SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-103
District Docket No. VA-2012-0004E

IN THE MATTER OF	
HERBERT JONI TAN	
AN ATTORNEY AT LAW	

Decision

Argued: June 19, 2014

Decided: November 7, 2014

Susan S. Singer appeared on behalf of the District VA Ethics Committee.

Respondent did not appear, despite proper notice.

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

This matter was before us on a recommendation for a six-month suspension filed by the District VA Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.4(c) (failure to explain a matter to a client to the extent reasonably necessary to allow the client to make informed decisions about the representation), RPC 1.7(a)(2) (conflict of interest), RPC 1.8(a) (business transaction with a client), RPC 1.15(d) (failure to adequately keep records), RPC 3.3(a)(1)

(false statement of material fact or law to a tribunal), RPC 3.3(a)(5) (failure to disclose a material fact to a tribunal knowing that the omission is reasonably certain to mislead the tribunal), RPC 8.4(a) (violating the Rules of Professional Conduct), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). For the reasons detailed below, we determine to impose a one-year suspension.

Respondent was admitted to the New Jersey bar in 1988. In 2006, he received a reprimand for knowingly making a false statement of fact in connection with a bar admission application. Specifically, respondent falsely stated, on his bar application, that he had earned a bachelor's degree, when he was one course shy of that degree. In determining that a reprimand was sufficient discipline, we considered that respondent and his fiancée were having health problems at the time, that he twice attempted to rectify the degree problem (although he failed to follow through for fear of discovery), that his misrepresentations were the result of poor judgment and inexperience, and that the offense had occurred more than eight years earlier. In re Tan, 188 N.J. 389 (2006).

In 2010, respondent received another reprimand for misconduct in two client matters. There, he failed to fully cooperate with ethics authorities in both matters and, in one of

them, lacked diligence and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions about the representation. As a result, the client did not understand the scope of the representation or the consequences of her choice on how to proceed in the matter. In re Tan, 202 N.J. 3 (2010).

In 2011, respondent was censured for gross neglect and lack of diligence in a workers' compensation matter, failure to abide by the client's decisions concerning the scope and objectives of the representation, failure to keep the client reasonably informed about the status of the case or to comply with the client's reasonable requests for information about the case, failure to explain a matter to the extent reasonably necessary for the client to make informed decisions about the representation, and a misrepresentation to the client. In re Tan, 208 N.J. 362 (2011). The Court ordered respondent to practice under the supervision of a proctor for a two-year period.

On November 20, 2013, respondent was temporarily suspended for failure to submit to the Office of Attorney Ethics the name of a proctor, as required by the Court order of November 3, 2011. In re Tan, 216 N.J. 296 (2013). He remains suspended to date.

More recently, on March 14, 2014, respondent was reprimanded for failure to keep a client reasonably informed about the status of a matter and to promptly comply with the client's reasonable requests for information. In re Tan, 217 N.J. 149 (2014).

This disciplinary matter arose out of respondent's representation of Joy Pachowicz, who retained him, on November 3, 2009, to pursue claims against her former employer, First Priority Payroll (FPP) and its owner, Jerry Carter.[1] Pachowicz executed a retainer agreement providing for a one-third contingent fee to respondent. Pachowicz' copy of the retainer was lost due to a computer virus. Although the presenter asked respondent to produce a copy of the retainer agreement, he testified that he was unable to locate it.

Pachowicz' claim against FPP and Carter stemmed from the following circumstances. In April 2006, she started working as a sales representative for FPP, located in New Jersey. She worked from her home, in West Virginia. Approximately three years later, she moved to New Jersey, at Carter's request. After arranging for a series of hotels and temporary residences for

[1] Pachowicz and her treating psychologist, Lena Klumper, Ph.D., appeared at the ethics hearing via Skype. In a certification to the presenter, Dr. Klumper opined that it would be detrimental to Pachowicz to travel to New Jersey.

Pachowicz, Carter provided an apartment for her in Hoboken, purportedly owned by FPP.

After Pachowicz arrived in New Jersey, Carter exhibited controlling and abusive behavior toward her. Pachowicz testified as follows:

> Well, he would give me orders; he would -- he had my debit card; and so I relied on him to get my food; he would tell me what time to wake up; what time to sleep; and he would stay -- say if I didn't do that, that he would swear and curse at me and then tell me he would kill me; and sometimes he would tell me what time to take a bath, morning and night; he wanted me to send a picture to prove that I was going to take a bath at that time . . . .
>
> [T34 at 14-22.][2]

Carter told Pachowicz to call him "Dom," which she believed was short for "dominator." She described the conditions in the apartment that Carter had provided for her:

> He said it was going to be nicely furnished, but when I got there, there were no linens; there was [sic] no blankets; there was no toilet paper; there was [sic] no towels; there were no utensils; there wasn't even hot water. In his -- even when I was there, they turned off the electricity.
>
> [T35 at 12-17.]

[2] "T" refers to the transcript of the DEC hearing.

E-mails that Pachowicz provided to respondent, during the course of the representation, provide additional examples of the abuse Carter inflicted on her:[3]

> Pachowicz: why can't I rest tonight
>
> Carter: Don't question me
>
> Pachowicz: I will just have to put out all the cats [7 cats that Carter required Pachowicz to take care of] but missy and they will have to fend for themselves . . . so they can get litter
>
> Carter: You put them out then I put you out
>
> Pachowicz: i have no one if u put me out i have no one
>
> Carter: Then obey
>
> Pachowicz: u tell me what ever u want I will obey u
> i am learning
> i lived my life for so long doing as i please
>
> Carter: Take your bath at 6 for 20 min.
>
> [Ex.C-9 at 2-5].

In addition, Carter arranged for Pachowicz to obtain a life insurance policy naming him as her beneficiary.

On October 29, 2009, the Hoboken Police responded to an anonymous tip that a woman named Joy was being held against her will, in an apartment in Hoboken.[4] After conducting an interview, the police escorted Pachowicz to a women's shelter.

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[3] Errors in capitalization, spelling, and punctuation in quotes are as they appear in the original communications.

[4] As seen below, the call was from Carter's assistant, Frank Roder.

Carter was arrested, on December 8, 2009, and charged with kidnapping, criminal restraint, harassment, terroristic threats, and bias intimidation.[5]

As part of his representation of Pachowicz, respondent obtained a series of investigation reports from the Hoboken Police Department that documented its investigation into Carter's abuse of Pachowicz. One such report stated as follows:

> Carter told Pachowicz that she needed to stay in the apartment and continue to work. Carter would tell Pachowicz that she was not allowed to leave the apartment. Carter would not provide a key to the apartment and advised her that her food would be brought to her. Carter would make her order food and tell her that he was watching her through a camera. Carter would order her to not eat the food and to let it just sit there. Frank [Roder] would come to the apartment daily and bring Pachowicz food. Frank would come and bring a gallon of wine to Pachowicz. Pachowicz was ordered to drink three glasses of wine a night. Carter would also order her to take a bath and take photos of the bubbles in the bath to prove that she was taking a bath. She would also have to take photos of the wine and send them to him. Pachowicz took photos with her cellular phone and sent them to Carter through text.
>
> [Ex.R8.]

Another report, dated December 7, 2009, stated the following:

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[5] Respondent testified that the prosecutor did not pursue the charges against Carter. The record does not reveal the reason for the prosecutor's decision.

> In speaking to Joy and the witnesses on numerous occasions during the course of this investigation, it appears that Joy is a credulous and naive individual. She believes anything she is told and is deficient in worldly wisdom or informed judgment. Her mannerisms and actions, at times were akin to the behavior of an adolescent child. It is apparent based on the evidence provided that Carter was aware of this and took full advantage of her as a result. He was well aware that she is a disabled person.[6]
>
> [Ex.8.]

To provide context to some of the allegations against respondent discussed below, some information about Frank Roder is necessary at this juncture.

Roder, an employee of FPP, was, according to Carter's statement to the police, Carter's "personal assistant." In an October 2009 email from Pachowicz to Carter, Pachowicz referred to Roder as "that filthy man." Pachowicz testified that Roder "would say things that were about his private parts" and "verbally curse [her] out" and tell her that he was following Carter's instructions.

Roder told the Hoboken Police about Carter's treatment of Pachowicz. Roder's statements, as well as evidence that Pachowicz provided, showed that Roder was acting on Carter's

[6] Dr. Klumper testified that Pachowicz suffers from psychological conditions and functions at the education level of a twelve-year-old child.

behalf to perpetuate the abuse against Pachowicz. For example, on one occasion, Roder dropped Pachowicz off at Starbucks, told her to stay there, and did not pick her up for thirteen hours.

The day after Pachowicz retained respondent, she told him that Roder "spoke sexually" to her. She also told respondent that she had complained to Carter that "Frank had a filthy mouth." According to respondent, during his investigation of Pachowicz' claims, he had asked her about Roder's behavior, in order to assess whether she might have an employer liability claim, based on harassment. He never discussed with Pachowicz that she might have an independent sexual harassment claim against Roder.

In early 2010, respondent told Pachowicz that he had made an appointment to interview Roder as a potential witness in her case. Also in early 2010, Pachowicz was corresponding directly with Roder and had sent him some money because he was unemployed and she felt sorry for him. As she explained in a February 4, 2010 email to respondent:

> In my heart I thought it was the christian and smart thing to do . . speaking to Frank . . that he was being isolated. then it came to me when I started thinking of his questions. . that he was doing the same thing Jerry was doing. playing with my mind to get me to do things his way. I have been so wrong. . in even continuing to talk to Frank
>
> [Ex.C13.]

Emails between respondent and Pachowicz indicate that respondent intended to add Roder as a co-plaintiff in Pachowicz' lawsuit against Carter, a decision that concerned Pachowicz. The following are excerpts of emails between her and respondent, dated March 26, 2010:

> Pachowicz: To me. . frank did bad things . . and I am still having a hard time with that . .
>
> Respondent: That's fine. I'd prefer if you two were not "friends" or not totally trust each other. It makes it more believable.
>
> Pachowicz: pairing us together in one case I just don't like it he only came on after, perhaps he couldn't work a deal with Jerry You had my case solo! until this week . . for 7 months and Frank decides to jump on . . Sounds fishy to me
>
> Pachowicz: . . . So things are not gelling with me right now Something is terribly wrong when you think about it . . . He [Roder] invaded my privacy now I must move over so he can drive the case to meet his needs.
>
> Respondent: You want me to split the cases? I am not going to go around trying to read what everyone's intentions are. If you want me to split the cases, I can certainly do that.
>
> [Ex.C13.]

In January 2011, the court granted respondent's motion to amend Pachowicz' complaint to add Roder as a plaintiff. In

February 2011, the following email exchanges took place between Pachowicz and respondent:

> Pachowicz (February 8, 2011): I think things you asked me to do since starting were not ethical writing fake reviews starting companies etc. taking on someone who was a hostile witness and sticking him as my partner in a case.
>
> Respondent (February 8, 2011): Joy, As your trial attorney on this matter, it is my professional opinion that I can proceed with both of your claims without any issue. I understand your concern, however, you have vacillated on your opinion of Frank on many occasions. You tend to make decisions on the spur of the moment. I would ask that you take at least one week before you finalize your decision.
>
> If you still feel that way after one week, then we will proceed to see what our mutual options would be. Regardless, I plan on deposing Jerry by the end of this month and would like to know your decision by then.
>
> Pachowicz (February 14, 2011): Herbert: You asked me to take a week . . and I still desire to have you as my lawyer.
> Happy Valentine's Day.
> TTYL
>
> Respondent (February 14, 2011): If you put me through this another situation like last week, I will ask for the judge to remove me from your case. I do not deserve to be treated like this. It will not happen again.
>
> Pachowicz (February 14, 2011): Herbert,
> If you ask to be taken off; please let me know . . I will drop the case. I will not continue with stressful situations. .

> I have other fish to fry.
>
> I do know why I reacted the way I did . . I still hold my opinions; but will keep them to myself.
>
> Thanks.
>
> [Ex. C-14.]

Pachowicz testified that, when she learned that Roder was added as a plaintiff in her case, she expressed her view to respondent:

> I said I had objections; and then, you know, it ended up like I would keep my opinions to myself because I thought I was going to end up losing him as a lawyer; and then I'd have to pay him for his hours of service; and then get another lawyer; and I don't have any money . . .
>
> [T104 at 4-9.]

Pachowicz also testified that, at the time of the February 14, 2011 conversation with respondent, she believed that she did not have the option of keeping him as her lawyer and removing Roder as a co-plaintiff: "I don't think Mr. Tan would have represented me if I went against his wishes." She testified further that she thought that respondent had tried to sabotage her case by bringing Roder in as her "co-partner," rather than as a witness.

Respondent never asked Pachowicz to confirm, in writing, her consent to his representation of Roder. He did not produce

any e-mail or other written communication in which Pachowicz had "unambiguously" consented to that dual representation. He admitted that, once he agreed to represent Roder, he could not "impartially consider a strategy of asserting a sexual harassment claim" against Roder.

On or about May 12, 2010, respondent filed a complaint on Pachowicz' behalf. Pachowicz signed the complaint, which was labeled pro se. It was accompanied by an application for a waiver of the filing fee, also signed by Pachowicz. A May 12, 2010 cover letter to the court, enclosing the complaint, a case information statement, and the waiver application indicated that it was from "Joy Pachowicz, Pro Se" and listed Pachowicz' home address. Respondent drafted the cover letter.

On May 19, 2010, the court approved the waiver request. One week later, on May 26, 2010, respondent filed a substitution of attorney form to substitute himself for Pachowicz. Later, in February 2011, respondent told Pachowicz that the complaint "originally had [her] name as the attorney in order to get the filing fee waived."

Respondent acknowledged that, from the outset, he had intended to be Pachowicz' counsel of record in the litigation, explaining that he had filed the complaint pro se because, if he had filed the complaint as the attorney of record, the court

would not have granted the application for the filing fee waiver.

In April 2012, the court entered a judgment in Pachowicz' favor against Carter, personally, for more than $860,000. There is no indication that Pachowicz collected any of the funds. Roder, too, obtained a judgment against Carter for approximately $63,000.

In November 2012, Pachowicz terminated respondent's services.

The complaint charged that the foregoing conduct violated RPC 1.7(a)(2), RPC 1.15(d), RPC 3.3(a)(1), RPC 3.3(a)(5), RPC 8.4(a), and RPC 8.4(c).

The complaint also charged respondent with a violation of RPC 1.8(a), for having entered into a business relationship with Pachowicz without observing the safeguards of that rule. That relationship developed as follows:

On November 16, 2009, thirteen days after Pachowicz retained respondent, they had the following conversation by email:

> Respondent: I was wondering if you have any advise [sic] on getting my website more traffic. . .
>
> Pachowicz: I can help you . . I am a super marketer . . if you like

> Respondent: Just give me a reasonable bill for your services. I don't expect you to work for free.
>
> Pachowicz: Hi. I wouldn't know what reasonable pricing would be perhaps you can suggest something. I never got paid for my blogs or marketing before. . so I really and truly don't know what to ask. I am agreeable to any price. Extra cash will help me; whatever the amount. . is.
>
> Respondent: How about $10 per hour? I'll try to work it into my advertising budget. Just don't go overboard with the hours.
>
> Pachowicz: . . . I think a couple hours a night . . . is that affordable to you?
>
> Respondent: A couple of hours a night is great.
>
> [Ex.C16;T43.]

Before entering into this arrangement, respondent did not advise Pachowicz to seek the advice of independent counsel and did not request that she sign a document consenting to the terms of the agreement.

Pachowicz wrote a series of posts on various sites to promote respondent, touting his skills as an employment attorney. She testified that, for about a year, she worked "a couple hours" each night to promote respondent's practice. She never sent him a bill and never got paid for her services.

Respondent also asked Pachowicz to write favorable internet reviews of his law practice. Pachowicz testified that

> [respondent] asked me to make fake reviews on him to make him look better on AVVO [an online attorney review and referral site]. He would tell me – like I was a John or I was a somebody else; and I would pretend that I was one of his clients and say that I was happy with his services.
>
> [T51 at 4-8.]

Pachowicz added that respondent had her "pretend to be clients and then say something nice about him so his -- so that his rating would go higher; he said they were low." She explained that she had complied and written the "fake reviews" "because [she] was afraid he wouldn't help [her]" and "[b]ecause, you know, he's my lawyer and I thought -- well, I felt sorry for him; and I didn't think he would ask me to do anything wrong; you know, he said that, you know, he only had that one bad mark; and it makes him look bad."

Respondent also engaged in another business enterprise with Pachowicz, known as Perfect Payroll Solution.

After retaining respondent, in November 2009, Pachowicz moved from New Jersey back to West Virginia. She found a job in sales at Integrated Payroll Services (Integrated), in December 2009. She testified that, when she was hired by Integrated, she signed "some kind of agreement that said you wouldn't do work for another payroll company while we were working for them."

In January 2010, respondent approached Pachowicz about starting a payroll company together. In reply to respondent's questions, Pachowicz provided him with detailed information about running a payroll services company. She did so "because he wanted me to start one, and his exact words to me was [sic] if a man like Jerry Carter can do a payroll company, he certainly can."

Between January 22 and January 24, 2010, Pachowicz and respondent had the following email conversation:

> Respondent: If you had the financial backing, would you consider starting a partnership?
>
> Pachowicz: . . . Yes
>
> Respondent: Great. We've got a lot of planning to do. First thing is that as an attorney, I have to see ethically if I can even enter into a business partnership. I know there are rules regarding this.
>
> Pachowicz: yes . . I don't know the rules . . regarding an attorney . . but you know you may acquire new customers through this endeavor . . Do you mean as my attorney . . or as an attorney in general. . . Are attorneys not allowed to have more than one job; I don't know.
>
> Respondent: My terms would be:
>
> 1. 50/50 stake in ownership.
>
> 2. I'll put up the start up funds.
>
> Pachowicz: . . . Those are very good terms . . I feel you are very trustworthy.

I will give more then [sic] 100 percent to growing and creating the business I wish I had funds to put up but that I dont'

Respondent: That's fine.

1. We can start the business out of the offices here in Newark . . . I don't want to mix my practice with the office so I would have to have a separate office within the suite.

2. Incorporating would be quick (assuming we agree on a name).

3. Software (as per you would be quick).

4. Accounts: This is the tricky portion. Maintain your status quo for now. It will take at least a month to get all the necessary items to start up. The tricky part will be when we actually start, how you will allocate the accounts you create. I don't want you to jeopardize your present employment in any way.

Pachowicz: Herbert

Are you going to put together some agreement . . that you want me to sign

When you get time . . will you look over the pdf copy of form I had signed for Integrated Payroll Solutions . . to make sure you see nothing that says I am bound to them for any length of time. . Have you any idea of how I will go about telling them about this endeavor when it goes forward? Am I allowed to have a savings that is apart from this business. . will I be required to put all my money I earn or receive into this business. Just some questions . . As owners you don't get paid like employees so how does one pay bills? That end of it I don't understand. . Thanks for your patience with my question.

[Ex.C24.]

Pachowicz had no business experience. Prior to working for FPP, she had been a caregiver for the elderly and, prior to that, she had prepared to become a nun.

Pachowicz and respondent decided to call their new business Perfect Payroll Solution. Pachowicz created the website, started to draft blog posts that they could use to promote the new payroll company, started researching software for the new company, and solicited customers. She paid for the software and a printer. On January 25, 2010, respondent registered the domain name perfectpayrollsolution.com.

In a January 28, 2010 email to respondent, Pachowicz expressed her concerns about working for two different payroll companies at the same time, in light of her non-compete agreement with Integrated. She told respondent: "I cannot work for 2 payroll companies as they said this in the beginning to me. I have to work for one or for the other. I just need to understand that's all." Respondent replied: "That's my understanding too. It's when do you cut ties." According to Pachowicz, respondent had told her to get herself fired from her position at Integrated. Respondent denied that claim, stating that he had advised Pachowicz to continue working for Integrated, while simultaneously working to start their new partnership.

At some point, Pachowicz told Integrated that she was considering starting a payroll company with a friend. Thereafter, Integrated stopped sending her sales leads, which had a negative impact on her sales performance. Integrated eventually fired her.

On or about January 29, 2010, respondent sent a letter to Pachowicz, titled "Disclosure Pursuant to NJ RPC 1.8." The letter stated as follows: "This letter shall confirm our proposed partnership agreement which is attached. As a short summary, we agree to start a payroll processing company with each side agreeing to a 50/50 split after costs."[7] Attached to the letter was a proposed partnership agreement. The letter purported to provide a block quote of RPC 1.8(a), but, notably, omitted most of subparagraph (3), including the word "informed" in connection with the requirement that the client give written consent. Instead, the letter merely quoted RPC 1.8(a)(3) as stating, "the client consents in writing thereto."

Following the "short version" of RPC 1.8(a), respondent's letter stated:

> As such, the client is advised to:
>
> 1. Seek advice of independent counsel as to the terms of our agreement.

[7] At the DEC hearing, Pachowicz testified that she did not know what a "50-50 split after costs" meant.

2. The terms must be fully understood and are fair and reasonable.
3. Client shall acknowledge that she understands such by signing at the bottom of this letter and returning such to my office.

[Ex. C-29.]

Pachowicz signed the letter and returned it to respondent. She testified that respondent did not explain to her the risks associated with starting a new business and, instead, presented a very optimistic view of the partnership's prospects, making the new business "sound like it was going to be the greatest thing."

Respondent suggested that Pachowicz have an attorney look at the agreement between them. On January 29, 2010, Pachowicz' sister, who is an attorney, reviewed the agreement. The sister told respondent that two clauses in the proposed agreement "sound[ed] fishy" and that she would have other attorneys review them. She also proposed changes to the partnership agreement, which were incorporated into its final version.

Pachowicz signed the partnership agreement on February 4, 2010. The business was incorporated as an LLC, with respondent and Pachowicz as co-owners. Pachowicz told the hearing panel that, although respondent had said that she was a partner, she "was the one who did all the work, basically; finding the people and putting it all together."

Pachowicz was confused about whether she would be receiving a salary. Although the agreement stated that neither party would receive a salary, she thought that she might receive payment because she was blogging for respondent and "he had a way to survive and [she] didn't." In addition, she was the one bringing in the customers.

As of the date of the ethics hearing, Pachowicz did not know what an LLC was. Respondent admitted that he did not provide Pachowicz with any explanation about the LLC he had formed. Pachowicz ultimately ended her partnership with respondent.

The DEC found respondent guilty of violating all of the charged RPCs. Specifically, the DEC determined that (1) respondent's failure to keep a copy of his retainer agreement with Pachowicz, as required by R. 1:21-6(c)(1)(C), violated RPC 1.15(d); (2) his preparation, presentation for Pachowicz' signature, and filing of Pachowicz' pro se complaint and fee waiver request violated RPC 3.3(a)(1), RPC 3.3(a)(5), RPC 8.4(a), and RPC 8.4(c); (3) his dual representation of Pachowicz and Roder violated RPC 1.7(a), in that he knew about Roder's participation in Carter's abuse of Pachowicz and Roder's overtly sexual comments and suggestions to her, a situation that would materially limit Pachowicz' representation by his concurrent

representation of Roder; the DEC found credible Pachowicz' testimony that she believed that she had only two choices: allow Roder to continue as a co-plaintiff in her case or lose respondent as her attorney; the DEC remarked that respondent's blatant threat to drop her case, if she questioned him again, added further credibility to Pachowicz' testimony on this issue; (4) respondent violated RPC 1.4(c) by failing to adequately explain the risks and benefits of the concurrent representation to allow Pachowicz to make informed decisions about the representation; and (5) respondent violated RPC 1.8(a) by improperly entering into two business deals with Pachowicz.

As to the latter finding, the DEC noted that, in the first transaction -- an agreement to pay Pachowicz for internet marketing services -- respondent had failed to comply with the RPC 1.8(a) requirements (fairness and reasonableness of the terms of the transaction; full disclosure of those terms, in writing, in a manner that the client understands; written advice that the client consult with independent counsel; and the client's written informed consent).

As to the second, more complex business transaction that involved the formation of a partnership to operate a payroll company, the DEC concluded that, when respondent recognized that he had certain ethics responsibilities to Pachowicz, he had sent

her a letter referencing RPC 1.8(a) and suggesting that she consult with an attorney. Although the letter attached a draft partnership agreement, it provided no explanation of the terms of the partnership or the operation of the payroll company. Pachowicz' testimony showed that she was confused by many aspects of the partnership, from its inception through the date of the ethics hearing, most notably, how she would be compensated. Thus, the DEC concluded that, although Pachowicz had signed the January 29, 2010 disclosure letter, at respondent's request, her consent had not been adequately informed.

The DEC also determined that respondent never explained to Pachowicz the potential conflicts of interest that might arise from their partnership. For example, during their early discussions about starting a payroll company, Pachowicz sought respondent's advice concerning her obligations to Integrated, her employer at that time. Respondent knew of Pachowicz' employment agreement with Integrated and knew that Pachowicz would likely be breaching it by starting a competing payroll company, thus jeopardizing her job. He advised her to keep working for Integrated while they were forming their new venture. At no time did he inform Pachowicz about the impact that their new partnership would have on her current employment.

In sum, the DEC found that, although Pachowicz had signed respondent's "disclosure letter," he had not adequately informed her about the terms of the partnership, its potential risks, and the possible conflicts of interest that might arise, both with respect to the formation of the partnership itself and any legal advice concerning the effect of Pachowicz' non-compete agreement with Integrated. The DEC concluded that respondent violated both the letter and spirit of RPC 1.8(a)(1) and (3) with regard to the partnership and formation of Perfect Payroll Solution.

In aggravation, the DEC considered respondent's lengthy ethics history, consisting of two reprimands, a censure, and a temporary suspension for failure to comply with a Court order.[8] The DEC noted that this is the third time that respondent has violated RPC 1.4(c) and RPC 8.4(c). Furthermore, the DEC noted

> the inherently unequal levels of sophistication between Grievant and Respondent. This is typically true of any engagement between lawyer and non-lawyer, but the disparity presented in this case was particularly egregious. Based on the information obtained during the course of his representation of Grievant – including the terrible details of the abuse Grievant was made to suffer under the control of her former employer Jerry Carter – Respondent knew or should have known that Grievant was an extremely trusting and vulnerable person. Despite this, and despite Grievant's clear

[8] The DEC did not mention respondent's most recent reprimand, because it was imposed two weeks after the date of the hearing panel report.

> lack of sophistication and understanding of basic business and legal concepts, Respondent chose to engage in not one, but *two* separate business transactions with Grievant. He also undertook concurrent representation of a man who was, at least to some extent, directly involved in the abuse Grievant was made to suffer. The Panel found this conduct totally unacceptable and inconsistent with the most basic ethical principles New Jersey attorneys are expected to uphold.
>
> [HPR30-HPR31.][9]

The DEC recommended a six-month suspension, to start at the end of respondent's current temporary suspension.[10]

Following a de novo review of the record, we find that the evidence clearly and convincingly establishes that respondent's conduct violated RPC 1.4(c), RPC 1.7(a)(2), RPC 1.8(a), RPC 1.15(d), RPC 8.4(a), and RPC 8.4(c).

First, respondent failed to keep a copy of his retainer agreement with Pachowicz. Pursuant to R. 1:21-6(c)(1)(C), attorneys are required to maintain, for a period of seven years, copies of retainer and compensation agreements with clients. A violation of R. 1:21-6 is a violation of RPC 1.15(d). R. 1:21-6(i).

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[9] "HPR" refers to the hearing panel report.

[10] Although respondent was not charged with misconduct in connection with the "fake [internet] reviews" of his skills as an attorney, the DEC, believing Pachowicz' testimony on this topic, strongly recommended that we refer this issue to the Committee on Attorney Advertising for an investigation.

Second, in order to have the filing fee waived, respondent designated Pachowicz as pro se on her complaint, when he had intended to represent her from the outset. Respondent's conduct in this regard was deceitful and a violation of RPC 8.4(a) and RPC 8.4(c), as charged. It did not, however, violate RPC 3.3(a)(1) or RPC 3.3(a)(5), which require a false statement of material fact to a tribunal and failure to disclose a material fact to a tribunal, respectively. It cannot be said that respondent's designation of Pachowicz as pro se was a material misrepresentation. It did not go to the merits of the case and, even if it had gone uncorrected, it would not have affected the underlying case. We, therefore, dismiss the charges of violations of RPC 3.3.

Next, we find that respondent violated RPC 1.8(a). In the first business transaction with Pachowicz, he hired her to create blogs for him and promote his website. Apart from the fact that he never paid Pachowicz, it is possible that the arrangement itself might not have been intrinsically unfair to her. The problem, however, is that, given her stated lack of experience on compensation for her work, she did not know what a fair rate of pay was. Because of the attorney-client relationship that existed between them, Pachowicz placed her trust in respondent to treat her fairly. Under the

circumstances, respondent was obligated to advise her to consult with independent counsel, which he failed to do.

In the second transaction, the creation of Perfect Payroll Solution, respondent made a feeble attempt at complying with RPC 1.8(a). At respondent's suggestion, Pachowicz had her sister, an attorney, review their draft agreement. The sister suggested changes that were incorporated into the final agreement. Respondent failed, however, to explain the matter clearly and sufficiently to his unsophisticated business partner, as required by RPC 1.8(a)(1) (the transaction and terms in which the lawyer acquires the interest must be fair and reasonable to the client and fully disclosed and transmitted in writing to the client in a manner that can be understood by the client).

What makes this matter more egregious is that respondent knew that Pachowicz' capacity to understand the terms of their business arrangement was limited. According to Dr. Klumper, Pachowicz' psychologist, Pachowicz suffers from psychological conditions and functions at the education level of a twelve-year-old child. That limitation was obvious to the police investigators, who, unlike respondent, did not know her. They found her to be "deficient in worldly wisdom or informed judgment." Respondent also knew that Pachowicz had been abused by her former employer, was easily influenced and dominated, and

trusted respondent unconditionally. Under the circumstances, the need for him to ensure that she had a complete understanding of their arrangement was critical. He did not do so. Pachowicz testified that she was unclear or confused about certain aspects of their deal, including compensation. Even as of the date of the ethics hearing, she did not comprehend key terms of their agreement. We find, thus, that respondent's failure to ensure that Pachowicz had a full understanding of the details of their business deal and to ensure that her consent thereto had been informed violated RPC 1.4(c) and RPC 1.8(a).

Respondent is also guilty of yet another conflict of interest, in that he represented two clients with clearly adverse interests. Respondent's simultaneous representation of Pachowicz and Roder was extremely troubling to us. It was improper from the outset. By lining up Roder as Pachowicz' co-plaintiff, respondent forced Pachowicz to forego a harassment claim against Roder, a claim that she did not even know that she could assert, inasmuch as respondent did not discuss it with her. The record is replete with Pachowicz' concerns about being on the same side as Roder, in the litigation against Carter. She told respondent that Roder "had spoken sexually to her;" that neither she nor the Hoboken detective trusted him; that Roder had done "bad things" and that she "was still having a

hard time with that;" that she did not like "pairing them together in one case;" and that "something was terribly wrong, when you think about it . . . he invaded my privacy" and "now I must move over so he can drive the case to meet his needs." At this juncture, respondent had to terminate the dual representation. Instead, he coerced Pachowicz into accepting the simultaneous representation by threatening that, if she "put [him] through another situation like last week, I will ask for the judge to remove me from the case. I do not deserve to be treated like this. It will not happen again." Faced with this threat, Pachowicz had no choice but to keep silent about her concerns. A more egregious scenario is not readily envisioned.

As the Court stated in In re Berkowitz, 136 N.J. 134, 145 (1994), "[o]ne of the most basic responsibilities incumbent on a lawyer is the duty of loyalty to his or her clients. From that duty issues the prohibition against representing clients with conflicting interests." (Citations omitted). Also, "[l]awyers have a duty to explain carefully, clearly and cogently why independent legal advice is required. When a lawyer has a personal economic stake in a business deal, he must see to it that his client understands that his objectivity and his ability to give his client his undivided loyalty may be affected." In re Wolk, 83 N.J. 326, 333 (1980).

Here, respondent failed miserably on all scores. First, he intimidated Pachowicz into accepting Roder, a man she did not trust, disliked, and thought of as having done her wrong, as her partner in a lawsuit. He never advised her -- perhaps even concealed from her -- that she might have a sexual or other form of harassment claim against Roder. Second, in his first business dealings with her, respondent said nothing about the requirements of RPC 1.8(a). In the second business transaction, his attempt to comply with the safeguards of the rule was more aimed at protecting himself than fully informing her of the essential terms of the transaction and the consequences of his representation of her interests. As the Court held in a case involving similar circumstances,

> [r]espondent knew that his client was naive and inexperienced in business matters, and that she was relying not only upon his advice but upon his judgment and upon the confidence she had in him based on his past 16 years of service as her late husband's attorney. That he suggested she seek independent advice is of little consequence under the circumstances of this case; he had every reason to believe that she would not do so. Given his client's obvious lack of understanding of the transaction and her failure to grasp the significance of respondent's interest in the company that was to benefit from her money, his suggestion that she seek independent legal and financial advice appears designed to protect him rather than his client. Respondent cannot shield himself behind the glib recitation of a disclosure the

practical meaning of which was unknown to his client.

[In re Wolk, supra, 83 N.J. at 333.]

What measure of discipline is, thus, appropriate for this serial ethics offender who, it is obvious to see, shows appalling indifference toward his clients and the rules of the profession and refuses to learn from his prior ethics errors?

It is well-settled that the usual form of discipline for a conflict of interest is a reprimand, absent egregious circumstances or substantial economic injury to the client. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, supra, 136 N.J. at 148. The following attorneys received discipline stronger than a reprimand when, like here, the conflict of interest situation in which they immersed themselves called for more severe discipline: In re Agrait, 207 N.J. 33 (2011) (censure for attorney who represented both the buyer and the seller in a residential real estate transaction, without making full disclosure and obtaining written waivers, and subsequently representing the seller in litigation instituted against her by the buyer; aggravating factors were the financial harm to one of the parties and the attorney's prior admonition and reprimand); In re Boyer ___ N.J. ___ (2010) (attorney suspended for three months when, in the course of representing the executrix of an estate, he rented a house, belonging to the

estate, to a business owned by his brother-in-law, without disclosing that familial relationship to the executrix; the attorney then arranged for other clients to sublet the property from his brother-in-law, with an option to purchase; a year later, the executrix agreed to sell the house to the brother-in-law, through another business that he owned; because the brother-in-law was not in a financial position to buy the property, the attorney formed a real estate investment company with his wife as the registered agent and, through that entity, financed the purchase of the house; the attorney represented both the estate and the brother-in-law in that sale; several months later, the brother-in-law sold the house at a much higher price; the attorney admitted that, by financing the purchase, he knowingly acquired a pecuniary interest adverse to his client; that he never disclosed to the executrix that he had financed the sale; that he rented the house to clients while representing the estate; that he represented the estate and the brother-in-law in the purchase of the house; and that he misrepresented to the Office of Attorney Ethics that he had not financially benefited from the resale, when he had received $1,142, prior admonition and three-month suspension; although the prior suspension also involved conflict of interest in a real estate transaction, the fact that the conduct in both matters occurred

during the same period of time precluded a finding that the attorney had not learned from his prior ethics misdeeds); In re Moeller, 201 N.J. 11 (2009) (three-month suspension for attorney who borrowed $3,000 from a client without observing the safeguards of RPC 1.8(a), did not memorialize the basis or rate of his fee, and did not adequately communicate with the client; aggravating factors were the attorney's failure to take reasonable steps to protect his client when he withdrew from the matter and his disciplinary record (a one-year suspension and a reprimand)); In re Fitchett, 184 N.J. 289 (2005) (attorney suspended for three months when he continued to represent a public entity as plaintiff in a lawsuit after he became employed by the law firm representing the defendant-corporation and then filed a lawsuit against the public entity on behalf of the corporation; although we found that the attorney had not caused the claimed economic injury to the corporation and voted for a reprimand, the Court imposed a three-month suspension because the "circumstances of [his] conflict of interest [were] egregious." Id. at 290-91; prior reprimand); In re Wildstein, 169 N.J. 220 (2001) (three-month suspension for attorney who engaged in a conflict of interest when he acted as the lawyer, executor, and trustee of an estate at the same time that he was the executor and beneficiary of another estate that held a

mortgage on the sole asset of the first estate; also, the attorney improperly drafted a will that named him as residuary beneficiary of the second estate, although at the testator's request; exhibited gross neglect; and made a misrepresentation to the Office of Attorney Ethics; prior private reprimand and public reprimand); In re Patel, 159 N.J. 527 (1999) (attorney suspended for three months for creating a conflict of interest when he represented father and son in separate civil actions and then arranged for a debt that the son owed to him to be satisfied out of the settlement proceeds from a suit that the attorney was handling for the father, thereby acquiring a pecuniary interest in the settlement proceeds and creating an adversarial position between the father and the son; the attorney also failed to properly maintain his attorney records and threatened criminal prosecution to obtain an unfair advantage in a civil matter, by threatening the father with the son's arrest to induce the father to satisfy the son's debt to the attorney out of the father's settlement funds; we found that the attorney had displayed callous disregard for his clients' interests; no prior discipline); In re Butler, 142 N.J. 460 (1995) (three-month suspension for attorney who represented both parties in negotiating a contract of sale and in a modification of its terms and then failed to inform his clients, the sellers,

of the buyers' contract to sell the property to a third party for a much higher price; the new contract had been executed before closing of title with the attorney's clients; no prior discipline); In re Doyle, 146 N.J. 629 (1996) (attorney suspended for six months for engaging in a series of conflict of interests; specifically, during the course of his representation of the elderly aunt of a former schoolmate, the attorney arranged for the aunt, who had suffered a severe stroke and whose competency might have been in question, to prepare wills and make inter vivos transfers that benefited a brother, also a client of the attorney, to the detriment of another brother; the attorney also purchased a property from the aunt and after subdividing it resold it at considerable profit; although the attorney had a background in real estate and land use, he never disclosed to the aunt that a subdivision could substantially increase the value of the property; in aggravation, that Court noted that the attorney's conduct had spanned eight years; in mitigation, the Court considered the attorney's exemplary career, the respect that fellow members of the bar held for him, the many tributes to his impeccable character, and his lack of good judgment, rather than venality; prior private reprimand); In re Caswell, 157 N.J. 623 (1999) (six-month suspension imposed on attorney who brokered an investment between two clients, one

of whom was a widow with limited financial resources and the other a friend of the attorney, who owned a company; the attorney did not disclose to the widow the company's poor financial condition and, touting it as a good investment, persuaded the widow to invest $20,000, instead of the $10,000 that she originally intended to invest; ultimately, the widow lost her entire investment; the attorney's conduct was aggravated by his misrepresentation to the widow that the return on her investment would be forthcoming and by his own interest in the company, represented by future stock ownership in lieu of legal fees; the attorney did not actually benefit from the transaction and was no longer practicing law at the time of the disciplinary matter; no prior discipline); In re Dato, 130 N.J. 400 (1992) (one-year suspension for attorney who represented an elderly woman in a divorce matter in which she was granted sole ownership of the marital home; the attorney then bought the house from the client for a lower price than the amount that another client of the attorney was willing to pay and, months later, resold the house for a significant profit, all without disclosure to the elderly client; no prior discipline); and In re Humen, 123 N.J. 289 (1991) (two-year suspension for attorney who engaged in multiple conflicts of interest during his eight-year representation of a widowed, unsophisticated, elderly

client who relied on him for legal and financial advice; the attorney counseled the client to purchase property owned by the attorney's friend, who was not independently represented and who took back a purchase money mortgage; to guarantee payments, the attorney prepared a rider to the contract of sale providing that the mortgage and note would not be recorded for thirty months to facilitate the friend's foreclosing on the mortgage loan, in the event of default; because of the rider, of which the client was unaware, there was no formal record of the client's ownership of the property; years later, the attorney persuaded the client to sell him the property for $14,000 less than its appraised value and $4,000 less than the amount that she had paid; the attorney misrepresented to the client that she was losing money by keeping the property; the client did not receive a penny from the sale to the attorney, allegedly because she owed him money, which was untrue; additionally, when the client purchased a new home, the attorney convinced her to obtain a mortgage and, unbeknownst to the client, made himself the mortgagee and later refused to renegotiate a lower interest rate, although rates had fallen; the attorney's conduct was fraught with deceit and self-interest; no prior discipline).

Guided by the above precedent, we conclude that respondent's conduct is deserving of a suspension. We view his

behavior to have been at least as serious as Dato's (one-year suspension). "The circumstances of [his] conflict[s] of interest were egregious." In re Fitchett, supra, 184 N.J. at 290-91. Respondent knew that Pachowicz was unsophisticated, inexperienced in business matters -- indeed, with limited capacity to understand business matters -- vulnerable, trusting, and reliant on him to protect her interests. "It is that reliance and trust that 'triggers the need for . . . full disclosure and informed consent'." In re Humen, supra, 123 N.J. at 301, citing In re Silverman, 113 N.J. 193, 214 (1988).

In fact, respondent has displayed a pattern of failure to explain to clients, in detail, the circumstances of the representation to allow the client to make informed decisions. In two of his prior disciplinary matters, his 2010 reprimand and his 2011 censure, he was found guilty of this same offense.

He has also exhibited a pattern of misrepresentations. In his 2006 matter, he lied on his bar application that he had obtained a bachelor's degree, when, in reality, he knew that he was one course shy of that degree. Despite having been treated with, in retrospect, apparent undue indulgence -- he received only a reprimand -- he continued to act deceitfully. In his 2011 censure matter, he made a misrepresentation to his client. In the current matter, he misrepresented to a court that

Pachowicz was acting pro se, admittedly with the purpose of avoiding a filing fee.

When we take into account the totality of respondent's infractions, coupled with (1) the fact that this is his fifth brush with the disciplinary system -- a circumstance that highlights his unwillingness to learn from his past ethics misdeeds; (2) his failure to accept responsibility for his offenses; (3) his disregard for the welfare of his clients; (4) his apparent unconcern for the restoration of his license to practice law, as demonstrated by his continuing failure to submit to the OAE the name of a proctor; and (5) his failure to either waive appearance or appear for oral argument before us, despite proper service, we determine that a one-year suspension is the appropriate discipline in this case.

We also determine that any pending disciplinary matters against respondent be consolidated for resolution, investigated and prosecuted by the OAE, and expedited. Further, we refer to the OAE, for whatever action it deems appropriate, respondent's request that Pachowicz write "fake" reviews for his legal services.

Member Rivera abstained. Vice-Chair Baugh 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
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Herbert J. Tan
Docket No. DRB 14-103

Argued: June 19, 2014

Decided: November 7, 2014

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Abstained	Did not participate
Frost		X				
Baugh						X
Clark		X				
Gallipoli		X				
Hoberman		X				
Rivera					X	
Singer		X				
Yamner		X				
Zmirich		X				
Total:		7			1	1

Ellen A. Brodsky
Chief Counsel