2009 letter is in the record. Sachs' letters were also "faxed" to the firm's office.

time that the complaint was filed, the situation had become emergent because Mergott believed that Kushner was going to stop the payment of her rent.

It is not clear why the firm did not advise Mergott that the complaint had been filed. The following exchange took place between Halbfish and the hearing panel chair:

> [Panel Chair]: After you filed this case which at least it went in some time in November. It was filed for [sic] December and at this point you got numerous letters from Mr. Sachs. Why didn't you at that point communicate with Ms. Mergott that this had been filed?
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> [Halbfish]: We had been relieved of counsel.
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> [Panel Chair]: But you still filed the case so you had an obligation to tell her it was filed. Why didn't you tell her it was filed?
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> [Halbfish]: I didn't realize the status of this at that time to tell her. I left things in a prepared state with my staff, but I didn't realize at the time that I had to raise these issues. I also thought we were turning over our full file and I didn't think that there would be any issue as to this and she independently learned about it rather quickly also because her correspondence made note of it which completely eliminated any need when the court notices started coming in.
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> [T75-13 to T76-10.][4]

[4] "T" denotes the transcript of the DEC hearing on April 29, 2010.

The original draft of the complaint indicated that it would be filed in Middlesex County. It was filed in Essex County. Mergott was unaware that the complaint would not be filed in Middlesex County. Halbfish testified that, because Kushner has a large presence in Middlesex County, there was a concern over the company's influence. Thus, he claimed, filing outside of the county would be prudent.

The firm's file contained a track assignment notice, dated December 10, 2008. As of the date of the DEC hearing, the firm remained as attorneys of record. Mergott did not pursue her lawsuit further.

The DEC found that, in addition to the charged violations of failure to communicate with Mergott (RPC 1.4(b)) and misrepresentation (RPC 8.4(c)) by allowing Mergott to believe that the complaint had been filed and by filing the complaint in Essex County without her knowledge, respondent was guilty of gross neglect (RPC 1.1(a)), pattern of neglect (RPC 1.1(b)), lack of diligence (RPC 1.3), failure to advise a client as to how, when and where the client can communicate with the attorney (RPC 1.4(a)), and (failure to cooperate with disciplinary authorities (RPC 8.1(b)).

Although the DEC believed that a reprimand was appropriate, it recommended that the reprimand be upgraded to a suspension

because of respondent's disciplinary history. As indicated previously, the DEC did not specify the length of the suspension.

Following a de novo review of the record, we find that some of the DEC's findings that respondent's conduct was unethical were supported by clear and convincing evidence. Other findings, however, bore no relation to the charges against respondent and, as such, cannot be sustained.

As noted above, the presenter withdrew the allegation that respondent violated RPC 8.1(b). Accordingly, a finding of a violation of RPC 8.1(b) would be inappropriate. Also, because respondent was not charged with violating RPC 1.1(a), RPC 1.1(b), and RPC 1.3, those charges cannot be sustained. R. 1:20-4(b) requires the complaint to set forth "sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated."

With regard to the DEC's finding that respondent violated RPC 1.4(a) "for failing to keep Complainant Mergott reasonably informed about the status of the filing of her lawsuit," that misconduct is more properly a violation of RPC 1.4(b), as seen below. Moreover, respondent was not charged with violating RPC 1.4(a). We, therefore, dismiss that finding.

We also dismiss the DEC's findings that respondent made misrepresentations to Mergott by allowing her to believe that the complaint had been filed and by filing the complaint in Essex County, without her knowledge. There is no clear and convincing evidence of such improprieties. There is no proof that respondent himself told Mergott that the complaint had been filed. Furthermore, the failure to inform Mergott that the complaint would be filed in a different venue would not be a misrepresentation but, more properly, a failure to advise her of a litigation tactic.

The DEC further found that respondent violated RPC 1.4(b) by failing to forward Mergott's file, following her request. We are unable to agree with that finding. Setting aside the fact that Mergott already had the bulk of her file, the failure to turn over client property, after the representation has ended, is a violation of RPC 1.16(d), with which respondent was not charged.

What is clear from this record is that the communication that Mergott received from the firm was inadequate. She did not understand what was being done on her behalf. Although respondent and/or Halbfish had meetings with Mergott, the record reveals that, at some point, she no longer understood the posture of her case. Despite their meetings, Mergott was entitled to be informed of the status of her case. Moreover,

Mergott (or Sachs) should have been advised when the complaint was filed. We find, thus, that respondent violated RPC 1.4(b). That is the sole finding established by clear and convincing evidence. An aggravating factor was respondent's failure to appear for oral argument before us, after having informed the OBC that he would be present.

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Gerald M. Saluti, Jr., DRB 07-117 (June 22, 2007) (attorney failed to communicate with the representatives of an incarcerated client); In the Matter of Edward G. O'Byrne, DRB 06-175 (October 27, 2006) (attorney did not inform his client about court-imposed costs against the client and delayed notifying him of a motion subsequently filed by the adversary for the collection of those costs); In the Matter of Alan Zark, DRB 04-443 (February 18, 2005) (attorney did not reply to the clients' requests for information about their matter; in addition, the attorney caused his clients unnecessary concern over the disposition of some checks to be transmitted to a court-appointed fiscal agent when the attorney turned over the checks to the agent six months later without first notifying the clients); and In the Matter of William H. Oliver, DRB 04-211 (July 16, 2004) (attorney failed to keep client apprised of

developments in her matter, including a sheriff's sale of her house). But see In re Wolfe, 170 N.J. 71 (2001) (failure to communicate with client; reprimand imposed because of the attorney's ethics history: an admonition, a reprimand, and a three-month suspension).

II. DRB 10-431 (FORMERLY DRB 10-125) - THE PEÑALOZA MATTER (DISTRICT DOCKET NO. VIII-2009-0016E) [5]

Service of process was proper in this matter. On June 11, 2009, the DEC mailed a copy of the complaint to 245 Main Street, Woodbridge, New Jersey, 07095, by certified and regular mail, on June 11, 2009. Allegedly, a few months before (February 2009), respondent had relocated his office to 208 Main Street, Woodbridge, New Jersey, 07095. Nevertheless, the regular mail was not returned. The certified mail was returned as unclaimed.

On July 15, 2009, the DEC mailed a copy of the amended complaint to the 245 Main Street address, by certified and regular mail. Although, by then, respondent's office address was allegedly 208 Main Street, the certified mail was received, as evidenced by the signature of respondent's then law partner,

[5] This and the other eight matters addressed below were before us on certifications of default filed pursuant to R. 1:20-4(f)(2), following respondent's failure to file answers to the formal ethics complaints.

Michael Halbfish.[6] The record is silent about the regular mail.

On September 30, 2009, the DEC sent a letter to the 208 Main Street address, via certified and regular mail, notifying respondent that, if he did not file an answer within five days of the date of the letter, the OAE could seek his immediate temporary suspension and the record would be certified directly to us for the imposition of sanction. Although the record is silent about the regular mail, respondent himself signed the certified mail receipt, on October 13, 2009.

Respondent did not file an answer to the complaint.

When this matter was scheduled for our review as a default, the OBC caused a notice to be published in the New Jersey Law Journal, on May 31, 2010. The notice stated that our review would take place on June 17, 2010 and that, if respondent wished to file a motion to vacate the default, he would have to do so before June 7, 2010.

On June 7, 2010, the OBC received said motion, purportedly filed by Halbfish. The DEC filed an objection to the motion, which we denied.

In essence, the motion alleged that, as a result of recent

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[6] As seen below (DRB 11-287), respondent forged Halbfish's signature on a motion to vacate the default in this matter and the matter under former DRB 10-126. There is no allegation that respondent forged Halbfish's signature on the certified mail card.

"major problems" with mail delivery, respondent had not received the mail "in a timely manner." The motion also alleged that the formal ethics complaint in another matter (District Docket No. VIII-2009-0025E) listed respondent's office address as 300 Kimball Street, Woodbridge, New Jersey 07095, and that he had not been at that location since September 30, 2004, when the office moved to 245 Main Street, Woodbridge, New Jersey, 07095.[7] According to respondent's certification in support of the motion, the office moved again, in February 2009, this time to 208 Main Street, Woodbridge, New Jersey 07095, respondent's current address.

In his certification, respondent alleged that, upon moving from 245 Main Street in January 2009, the office had filed a forwarding address with the United States Postal Service, directing that all mail addressed to 245 Main Street be forwarded to the firm's P.O. Box. He claimed, however, that not all mail was timely forwarded. He attached letters from the Woodbridge Postmaster, confirming the delays. Those letters were dated April, May, and August 2009. In his certification, respondent asserted that he would have filed answers, had he received copies of the ethics complaints.

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[7] Respondent was mistaken. The complaint in VIII-2009-0025E listed his current address. The 300 Kimball Street address was listed in the complaint in this matter.

The brief in support of the motion, purportedly filed by Halbfish, stated that "Mr. Tunney never received the complaints." Respondent made such a claim, despite having personally been served with the DEC's "five-day letter" (and, as it was recently discovered, despite having signed Halbfish's name on the certified mail card that accompanied service of the complaint). That being the case, we concluded that respondent's statement (on his behalf and, as it turned out, on behalf of Halbfish) that he had not received a copy of the complaint was false.

In reviewing respondent's motion, we noted that, for a motion to vacate a default to succeed, a respondent must satisfy a two-prong requirement: (1) there must be a reasonable excuse for the failure to file the answer and (2) there must be meritorious defenses to the charges. On the basis of respondent's failure to satisfy the first prong alone, we denied his motion.

The facts alleged in the complaint are as follows:

The grievant in this matter, William T. Harth, represented Luis Peñaloza in the purchase of property owned by Jorge Guerrero, respondent's client. The contract of sale was dated December 13, 2007. Peñaloza paid a $500 initial deposit, which, Harth eventually learned, was deposited in respondent's trust account.

On April 2, 2008, Harth notified respondent that the seller, Guerrero, had breached the contract as a result of his inability to convey clear title. Harth demanded the return of the $500 deposit, along with damages suffered by Peñaloza.

There ensued discussions between the two lawyers about the possibility of resolving the title problem. Several letters were exchanged between the two offices. Presumably, the issue could not be resolved, because, on July 15, 2008, Harth advised respondent that this was a "dead deal," despite the best efforts of his office and of the title company. Harth requested the return of the $500 deposit and, in addition, $1,054 for his client's out-of-pocket costs for the survey and title search.

On September 3 and October 15, 2008, Harth again demanded the payment of the above amounts. Harth also questioned respondent's failure to reply to his demands. He complained that respondent had ignored all his correspondence and phone calls, as well as those of his secretary and the title company representative. "Reluctantly," Harth filed a grievance against respondent, in February 2009. Harth informed the DEC that respondent had not communicated with him for "over a year" and had not returned his client's deposit.

On April 28, 2009, the DEC investigator sent respondent a copy of the grievance and requested that he contact the

investigator within ten days of his receipt of the letter. Respondent did not comply with the investigator's request.

The complaint charged respondent with gross neglect (RPC 1.1(a)), lack of diligence (RPC 1.3), failure to communicate with Harth (RPC 1.4, no paragraph cited), failure to promptly deliver funds that a third party was entitled to receive (RPC 1.15(b)), and failure to cooperate with the DEC's investigation of the grievance (RPC 8.1(b)).

The failure of a respondent to file an answer shall be 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). Nevertheless, the complaint must contain a sufficient factual basis for the charged violations to be sustained. Here, only the RPC 1.15(b) and RPC 8.1(b) charges are supported by the facts recited in the complaint. Nothing in the complaint supports the conclusion that respondent grossly neglected his client's case or lacked diligence in the representation. Therefore, we dismiss the charges that respondent violated RPC 1.1(a) and RPC 1.3.

Similarly, we find no violation of RPC 1.4 (presumably (b)). That rule addresses an attorney's failure to communicate with a client, not with an attorney who represents the other party, as in this case.

Respondent, however, violated RPC 1.15(b) when he did not return to Peñaloza the $500 deposit that he was holding in trust. After Hart declared the contract breached for Guerrero's failure to deliver marketable title, after a series of letters between Hart's and respondent's offices about correcting the problem failed to yield positive results, and after respondent apparently failed to assert his client's entitlement to the deposit for whatever reason -- or at least an objection to Hart's position -- respondent should have returned the $500 to Peñaloza. Although it is not apparent that Peñaloza was legally entitled to $1,054 for survey and title search expenses, he was entitled to receive his $500 deposit, once the transaction was cancelled.

By failing to promptly refund the Peñaloza deposit, respondent violated RPC 1.15(b). He also violated RPC 8.1(b), when he did not comply with the ethics investigator's request for information about the grievance.

Ordinarily, failure to promptly deliver funds to which a client or a third party is entitled results in an admonition, even if accompanied by other, non-serious violations. See, e.g., In the Matter of David J. Percely, DRB 08-008 (June 9, 2008) (for three years attorney did not remit to client the balance of settlement funds to which the client was entitled, a violation

of RPC 1.15(b); the attorney also lacked diligence in the client's representation, failed to cooperate with the investigation of the grievance, and wrote a trust account check to "cash," violations of RPC 1.3, RPC 8.1(b), and R. 1:21-6(c)(1)(A); significant mitigation presented, including the attorney's unblemished twenty years at the bar); In the Matter of Anthony Giampapa, DRB 07-178 (November 15, 2007) (attorney did not promptly disburse to a client the balance of a loan that was refinanced; in addition, the attorney did not adequately communicate with the client and did not promptly return the client's file; violations of RPC 1.15(b), RPC 1.4(b), and RPC 1.16(d)); In the Matter of Walter A. Laufenberg, DRB 07-042 (March 26, 2007) (following a real estate closing, attorney did not promptly make the required payments to the mortgage broker and the title insurance company; only after the mortgage broker sued the attorney and his client did the attorney compensate everyone involved; violations of RPC 1.1(a) and RPC 1.15(b)); and In the Matter of Gordon Allen Washington, DRB 05-307 (January 26, 2006) (for a seven-month period attorney did not disburse the balance of escrow funds that a party to a real estate transaction was entitled to receive; the attorney also lacked diligence in addressing the problem once it was brought to his attention).

In addition, respondent failed to cooperate with the investigation of the grievance. An admonition is the usual form of discipline for that infraction. See, e.g., In re Ventura, 183 N.J. 226 (2005) (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the district ethics committee investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to the district ethics committee's requests for information about two grievances); and In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous communications regarding a grievance).

III. DRB 10-432 (FORMERLY DRB 10-126) - THE TSAU MATTER (DISTRICT DOCKET NO. VIII-2009-0025E)

Service of process was proper in this matter. On August 27, 2009, the DEC sent a copy of the complaint to 245 Main Street, Woodbridge, New Jersey, 07095, via certified and regular mail. On August 28, 2009, the certified mail receipt was purportedly signed by Halbfish (as we now know, it was signed by respondent

himself). The record is silent about the regular mail.

When respondent did not file an answer within the prescribed twenty-one days, the DEC sent a letter to 208 Main Street, Woodbridge, New Jersey, 07095 on September 30, 2009, an address to which, respondent alleged, his office had been relocated in February 2009. The letter notified respondent that, if he did not file an answer within five days of the date of the letter, the OAE could file a motion for his temporary suspension and, in addition, the record would be certified directly to us for the imposition of sanction. Respondent signed the certified mail card on October 13, 2009. He did not file an answer to the complaint.

As in DRB 10-125 (now DRB 10-431), when this matter was scheduled for our review, the OBC caused a notice to be published in the New Jersey Law Journal, on May 31, 2010. The notice stated that our review would take place on June 17, 2010 and that any motion to vacate the default would have to be filed before June 7, 2010.

As mentioned previously, the OBC received a motion purportedly filed by Halbfish but that, as it was later revealed, had been prepared and filed by respondent himself, unbeknownst to Halbfish. Respondent affixed Halbfish's name and signature to the motion, without Halbfish's consent and knowledge.

In a "strong opposition" to the motion, the DEC investigator alluded to respondent's "material misrepresentations" to us, namely, that respondent had not been served with the complaint. The investigator asserted that to him, too, respondent had lied. When, on October 16, 2009, the investigator had a phone conversation with respondent, respondent denied having received the complaint. According to the investigator, he was "astounded" by respondent's statement, given the clear evidence of personal service on respondent.

As to respondent's asserted "defense," in his motion, that he had returned an escrow to the client, the investigator noted that assertion was untrue. On June 8, 2010, the investigator spoke to the client, who denied having received the escrow. The investigator remarked that "Respondent's sworn statement to the contrary causes great concern."

As indicated previously, we denied the motion on the ground that respondent had failed to satisfy the first prong of the test, that is, provide a reasonable excuse for his failure to answer the complaint. We found it unnecessary to reach the merits of respondent's alleged defenses.

According to the ethics complaint, Shih-Horng Tsau, the grievant in this matter, retained respondent in connection with the purchase of a condominium unit in Eatontown, New Jersey. The

closing took place on September 26, 2008. Since that date, respondent has been holding $1,533.32 in escrow, apparently to pay the 2008 fourth quarter taxes.

During Tsau's own investigation as to why he had not received the escrow or as to whether the taxes had been paid, he learned that, because the property was new construction, the 2008 fourth quarter taxes were going to be combined with the 2009 tax bill. Tsau, therefore, believed that the $1,500 should have been returned to him, inasmuch as it did not have to be turned over to the tax office until 2009.

On January 30, 2009, Tsau sent a letter to respondent, requesting that the $1,500 be either released to him or forwarded to his tax escrow account with JP Morgan & Company. According to the complaint, as of March 2, 2009, respondent had done neither.[8] In addition, Tsau's efforts to communicate with respondent have been unsuccessful.

Eventually, Tsau filed a grievance against respondent because "all efforts to resolve the escrow account for taxes have gone unaddressed, unanswered and otherwise neglected." On three occasions, March 12, May 18, and June 22, 2009, the DEC mailed a copy of the grievance to respondent and requested his

[8] In his opposition to respondent's motion to vacate the default, the DEC investigator asserted that he had spoken to Tsau, on June 8, 2010, at which time he had been informed that respondent had not yet returned the funds to Tsau.

written reply. Respondent ignored those requests.

The complaint charged respondent with gross neglect (RPC 1.1(a)), failure to communicate with the client (RPC 1.4(b)) and failure to cooperate with disciplinary authorities (RPC 8.1(b)).

The failure of a respondent to file an answer shall be 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). In this matter, the complaint alleged sufficient facts to support the charges of failure to communicate with the client and failure to cooperate with the ethics investigation, violations of RPC 1.4(b) and RPC 8.1(b). It is not so clear to us that the facts recited in the complaint sustain a finding of gross neglect (RPC 1.1(a)).

In late September 2008, respondent held in escrow $1,500 for the payment of the 2008 fourth quarter taxes on Tsau's condominium. As of March 2, 2009, he had not paid the taxes. According to the complaint, the 2008 taxes were due together with the 2009 taxes. Because the record does not reveal precisely when the taxes were due, it cannot be found that respondent's failure to pay them as of March 2009 constituted gross neglect.

On the other hand, respondent should have complied with Tsau's requests for the return of the funds, rather than ignore

Tsau's letter and phone calls. Unquestionably, thus, he violated RPC 1.4(b). He also violated RPC 8.1(b) for his failure to reply to three letters from the DEC, requesting information about the grievance.

Typically, attorneys who fail to adequately communicate with their clients are admonished. See, e.g., In the Matter of Gerald M. Saluti, Jr., DRB 07-117 (June 22, 2007) (attorney failed to communicate with the representatives of an incarcerated client); In the Matter of Edward G. O'Byrne, DRB 06-175 (October 27, 2006) (attorney did not inform his client about court-imposed costs against the client and delayed notifying him of a motion subsequently filed by the adversary for the collection of those costs); In the Matter of Alan Zark, DRB 04-443 (February 18, 2005) (attorney did not reply to the clients' requests for information about their matter; in addition, the attorney caused his clients unnecessary concern over the disposition of some checks to be transmitted to a court-appointed fiscal agent when the attorney turned over the checks to the agent six months later, without first notifying the clients); and In the Matter of William H. Oliver, DRB 04-211 (July 16, 2004) (attorney failed to keep client apprised of developments in her matter, including a sheriff's sale of her house). On the other hand, if the attorney has a disciplinary

record, failure to communicate alone may lead to the imposition of a reprimand. See, e.g., In re Wolfe, 170 N.J. 71 (2001) (failure to communicate with client; reprimand imposed because of attorney's ethics history: an admonition, a reprimand, and a three-month suspension).

In addition to failing to adequately communicate with his client, respondent did not cooperate with the DEC investigation of the grievance, a violation that ordinarily leads to an admonition. See, e.g., In re Ventura, 183 N.J. 226 (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); In the Matter of Kevin R. Shannon, DRB 04-512 (June 22, 2004) (attorney did not promptly reply to the district ethics committee investigator's requests for information about the grievance); and In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to the district ethics committee's requests for information about two grievances).

At times, the combination of failure to cooperate with disciplinary authorities and failure to communicate with clients may still lead to the imposition of only an admonition. See, e.g., In the Matter of Todd E. Schoenwetter, DRB 07-348 (February 1, 2008) (attorney failed to cooperate with the investigation of the grievance and failed to communicate with the client).

IV. DRB 10-379 - THE PEROTTI, LUZURIAGA, MCDONOUGH, AND GRINBLAT MATTERS (DISTRICT DOCKET NOS. VIII-2010-0001E, VIII-2010-0031E, VIII-2010-0032E, AND VIII-2010-0039E)

The charges in these matters were consolidated in a single formal ethics complaint that charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with client, inadvertently cited as RPC 1.14(b)), and RPC 8.1(b) (failure to cooperate with disciplinary authorities) in all four matters.

Service of process was proper in these matters. On June 30, 2010, the DEC secretary sent a copy of the complaint, via regular and certified mail, to respondent's office address, 208 Main Street, Woodbridge, New Jersey 07095. The certified mail receipt card was purportedly signed by respondent's then law partner, Halbfish, on July 7, 2010. The certification is silent about the regular mail.

As mentioned in DRB 10-431 (formerly DRB 10-125) and DRB 10-432 (formerly DRB 10-126), Halbfish did not allege that respondent had forged his signature on certified mail cards, only in the motion papers. Indeed, the complaint that arose out of Halbfish's claim of forgery did not charge respondent with having signed Halbfish's name to the certified mail cards. In his letter to the Court, Halbfish asserted that he had given

respondent "all ethics letters" that he had received from the Post Office.

Respondent did not file an answer to the complaint.

On August 11, 2010, the DEC secretary sent a letter to the same address, via regular and certified mail, notifying respondent that, if he did not file an answer within five days, the allegations of the complaint would be deemed admitted, he could be immediately temporarily suspended from the practice of law, the record would be certified to us for the imposition of sanction, and the complaint would be amended to charge him with a violation of RPC 8.1(b). Once again, the certified mail receipt card was returned with Halbfish's purported signature. The certification is silent about the regular mail.

Respondent did not file an answer to the complaint.

1. **The Perotti Matter (First Count) (District Docket No. VIII-2010-0032E)**

According to the complaint, in 2008, Henry Perotti, the grievant, retained respondent to represent him in connection with a fall at the Greenbrier At Whittingham. Perotti's subsequent calls to respondent went unanswered. Also, neither respondent nor his staff provided Perotti with information about his case.

For approximately six months prior to March 23, 2010, Perotti called respondent to inform him that he would be hiring another lawyer, if he did not hear from respondent. Presumably, respondent ignored Perotti's pleas for information about his case, inasmuch as Perotti did retain another attorney, Willard Geller.

On January 28, 2010, Perotti sent a letter to respondent's prior mailing address, 245 Main Street, Woodbridge, New Jersey, informing him that he no longer wished to be represented by respondent and requesting that his file be turned over to Geller. On February 3, 2010, Geller, too, sent a letter to respondent, asking for the Perotti file. Respondent must have ignored those requests, because, on February 19, 2010, Geller sent him a fax referencing the two prior letters. He heard nothing from respondent.

On two subsequent occasions, May 5 and May 21, 2010, Geller reiterated his requests for the file, to no avail. All told, respondent did not communicate with Perotti for two and a half years.

Respondent also did not comply with the DEC investigator's requests for a reply to the grievance, made by letters dated April 26 and May 18, 2010.

The first count of the complaint charged respondent with gross neglect and lack of diligence (RPC 1.1(a) and RPC 1.3), as "it [] appears, without any information from the Respondent,

that he failed to file a Complaint on [Perotti]'s behalf" and "it appears that the Respondent clearly did not act diligently and promptly in representing his client in providing any information to [Perotti] relative to the status of his claim."

The first count also charged respondent with a pattern of neglect (RPC 1.1(b)), based on his gross neglect in this matter and other instances of neglect in respondent's prior disciplinary matters.

Finally, the first count charged respondent with failure to communicate with his client (RPC 1.4(b)) and failure to cooperate with disciplinary authorities (RPC 8.1(b)).

2. The Luzuriaga Matter (Second Count) (District Docket No. VIII-2010-0001E)

According to the complaint, Merly Luzuriaga retained respondent's services in connection with an automobile accident that occurred in November 2002.

On numerous times over the next several years, Luzuriaga asked respondent about the status of her case. Respondent repeatedly assured her that "everything was going to be fine." Throughout this period, Luzuriaga received little, if any, written communications from respondent. Her numerous phone calls to respondent went unanswered. Altogether, respondent failed to

communicate with her for seven and a half years.

Later, Luzuriaga discovered that she was being sued by various medical providers. She then immediately retained the law firm of Garces and Grabler and so informed respondent. Despite the Garces firm's efforts to obtain a copy of Luzuriaga's file, nothing was ever provided to it.

The DEC investigator's inquiry to the court about Luzuriaga's case revealed that respondent had not filed a complaint as of June 2010.

Here, too, respondent failed to provide a reply to the grievance, despite the DEC investigator's three requests therefor, dated January 19, April 21, and May 18, 2010.

The second count of the complaint charged respondent with gross neglect (RPC 1.1(a)), lack of diligence (RPC 1.3), a pattern of neglect (RPC 1.1(b)), failure to communicate with the client (RPC 1.4(b)), and failure to cooperate with disciplinary authorities (RPC 8.1(b)).

3. The McDonough Matter (Third Count) (District Docket No. VIII-2010-0031E).

According to the complaint, Eileen McDonough hired respondent to represent her in the purchase of a house in Avenel, New Jersey. After the January 2009 closing, some water damage problems arose,

necessitating repairs in the amount of $13,000. McDonough's numerous attempts to reach respondent about help with a potential claim against the sellers were unsuccessful.

At a meeting on June 1, 2009, respondent asked McDonough to send him pictures depicting the water damage to the house. McDonough did so on June 3, 2009. On June 4, 2009, when she called respondent's office to verify his receipt of the pictures, her call was not returned. Likewise, she received no call back on June 6, 2009, when she left a detailed message for respondent, asking whether he was going to help her with the water damage claim. Her numerous calls in the ensuing weeks were also ignored.

On March 15, 2010, McDonough contacted respondent's office one more time to find out the sellers' address, so that she could pursue a small claims action against them. Respondent's failure to favor McDonough with the sellers' new address prevented her from filing a claim against them.

As in the prior two matters, respondent did not furnish the DEC investigator with a reply to the grievance, as requested in letters dated April 26 and May 18, 2010.

The third count of the complaint alleged that respondent grossly neglected McDonough's case (RPC 1.1(a)), lacked diligence in representing her interests (RPC 1.3), displayed a

pattern of neglect (RPC 1.1(b)), failed to communicate with her (RPC 1.4(b)), and failed to cooperate with disciplinary authorities (RPC 8.1(b)).

4. The Grinblat Matter (Fourth Count (District Docket No. VIII-2010-0039E)

According to the complaint, in September 2006, Shela Grinblat (Grinblat) retained respondent to represent her in a claim for injuries arising out of a motor vehicle accident that occurred in August 2006. Grinblat was a passenger in a car driven by her husband, Semyon Grinblat. Richard Catena was the driver of the vehicle that collided with the Grinblats' car.

Initially, both Grinblat and her husband consulted with respondent, who told them that he would be representing both. Only Grinblat signed a retainer agreement, however. Months later, respondent told the Grinblats that he could not represent both. Semyon was represented by another lawyer.

Following that initial consultation, Grinblat and her adult son, on her behalf, called respondent approximately forty times. Respondent never returned those calls. Grinblat also wrote a letter to respondent, on May 11, 2009, demanding to be apprised of the status of her case. Respondent did not reply to that letter.

Later, through correspondence from her husband's attorney,

Grinblat found out that her complaint had been dismissed with prejudice, on June 26, 2009. According to the ethics complaint, Grinblat thereafter "vigorously pursued all avenues available to her and was alone able to recreate the following history of her own case:" On March 20, 2008, respondent served the complaint and, on the same day, was served with a notice to produce by Catena's counsel. On June 23, 2008, respondent was served with an answer and discovery demands by Semyon's lawyer. Although respondent provided discovery answers, Semyon's lawyer later requested more specific answers to interrogatories, which respondent never supplied. Similarly, respondent never gave signed HIPAA authorizations to either Semyon's or Catena's lawyers, as requested. On January 23 and April 3, 2009, respectively, Grinblat's complaint was dismissed without prejudice for failure to comply with discovery requests by Catena's and Semyon's lawyers. Although Semyon's lawyer sent a copy of the dismissal order to respondent, respondent never filed a motion to vacate the order or made any efforts to cure the discovery deficiencies. On April 17 and June 26, 2009, respectively, the court dismissed, with prejudice, Grinblat's claims against Catena and Semyon.

The complaint alleged that Grinblat is barred from pursuing her claim because of respondent's gross neglect.

Respondent failed to provide the DEC investigator with a reply to the grievance, as requested by letters dated May 3 and May 18, 2010.

The fourth count of the complaint charged respondent with gross neglect (RPC 1.1(a)), a pattern of neglect (RPC 1.1(b)), lack of diligence (RPC 1.3), failure to communicate with the client (RPC 1.4(b)), and failure to cooperate with disciplinary authorities (RPC 8.1(b)).

The failure of a respondent to file an answer shall be 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).

Respondent's failure to either apprise his clients of the progress of their cases or to comply with their requests for information was glaring. Perotti called respondent for approximately six months to inform him that he would be retaining another lawyer, if he did not hear from respondent. Respondent stood silent. His failure to communicate with Perotti spanned a period of two and a half years. Luzuriaga, too, was kept in the dark for an extended period, seven and a half years. Respondent's indifference to his clients' pleas for information about their cases continued. Grinblat placed no fewer than forty calls to his office, to no avail.

Respondent also failed to handle Perotti's, Luzuriaga's, and Grinblat's cases with diligence and, in fact, grossly neglected them. He did not file a complaint in Perotti and Luzuriaga; in Grinblat, his failure to comply with discovery demands caused the complaint against two defendants to be first dismissed without prejudice and then with prejudice. It also caused Grinblat to be barred from pursuing her claim. Respondent's neglect of the three cases also constituted a pattern of neglect.

Respondent's unconcern for his clients' requests for information also extended to the volunteer members of the disciplinary system. In each of the above four matters, the DEC investigator sent two letters to respondent, seeking information about the grievance. Respondent paid no heed to them.

Finally, in two of the matters, Perotti and Luzuriaga, respondent disregarded the clients' and their new attorneys' requests for the return of the files. Such conduct violated RPC 1.16(d) (failure to protect the client's interests upon termination of the representation). Although the complaint did not cite an RPC for that conduct, the facts recited in the complaint gave respondent ample notice of a potential finding of a violation of RPC 1.16(d). Therefore, there will be no due process violation in finding that respondent's failure to release the file to the

clients or their attorneys was unethical.

The only charges that are not supported by the facts recited in the complaint are that respondent grossly neglected the McDonough case, lacked diligence in representing her interests, and failed to properly communicate with her. Although it is true that McDonough's attempts to ascertain whether respondent had received pictures of the water damage to her house and whether he had an address for the sellers were unavailing, respondent's representation ended with the closing of title. It is not so clear that respondent's subsequent request for evidence of the water damage constituted acceptance of the pursuit of McDonough's claim against the sellers.

When an attorney displays a pattern of neglect, a reprimand ordinarily ensues. See, e.g., In re Tyler, 204 N.J. 629 (2011) (consent to reprimand; in six bankruptcy matters the attorney was guilty of gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients; in one matter the attorney communicated with a client represented by counsel; mitigation included the attorney's lack of a disciplinary history and her health and mental problems at the time of her misconduct); In re Gellene, 203 N.J. 443 (2010) (attorney guilty of gross neglect, pattern of neglect, and lack of diligence; the attorney failed to timely file three appellate briefs, failed to

communicate with his client in two of the matters and failed to appear on the return date of an order to show cause without notifying the court that he would not appear, which was considered conduct prejudicial to the administration of justice; aggravating factors included his ethics history: two private reprimands and an admonition; mitigating factors considered were his financial problems, depression, and serious personal problems); In re Weiss, 173 N.J. 323 (2002) (lack of diligence, gross neglect, and pattern of neglect); In re Balint, 170 N.J. 198 (2001) (in three matters, attorney engaged in lack of diligence, gross neglect, pattern of neglect, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (lack of diligence, failure to communicate in a number of cases handled on behalf of an insurance company, gross neglect, and pattern of neglect).

Even in the absence of a pattern of neglect, an attorney's disciplinary record serves to aggravate discipline that otherwise might be appropriate for the found ethics infractions. See, e.g., In re Giampapa, 195 N.J. 10 (2008) (censure for attorney who, in one client matter, exhibited gross neglect, lacked diligence, failed to communicate with the client, and failed to cooperate with disciplinary authorities; two prior private reprimands and an admonition; the censure was elevated

from a reprimand because of the attorney's pattern of failure to cooperate with disciplinary authorities).

If the matter proceeds as a default, the appropriate discipline will be enhanced to reflect the attorney's failure to file an answer to the ethics complaint. See, e.g., In re Oxfeld, 200 N.J. 268 (2009) (censure for attorney who failed to file suit on her client's behalf and failed to comply with the client's requests for information about the case; two prior admonitions and a reprimand); In re Banas, 194 N.J. 504 (2008) (censure for attorney guilty of lack of diligence and failure to communicate with a client for whom he was handling two separate matters; the censure was premised on the attorney's conduct, the default nature of the proceedings, and the attorney's disciplinary record - a reprimand and a three-month suspension, the latter also a default); In re Clemmons, 169 N.J. 477 (2001) (three-month suspension for attorney who grossly neglected a matter, failed to act with diligence, failed to communicate with the client and failed to cooperate with disciplinary authorities; the attorney had a prior six-month suspension); In re Daly, 166 N.J. 24 (2001) (three-month suspension for attorney guilty of lack of diligence and failure to communicate with client; prior three-month suspension); In re Davidson, 204 N.J. 175 (2010) (six-month suspension for attorney found guilty of

gross neglect, lack of diligence, failure to communicate with the client, failure to expedite litigation, and failure to cooperate with disciplinary authorities; the attorney's ethics history included a three-month suspension, a reprimand, a temporary suspension, and a six-month suspension; the matter was the attorney's second default); and In re Walsh 196 N.J. 161 (2008) (six-month suspension for attorney guilty of failure to communicate with the client and failure to cooperate with disciplinary authorities; the attorney failed to inform his client of two court orders in a child custody case and failed to reply to the client's numerous telephone calls; the attorney had a prior reprimand for similar misconduct and a censure for failure to cooperate with disciplinary authorities; the six-month suspension was based on the attorney's ethics infractions, ethics history, and continuing disregard for the ethics system).

V. DRB 11-287 - THE HALBFISH FORGERY MATTER (FIRST COUNT) (DISTRICT DOCKET NO. XIV-2010-0464E), THE FAILURE TO COOPERATE WITH DISCIPLINARY AUTHORITIES MATTER (SECOND COUNT) (DISTRICT DOCKET NOS. XIV-2010-0038E AND XIV-2010-0039E), THE NEGLIGENT MISAPPROPRIATION MATTER (THIRD COUNT) (DISTRICT DOCKET NOS. XIV-2010-0038E AND XIV-2010-0039E).

Service of process was proper in these matters. On May 31, 2011, the OAE sent a copy of the complaint to respondent's last office address, 208 Main Street, Woodbridge, New Jersey, 07095,

and his home address, 330 Peter Forman Drive, Freehold, New Jersey, 07728, by regular and certified mail. The certified mail card for the Woodbridge address was signed by an unknown individual. The regular mail was not returned.

The certified mail addressed to Freehold was returned with the notation "Return to Sender, Unclaimed." The regular mail was not returned.

Respondent did not file an answer to the complaint.

On July 1, 2011, the OAE sent a "five-day letter" to the above addresses, by regular mail. The letter advised respondent that, if he did not file an answer within five days of the date of the letter, the record would be certified directly to us for the imposition of sanction and the complaint would be amended to include a willful violation of RPC 8.1(b). The regular mail was not returned to the OAE.

Respondent did not file an answer.

1. The Halbfish Forgery Matter (First Count) (District Docket No. XIV-2010-0464E)

The complaint alleged that, following the filing of the Harth (Peñaloza) and Tsau formal ethics complaints, respondent defaulted by not filing answers thereto. Thereafter, on June 7, 2010, the OBC received a motion to vacate the default, which

motion had been purportedly filed by Halbfish, as attorney for respondent. Halbfish's signature appears on the motion, the verified answers attached to the motion, and the brief in support of the motion. As mentioned previously, the essence of the motion was that respondent had received no notice of the pending complaints, as a result of a mail delivery problem.

In reality, Halbfish was not respondent's attorney and had not signed the motion, the answers, and the brief. Instead, respondent had forged Halbfish's signature, without Halbfish's knowledge.

The complaint charged respondent with having violated RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

2. The Failure to Cooperate with Disciplinary Authorities Matter (Second Count) (District Docket Nos. XIV-2010-0038E and XIV-2010-0039E).

On February 10, 2010, the OAE notified respondent that a demand audit had been scheduled for March 8, 2010, for the purpose of determining whether the funds that he was obligated to hold for Peñaloza and Tsau had been misappropriated.

On March 7, 2010, OAE Disciplinary Auditor John Rogalski telephoned respondent's office and left a voicemail message confirming the audit date.

On the scheduled date of the audit, March 8, 2010, Rogalski appeared at respondent's office to conduct the demand audit. Rogalski found the office locked. Respondent did not appear. Rogalski then telephoned respondent's office and left a message that included a cell phone number at which he could be reached. Respondent did not contact Rogalski.

On March 16, March 24, April 20, May 17, May 18, June 2, June 16, July 12, and July 22, 2010, Rogalski telephoned respondent's office and left either a voicemail message or a message with respondent's secretary, Liz, asking that respondent contact the OAE. Respondent did not reply to any of those messages.

According to the complaint, on May 5, 2010, respondent called the OAE to advise that he had not received the OAE's letter scheduling the demand audit for March 8, 2010.

On August 6, 2010, the OAE sent a letter to Tunney and Halbfish, at 208 Main Street, Woodbridge, New Jersey, 07095, by regular and certified mail, re-scheduling the audit for August 25, 2010 at the OAE's offices. The certified mail card bears Halbfish's signature.

On August 24, 2010, the day before the audit, Rogalski telephone Respondent's office and confirmed the audit date with Liz.

On the audit date, respondent appeared at the OAE's offices without any of the required records. As a result the audit was

continued to September 3, 2010 to allow respondent to obtain the necessary records. Although respondent appeared at the OAE's offices on September 3, 2010, he again did not bring the requested records. He assured the OAE that he would obtain the records directly from the bank. The audit was then continued to September 17, 2010.

On September 17, 2010, respondent did not appear for the continuation of the demand audit. By letter dated September 30, 2010, the OAE directed him to contact that office to schedule a new audit date. The letter was sent by regular and certified mail. Respondent's secretary signed the receipt for the certified mail on October 7, 2010. Respondent never contacted the OAE, as directed.

In addition, on October 1, 2010, the OAE wrote to respondent, requesting a written reply to the allegations that he had made misrepresentations to us, in the motion to vacate the default in DRB 10-125 and DRB 10-126. According to the complaint, "[t]he certified mail was signed for and delivered to respondent's home address . . . [but] [r]espondent failed to respond in any way to the letter."

The complaint charged respondent with having failed to cooperate with disciplinary authorities, a violation of RPC 8.1(b).

3. The Negligent Misappropriation Matter (Third Count) (District Docket No. XIV-2010-0038E and XIV-2010-0039E).

According to the complaint, in connection with the Peñaloza and Tsau matters, the OAE conducted an analysis of respondent's trust account records to determine the status of the escrows for each case, specifically, $500 tendered by Peñaloza's lawyer, Harth, and $1,533.32 escrowed for Tsau's estimated real estate taxes for the 2008 fourth quarter.

The $500 deposit for Peñaloza was posted to respondent's trust account on December 18, 2007. On January 4, 2008, the trust account balance fell to $207, as a result of a $430 check payable to Halbfish.

Respondent has never returned the $500 to Peñaloza.

In Tsau, although it was later determined that the 2008 taxes would be combined with the 2009 tax bill, respondent never returned the $1,533.32 to Tsau. Furthermore, on February 12, 2009, the balance in respondent's trust account fell to $694.89, below the amount that he should have been keeping for Tsau.

According to the complaint, the above misappropriations were the result of respondent's negligent recordkeeping practices, rather than an intent to misappropriate. Indeed, the OAE found several recordkeeping problems, when it reviewed respondent's records for the period from November 1, 2007

through December 31, 2009, including, among others, no trust receipts and disbursements journals, no ledger card for each client, no monthly three-way reconciliations with client ledgers, journals, and checkbook, and no running checkbook balance.

The complaint charged respondent with the negligent misappropriation of client trust funds, a violation of RPC 1.15(a), recordkeeping improprieties, a violation of RPC 1.15(d), and failure to promptly deliver funds to which the client or a third party is entitled, a violation of RPC 1.15(b).[9]

The failure of a respondent to file an answer shall be 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).

Respondent's most serious unethical acts occurred in connection with the motion to vacate the default in DRB 10-125 and DRB 10-126, which was purported to have been filed by his law partner at the time, Halbfish. Halbfish's signature appeared on the motion itself, on the verified answers, and on the brief in support of the motion. As it was later revealed, respondent

[9] The charged violation of RPC 1.15(b) in the Peñaloza matter is a duplicate charge. It was also alleged in the complaint under District Docket No. VIII-2009-0016E (DRB 10-125, now DRB 10-431).

had forged Halbfish's signature on those papers. Halbfish neither represented respondent in connection with the motion nor had any knowledge of the motion. Respondent's conduct in this context was deceitful and prejudicial to the administration of justice, violations of RPC 8.4(c) and RPC 8.4(d), respectively.

Respondent's patent disregard of his duty to cooperate with disciplinary authorities continued in these matters as well (RPC 8.1(b)). In the course of the OAE's investigation of the forgery charge, respondent ignored the OAE's request for his written reply to Halbfish's allegation of forgery. He also failed to appear on two scheduled audit dates and paid no heed to the OAE's numerous requests for the submission of his attorney records for the audit. On no fewer than nine occasions, Rogalski left messages either on respondent's voicemail or with his secretary, asking respondent to contact the OAE. Apparently unconcerned, respondent did not do so. His disrespect for the disciplinary system was once again evident in these matters.

Furthermore, as a result of his recordkeeping derelictions (RPC 1.15(d)), respondent negligently misappropriated the $500 belonging to Peñaloza and the $1,533.32 belonging to Tsau (RPC 1.15(a)). He never returned those monies to his clients (RPC 1.15(b)). Tsau was able to recover his $1,533.32 only because the New Jersey Lawyers' Fund for Client Protection (the Fund)

reimbursed him for that amount.[10]

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Gleason, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee); In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of $43.55 occurred in attorney trust account, as the result of a bank charge for trust account replacement checks; the attorney was also guilty of recordkeeping irregularities); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney overdisbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean

[10] The Fund asked us to consider conditioning respondent's reinstatement on his restitution to the Fund, should he apply for reinstatement. See the Fund's report, dated September 1, 2011.

disciplinary record of forty years); In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a reprimand for a conflict of interest); and In re Fox, 202 N.J. 136 (2010) (motion for discipline by consent; attorney ran afoul of the recordkeeping rules, causing the negligent misappropriation of client funds on three occasions; the attorney also commingled personal and trust funds).

In addition to negligently misappropriating client's funds, respondent failed to cooperate with the OAE's investigation of the forgery allegations and with the OAE's review of his attorney records, for the purpose of determining whether Peñaloza's and Tsau's funds had remained untouched in his trust account.

As discussed previously, such transgression, standing alone, usually leads to an admonition. See, e.g., In re Ventura, supra, 183 N.J. 226 (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); In the Matter of Kevin R. Shannon, supra, DRB 04-152 (June 22, 2004) (attorney did not promptly reply to the district ethics committee investigator's requests for

information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to the district ethics committee's requests for information about two grievances); and In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous communications regarding a grievance).

Respondent's most troubling offense here was his forgery of Halbfish's signature on the motion submitted to us, an offense that requires severe discipline. See, e.g., In re Kozlowski, 181 N.J. 307 (2004) (attorney suspended for three months for forging his clients' signatures on two bankruptcy petitions to conceal his failure to prosecute the matters; lack of diligence, failure to communicate with the clients, failure to cooperate with disciplinary authorities, and recordkeeping deficiencies also found; prior private reprimand, admonition, and two reprimands); In re Bowman, 179 N.J. 367 (2004) (three-month suspension for attorney who signed a client's name on a settlement agreement without the client's knowledge; additional violations were gross neglect in six matters, pattern of neglect, failure to communicate with clients, and misrepresentations to clients; mitigating factors were the attorney's clean disciplinary record, his alcohol and depression problems, the work demands

placed on him by his law firm, and his family problems) and In re White, 191 N.J. 553 (2007) (one-year suspension for attorney who forged a co-worker's signature on a $54,000 application for a student loan to benefit the attorney, who was in law school at the time; mitigating factors included the substantial passage of time (more than seven years) since the wrongdoing occurred, the fact that respondent was not yet a member of the bar when she committed the criminal act, her otherwise unblemished disciplinary record, her cooperation with law enforcement and ethics authorities, her remorse, and her continuing payment of the loan in installments, coupled with her intent to completely repay it).

The presence of special mitigating circumstances may reduce the level of discipline that the forgery may otherwise require. See, e.g., In re Reilly, 143 N.J. 34 (1995) (reprimand for attorney who, in the course of handling an application for the early withdrawal of proceeds from an annuity fund, signed the petitioner's name on the application; prior private reprimand for failure to cooperate with disciplinary authorities; in mitigation, it was considered that the attorney readily admitted his wrongdoing, that he was motivated by his desire to help the applicant, a single mother of a one-year old and an infant, to receive the funds expeditiously, and that the applicant admitted that she would have executed any document that would have

facilitated the release of the annuity funds) and In re Homan, 195 N.J. 185 (2008) (censure for attorney who fabricated a promissory note reflecting a loan to him from a client, forged the signature of the client's attorney-in-fact, and gave the note to the OAE during the investigation of a grievance against him; the attorney told the OAE that the note was genuine and that it had been executed contemporaneously with its creation; ultimately, the attorney admitted his impropriety to the OAE; extremely compelling mitigating factors considered, including the attorney's impeccable forty-year professional record, the legitimacy of the loan transaction listed on the note, and the fact that the attorney's fabrication of the note was prompted by his panic at being contacted by the OAE and his embarrassment over his failure to prepare the note contemporaneously with the loan).

Respondent's forgery of his law partner's name was all the more grievous because of its intended purpose – to mislead the ethics authorities, particularly this Board and the Court, that respondent had not been served with the formal complaints and that, as result, the defaults should be vacated.

Misrepresentations to ethics authorities have been met with discipline ranging from a reprimand to a term of suspension, depending on the gravity of the offense, the presence of other unethical conduct, and aggravating or mitigating factors. See,

e.g., In re DeSeno, 205 N.J. 91 (2011) (attorney reprimanded for misrepresenting to the district ethics committee the filing date on a complaint on the client's behalf; the attorney also failed to adequately communicate with the client and failed to cooperate with the investigation of the grievance; prior reprimand); In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who created a phony arbitration award to mislead his partner and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years since the occurrence, the attorney's unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension for attorney who submitted two fictitious letters to the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; the attorney also filed a motion on behalf of another client after his representation had ended and failed to communicate with both clients); In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney who submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the client's case; the attorney also exhibited lack of diligence and misrepresented the status of the matter to the client); and In re Katsios, 185 N.J. 424 (2006)

(two-year suspension for attorney who, without the consent of the seller of real estate, prematurely released to the buyer, his cousin, a $20,000 deposit that he held in escrow; when contacted by the OAE, the attorney panicked and then sought to cover up his misdeed; the cover-up was found to be worse than the ethics violation).

Egregiously, the vehicle for respondent's lies was a sworn certification filed in support of his motion to vacate his default. Lying under oath is a serious offense. See, e.g., In re Perez, 193 N.J. 483 (2008) (on motion for final discipline, the attorney was suspended for three months for false swearing; the attorney, then the Jersey City Chief Municipal Prosecutor, lied under oath at a domestic violence hearing that he had not asked that the municipal prosecutor request a bail increase for the person charged with assaulting him); In re Chasar, 182 N.J. 459 (2005) (three-month suspension imposed on attorney who misrepresented in a certification in her own divorce matter that she had paid her staff "on the books" when in fact she had paid her staff in cash); In re Coffee, 174 N.J. 292 (2002) (on motion for reciprocal discipline in a matter where the attorney received a one-month suspension in Arizona, a three-month suspension was imposed for the attorney's submission of a false affidavit of financial information in his own divorce case,

followed by his misrepresentation at a hearing under oath that he had no assets other than those identified in the affidavit); In re Lyle, 172 N.J. 563 (2002) (attorney suspended for three months for misrepresenting in his divorce complaint that he and his wife had been separated for eighteen months, when they had been separated for only one month); and In re Kernan, 118 N.J. 361 (1990) (attorney received a three-month suspension for knowingly making a false certification when he failed to correct the case information statement in his own matrimonial matter to reflect that he had transferred ownership of an eleven-acre lot after the submission of the certification to the court).

Only when there are compelling mitigating factors is the discipline for lying under oath less severe. See, e.g., In the Matter of Richard S. Diamond, DRB 07-230 (November 15, 2007) (in a matrimonial matter, attorney filed certifications with numerous references to attached psychological and medical records that were merely billing records from the client's insurance provider; the attorney's first encounter with the disciplinary system in a twenty-year career justified only an admonition); In re McLaughlin, 179 N.J. 314 (2004) (reprimand for attorney who was required to file periodic certifications with the Board of Bar Examiners about his abstinence from alcohol and who falsely certified that he had been alcohol-free

during a period in which he had been convicted of DUI; after the false certification was submitted, the attorney sought the advice of counsel, came forward, and admitted his transgressions); In re Manns, 171 N.J. 145 (2002) (reprimand for attorney who, in a certification in support of a motion to reinstate a complaint, misled the court as to when he had learned of the dismissal of the complaint; the attorney was also guilty of lack of diligence, failure to expedite litigation, and failure to communicate with the client; although the attorney had received a reprimand, the conduct in both matters occurred during the same time frame; in addition, the misconduct in the second matter may have resulted from the attorney's poor office procedures); and In re Clayman, 186 N.J. 73 (2006) (censure for attorney who knowingly misrepresented the financial condition of a bankruptcy client in filings with court; mitigating factors were the attorney's unblemished disciplinary history and the absence of personal gain and venality).

It cannot be overlooked, also, that respondent thought nothing of involving an unsuspecting party (Halbfish) in his lies, thereby not only causing us to suspect foul play on Halbfish's part, but also causing ethics troubles for Halbfish. Believing that Halbfish had filed the motion and had lied in his brief, when he asserted that respondent had not received a copy

of the complaints, we referred that conduct to the OAE for an ethics investigation.

It is now abundantly clear that respondent has refused to learn from his prior ethics mistakes, which were considerable. In our November 2, 2005 decision (DRB 05-290), we noted that our determination to impose only a six-month suspension was based on our conviction that respondent's ethics transgressions, viewed in their entirety, were not the product of a failure to learn from prior errors (fourteen disciplinary matters at the time), but, instead, a "pocket" of improprieties that had taken place during a confined period, when respondent had been beset by debilitating mental illness. We wrote, in our decision:

> The issue that confronts us is whether additional discipline is required and, if so, to what extent. The answer is not readily apparent and requires a close examination of several factors, including whether this is a matter of an attorney who continued to act unethically after being disciplined, in which case additional -- indeed, more severe -- discipline is required, or whether respondent's conduct in these . . . matters occurred during the same time frame, in which case it would have been beneficial to dispose of all [the] matters in one fell swoop.
>
> More simply stated, do these new matters suggest that respondent has not learned from prior mistakes or are they part and parcel of the overall pattern of misconduct exhibited by respondent during a defined and limited period of time? The difference is crucial because an attorney's

> failure to conform to the rules of the profession after the attorney has been disciplined reflects willfulness, defiance even. On the other hand, if an attorney has an unblemished disciplinary record for a long period and then a pattern of misconduct occurs during a specified time frame, with no further ethics incidents reported, there may be a reason for that cluster of transgressions. The attorney will not escape a finding that the conduct was unethical, but at least there is an explanation therefor. Such matters are obviously viewed with more indulgence than the matters that show obstreperous resistance to atonement.
>
> The totality of the factors in this case strongly suggests that it falls into the more favorable category. Before the grievances that led to respondent's reprimand in 2003, he had a spotless disciplinary history since his 1988 bar admission. The record is replete with praise and respect for his personal and professional integrity, competence and regard for clients' welfare. Trouble began to hit in the mid-nineties, however. Documents were not filed, phone calls went unreturned and, despite respondent's good character, misrepresentations were made in some instances. Altogether, respondent's unethical acts covered a period of approximately five years. In 2001, he hit rock bottom. That led him to receive prompt treatment and medication. He is now symptom-free, according to Dr. Vetrano, who has been treating him since July 2001.
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> [In the Matter of John A. Tunney, DRB 05-290 (November 2, 2005) (slip op. at 24-25.]

Persuaded that respondent's ethics problems were over at that juncture, we determined that a six-month suspension, to be served

concurrently with a prior six-month suspension, was appropriate. The Court agreed. The Court reinstated respondent, on December 7, 2005, and imposed a two-year proctorship requirement. That requirement was discharged on January 31, 2008.

Within months, however, respondent reverted to his errant ways. In July 2008, Peñaloza's lawyer, Harth complained about respondent's "complete lack of response" in addressing a title problem and requested the return of Peñaloza's deposit, which respondent was holding in escrow. Respondent ignored Harth's request. Two subsequent requests were also met with silence on respondent's part. Frustrated with respondent's inertia, Harth filed a grievance with the DEC.

Upon receiving a copy of the grievance and being asked to submit a reply, respondent ignored the ethics investigator. Next, he chose not to file an answer to the formal ethics complaint, thereby frustrating the ethics authorities' efforts to properly adjudicate the disciplinary matter.

Also, beginning in January 2009, Tsau's requests for the release of his tax escrow fell on deaf ears. Respondent paid no attention to Tsau's letter of January 2009 and to Tsau's numerous phone calls. He was also indifferent to the DEC's attempt to investigate the Tsau grievance and, later, to the DEC's endeavor to obtain his answer to the complaint.

Respondent's misconduct in Perotti, McDonough, and Grinblat, also, took place after he was reinstated in 2005.[11]

It is now patently clear that, in 2005, our trust in respondent's good character was misplaced. Then, his crippling bouts with depression were urged as the purported cause of his neglect of his client's interests. We accepted the proposition that respondent's conduct was in no way the product of plain and simple disregard of clients' well-being. Regrettably, we must now come to a contrary conclusion.

Indeed, despite having been treated with the appropriate degree of indulgence when we assessed the proper quantum of discipline for his numerous ethics offenses, respondent went astray only months after having been relieved from supervision by one of his peers, who acted as his proctor. Such relapse clearly demonstrates that he has no regard for his clients' welfare and for the work of lawyers and public members who unselfishly volunteer their time and efforts to the attorney disciplinary system.

What discipline then is appropriate for this respondent? The current cases bring to twenty-five the number of disciplinary matters in which respondent's unethical conduct has

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[11] In the Luzuriaga matter, although respondent was retained in 2002, his failure to cooperate with disciplinary authorities occurred in 2010, after his reinstatement.

been proven. He has shown utter disregard for the ethics authorities, ignoring the investigators' requests for information about the grievances and for the production of records, and defaulting in nine matters. And he has chosen to ignore the lessons that he was expected to have learned from his prior brushes with the disciplinary system.

It is noteworthy that respondent did not, in any way, suggest that his inaction in the more recent matters was the result of a reoccurrence of his mental health problems. Neither did he choose, despite service of the complaints, to file an answer alleging any defense or mitigation, such as, for instance, the return of his mental illness. Presumably, he is free from his prior psychiatric problems. At the time of his reinstatement, the doctor who had treated him since 2001 attested that he had been compliant with his medication and that there was no psychiatric reason to prevent him from returning to the practice of law.

Because there is no evidence that respondent's new ethics improprieties were the result of his prior psychiatric illness, the conclusion is inevitable that they were the product of his resistance to learning from his earlier mistakes. Stern, discipline is, therefore, required.

After evaluating the nature of respondent's new violations, his significant disciplinary record, and other substantial

aggravating factors -- refusal to learn from his past disciplinary experiences and demonstrated disregard for his clients' interests and for the ethics authorities -- we come to the inevitable conclusion that he has forfeited his privilege to practice law. We, therefore, recommend that he be disbarred. See, e.g., In re Harris, 182 N.J. 594 (2005) (attorney disbarred for being a "persistent violator" and committing ethics violations in eleven separate matters, including lack of diligence, dishonest conduct, conduct prejudicial to the administration of justice, knowingly disobeying the rules of a tribunal, using a misleading professional designation, failing to comply with R. 1:20-20 after a suspension, failing to safekeep property, and instituting frivolous litigation; prior admonition, three-month suspension, and six-month suspension).

Member Wissinger 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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of John A. Tunney
Docket No. DRB 10-249, 10-379, 10-431, 10-432 and 11-287

Decided: December 21, 2011

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh	X					
Clark	X					
Doremus	X					
Wissinger						X
Yamner	X					
Zmirich	X					
Total:	7					1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel