SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-190
District Docket No. XIV-2006-0321E

IN THE MATTER OF	
HARRY JAY LEVIN	
AN ATTORNEY AT LAW	

Corrected Decision

Argued: October 18, 2012

Decided: December 18, 2012

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter came before us on a recommendation for a nine-month suspension, filed by Special Master J. Llewellyn Mathews, based on respondent's multiple violations of numerous ethics rules. For the reasons set forth below, we determine that a censure is the appropriate discipline for respondent's misconduct.

The four-count complaint, filed by the Office of Attorney Ethics (OAE), charged respondent with multiple ethics infractions. Count one alleged that he had violated RPC 1.2 (presumably (a)) (failure to abide by a client's decisions concerning the scope and objectives of representation), RPC 1.4 (presumably (b)) (failure to keep a client reasonably informed about the status of a matter), RPC 1.5(a) (unreasonable fee), RPC 1.7 (a) and (b) (conflict of interest), RPC 1.15(b) (failure to promptly notify the client or third person upon receipt of funds in which either or both have an interest), RPC 1.15(c) (failure to keep separate property in which the lawyer and another person claim interests), RPC 3.3(a) (false statement of material fact to a tribunal), RPC 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal), RPC 8.1(a) (false statement of material fact in connection with a disciplinary matter), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Count two charged respondent with having violated RPC 1.5(b) (failure to set forth in writing the basis or rate of the fee); RPC 1.7(a), RPC 1.8(a) (improper business transaction with a client), and RPC 1.15(b). In count three, he was charged with a single violation of RPC 8.4(d) (conduct prejudicial to the

administration of justice). The OAE voluntarily dismissed count four, which stemmed from an unrelated matter.

Respondent was admitted to the New Jersey bar in 1983. At the relevant times, he maintained a law office in Toms River.

In 2008, respondent received an admonition for violating RPC 8.4(d). In re Levin, 193 N.J. 348 (2008). In that matter, he convinced the grievant's son to persuade the grievant to withdraw the ethics grievance against him. A few months later, however, the grievant requested the OAE to "reactivate" the grievance. Respondent then threatened that, at the conclusion of the ethics matter, he would sue the grievant and her husband and seek court intervention to require that she be examined by a physician and psychiatrist.

In September 1998, attorney Michael S. Paduano represented George and Cynthia (Cindy) Trim[1] and LaBean, Inc. (LaBean) against Megtara, LLC (Megtara) and Debra Nayak in an action to enforce certain provisions of an asset sale and purchase agreement.

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[1] Ordinarily, we refer to adults by their last names. In this matter, however, we will use the Trims' first names for the reader's easier reference.

George testified that, sometime before the spring of 1997, Cindy and his brother wanted to get into "a food business," which George agreed to finance. LaBean was formed for the purpose of purchasing an establishment. Respondent handled its incorporation.

Cindy, LaBean's president, owned fifty-one percent of LaBean's stock. George was its secretary and owned forty-nine percent.

On May 12, 1997, LaBean purchased Subcontractors Deli & Café (Subcontractors) in Toms River. Beth Pollack, an attorney in respondent's firm, initially handled the matter. When the Trims grew dissatisfied with her, respondent intervened and "g[o]t the contract done."

In March 1998, Cindy filed for divorce from George. At that time, Subcontractors was losing money, and George wanted to cut his losses. Consequently, on May 27, 1998, LaBean entered into an asset sale and purchase agreement with Megtara, which was owned by Nayak.

Paduano, whom George knew socially, represented the Trims and LaBean in the asset sale. The closing, which George did not attend, took place on June 1, 1998, at Paduano's office.

In addition to the $30,000 purchase price, Megtara was to pay for inventory on hand, "dollar for dollar," and obtain from the landlord an assignment of LaBean's lease. Nevertheless, LaBean did not receive compensation for the existing inventory or, as the Trims expected, a refund of the security deposit.

On September 8, 1998, Paduano filed suit against Megtara and Nayak on behalf of "George Trim and Cynthia Trim, individually and t/a LaBean, Inc." The single-count complaint sought reimbursement for LaBean's inventory and security deposit.

On August 16, 1999, respondent substituted as attorney for the plaintiffs. Cindy testified that the Trims sought respondent's counsel because Paduano had told her that he was not going to be able to recover any monies from Nayak. George, in turn, testified that they retained respondent because Paduano had told Cindy that he could not be both a witness and their lawyer in the same case.

According to respondent, the Trims retained him to file a malpractice claim against Paduano. He testified that George wanted retribution for Paduano's mistakes and the resulting legal fees that he had incurred in the Megtara litigation, a contention that George denied. Rather, George explained, he was

upset with Nayak because she had not complied with the terms of the asset sale. Cindy also denied that she wanted retribution.

According to the Trims, when they hired respondent, they did not sign a retainer agreement. Cindy did not recall having received any writing explaining respondent's fee. Although respondent claimed that he had provided the Trims with a written retainer agreement, he could not locate it. Nevertheless, he asserted that, because he had represented LaBean previously, LaBean "knew exactly what our billing was." He also had billed George for the work on the Subcontractors purchase.

Respondent and his law partner, Colleen Flynn Cyphers, testified extensively about the firm's procedures regarding retainer agreements, speculating that, in this case, the agreement with the Trims had been lost, during one of the firm's relocations.

Both Cindy and respondent claimed that, in the Trims' matrimonial action, George and Cindy had agreed that George would pay the legal fees in the Megtara matter, and that Cindy would receive the monies recovered on the inventory and security deposit claims. Respondent alleged that he had confirmed this understanding with George's divorce attorney, Catherine A. Tambasco, who denied that assertion.

Although George denied having agreed to pay the legal fees, he admitted consenting to Cindy's retention of any proceeds from the lawsuit. According to George, the payment of litigation fees was not a part of the divorce proceeding. He maintained that the statement, in the OAE's investigative report, that he had agreed to assume the legal fees as part of the divorce proceeding was inaccurate.

Respondent denied that the Trims' agreement regarding the payment of fees and the disposition of any recovery in the Megtara litigation had created a conflict of interest for him. He claimed that the stockholders' agreement as to "how they're going to whack up who's responsible is really irrelevant" because LaBean was his client.

Respondent testified that, after the Trims' divorce had been finalized in March 2000, George refused to pay the Megtara legal fees because they were Cindy's debt. When respondent suggested that there was another way to fund the litigation, that is, by joining Paduano as a defendant in the Megtara suit, George told him to "do what you gotta do."

On July 12, 2000, respondent filed an amended complaint, which, in addition to the prior counts, asserted a malpractice

claim against Paduano. Cindy did not realize that Paduano was sued for the purpose of recovering legal fees.

Although respondent insisted, throughout the ethics hearing, that the caption in the Megtara matter was inaccurate because the real party-in-interest was LaBean, he did not remove the Trims as plaintiffs when he amended the complaint.

Paduano did not promptly notify his malpractice carrier, Philadelphia Insurance Company (PIC), of the claim against him. Therefore, his defense proceeded under a reservation of rights.

On July 24, 2000, Nayak paid $3,507.82 to settle the inventory claim. After the monies were turned over to Cindy, that count of the amended complaint was dismissed.

On April 6, 2001, respondent filed a second amended complaint, which omitted the settled inventory claim, retained the security deposit and malpractice claims, and added a claim against Paduano's partner, James P. Brady. The claim against Brady was dismissed on summary judgment a few months later.

In the fall of 2001, George told respondent that he wanted to "drop" the Megtara and Paduano cases because the litigation was going "beyond what [he] understood it was," "the fees were climbing," and there was no benefit to him to continue. Respondent replied that, if George dismissed or abandoned the

claim against Nayak, she could sue George for attorney fees. He also told George that, although he would dismiss the case, if George so desired, George would be responsible for respondent's outstanding legal fees. According to respondent, George replied that he would not pay respondent's fees and that respondent should seek to obtain them from Paduano.

On November 21, 2001, George sent a letter to respondent, expressing frustration over the mounting legal fees. The letter stated, in part:

> As you may recall, we have had ongoing conversations in which I have explained to you my desire to settle this case. I feel this has fallen on deaf ears. Several months ago, you advised me that there was an offer of $15,000.00 made to settle the matter. At that time, I indicated to you my desire to settle. At the present time, your fee is now upwards of $20,000.00 and, as I have indicated, my liability increases daily and the prospects of recovery are, at best, minimal in comparison. This is unacceptable. I would like to settle this case now and we will address reasonable attorney fees relative to the recovery.
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> I hope you understand my need to expedite this matter in order to have relief from the stresses that this ongoing litigation causes me.
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> [Ex.P10].

George claimed that he had learned of a settlement offer months before, when Nayak asked him why the case had not

settled, in light of the offer that had been made. Nayak, however, denied that she had ever made a settlement offer because, in her view, she was not at fault. Cindy claimed that she was never aware of a $15,000 settlement offer.

According to respondent, after he received George's November 21, 2001 letter, he told George that there was no settlement offer on the table and that Nayak would not pay anything to settle. When George complained about the legal fees, respondent replied, "I'm doing my job."

Respondent formally replied to George's letter in a memo, dated December 1, 2001, which stated in part:

> We never "had" $15,000 in our pocket. While it was true that Paduano said that he thought he could raise $10,000 and Nolan thought he could get Nyak [sic] to kick in $5,000, when I said to both of them okay pay up, Paduano responded that now that his insurance company was involved that [sic] he was powerless to settle without their authority. And Nolan suddenly left his firm, I think on bad terms, and has been ostensibly incommunicado. When he lost the Summary Judgment Motion I understood Debbie was really pissed because he assured her that he was going to win.
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> Believe me nothing you would ever say to me would fall on deaf ears; I have been trying all that I know to put together a settlement pot so that you do not have to go into your pocket. Look if I wasn't in your court I would have insisted on being paid earlier.

> I fully appreciate the financial straights [sic] that you are in which is precisely why I have not pressed but instead [sic] done all that I can to try to make sure you do not have to go into your pocket. I do know this, Debbie is a liar and intentionally took advantage of the situation and she will be exposed. Paduano is a screw up and should have fessed up and taken the responsibility.
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> George if there was an opportunity to settle I would have and still will. While this is your case and I will do as you instruct I cannot settle a case where there is no money on the table, unless you want me to unilaterally dismiss the case at which time you might be faced with Nyak's [sic] suit for legal fees. I can assure you if you simply fold your tent she will insist on reimbursement.
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> Finally, while I appreciate the stress that this or any legal matter you are involved in causes, I ask that you allow this matter to percolate a little longer. Its [sic] up to you, but you need to know and this is only business, I believe our fees will be paid through an award if we litigate, if you choose not to those fees as billed will need to be paid. It would be infinitely wiser to allow this matter that is near completion runs [sic] it [sic] course rather than incurring the responsibility to pay these fees which were necessitated by Nyak [sic] and Paduano.
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> [Ex.R1.]

Respondent claimed that he continued to litigate the matter and incur fees, "[w]ith permission of the client." George

denied that contention, asserting that he had objected to the continued litigation.

After George had received respondent's December 1, 2001 memo, he unsuccessfully attempted to talk to respondent. By March of 2002, George was still trying to stop the litigation, but respondent continued to ignore his telephone calls.

On March 13, 2002, more than a year-and-a-half after he was sued, Paduano filed for bankruptcy. As a result of the automatic stay, the Superior Court of New Jersey entered an order dismissing without prejudice the Megtara and Paduano matters.

In a letter dated May 15, 2002, respondent informed George and Cindy that the costs and fees in the Megtara matter were nearly $35,000. Respondent testified that he offered to cap the fees at $30,000, and George accepted that offer. George, however, denied that respondent had ever made such an offer.

On George's behalf, respondent's office prepared a proof of claim in Paduano's chapter 7 bankruptcy proceeding, in the amount of $58,183.95, representing respondent's attorney fees. George never signed it because, he explained, he had not asked that a claim be filed and he wanted nothing further to do with

the case. George understood that Paduano was having personal problems and he did not want to "pile on."

By July 16, 2002, the outstanding legal fees owed to respondent in the Megtara and Paduano matters totaled $33,363.40. George had already paid respondent $10,000. Cindy testified that she had not discussed the fees with respondent because George was paying the bill and it was his decision whether or not to move the case forward.

In September 2002, respondent made another unsuccessful attempt to secure George's signature on the Chapter 7 proof of claim. Finally, in January 2003, respondent filed his own proof of claim for $62,183.95, in Paduano's chapter 13 bankruptcy proceeding.

In November 2002, George testified, he renewed his objection to continuing with the Paduano matter. He claimed that he wrote to respondent on November 9, 2002, December 9, 2002, and March 2003, and told him that he would no longer participate in the lawsuit and that he wanted it discontinued. According to OAE disciplinary auditor John Rogalski, however, the November 2001 letter was the only written or oral communication from George to respondent, of which Rogalski was

aware, stating that George wanted respondent to stop working on the litigation.

Respondent forged ahead. On February 14, 2003, the bankruptcy court lifted the automatic stay so that the Trims could "proceed solely against the policy limits maintained by [Paduano] under his professional liability policy." The order expressly precluded the Trims from proceeding against Paduano's personal assets.

On May 27, 2003, the Megtara and Paduano matters were reinstated by the Superior Court of New Jersey. The security deposit issue in the Megtara matter settled on October 7, 2003 and was memorialized in an order entered a month later. Nayak agreed to turn over the security deposit to Cindy, if and when the landlord refunded it to her. By this time, only the malpractice claim against Paduano remained pending.

As for the allegation that respondent had charged excessive legal fees, when compared to the amount of damages in the Megtara and Paduano matters, respondent stated the following:

> If the sum and substance of my legal work would have been to clarify and resolve the deficiency that Paduano had in the closing, charging that kind of money would have been a problem.
>
> What's difficult in the practice of law is that you never know where a case is going

to take you. This particular case took me to a variety of places.

Number one is that I ended up trying to see — since Paduano did not report the matter to the insurance company, I tried to see if I could get a hook through his partner, James Brady. I think James is his name. That took time and money and effort.

I also then had to file the malpractice case against him, and that malpractice case morphed into this bankruptcy aspect of it.

If you truly look at it and see the extent of the work that was involved, that amount of money that was charged, although it wasn't paid, really was not excessive in any way, shape, or form, because it was, really, four or four and a half cases within one.

[8T84-23 to 8T85-19.][2]

According to respondent, the malpractice case against Paduano "went on for years without George saying a word to [him] about stopping or doing anything." As discussed below, the Paduano matter was finally settled in February 2005.

We now turn to the formation of Manna, LLC, and the purchase and sale of a commercial building, located in

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[2] "8T" refers to the transcript of proceedings on February 10, 2011.

Manahawkin, which occurred at around the same time as the LaBean transaction and fallout were taking place.

In 1997, George was one of four partners at North Dover OB/GYN Associates. Early in the year, he became dissatisfied with the practice. At around that time, a representative from Meridian Health Care System (Meridian) spoke to the partnership about an affiliation opportunity. Because George's partners were not interested, he met with the representative individually.

In July 1997, a few months after LaBean's purchase of Subcontractors, George notified his partners that he would be leaving North Dover. They locked him out of the building. Respondent then negotiated George's separation from the group.

George and respondent testified, that, at this point, they were "having discussions multiple times a day" and, according to respondent, "having lunch multiple days during the week." As a result, George and respondent "developed a relatively close relationship."

Respondent testified that, after George had entered into negotiations with Meridian, its competitor, Saint Barnabas, approached respondent about making a deal with George. As a result, George and Meridian never entered into an agreement.

Saint Barnabas made an offer to George, and respondent negotiated a final employment agreement, which was signed on October 10, 1997.

At respondent's suggestion, Saint Barnabas also agreed to lease space in a building that would be owned by George where George and other Saint Barnabas affiliates would have their offices. According to respondent, when George learned of this opportunity, he was "elated." A commercial building in Manahawkin was available, and George considered the possibility of purchasing it.

George asked respondent to identify the risks of owning a commercial building. He testified that respondent told him that, if there were no other tenants, George could be personally responsible for the full amount of the mortgage and repairs.

Respondent's account was more detailed than George's. He testified that he told George that there are inherent risks in every real estate transaction, such as tenants breaking their leases or filing for bankruptcy, the cost of repairs or improvements to building, and the likelihood that George would have to sign a personal guarantee for the mortgage loan.

Respondent disagreed that the purchase of the Manahawkin building posed little risk, as alleged in the ethics complaint,

and pointed out that no one had produced any calculation proving that assertion to be true. According to respondent, it would have been malpractice for him to have told George that there was no risk.

Moreover, respondent claimed, certain risks actually occurred. For example, two tenants, Fleet Bank and Center State Management Corp. (CSM), the Saint Barnabas entity that had rented space in the Manahawkin building, broke their leases, although they continued to pay rent. Moreover, a problem with the HVAC system required the infusion of capital into the property.

Respondent testified that, when he and George discussed these risks, George asked him if he would be interested in investing in the purchase of the Manahawkin building. According to respondent, George said that he did not believe that he could afford the building himself because he was in the middle of a divorce from Cindy and, in addition, he did not have "great" credit. (Cindy had not yet filed for divorce.)

Respondent testified that he agreed, "conceptually," to being involved in the deal, and cautioned George that, if he were to be involved, George would have to discuss it with another lawyer. George replied that respondent was just trying

to cover his ass. Respondent retorted: "Yeah, I'm trying to cover my ass and yours."

George testified that, when the opportunity to purchase the building arose, it "moved forward very quickly," and he "wasn't given any advice to seek out information from an independent person." George told the special master that he trusted respondent and, as a result, he did not ask him questions but, rather, just went along with what he said.

George denied having told respondent that he could not afford to buy the building alone because his credit was not so great. Indeed, he believed that he could have afforded it, even after Cindy had filed for divorce, a few months later.

George denied that respondent had advised him to get another attorney if respondent were to be a partner, and to seek independent advice as to whether he should have partners in the ownership of the building. George and his divorce attorney, Tambasco, both denied that they had ever discussed the issue of his having partners in the ownership of the building. George did not seek the advice of other counsel because, he testified, he "had full faith in Mr. Levin."

Two additional partners were included in the venture, accountant Daniel Vitale and Dr. Paul Low.

Respondent and George each claimed that the other suggested that Vitale and Low be included in the deal. In respondent's opinion, without Vitale and Low, the deal would have been "way too risky."

Both Vitale and Low testified that they believed the purchase of the Manahawkin building was a good deal. It was a good building in a good location, with the hospital as a good tenant. Vitale also described the Saint Barnabas lease as "a good lease."

Respondent's partner, Cyphers, provided the legal services necessary to form a partnership to purchase and maintain the building. It was called Manna, LLC. George, Low, and Vitale testified that respondent did not provide them with a retainer agreement or any writing explaining the terms of the representation.

Although respondent believed that he had entered into a retainer agreement with Manna, he could not find it. Nevertheless, he stated that he had explained the general parameters of the representation to the partners, who authorized him to do the work.

Respondent did not consider it necessary to obtain a waiver of conflict from the Manna partners because it was "a

sympathetic arrangement between four sophisticated people whose interests were completely aligned insofar as the ownership interests were equal, the financial obligations were equal, the risks were equal, and so there was no adverse matter at all."

Manna was formed on December 12, 1997. The Manahawkin building was purchased from Fleet Bank for $1.2 million, on March 25, 1998, just after Cindy had filed for divorce from George. Respondent negotiated the contract for the purchase of the building, as well as the lease for its two tenants, Saint Barnabas and Fleet Bank. In February 1998, respondent arranged for a different attorney, Stuart Snyder, to handle the closing, due to a conflict of interest.

Respondent denied that he had arranged for Snyder to handle only the closing, explaining that this was "a good faith approach to having another experienced lawyer involved so that, quite frankly, if anybody had any questions or any issues they would go to him and not to me." No one objected to his recommendation of Snyder.

Snyder testified that he did not handle the negotiations for the contract of sale, did not prepare the contract of sale, did not order title work, and did not take care of the building and environmental inspections. Yet, he did not simply manage

the closing. For example, prior to the closing, he made sure that the proposed use could continue, obtained a certificate of occupancy, and prepared the settlement statement and the affidavit of title.

George testified that, prior to and even at the closing, he had no conversation with Snyder. Low stated that he did not meet Snyder until that day. Up until that time, Low testified, respondent had handled all the work associated with the transaction.

Snyder testified that, at the closing, he represented Manna and its partners. When he introduced himself at the closing, Snyder stated that he was there because respondent had a conflict. Snyder also passed all the documents around to the partners, who had the opportunity to read them. He specifically reviewed and explained the HUD-1 with everybody.

According to the HUD-1, $50,391.39 was returned to Manna because the partners had borrowed more than they needed. Snyder wrote a trust account check, in that amount, payable to respondent's trust account. Snyder recalled that he "[p]robably" passed the check "at the table." It was not kept a secret from the partners, and they would have known that the check was issued.

Respondent explained that the monies were given to him so that he could pay off the pre-closing obligations that Snyder did not pay at the closing. According to respondent, the partners knew that. Over the course of the next several months, respondent paid taxes "and other obligations." After all the bills were paid, $11,000 remained in the trust account, which was then transferred to Manna's bank account.

Vitale confirmed that the $50,391.39 was recorded on respondent's firm's ledger for the transaction. He also reviewed the ledger and noted that, after a number of trust account checks had been written, including one in payment of respondent's $9,339.78 bill, the ledger zeroed out. George testified that, at some point, he knew that respondent was going to charge Manna for the legal work that he had done.

Low and Vitale testified that the purchase of the Manahawkin building was a fair transaction because the partnership was equal in terms of contribution and return and losses, if any. Respondent agreed. Low had no criticism of the work that respondent did. Vitale did not observe any overreaching on respondent's part as concerned his relationship with George.

George testified that, prior to the Manna transaction, he had never purchased commercial real estate or obtained commercial financing. He had never entered into a commercial mortgage.

In terms of what he knew or did not know prior to entering into the purchase of the Manahawkin building, George claimed

> [t]hat if I had known the full impact of the lease arrangements, how much the building was going to cost, and there weren't the risks that you inferred to me, that I would have done it myself. That if, in fact, the risks weren't as I was led to believe.
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> [7T108-21 to 7T109-1.][3]

According to respondent, George was a sophisticated businessman, who had amassed "quite a net worth," consisting of a large Toms River home and other investments. In addition, he had negotiated a commercial lease for LaBean and the deal with Meridian, although that did not go through. With respect to the purchase of the Manahawkin building, respondent explained:

> George had been involved with each and every step of the process, including finding the building, including coming up with the deal, including assisting in the

[3] "7T" refers to the transcript of proceedings on January 27, 2011.

> negotiations of the deal, securing the financing, and executing all of the documents that were necessary, including the HUD statement, with respect to the party's interest.
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> [8T57-19 to 25.]

At some point in the year 2000, due to antitrust concerns, Saint Barnabas decided to divest itself of most medical practice affiliations, including George's. In short, George testified, Saint Barnabas handed him its terms and suggested that he retain counsel. George went to respondent.

In November 2000, George and Saint Barnabas terminated their relationship, and, with Manna's consent, George became the sublessee of Saint Barnabas for the space used by his practice in the Manahawkin building.

At some unidentified point, the partners decided to sell the building. In terms of the actual negotiations for the sale of the building, respondent testified that he was "kind of odd man out on this" and that his role was "quite limited." He claimed that Vitale did most of the negotiating, although respondent acted as conduit between the entities.

Respondent stated that he did not negotiate the purchase price or the terms for the sale of the building. Nevertheless, on July 31, 2003, respondent signed the agreement of sale, on

behalf of Manna, for $2.4 million. After the buyer's inspection, respondent agreed, again, on behalf of Manna, to reduce the price to $2.2 million, which had been agreed upon by Vitale, George, and Low.

Respondent testified that he did not handle or attend the closing on the sale of the building, which took place on March 30, 2004. Respondent had advised the partners that they needed to have new counsel at the closing. Ultimately, he selected attorney Frank J. Dupignac, Jr. to represent all four partners, after he had asked the other partners if they had a preference.

On October 14, 2003, one week after the security deposit claim in the Megtara matter was settled, but while the Paduano matter and the sale of the Manahawkin building were still pending, George sued respondent for malpractice as the result of his advice to, and representation of, George in the purchase of the Manahawkin building (Levin matter). In the Levin matter, George was represented by William W. Voorhees, Jr. Respondent was represented by Daniel J. Carluccio and John Gonzo. As shown below, after George had sued respondent, the resolution of the Paduano matter became intertwined with the Levin matter.

George testified that, after he had sued respondent, respondent never stated that he could no longer represent George

in the Megtara matter. Respondent testified that, after George had sued him, he communicated with George in the Paduano matter through their lawyers in the Levin matter. Respondent communicated with LaBean through its president, Cindy.

With respect to the merits of the claims in the Levin matter, Voorhees testified that respondent had given George inconsistent and professionally substandard advice about the risk in purchasing the Manahawkin building alone. Voorhees claimed that the purchase was "one of the most extraordinary low-risk, high-gain real estate ventures that anybody could possibly encounter or have the opportunity to engage in, and that it was, in effect, the deal of a lifetime." Moreover, respondent failed to advise George that only $120,000 was required for a ten percent down payment, which was "unheard of" for a commercial building, and that George had that money "readily on hand."

He asserted that, even if the tenant that had leased 12,000 feet went "belly up," George still could have maintained the property based on his $450,000 annual payment from Saint Barnabas. Voorhees testified that he believed that George had sustained at least $750,000 in damages as a result of respondent's conduct.

Voorhees acknowledged that all commercial real estate investments have some risk. Moreover, he admitted that, in his thirty years as a lawyer, he did not handle commercial or bankruptcy matters; he did not know whether George could have obtained bank approval for a loan; and he did not take into account that Cindy had filed for divorce just before the closing on the building, and, therefore, George could become liable for alimony, child support, and a separate residence for Cindy.

On August 30, 2004, several months after the Manahawkin building was sold, PIC, Paduano's insurance carrier, offered $10,000 to settle the Paduano matter. Respondent accepted the settlement offer on behalf of the Trims and LaBean.

George testified that respondent never told him about the settlement offer, and never asked George to sign a release or the settlement check. Respondent testified that his lawyers in the Levin matter communicated the offer to George and that he (respondent) communicated the offer directly to Cindy. Although Cindy acknowledged that respondent had informed her of the offer, she testified that she played no role in the actual settlement.

On October 11, 2004, the release was sent to Cindy for her signature. She did not sign it for months.

On February 2, 2005, Cindy wrote a letter to respondent, seeking clarification that he would accept the $10,000 settlement "as payment in full for any fees" incurred in the Megtara and Paduano matters. By this time, she and George had been divorced for nearly five years. Cindy testified that she would have endorsed the $10,000 settlement check only if it would be deemed payment in full of respondent's legal fees in the Megtara and Paduano matters.

Respondent testified that, in reply to Cindy's letter, he called her and stated that the $10,000 would be applied to outstanding bills because Paduano was protected from paying damages. Indeed, the letter subsequently transmitting the check to respondent, which was copied to George and Cindy, expressly stated that the monies were to be used to satisfy unpaid bills and liens. Neither George nor Cindy ever filed a legal action against respondent to recover these monies.

On February 25, 2005, a stipulation of dismissal in the Paduano matter was filed with the court. Respondent signed the stipulation as attorney for the Trims and LaBean. He claimed that Cindy had given him the authority to do so, although she had not yet signed the release.

In an email to Cindy, dated March 6, 2005, respondent confirmed that the Paduano matter had settled for $10,000 and that "these monies were simply and expressly payment of legal fees." He continued:

> While it is true that I will not seek another penny from you for my fees, the balance owed at the time I promised to stop billing ($20,000+-) is being sought against George Trim, [sic] it will be part of the suit he filed against me. I have a legal obligation to include all claims since he sued me and so this is where the matter lies. His lawsuit against me has left me with no option but to take this action.
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> [Ex.P20.]

On March 11, 2005, Cindy signed the release.

OAE disciplinary auditor John Rogalski testified that, during the OAE's investigation, he saw the March 2005 email from respondent to Cindy, reserving his right to seek legal fees from George, in light of the pending Levin matter. During respondent's interview with the OAE, on August 29, 2006, Rogalski testified, respondent stated that, although he did not intend to seek the remainder of outstanding legal fees from George, he had reserved the right to do so in the Levin matter. Nevertheless, the investigative report stated that respondent had no intention of collecting the "remainder of the bill" from George.

Respondent explained:

> What I wanted to do, what I intended to do with respect to this issue was to get the $10,000, because that's all that I was going to get, that would have reduced George Trim's obligation to me in that deal that he made with his divorce lawyers, and that would inure to his benefit.
>
> I simply said to Cindy, George has sued me for malpractice. I'm thinking as a lawyer, entire controversy, I'm saying to myself, you know, that may be included in the file in it going forward.
>
> I gave her notice, I never did include it in it, but I simply said to her exactly what my position was. You're off the hook, I don't want to – you know, I'm not going to be talking to you at all, but I specifically and expressly told her that I would be seeking against George Trim, and she subsequently signed the release.
>
> [1T203-22 to 1T204-16.][4]

On September 22, 2005, Paduano's attorney sent the $10,000 settlement check to respondent, which was made payable to him and the Trims. Upon his attorneys' instruction, respondent testified, he placed the check in his safe. He did not cash it.

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[4] "1T" refers to the transcript of proceedings on January 18, 2011.

On October 6, 2005, Carluccio wrote to Voorhees, George's lawyer in the Levin matter, and enclosed a copy of the check. After some confusion about how the proceeds were to be disbursed, Carluccio informed Voorhees, in a letter dated December 22, 2005, that "the proceeds were to be applied against outstanding legal fees owed to the Levin firm."

On March 29, 2006, Voorhees wrote to Gonzo and requested that respondent sign a substitution of attorney for Voorhees to become George's lawyer in the Megtara and Paduano matters, even though the claims against Megtara had been settled in November 2003, and the claims against Paduano had been dismissed in February 2005. Voorhees wanted respondent to sign a substitution of attorney so that, as George's attorney of record, he could investigate whether there was "an appropriate disposition" of the $10,000 settlement check, which he understood had been deposited into respondent's trust account, based on a statement made by Carluccio in a previous letter, to the effect that "the settlement proceeds remain in Mr. Levin's trust account." Because Voorhees knew from George that neither he nor Cindy had endorsed the check, he believed that respondent may have forged the check prior to its deposit.

Respondent testified that he and Carluccio had concluded that it was improper to execute a substitution in a case that had been settled and dismissed. Thus, upon counsel's advice, respondent did not sign the substitution of attorney.

On June 2, 2006, Voorhees wrote a lengthy letter to David E. Johnson, Jr., former Director of the OAE, and reported a number of possible ethics violations committed by respondent, notably that he had potentially forged the $10,000 check and absconded with the money.

In a motion, dated December 19, 2006, filed in the Megtara and Paduano matters, Voorhees asked the court to compel respondent's execution of the substitution of attorney. Respondent submitted a certification, in opposition to the motion, the details of which will be discussed below.

On March 13, 2007, the court denied the motion, but ordered respondent to obtain a $10,000 replacement check from PIC, made payable to his attorney trust account, where it was to be deposited and remain, until further order of the court.

As for the grievance, Rogalski testified that, on August 29, 2006, the OAE audited respondent's books and records, which did not uncover any recordkeeping deficiencies. Rogalski also testified that, at the audit, respondent produced the unendorsed

check that Voorhees claimed he had forged and cashed. Even though Rogalski was satisfied that nothing untoward had happened with the check, the OAE's investigation continued because Voorhees had raised other issues in his letter to Johnson.

The Levin matter was settled on May 22, 2007. Voorhees testified that respondent was present, off and on, throughout the settlement negotiations. Voorhees never heard respondent say that, as a condition to settlement, Voorhees had to withdraw his grievance against respondent. However, Voorhees did recall that, at one of the discussions about settlement, one of respondent's attorneys had, in respondent's presence, asked that settlement be conditioned on the withdrawal of Voorhees' grievance. Respondent did not object.

Respondent vehemently denied that he ever made the withdrawal of the grievance a condition of settlement in the Levin matter. He knew that it would be improper.

Gonzo testified that respondent did not participate in the settlement negotiations when Voorhees was present. Respondent never stated that settlement had to be conditioned on Voorhees' withdrawal of the grievance.

When the settlement was placed on the record, Judge O'Brien, who presided over the proceedings, expressed the hope

that they could "clear up the ethics matter a little bit." According to the judge, as "one of the parts of the settlement," respondent wanted the grievance withdrawn, but Voorhees had contended that no grievance was pending. OAE deputy ethics counsel, Christina Blunda Kennedy, confirmed that, contrary to Voorhees' original suspicion, the OAE's investigation had established that respondent had not forged or deposited the original $10,000 settlement check. Nevertheless, she stated that the investigation had uncovered other facts that required further examination.

Voorhees stated to Judge O'Brien: "We have no further concerns about that check and I want to make it clear that . . . it has nothing to do with the settlement. Um . . . it's not contingent upon the settlement." Judge O'Brien stated that he understood Voorhees' position but that he just wanted to "clean up some loose ends." Gonzo chimed in, stating that the settlement was contingent on Voorhees' writing a letter to the OAE "rescinding" his June 2, 2006 letter.

Gonzo testified at the disciplinary hearing that he had no idea why Judge O'Brien believed that respondent wanted the grievance withdrawn as "one of the parts of the settlement." Gonzo believed that he (Gonzo) "must have misspoke [sic]" when

he stated that settlement was contingent on withdrawal of the letter because that was never the case. Rather, it was Gonzo's inartful attempt to clarify for the record that, in fact, respondent had not handled the settlement check improperly.

At the hearing, Judge O'Brien also acknowledged that, as part of the settlement, George had agreed to release any claim that he might have had to the $10,000 settlement in the Paduano matter and that respondent could keep the monies.

Although respondent was charged with unethically taking the $10,000 in the absence of "further order of the court," he testified that, when the Levin matter was settled, "[i]t was represented that George Trim had no claim onto the money, and Judge O'Brien on the record stated that the $10,000 would be able to go to me for legal fees." Respondent considered this judicial approval for him to take the monies. In other words, when a judge directs someone to do something from the bench, "it is a Court Order." Thus, respondent took the monies, with no objection from George or Cindy.

As stated previously, in response to Voorhees' unsuccessful motion to compel respondent to sign the substitution of attorney in the Megtara and Paduano matters, respondent submitted a

certification in which the following statements were alleged to be false:

> 16. My firm was retained on an hourly basis to substitute in and add Paduano as a third party defendant claiming malpractice.
>
> * * *
>
> 18. The Trims wanted retribution. They wanted their money and they wanted Paduano to pay. It was one of those classic situations where the client says "I don't care how much it costs and I'd rather pay you."
>
> * * *
>
> 21. By this time we had billed and collected several thousands of dollars on the file and when I advised Dr. Trim of Paduano Bankruptcy filing. [sic] [H]e was livid and frankly, that is an understatement.
>
> * * *
>
> 23. . . . On behalf of LaBean my office filed a Proof of Claim with the Bankruptcy Court . . . . I specifically received authorization to proceed with the bankruptcy if it was a way for us to get paid.
>
> 24. . . . The Court ruled that I could proceed to try to collect my fees against the insurance company but nothing could come from Paduano. The Court was clear, LaBean's claim was discharged and LaBean could not receive a penny from Paduano. . . .
>
> * * *
>
> 32. I agreed to accept payment from the insurance company in full payment of the

> outstanding fees owed to my law firm in our representation of LaBean in the Paduano matter. . . .
>
> [Ex.P34;¶16,¶18,¶21,¶23,¶24,¶32.]

With respect to paragraphs 16, 18, 21, and 23, the evidence demonstrated the following: (1) there was no written fee agreement; (2) the Trims denied that they wanted retribution; (3) George denied that he was livid when he learned of the bankruptcy; and (4) respondent had not been expressly authorized to proceed in bankruptcy court with the proof of claim.

With respect to respondent's assertion, in paragraph 24, that the bankruptcy court had ruled that he could try to collect his fee from the insurance company, respondent pointed out that, by allowing the matter to proceed, the court permitted him to go against the insurance company.

Respondent asserted that the statement in paragraph 24 of his certification that LaBean's claim had been discharged at the time of the court's February 14, 2003 order was not false. He explained that, in his experience, when a person files Chapter 7 bankruptcy, "the case is over, effectively," except perhaps for some paperwork. Thus, respondent believed his statement to be factually correct. He had used the term "discharged" in the same sense that a bankruptcy attorney would use it.

At the conclusion of the hearing, respondent pointed out the following factors in mitigation of his alleged misconduct:

- the alleged misconduct took place from the end of 1997 through early 1998, which was thirteen-to-fourteen years prior to the disciplinary hearing;
- he had practiced law as an in-house attorney, exclusively, from his admission to the bar in 1980 until 1991;
- his firm maintained "fastidious" recordkeeping practices, which called into question that it had "played fast and loose with retainer agreements;"
- his public service as a governor-appointed trustee for Ocean County College, where he taught courses in business law without compensation, during his tenure as trustee (as required) and continuing after his term had ended;
- his position as chairman of the Center for Peace, Genocide & Holocaust Studies;
- his membership in the following organizations:
    - the Rotary Club, where he served as president and had been awarded the Paul Harris Fellow Award, which he described as the highest international award that could be given to a member,
    - the Masons, where he has achieved the highest level possible,
    - the Scottish Rite,
    - the Shriners, and

- the Ocean County Business Association where he had received the member of the year award;

- his past service supporting a women's shelter and coaching his son's mock trial team in high school;
- the "scores of hours of free mediation" that he has undertaken on behalf of the courts;

- his volunteer service on the blue ribbon panel for matrimonial resolutions, "where the most difficult matrimonial cases are presented;"

- his service as chairman of the commercial law section of the Ocean County Bar Association; and

- his pending application to become a certified civil trial attorney.

The special master's findings and conclusions were set forth in a lengthy hearing report and a supplemental report. Although the underlying events took place between the late 1990s and May 31, 2007, the special master relied solely upon the pre-2004 version of the RPCs in making his determinations.

The special master found that, when the Trims sought respondent's counsel in the Megtara matter, respondent had previously represented George "in matters related to his professional business," as well as LaBean, specifically its purchase of Subcontractors. However, respondent had not previously represented Cindy, and, therefore, he violated RPC

1.5(b), as to her, by failing to provide her with a writing setting forth the basis or rate of his fee.

The special master found that respondent's $33,000 fee in the Megtara and Paduano matters was unreasonable, a violation of RPC 1.5(a). The special master acknowledged that a fee far in excess of the amount in dispute is just one factor to consider when making a determination as to reasonableness. However, he noted that, in this case, George had told respondent to cease litigating the Megtara and Paduano matters. Thus, under RPC 1.5(a)(5), which refers to limitations imposed by the client, the special master found that respondent charged an unreasonable fee because he persisted in litigating and charging fees after George made it clear that he no longer wished to proceed.

Further, respondent's failure to abide by George's express instruction to cease the Megtara litigation violated RPC 1.2. Here, the special master rejected respondent's claim that he could not dismiss the case, lest he subject his clients to a suit for attorney fees. Indeed, the special master believed that the only reason why respondent wanted to continue with the lawsuit was so that he could recover something to apply to his attorney fees because George was not likely to pay the bill.

The special master rejected the OAE's claim that respondent violated RPC 1.2 when he refused to sign the substitution of attorney. Instead, the special master found that this behavior violated RPC 1.16(a)(3) because he had been discharged and was, therefore, obligated to withdraw from the representation.

The special master found that respondent violated RPC 1.4(b) because he settled the Megtara matter without informing George of the settlement offer and obtaining his consent to accept it.

In terms of respondent's applying the $10,000 to outstanding legal fees, the special master found that that conduct did not violate either RPC 1.15(c) or RPC 3.4(c). In short, according to the special master, George "expressly consented" to that disposition, when the Levin matter was settled. Moreover, respondent did not apply the funds to his outstanding legal fees until after the settlement had taken place.

As to Cindy, the special master ruled that, in light of respondent's March 6, 2005 email and other communications between them, respondent reasonably believed that she had asserted no claim to the settlement proceeds. In fact, she never did assert a claim to any portion of the monies. Thus,

respondent had a good faith belief that he was entitled to the $10,000 as payment against the outstanding legal fees in the Megtara/Paduano matter. Based on these facts, the special master determined that respondent did not violate RPC 1.15(c).

The special master also found that respondent did not run afoul of RPC 3.4(c). Although Judge O'Brien never entered an order authorizing respondent to take the $10,000, the special master noted that, when the Levin settlement was placed on the record, the judge had orally approved the disposition of the settlement funds.

The special master determined that respondent did not violate RPC 1.7(a)(1), by representing George and Cindy, in view of their agreement regarding the disposition of any recovery in the Megtara matter and the payment of legal fees. First, the Trims were each represented by matrimonial counsel when the agreement was reached. Second, there was "no evidence to suggest that Respondent's independence was compromised by the payment arrangement, or that confidentiality of client information was compromised." Accordingly, there was no violation of RPC 1.7(a)(1). Indeed, the special master suggested that the payment arrangement was permissible under the more applicable RPC, that is, RPC 1.8(f).

The special master determined that respondent violated RPC 1.7(a)(2) when he continued to represent the Trims in the Megtara matter after George had sued him. According to the special master, as soon as respondent was aware of George's claim against him, he "should have ceased work on the *Megtara* matter and advised at least Dr. Trim, if not both of the Trims, to secure new counsel."

Finally, the special master determined that the record lacked clear and convincing evidence that respondent had violated RPC 8.1(a), by misrepresenting to the OAE that he had advised Cindy, in writing, that, if she signed the Paduano release and endorsed the settlement check over to him, he would not pursue payment of his attorney fees. Although there was no such writing, the special master found that Rogalski's testimony was unclear about what representations were made to him on this topic during his investigation.

The special master recognized that, prior to the purchase of the Manahawkin building, respondent had represented George in a number of contexts. Nevertheless, respondent violated RPC 1.5(b) because Manna and its partners were not provided with a writing setting forth the rate or basis of respondent's fee.

Their failure to object to his bill was insufficient to overcome the absence of a writing.

With respect to the purchase of the Manahawkin building, the special master found that George "had no substantial experience with commercial real estate transactions" and "no deep level of sophistication." He found that respondent represented all members in the formation of Manna, the acquisition of the building, the negotiation of the leases, "and other related aspects." Notwithstanding Snyder's handling of the closing, the special master found that respondent had "handled virtually everything from start to finish" in connection with the acquisition of the property.

Likewise, when the building was sold, respondent "handled virtually all of the arrangements relating to the sale," with Dupignac handling the closing itself.

Based on these facts, the special master determined that respondent's participation in the purchase and sale of the Manahawkin building was rife with conflicts of interest. According to the special master:

> The group of transactions involving the formation of Manna, the acquisition of the property, and negotiation of the leases, all of which were inter-related with the acquisition of Dr. Trim's practice, and his employment by St. Barnabas, were of

Sufficient complexity that Respondent should not have undertaken the representation of all of the members and the business entity. The thought that all of the participants probably would have consented after full disclosure, if asked, does not change the result. The conclusion that these three RPC's were violated is all but mandated by *In the matter of LaVigne*, 146 N.J. 590 (1996). As is contended by the OAE, RPC 1.7(b) was violated again when Respondent represented Manna and its members at the time of sale of the property.

By bringing Mr. Snyder and Mr. Dupignac in to handle the closings at the last minute, Respondent implicitly recognized the conflicts, but failed to appreciate that those conflicts arose well before those gentlemen became involved.

Respondent and Dr. Trim disagreed over whether Respondent was motivated by self-interest, or helpful concern over the well-being of a friend, when Respondent recommended dilution of the risks through participation of Respondent and the other two members of Manna. The Special Master believes that the truth lies somewhere in the middle. Respondent's suggestion that risk could be reduced through participation of others was valid and worth considering. However, the Special Master believes that Respondent was motivated by self-interest when he suggested that he be one of the members in the venture. The central purpose of RPC 1.8 was frustrated when Respondent failed either to refuse to become involved

> as a member, or withdraw from representing Dr. Trim and referring him to other counsel.
>
> [SMR42-SMR43.][5]

The special master found no clear and convincing evidence to support the conclusion that respondent violated RPC 1.15(b) when he left the closing with the $50,391.39 check. According to the special master, all Manna partners "had fair notice that Respondent left the closing with the check" because Snyder had passed the check around to the partners and reviewed the HUD-1 with all parties.

The special master determined that respondent did not violate RPC 8.4(d) because there was no coercion, intimidation, or "other improper means" used to garner the withdrawal of Voorhees' grievance, which was based on factually incorrect information. Thus, the negotiation of its withdrawal simply was not prejudicial to the administration of justice.

The special master acknowledged that Gonzo's attempt to incorporate the withdrawal of the grievance within the settlement was overreaching and improper. Although respondent's

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[5] "SMR" refers to the special master's hearing report, dated February 21, 2012.

involvement in Gonzo's tactics was "fuzzy," the special master observed that the deal was struck in the presence of a judge and deputy ethics counsel. In short, the special master could not hold respondent vicariously liable under the RPCs for Gonzo's inappropriate behavior.

Of the many statements in respondent's certification alleged by the OAE to be false, the special master found only two of them to be in violation of RPC 3.3(a)(1) and RPC 8.4(c). The first was respondent's statement, in paragraph 18, that the Trims wanted retribution against Paduano. The special master noted that the Trims were upset with Nayak, not Paduano.

The second was respondent's statement in paragraph 32, that he had agreed to accept the $10,000 settlement "in full payment of the outstanding fees owed." In this regard, the special master noted that the statement contradicted respondent's March 6, 2005 email to Cindy, as well as his May 15, 2002 letter to George. Moreover, respondent "deliberately reserved his right to pursue Dr. Trim for fees up until the settlement of *Trim v. Levin* was put on the record." In short, respondent did not agree to accept the $10,000 settlement in the Paduano matter as full payment of his outstanding legal fees until the 2007 settlement in the Levin matter.

As for the remainder of the statements, the special master described them as "imprecise, even sloppy," but not knowing misrepresentations.

For these violations, the special master recommended the imposition of a three-month suspension, noting respondent's mitigation, that is, his statement that he is "'not the same lawyer today that [he] was then' indicating the [sic] has learned some hard lessons."

On March 23, 2012, the OAE wrote to the special master and stated that respondent's 2008 admonition should enhance the three-month suspension to either six months or a year. On May 9, 2012, the special master issued a supplemental report in which he re-examined the discipline based on respondent's ethics history. First, the special master noted that, within the context of the RPC 8.4(d) charge in the current disciplinary matter and respondent's previous discipline, respondent "should have been especially sensitized to the need to avoid any interference with the disciplinary process."

The special master increased the discipline from a three-month suspension to nine months based on his review of some other disciplinary cases involving multiple conflicts of interest. According to the special master, "the Supreme Court

has made it clear that conflict of interest violations in the context of business transactions with clients will result in substantial disciplinary consequences under circumstances like those presented here, and of course, those precedents cannot be ignored." In the special master's view, In re Doyle, 146 N.J. 629 (1996), called for a six-month suspension. In light of respondent's disciplinary history, however, the special master recommended a nine-month suspension.

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

Respondent undertook the representation of LaBean and the Trims in 1999. At the time, RPC 1.5(b), which was unchanged by the 2004 amendments to the RPCs, required a lawyer who has "not regularly represented the client," to communicate to the client, in writing, the basis or rate of the fee, "before or within a reasonable time after commencing the representation." Respondent certainly violated this rule as to Cindy, whom he had not previously represented in any legal matter and to whom he did not provide any writing setting forth the basis or rate of his fee in the Megtara and Paduano matters.

Notwithstanding respondent's claim that his firm's policy requires a signed retainer agreement to be on file in every matter, no agreement between the firm and Cindy could be located. Indeed, respondent was unable to produce a signed retainer agreement in any of the matters at issue in this proceeding.

Contrary to the special master's finding, respondent violated RPC 1.7(a)(1) when he undertook the representation of George and Cindy, knowing that Cindy was to receive any recovery in the Megtara matter, while George was to pay the bills. In 1999, RPC 1.7(a)(1) provided:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:
>
> (1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation.

We agree with the special master's finding that George and Cindy had agreed that George would pay the bills in the Megtara case and she would receive any award. The net effect of this agreement, as Cindy unwittingly testified, was that George alone

determined whether or not to move the case forward. This was the conflict, which played itself out.

First, after the Trims' divorce was finalized, in March 2000, George no longer wanted to continue paying respondent's fees. This is why Paduano was joined in the suit – so that George could recover some of the fees that were accumulating, or, stated another way, so that respondent would be paid.

Second, in the fall of 2001, George wanted to drop the Megtara and Paduano matters because he was receiving no benefit from continuing with the litigation, just incurring more fees. At this point, the security deposit claim was still pending in the Megtara matter. Thus, George's and Cindy's interests were not aligned. George wanted to end the litigation; Cindy wanted her money. If George had persuaded respondent to dismiss the litigation, Cindy would have lost her $5000 claim.

Of course, Cindy was LaBean's majority shareholder and, therefore, she could have elected to proceed, even if George would no longer cooperate or pay the bill. However, this scenario did not appear to be an option in anyone's eyes. It was all or nothing. Either George paid the bills or the case would not proceed.

The agreement between George and Cindy also played into the RPC 1.2(a) charge. Under former RPC 1.2(a), a lawyer was required to, among other things, "abide by a client's decisions concerning the objectives of representation" and "consult with the client as to the means by which they are to be pursued." Here, we disagree with the special master's finding that respondent failed to abide by George's express instruction to stop litigating the Meqtara litigation.

George's November 21, 2001 letter instructed respondent to settle the case, not to discontinue it. Respondent explained that the case could not be settled in the absence of an offer and that no offer would be forthcoming. Although George claimed that he later instructed respondent, in a number of letters, to stop the litigation, no letters were produced.

The record clearly demonstrates that George did not want to continue incurring legal fees and that he stopped cooperating with respondent at some point. However, there is no clear and convincing evidence that George ever moved beyond complaining to making a clear and definitive demand that the litigation be dismissed and that respondent refused to abide by his demand.

Respondent also was charged with having violated RPC 1.2(a) by refusing to sign the substitution of attorney in the Meqtara

and Paduano matters. Although his conduct was petty, it was not unethical. First, at the time the request was made, both matters had been concluded. Second, the substitution of one attorney for another is not an "objective of representation," such as whether to settle a civil case or to enter a plea in a criminal matter. Thus, as the special master noted, if any RPC were applicable, it would have been the current RPC 1.16(a)(3), which requires an attorney to withdraw from a representation if he or she has been discharged.

The OAE asserted that respondent's fee was unreasonable because he "ultimately sought the payment of upwards of $60,000 in legal fees" in a case that involved $15,000 in damages. RPC 1.5(a), which was unchanged in 2004, requires a lawyer's fee to be reasonable. The rule lists eight factors to be taken into consideration when determining the reasonableness of a fee. RPC 1.5(a)(1)-(8).

Respondent did not violate RPC 1.5(a). Respondent capped his fee at $30,000. Of that amount, George personally paid only $10,000, in two $5000 payments. The second payment was made on October 19, 2000, against $13,601.45 in unpaid fees. As of that date, Paduano had not yet filed for bankruptcy; thus, the so-called complications that arose out of that proceeding had not

yet taken place. In effect, George never paid a dime for respondent's work after the bankruptcy was filed.

As the special master noted, two of the factors to be taken into consideration when determining whether a fee is reasonable are "the amount involved and the results obtained" and "the time limitations imposed by the client or by the circumstances." RPC 1.5(a)(4) and (5). The record contained references to the value of the claims in Megtara at $15,000. While attorney fees for twice that amount seems excessive, as the special master ruled, not enough is known about the other factors to make a determination. What was respondent's hourly rate? What did he do? Did he take an excessive amount of time to complete his tasks? As for "time limitations," George's second and final payment was made more than a year before he wrote the November 2001 letter asking that respondent settle the case. In our view, therefore, the record, as developed, lacks clear and convincing evidence that the $30,000 fee was unreasonable.

Former RPC 1.4(b) required a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." The OAE asserted that respondent had violated this rule by failing to (1) notify George or his counsel of the August 2004 $10,000

settlement offer, (2) obtain George's authorization to accept the offer, and (3) request that George sign the release.

Because George was a plaintiff in the Megtara and Paduano matters, respondent had an ethical obligation to inform him of the $10,000 settlement offer and to obtain his consent to accept it, even if the offer and consent had to be communicated from respondent's lawyers (Carluccio or Gonzo) to George's lawyer (Voorhees) in the Levin matter. Respondent failed to do so, choosing instead to inform Voorhees of the settlement, after the fact.

The OAE asserted that respondent violated RPC 1.7(a)(2) when he continued to represent George in the Megtara and Paduano matters after George had sued him for malpractice in 2003. Although the OAE charged respondent with having violated RPC 1.7(a)(2), the applicable RPC is former RPC 1.7(b), which prohibited an attorney from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests," unless the lawyer "reasonably believe[d] the representation [would] not be adversely affected" and "the client consents after a full

disclosure of the circumstances and consultation with the client."

That a lawyer should not continue to represent a client who has sued him is obvious. Nevertheless, respondent continued to do so, even going so far as to consent to settlement in the Paduano on behalf of all plaintiffs, without consulting George, a violation of RPC 1.7(b).

According to the OAE, respondent violated current RPC 8.1(a) when he told Rogalski, during his 2006 interview, that he had advised Cindy, in writing, that he would not pursue legal fees if she signed a release and endorsed the $10,000 settlement check over to him. RPC 8.1(a) prohibits an attorney from knowingly making a false statement of material fact in connection with a disciplinary matter.

Respondent did not violate this rule. Rogalski testified that he saw the email from respondent to Cindy, in which he stated that he would not pursue her for legal fees, but that he reserved the right to go after George. Rogalski also testified that respondent told him that he had reserved the right in the Levin matter, although he did not intend to follow through on collecting the fees. We find that Rogalski's testimony failed to establish clear and convincing evidence that respondent made

any misrepresentation to the OAE. Thus, respondent did not violate RPC 8.1(a).

Current and former RPC 1.15(c) provide:

> When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The OAE asserts that respondent violated this rule when he took the $10,000 settlement in the Paduano case and applied it to the outstanding legal fees owed in that and the Megtara matter. He did not. As the special master recognized, George "expressly consented" to that disposition, when the Levin matter settled, and respondent did not apply the funds to his outstanding legal fees until after the settlement had taken place. Moreover, as the special master concluded, in light of respondent's March 6, 2005 email and other communications between him and Cindy, respondent reasonably believed that she had asserted no claim to the settlement proceeds. In fact, she never asserted a claim to any portion of the monies. Thus, respondent had a good faith belief that he was entitled to the

$10,000 as payment against the outstanding legal fees in the Megtara/Paduano matter. He did not violate RPC 1.15(c).

Moreover, respondent did not violate RPC 3.4(c) by taking the $10,000 and applying it to the outstanding legal fees in the Megtara and Paduano matters. That rule prohibits a lawyer from "knowingly disobey[ing] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Although the prior court order stated that the $10,000 was to remain in respondent's trust account "until further Order of the Court," and no further order was entered, the fact is that Judge O'Brien made it clear on the record, when the Levin matter was settled, that respondent could apply the funds to the outstanding fees. Thus, he did not violate RPC 3.4(c) by failing to obtain a written order.

In summary, in the Megtara and Paduano matters, respondent violated former RPC 1.4(b), RPC 1.5(b), former RPC 1.7(a)(1), and former RPC 1.7(b). He did not violate RPC 1.2(a), RPC 1.5(a), current RPC 1.7(a)(2), RPC 1.15(c), RPC 3.4(c), or RPC 8.1(a).

Turning to the Trim v. Levin matter, there was no evidence that respondent had provided Low or Vitale, neither of whom he had previously represented, with any writing setting forth the

basis or rate of his fee with respect to the formation of Manna. He also failed to do the same as to Manna when it purchased and sold the Manahawkin building. Thus, he violated RPC 1.5(b).

The OAE asserted that respondent violated RPC 1.8(a) by failing to advise George to seek the advice of independent counsel with respect to the formation of Manna. According to the OAE, the terms of the transaction were not fair and reasonable to George, they were not in his interest, they were not fully disclosed and transmitted to him in writing, and he did not provide written consent to the terms of the agreement.

Former RPC 1.8(a) provides, in relevant part:

> (a) A lawyer shall not enter into a business transaction with a client . . . unless (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms that should have been reasonably understood by the client, (2) the client is advised of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice in the transaction, and (3) the client consents in writing thereto.

Respondent violated RPC 1.8(a). Although the OAE claims that the terms were not fair and reasonable or in George's best interest, there was no clear and convincing evidence offered to support these assertions. Moreover, George's claim that he

could have purchased and maintained the building without any partners was supported only by his and Voorhees' opinions. Nevertheless, respondent did not provide any writing to George fully disclosing the transaction and terms; it is highly questionable that he advised George to seek the advice of independent counsel; and there was no evidence that George had consented to respondent's participation in the partnership, in writing.

Although the OAE charged respondent with having violated RPC 1.7(a)(2), the applicable RPC is former RPC 1.7(b), which prohibited an attorney from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests," unless the lawyer "reasonably believed the representation [would] not be adversely affected" and "the client consents after a full disclosure of the circumstances and consultation with the client." RPC 1.7(b)(1)(2). More specifically: "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." RPC 1.7(b)(2).

Clearly, because respondent was to be a partner in Manna, his own interests were at issue. However, by merely suggesting the partnership to George, respondent did not violate RPC 1.7(b). Further, there was no clear and convincing evidence that he violated that rule when he proceeded to represent George, Low, and Vitale in the formation of Manna without complying with the rule's disclosure and consent requirements. Because all the partners shared equally in the benefits and burdens of the partnership, there was no conflict of interest, either in the purchase or the sale of the Manahawkin building. All partners shared equally in the purchase price, and all shared equally in the distribution of the profit when the building was sold.

Respondent's receipt and deposit of the $50,391.39 check, issued by Snyder to respondent's trust account at the closing, did not violate RPC 1.15(b). That rule states, in relevant part: "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person."

Each partner testified that the excess funds were disclosed on the HUD-1, which was signed by George. Although the HUD-1 did not indicate that the $50,000 was to be turned over to respondent for the payment of bills, which is exactly what

happened, Snyder testified that he had passed the check around the table at the closing and reviewed the HUD-1 with all parties. Thus, they knew the funds were given to respondent.

In summary, in the formation of Manna and the purchase and sale of the Manahawkin building, respondent violated RPC 1.5(b) and former RPC 1.8(a). He did not violate current RPC 1.7(a)(2), former 1.7(b), or RPC 1.15(b).

An attorney who attempts to persuade a grievant to withdraw a grievance filed against the attorney violates RPC 8.4(d), which proscribes conduct prejudicial to the administration of justice. Here, the record lacked any evidence that respondent ever attempted to condition settlement of the Levin matter on Voorhees' withdrawal of the grievance filed against him. Rather, Gonzo simply wanted Voorhees to "rescind" the June 2006 letter to the OAE because the basis upon which it had been written, that is, respondent's possible forgery and deposit of the $10,000 settlement check in the Paduano matter, turned out to have not occurred. Thus, respondent did not violate RPC 8.4(d).

The OAE asserted that respondent violated RPC 3.3(a)(1) and RPC 8.4(c) by reason of certain statements made in his certification, filed in opposition to the motion to compel him to sign a substitution of attorney in the Megtara/Paduano

litigation. RPC 8.4(c) prohibits conduct involving dishonesty, fraud, deceit and misrepresentation. RPC 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal.

For the reasons stated by the special master, we find that respondent violated these rules only as to paragraph 18, in which he stated that the Trims wanted retribution, and paragraph 32, in which he stated that he had agreed to accept the $10,000 in full payment of his fees. The Trims' testimony was compelling. They did not want retribution. Moreover, at the time of the certification, respondent had an outstanding claim for fees against George in the Levin matter, which was not resolved until months later.

As for the other paragraphs, we note the following: (1) even in the absence of a retainer agreement, respondent did bill on an hourly basis in the Megtara and Paduano matters (¶16); (2) George certainly was unhappy when Paduano filed for bankruptcy (¶21); (3) when the stay was lifted, the effect was that respondent could seek fees in the Paduano matter (¶23); and (4) any monies collected from Paduano could be used only to pay respondent's bill (¶24). Thus, as the special master ruled, the dramatic words used by respondent to describe these events were

more in the nature of exaggerations than intentional misrepresentations of fact.

In summary, respondent violated RPC 3.3(a)(1) and RPC 8.4(c) as to two of the six paragraphs at issue in his certification.

There remains for determination the appropriate measure of discipline to be imposed for respondent's failure to communicate with George, his multiple conflicts of interest, his multiple misrepresentations, and his multiple failures to provide writings to his clients setting forth the basis or rate of his fee. For the reasons stated below, we find that a censure is sufficient discipline.

An admonition is typically imposed on an attorney who fails to provide a client with a writing setting forth the basis or rate of the fee, even when accompanied by other, non-serious ethics offenses. See, e.g., In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (attorney violated RPC 1.5(b) and, in another client matter, failed to promptly deliver funds to a third party); In the Matter of Alfred V. Gellene, DRB 09-068 (June 9, 2009) (in a criminal appeal, the attorney violated RPC 1.5(b) and also lacked diligence in the matter); and In the Matter of Carl C. Belgrave, DRB 05-258 (November 9, 2005)

(attorney was retained to represent the buyer in a real estate transaction, and failed to state in writing the basis of his fee, resulting in confusion about whether a $400 fee was for the real estate closing, or for a prior matrimonial matter for which the attorney had provided services without payment; recordkeeping violations also found). Thus, for respondent's violations of RPC 1.5(b) and RPC 1.4(b), an admonition is appropriate.

Since 1994, it has been a well-established principle that a reprimand is the measure of discipline imposed on an attorney who engages in a conflict of interest. In re Berkowitz, 136 N.J. 148 (1994). If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," discipline greater than a reprimand is warranted. Berkowitz, supra, 136 N.J. at 148. See also In re Guidone, 139 N.J. 272, 277 (1994) (reiterating Berkowitz and noting that, when an attorney's conflict of interest causes economic injury, discipline greater than a reprimand is imposed; the attorney, who was a member of the Lions Club and represented the Club in the sale of a tract of land, engaged in a conflict of interest when he acquired, but failed to disclose to the Club, a financial interest in the entity that purchased the

land, and then failed to (1) fully explain to the Club the various risks involved with the representation and (2) obtain the Club's consent to the representation; the attorney received a three-month suspension because the conflict of interest "was both pecuniary and undisclosed"). Here, respondent was involved in a conflict of interest in the Megtara/Paduano matter and in the formation of Manna.

The conflict in Megtara/Paduano did not involve egregious circumstances or result in serious economic injury to either Cindy or George. Respondent simply made the mistake of allowing George to control the litigation, even though he represented George and Cindy. The person at risk of economic injury, as the result of the agreement between the Trims, was Cindy. In the end, however, respondent obtained a favorable outcome for her on both the inventory and security deposit claims. Thus, a reprimand is the appropriate measure of discipline for the conflict in this matter.

In the case of the formation of Manna, respondent clearly failed to make the disclosures required RPC 1.8(a). However, his violation was limited to failing to follow the letter of the law rather than the desire to harm George. The record lacked

clear and convincing evidence of either egregious circumstances or serious economic injury to his client.

Of paramount concern, of course, is the claim that respondent insinuated himself into what would have been a very lucrative investment for George, if he had pursued it alone. Yet, as stated above, the record lacked sufficient evidence upon which to conclude that George had the financial ability to make the investment without partners.

In terms of the deal itself, there was no clear and convincing evidence of egregious circumstances or serious economic injury to George. Respondent was one of four equal partners. He did not receive anything more or anything less than the others. Everything about the formation of the partnership and the purchase and sale of the Manahawkin building was disclosed and ostensibly above board.

A reprimand is sufficient discipline for these conflicts because there was no harm to the clients.

In re Doyle, 146 N.J. 629 (1996), which the special master relied upon in reaching his decision that a nine-month suspension is appropriate, does not apply to this case. In Doyle, the Court imposed a six-month suspension on an attorney, who engaged in multiple conflicts of interest through his

representation of a former school mate, Jack; Jack's parents, John and Loretta; and Jack's various aunts and uncles in multiple estate- and real-estate-related matters. Id. at 632.

Specifically, the attorney first represented Jack's Aunt Kathryn, as executrix of her sister Marion's estate, of which Kathryn was the primary beneficiary. Ibid. The assets included a camp valued at $1.8 million. Ibid.

In November 1979, shortly after Kathryn had inherited the property, she suffered a stroke, which rendered her unable to communicate orally, partially-paralyzed, and confined to a nursing home. Ibid. Thereafter, John hired respondent to have Kathryn removed as executor of the estate, which he did without an affidavit from a doctor stating that Kathryn was unable to tend to any business or estate matters, or having her incompetency formally adjudicated. Id. at 632-33.

Next, at John's request, the attorney prepared a power of attorney, in favor of John, for Kathryn's signature. Ibid. Kathryn signed it with an "X." Ibid. He then prepared a will for Kathryn and her husband James, which conveyed seventeen lots from the camp property to John, in trust. Id. at 634. Kathryn signed her name to the will, rather than marking it with an "X." Ibid.

Four years later, the attorney met with Kathryn to discuss an estate plan that he had drawn up without first having consulted with her. Id. at 634-35. Through questions that could be answered "yes" or "no," the attorney determined that, after James died, her own brother, Barrett, was to receive only $5000, with the rest of her estate going to John and then Jack, his former school mate. Id. at 635.

The net effect of the attorney's "representation" was that Kathryn transferred all of her property to John and Jack, leaving the trusts established by her will without assets. Id. at 636. When Kathryn died, Barrett contested the will. Ibid. Ultimately, the parties agreed to set aside the will. Id. at 637.

In the same year that Kathryn died, the attorney purchased one of the parcels that she had conveyed to John and his wife, which he turned around and sold at a substantial profit. Id. at 638.

Respondent was not embroiled in multiple conflicts involving clients who sought to wrest control of assets from other clients. He did not take advantage of his relationships with his client in order to seize upon an investment opportunity for self gain.

When an attorney makes a misrepresentation to a court while under oath, short-to-long-term suspensions are typically imposed. See, e.g., In re Trustan, 202 N.J. 4 (2010) (three-month suspension imposed on attorney who, among other things, submitted to the court a client's CIS, which falsely asserted that the client owned a home, and drafted a false certification for the client, which was submitted to the court in a domestic violence trial); 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 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 Coffee, 174 N.J. 292 (2002) (on motion for reciprocal discipline in matter where attorney received a one-month suspension in Arizona, three-month suspension imposed for 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 Cillo, 155 N.J. 599 (1998) (one-year suspension where, after falsely certifying to a judge that a case had been settled and that no

other attorney would be appearing for a conference, the attorney obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension where the attorney, who had been in an automobile accident, misrepresented to the police, her lawyer, and a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse another of her own wrongdoing).

In some instances, however, discipline less severe than a three-month suspension was imposed, due to mitigating factors. See, e.g., In the Matter of Jean S. Lidon, DRB 11-254 (October 27, 2011) (admonition imposed on attorney who failed to disclose to the court and to the adversary in her own matrimonial matter that she had redacted a letter produced during discovery, a violation of RPC 3.4(a); attorney had an unblemished disciplinary history and there was a lack of venality in her actions); In the Matter of Richard S. Diamond, DRB 07-230 (November 15, 2007) (admonition imposed on attorney, who, in a

matrimonial matter, filed with the court certifications making numerous references to "attached" psychological and medical records, whereas the attachments were merely billing records from the client's insurance provider; attorney's first encounter with disciplinary system in twenty-year career); In re McLaughlin, 179 N.J. 314 (2004) (reprimand imposed on attorney, who had been required by the New Jersey Board of Bar Examiners to submit quarterly certifications attesting to his abstinence from alcohol, falsely reported that he had been alcohol-free during a period within which he had been convicted of driving while intoxicated; after the false certification was submitted, respondent sought the advice of counsel, came forward, and admitted his transgressions); and In re Manns, 171 N.J. 145 (2002) (reprimand for misleading the court in a certification in support of a motion to reinstate a complaint as to the date the attorney learned that the complaint had been dismissed, as well as lack of diligence, failure to expedite litigation, and failure to communicate with the client; although attorney had received a prior reprimand, we noted that the conduct in both matters had occurred during the same time frame and that the misconduct in the second matter may have resulted from the attorney's poor office procedures).

The misrepresentations in respondent's certifications do not justify the imposition of more than a reprimand for that misconduct. They were made in a certification in opposition to a motion to compel respondent to execute a substitution of attorney so that a stale settlement check could be replaced. The misrepresentations did not go to the ultimate issue to be determined by the court in the various litigation matters. They stemmed more from his self-righteousness than the intent to seek gain or avoid loss by deception. Moreover, given their relatively-benign nature, a reprimand is sufficient discipline for all of respondent's misrepresentations in this matter.

Based on the foregoing, we conclude that a single censure is sufficient discipline for the totality of respondent's misconduct. Although the special master made much ado about respondent's prior admonition in a matter where he tried to strong arm the withdrawal of a grievance, respondent did no such thing in this case. Moreover, the grievance in that matter was filed after the events in this matter had taken place.

Member Doremus 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