SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-105
District Docket No. XIV-2012-0206E

IN THE MATTER OF
DARRYL W. SIMPKINS
AN ATTORNEY AT LAW

Decision

Argued: July 16, 2015

Decided: December 2, 2015

Timothy J. McNamara appeared on behalf of the Office of Attorney Ethics.

John McGill, III appeared on behalf of respondent.

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 two-year suspension filed by the special master. The complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with a client), RPC 1.15(a) (failure to safeguard client funds), RPC 8.4(b) (commission of a criminal act that reflects adversely on the attorney's honesty, trustworthiness or

fitness as a lawyer), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice). For the reasons expressed below, we recommend that respondent be disbarred.

Respondent was admitted to the New Jersey bar in 1984. He maintains a law practice in Hillsborough, New Jersey.

In 2011, on a motion for discipline by consent, respondent was admonished for lack of diligence and failure to communicate with a client. Specifically, in 2001, he was retained to represent a client in connection with a personal injury matter. However, he never a filed a complaint on the client's behalf, allowing the statute of limitations to expire. He also failed to reply to the majority of the client's numerous requests for information about the status of the matter over the following months and years. In the Matter of Darryl W. Simpkins, DRB 11-258 (October 31, 2011).

On June 3, 2015, respondent's counsel filed a motion to supplement the record and for a protective order. The motion will be addressed below.

During the course of the ethics hearing, respondent's counsel made several motions (1) for reconsideration of the special master's denial of a protective order in respect of respondent's psychiatric, psychological, and medical records;

and (2) to dismiss the charged violation of RPC 8.4(b) because the ethics complaint was not legally sufficient, as it failed to provide adequate notice of the specific crimes alleged. The special master denied respondent's motions.

Respondent's post-hearing brief accuses the special master of bias against him. Because a portion of the charged violations rests on the credibility of the witnesses, some sections of the transcript are cited below to assist in assessing credibility. We note that, at the ethics hearing, respondent's behavior towards the special master was gleaned from comments he made to her – apologizing for yelling; stating that he was trying to calm down; apologizing for not focusing on posed questions; and from the special master cautioning him to refrain from raising his voice.

Although respondent made numerous admissions in his answer to the complaint, and during the OAE's investigation, at the ethics hearing he was, at times, evasive, unresponsive, inconsistent, and combative. He, nevertheless, admitted that he had engaged in gross neglect, lack of diligence, and failure to communicate and had made misrepresentations to his clients, Erasmo and Annie Catanzaro. We find that respondent's misrepresentations to his client were so pervasive and

outrageous, and persisted for such an extended period that, coupled with his other infractions, disbarment is warranted.

By way of background, respondent graduated from Rutgers University in 1981 and Harvard Law School in 1984. Afterwards, he clerked for the Honorable William Wall. Over approximately the next eight years, he had four different employers: the New Jersey Attorney General's Office; Stryker, Tams and Dill; Podvey Sachs and Meanor; and CIGNA Insurance Company. In 1993, respondent opened his own law practice. His wife joined him as a partner in 2003. Among other organizations, respondent served on the Board of Bar Examiners and several New Jersey State Bar committees.

We now turn to the facts of this matter. Based on the recommendation of a mutual friend, the Catanzaros contacted respondent for a possible medical malpractice claim for injuries that Erasmo Catanzaro (Catanzaro) had sustained as a result of having been prescribed Vioxx. According to Catanzaro, that friend told him that respondent needed the business.

On May 23, 2003, Catanzaro provided respondent an eight-page hand-written summary of the circumstances surrounding his injuries and the resultant economic and emotional injuries he sustained from the negligent prescribing of Rofecoxib (also known as Vioxx) by Dr. Andrea Reznik. At the ethics hearing,

Catanzaro explained that, among other things, the medication caused him to suffer from blisters all over his body and that any bruising he sustained resulted in infection, requiring his hospitalization.

On July 23, 2004, respondent and the Catanzaros executed a contingent fee agreement. Respondent, thereafter, drafted a complaint, dated September 9, 2004, naming Dr. Reznik, Merck & Co. (the manufacturer of Vioxx), and various John Does as defendants, with Essex County listed in the caption. On that same date, respondent hand-delivered the complaint to the Superior Court, Somerset County Clerk, even though there was no nexus to that county, other than the location of respondent's law office. Respondent claimed that courts will generally transfer cases to the proper counties, but the Somerset County court clerk did not do so.

Even though the complaint was stamped "filed" on September 9, 2004, the Somerset County court clerk would not accept it and returned it to respondent. The statute of limitations in Catanzaro's case was set to expire on September 12, 2004, a Sunday. Respondent made no attempt to file the complaint in Essex County, which he deemed to be a favorable venue. Respondent asserted that he had not done so because he was concerned that he would not be able to obtain an affidavit of

merit. He claimed that, from the outset, he did not believe that Catanzaro had a viable cause of action, but did not inform him of that fact. He conceded that it "was bad behavior on my part" for not doing so; it was "very, very wrong." To the contrary, Catanzaro testified that respondent told him that he had a "very, very good case."

Respondent remarked that, as the statute of limitations deadline approached, he became "a bit more anxious . . . more concerned and just panicked." He became paralyzed and could not tell Catanzaro that he had no case. He lied to Catanzaro about the status of his case for more than four years. Respondent added that, on "different occasions" he thought that it was time to tell Catanzaro the truth, but he "ran into issues of how to present it. I felt, you know, a sense of being overwhelmed, panic, anxiety about having to confront this gentleman who really . . . wished there was a case."

Rather than inform the Catanzaros that he had missed the statute of limitations, respondent took many steps over the next four years, from 2004 to 2007, to mislead the Catanzaros to believe that a medical malpractice claim against Reznik and a products liability claim against Merck were proceeding apace. He: (1) put a false docket number on the complaint; (2) claimed that the case had been venued in Atlantic County and that the

Honorable Carol Higbee, J.S.C., was presiding over the case; (3) on June 15, 2005, sent Catanzaro for a medical evaluation and obtained a report from the doctor; and (4) instructed Catanzaro to reply to interrogatories.

Respondent testified that he was not concerned with the expense that Catanzaro incurred in connection with the unnecessary medical evaluation because he believed that Catanzaro had a good health insurance plan and that his out-of-pocket expenses would be low. Respondent also testified that he sent Catanzaro for a medical evaluation because

> I wanted to in my own mind because eventually I was going to have to, you know, face him and tell him you don't have a case, but I wanted to make sure that that is true. . . . [H]e was operating under the impression that the case would deal only with his allergic reaction and the swelling of the lymph nodes and the tongue and the facia there. I wanted to double check that there was not in fact based on his history any heart issue. Now, he would not be able to recover against, you know, Vioxx or whoever, but he would be able to recover against me . . . for having screwed that part up if that were the case.
>
> [1T192-8 to 192-20.][1]

[1] 1T refers to the May 19, 2014 ethic hearing transcript; 2T refers to the May 27, 2014 ethics hearing transcript; and 4T refers to the June 9, 2014 ethics hearing transcript.

Respondent added that Catanzaro would have recovered the cost as part of a civil recovery – a legal malpractice suit against him "for having screwed that part up if that were the case."

Respondent admitted that, over the years, Catanzaro repeatedly inquired about the status of his case. Respondent, however, either failed to reply to Catanzaro's oral and written requests for information or misled him that the case was progressing. In fact, by letter dated November 22, 2005, more than one year after the expiration of the statute of limitations, respondent informed Catanzaro that (1) he had spoken to two doctors who had given him oral reports; (2) he had "engaged the services" of another doctor and might add another expert to support his claims; (3) there had been a "slow down" at the court because so many Vioxx cases had been filed and they were all assigned to Judge Higbee in Atlantic County; (4) Catanzaro's case was not listed on the fast track "and, as such, had been more delayed;" (5) they were at the discovery stage and had to provide answers to interrogatories and propound interrogatories; (6) discovery had to be completed by "June 2005 [sic];" and (7) he anticipated that Catanzaro would be deposed by March/April 2006 and the trial or settlement would take place in the summer of 2006.

Catanzaro remarked that respondent's letter to him was prompted by his meeting with another attorney about his case, which displeased respondent. Catanzaro noted that his attempts to obtain information from respondent had been unavailing, even after sending respondent a letter consenting to pay for his "valuable" time. Catanzaro's letter stated in relevant part, "[p]lease make an effort to answer the above questions to the best of your ability. Worth repeating, I understand that your time is valuable, but if you have to charge me do so."

On the same date as respondent's letter, November 22, 2005, after discussions with Catanzaro, respondent amended the contingency fee agreement by adding the following statement: "the total costs to be ------- Catanzaro ------- for expert witnesses shall be no more than $5,000 [sic]. The law firm will provide the rest." Respondent alone signed the amendment. He admitted that he had added the language to deceive Catanzaro that his case was still active. Catanzaro remarked that respondent added the language after respondent informed him that he had incurred expenses in Catanzaro's case but denied taking cash from Catanzaro.

According to Catanzaro, over the course of the four years, respondent accepted funds from him, even though the retainer called for a contingent fee. Respondent admitted knowing that he

was not entitled to charge an additional hourly fee but denied taking cash from Catanzaro.

At the ethics hearing, respondent's explanation for accepting a September 11, 2006, $300 check from the Catanzaros (after the statute of limitations had expired), differed from both Catanzaro's and respondent's own initial explanation to the OAE during a July 11, 2012 interview. The following exchange occurred during that OAE interview:

> OAE: Did you charge any fees or expenses to the Catanzaros at any time?
>
> Respondent: We talked a lot about the fees. . . . I didn't charge them.
>
> OAE: Was your agreement through the retainer . . . a contingency . . . fee?
>
> Respondent: Correct. Except he would be responsible for expenses.
>
> OAE: Okay. And were you ever paid any reimbursement of your expenses by them?
>
> Respondent: I think he may have -- one day he came by and wanted to leave a check and I believe he left one, even though I didn't ask him for it, I didn't tell him, I said -- but he had been receiving copies of the record as well as the bill, you know, 150 here, 200 here, 300 here,
>
> OAE: What were you charging him expenses for?
>
> Respondent: The medical records.
>
> . . .

> I mean, we would have charged him expenses for the doctor's reports, but we got all of that for free by doing it, you know, offline. But I'm saying . . . If this were a typical case, he would have been responsible for those in the end.
>
> OAE: . . . I'm more interested in knowing what actually did happen. . . . What was the check for? . . .
>
> Respondent: It would have been for medical records. . . . only for medical records.
>
> OAE: . . . do you remember how much he gave you?
>
> Respondent: I don't. It may have been -- I don't want to guess, but I think like 300 . . . .
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> [Ex.P36;29-18 to 31-12.]

Afterwards, respondent's counsel's August 29, 2012 letter to the OAE stated that (1) respondent had received the $300 check which was, apparently, "payment of attorney's fees for one hour of legal consultation that occurred at some time previously;" (2) respondent did "not have a clear present recollection of the full circumstances surrounding the receipt of the check;" (3) counsel believed that the check "speaks for itself and accurately records any prior understanding between the parties;" and (4) respondent recalled, however, that at that time, it was his "normal business practice to charge clients a fee for an initial one hour consultation" and he "believes" that in 2006, "his reasonable hourly rate was approximately $300.00."

Respondent's July 2004 retainer agreement listed his hourly rate as $275.

At the ethics hearing, respondent stated that, at the OAE interview, he had not reviewed the check and had testified from memory. He added that, later, when he saw the check and the notation "consult," "[t]hat is when in my mind's eye I realized what was -- what I think occurred."

Respondent denied that the $300 check was related to the malpractice case. Notwithstanding his failure to keep Catanzaro updated and his admitted failure to reply to Catanzaro's inquiries, respondent opined that Catanzaro may have consulted him about another matter and that the check represented payment of a consultation fee, thus explaining why the check bore the notation "consult 1 hr 9/11/06." He could not recall, however, what the other matter entailed, was unable to locate any notes regarding that other case/consultation and, nevertheless, would not have had a retainer agreement for a consultation. According to respondent, he would have dictated a memo to the file about that consult, but it was a "very, very, very, busy" time and the tape may not have gotten transcribed or it could have been lost or misfiled "because there were just a billion of them." Respondent claimed that he charged consultation fees even to existing clients. At a later point during the hearing, however,

respondent stated that the money he received from the Catanzaros was for either medical expenses or for a consultation.

During discovery in the ethics case, respondent provided the OAE with receipts for costs, totaling $173.22, incurred by his office in Catanzaro's matter. He claimed, thus, that the $300 check was for another matter. He asserted further that Catanzaro went to his office "many times" before the expiration of the statute of limitations to give the firm money, but that he told Catanzaro not to advance any funds.

Catanzaro's testimony in this regard differed from respondent's. He understood that the $300 check was in connection with his malpractice claim. According to Catanzaro, respondent stated to him:

> well, you know, time is money and I spent sometime [sic], you know, talking to you. And I'm only going to charge you $300. I turned and he said there might be some more change [sic] factor for mailing and who not [sic]. I give him another $50. That was it.
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> [2T177-24 to 177-7.]

Catanzaro testified that, on September 11, 2006, he gave respondent both the $300 check and, because the check had already been written, an additional $50 in cash. Catanzaro added that the payment was for approximately thirty-five or forty minutes of consultation with respondent on the Vioxx case. By

that time, Catanzaro was not satisfied with respondent's services, rather, he was "infuriated" with him.

Catanzaro vehemently disputed respondent's testimony that the check was for a consultation in another matter. He stated:

> Absolutely not.
>
> . . . .
>
> Because personally I've been put through the eye of a needle. And I've cursed the day every day to the fact that Ms[.] Raviky sent me to him to begin with. I would not have given him any other business or any other consultation besides this particular matter which I was involved in which I could not even get my records out to bring it to another attorney.
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> [2T179-8 to 179-16.]

According to Catanzaro, respondent had asked him for money in 2003 and 2004. He first asked for $400 to obtain medical records. When Catanzaro requested a receipt for the payment, respondent's office personnel informed him that the receipt would be sent to him with a copy of the records. He never received either, however.

The following year, respondent asked Catanzaro to sign a release for his medical records, claiming that he was going to send a report to another doctor to review Catanzaro's case. Catanzaro, thus, gave respondent an additional $400 in cash for which he received neither a receipt nor any records. According

to Catanzaro, he made another cash payment purportedly for research on the claim against Merck and for costs to obtain records from his personal doctor. Again, he did not receive a receipt for the payment.

Catanzaro did not insist on receipts because, at the time, he trusted respondent; he had come highly recommended by his wife's friend. In Catanzaro's world, his "word is [his] contract." It was part of his nature to trust people. Catanzaro became suspicious, however, when respondent failed to send him any documentation.

OAE investigator Mary Jo Bolling confirmed that Catanzaro had informed her about at least three cash payments that he had made to respondent. According to Bolling, he recalled the specifics of only two of the payments.

The complaint thus alleged that, after the statute of limitations expired: (1) respondent asked Catanzaro to pay an additional $5,000 for costs and respondent amended the retainer to indicate that Catanzaro would not be responsible for more than that amount, but that Catanzaro did not pay it; (2) respondent also asked Catanzaro for money to pay doctors and for expert reports and that Catanzaro recalled paying $400 on at least three occasions, but received no receipts for the payments; (3) Catanzaro gave respondent a $300 check with the

word "consult" on it; and (4) Catanzaro gave respondent an additional $50 in cash.

Respondent denied that Catanzaro ever paid him in cash. He remarked that, when his firm accepted cash payments, his clients were given receipts. Respondent, therefore, reasoned that there were no receipts in this case because Catanzaro never gave him cash. Respondent opined that Catanzaro may not have fabricated having made the payments, but might have been confused or mistaken. He, thus, testified that the check may have been for a consult but also testified that it may have been costs for medical records.

Because Catanzaro had not received any information from respondent, he consulted several other attorneys, including Lee Roth and Lewis Stein. Catanzaro retained Roth to investigate the status of his lawsuit. Roth discovered that respondent had not filed a lawsuit and that the statute of limitations had expired on Catanzaro's claim. Catanzaro emphasized that, although he had spent fifty-two days in the hospital as a result of infections and complications from Vioxx, respondent never informed him that he did not have a viable case.

After Catanzaro learned that he had lost his cause of action, he and respondent met at a diner, "neutral territory," to discuss what had happened. According to Catanzaro, although

respondent stated "please . . . I have three children. I don't want to get into problems. And we will make it up to you," respondent did not seem remorseful or apologetic for his conduct; he was merely concerned about himself and his family. Respondent became emotional only when Catanzaro informed him that he would have to deal with Catanzaro's attorneys.

Catanzaro testified that, although respondent offered him a $300,000 settlement, respondent did not appear for several meetings to iron out the details of that verbal agreement. Roth testified that when respondent eventually met with him, respondent did not express any "regret" for what he had done, but merely confirmed his desire to settle the matter. Because respondent did not have the funds available at the time, he proposed an agreement providing for three equal installments. He was unable to provide any unencumbered security and never executed the settlement agreement reflecting those terms.

Roth remarked that he sensed Catanzaro's anger and frustration. He had trusted respondent to represent him. "It wasn't just that it didn't happen. It was that [Catanzaro] was misled." Initially, Roth did not believe that respondent was "ducking" Catanzaro's calls until respondent would not return his own calls.

Thereafter, Catanzaro retained Stein (the grievant)[2] to file a legal malpractice claim against respondent. In March 2009, Stein sent a draft legal malpractice complaint to respondent, offering to refrain from filing it if respondent paid the $300,000 that he had previously offered. On July 7, 2009, having received no reply, Stein filed the complaint on the Catanzaros' behalf.

Stein deposed respondent at least twice. During a March 30, 2010 deposition, respondent admitted misleading the Catanzaros for several years that they had a viable case and, more specifically, that he never served Catanzaro's complaint but, nevertheless, prepared interrogatories.

The case was referred to a retired judge for mediation with a goal toward settlement. Catanzaro was dissatisfied with the settlement amount offered. Therefore, respondent's counsel agreed that respondent would demonstrate his financial ability to pay by producing his income tax returns within a certain period. He failed to do so, however.

At another deposition for financial information, respondent was to produce his checking and savings account records and cancelled checks. It became clear to Stein that Catanzaro had no

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[2] Catanzaro's initial grievance in this matter was declined because of pending civil litigation.

reasonable prospect of any recovery because Stein was unable to find any unencumbered assets belonging to respondent. Catanzaro, nevertheless, wanted to go to trial. When Stein sought to be relieved as counsel, Catanzaro agreed to accept a $50,000 settlement. On November 4, 2011, a settlement was reached and entered onto the record. Respondent was to pay the settlement in $8,000 installments every sixty days, with a final payment of $10,000. If respondent defaulted on the payments, $100,000 would be due.

In April 2012, Stein filed a motion to enforce the settlement and for counsel fees, which, on June 14, 2012, respondent opposed. In June 2012, the court granted the motion and ordered respondent to make the first payment to the Catanzaros on May 15, 2012 and the second on July 15, 2012.

Respondent defaulted. Thus, by letter dated July 10, 2012, Stein agreed to defer seeking the entry of a default judgment if respondent made two payments, totaling $16,000, before July 25, 2012. On July 25, 2012, respondent's then attorney, James Key, Esq., arranged for the hand-delivery of respondent's $16,000 check to Stein. Respondent's check was, thereafter, returned for insufficient funds. By letter dated August 6, 2012, Key expressed respondent's apology for the returned check, representing that respondent would supply a replacement check

within a couple of days. Respondent, however, did not replace it. A $100,000 default judgment was then entered against him.

On November 16, 2012, the Honorable John J. Coyle, Jr., J.S.C., ordered respondent to bring his financial information to a November 21, 2012 deposition. Thereafter, at that deposition, the following exchange took place between Stein and respondent:

> Mr. Stein: On August 1, 2012, you issued a check in the amount of $16,000 to satisfy the judgment in this case, which was returned for insufficient funds on August 1st. How much money did you have in your account at that time?
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> Respondent: I would not know off the top of my head.
>
> Stein: How about ballpark?
>
> Respondent: I am guessing maybe ten or so.
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> [Ex.P-19;23-10 to 23-18.]

Stein interpreted respondent's testimony as an admission that, when respondent issued the $16,000 check, he knew, at that time, that he did not have sufficient funds in his account to cover the check. At the ethics hearing, respondent denied that he had issued a bad check. He claimed that he had an arrangement whereby the bank would either contact him before returning his checks or would cover his checks because he had a $25,000 line of credit. Respondent admitted, however, that he had no written agreement memorializing his understanding with the bank. He

presented bank records to show that on other occasions, when he overdrew his account, the bank paid the checks but charged him service or overdraft fees. He did not provide the bank records for July 25, 2012, which he presumed was an oversight on his part.

Respondent claimed that he thought he had sufficient funds when he wrote the check to Catanzaro and that Stein should have worded his question differently; he should have asked how much money he thought he had at the time he wrote the check. According to respondent, he found out only after the fact how much money was actually in the account. Therefore, the returned check was merely "inadvertence" on his part.

The complaint alleged that, as payment toward the legal malpractice settlement, respondent issued a $16,000 check that was returned for insufficient funds and that when Stein questioned respondent at a November 21, 2012 deposition, respondent "guessed that he had maybe 'ten or so' in his bank account when he issued the check."

Judge Coyle's November 16, 2012 order specifically directed respondent to bring to the November 21, 2012 deposition his filed federal and state income tax returns for the years 2008 to 2011. Respondent failed to bring the returns, asserting that he had been unaware of the court order until the day of the

deposition. Because he was so emotional and had difficulty dealing with the issue, he had not read the order.

Stein testified that, before the deposition began, Key took him aside to inform him that respondent would arrange to borrow $40,000 "on account of the judgment," but would do so only if Stein promised that he would not question respondent under oath about his income tax returns because respondent had not filed them.

As an additional inducement, respondent assured Stein that (1) he was a creditor of the City of Orange and was owed $60,000 or more in legal fees, and (2) when the City paid him, respondent would pay the balance of the judgment against him. Stein remarked that

> And so on the basis of those two representations and the further representation that if we insisted on going forward with the inquiring about the income tax returns, [respondent] would not continue to pursue those arrangements for payment. He would not feel motivated to. So on that basis, no questions were asked.
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> [4T59-8 to 59-14.]

Stein agreed to refrain from questioning respondent about the returns because he believed it would benefit his client.

The complaint charged that "[R]espondent's then attorney . . . advised that respondent had not filed an income tax return for [the years 2008 through 2011].

Stein remarked that, because of respondent's lies and misleading actions, Catanzaro developed "an errant disbelief" in even what Stein told Catanzaro, which negatively impacted their attorney-client relationship. Catanzaro further did not believe that he would get justice from the ethics proceedings. Catanzaro lost respect for the profession, for the system and, at that time, even for Stein.

Stein noted that, by the end of the legal malpractice case, Catanzaro appreciated his efforts. When respondent made a $40,000 partial payment towards the settlement, Catanzaro wanted Stein to keep the money as his fee. As of the date of the ethics hearing, May 27, 2014, respondent still owed Catanzaro $60,000, plus accrued interest.

According to respondent, he borrowed the $40,000, but was unable to obtain a bank loan to pay Catanzaro the remaining $60,000. Respondent claimed that his firm had laid off its employees and that his wife worked there only part-time; she had to find other employment. He no longer had malpractice insurance and his carrier declined to pay Catanzaro's claim because, through inadvertence, respondent had failed to notify it about the claim.

When Catanzaro was asked how it felt, to find out at the end of 2008 that respondent "did all these things" to him, he

replied, "I have no words to describe it. I feel like . . . I was made a fool of." As of the ethics hearing, Catanzaro remarked that he still woke up nights not understanding why the case was never filed. He added that he was never given the opportunity to show the public the damaging impact that the drug had on him. Ten years later, he still felt betrayed because of the on-going ill-effects he suffered from the medication. Catanzaro understood that the statute of limitations had run on his case, but simply wanted to know why respondent never filed the complaint. He stated, "it's something I have to live [with] for the rest of my life."

Respondent's testimony relating to the filing of his tax returns was extremely evasive and required repeated questioning before the presenter could elicit a response. Even then, respondent's testimony changed over the course of the hearing and was at times difficult to follow.

On the second day of the hearing, respondent eventually admitted that he had not brought the tax returns to the deposition because he had never filed them. His testimony on the issue of whether he had filed or been granted extensions of time to file his federal and state income tax returns for the years 2008 through 2011 was markedly inconsistent, ranging from an assertion that he had sought extensions, but did not mention

when; that he had received the extensions; that he thought he had received "some" extensions; and finally acknowledging that he had not received any written extensions.

During the hearing, respondent had speculated that his accountant had made extension requests electronically. Respondent testified further that, estimated payments were made with the extension requests but, again, he failed to mention when that had occurred and provided no communications from his accountant to corroborate his assertions.

Respondent had also asserted that he had proof in his file "somewhere" of the estimated payments he had made to the taxing authorities, but did not provide that information to the OAE because, he claimed, he did not know that the OAE was alleging that his failure to file tax returns was a crime.

At the DEC hearing when respondent was asked who followed up with the federal government about the extensions, respondent's reply was as follows:

> I then heard back from the IRS on occasions where they asked me we've got his check or whatever. Do you know like, for example, in 2009 they would say 2009 extension was asked for and the -- 2009. And they had received the check or whatever concerning -- the check that the extension that was sent in, they wanted to know when are you going to file the 2008. I would explain to them that we are making -- we have issues. We're working on them and, you know, I don't know.

> We hope within a year or so, but I'm not exactly sure.
>
> [4T151-1 to 151-11.]

Eventually, respondent replied that he was the one who followed up. As to the state returns, respondent testified that there was "no follow up . . . other than . . . I think there might have been one question I think the accountant handled." Respondent claimed that his accountant led him to believe that the federal government did not send letters granting extensions.

On the final day of hearing, June 9, 2014, respondent admitted that he was working with the IRS, which was "aware that they're outstanding and that we're working on them." He conceded that he may owe taxes for 2008 and 2010 but a "miniscule" amount. He testified that he hoped "to get them all finalized and submit them all at one time." He also believed that he owed state taxes. He further admitted that he had lied to his wife each year by telling her that he had filed the tax returns and had even obtained her signature on draft tax returns that were never filed.

In mitigation, respondent claimed that, at the time of his conduct, he was confronted with (1) added responsibilities for the care of his three children; (2) the explosive growth in his law firm, including representation of large corporations and Fortune 500 companies and their complex issues, as well as

municipalities and their employees; (3) his obligations as a member, and, for several years, as Chair of the Board of Bar Examiners, which had hard and fast deadlines, requiring him to schedule those duties around his other responsibilities; and (4) his involvement with other Supreme Court committees, including the New Jersey State Bar Association Judicial and Prosecutorial Appointments Committee, the National Conference of Bar Examiners, the New Jersey State Bar Association Committee on Minority Concerns, the Committee on Civil Practice, an Ad Hoc Committee on Admissions, and a Committee on Continuing Legal Education. He opined that there was a relationship between the above responsibilities and his conduct towards Catanzaro.

Respondent also alleged that, for years, he suffered from depression. Since approximately 1995, he had been treated, on a regular basis, by Dr. Jean Chiardello, a psychologist. She passed away in 2007 or 2008. He also saw Dr. Michael Leopold, a psychiatrist, while treating with Dr. Chiardello, but only once per year from 2003 to 2007, for a total of five sessions. As of February 2013, after the conduct at issue, he began seeing Michael Andranico, Ph.D, a psychologist, from whom he still receives treatment.

Respondent claimed that his depression made it difficult to confront Catanzaro to inform him that he did not have a viable

case. As time passed, respondent experienced panic and became "more worked up," more anxious, and paralyzed, unable to tell Catanzaro that he did not have a case.

Respondent has since learned (1) that he has a "finite capacity;" (2) not to over-extend himself with work or other activities; and (3) not to reach the point where he becomes overwhelmed.

Respondent gave assurances that, to protect the public from his "past admitted conduct," he will "seek medical treatment," to help him understand what went wrong and to recognize the triggers for his stressors. He no longer accepts as much volunteer work or as many cases. He also was prescribed antidepressants and antianxiety medications, which he is not required to take on a regular basis.

According to respondent, he did not realize, at the time, that the stressors were affecting him. He conceded, however, that the stressors did not affect his entire practice, but only his ability to confront Catanzaro and his representation of Marcia Gladden (for which he previously received the admonition).

Dr. Leopold confirmed that Dr. Chiardello had referred respondent to him in 1999 for treatment for depression and anxiety and that he has been treating respondent since that

time. He prescribed medication for those conditions. He noted, however, that respondent was inconsistent with his treatment and often took his medication only when he felt symptomatic, discontinuing the medication when he felt better. Dr. Leopold was unable to provide an opinion with certainty "about how his mental/emotional condition may have influenced his actions" due to the infrequency of respondent's visits during the period in question.

As previously noted, Dr. Leopold saw respondent only five times between April 2003 and May 2003. During four of those visits, respondent presented with symptoms of anxiety and depression. The doctor's notes indicated that, at the September 14, 2004 session, respondent was "minimally anxious" and "overtly euthymic," which Dr. Leopold explained meant "normal mood," that respondent exhibited no depression, but that he suffered from seasonal affective disorder, i.e., he had a greater tendency to become depressed during the winter.

Dr. Leopold mentioned several factors that occurred prior to 2003 that impacted respondent's condition: 1) sleep apnea; 2) the birth of his twins; 3) a cervical neck fracture; and 4) the death of Dr. Chiardello.

According to Dr. Leopold, respondent never informed him how Dr. Chiardello's death or his anxiety and depression affected

his representation of only two clients (Catanzaro and Gladden), but allowed him to continue representing his other clients.

Respondent's counsel offered the testimony of Dr. Andronico, respondent's current treating psychologist, for an opinion about respondent's condition, and for purposes of mitigation. The OAE argued that Dr. Andronico's testimony should be limited, because he did not treat respondent during the period in question, May 23, 2003 through November 21, 2012, and because his "report" was conclusory, consisting of a net opinion that did not provide a basis for his conclusion or state an opinion as to respondent's diagnosis. Based on the OAE's objections, the special master limited Dr. Andronico's testimony to the issue of mitigation.

Dr. Andronico began treating respondent in February 2013 on a weekly basis. According to the doctor's March 10, 2014 letter, respondent was anxious and depressed when their sessions began. The letter stated further

> The financial pressures continue and some progress has been made towards reducing the marital stress. Throughout his treatment Mr. Simpkins, to a reasonable degree of psychological certainty, appeared to be functioning appropriately in his profession and gave no obvious indications that the pressures he was under severely impacted his work performance.
>
> [Ex.R-3.]

Respondent admitted his wrongdoing, asserting that it was difficult for him to discuss what had occurred because of the reputation he had spent twenty years building. He had been held in high esteem by his peers. He felt "very, very bad" that he could not help Catanzaro and was unable to tell him that he did not have a case. He stated that he still feels "awful" about it.

The special master found that respondent's lies were alarming and that his November 22, 2005 letter to Catanzaro was egregious. The letter perpetrated the charade that Catanzaro's case was active, by providing anticipated dates for discovery, depositions and a trial or settlement.

Based on respondent's admissions and the evidence, the special master found that respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

The special master noted that the remaining charges of RPC 1.15(a), RPC 8.4(b), and RPC 8.4(d) were in dispute.

The special master found not credible respondent's testimony that Catanzaro had given him a $300 check for another matter, even though Catanzaro was not getting "the expected responses" from respondent in the first matter. She concluded that respondent's claim simply defied logic. The special master

emphasized that respondent's testimony about the check changed continuously. First, during an OAE interview, he claimed that the check was for medical records. However, he could document only $173.22 in costs. Later, he asserted that the check was for fees in another matter, but could not support that claim.

The special master noted that Catanzaro's testimony, which contradicted respondent's testimony, was credible. She found credible Catanzaro's testimony that he gave respondent cash on multiple dates and a $300 check for costs, and that he never consulted respondent about another case. The special master, thus, found that respondent's wrongful receipt of funds from Catanzaro violated not only RPC 1.15(a), but also RPC 8.4(c).

As to the returned check issued to Catanzaro, the special master found that respondent failed to provide any proof that he had sufficient funds in his bank account when he issued the July 25, 2012 check. He produced neither the bank statement for that month nor documentation to substantiate his claim of overdraft protection.

The special master found that respondent's issuance of a $16,000 check, which was returned for insufficient funds, "with a 'ballpark guess' that he had only $10,000.00 or so when he issued the check, and then reneging on his promise to make good on the check," constituted a violation of RPC 8.4(b).

As to issue of the tax returns, the special master found that the issue was "heavily obscured" by respondent's testimony, but that he did admit at the hearing and in his answer that he did not file federal or state tax returns and that, as of the date of the ethics hearing, the tax returns still had not been filed. In addition, respondent failed to provide any evidence that he had obtained extensions to file the returns or that he had paid estimated taxes. The special master, thus, found a violation of RPC 8.4(b) in this regard as well.

The special master further found that, even though respondent had represented the Catanzaros on a contingent fee basis, he requested and received money from them to mislead them that their case was still pending. She concluded that respondent's improper acceptance of money for a non-existent case constituted a failure to safeguard his clients' property.

The special master found respondent's testimony on the issue of his failure to pay income taxes most egregious and that his testimony "changed radically over the course of four days."

The special master pointed out that, initially, respondent placed much emphasis on the fact that he had obtained oral extensions to file his taxes, yet, neither his brief nor his answer to the complaint had made similar assertions.

The special master noted that the willful failure to pay taxes constitutes a misdemeanor and that willfulness for purposes of prosecution did not require any motive other than a voluntary, intentional violation of a known legal duty. It did not need to be careless, thoughtless, heedless or inadvertent [citations omitted]. Because respondent failed to pay his taxes, the special master found that he was guilty of violating RPC 8.4(b) and RPC 8.4(c).

The special master addressed respondent's claim of surprise with regard to the charge in the complaint of RPC 8.4(b) and the complaint's failure to cite any criminal statutes. The special master pointed out that, rather than filing a pre-trial, written motion to dismiss the charge, respondent's counsel made an oral motion to dismiss it at the hearing. Although respondent's counsel explained that he had not filed a pre-hearing motion because the special master had expressed her dissatisfaction with prolonging the matter by the filing of such motions, the special master observed that counsel had filed pre-hearing motions for a protective order and for reconsideration of her denial of that motion.

The special master found no provision in the Rules of Court requiring the citation of a specific criminal statute in an ethics complaint charging a violation of RPC 8.4(b). The special

master, thus, found that respondent had appropriate notice with regard to the RPC 8.4(b) charge because of the specific allegations set forth in the complaint.

As to the RPC 8.4(c) violation, the special master found that respondent violated that rule "in a variety of ways," concluding that he "simply had no regard for telling the truth."

The special master also found that respondent violated RPC 8.4(d) by (1) failing to execute the settlement agreement in the legal malpractice case; (2) utilizing the court's resources and time by engaging in litigation, which resulted in an order compelling him to provide his filed income tax returns; (3) providing a check to Catanzaro when he had insufficient funds in his account; (4) failing to "make good on the check," resulting in a motion to enter a judgment against him; and (5) attempting to extract the clients' agreement to refrain from filing an ethics grievance as a condition of settling an underlying dispute.[3] The special master concluded that the wasting of precious judicial resources is prejudicial to the administration of justice.

The special master discounted respondent's mitigating factors: (1) his minor disciplinary history and the passage of

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[3] *The record contains no evidence in this regard.*

time (five years) with no new ethics violations; (2) his admission of wrongdoing; (3) his contrition and remorse; (4) his exemplary volunteer conduct; (5) the unlikelihood of repeating the offense and no risk to the public; (6) his cooperation with ethics authorities; (7) the stressful circumstances that contributed to his lapses in judgment, due to panic and depression; (8) the absence of personal gain; and (9) his payment of $40,000 of the $100,000 legal malpractice judgment.

The special master pointed out that: (1) respondent repeatedly lied to his client; (2) at the ethics hearing, he was combative and uncooperative, evaded questions, and testified inconsistently; (3) he showed disrespect toward the special master (verbal and nonverbal through his gestures); (4) his contrition was insincere; (5) he previously engaged in similar misconduct; (6) his own treating physician was unable to state with certainty how his emotional state may have influenced his actions; (7) he profited from the amounts he received from Catanzaro; and (8) he failed to pay the balance owed to Catanzaro.

The special master added further that respondent's conduct evidenced a hostility toward ethics standards; he engaged in a continuing course of dishonesty and misrepresentations; he

failed to cooperate and lacked candor with ethics authorities; and he displayed no remorse at the ethics hearing.

Finally, the special master commented that, although the RPC violations listed in the complaint were discussed during a pre-hearing telephone conference, respondent did not file a motion concerning RPC 8.4(b) prior to the hearing.

The special master found that the extent of respondent's deception was "severe." Weighing the mitigating and aggravating factors, and respondent's "almost defiant attitude," the special master concluded that the gravity of his offenses required a two-year suspension.

On June 3, 2015, respondent, through counsel, filed with us a motion to supplement the record and for a protective order.

Respondent's motion sought to supplement the record with submissions relating to the protective order issue, including respondent's letters to the special master dated: (1) April 16, 2014; (2) May 7, 2014; (3) May 9, 2014, along with the OAE's submissions: (4) April 15, 2014; (5) April 16, 2014; and (6) a May 15, 2014 letter-brief.

As to the protective order, respondent argued that the special master's reliance on R. 4:42 (orders) and its progeny to justify her refusal to entertain his oral motion for reconsideration of her order denying the protective order was

misplaced. Respondent contended that R. 1:20-6(a)(4)(b) and R. 1:20-6(b)(4) (trier of fact's power to entertain pre-hearing motions) confer "general authority" for special masters to hear such motions. Counsel argued further that respondent's psychiatric, psychological, and medical records constituted private and "confidential exceptionally sensitive information," which should be protected from disclosure.

In his brief submitted to us, dated June 3, 2015 (RB), respondent argued that, under the principles of In re Serterides, 113 N.J. 477 (1988), the totality of the circumstances and substantial mitigating factors presented required the imposition of only a reprimand. In addition, respondent alleged that, by failing to cite specific statutes in the ethics complaint, the OAE tried to trap respondent by "crafty use of concealment prehearing and surprise at trial, rather than conducting a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

Respondent further contended that the special master's findings and recommendations were "tainted with her bias" against him and we should reject them in our de novo review. He also claimed that the special master's credibility findings were skewed against him and, therefore, were not reliable. As a remedy for the special master's partiality, counsel suggested

that we make our own independent findings in all material respects.

In addition, respondent asserted that the special master abandoned her role as a neutral factfinder by ruling in favor of the OAE on virtually every application, regardless of the merits, and then questioning respondent herself, as if she were part of the prosecution, rather than an impartial trier of fact.

Respondent disputed the special master's finding that he violated RPC 1.15(a) by accepting the $300 check. He asserted that he was confused about the circumstances surrounding the check and that Catanzaro altered his testimony, based on the OAE's leading questions. Further, respondent accused the special master of ignoring Catanzaro's inconsistent testimony about the additional cash payments. According to respondent, Catanzaro testified that he made cash payments on two occasions and testified, at another time, that he had done so on three occasions.

Respondent further claimed that the special master mischaracterized his testimony about the returned $16,000 check and that both the complaint and Stein's testimony that respondent was aware that he had insufficient funds when he wrote the check rested on speculation and conjecture.

Respondent also argued that the complaint had not provided him with sufficient notice of the specific crimes that he was alleged

to have committed, contrary to the spirit of R. 1:20-4(b)[4] and its notice requirements.

As to the tax records, respondent argued that there was no evidence that the OAE ever sought them through discovery. Respondent argued further that the

> OAE had a duty to affirmatively seek Respondent's cooperation through specific requests for information during its investigation and prehearing discovery, rather than rely passively on an alleged duty of Respondent to cooperate by guessing what information the OAE may need, and then provide it to the OAE.
>
> [RB14.]

Respondent, therefore, concluded that the issue of whether or not he willfully failed to file tax returns should not have been dependent on his testimony.

Respondent asked us to (1) disregard the special master's "biased" report; (2) disregard Catanzaro's testimony on all material issues in dispute, based on the OAE's failure to disclose exculpatory and/or impeachment evidence (the differing number of cash payments Catanzaro made to respondent); (3)

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[4] This subsection states, in relevant part, that the complaint "shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated."

dismiss the RPC 8.4(b) allegations for lack of sufficient prior and fair notice; and (4) impose a reprimand.

The OAE did not oppose respondent's motion to supplement the record, but opposed his motion for a protective order, citing R. 1:20-9(h), which permits protective orders in "exceptional cases." The OAE contended that the bar and public have an overriding right "to know what psychiatric defenses and mitigation evidence has credence, and how other proofs can be lacking." Moreover, the OAE pointed out that, because the special master denied respondent's motion for a protective order and because respondent failed to appeal that order, the OAE already had disseminated the hearing report to the grievant and the former OAE investigator assigned to the case, without placing any restrictions or conditions on the report's further release.

As to respondent's claims about the special master's alleged bias, the OAE's brief to us pointed out that respondent neither moved for the special master's recusal nor raised the issue in his summation brief to her. Moreover, although many of respondent's objections were overruled, the OAE pointed out that a fair reading of the hearing transcripts showed that respondent often repeated his arguments, spoke over the special master, interrupted her when she spoke, and attempted to retry his

objections. According to the OAE, respondent failed to exercise decorum in the courtroom and was evasive in his responses. Excerpts from the transcript were reproduced in the OAE's brief to illustrate both points. In addition, the OAE argued that one cannot conclude that the special master's rulings were biased simply because she did not agree with respondent's position.

The OAE underscored the fact that respondent would not provide direct responses to questions but, instead

> would circle around and around in his reply, often pausing and then continuing on with a response to the prior question when a new one was being asked. This inevitably led to delays during the hearing, some objections and attempts by the Special Master to exercise some reasonable control over the proceedings.
>
> [OAE.B7.][5]

The OAE's brief also reproduced portions of the transcript to emphasize respondent's evasiveness.

According to the OAE, the special master was not biased, but demonstrated a tremendous amount of restraint when respondent's counsel failed to accept her rulings and continued to object and re-litigate the special master's rulings.

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[5] OAE.B refers to the OAE's letter-brief replying to respondent's motion.

The OAE also argued that respondent's assertion that the OAE failed to disclose exculpatory or impeachment evidence on the issue of cash payments was simply respondent's attempt "to deflect attention away from his own actions which were the subject of the ethics hearing."

The OAE recommended a two-year suspension for the totality of circumstances: 1) the toll that this matter took on Catanzaro; 2) the ten-year span over which respondent's violations took place, from 2002 to 2012; 3) respondent's criminal acts (theft, issuance of a bad check, and failure to file income tax returns); 4) the applicable case law; 5) the aggravating factors and lack of mitigating factors; 6) the lack of true remorse; and 7) respondent's arrogant demeanor at the ethics hearing.

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. We do not, however, agree with all of the special master's findings.

Before addressing the merits of this case, we address several procedural issues. We grant respondent's motion to supplement the record, which consists of respondent's motion and

letters for reconsideration of the denial of a protective order and the OAE's replies thereto.

We, however, deny respondent's request for a protective order. We note that, previously, in April 2014, the OAE had consented to a protective order of respondent's psychiatric records if respondent agreed to the following conditions: (1) neither the OAE, the special master, the "DRB," nor the Court be restricted from referencing and quoting from the records; and (2) respondent and his counsel agree to refrain from citing to the protective order in any other disciplinary matters. By letter dated April 16, 2014, respondent's counsel agreed to the unrestricted referencing of respondent's information, if the records and transcripts relating to respondent's medical problems were kept confidential and were sealed. Counsel opposed the second restriction, seeing no relevant reason for it.

As noted in Michels, protective orders may be issued to prevent disclosure of specific information to protect the interests of, among others, a respondent:

> This exception to the general rule of openness should be strictly construed and limited to only the most exceptional reasons. For this reason the standard of "good cause" has been adopted. . . . [O]nly exceptionally sensitive matters should be the subject of a protective order, including, for example, by way of illustration, copyright or trademark secrets

> [sic] or testimony by minors regarding sexual misconduct involving children."
>
> Michels, New Jersey Attorney Ethics (GANN, 2015) §43:2-2f at 1103.]

Although it is clear that the dissemination of respondent's doctor's notes and other personal information may be the source of embarrassment to him, the information sought to be protected does not meet the standard of an exceptional case. The documents provide little detail about respondent's psychological problems or the nexus between his problems and his inability to properly represent only one or two clients. Moreover, respondent should not be permitted to shield his defenses and proposed mitigation from public scrutiny. The records he seeks to protect refer to his own emotional and psychological issues – not to those of an innocent third party. To allow him to shroud his defenses and proposed mitigation in such secrecy under these circumstances would unduly confer on him a benefit never intended in an otherwise transparent process. Finally, issuing a protective order for the records and the portion of the transcripts relating to respondent's condition would be unduly burdensome and contrary to the intended purpose of a protective order.

We next address respondent's claim that the special master was biased in her handling of the case. We note the obvious tension between the special master and respondent/respondent's

counsel. We have also considered the fact that respondent was an extremely difficult witness, who, in his testimony avoided giving a direct answer. His evasiveness required the presenter to repeatedly ask the same questions, posed in different ways. The transcript also conveyed respondent's tendency to raise his voice, for which he apologized on more than one occasion. He attributed his outbursts to his emotional state resulting from the proceedings.

We determine that there is no need to remand this matter due to any real or perceived bias, as alleged by respondent, because the record was sufficiently developed to permit us, on de novo review, to make independent findings of fact. In addition, respondent admitted violating a number of the RPCs and allegations set forth in the complaint.

A pivotal issue in this case relates to the witnesses' credibility. Generally, we defer to the findings of triers of fact in this regard because of their opportunity to observe the intangible aspects of the case not transmitted by the written record. Dolson v. Anastasia, 55 N.J. 2, 7 (1969).

Here, because the special master has been accused of bias, we have made our own independent assessment on credibility. The transcripts clearly demonstrated respondent's defensive nature, his failure to provide direct answers to questions posed by the

presenter and special master, and glaring inconsistencies in his testimony, not only during the OAE interview, but also from the time of that interview to the ethics hearing, and throughout the course of the four-day hearing. These contradictions were apparent in respondent's testimony about the issue of the filed tax returns, the costs in the matter, and the purpose of the $300 check. We, thus, find that respondent's testimony on the contested issues is not credible. Moreover, it was not until oral argument before us that respondent admitted that it was only "about a year ago" that he finally filed his tax returns for the years in question.

In contract, we find Catanzaro's testimony to be credible. The fact that he could not recall whether he made two or three cash payments to respondent, almost ten years earlier, does not impugn his credibility, particularly because respondent did not provide him with any receipts for the payments. Moreover, OAE Investigator Bolling confirmed that Catanzaro's testimony was consistent during the investigation. In addition, his letter to respondent, offering to pay for respondent's time, lends credence to his testimony that he had provided respondent with cash payments, after the statute of limitations had expired. Furthermore, there was no reason for Catanzaro to manufacture cash payments in this regard, because he did not seek

reimbursement of those payments from respondent. Respondent's own testimony that Catanzoro came to his office to give him funds "many times" before the expiration of the statute of limitations, which he asserted he refused, telling him not to "advance" funds, is simply not believable and bolsters Catanzaro's version of events.

Finally, we must resolve the issue of respondent's claim that he lacked notice of the allegations giving rise to the RPC 8.4(b) charge and that the specific criminal statute should have been referenced in the complaint.

RPC 8.4(b) states that it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Case law establishes that a violation of RPC 8.4(b) may be found even in the absence of a criminal conviction or guilty plea. In re Gallo, 178 N.J. 115, 121 (2002) (the scope of disciplinary review is not restricted, even though the attorney was neither charged with nor convicted of a crime). In In the Matter of Eugene F. McEnroe, DRB 01-154 (January 29, 2002) (slip op. at 14), we declined to find a violation of RPC 8.4(b) because the attorney had not been charged with the commission of a criminal offense. The Court, however, specifically reinstated the RPC

8.4(b) charge and found the attorney guilty of violating that rule. In re McEnroe, 172 N.J. 324 (2002).

In his answer to the complaint, respondent raised the issue of the vagueness of the RPC 8.4(b) violation, stating that the allegation "neither sets forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct and criminal act complained of nor the criminal statue alleged to have been violated." According to the special master, the issue was discussed during the pre-hearing proceedings, although the outcome of those discussions was not disclosed. Respondent, thus, could have sought clarification of the charge before the ethics hearing began.

Moreover, a review of the ethics complaint itself establishes that respondent had sufficient notice to mount a defense to the allegation that he failed to file federal and state income tax returns for the years 2008 through 2011. The complaint stated that respondent was ordered to bring his "filed federal and state income tax returns for the years 2008, 2009, 2010 and 2011" to a November 21, 2012 deposition – and that "Respondent's then attorney . . . advised that Respondent had not filed an income tax return for the designated years [2008-2011]." Respondent admitted these allegations in his answer to the complaint. The complaint then alleged that "[a]s a result of his

actions, respondent violated . . . RPC 8.4(b)." Clearly, respondent had reasonable notice that the RPC 8.4(b) charge related to his failure to file his tax returns.

As to tax evasion, 26 U.S.C. § 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . .

Willfulness in this context simply means a voluntary, intentional violation of a known legal duty and requires no motive. United States v. Pompino, 429 U.S. 10 (1976).

In New Jersey, it is a disorderly persons offense to "recklessly or negligently" fail to file any tax return or to fail to pay any tax required under the State's tax laws. N.J.S.A. 54:52-6a and b.

In In re Garcia, 119 N.J. 86 (1990), the Court announced that a finding of willful failure to file income tax returns warrants the same discipline (a suspension) whether or not a respondent has been charged with or convicted of a crime in that regard. Because Garcia was a case of first impression, however, the Court imposed only a reprimand.

In a case somewhat similar to the instant matter, an attorney was found guilty of violating RPC 8.4(b) and RPC 8.4(c). In re Vecchionne 159 N.J. 507 (1999). In that case, a judge sitting on an early settlement panel involving Vecchionne's matrimonial matter learned that Vecchionne had failed to file federal income tax returns for twelve years, which prompted an OAE investigation. In the Matter of Andrew P. Vecchione, DRB 98-386 (April 12, 1999). After the IRS contacted the attorney about his missing returns, the attorney asked for a payment plan, and was told that, first, he had to file his returns. The attorney admitted that he was not knowledgeable about tax matters but "was not trying to 'evade' the IRS or make misrepresentations to it," and was never informed by the IRS that his failure to file the returns was a criminal offense. He believed that the IRS was simply pursuing civil remedies. Even absent a criminal conviction, the Court found that the attorney's conduct violated RPC 8.4(b) and RPC 8.4(c).

In this context, we find that respondent had sufficient notice that the RPC 8.4(b) charge related to his failure to file income tax returns.

Clearly, respondent's testimony at the ethics hearing, that he failed to file the returns, that he obtained his wife's signature on draft forms and lied to her about filing the

returns over a period of years, and that he was experiencing financial problems, establishes the type of willfulness cited in 26 U.S.C. § 7203.

Moreover, respondent's claim that he filed for extensions was disingenuous. His testimony was strikingly inconsistent, at times incomprehensible, and strongly suggested that he had not sought any extensions until the pending ethics proceeding. During repetitive questioning, respondent finally admitted that, as of the date of the ethics hearing, he had not filed his federal or state income tax returns for the years 2008 through 2011 and that he had not applied for extensions to file the returns until well after he was ordered to bring the returns to the deposition. At oral argument before us, respondent made it clear that his tax returns for the years in question were filed only about "a year ago." We, therefore, find that respondent violated RPC 8.4(b) in this regard.

We find, however, that respondent did not have sufficient notice of the RPC 8.4(b) charge in connection with his taking money from Catanzaro after the statute of limitations had expired (theft). The complaint alleged that, after the statute of limitations expired: (1) respondent asked Catanzaro to pay an additional $5,000 for costs and then amended the retainer to indicate that Catanzaro would not be responsible for more than

that amount, but that Catanzaro did not pay it; (2) respondent also asked Catanzaro for money to pay doctors and for expert reports and Catanzaro recalled paying $400 on at least three occasions, but received no receipts for the payments; (3) Catanzaro gave respondent a $300 check with the word "consult" on it; and (4) Catanzaro gave respondent an additional $50 in cash. The complaint did not refer to this conduct as a theft of funds. Thus, we do not find that the complaint provided sufficient notice that respondent was being charged with a crime in that regard.

Respondent's conduct, however, was plainly a violation of RPC 8.4(c). Having found Catanzaro's testimony to be credible, we find that, after the statute of limitations had expired, Catanzaro gave respondent cash on several occasions, in pursuit of a non-existent case. Moreover, Catanzaro convincingly testified that the $300 check to respondent was not for a consultation in another matter, but related solely to a consultation in his medical malpractice matter. Whether respondent took the funds because of his financial "issues" or simply to mislead Catanzaro that his case was progressing is irrelevant. We find that, by fraudulently obtaining payments from Catanzaro, after the statute of limitations expired, respondent violated RPC 8.4(c).

We dismiss the <u>RPC</u> 1.15(a) charge, cited in the complaint as failure to safeguard funds by not holding the "property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property," because it is inapplicable to the facts of this case.

We also find that respondent did not have sufficient notice that he was being charged with an <u>RPC</u> 8.4(b) violation in connection with the returned check allegations. According to the complaint, as payment towards the legal malpractice settlement, respondent issued a $16,000 check that was returned for insufficient funds. At a November 21, 2012 deposition, when Stein questioned respondent under oath, "Respondent guessed that he had maybe 'ten or so" in his bank account when he issued the check." These allegations cannot be interpreted as sufficient to put respondent on notice that he was being charged with a criminal act in that regard. Moreover, there was no clear and convincing evidence that, at the time respondent issued the check, he knew that he had insufficient funds in his business account. A reading of the deposition transcript on this point can be interpreted to suggest that, at the time respondent wrote the check, he did not know the amount of the balance in his business account but, by the time he was deposed, knew he did not have sufficient funds to cover the check.

Although an inference can be drawn that respondent knew or should have known that his finances were poor at that time, we find no clear and convincing evidence of a violation of RPC 8.4(b) in this regard.

In our view, there also is no clear and convincing evidence that respondent violated RPC 8.4(d) (conduct prejudicial to the administration of justice). Generally, such a violation is found when the judicial process had been disrupted, for example, when an attorney fails to appear in court, disobeys obligations under the rules of a tribunal, defies court orders,[6] or disrupts proceedings. None of those factors are present here. Therefore, we dismiss this *charge* as well.

As to the remaining charges, it is undisputed that respondent engaged in gross neglect, lack of diligence, failure to communicate, and egregious misrepresentations to the client. Indeed, respondent so admitted. Respondent's pattern of misrepresentations to Catanzaro, which continued for years until Catanzaro retained another lawyer to investigate the status of his case, was shocking. Specifically, after allowing the statute of limitations to expire, respondent:

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[6] Respondent did not intentionally violate the court's order requiring him to bring his tax returns to the deposition. He simply did not have them.

- put a false docket number on the complaint;
- sent his client for useless medical evaluation, thereby causing Catanzaro to incur an unnecessary expense and, in essence, resulting in a false claim to Catanzaro's medical insurance provider;
- directed his client to respond to unnecessary interrogatories;
- informed his client of the venue for the case and the name of the judge presiding over it;
- took money from his client on several occasions, under false pretenses, purportedly to pursue the case;
- told Catanzaro that he had spoken to other doctors about his medical malpractice claim;
- told Catanzaro that he had "engaged the services" of another doctor;
- informed his client about the discovery schedule and anticipated date for a settlement and/or trial;
- told Catanzaro that the delay in the matter was caused by a "slow down" in Vioxx cases; and
- amended the fee agreement.

Respondent's fabrications were part of an elaborate charade to convince Catanzaro that his case was still progressing.

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 8.4(b), and RPC 8.4(c).

Violations of federal tax law are serious ethics breaches. In re Queenan, 61 N.J. 578, 580 (1972). "[D]erelictions of this kind by members of the bar cannot be overlooked. A lawyer's training obliges him to be acutely sensitive of the need to

fulfill his personal obligations under the federal income tax law." In re Gurnik, 45 N.J. 115, 116-17 (1965).

Attorneys convicted of willful failure to file one personal or corporate income tax return generally receive a six-month suspension. See, e.g., In re Waldron, 193 N.J. 589 (2008); In re Touhey, 156 N.J. 547 (1999); In re Gaskins, 146 N.J. 572 (1996); In re Silverman, 143 N.J. 134 (1996); In re Doyle, 132 N.J. 98 (1993); In re Leahy, 118 N.J. 578 (1990); In re Chester, 117 N.J. 360 (1990); and In re Willis, 114 N.J. 42 (1989).

Attorneys who fail to file multiple income tax returns generally receive a suspension of at least one year. See, e.g., In re Cattani, 186 N.J. 268 (2006) (one-year suspension for failure to file federal and state income tax returns for eight years); In re Spritzer, 63 N.J. 532 (1973) (after concluding that proffered mitigating circumstances did not justify attorney's failure to file federal income tax returns for ten years, the Court imposed a one-year suspension). See also, In re Foglia, 207 N.J. 62 (2011) (two-year suspension for attorney who pleaded guilty to one count of willfully attempting to evade the payment of federal income tax); and In re Rakov, 155 N.J. 593 (1998) (two-year suspension for attorney with an unblemished disciplinary record convicted of five counts of attempted income tax evasion).

A shorter term of suspension is imposed only when the attorney who fails to file multiple tax returns did not owe any taxes or presented compelling mitigation. See, e.g., In re McEnroe, supra, 172 N.J. 324 (three-month suspension for attorney with no disciplinary history for violations of RPC 8.4(b) and RPC 8.4(c), resulting from his seven-year failure to file joint federal and state income tax returns on behalf of himself and his wife; the attorney's payment of all outstanding federal and state tax obligations was considered as mitigation); In re Williams, 172 N.J. 325 (2002) (reprimand for willful failure to file income tax returns for four years; attorney did not owe any taxes and had incurred no penalties); In re Vecchione, supra, 159 N.J. 507 (compelling mitigating factors justified a six-month suspension for the attorney's failure to file federal income tax returns for twelve years). See also In re Stenhach, 177 N.J. 559 (2003) (on a motion for reciprocal discipline, attorney received a nine-month suspension for his guilty plea to one count of willful failure to file one federal income tax return; the attorney actually had failed to file tax returns and to pay taxes from 1982 through 1989; a jury also found the attorney guilty of two counts of willful failure to file Pennsylvania income tax returns and to remit income tax for the years 1996 and 1997; given that the willful failure to file

income tax returns typically results in a suspension in this state, no deviation was required from the discipline imposed in Pennsylvania).

As to the remaining violations (gross neglect, lack of diligence, failure to cooperate, and misrepresentations), the presence of the misrepresentations serves to enhance the discipline from what might ordinarily be an admonition.

In a particularly egregious case of neglect and misrepresentation, which proceeded by way of default, the Court disbarred an attorney who failed to file a medical malpractice action in his client's behalf and, instead, allowed the statute of limitations to expire. In re Morell, 184 N.J. 299 (2005). In that case, the attorney misrepresented to his client that he had filed suit in his behalf and then, for approximately four years thereafter, continued to misrepresent to him the status of his case, engaging in an elaborate series of lies to conceal his neglect. Specifically, knowing that he had not even filed suit, the attorney told his client that he had retained expert witnesses in his behalf, discussed settlement with representatives of one of the defendant's carriers, and had rejected a $250,000 and then a $700,000 settlement offer. Ultimately, long after the statute of limitations expired, the attorney told his client that he had received an offer of 1.1

million dollars, which the client accepted, and then had the client sign a release for the non-existent settlement. Relying on the attorney's advice that he could go ahead and purchase the "car of his dreams," the client borrowed funds from his father and purchased an expensive automobile. Thereafter, the attorney continued his misrepresentations, telling his client on two occasions that he had received the settlement funds and would be wiring them to him shortly.

The attorney failed to appear in response to the Court's order to Show Cause, despite several notices and opportunities to do so. The Court considered the attorney's failure to appear and to offer any defenses or mitigation, noting that the failure to do so in such a serious case "openly displays his unfitness to continue to practice law." Id. at 304, citing In re Kantor, 180 N.J. 226 (2004).

In determining to disbar the attorney, the Court stated, "attorney misconduct that undermines the integrity of the administration of justice" may warrant disbarment. Ibid., citing In re Kornreich, 149 N.J. 346, 365 (1997) (1997). The Court continued:

> [T]he undisputed evidence demonstrates that respondent continually fabricated a story to his client to make it appear that the client's interests were protected and that the client would receive a substantial recovery. Respondent's conduct displayed a total

> disregard for an attorney's responsibility to "serve [his] clients and the administration of justice honorably and responsibly."
>
> [In re Morell, supra, 184 N.J. at 305-306, citing In re Matthews, 94 N.J. 59, 77 (1983).]

See also, In re Kornreich, supra, 149 N.J. 346 (attorney suspended for three years for false statements to the police, to the court, to her attorney, and to others implicating her babysitter as the driver of a car involved in a minor motor vehicle accident when it was, in fact, the attorney who had been the driver; in imposing a suspension, instead of disbarment, the Court noted the attorney's youth and inexperience, her reliance on the advice of her more experienced husband, who was also an attorney, and on her clean ethics history).

Lesser discipline has been imposed in cases involving misrepresentations that were not as serious or where there were substantial mitigating factors. See, e.g., In re Brollesy, 217 N.J. 307 (2014) (three-month suspension in a consent matter for attorney who misled a client to believe that he had obtained visa approval for a top-level executive so he could begin working in the United States; although the attorney filed the application for the visa, he took no further action on it and failed to keep the client informed about the status of the matter; to conceal his inaction, he lied to the client, forged a

letter purporting to be from an official U.S. embassy and forged a signature of an alleged U.S. consul; mitigation included the attorney's lack of an ethics history in his twenty years at the bar and his ready admission of wrongdoing by entering into a disciplinary stipulation); and In re Tinghino, 210 N.J. 250 (2012) (reprimand for attorney guilty of lack of diligence and gross neglect in one matter; although the attorney was inexperienced in the area of the client's representation, had a clean disciplinary record, set out to make the client whole, reported his conduct to disciplinary authorities, and expressed remorse for his wrongdoing, the aggravating factors required the imposition of a reprimand; specifically, after the client's complaint was dismissed for having been filed in the wrong court, the attorney made numerous misrepresentations to the client about the status of the case, including that there was a settlement offer, fabricated a release for the client's signature, and wrote two letters on behalf of the client stating that settlement monies would be forthcoming; the attorney's negotiation of his own restitution agreement with the client without advising her to obtain separate counsel was considered another aggravating factor).

Extensive harm to the client has also been viewed as a factor warranting increased discipline. See, e.g., In re

Burstein, 214 N.J. 46 (2013) (reprimand for attorney who failed to properly serve all appropriate parties in his client's lawsuit, failed to correct his error and, after filing an appeal on his client's behalf, allowed the appeal to be dismissed, presumably as a result of his failure to file a brief; reprimand premised on extensive harm to the client, who collected only $35,000 for injuries so severe that they necessitated back surgery and ten to twelve days in the hospital) and In re Uffelman, 200 N.J. 260 (2009) (reprimand imposed where the attorney was found guilty of gross neglect, lack of diligence, and failure to communicate with a client; although the attorney had no disciplinary record, the reprimand was premised on the extensive harm caused to the client, who was forced to shut down his business for three months because of the attorney's failure to represent the client's interests diligently and responsibly).

Here, respondent presented doctors' reports and testimony in mitigation of his conduct. However, neither of the doctors was able to establish that respondent's anxiety and depression caused his misconduct. Dr. Leopold saw respondent on only five occasions in as many years and could not "make statements with certainty concerning how his mental/emotional condition may have influenced his actions," and Dr. Andronico began treating

respondent in February 2013, long after the misconduct had occurred.

Significantly, despite the fact that respondent represented, without incident, several municipalities and Fortune 500 companies, his problems affected only two clients -- Catanzaro and the grievant in his prior matter. Under these circumstances, we give this mitigating factor little weight.

Respondent's evident belligerence at the ethics hearing, too, makes it difficult to conclude that he exhibited any contrition or remorse.

While we are mindful that respondent's ethics history includes only a prior admonition, it was for similar misconduct – missing a statute of limitations and failing to communicate with a client. In addition, in the earlier matter, respondent was retained in 2001. Thus, the conduct here occurred on the heels of the prior matter.

Although respondent admitted some of the violations with which he was charged, we cannot view his conduct at the ethics hearing as whole-hearted cooperation with the ethics process, as evidenced by his refusal to provide straightforward answers during questioning.

Respondent claimed that his misconduct was not for personal gain. In our view, the evidence points otherwise. He clearly

profited from the payments Catanzaro made to him after the statute of limitations expired. Moreover, there was sufficient evidence in the record from which to conclude that respondent was suffering from cash flow problems that may have prompted him to seek cash from Catanzaro: (a) his inability to pay his taxes, (b) downsizing his office staff, and (c) his wife's seeking supplemental employment.

As noted above, the baseline for respondent's failure to file income taxes alone is a one-year suspension. However, we find most egregious respondent's treatment of his client and consider his misconduct to be most analogous to that of Morell. In fact, respondent's web of deceit was even more elaborate in some respects than Morell's. Not only did respondent continue to lie to Catanzaro about the status of his case over a period of four years, but he also took affirmative steps to conceal his neglect and deceive his client in many respects, such as by affixing a fictitious docket number to the complaint; by informing Catanzaro that the matter specifically had been venued in a particular county and under the management of a particular judge; by instructing Catanzaro to reply to interrogatories; by telling Catanzaro that the matter would be scheduled for trial or settlement in the summer of 2006; by reporting to Catanzaro that he had engaged the services of a doctor to act as an

expert; and by actually sending Catanzaro for a medical exam at his expense and obtaining a report at a time when the statute of limitations already had expired. Moreover, respondent solicited the payment of other costs not actually incurred. And, in the end, respondent's client was left with nothing but lies, a lost cause of action, and a very bitter taste from his experience. Indeed the client's negative dealings with respondent even affected Catanzaro's attorney-client relationship with Stein, his subsequent counsel.

We recognize that the Court based its decision to disbar Morell, in part, on the attorney's failure to participate in any aspect of the proceedings against him, and that respondent in this matter very actively participated. However, we cannot characterize respondent's participation in the process as forthright or productive. He was evasive, combative, and, at times, disrespectful. Participation and cooperation involve more than just "showing up" pursuant to a specific obligation to do so. See R. 1:20-6(c)(2)(D). The Court long ago established that an attorney's obligations in respect of his participation in the disciplinary process extend far beyond perfunctory compliance with procedural rules. Rather, the Court made clear that an attorney's participation must be meaningful, requiring him to make "a full candid and complete disclosure of all facts

reasonably within the scope of the transactions set forth in the charges against him." In re Gavel, 22 N.J. 248, 263 (1956). The Court further noted, "[A]ny sophistry or half-truth or other tactic which has as its purpose or effect the frustration of the disciplinary proceeding is deceitful and indefensible from an ethical standpoint and contrary to the spirit of the rules . . . ." Ibid. Thus, we do not view respondent's participation under the circumstances to justify a departure from Morell.

Moreover, we find that respondent's mitigation was not sufficiently compelling, nay existent, to decrease the level of discipline. Neither respondent's depression and anxiety nor his treating physicians' testimony explained how his condition affected his ability to properly represent only Catanzaro and one other personal injury client. On the other hand, we find that respondent's egregious misrepresentations and the harm to his client warrant increasing, rather than decreasing, the discipline to be imposed.

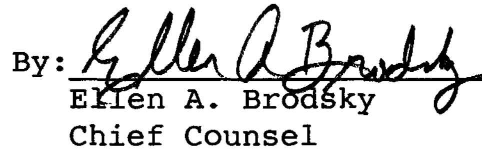
We find that the totality of respondent's ethics violations (RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 8.4(b) and RPC 8.4(c)) are compounded not only by the harm to Catanzaro, but also by respondent's systematic misrepresentations to his client, which were so outrageous and which evidence such a deficiency of

character, that nothing short of disbarment is sufficient to protect the public. We so recommend to the Court.

Vice-Chair Baugh and Member Singer voted to impose a three-year suspension. Chair Frost voted to impose a two-year suspension. Member Clark 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
Hon. Maurice J. Gallipoli

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

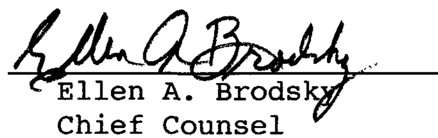
In the Matter of Darryl W. Simpkins
Docket No. DRB 15-105

Argued: July 16, 2015

Decided: December 2, 2015

Disposition: Disbar

Members	Disbar	Three-year Suspension	Two-year Suspension	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh		X				
Clark						X
Gallipoli	X					
Hoberman	X					
Rivera	X					
Singer		X				
Zmirich	X					
Total:	4	2	1			1



Ellen A. Brodsky
Chief Counsel