SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-117
District Docket No. XII-04-023E

IN THE MATTER OF	:
ELLIOT H. GOURVITZ	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 19, 2005

Decided: July 27, 2005

Robert J. Logan appeared on behalf of the District XII Ethics Committee.

Elliot H. Gourvitz appeared pro se.

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 reprimand filed by Special Master Julius J. Feinson. The first count of the complaint charged respondent with having violated RPC 8.4(g) (conduct involving discrimination) when he refused to allow his long-time secretary, Helen Rokos, to return to work after she had recovered from cancer surgery that disfigured her face. The second count charged respondent with having violated

RPC 8.4(c) (misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice) when, despite the entry of a judgment upon a jury verdict finding him liable for employment discrimination – a judgment that was subsequently affirmed by the Appellate Division and followed by the issuance of a wage execution – respondent failed to (1) pay the judgment, (2) post a bond or seek a stay of the judgment, and (3) cooperate with sheriff's officers in the location of and execution upon his assets.

Respondent was admitted to the New Jersey bar in 1969. He maintains a law office in Springfield, New Jersey. Respondent has no disciplinary history.

The facts in this matter, for the most part, are not in dispute. However, with respect to the RPC 8.4(c) and RPC 8.4(d) charges, the facts are difficult to discern at times.

The Discrimination Action (RPC 8.4(g))

Helen Rokos was respondent's secretary from September 1975 until September 1999. Rokos described her relationship with respondent as "employer/secretary" and said that they "were not overly fond of each other." According to Rokos, she stayed with respondent for so many years because she was paid well.

In May 1999, Rokos was diagnosed with adenoid cystic carcinoma, which was described by another witness as an unusual cancer of the face. After some thought, Rokos elected to undergo surgery. Her last day in respondent's office was September 3, 1999. At the time, Rokos was sixty-nine years old.

Respondent and others treated Rokos to lunch in mid-July 1999, when she was presented with a gold watch. According to Rokos, the gift fulfilled the promise of a long-standing joke that one day she would receive a gold watch for putting up with respondent for so many years. According to Rokos, as of the time of the party, she had not yet decided whether to have the surgery. Thus, Rokos claimed to have no idea why the party was given for her.

Rokos denied that the luncheon was a retirement party. At the event, Rokos said nothing about retiring from the job. Moreover, when, at some point, respondent's daughter referred to the luncheon as a retirement party, Rokos said that she had not retired.[1] In fact, when Rokos left the office to have her surgery, she did not take with her any personal property in her work area, including photographs.

The surgery was performed on September 8, 1999, followed by a two-week recuperation period, which was then followed by seven

[1] Respondent's wife and his daughter worked in his office at the time of the party.

weeks of radiation, five days a week. During the period of radiation therapy, Rokos met some of her co-workers for lunch. She never told any of them that she had retired. To the contrary, Rokos needed to work to pay her bills. Although Rokos conceded that certain hospital forms identified her as retired, she claimed that the person who completed the forms had made a mistake. Rokos had informed the individual who completed the forms that she was "not working." Rokos planned to work until approximately age seventy-five.

In January 2000, after Rokos's radiation had been completed, she called respondent at home. According to Rokos, respondent asked her when she was coming back, as the work was piling up, and he thought he might have to hire someone on a part-time basis. Rokos explained that she would be seeing all of her doctors in February, at which time she expected to be discharged and return to work. The doctors did, in fact, discharge Rokos.

Rokos collected temporary disability from September 1999 through February 2000. Also, respondent gave her money so that she could pay her medical bills during that time. Rokos believed that she was capable of returning to her job in February 2000.

At the end of February 2000, Rokos called respondent and told him that she would be returning to work the first week of March. Respondent claimed that he did not have work for her, that he did not want to "start writing checks," and that she was "not to come back."

When Rokos's temporary disability benefits expired at the end of February 2000, she applied for unemployment compensation. On the application, Rokos did not state that she had been "fired" because she understood that, if such were the case, she would have to wait an extra month for benefits, which she could not afford to do. Instead, Rokos said that the reason for the separation was "lack of work, could not afford it." Rokos repeated this information in a telephone interview with an unemployment office representative on April 3, 2000.

On March 27, 2000, Rokos wrote to respondent and explained that she was without "financing" and had medical expenses to pay. She asked to be paid for some unused vacation days during the 1998-99 time period. In a letter dated March 30, 2000, respondent replied (emphasis added):

> Dear Helen:
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> How stupid do you think I really am? You are not ready, willing or able to come to work and only offered to do so because your disability was running out and you needed some excuse to get your unemployment. You have already confided to members of my office that you cannot type, you cannot see, you

have double vision in one eye and cannot remember. Your appearance is not such that would be conducive to my clientele meeting and greeting you each day. Despite this, I was willing to let it slide and greatly disappointed that you had to use this method in order to ensure that you would be able to get disability. If you had come to me instead maybe something could have been worked out.

Nonetheless, I let it slide and did not oppose your claim for unemployment. Now I shall. I shall now amend my forms to oppose your unemployment and shall state that you are unwilling and unable to work. Thus, you will not be collecting your unemployment.

Yes, you probably did have $688.00 for untaken vacation days. This is offset by the fact that I have been paying for you since August of 1999 for [sic] your medical insurance which totals $1,436.00.

I also had every intention of carrying your medical insurance for the rest of your life and told you so not because I was obligated but because, as you said in your letter, for your past work and conscientious service. You have now thrown that out of the window and, as of this month, I will no longer pay your medical insurance.

You made a pig out of yourself and now you have to pay the price.

Very truly yours,

/s/

ELLIOT H. GOURVITZ

Rokos was shocked that respondent wrote that she "didn't look good enough to come to work in his office." She did not know what he was talking about, as respondent had not seen her from the time that she was in the hospital until the day of her

deposition in the discrimination case that she ultimately filed against respondent and his law firm. Rokos described as follows her appearance in March 2000:

> At that point my teeth were missing. I was having teeth made. There was a dent here, where they took a bone, put it under here. My eye is slightly lower and after – there was scarring, which has disappeared, after radiation. And my face, through radiation, probably had a red look to it. That lasted a few weeks after radiation.

Although Rokos had double vision following the surgery, she did not have it at the time that she wanted to return to work. However, Rokos admitted to having seen an eye doctor in January 2002, as a result of vision difficulty in the right eye. Rokos described it as "an incident," not a daily occurrence. Moreover, in a February 2002 letter to a doctor, Rokos mentioned recurring double vision that accompanied a recurring eye infection. She claimed to have written the letter simply to inquire whether she had to remain on antibiotics for the rest of her life or whether the problem could be corrected.

Rokos was permitted to drive by the end of February 2000.

Rokos conceded that, prior to her operation, she and respondent did not discuss whether or not she would return to work following the surgery and treatment. They never discussed whether respondent would keep her job open, and no arrangement was made to keep her job open. However, prior to her departure

for the surgery, Rokos asked respondent if he would continue paying her medical insurance or whether she would have to make other arrangements. Respondent replied that it would be his pleasure to continue the medical coverage while she was out.

Respondent, for his part, testified that Rokos was not a good employee, as she was bossy, nasty, and condescending to everybody in the office and, according to respondent's wife, talked "badly" about him. Nevertheless, respondent stated that he was loyal to her because, up until the last five years of their relationship, she had been "an effective employee."

Respondent insisted that Rokos "left" his employ when she had her surgery, which relieved him of the dilemma of how to terminate her employment. Because Rokos was leaving, he gave a retirement party for her; "[t]he whole purpose . . . was that it was her retirement party." He agreed to pay for Rokos's medical insurance for life by giving her the money to pay for it on her own. Respondent testified that, regardless of Rokos's status when she left (retired, disabled, quitting), he understood that she would no longer be in his employ.

When Rokos left, respondent had no contact with her until January 2000, when she called him. He did not recall asking her when she would be back or telling her that she was missed or

that the work was piling up. Indeed, respondent already had replaced Rokos.

During their telephone conversation in February 2000, respondent told Rokos that he did not have the money to pay a third secretary and asked why all of a sudden she was coming back, inasmuch as she had retired. He claimed that Rokos's true intent in calling to say that she was returning to work was to set up an unemployment claim because her temporary disability benefits were running out at the end of the month. Respondent acknowledged that, if that were the case, Rokos was committing a fraud.

According to respondent, Rokos's March 27, 2000 letter angered him because she was committing a sham upon him for the purpose of fraudulently receiving unemployment benefits. He testified that he wrote the March 30, 2003 letter "out of a sense of pique and . . . to be hurtful." He claimed, however, that "the animus was not generated by discrimination." Moreover, respondent added, he only learned about Rokos's appearance from people in the office who had seen her post-surgery. He explained:

> I had never even thought about a handicap or that's the reason that I was going to do it because she couldn't work. That's how her attorneys have interpreted it. I did say everything I said in the papers in place of her looks, and I did it to be hurtful because I was hurt by a woman who had worked

> for me for 25 years, who herself was so law abiding she would not take 15 cents worth of stamps without telling me she took 15 cents worth of stamps and reimburse me for it. We used to joke about it because she was an old German with a sense of right and wrong and structure and everything else, and she was loyal to a fault and she was honest to a fault. So I couldn't see this going on.
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> I regret very much writing that letter. The Appellate Division says I never apologized to her. And they're probably right. I regret any of the harm that it may have caused her mentally; but quite frankly, it really didn't. She's a tough old lady and something like that except for the context of this case caused her no problems. She had an allegation for mental anguish, etcetera, in the Complaint; but in discovery, we found out she never went to a psychologist, a psychiatrist; but that still doesn't excuse my action in writing that letter and sending it to her.

In short, respondent testified that, when Rokos left, it was not known that she would return; in fact, she thought she would die; she did not attempt to return until six months later; and, as a small business owner, he could not afford to keep a job open for six months.

Two attorneys who shared office space with respondent and a number of respondent's employees (including his wife and daughter) also testified that Rokos was unpleasant, at best, and that she had, in fact, retired or quit in September 1999, with no intention of returning to work. Indeed, one employee testified that, when Rokos learned that she had cancer, which was a few months before the surgery, Rokos stated that she did

not know if she would survive, that she would retire either after or because of the surgery, and that she was not certain that she would even "make it out of the surgery." Rokos denied making these statements. In addition, Rokos denied having told anyone in the office that she was not ready, willing, and able to return to work.

Two employees testified about a personal encounter with Rokos in early 2000, which suggested to them that Rokos was not capable of returning to work. Rejene Ravo, who worked in respondent's law firm since 1991, testified that she started working directly for respondent in October 2000. One day in either February or March 2000, Rokos came to the office to collect her personal effects. She and Ravo had lunch together. By this time, Rokos had been replaced. According to Ravo, at the time of the visit, Rokos could not drive, and she had double vision, which she was not sure would ever go away.

Marie Vespasiano worked in respondent's office building for her husband and also for respondent (for less than a year). Vespasiano joined Ravo and Rokos for lunch the day Rokos came to the office. She, too, stated that Rokos complained that she had double vision and could not drive.

Respondent's wife, Bonnie, testified that Rokos once told her that "one day she'd get him" because he had not provided her

with a pension. In addition, Bonnie testified, when Rokos left for her surgery, there was "absolutely no question she quit, retired and was never coming back." According to Bonnie, in April 1999, Rokos had discussed retirement with her. Bonnie testified that the party for Rokos was indeed a retirement party.

Bonnie testified that she knew that Rokos's unemployment claim "was her way of scamming us and the government because she had run out of disability." According to Bonnie, when Rokos stopped by the office to collect her things, she said that she still had double vision and, as a result, she could neither drive nor type.

Finally, two of respondent's friends, in addition to his wife and daughter, testified that respondent was of the highest character and a generous philanthropist and that he engaged in many charitable and professional activities. Moreover, respondent abhorred discrimination, never engaged in the practice, and, in fact, had implemented a policy that encouraged women to apply for membership in and be accepted by fellows in the American Academy of Matrimonial Lawyers.

Rokos sued respondent for employment discrimination. On June 25 and 26, 2002, respectively, a jury awarded her $300,000

in compensatory damages and $5000 in punitive damages.[2] In August 2002, the court entered an order for judgment in the amount of $344,590.00. On December 3, 2003, the Appellate Division affirmed the orders denying respondent's motions for a directed verdict and a new trial.

In its December 3, 2003 unpublished opinion, the Appellate Division rejected respondent's claim (among others) that he was entitled to either a directed verdict or a new trial on the ground that the liability verdict was against the weight of the evidence. Rokos v. Gourvitz, Docket No. A-1140-02T3 (App. Div. December 3, 2003) (slip op. at 2-3). Specifically, the appellate court rejected respondent's argument that there was no evidence that he had intended to discriminate against Rokos based upon a handicap and that his March 30, 2000 letter was insufficient proof that he had such an intent. Id. at 12, 20. The panel went on to identify a number of reasons why the evidence proved that respondent "had a discriminatory intent when [he] terminated [Rokos]'s employment on February 24, 2000." Id. at 20.

Initially, the Appellate Division distinguished two of three federal cases upon which respondent had relied, noting

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[2] On October 15, 2002, the court entered an order for judgment for counsel fees and costs in the amount of $195,463.36.

that the discriminatory statements at issue there were not made in the context of the adverse employment decisions or by persons who were involved in the decisions. Id. at 12-15. The Appellate Division further noted that the third case upon which respondent had relied actually favored Rokos because the person who made the discriminatory remarks in that case was one of the decision makers and at least one of the comments was contemporaneous with the adverse employment decision. Id. at 16-17.

Moreover, the judges observed, the "strongest proof of discriminatory intent" on respondent's part was his March 30, 2000 letter. Id. at 17. Plus, "there was additional evidence on this issue." Ibid. First was respondent's statement to Rokos during their February 24, 2000 telephone conversation that he no longer needed or wanted Rokos and was unwilling to "start writing checks again." Id. at 17-18. The court observed that "[o]bviously left hanging in this expression by Gourvitz of his termination decision is why he no longer needed or wanted [Rokos] and why he was unwilling to start paying her again." Id. at 18. The appellate panel continued:

> The jury was entitled to find that the answer to those questions was given in Gourvitz's letter of March 30, 2000, in which he stated that "[y]our appearance is not such that would be conducive to my clientele meeting and greeting you each day."

> There is a logical link between Gourvitz's termination decision on February 24, 2000, and his letter of March 30, 2000. The latter explains and sheds light on the former, revealing a basis for the termination decision where scant basis was shown before. Moreover, Gourvitz's letter addresses other aspects of the apparently still-ongoing termination process: plaintiff's accumulated but unpaid vacation benefits and her health insurance. Thus, Gourvitz's letter may be viewed as another phase of the continuing process of terminating plaintiff. So viewed, Gourvitz's letter provides a link showing that he had a discriminatory intent when he terminated plaintiff's employment.
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> [Ibid.]

The court identified other evidence that disproved respondent's assertion that Rokos had quit, retired, or was unable to perform her job. Ibid. In this regard, the court observed that respondent never mentioned in his letter that Rokos had quit or retired. Id. at 19. So, too, with the January 2000 telephone conversation and Rokos's March 27, 2000 letter. Ibid. In addition, Rokos never removed her personal items from the office when she departed prior to surgery; she did not ask for her accumulated vacation pay at that time; and she applied for temporary disability benefits. Ibid. Finally, Rokos clearly was able to return to work because her physician had certified that she was able to return and that she did not have any disability that prevented her from performing the duties of a legal secretary. Ibid. The Appellate Division concluded:

> The result is that there was evidence showing that the reasons advanced by defendants for plaintiff leaving her employment were false. That evidence, coupled with Gourvitz's letter of March 30, 2000, provided proof that defendants had *a* discriminatory intent when Gourvitz terminated plaintiff's employment on February 24, 2000.
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> [Id. at 20.]

Eventually, the matter was settled for $350,000.00. As of the hearing before the special master, it was not clear how much respondent had paid. At the hearing in early December 2004, Rokos claimed to have received "under $100,000." Her attorney claimed that Rokos had been paid about $150,000. At the hearing in January 2005, one of the attorneys who represented respondent during the post-judgment collection proceedings claimed that all the money due Rokos had been paid. At oral argument before us, respondent represented that he had satisfied the judgment in full, except for the attorneys' fee issue, which was pending appeal.

The Collection Efforts (RPC 8.4(c) and RPC 8.4(d))

It was difficult to ascertain the facts with respect to Rokos's lawyers' efforts to collect upon the judgment. The evidence is confusing and replete with respondent's unsubstantiated and unexplained assertions of wrongdoing on the part of Rokos's lawyers and the Honorable James S. Rothschild,

Jr., J.S.C., one of the judges assigned to the matter. Moreover, the investigative report issued by the District Ethics Committee was limited to the issue of respondent's discriminatory conduct and contains no findings or discussion of the RPC 8.4(c) and RPC 8.4(d) charges based upon respondent's failure to satisfy the judgment entered against him in Rokos's employment discrimination action. In addition, the special master's hearing report provides little detail about respondent's conduct, citing only certain court orders and a judge's letter in support of his conclusions. Finally, the presenter's brief to us contains no discussion of the RPC 8.4(c) and RPC 8.4(d) charges, and respondent's brief does little more than assert the same vague, conclusory references to his repeated attempts, offered below, to hold Rokos's attorneys and Judge Rothschild to "the letter of the law." Inasmuch as the testimony was difficult to follow at times and often consisted of little more than bare conclusions, we rely substantially on certain letter opinions issued by Judge Rothschild.

As stated previously, the trial court entered an order for judgment in August 2002. In October 2002, the court denied respondent's motion for a new trial and entered an order for judgment for counsel fees and costs. Respondent appealed the order denying the motions for a directed verdict and new trial,

but he neither posted a bond nor requested a stay of execution of the judgment that had been entered.

In her testimony before the special master, Diane LaPadula, Rokos's lawyer in the discrimination case, stated that, in December 2002, she filed a motion as a result of respondent's refusal to appear for supplementary proceedings, produce his financial records, produce his wife for deposition, and disclose his assets. The court ordered respondent to do all these things, except produce his wife.

In January 2003, according to LaPadula, respondent appeared at supplementary proceedings. Based upon information obtained during the process, in March 2003, the court ordered that respondent's firm make "periodic payments anywhere between 15 and 25,000 per month" out of the firm's assets. In addition, because Rokos's proofs showed that the firm was making substantial money, but respondent claimed that the firm had no money, a court-appointed accountant was charged with reviewing the firm's financial records to determine the exact amount of the periodic payments that would be made to Rokos. This order was appealed and eventually affirmed by the Appellate Division. The accountant never rendered a report.

In April 2003, the Essex County sheriff apparently levied upon all of the goods and chattels located at respondent's

Livingston home, which were then purchased by respondent's mother-in-law at twice the value. At some point, the goods and chattels located at respondent's Springfield law office also were levied upon and sold to an attorney in respondent's law firm.

At some other point in 2003, Rokos filed with the District XII Ethics Committee (DEC) a grievance in which she apparently alleged that respondent had violated RPC 8.4(g). On July 7, 2003, DEC investigator Gary D. Nissenbaum issued an investigative report concluding that respondent had not violated the rule. On July 15, 2003, the DEC secretary wrote a letter to Rokos and informed her that "there is no evidence of ethical misconduct that would warrant filing a complaint."

In September 2003, Rokos filed with us an appeal from the DEC's determination. On February 9, 2004, we reversed the DEC's determination and remanded the matter for the filing of a complaint charging respondent with having violated RPC 8.4(g).

As stated previously, in December 2003, the Appellate Division affirmed the order denying the motions for a directed verdict and new trial in the discrimination suit. At the same time, the Appellate Division affirmed the lower court's March 2003 order requiring respondent's firm to make "periodic

payments anywhere between 15 and 25,000 per month" out of the firm's assets.

In January 2004, Judge Rothschild was handling the case. According to LaPadula, the judge appointed attorney Jay Benenson as "fiscal agent" for the purpose of analyzing respondent's firm's operations. Shortly after Benenson's March 1, 2004 letter to the court reporting his findings, the Rokos case was settled, at least in the eyes of LaPadula and Judge Rothschild. (As seen below, respondent denied that a settlement had been reached.) The settlement was facilitated by Judge Rothschild. By this time, the judgment had reached about $700,000.

Under the terms of the settlement agreement, as understood by LaPadula and Judge Rothschild, respondent was to pay Rokos $350,000, inclusive of what she already had been paid.[3] Of that amount, $200,000 was to be paid within sixty days of March 17, 2004, with $69,932.36 to be paid within the next year. In addition, "$50,000 at 5% interest [was] to be paid quarterly beginning 45 days from July 24." At this point, according to LaPadula, the agreement was in principle, meaning that the terms "as to the amount of money to be paid, when it would be paid, total amount of the settlement, were all defined and finalized." She claimed, however, that respondent wanted to check with his

[3] The record was unclear as to whether, by this time, Rokos had received $15,000 or $30,000.

accountant to make sure that the payments would be deductible to him. There also was an issue with respect to the confidentiality of the agreement.

In May 2004, Judge Rothschild entered an order of settlement. The order is not a part of the record. On June 18, 2004, the judge entered another order, this time clarifying and enforcing the settlement agreement. At this point, the $200,000 payment was due on July 24, 2004.

For his part, respondent denied that a settlement agreement had been reached. Instead, he claimed that he had to take some time to think about the proposal, to understand the tax consequences, and to have his wife seek independent counsel, inasmuch as she was going to co-sign a mortgage against the marital home in order to obtain funds to satisfy respondent's financial obligation under the proposal.

Moreover, according to respondent, the ethics complaint was filed in May 2004. Respondent claimed that he did not hear about our February 2004 reversal and remand of the DEC's July 2003 decision or the filing of the complaint until June 2004.[4] When he received the complaint, respondent and his wife were concerned that, if the house were mortgaged, and he were suspended or disbarred, he could not satisfy the increased

[4] Respondent denied that he had ever received notice from us that the ethics case had been revived.

mortgage payments, and he and his wife would lose the house. After consulting with a lawyer, respondent's wife rescinded her agreement to co-sign a mortgage on the house.

According to respondent, despite the setback — or because of it — he offered to pay Rokos $10,000 a month from his business, but she rejected it and demanded $30,000 a month because there was an agreement. Respondent also testified before the special master that he had vociferously denied to counsel and in papers to the court that there was a settlement agreement. Nevertheless, Judge Rothschild had decided to enforce the "agreement" and, respondent stated, entered the June 18, 2004 order. Respondent appealed the June 2004 order; and, as of his December 8, 2004 testimony before the special master, the appeal had not been dismissed and was, therefore, presumably pending.

On July 23, 2004, the day before the July 24 payment was due, respondent filed a motion asking the court to vacate and reconsider the orders pertaining to the settlement and stay the orders pending appeal. Among respondent's arguments was the unsubstantiated claim that his wife was unwilling to co-sign a mortgage on the marital home, after having learned that the disciplinary action against him had been revived. Judge Rothschild denied respondent's motion on the basis that the

settlement agreement did not condition the payment of the $200,000 upon respondent's obtaining a mortgage.[5]

In a supplemental application for a stay, respondent offered to pay Rokos $25,000 in early September 2004, followed by $5000 monthly payments. At a two-day hearing in mid-August 2004, presumably on the supplemental application for a stay, respondent refused to disclose to the court his whereabouts during the preceding week. Eventually, respondent confessed that he and his wife had been in Italy, where they stayed at a villa that they had rented.

Moreover, although respondent testified during the hearing that he had "more than $15,000" in his possession, he refused to give the judge an exact figure. Among other things, respondent also testified that he was reluctant to pay Rokos what he owed because she did not deserve the money. Respondent admitted that he had informed Benenson that he would settle the matter by bringing $100,000 to court with him. Respondent conceded, however, that he would not give the money to Rokos unless she

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[5] The date that this motion was denied is not reflected in the record. However, it could have been either August 3 or August 10, 2004. An August 12, 2004 Appellate Division order denying respondent's emergent application for a stay of the trial court's August 10, 2004 order refers to trial court orders of August 3 and August 10, 2004. The existence of this appellate court order suggests that respondent appealed Judge Rothschild's order that denied respondent's July 23, 2004 request for vacation, reconsideration, and a stay of the May and June 2004 settlement orders.

agreed to the new settlement proposal set forth in respondent's supplemental application for a stay. Also disclosed at the hearing on respondent's motion for a stay was his receipt of a $36,717.96 draw down on his home equity line, which respondent claimed to have used for the payment of other debts. In addition, he disclosed the existence of a bank account that he had not previously identified.

Respondent wound up tendering the $15,000 check to Rokos at the hearing. Even then, the judge noted, the payment was eleven days late and made only under threat of incarceration. Judge Rothschild observed: "To describe Gourvitz' position during all these proceedings as obfuscatory, intractable, recalcitrant, grudging and dilatory would be a significant understatement."

Despite respondent's objections and claims that he could not obtain the money he owed under the settlement, Judge Rothschild held him in contempt on the basis that his practice generated between $660,000 and $900,00 per year; that he continued to spend lavishly; that he refused to pay even what he claimed capable of paying; that he could have borrowed against homes; that he drew down on his equity line but offered it only for purposes of settlement; and that he otherwise "refused to pay a cent."

The supplemental motion was denied, and, as of August 17, 2004, respondent had "appealed all the court's recent rulings." Presumably, the "recent rulings" included the May and June 2004 orders confirming and enforcing the March 2004 settlement agreement and the order denying respondent's first motion for reconsideration and stay of the settlement orders, which was filed on July 23, 2004.

On August 18, 2004, Judge Rothschild entered two more orders, presumably in response to respondent's supplemental application and as a result of what had transpired at the two-day hearing earlier in the month. Both orders found that respondent had placed assets beyond the reach of execution and that he had the ability to make an immediate payment of $100,000 to Rokos. The orders held respondent in contempt. Specifically, one order authorized the issuance of a warrant for respondent's arrest and incarceration if he did not pay Rokos $100,000. However, Judge Rothschild stayed the terms of the order until Monday, August 23, 2004. The other order appointed Benenson as receiver of respondent's law firm and provided that, if (among other things) respondent paid $100,000 that day, followed by payment of $64,000 by August 31, 2004, the order would be suspended. This order did not contain a stay provision.

On August 20, 2004, the Appellate Division denied respondent's motion for a stay of both August 18, 2004 orders.[6] That month, respondent paid Rokos $15,000. Respondent also paid Rokos $100,000, but the payment amount did not fulfill his obligations under the settlement agreement. Moreover, instead of paying the $64,000 by August 31, 2004, respondent paid only $20,000, and then only as a result of a conference call generated by the missed payment.

On September 13, 2004, the court held a hearing on Rokos's motion to compel respondent to pay the remaining $44,000 of the $64,000 obligation or be incarcerated. At the hearing, respondent did not dispute that "he and his family take out close to $400,000 per year from the firm." Moreover, Judge Rothschild found that, by this time, respondent's wife had agreed to sign a mortgage so that he could obtain enough money to satisfy his financial obligation to Rokos.

On September 26, 2004, Judge Rothschild issued an order requiring respondent to pay Rokos $44,355.62 by October 29, 2004, or be incarcerated. Respondent did not make the payment,

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[6] On August 20, 2004, the Honorable James J. Ciancia, J.A.D., signed an order on emergent application. Even though one of the August 18, 2004 orders provided for a stay, Judge Ciancia's order stated that respondent had sought a stay pending appeal "of the trial court's orders of August 18, 2004" (emphasis added).

as he had appealed the order, and the Appellate Division stayed the incarceration provision, though presumably not the payment provision. This appeal, and presumably all of the appeals from the orders pertaining to the settlement and respondent's attempt to have those orders vacated, reconsidered and stayed, were pending as of LaPadula's testimony before the special master. By this time, respondent still had not posted a bond or obtained a stay of the judgment. Moreover, as of the date of LaPadula's testimony (December 7, 2004), respondent had paid no more money to either Rokos or her attorneys.

On December 3, 2004, five days before LaPadula's testimony, respondent made another settlement offer, namely, that "by Monday" he would (1) immediately pay $120,000 to Rokos and place the remaining $70,000 in court, which would then be paid to her "as called for under the Agreement," (2) "not seek by way of appeal the return of any monies paid to Ms. Rokos or the reduction of any sums to be paid," and (3) obtain a bond to cover $70,000 of the attorneys fees but continue with the appeal regarding this issue. Moreover, respondent proposed that the parties sign mutual releases. LaPadula testified that, as of the day of her testimony (Wednesday, December 8, 2004), respondent had not posted a bond, there had been no payment, and the appeals had not been withdrawn. Moreover, respondent had

not submitted a certification from his wife setting forth her agreement to sign off on a mortgage of the marital home, which LaPadula claimed that he had offered to do on December 3, 2004.

Respondent detailed extensively before the special master his position that he did not thwart Rokos's collections efforts. Rather, he claimed, Rokos's lawyers and Judge Rothschild refused to follow the law, and he was forced to make them do things properly either by forcing the lawyers to file motions or by his taking appeals.

Respondent claimed that, when the court ruled that he had the ability to pay but was spending the money on things such as a vacation in Italy and the purchase of a car, the court "didn't follow the law." Moreover, respondent testified, his wife agreed to mortgage the home only because "she gave in," as she did not want to see respondent go to jail.

Respondent boasted to the special master that, as a result of the appeals, he could "sit back for the next year and not pay Mrs. Rokos a cent," although he did not want to do that. He contended that he was set to close and pay Rokos in full, but her attorneys would not accept the offer unless he also agreed to pay the attorneys' and Benenson's fees.

With respect to the claim for attorneys' fees, respondent told LaPadula: "Besides, it's under appeal. You don't deserve

it." In fact, during his testimony before the special master, respondent claimed that the closing on the house "was in place as far as the money that I need to pay her off."

At the hearing before the special master, respondent continued to adhere to his position on his obligation to pay the judgment and the manner in which the judgment could be collected, which he described as follows:

> Now, when you say 'required to pay,' that's a misnomer. There is a judgment against me in which they can do whatever the law legally requires them to do and for me to obey whatever's legally required in order to pay that money.

Respondent conceded that he was capable of paying $10,000 per month to Rokos if she and the court had agreed to it. In fact, he paid $10,000 a month in 2003, but the total amounted to less than $30,000 for the year. When asked why he had not paid the amount owed, respondent suggested that it was because counsel for Rokos was not collecting in the correct manner, and his family had abandoned him. So, "as a result of that and the hurt that they did and everything else I was going to hold them to the Ps and Qs and letters of the law."

In sum, respondent refused to acknowledge in any way that he acted inappropriately with respect to satisfaction of the judgment. Instead, he argued that he had not paid the monies because he did not have attachable assets, and Rokos's attorney

had always gone about her collection efforts illegally. Therefore, he had taken it upon himself to enforce the letter of the law. In addition, respondent claimed, Judge Rothschild entered the various orders illegally and had illegally appointed a receiver who was the judge's friend and as the result of ex parte communications.

Attorneys Brian Corrigan, who had shared an office suite with respondent for thirteen to fourteen years, and Richard Outhwaite, who had been an attorney with respondent's firm for fourteen years, attempted to corroborate respondent's claims of wrongdoing on the part of Rokos's attorneys and Judge Rothschild. However, most of their testimony pertained to matters that pre-dated the settlement. Only Outhwaite testified with respect to the hearings in August 2004, but, again, the content of his testimony was little more than accusations about the judge's perceived incompetence.

Outhwaite testified before the special master that, at the "pay or stay" hearing (presumably held in August 2004), Judge Rothschild applied the standard used in matrimonial cases where deadbeat former spouses and parents go to jail if they have assets but refuse to meet their support obligations. According to Outhwaite, in a civil case, a party may be jailed only if he or she is found to have been secreting assets. Benenson made no

such finding with respect to respondent. Moreover, Judge Rothschild had made his decision before the hearing even began.

With respect to the purported settlement agreement, which, according to Outhwaite, the judge forced upon respondent, Outhwaite testified that there was an issue regarding the taxability of payments made to Rokos. The agreement was tentative, but the judge held respondent to it. Outhwaite testified that respondent had informed the judge that there was no agreement, nothing in writing, and there would be no agreement until he learned about the tax ramifications "and other issues." According to Outhwaite, once the tax issues were resolved, and the judge was informed, the judge declared that there was an agreement, even though there was not.

Outhwaite testified that, when respondent made arrangements to obtain a mortgage and was in the position to pay Rokos the full amount owed, including interest (presumably in early December 2004), Rokos refused to accept it. Outhwaite believed that Rokos turned it down just to be vindictive. Even one of Rokos's attorneys believed that she was being unreasonable. Nevertheless, Outhwaite stated, all the money had been paid, but Rokos had not yet signed the release. In early January 2005, respondent filed an order to show cause (presumably on this issue), but Judge Rothschild did not sign it until the day

before Outhwaite's testimony (January 19, 2005). Moreover, the order compelled respondent to produce documents and to appear before the judge on the day of the ethics hearing. According to Outhwaite, all of this, as with things in the past, was done without the benefit of any court rule authority.

As we stated previously, respondent represented at oral argument before us that he had paid Rokos all that she was owed.

THE SPECIAL MASTER'S FINDINGS

With respect to the first count of the complaint, the special master concluded that respondent did not violate RPC 8.4(g) (conduct involving discrimination). As for the second count, the special master concluded that respondent "acted in a way which is prejudicial to the administration of justice," which constituted a violation of RPC 8.4(d). The special master's report was silent as to whether respondent had violated RPC 8.4(c) (misrepresentation), which also was charged in the second count. The special master recommended the imposition of a reprimand.

In support of his conclusions that respondent had not violated RPC 8.4(g), the special master found that respondent and Rokos had a difficult relationship but, nevertheless, worked together for twenty-five years. The special master took no

position on whether Rokos had retired when she went out for her surgery but noted that she left, "at the very least, for six months." The special master further found that, when Rokos sought to return to her employ with respondent, respondent became angry because Rokos knew that she already had been replaced. The special master noted that, when Rokos applied for unemployment benefits, respondent's "anger turned to rage," a reaction that the special master found "difficult to understand."

With respect to respondent's March 30, 2000 letter to Rokos, the special master observed that the one sentence about Rokos's appearance had a catastrophic effect on respondent. A $305,000 judgment was entered against him, which ballooned to more than $700,000 with interest, before the case ultimately was settled for $350,000.

The special master found that the record did not support the conclusion that respondent "was engaged in a concerted effort to discriminate." "Rather, it demonstrates that Respondent reacted in a fit of anger." In other words, "one sentence in an angry letter" did not constitute an ethics violation. The special master concluded:

> Respondent's testimony regarding his attitude toward discriminatory conduct is persuasive. The character witness [sic] he presented indicated that Respondent

was active in promoting community matters and was a leading and active advocate in his practice.

His relationship with Complainant was at times angry and negative. But they, [sic] stayed together for a number of years. A one-line sentence in a letter, absent any other evidence of discrimination should not subject a lawyer to ethical penalties and I will so recommend.

Although the special master viewed the first count of the complaint as having been based upon "a one time lapse in judgment," he described the conduct that led to the second count as "deliberately obstructive." The special master explained:

There is no question that Respondent was confronted with a significant financial obligation. Respondent's testimony and demeanor during the course of these ethics hearings demonstrated a high degree of resentment regarding the outcome of the civil suit. Respondent appears to have let this resentment control his conduct.

The evidence submitted by the Committee show [sic] pattern which in any context would be troubling.

The special master quoted Judge Rothschild's statement that respondent's resistance to Rokos's collection efforts was "obfuscatory, intractable, recalcitrant, grueling and dilatory" and essentially unbecoming of an attorney.

In recommending a reprimand for "act[ing] in a way which is prejudicial to the administration of justice," the special master concluded:

The conduct of Respondent went beyond simply protecting his rights. He abused the process and let his resentment get the better of his professional

judgment. This conduct, however, appears to be specific to Respondent's personal problem and not his conduct with regard to his everyday professional activities.

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent violated RPC 8.4(d) is supported by clear and convincing evidence. In addition, we are satisfied that the special master properly concluded that the record lacked clear and convincing evidence that respondent violated RPC 8.4(g).

Conduct Prejudicial to the Administration of Justice (RPC 8.4(d))

The charge that respondent violated RPC 8.4(d) was based upon, among other things, his failure to pay the judgment entered against him, even though he had neither posted a bond nor requested a stay.[7] RPC 8.4(d) provides that it is professional misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice." Failure to obey a court order is conduct that is prejudicial to the

[7] The second count also alleged that respondent violated RPC 8.4(d) when he failed to cooperate with the sheriff's officers in their attempts to locate and execute upon his assets. There was very little testimony on this issue beyond claims that Rokos's lawyers did not proceed correctly. Ultimately, however, the sheriff's officers succeeded, and the assets apparently were seized. In any event, the record does not clearly and convincingly establish that respondent did not cooperate with the sheriff's officers.

administration of justice and, therefore, a violation of RPC 8.4(d). In re Harris, 182 N.J. 594, 601, 605 (2005) (attorney violated RPC 8.4(d) when she failed to abide by an order to turn over a file to the client in one matter and an order to return the unearned portion of a retainer in another matter); In re Hartmann, 142 N.J. 587 (1995) (attorney violated RPC 8.4(d) when he repeatedly failed to abide by several orders requiring him personally to pay opposing counsel's attorney fees, necessitating repeated and additional court action for more than fifteen months).

Although the special master concluded that respondent had violated RPC 8.4(d), he provided scant detail with respect to just how respondent acted contrary to that rule. Nevertheless, we find clear and convincing evidence of respondent's misconduct in this regard.

When respondent appealed the orders denying his motions for a directed verdict and for a new trial, he failed to seek a stay of execution of the judgment or post a bond. Thus, the trial court was able to enforce payment of the judgment. There is no clear and convincing evidence that, prior to the entry of the June 18, 2004 order enforcing the settlement, respondent had deliberately avoided satisfying the judgment or abiding by court orders. Although the court entered an order in March 2003

requiring respondent's firm to make period payments, the order is not included in the record, and its language (as described by LaPadula in her testimony) is vague insofar as it reportedly identified the payment amount as "anywhere between 15 and 25,000 per month." Moreover, while an accountant was appointed to determine the amount that was to be paid, he never rendered a report. In addition, the order was on appeal through December 2003, and there is very little evidence with respect to Rokos's efforts to obtain payment. Nevertheless, during this time, respondent was not making any progress toward satisfying the judgment.

Respondent's obstreperous conduct began with certainty after the entry of the June 18, 2004 order enforcing the settlement. While respondent and his two attorney witnesses offered a multitude of reasons why a "settlement" had not been reached and why the order should not have been entered, the fact is that, right or wrong, the order was entered, and its provisions were never stayed. Yet, instead of complying with the order, respondent embarked on a mission to do all he could to avoid paying Rokos because, as he testified before Judge Rothschild, she did not deserve it.

With this attitude, respondent first attempted to re-negotiate the terms of the settlement by offering Rokos $10,000

a month. When that failed, on July 23, 2004, the day before the first payment was due under the settlement agreement ($200,000), respondent filed a motion seeking reconsideration and a stay. He did not make the $200,000 payment. He did not comply with the June 18, 2004 order.

When his motion seeking reconsideration was denied, respondent filed a "supplemental" motion for a stay, which was accompanied by yet another settlement offer on his part – this time asking Rokos to accept $5000 per month. While the proceedings on this motion were under way, respondent revealed that he had been on a vacation in Italy and that he was capable of paying Rokos $115,000 on the spot if she agreed to his latest offer, which presumably was the $5000 per month. After the entry of additional orders, respondent finally paid the $115,000 to Rokos under threat of incarceration.

Next, respondent refused to pay Rokos the $64,000 due on August 31, 2004. Instead, he paid only $20,000. When the judge issued another order requiring payment of the $44,000 balance by October 29, 2004, respondent appealed the order and refused to pay the money, even though the Appellate Division had stayed only the incarceration provision. In the absence of the court's ability to incarcerate respondent, he elected not to pay the money.

Yet, Respondent was again able to come up with money he claimed not to have when it benefited him. On the eve of the hearing before the special master in this matter, respondent made yet another settlement offer. This time he agreed to pay Rokos all that she was owed. By the final day of the hearing, respondent apparently had paid Rokos the money due.

Thus, in the end, perhaps in a bid to avoid jeopardizing his privilege of practicing law, respondent managed to come up with the money that for over two years he claimed not to have. Moreover, between the time that the judgment was entered and finally paid, respondent repeatedly refused to comply with the terms of any orders requiring payment unless and until he faced the loss of his freedom.

The fact that, in respondent's view, the orders were based upon misunderstandings of facts, agreements, or the law is of no import. Those are issues for the appellate courts to resolve. The filing of an appeal in and of itself does not grant dissatisfied litigants the right to disregard the terms of an order as to which they seek appellate review, particularly when those litigants are lawyers. As we observed in an earlier matter involving similar, though less outrageous conduct:

> Respondent's contention that, by his repeated disregard of Court orders, he was exercising options available to any person not only misconstrues the effect of Court orders upon laypersons but also

> ignores the higher standards imposed upon attorneys as officers of the court. See, e.g., In re Franklin, 71 N.J. 425 (1976). The disrespect for the system exhibited by respondent's conduct was inexcusable . . . . . Furthermore, the expenditure of vast additional court resources to force respondent to comply with the original order warrants additional findings of violations of both RPC 3.5(c) and RPC 8.4(d).
>
> [In the Matter of John A. Hartmann, III, Docket No. 949-436 (DRB July 10, 1995) (slip op. 5).]

In Hartmann, supra, slip op. 9-10, we determined that precedent required the imposition of a reprimand. In that case, for fifteen months, the attorney, who had no disciplinary history, intentionally failed to abide by several court orders requiring him to pay his adversary's counsel fee, which was imposed as a result of his failure to appear on time for a trial call. Id. at 2. In fact, the attorney did not pay the counsel fee until a warrant for his arrest was issued. Ibid. Inasmuch as attorneys in two prior cases had been reprimanded for failure to obey court orders, In re Gaffney, 133 N.J. 65 (1993), and In re Lekas, 136 N.J. 515 (1994), we determined that a reprimand was the appropriate discipline. Id. at 8-9. The Supreme Court agreed. In re Hartmann, supra, 142 N.J. 587.

Here, respondent clearly engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(d), when he repeatedly disregarded several orders requiring him to

satisfy his financial obligation to Rokos, an elderly cancer survivor.[8]

Conduct Involving Discrimination (RPC 8.4(g))

The charge that respondent violated RPC 8.4(g) was based upon the judgment obtained by Rokos in her employment discrimination case, which the Appellate Division has affirmed. RPC 8.4(g) provides, in pertinent part:

> It is professional misconduct for a lawyer to
> . . .
>
> (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of . . . handicap, where the conduct is intended or likely to cause harm.

Thus, when a lawyer is charged with *having* violated RPC 8.4(g) based upon employment discrimination, the ethics presenter must show that (1) the employee instituted an employment discrimination claim that resulted in a favorable final agency or judicial determination, and (2) the discriminatory conduct was intended or likely to cause harm. The question arises as to whether the first showing is intended to be solely jurisdictional or conclusive evidence that

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[8] For purposes of RPC 8.4(d), we distinguish failure to satisfy a judgment from failure to comply with a court order, concluding only that it is respondent's failure to comply with a court order that constituted a violation of RPC 8.4(d).

discrimination has occurred. With respect to the first showing, we conclude that the rule's requirement that the alleged victim of the discrimination first obtain a favorable final agency or judicial determination prior to the filing of a RPC 8.4(g) charge is jurisdictional only. The final agency or judicial determination is not to replace the clear and convincing standard by which we are to judge whether a violation has been committed. Indeed, in this case, where Rokos obtained a judgment in the Superior Court of New Jersey, the applicable standard was by a preponderance of the evidence — a standard that is not as stringent as the clear and convincing standard by which we judge the evidence presented.

We recognize that, in the Supreme Court's comment to the rule, the Court said:

> Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

[Pressler, Current N.J. Court Rules, Official Comment by Supreme Court (May 3, 1994) to RPC 8.4(g) at 502-03 (2005).]

We further recognize that, in his book, New Jersey Attorney Ethics: The Law of New Jersey Lawyering, Kevin H. Michels has interpreted this comment to mean that "the Court and its disciplinary committees apparently will not perform fact finding on matters of employment discrimination." Kevin H. Michels, New Jersey Attorney Ethics: The Law of New Jersey Lawyering, § 41:2-2 at 958 (2005). Instead, according to Michels, "[a]s with criminal convictions . . ., the Court's role [is] to consider the nature of the wrongdoing and to determine the appropriate quantum of discipline." Ibid. Yet, Michels posits, "[i]n other matters relating to discrimination, the disciplinary process will include a full inquiry into the underlying facts of the alleged discrimination." Ibid.

The Supreme Court's comment and Michels's interpretation notwithstanding, we do not interpret RPC 8.4(g) to have stripped us of our duty to conduct a de novo review of the record for the purpose of determining whether the formal charges of unethical conduct have been "established by clear and convincing evidence." R. 1:20-6(2)(B); R. 1:20-15(f)(1). We acknowledge that, with respect to motions for final discipline, the conduct is "deemed to be conclusively established" by, among other

things, a copy of the judgment of conviction and that, the sole issue for our determination is "the extent of final discipline to be imposed." R. 1:20-14(c)(1)(2). We also are aware that, with respect to motions for reciprocal discipline, "a final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state," R. 1:20-14(a)(5), and that "the sole issue to be determined . . . [is] the extent of final discipline to be imposed." R. 1:20-14(b)(3). Nevertheless, we remain steadfast in our position.

With respect to motions for final discipline, the clear and convincing standard is not thwarted by our having to deem as "conclusively established" conduct that leads to, among other things, a judgment of conviction. In criminal actions, the standard of proof is beyond a reasonable doubt. Clear and convincing evidence is a lower standard. Yet, clear and convincing evidence is a higher standard of proof than what is required in an employment discrimination civil action where the burden is by a preponderance of the evidence.

Similarly, with respect to motions for reciprocal discipline, in a number of states the standard of proof is clear

and convincing evidence. See, e.g., In re Moloney, 2005 WL 103063 (Cal. Bar Ct. 2005); In the Matter of Respondent X, 3 Cal. State Bar Ct. Rptr. 592, 603 (Review Dept. 1997); People v. Stoorman, 103 P.2d 352, 355-56 (Colo. 2004); Ansell v. Statewide Grievance Committee, 865 A.2d 1215, 1220 (Conn. App. Ct. 2005); In re Brewster, 587 A.2d 1067-68 (Del. 1991); Attorney Grievance Commission of Maryland v. Potter, 844 A.2d 367, 373 (Md. 2004); Goeldner v. The Mississippi Bar, 891 So.2d 130, 135 (Miss. 2004). But see, e.g., In re Capoccia, 59 N.Y.2d 549, 550 (N.Y. 1983) (fair preponderance of the evidence); Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 444 (Pa. 2000) (citations omitted) ("The Office of Disciplinary Counsel has the burden of proving, by a preponderance of the evidence, that respondent's actions constitute professional misconduct. This burden of proof must be established by clear and satisfactory evidence."). Thus, with respect to *motions for reciprocal* discipline from states where the burden of proof is the same as New Jersey's, there is no reason for us to review the record again for the purpose of determining whether unethical conduct has occurred. Moreover, even in those states where the burden of proof is not subject to the clear and convincing standard, our Supreme Court has directed that we accept the determinations

of misconduct as conclusively established, presumably as a matter of comity.

Regardless of the reasons underlying the Supreme Court's mandate that, for purposes of motions for final and reciprocal discipline, we accept as conclusively established the facts underlying the convictions and misconduct, the fact remains that the Supreme has directed us to do so in those matters. In RPC 8.4(g), however, the Supreme Court did not direct that we consider the facts underlying the successful unemployment discrimination claim as having been "conclusively" established. Therefore, in the absence of such direction, we believe that our task is to apply the clear and convincing evidence standard of proof governing disciplinary matters. This having been said, we agree with the special master's ruling that the record does not support the conclusion that respondent violated RPC 8.4(g).[9]

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[9] The special master actually concluded that there was no clear and convincing evidence that respondent "was engaged in a concerted effort to discriminate." However, this is not what must be proven to establish a violation of RPC 8.4(g). Perhaps the special master's ruling was based upon a misunderstanding of a comment to the rule in the New Jersey Court Rules. In referring to RPC 8.4(g)'s requirement, among others, that employment discrimination is covered by the rule only if adjudicated, the comment states:

> This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its

Our conclusion that respondent did not violate RPC 8.4(g) is based solely upon the application of the rule to the facts, as precedent is not helpful to our analysis. None of the cases in which attorneys were found to have violated RPC 8.4(g) involved employment discrimination. In re Vincenti, 114 N.J. 275, 281 (1989) (in a case that pre-dated but led to the codification of RPC 8.4(g), the Supreme Court suspended an attorney who barraged opposing counsel and a witness with abusive and offensive language, including "racial innuendo," which, at the time, constituted a violation of RPC 3.2 and RPC 8.4(d)); In re Geller, 177 N.J. 505 (2003) (attorney reprimanded for a number of ethics violations that were the subject of a twelve-count complaint, including RPC 8.4(g) as a result of his referring to "Monmouth County Irish" as having their own way of doing business); In re Pinto, 168 N.J. 111 (2001) (attorney reprimanded for discriminatory conduct with his client in the form of graphic, sexually-charged comments).

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occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive.

[Pressler, Current N.J. Court Rules, supra, comment on RPC 8.4(g).]

This comment refers to the actor's intent and merely repeats what the rule says, that is, the attorney must intend to cause harm. However, the comment also observes that the Court intended to carve out an exception where one does not intend harm but nevertheless engages in repetitive discriminatory behavior.

These cases provide no guidance on the issue of whether respondent's conduct, for purposes of disciplinary proceedings, was discriminatory. Nevertheless, the evidence does not clearly and convincingly support the conclusion that respondent's literary outburst was anything more than pent-up anger, which was unleashed upon a former, long-time employee with whom he had had a difficult relationship over the years. Stated differently, there is no clear and convincing evidence that respondent failed to take back Rokos because she was disfigured.

Certainly, the Appellate Division found substantial evidence in support of the jury's verdict. However, neither the jury nor the Appellate Division were required to find discrimination based upon clear and convincing evidence. As stated previously, the standard for the jury's assessment was preponderance of the evidence. The standard on appeal was whether, in denying respondent's motion for a new trial, the trial judge caused "a miscarriage of justice under the law." Rokos v. Gourvitz, supra, slip op. at 20. We are not bound by such determinations.

Because we find no clear and convincing evidence that respondent engaged in discrimination, we need not reach the issue of harm. Nevertheless, in the event that the Supreme Court disagrees with our conclusion, we determine that the

evidence clearly and convincingly established that respondent intended that his conduct harm Rokos.

Little has been said about the element of harm that must be proven in a case where an attorney is charged with having violated RPC 8.4(g). In Geller, for example, it was not necessary for us to consider the requirement that the discriminatory conduct be intended or likely to cause harm. In In the Matter of Harry J. Pinto, Jr., Docket No. 00-049 (DRB October 19, 2000) (slip op. at 13), despite the attorney's assertion that he did not intend to harm the client, we found that he had engaged in discriminatory conduct that was "'likely to cause harm.'" The facts in that matter, too, are such that a discussion of the issue is unnecessary.

Here, there is clear and convincing evidence that respondent's conduct was intended or likely to cause harm: his own words. In respondent's March 30, 2003 letter to Rokos, he unambiguously asserted that he would not permit her to return to work because of her appearance when he wrote: "Your appearance is not such that would be conducive to my clientele meeting and greeting you each day." Rokos's appearance was caused by disfiguring surgery for the purpose of treating the adenoid cancer. Respondent's statement, thus, was likely to cause harm to Rokos. Moreover, respondent's own words at the DEC hearing

provided clear and convincing evidence that what he wrote to Rokos was intended to cause harm. Indeed, he testified clearly that he intended that statement to "be hurtful" and to "hurt her."

To conclude, the special master correctly determined that respondent did not violate RPC 8.4(g). Although the Appellate Division affirmed the trial court's denial of respondent's motions for a directed verdict and new trial based upon a detailed analysis of the facts underlying the discrimination claim, we are not bound by that determination.

Although we are unanimous in our decision that respondent's conduct warrants a reprimand (Hartmann, Gaffney, and Lekas), we are divided as to which Rules of Professional Conduct he violated. Five members determined that respondent violated only RPC 8.4(d), while three members determined that he violated both RPC 8.4(d) and RPC 8.4(g). We unanimously conclude that respondent did not violate RPC 8.4(c). Member Matthew Boylan, Esquire did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for the costs incurred in connection with the prosecution of this matter.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Elliot H. Gourvitz
Docket No. DRB 05-117

Argued: May 19, 2005

Decided: July 27, 2005

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley			X			
O'Shaughnessy			X			
Boylan						X
Holmes			X			
Lolla			X			
Neuwirth			X			
Pashman			X			
Stanton			X			
Wissinger			X			
Total:			8			1

Julianne K. DeCore
Chief Counsel