SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-108
District Docket No. XIV-2013-0706E

IN THE MATTER OF	:
GREGORY N. FILOSA	:
AN ATTORNEY AT LAW	:

Decision

Argued: June 19, 2014

Decided: July 30, 2014

Hillary Horton appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), following an order from the Committee on Grievances for the United States District Court of the Southern District of New York, suspending respondent for one year, effective February 5,

2013.[1] Respondent was found guilty of violating the equivalent of New Jersey RPC 3.3(a)(4) (a lawyer shall not knowingly offer evidence that the lawyer knows to be false), RPC 3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act), RPC 3.4(b) (a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely), RPC 4.1(a) (a lawyer shall not knowingly make a false statement of material fact or law to a third person), RPC 8.4(a) (conduct that violates the Rules of Professional Conduct), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).[2]

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[1] On October 31, 2013, the New York Supreme Court, Appellate Division, First Judicial Department (the New York Court) imposed a one-year suspension on respondent, retroactive to February 12, 2013.

[2] Respondent was also charged with violating New York Rules of Professional Conduct (NY RPC) 3.4(a)(3) (failure to disclose that which the attorney had a legal obligation to disclose) and RPC 8.4(h) (engage in conduct that adversely reflects on the attorney's fitness as a lawyer). Those rules have no New Jersey RPC equivalent.

The OAE recommended a one-year suspension without clarifying if it should be retroactive or prospective. Respondent agreed with the OAE's recommendation, but requested that the suspension be retroactive to February 12, 2013. We determine to impose a one-year suspension, retroactive to February 12, 2013.

Respondent was admitted to the Pennsylvania bar in 2005, the New Jersey bar in 2006, and the New York bar in 2008. He has no history of discipline in New Jersey.

The federal court reinstated respondent on April 17, 2014. The New York Court reinstated him on May 29, 2014.

The facts that gave rise to this matter are as follows:

In June 2009, Violet Fryer retained the law firm of Thompson Wigdor and Gilly (TWG or the firm) to represent her as the plaintiff in an employment discrimination case against her former employer, OMD, a subsidiary of Omicron Media Group. Fryer alleged that OMD had subjected her to "employment discrimination and retaliatory termination," in violation of the Family Medical Leave Act and Title VII of the Civil Rights Act of 1964. Respondent was the firm's associate assigned to the case. He worked under the supervision of partner Andrew Goodstadt until August 2010, when Goodstadt left the firm.

Thereafter, TWG partner Scott B. Gilly supervised respondent's work.

In April 2010, OMD requested the production of all documents pertaining to (a) Fryer's efforts to mitigate her damages; (b) her efforts to secure employment, following the termination of her employment at OMD; (c) each job she had held, since the termination of her employment; and (d) income she had received from any such job. Fryer produced documents responsive to OMD's requests and supplemented her document production on September 7, October 5, and October 12, 2010.[3]

In July 2010, the firm retained an economist to prepare a calculation of Fryer's potential damages. The report contained an analysis based, in part, on an assumption that Fryer would be unemployed through the end of 2010 and calculated future earnings for a period of one-to-six years.

Prior to service of the expert report, Fryer received and accepted two job offers. On September 10, 2010, Universal McCann (UM) offered her a job, which she accepted. One week later, Kraft Foods (Kraft) offered her a job at a higher salary than she had been earning at OMD. Fryer withdrew her acceptance

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[3] It appears that Fryer gave those documents to respondent and that respondent did not produce them to OMD's counsel.

of the UM offer and accepted the Kraft offer. She was scheduled to begin work with Kraft on October 11, 2010. She kept respondent informed about the job offers and related developments.

On September 10, 2010, respondent and Gilly discussed Fryer's job offer and the "desirability of settling the case as soon as possible." On September 17, 2010, respondent advised Gilly that Fryer had accepted the offer from Kraft and had authorized respondent to renew the settlement discussions with OMD.

On September 22, 2010, the firm received the expert report. Two days later, respondent emailed the report to Gilly and notified him that the report would be submitted to opposing counsel the following week. Respondent requested a meeting with Gilly to discuss how to "leverage this into trying to settle it before they know about her new job." Gilly and respondent "had further discussions" about this issue. Respondent served the report on opposing counsel on September 27, 2010.

On September 28, 2010, respondent and opposing counsel engaged in settlement discussions. Respondent renewed an earlier demand for $350,000 and referenced the expert report, in support of the "reasonableness of the settlement demand."

On September 29, 2010, respondent sent opposing counsel a settlement demand letter, summarizing the history of their discussions and noting that his renewed offer of $350,000 was at the bottom of the range of the economic damages outlined in the expert report. Gilly reviewed and revised the demand letter, before it was mailed out. On October 4, 2010, respondent and Gilly discussed discovery strategy. There were no further settlement discussions until the first day of Fryer's deposition.

On October 7, 2010, the OMD attorneys deposed Fryer. OMD counsel asked Fryer if she had worked since leaving OMD. Fryer said "no." Counsel asked Fryer what steps she had taken to find employment. Fryer replied that she had submitted her resumé to job boards and to companies, had been on approximately ten interviews, and had been working with "headhunters." When asked if she had been on any second interviews, Fryer answered that she had been on a few, but either had not heard back or had not gotten the job. Fryer also discussed the emotional impact of losing her job and her financial stress and commented that it was "frustrating to keep trying and not [get] anywhere." Respondent knew that, at the time of the deposition, Fryer had accepted and rescinded the job offer with UM and was scheduled

to begin work at Kraft, on October 11, 2010. Nevertheless, respondent did not disclose those facts to OMD at or immediately following the deposition. He took no additional steps to correct the record.

On October 12, 2010, OMD began making offers to settle the case. Respondent reduced Fryer's settlement demand to $250,000. OMD offered $150,000. When Fryer refused to accept less than $250,000, the settlement negotiations reached an impasse.

On October 19, 2010, respondent and Gilly discussed the situation and the status of discovery. According to the Committee on Grievances' opinion, "Gilly was aware that Respondent had not yet supplemented Fryer's document production with correspondence concerning her job offer, and that he had not amended the expert report, despite the fact that Fryer had commenced employment with Kraft one week earlier."

On October 27, 2010, OMD's counsel contacted respondent and advised him that OMD had learned that Fryer had obtained employment. Respondent confirmed that Fryer had gotten a new job. By letter dated November 16, 2010, OMD counsel advised respondent that OMD intended to seek the dismissal of the action and sanctions, based on Fryer's misconduct. Counsel asked respondent to confirm that, prior to October 27, 2010, neither

he nor anyone at the firm was aware of Fryer's job offers or of her acceptance of the job with Kraft. By letter dated November 24, 2010, respondent denied OMD's allegations of misconduct and threatened to seek sanctions against OMD, if it pursued a "frivolous" dismissal motion.

On December 2, 2010, respondent served OMD with a revised expert report that capped Fryer's economic damages at $151,239 based, in part, on her acceptance of the job at Kraft. On December 22, 2010, counsel for OMD advised the court of Fryer's misconduct and requested a pre-motion conference on OMD's motion for dismissal and sanctions against respondent, Gilly, the firm, and Fryer. By letter dated December 30, 2010, respondent denied any misconduct by Fryer or her attorneys and requested that the judge deny OMD's request for a pre-motion conference.

In January 2011, the judge conducted a pre-motion conference. The record does not reveal the outcome of that conference. In March 2011, OMD conducted another deposition of Fryer. Here, too, the record is silent about what transpired at that deposition. The following month, OMD's counsel moved for sanctions and dismissal. Gilly and another partner from the firm were present at the May 2011 oral argument on the motion. Respondent was not present. The judge imposed a sanction of

$2,500 against Fryer and $15,000 against the firm, "based on false testimony by Ms. Fryer at her deposition" and respondent and Gilly's efforts "to conceal Ms. Fryer's new employment and to leverage a false expert report in order to extract a favorable settlement." The judge declined to dismiss the case against OMD at the time. Respondent was asked to resign from the firm on May 31, 2011.

The New York Committee on Grievances determined that respondent violated NY RPC 3.3(a)(3), NY RPC 3.4(a)(4) and NY RPC 4.1, by serving on OMD an inaccurate expert report and then re-affirming the report's representations, when he subsequently referenced the report, in support of the reasonableness of Fryer's settlement demand; NY RPC 3.3(a)(3) and NY RPC 3.4(a)(4), by failing to correct Fryer's false testimony at the October 2010 deposition; NY RPC 3.4(a)(1) and (3), by failing to promptly supplement Fryer's document production with documents relating to her job offers from UM and Kraft; and NY RPC 8.4(a),(c),(d), and (h), by the above conduct, including misleading OMD about Fryer's employment prospects through the inaccurate expert report; by failing to correct Fryer's deposition testimony; by failing to produce documents that would

have revealed Fryer's two job offers; and by trying to settle the case quickly "before the defendants caught on to the truth."[4]

As noted previously, the Committee on Grievances imposed a one-year suspension on respondent, effective February 5, 2013.

In support of its recommendation for a one-year suspension, the OAE relied primarily on In re Shearin, 166 N.J. 558 (2001) (on a motion for reciprocal discipline, one-year suspension for attorney suspended for that period in Delaware for multiple violations, including preparing two deeds and submitting a false certification, making false statements to tribunals and submitting false evidence, submitting a false debtor's schedule in a federal bankruptcy court, and submitting a false "certificate" to the Delaware Division of Corporations); In re Hock, 174 N.J. 376 (2002) (on a motion for reciprocal discipline, one-year suspension imposed on attorney suspended in New York for two separate instances involving written misrepresentations in connection with court-required disclosure statements; specifically, the attorney misrepresented that experts witnesses would testify favorably to his client, when he

[4] In its statement of facts, the Committee on Grievances referenced that, "[by] letter dated December 30, 2010, respondent denied any misconduct by either Fryer or her counsel." The letter was sent to the judge who presided over the case.

knew that was not the case); and In re Kalman, 177 N.J. 608 (2003) (suspension from pro hac vice appearances in New Jersey courts for a period of one year for attorney who engaged in business litigation for one client in Pennsylvania, while representing another client in related litigation in New Jersey; both courts found that the attorney withheld certain documents from his adversary and the court; in addition, the New Jersey trial court ruled that respondent's failure to correct his client's false pleadings was improper; both courts sanctioned the attorney; other improprieties were conflict of interest and acceptance of compensation from someone other than the client).

As mentioned above, respondent did not dispute that a one-year suspension is appropriate, but requested that it be made retroactive to February 12, 2013, the day after his employment in New York with another firm was terminated. In support of this request, respondent noted that he promptly reported his suspension to the OAE and followed up with that office; prior to this matter he had no other disciplinary history; since this matter was reported in New York, he was subjected to "public excoriation" and the loss of his employment twice; and he has taken steps to better educate himself and prevent any future lapses in professional judgment, including joining an ethics committee, taking a number

of CLE classes beyond his requirements in ethics and witness preparation, and participating in pro bono legal aid programs.

Respondent also stated that, prior to OMD's learning of Fryer's employment, he was in the process of compiling documents to disclose her employment to OMD. We note, however, that too many days had passed between Fryer's deposition and OMD's learning of her employment for us to accept respondent's argument that his intent was to clarify and correct the record. See In the Matter of Robin K. Lord, DRB 01-250 (September 24, 2001) (admonition for attorney who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias; unaware of the client's significant history of motor vehicle infractions, the court imposed a lesser sentence; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated).

Respondent also noted that, at the time of his misconduct, he was a relatively young associate working under the close supervision of a senior/founding partner of his firm, who was a well-respected member of the New York labor and employment bar. Nevertheless, respondent acknowledged that, although he was working under the supervision of a senior partner, he failed to

conduct himself in accordance with the Rules of Professional Conduct.[5]

In further support of his request that the suspension be retroactive, respondent relied on In re Fisher, 185 N.J. 238 (2005) (one-year suspension starting on July 29, 2004, the effective date of attorney's one-year-and-one-day Pennsylvania suspension for criminal conviction of one count of insurance fraud, one count of forgery, and one count of criminal conspiracy) and In re Wiss, 181 N.J. 298 (2004) (six-month suspension retroactive to the date of the attorney's New York suspension, following his guilty plea to a charge of insurance fraud in the fifth degree).

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[5] As to whether respondent could argue that he was following Gilly's directions, the Committee on Grievances' opinion concluded that, although NY RPC 5.2(b) provides that a subordinate attorney does not violate the RPCs if the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty, the rule did not apply here. This was so because Gilly's resolution of these questions -- namely, whether to serve the misleading expert report, whether to inform opposing counsel of the invalid assumptions contained therein, and whether to rely on the expert report in the course of settlement negotiations -- was not even remotely reasonable.

Following a review of the full record, we determine to grant the OAE's motion for reciprocal discipline. As the OAE summarized:

> Here, respondent violated his ethical duties by exploiting a false expert report and his client's false deposition testimony to leverage a favorable settlement. The Committee found based on clear and convincing evidence that respondent was aware that his expert report over-valued the future lost earnings of his client who had already obtained new, better paying employment. Respondent failed to tell his adversary that "one of the key assumptions in the expert report was no longer valid or would become invalid in the near future" (Exhibit G). The Committee found it unconvincing that respondent was following the directions of his supervising lawyer as "it cannot be said that Gilly's resolution of these questions – namely, whether to serve the misleading expert report, whether to inform opposing counsel of the invalid assumptions contained therein, and whether to rely on the expert report in the course of the settlement negotiations – were even remotely reasonable." Ibid. Additionally, the Committee found that respondent failed to take any measures to correct Fryer's false deposition testimony. Ibid. And respondent's delay in providing documents that would have revealed Fryer's job offers (Kraft and UM) was "premised on the need to 'leverage' that apparent misperception." Ibid. Respondent also presented a false declaration to Judge Pauley suggesting that he did not have any documents that disclosed Fryer's job offers when, in fact, he was in possession of at the very least e-mails

discussing the UM and Kraft offers. (Exhibit E).

[OAEb17.][6]

Respondent offered a false expert report in the context of a lawsuit, assisted Fryer to testify falsely, and lied to opposing counsel and to the court about knowing of any improprieties by either his client or her attorneys. Altogether, he violated the equivalent of New Jersey RPC 3.3(a)(4), RPC 3.4(a), RPC 3.4(b), RPC 4.1(a), RPC 8.4(a), RPC 8.4(c), and RPC 8.4(d).

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which states as follows:

> The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> > (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
> >
> > (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;
> >
> > (C) the disciplinary or disability order of the foreign jurisdiction does not

[6] OAEb refers to the OAE's brief in support of its motion for reciprocal discipline.

remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E).

Lack of candor to a tribunal has resulted in discipline ranging from an admonition to a long-term suspension. See, e.g., In the Matter of Lawrence J. McGivney, DRB 01-060 (March 18, 2002) (admonition for attorney who improperly signed the name of his superior, an Assistant Prosecutor, to an affidavit in support of an emergent wiretap application moments before its review by the court, knowing that the court might be misled by his action; in mitigation, it was considered that the superior had authorized the application, that the attorney was motivated by the pressure of the moment, and that he brought his impropriety to the court's attention one day after it occurred); In the Matter of Robin K. Lord, supra, DRB 01-250 (September 24, 2001) (admonition for attorney who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias; unaware of the client's significant history of motor vehicle

infractions, the court imposed a lesser sentence; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); In re Lewis, 138 N.J. 33 (1994) (admonition for attorney who attempted to deceive a court by introducing into evidence a document falsely showing that a heating problem in an apartment of which the attorney was the owner/landlord had been corrected prior to the issuance of a summons; in mitigation, it was considered that the court was not actually deceived because it discovered the impropriety before rendering a decision and that no one was harmed as a result of the attorney's actions); In re Whitmore, 117 N.J. 472 (1990) (reprimand imposed on a municipal prosecutor who failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a DWI charge had intentionally left the courtroom before the case was called, resulting in the dismissal of the charge); In re Mazeau, 122 N.J. 244 (1991) (attorney reprimanded for failure to disclose to a court his representation of a client in a prior lawsuit, when that representation would have been a factor in the court's ruling on the attorney's motion to file a late notice of tort claim); In re Shafir, 92 N.J. 138 (1983) (an assistant prosecutor who forged his supervisor's name on internal plea disposition forms and

misrepresented information to another assistant prosecutor to consummate a plea agreement received a reprimand); In re Stuart, 192 N.J. 441 (2007) (three-month suspension for assistant district attorney in New York who, during the prosecution of a homicide case, misrepresented to the court that he did not know the whereabouts of a witness; in fact, the attorney had made contact with the witness four days earlier; compelling mitigation justified only a three-month suspension); In re Hasbrouck, 186 N.J. 72 (2006) (attorney suspended for three months for, among other serious improprieties, failing to disclose to a judge his difficulties in following the judge's exact instructions about the deposit of a $600,000 check in an escrow account for the benefit of the parties to a matrimonial action; instead of opening an escrow account, the attorney placed the check under his desk blotter, where it remained for eight months); In re Evans, 181 N.J. 334 (2004) (three-month suspension for attorney who, while general counsel for Holt Cargo Systems, a defendant in a lawsuit about spoilage brought by Ocean Spray Cranberries, knowingly withheld critical information from Ocean Spray and from Holt Cargo's outside counsel with regard to a prior cover up and fabrication of records by Holt in order to avoid liability in the lawsuit); In re Paul, 167 N.J. 6 (2001) (three-

month suspension for attorney who made misrepresentations to his adversary in a deposition and in several certifications to a court); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension for attorney who made multiple misrepresentations to a judge about his tardiness for court appearances or failure to appear; mitigating factors considered); In re Poreda, 139 N.J. 435 (1995) (attorney suspended for three months for presenting a forged insurance identification card to a police officer and to a court); In re Forrest, 158 N.J. 428 (1999) (attorney who failed to disclose the death of his client to the court, to his adversary, and to an arbitrator was suspended for six months; the attorney's motive was to obtain a personal injury settlement); In re Marshall, 165 N.J. 27 (2000) (one-year suspension for attorney who deceived his adversary and the court in a litigated matter by failing to reveal a material fact during litigation, serving false answers to interrogatories, and permitting his client to produce misleading documents to his adversary, all the while maintaining his silence; the attorney backdated a stock transfer document and put an incorrect date in his notarization of the transfer agreement knowing that the timing of the transfer could have a material effect on the case); In re Telson, 138 N.J. 47 (1994) (after an attorney concealed a judge's docket entry dismissing his

client's divorce complaint, the attorney obtained a divorce judgment from another judge without disclosing that the first judge had denied the request; the attorney then denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was scared; the attorney was suspended for six months); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, 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 for attorney who was involved in an automobile accident and then misrepresented to the police, to her lawyer, and to a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing).

As to the appropriate measure of discipline for respondent's infractions, In re Forrest, supra, 158 N.J. 428 (six-month suspension), is instructive. Both respondent and Forrest neglected

to disclose to their adversary what was clearly a material fact affecting their settlement offers. Both made misrepresentations to a court in connection with a pending lawsuit. Forrest did not disclose the death of his client to his adversary, the arbitrator, and to the court. Respondent did not disclose to his adversary and the court that his client had obtained gainful employment.

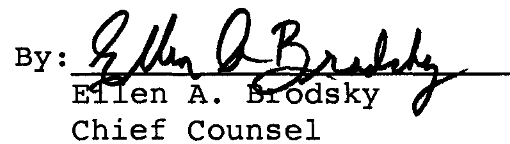
Moreover, respondent allowed his client to testify falsely, produced a false expert report, and when his adversary confronted him with the truth, he acted indignantly, denied any wrongdoing, and threatened the adversary with sanctions.

Unquestionably, respondent's conduct was more serious than Forrest's, for which stronger discipline is warranted. Indeed, we see no compelling reason to deviate from the same discipline imposed in New York – a one-year suspension. The suspension, however, should be retroactive to February 12, 2013, the date that the New York Court suspended respondent. The determination to make the suspension retroactive is reinforced by the fact that the resolution of this matter has been delayed for more than a year, through no fault of respondent.

Members Gallipoli and Zmirich agree that a one-year suspension is appropriate, but believe that it should be prospective. Vice-chair Baugh did not participate and Member Rivera abstained.

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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

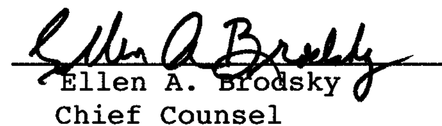
In the Matter of Gregory N. Filosa
Docket No. DRB 14-108

Argued: June 19, 2014

Decided: July 30, 2014

Disposition: One-year retroactive suspension

Members	Disbar	One-year Retroactive Suspension	One-year Prospective Suspension	Dismiss	Abstained	Did not participate
Frost		X				
Baugh						X
Clark		X				
Gallipoli			X			
Hoberman		X				
Rivera					X	
Singer		X				
Yamner		X				
Zmirich			X			
Total:		5	2		1	1



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