SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-070
District Docket No. XIV-2012-0606E

IN THE MATTER OF

YARON HELMER

AN ATTORNEY AT LAW

Corrected Decision

Argued: June 15, 2017

Decided:

Steven J. Zweig appeared on behalf of the Office of Attorney Ethics.

Patricia B. Quelch 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 as an ethics appeal from a post-hearing dismissal by a special master. We determined to grant the motion and treat the matter as a recommendation for discipline.

The formal ethics complaint, filed by the Office of Attorney Ethics (OAE), charged respondent with violating RPC

3.4(g) (presenting, participating in presenting, or threatening to present criminal charges to obtain an improper advantage in a civil matter); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice). For the reasons set forth below, we determine to impose a censure.

Respondent earned admission to the New Jersey bar in 1978. During the relevant times, he was the managing partner of his law firm, Helmer, Conley & Kasselman, P.A., which has its primary office in Haddon Heights, New Jersey. He has no prior discipline.

We turn to the facts of this case. In 2008, respondent agreed to represent National Freight, Inc. (NFI), in pursuit of criminal charges, in Cumberland County, against Trident, LLC (Trident) and two of its corporate principals, Chief Executive Officer (CEO) James Land, Jr. and President Michael Pessiki. At the time he was retained, respondent knew that NFI had filed a civil lawsuit against Trident, Land, and Pessiki, which had named Trident for informational purposes only, due to an automatic stay imposed as a result of Trident's ongoing involuntary bankruptcy proceedings. Indeed, respondent admitted

that he had met and spoken with NFI's civil attorney "on at least a couple of occasions," and had learned that its civil suit against Trident was based on the same alleged misconduct for which he had been retained to pursue criminal charges. In fact, NFI's civil attorney had told a judge of the Superior Court of New Jersey that NFI's claim was "essentially a theft and related fraud action against the Land family and the successor and related entities." Moreover, according to respondent, prior to his retention, NFI had asked him if he thought the case "was criminal versus civil," and he had opined that "it was both."

At the time he was retained, respondent also was aware of Trident's ongoing involuntary bankruptcy proceedings, and specifically knew that NFI was "fighting in bankruptcy to pierce the corporate veil," in order to seek personal liability against, and compensation from, Land and Pessiki.[1]

In August 2008, prior to retaining respondent, NFI had endeavored to file criminal charges against Trident, Land, and Pessiki on its own, signing complaints at the Vineland, New

[1] If NFI had successfully pierced Trident's corporate veil, Land and Pessiki could be held personally liable for Trident's corporate debts, thus allowing NFI to target Land's and Pessiki's homes, personal bank accounts and investments, and other assets to satisfy Trident's corporate debts.

Jersey police department. Respondent was aware of this prior attempt by NFI to initiate a criminal prosecution.

The Cumberland County Prosecutor's Office (CCPO) declined to prosecute those charges. Specifically, the CCPO reviewed the Vineland complaints and police reports filed on behalf of NFI, and concluded that the matter was a civil dispute. The Vineland Police Department, which conducted the initial investigation, determined that, although Trident had issued checks to NFI that had bounced, the parties subsequently worked out "a schedule or payment plan." Thus, it concluded that the case was a "civil matter." Respondent knew that such a payment plan had been negotiated after the first check bounced, but maintained that subsequent bad checks had been written, in violation of New Jersey criminal law. Land and Trident's attorney, Walter Weir, had cooperated with the Vineland police investigation, providing information and documentation relevant to the course of conduct between the parties, including that "schedule or payment plan."

Consequently, after reviewing the investigatory file, CCPO Assistant Prosecutor C.J. Wettstein informed NFI that "[t]his appears to be a civil matter between two companies in different states" and that the CCPO "is not in the business of operating as a collection agency on your company's behalf." Wettstein explained that, during his review of the Vineland Police

Department's investigation, he saw no evidence of two of the essential elements of the theft crime involving issuing bad checks: NFI had not made a proper demand for payment from Trident, and there was insufficient evidence that Land and Pessiki issued the checks knowing that they would not be honored. Respondent acknowledged that he was aware of Wettstein's decision to reject the case, but asserted that "[m]y job was to help [NFI] with the criminal justice system and ask [the CCPO] to re-review the matter in the hopes that they would reach the conclusion that, in fact, there was criminal activity and it should be pursued."

The dispute between NFI, a New Jersey distribution company, and Trident, a Delaware bottled water company doing business in Pennsylvania, arose out of a 2007 business contract between the companies. According to respondent, the two companies had been discussing a potential business deal since 2004, and NFI was "pretty excited about" commencing the relationship. Under the contract, which was executed on October 22, 2007 and subsequently amended, NFI agreed to deliver bottled water on behalf of Trident, which agreed to pay NFI for those distribution services. On November 12, 2007, three weeks after the contract began, Trident's accountant sent a letter to Trident's vendors and creditors, including NFI, informing them

that Trident was struggling to meet its financial obligations, and was requesting to make minimum payments until spring 2008, when Trident anticipated it would have increased revenues and would be able to fully pay its debts.

Despite Trident's grim letter, during subsequent months, the business arrangement between NFI and Trident was mutually beneficial, and Trident paid NFI more than $887,000 for its distribution services. It was not until March 17, 2008 that a $100,000 check from Trident to NFI bounced; from that point forward, pursuant to a negotiated "deal" ("the schedule or payment plan" referenced above) Trident agreed to pay NFI $17,000 daily, and NFI agreed, in writing, to this accord, in lieu of terminating the distribution services it was providing. NFI's chief operating officer, Keary Mueller, knew that Trident was struggling financially, had scheduled a meeting with its Chicago-based lender, and had threatened to stop performing under the contract without the accord. On April 30, 2008, Mueller sent an e-mail to NFI employees, including its general counsel, Robert Barron, stating "the deal we worked" with Trident included prepayment for services, and that Land "understands we shut down Friday am without resolution."

After the accord was reached, most of Trident's daily checks to NFI cleared. On various dates in April 2008, however,

four more checks, totaling $68,000, bounced, after Trident's line of credit was permanently closed by its lender. Trident then wired $35,588 cash to NFI, in a futile attempt to maintain the delivery of its product, but its efforts eventually failed, and, in May 2008, Trident went out of business. Land testified that he had contributed his own funds to Trident in an attempt to keep it afloat, and had suffered a personal loss of approximately $900,000 when Trident failed.

On May 11, 2008, NFI filed a civil lawsuit, seeking $3 million in damages, against Trident, Land, and Pessiki, in Superior Court, Camden County, alleging breach of contract, unjust enrichment, fraud, and conspiracy to commit fraud. The suit alleged that Trident was created as a shell company to bifurcate and, thus, protect, the corporate assets of the successful Wissahickon Spring Water, Inc., and that its corporate officers, including Land and Pessiki, had conspired to defraud creditors and consummate a profitable sale of other, valuable assets to Nestle Waters North America, for $13 million. The sale to Nestle closed on or about April 4, 2008. According to Barron, NFI believed that Trident had "strung us along so they could effectuate the sale of another portion of their business . . . I thought it was very much intentional." The suit further alleged that Trident operated only from September 2007

through May 2008, yet owed creditors over $26 million at the time it ceased operations.

In the Superior Court action, NFI sought to pierce the corporate veil and pursue the assets of Land and Pessiki, suing them under a theory of personal liability, due to the alleged fraud on their part. On May 13, 2008, in response to NFI's e-mail, Land revealed that, based on a decision made by Trident's board of directors and lender, he was no longer employed at Trident. Five days after the lawsuit was filed, on May 16, 2008, NFI's Vice President of Security, Willard Graham, warned Land and Pessiki, in writing, that NFI would pursue a criminal prosecution if Trident did not make NFI whole within twenty days.

On September 3, 2008, four months after NFI's civil lawsuit was filed, Trident was forced into involuntary bankruptcy by three of its creditors, not including NFI. In the bankruptcy proceedings, presumably due to the negative effect that the automatic stay would have on NFI's civil suit, NFI again sought to pierce the corporate veil, seeking personal liability against Trident's corporate officers, including Land and Pessiki.

In a March 16, 2011 brief to the bankruptcy court, the trustee for the bankruptcy proceeding sharply criticized NFI's Superior Court lawsuit, alleging that its civil claims "are

nothing more than an attempt by NFI to override or circumvent the automatic stay" and the exclusive jurisdiction of the bankruptcy court, in order to "only benefit NFI" to the detriment of Trident's other creditors. The trustee sought to enforce the automatic stay and force NFI to withdraw its civil lawsuit against Trident, characterizing the lawsuit as a "violation" of the bankruptcy laws and contending that it created "an adverse and deleterious impact" on the proceedings and was an attempt to "misappropriate" estate assets for a single creditor's benefit. The civil suit was dismissed in May 2011, with prejudice, because the bankruptcy proceeding preempted the civil suit.

In July 2012, the bankruptcy was settled by Trident and its creditors, with NFI receiving only $89,223.15 toward its unsecured claim for $2.5 million. Notably, the bankruptcy trustee agreed that the corporate officers of Trident had committed misconduct, including "breach of fiduciary duty, negligence, and unjust enrichment, fraudulent transfer," summarizing

> the Trustee believes that [Land], Land Sr., and Pessiki . . . structured and consummated the Merger in order to jettison the significant corporate liabilities of the underperforming Bottling Business, so that they could sell Wissahickon's remaining assets . . . at a substantial profit [to Nestle] — a transaction which the Trustee

> believes benefited the [above-named parties] . . . Despite the absence of funds and the acknowledged inability to continue as a going concern, Trident interacted with its creditors as if nothing was wrong and — worse — induced creditors to provide goods and services and extend "credit" to Trident . . . The total amount of all [bankruptcy] claims is $28,698,969.84.
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> [OAEaEx.48pp4-5.]

After the CCPO declined to prosecute Trident, NFI retained respondent, who previously had served as First Assistant Prosecutor at the CCPO, to "act as a middleman" and persuade the CCPO to prosecute Trident. The retainer agreement, dated December 8, 2008, recited respondent's "unique background and contacts in [Cumberland] County," and provided for a $10,000 fee, with additional, contingent fees to be paid in the event NFI received restitution from Trident in connection with a criminal prosecution. Specifically, respondent would receive 20% of the first $500,000 in restitution, and 15% of any restitution exceeding that amount. The retainer agreement added, "[y]ou will not be entitled to a percentage of any payments made by Defendants other than those made in restitution in a criminal matter." NFI general counsel Barron negotiated the fee arrangement with respondent.

The arrangement with respondent was the first and only time Barron had negotiated an outside attorney's compensation based

on the amount of restitution obtained in a criminal matter. Barron testified that he relied on respondent's experience in respect of both the propriety of the retainer arrangement and respondent's subsequent testimony as a witness before a Cumberland County grand jury.

Although respondent claimed that Barron had completely "walled [him] off" from the civil proceedings, he admitted to contrary facts - that he knew of specific details of both the civil litigation and Trident's involuntary bankruptcy proceeding, and had personally met with NFI's civil attorney. Barron testified that he was aware of the potential ethics issues associated with mixing the criminal and civil proceedings, and "certainly wasn't trying to use the criminal matter as leverage."

During the ethics hearing, respondent explained that he believed that the purpose of RPC 3.4(g) "was to target unscrupulous attorneys who would take something clearly civil, such as they're owed a fee by a client and they threaten or they file a criminal charge of theft." Respondent conceded, however, that he knew that an order of restitution, in connection with a criminal matter, would not be dischargeable through bankruptcy, and that Land and Pessiki could be held "personally responsible if they were accomplices" to a crime, stating that they could no

longer play "three-card Monte with the money" (i.e., would be forced to pay NFI).

Respondent maintained that Trident had defrauded NFI and that there was sufficient evidence to prove a criminal case against Trident, Land, and Pessiki. He staunchly defended his retention as that of a "victim's advocate" and "liaison" for NFI, consistent with New Jersey's constitutional mandate set forth in "The Crime Victim's Bill of Rights." He previously had been retained as a victim advocate a "couple of dozen times." Harrison Walters, the assistant prosecutor assigned to the revived case against Trident, testified that respondent had made no contact with the CCPO's victim/witness coordinator in connection with the prosecution, despite respondent's claim that his role was that of a "victim advocate."

Respondent had been employed at the CCPO from 1985 through 1989, and had served as the First Assistant[2] from 1988 through 1989. During his tenure, he renewed his acquaintance with Assistant Prosecutor David Branco, with whom he previously had worked at a law firm, and the two since became close friends. The close relationship between respondent and Branco was well known within the CCPO. Respondent admitted taking Branco, along

[2] The First Assistant Prosecutor is second in command at a county prosecutor's office and normally oversees the day-to-day operations of the legal and investigative staff.

with other CCPO assistant prosecutors, at respondent's expense, to the annual Army/Navy game after respondent had left the CCPO and had formed his own law firm. He denied, however, that Branco had distributed the tickets to the other assistant prosecutors and that, during the game, Branco sat with respondent, separate from the other assistant prosecutors, sometimes in a "private box."[3] Wettstein testified that respondent also paid his admission to an Army/Navy game. Branco had allegedly told Harrison Walters that, when he retired as a prosecutor, he planned to open a Cumberland County satellite office for respondent's law firm, but later claimed that he had made the statement purely in jest.

Kenneth Pagliughi testified that he had served as First Assistant at the CCPO from 2003 through 2010. During his tenure, law enforcement officers had expressed concern over Branco's relationship with respondent, citing possible preferential treatment for respondent's criminal clients. Consequently, Pagliughi had instructed Branco to recuse himself from respondent's cases, "to avoid any appearance of impropriety, and try to . . . keep the integrity that I was trying to reestablish with law enforcement and the office." Additionally, Pagliughi

[3] The formal ethics complaint did not charge respondent with an ethics violation in respect of this conduct.

had instructed Branco to brief him on any plea agreements that he reached with respondent on behalf of his clients.

It is clear from the record that, despite Pagliughi's prohibition, respondent and Branco continued to discuss CCPO cases. Specifically, on July 22, 2009, respondent's staff e-mailed Branco's staff with a list of fourteen criminal cases to discuss at a meeting between the two, including a case captioned "[NFI] – Will discuss mediation/arrest date."

In December 2008, when NFI retained respondent, Branco was the Chief of Major Crimes, including homicides, for the CCPO. Respondent urged Branco to pursue a criminal prosecution of Trident, but did not inform him of Wettstein's prior rejection of the case. Branco admitted that he had not apprised Pagliughi of respondent's request that he review the NFI/Trident matter.

Branco assigned the case to Walters, a relatively inexperienced assistant prosecutor, who had been working at the CCPO for just over three years. Respondent described Walters as "a line guy" and a "rookie" who "was doing a lot of fumbling" in respect of the prosecution of Trident. Walters testified that he "looked up to" Branco, who was considered a "star" within the CCPO, and that "I didn't think Dave [Branco] . . . was gonna lead me to do anything wrong."

According to CCPO Assistant Prosecutor John Jesperson, "it was not the standard practice" for Branco to assign Walters a case. At that time, Walters was a member of a trial team supervised by Assistant Prosecutor Michael Ostrowski. Ostrowski was, in turn, supervised by Jesperson. Walters also testified that his assignment to the case was "outside of the ordinary," since Jesperson normally assigned cases to him. No one informed Walters that his colleague, Wettstein, previously had reviewed the case and declined prosecution. Similarly, respondent did not inform Walters or anyone else at the CCPO of the contingent nature of his retainer agreement with NFI, maintaining that such information was privileged.

Branco testified that he did not inform Wettstein that he was reevaluating the case and had assigned it to Walters and could not recall whether he had informed Jesperson that he was reevaluating the case. Wettstein described Branco's reevaluation of the case, without Wettstein's knowledge or input, after he had declined to prosecute, as "out of the normal course."

On May 27, 2009, shortly after Branco assigned the Trident case to him, Branco unexpectedly called Walters into a meeting, at the CCPO, at which respondent and representatives of NFI, including its general counsel, Barron, were already present. Branco and respondent jointly ran the meeting. Walters believed

that he had no imput in the "plan" to prosecute Trident. Rather, it was a "fait accompli." According to Walters, a "plan" for "swift resolution" of the Trident prosecution was hatched at the meeting: the CCPO would obtain a sealed indictment against Trident principals Land and Pessiki; arrest Land and Pessiki in New Jersey, by surprise; request high bail amounts; initiate a bail source inquiry, alleging that the bail money posted represented the proceeds of a crime; and seek to seize the bail monies and apply them toward restitution to NFI. Walters added that the bail would be required to be posted as cash, and that, even though the indictment would be for second-degree charges, the State would offer Pre-Trial Intervention in exchange for restitution.[4] Respondent admitted these aspects of the meeting and the "plan."

During their testimony, both respondent and Branco emphasized that bail can be forfeited only with the consent of a defendant, and that defendants cannot be compelled to convert posted bail to restitution. Respondent testified that, if Land and Pessiki "agreed to pay restitution as part of a resolution of the case, why not the bail money, too, if they're willing to do it."

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[4] In New Jersey, a defendant indicted for second-degree charges usually is ineligible for Pre-Trial Intervention. If the prosecutor agrees to such treatment, however, the court will be more likely to accept a defendant into the program.

Based on respondent's statements during an OAE interview, respondent tailored the "plan" in conjunction with NFI's ultimate quest, which was to be made financially whole by Trident. Specifically, respondent recounted the following instructions from Barron:

> I remember in discussions with Barron, I just wanted to get a flat fee [of roughly $30,000] to [represent NFI]. [But Barron said] . . . [if Land and Pessiki] 'go to prison . . . that's not going to help my client get restitution. Then I'm going to be spending money on you. We spent money in the civil case. I don't know if my client is going to be, you know, willing to spend money if they don't -- a lot of money if they don't get restitution.'
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> [OAEaEx.130p35.]

Walters testified that, at the initial meeting, there was discussion of NFI's civil suit against Trident, and NFI's status, as an unsecured creditor, at the "back of the line" in respect of Trident's bankruptcy proceeding, behind the secured creditors, who would "be paid before NFI." Accordingly, Walters had the immediate impression that NFI was seeking "to jump the line in the bankruptcy." Walters, however, did not raise any concern in this regard, and no one present at the meeting expressed this motivation as an express purpose of the "plan." Walters recounted that the bankruptcy trustee contacted him during the prosecution of Trident, after the case was indicted,

telling him that there was "a long line of creditors," and expressing concern about a potential "criminal penalty . . . supersed[ing] any part of the payment to the creditors."

Walters testified that, despite his status as the assigned prosecutor, he conducted no independent investigation of NFI's allegations against Trident, as he normally conducted in white collar cases, and that Branco had never asked him whether he had conducted such an investigation. Specifically, Walters did not subpoena bank records, did not secure copies of the checks in question or the contract between NFI and Trident, and did not conduct interviews of witnesses. Walters got the impression that Branco was looking to keep his own hands off of the case, and put all of the responsibility on Walters. Walters, however, "didn't think [Branco] would steer him wrong," and admitted that he was trying to impress him. Moreover, Walters did no preparation for the grand jury session before the case was actually presented.

On June 11, 2009, respondent e-mailed Walters, alerting him that the current grand jury would complete its term in two weeks, and suggesting that Walters schedule a presentment against Trident, Land, and Pessiki on June 17, 2009, to have the benefit of the "seasoned" grand jury panel. Walters testified that part of the "plan," discussed during the initial meeting

with respondent and Barron, was to obtain the indictment of Land and Pessiki during the end of a "seasoned" grand jury's term, because such a grand jury is "less likely to ask questions."

Respondent provided Walters with a narrative summary of the suggested presentment to the grand jury, enumerating ten criminal charges to indict, including second-degree counts of theft, conspiracy, and bad checks. In the e-mail, respondent stated, "I will provide the above narrative to the grand jury in more detail." According to Walters, it was not customary for parties not employed by the CCPO to outline indictments for presentation to the grand jury. Neverthleless, Walters instructed his secretary to draft an indictment based on respondent's e-mail to him. Barron, NFI's general counsel, testified that respondent suggested that respondent "would be the one to testify at the grand jury," since "he was the most effective person to testify."

On June 17, 2009, Walters presented the case to the "seasoned" grand jury; respondent testified, under oath, as his only witness. Although Walters preferred that James Matlock, a former employee of NFI and a former state trooper, testify before the grand jury, Branco had told him "if [respondent] wants to testify, let [respondent] testify, it'll be [respondent's] problem, not ours." Walters found it odd, and a

potential breach of attorney-client privilege, for respondent to be the witness before the grand jury.

Matlock, who was working for the Cumberland County Office of Emergency Management at the time of the grand jury presentment, testified that he would have been available to testify. Respondent refuted that assertion, claiming that, by the time the grand jury presentment occurred, Matlock was no longer an employee of NFI, and, thus, was "not available to testify." Under questioning by his counsel, respondent modified his position on this issue, explaining that Matlock had taken a new job after leaving NFI, and "wasn't returning [respondent's calls] . . . and I got tired of trying to reach him."

During the grand jury presentment, Walters asked respondent a series of specific questions regarding Land's and Pessiki's mens rea; in response, respondent testified that Land and Pessiki had purposefully manipulated NFI to "obtain services and to obtain trucking from [NFI] without having to pay." Walters also asked respondent whether NFI was attempting to use the CCPO "as a collection agency," to which respondent replied "no." During the ethics hearing, respondent admitted that, prior to testifying before the grand jury, he had neither conducted an independent investigation of NFI's allegations nor interviewed anyone; he was simply conveying information that NFI had

provided to him; he made no effort to verify the accuracy of NFI's information; he did not know exactly what percentage of NFI's services remained unpaid; he had not reviewed Trident's bank statements prior to testifying; he had never spoken to Land or Pessiki; and he had reviewed no deposition transcripts, despite the fact that Land had been deposed on March 4, 2009, prior to the grand jury presentment.

Respondent also testified before the grand jury that the four bounced checks at issue were signed by "either" Land or Pessiki, and incorrectly identified the check numbers at issue. He further claimed to the grand jury that Land and Pessiki had "pocketed things," but admitted, during the ethics hearing and during a civil deposition, that no one at NFI had ever made such an allegation. He also testified that, after "some checks bounced," they were "made good," but that, subsequently, four checks bounced and Trident never rectified them. Additionally, he posited, before the grand jury, that Trident "knew they could sign a contract for $10 million, not just a million, if they're not going to" honor it. During the ethics hearing, respondent conceded that the NFI case was the only occasion in which he had testified before a grand jury in the role of victim "navigator."

The grand jury indicted Trident, Land, and Pessiki on all counts that respondent had suggested, including the second-

degree charges of theft by deception, theft of services, and bad checks, but the vote was not unanimous, which concerned both Walters and Branco. After the grand jury presentment, Walters, Branco, and respondent reconvened in Branco's office and discussed the grand jury's divided vote. Although there was concern, Walters testified that the "machine would continue" and the matter would be "swiftly resolved" after the arrests. The trio, thus, discussed the next step of the plan – the surprise arrests of Land and Pessiki, in New Jersey.

The next day, the Honorable John W. Waters, J.S.C., issued arrest warrants against Land and Pessiki, and set their bail. Branco conceded that the standard bail range for the crimes charged in the indictment was $35,000 to 70,000, with a ten percent option permissible, but maintained that, given the fraud that NFI alleged that Trident perpetrated, $150,000 was an appropriate bail amount. Branco characterized Trident's misconduct as the most egregious bad check case he had seen in his career, despite respondent's and Walter's admissions that no investigation had been conducted prior to the grand jury presentment. Moreover, Branco admitted that the reason for the high bail amounts was to "get as close to the restitution amount as possible . . . you have at least $168,000 of bad checks." Although Branco conceded that restitution is not one of the

enumerated factors for the setting of bail, pursuant to R. 3:26-1(a), he defended the amounts, asserting that Judge Waters was very experienced, had the ultimate authority to set a reasonable bail, and could have crossed out the $150,000 amounts and set whatever bail he saw fit. Branco additionally maintained that it is a common practice to set bail in amounts well above, and well below, the guidelines, depending on specific factors.

On the same day that Judge Waters issued the arrest warrants, Walters secured the sealing of the indictment through a different judge, the Honorable Robert P. Becker, Jr., J.S.C. Walters testified that the sealed indictment was part of the "plan" because Land and Pessiki were "wealthy individuals that were able to afford to dodge jurisdiction for an extended period of time, that if they knew there was a warrant against them they would not come to New Jersey." The sealing of the indictment was not placed on the record or entered in the court's log. Moreover, the sealing of the indictment was not disclosed to either the First Assistant Prosecutor or the Prosecutor. Walters admitted that he did not disclose to Judge Becker the elements of the "plan" for a "swift resolution."

After securing the indictment, Walters and Branco discussed the "plan" to have Land and Pessiki arrested in New Jersey. Barron testified that "the feeling was . . . by [respondent] and

I guess the prosecutor's office, that [the arrests] would give [the CCPO] additional leverage in the criminal case." To that end, respondent informed Walters and Branco that the civil case between NFI and Trident was scheduled for mediation, on August 6, 2009, at a law firm in Woodbury, Gloucester County, New Jersey. Barron had conveyed this information to respondent, who, in turn, instructed his staff to e-mail Branco regarding cases to discuss, including the details for the plan to arrest Land and Pessiki at the Woodbury mediation. During his testimony, Branco maintained that respondent had sent him this information at his direction, that he had told respondent to "let [him] know when they thought [Land and Pessiki] would be in New Jersey."

Walters testified that Land and Pessiki had to be lodged in the Cumberland County Jail, because if they were jailed in another county, the bail monies "would not be able to be seized for restitution," in accordance with the "plan." Branco justified the plan to arrest Land and Pessiki in New Jersey, asserting a myriad of jurisdictional issues, the desire to benefit from the element of surprise, and the opportunity to control the criminal defendants, in order to get a statement from them.

Notably, this mediation session represented the third such proceeding between the parties, following two unsuccessful

attempts. The first mediation, held in February 2009, had been pointless because, due to a scheduling error, no one from NFI attended. The second mediation session, which occurred on April 30, 2009, did not produce a settlement because NFI's demand was $750,000, while Trident's offer was only $50,000. On June 26, 2009, NFI's civil action attorney e-mailed Trident's attorney, Brett Datto, "out of the blue," requesting that the parties meet for mediation, in New Jersey, a third time. According to Datto, Trident was "shocked to say the least . . . [Trident] thought that the [civil] case was going strong for [Trident], we were surprised that NFI wanted to go back to mediation because their [damages] numbers seemed to be increasing." According to Datto, at the third mediation session, held on August 6, 2009, NFI raised its settlement demand to $3.2 million dollars, after inducing Land and Pessiki to attend the mediation by misrepresenting that NFI's demand actually would be reduced from $750,000. Datto ultimately concluded that the third mediation session had been a sham, not a "good faith effort," meant only to get Land and Pessiki into New Jersey for purposes of their arrests.

On July 22, 2009, respondent's secretary e-mailed Branco regarding the arrests of Land and Pessiki to be made on August 6, 2009. On August 5, 2009, because Walters and Branco were both

out of the office, respondent directly contacted CCPO Trial Chief John Jesperson, requesting that the indictment be unsealed and that Land and Pessiki be arrested the next day. Jesperson did not realize that respondent was calling about the same case that Jesperson had previously assigned to Wettstein, which Wettstein had reviewed and declined to prosecute. For other reasons, however, Jesperson refused respondent's requests, telling him to "deal with the people who were handling the case." Jesperson testified that he recollects no other criminal case where a private attorney had requested the arrest of criminal defendants at a civil mediation.

When Walters returned from paternity leave, on August 5, 2009, he discovered that Branco was tied up in a trial, and that "nothing had been coordinated" in respect of the "plan" to arrest Land and Pessiki. Walters called Branco and said "essentially, what the hell? You're leaving me to coordinate this? I don't know what I'm doing." Branco told Walters to "take care of it," so Walters "tried to pull it together." That same date, respondent called Walters to remind him "today's the date and the time, let's implement the 'plan.'" Over the course of August 5 and 6, 2009, as the efforts to effectuate the arrest of Land and Pessiki unfolded, a series of eight cellular telephone conversations occurred among respondent, Branco, and Walters.

Walters successfully unsealed the indictment, via a third judge, the Honorable Ann McDonnell, J.S.C., "so that we could effectuate the arrest, as per the 'plan.'" His efforts to convince CCPO detectives to arrest Land and Pessiki, however, not only were refused, but also prompted both a "yelling match" between Walters and a supervising detective, and an unintended discussion of the case between the CCPO Chief of Detectives and First Assistant Prosecutor Pagliughi. Walters was called into Pagliughi's office, where Walters "laid out the 'plan' for prosecution" of Land and Pessiki. Pagliughi told Walters that the "plan" was "no longer going to happen," and that Land and Pessiki would not be arrested; Pagliughi instructed Walters to immediately have the bail for Land and Pessiki modified from $150,000, full cash, to their release on their own recognizance, i.e., without the need to post any bail. Pagliughi explained that, pursuant to bail guidelines, Land and Pessiki "did not have a prior record. They weren't a flight risk, and I didn't see the reason why they should be arrested at a meeting in New Jersey."

Walters notified respondent, by telephone, that the "plan" for the surprise arrest of Land and Pessiki was not going to happen. Respondent was "upset" by the news. Later that evening, Walters and Branco had an additional telephone conversation, in

which Branco informed Walters that "the plan is still solid, we can . . . go through PTI as opposed to having . . . the money right up front." The next morning, Walters called respondent to fill him in on the modified "plan."

On August 6, 2009, a fourth judge, the Honorable Walter L. Marshal, J.S.C., cancelled the arrest warrants and ordered that Land and Pessiki be released on their own recognizance.

During the ethics hearing, Land testified that, as of the date he and Pessiki were to be arrested, pursuant to the "plan," he had sufficient financial means to have posted $300,000 cash bail for both Pessiki and himself. Land asserted that NFI was well aware of that fact, because NFI had obtained his personal banking statements and asset information in connection with the ongoing civil litigation. He testified that, given the civil discovery, NFI "even knew what my house was worth."

Ultimately, Land and Pessiki made every required appearance in respect of the criminal charges against them. On September 15, 2009, they were arraigned in Superior Court. Despite the second-degree charges in the indictment, Walters represented that the CCPO would support PTI for Land and Pessiki if they made full restitution to NFI, characterizing restitution as a "big chunk" of any plea deal. Walters testified that he was willing to offer PTI, despite seven second-degree charges,

"because that was . . . part of the plan. It was trying to get the swift resolution, trying to get it done."

Respondent recounted conversations with Carl Poplar, the lawyer for Land, during which respondent warned Poplar that his client would not "get a sentence less than five years," but that NFI would support PTI or probation in conjunction with payment of significant restitution. As to restitution, respondent made clear that NFI wanted compensation for "the cost expended by [NFI], including, but not limited to, the repair and replacement of damaged equipment, the cost of services unlawfully taken, investigation expenses, and attorney fees" - the same bases for liability pursued in both the civil and bankruptcy matters, and the same consequential damages sought.

After the arraignment of Land and Pessiki, respondent shifted his efforts, on behalf of NFI, to requesting that the CCPO pursue restitution in excess of the amounts of the bounced checks, arguing for consequential damages, and restitution of over $1.8 million. On cross-examination, respondent admitted that his portion of such a restitution amount, per the contingent fee agreement, would be approximately $325,000.

In December 2009, Land's criminal defense attorney moved to dismiss the indictment, arguing that respondent had manipulated the grand jury and the criminal justice system in order to

achieve a result available via a civil remedy. In January 2010, that motion was denied. In July 2010, however, the indictment was dismissed, with prejudice, due to the CCPO's failure to produce "originals of the checks that [NFI alleged] were bounced." The CCPO denied NFI's written requests that the CCPO appeal the indictment's dismissal. In addition to a request from NFI's CEO, respondent submitted to the CCPO a detailed letter brief on the issue, to no avail.

Moreover, in a letter to defense counsel, the CCPO asserted that, although it believed that the court's evidentiary ruling was incorrect, the CCPO agreed, "without equivocation or hesitation," that, "as a matter of professional responsibility," the presentation to the grand jury "was not proper and shall not be sanctioned or condoned" by the Cumberland County Prosecutor. Furthermore, the CCPO opined that "there does not exist a good faith basis to prove a criminal case beyond a reasonable doubt." The criminal prosecution of Land and Pessiki was, thus, terminated with prejudice.

In October 2010, the CCPO Prosecutor, Jennifer Webb-McRae, along with her First Assistant, Harold Shapiro, initiated an internal ethics investigation into the conduct of Walters and Branco in respect of the Trident prosecution. After the CCPO investigation, Walters was suspended, without pay, for six

weeks, and Branco's employment was terminated. At the time he was fired, Branco was in poor health, having been diagnosed with cardiac issues. He testified that, given his twenty-three years of service as a prosecutor, he attempted to find another job as a prosecutor, then as a public defender, and went to work for respondent months later, only after he had exhausted that futile search.

Shapiro, who had replaced Pagliughi as first assistant, testified that respondent had taken over an investigation "that should have been done by our office," specifically by drafting the indictment; suggesting the matter be presented to a "seasoned" grand jury; offering "unsupported assertions of fact and statements of opinion regarding defendants' mental state during testimony before the grand jury;" participating in a strategy to arrest the defendants at a civil proceeding; urging Jesperson to effectuate those arrests; and contacting Branco, rather than Wettstein's supervisors, to reevaluate the case, "in light of his special relationship with, and access, to Branco."

Moreover, Shapiro was concerned that the CCPO had not conducted any "real investigation," prior to presenting the case to a grand jury, but, rather, relied solely on narrative summaries that NFI had prepared. Shapiro was also concerned about the $150,000 full cash bail amounts, asserting that it was

not justified, because the case was a "business dispute," Land and Pessiki had "no prior record," and, thus, the high bail "didn't make sense . . . one was prompted to kind of look behind and try to figure out, you know, why, what's going on here."

Shapiro explained that bail is intended to ensure a defendant's appearance, "not to create a fund to settle a claim which would have to be played out in court on the merits." He opined that the "plan" that respondent and Branco had concocted "seemed to be putting the cart before the horse in terms of the . . . ultimate issues in the case, which is if the prosecution had been successful, [then] the entitlement to restitution" would follow. Shapiro was also concerned with respondent's potential "special access influence" with Branco and other assistant prosecutors, including in respect of the Army/Navy games.

Nonetheless, at the conclusion of the CCPO's internal investigation, Shapiro believed that "criminal acts may have been committed" by Trident, Land, and Pessiki, and "that a professional investigation and competent and independent legal analysis would permit an informed decision." Shapiro opined that Walters should not have taken such a case to a grand jury without a thorough investigation; that there was only marginal probable cause, at the time of the grand jury presentation,

based on the evidence he had seen; and that Walters should have analyzed the case from a "reasonable doubt standard" before presenting it for potential indictment. In respect of Trident's alleged scheme to defraud NFI, Shapiro stated that the CCPO investigation had not even attempted to "scratch the surface." Moreover, Shapiro testified that, upon reviewing the civil deposition transcript of NFI principal Mueller, who acknowledged the "accord" reached between the parties, he did not see how the CCPO ever could have prosecuted the indicted "charges of fraud and deception." He believed, however, that the bad checks charge was supportable.

On May 19, 2011, in respect of the civil and bankruptcy matters, NFI received only $89,223 toward its $2,500,000 unsecured claim, and Land and Pessiki incurred no personal liability. During the ethics hearing, respondent and the OAE entered into the following stipulation of fact:

> Any restitution paid by Mr. Land or Mr. Pessiki to NFI in the criminal matter would be personal funds outside the purview and not subject to the control or disposition of the bankruptcy court overseeing the involuntary bankruptcy of Trident, LLC.[5]
>
> [3T5.]

[5] In light of the theories of personal liability pursued by NFI in the civil, bankruptcy, and criminal matters, the import of the stipulation is unclear.

Walters testified that, in retrospect, he did not believe that Trident's behavior rose to the level of criminal intent to defraud. He stated "[s]itting here today looking back at everything that's transpired, it appeared to be - - it looks like this is a case to try to get money out of - - out of Trident." Walters claimed that, although he initially believed there was probable cause that fraud had been committed, he subsequently found out that Trident, Land, and Pessiki had attempted to "make good on the checks . . . I learned later that that intent to deceive didn't exist." Walters stated that the main thrust of the prosecution was "money, money, money . . . I got two letters, I got the 'plan' at the meeting, we're gonna get the money then . . . Even when [Branco] and I were on board [with the prosecution] . . . there was always, no, we need more money than that."

Walters acknowledged that he had initially defended the prosecution, but later came to believe that the prosecution for fraud was not appropriate. He believed that the bad check aspect of the case was the only criminal conduct that was potentially actionable. He agreed that his suspension from the CCPO, imposed for his handling of the prosecution of the NFI matter, was an appropriate sanction against him. Walters also admitted that, based on documents presented to him at the hearing, he had

inadvertently indicted Land's father, rather than the James Land he had intended to indict, and did not realize his error until it was pointed out by a defense attorney, at the arraignment, which the correct Land had voluntarily attended.

Respondent consistently argued throughout the ethics proceeding that he committed no ethics violations, but simply acted as a zealous advocate of a corporate victim of crime. He pointed to his written communications with Branco and Walters as evidence of his good faith, and described Branco as "the most experienced prosecutor" at the CCPO. He contended that, if he had been trying to hide his activity from the rest of the CCPO, he "[w]ouldn't have been sending e-mails and letters." Respondent maintained that encouraging NFI to pursue criminal charges, during the pendency of the civil and bankruptcy matter, did not constitute a violation of RPC 3.4(g).

Multiple retired prosecutors testified during the ethics hearing, in support of respondent, offering their opinions as experts in the fields of New Jersey criminal law, criminal prosecution, and grand jury practice. In summary, all of them supported the propriety of respondent's conduct, finding no fault in his efforts to re-open the criminal case, even while the civil proceedings were pending, in the components of his overall "plan," and in his testimony, as the sole witness,

before the grand jury. They also testified as to respondent's stellar reputation for good character. All of the expert witnesses knew respondent over the course of decades, considered him a friend, had business relationships with him, such as the mutual referral of cases, or worked at his law firm.

In 2011, Land and Pessiki sued respondent for malicious prosecution in the United States District Court, District of New Jersey. On February 8, 2012, the Honorable Joseph E. Irenas, S.U.S.D.J., granted summary judgment, in favor of respondent, concluding that Land and Pessiki had admitted writing bad checks and, thus, probable cause had existed for their prosecution by the CCPO. On two subsequent occasions, the CCPO referred respondent and Branco to the New Jersey Attorney General (NJAG) for possible prosecution; on both occasions, the NJAG declined prosecution.

* * *

The special master concluded that respondent had committed no misconduct, stressing that, although the OAE had painted respondent as a nefarious manipulator of the criminal justice system, two "independent" prosecutors and several judges had signed off on the prosecution of Trident in varying respects. The special master also determined that the record "did not disclose any material involvement by [respondent] in either the

[civil lawsuit] or Trident's bankruptcy. The inception of both predated his involvement in this dispute, and were handled by other counsel with whom [respondent] did not communicate." The special master concluded that

> "[t]he OAE's theory of the case [especially in respect of RPC 3.4(g)] would impose restrictions on, if not completely prevent, an attorney's zealous representation of criminal victims seeking restitution under the current statutory scheme. Suggesting that criminal and civil proceedings to recover for the same injury cannot be simultaneously pursued, or perhaps can only be pursued at substantial risk to the attorney retained to pursue criminal restitution, runs counter to what the statutory scheme expressly permits."
>
> [SMR21.][6]

The Special Master's Findings Regarding RPC 3.4(g)

The special master concluded that the OAE was unable to prove, by clear and convincing evidence, that respondent sought "to obtain an improper advantage in a civil matter" through his representation of NFI.

As a threshold matter, the special master correctly noted that, pursuant to New Jersey's Crime Victim Bill of Rights (N.J.S.A. 52:4B-36), crime victims have the right to be informed about available remedies and "[t]o be compensated for their loss

[6] "SMR" denotes the special master's report, dated September 29, 2016.

whenever possible." Moreover, he correctly noted that, pursuant to N.J.S.A. 2C:44-2(f), restitution ordered as a result of criminal conviction or agreement

> shall not operate as a bar to the seeking of civil recovery by the victim based on the incident underlying the criminal conviction. Restitution ordered under this section is to be in addition to any civil remedy which a victim may possess, but any amount due the victim under any civil remedy shall be reduced by the amount ordered under this section to the extent necessary to avoid double compensation for the same loss, and the initial restitution judgment shall remain in full force and effect.

Based on these statutory provisions, the special master determined, "the putative victim of a crime may be represented by counsel in seeking simultaneously both criminal restitution and civil recovery for the same loss," and RPC 3.4(g) does not require that these tracks "be undertaken sequentially." Additionally, the special master determined that "[r]epresentation provided pursuant to these statutes does not present a per se violation of RPC 3.4(g), and, in turn, a violation of RPC 3.4(g) cannot be defended by reliance upon these statutes."

In his analysis of the actual application of RPC 3.4(g), the special master concluded that RPC 3.4(g) "does not require proof of intent," citing a portion of the decision in In re

Barrett, 88 N.J. 450 (1982), which examined DR 7-105(A),[7] the predecessor to RPC 3.4(g).

The special master further determined that, although respondent clearly participated in presenting criminal charges, RPC 3.4(g) does not "proscribe improper conduct within a criminal proceeding. By its terms, this rule operates independently of such concerns, as well as the intent of the attorney involved." The special master found that

> RPC 3.4(g) expressly addresses the use of any criminal process, proper or not, "to obtain an improper advantage in a civil matter." The criminal process involved could be entirely proper, but using it for an improper advantage in a civil matter would violate the rule. An improper criminal proceeding may give rise to other sanctions, but to violate RPC 3.4(g) an attorney must use it in an effort to obtain an improper advantage in a civil matter.
>
> [SMR7.]

With respect to the application of RPC 3.4(g) to the facts of this case, the special master held that an attorney must commit "an overt act, which either interfered with, or could have [improperly] interfered with, a particular civil proceeding." Applying this analysis, the special master determined that

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[7] The Disciplinary Rules were replaced by the Rules of Professional Conduct in 1984.

> merely being designated as a criminal defendant cannot be an improper advantage. Helmer did not indict Land & Pessiki. The CCPO did. The simultaneous pendency of a criminal proceeding, or the threat of one, and a related civil matter presents a precondition for a RPC 3.4(g) violation, but does not present a per se violation under statutory law . . . . It's equally obvious based upon the evidence adduced at trial that [respondent's] conduct did not result in any actual advantage. Indeed, his conduct came to nought in all respects.
>
> [SMR8.]

The special master found the OAE's position in respect of respondent's alleged violation of RPC 3.4(g) meritless, concluding that (1) an improper advantage in the civil lawsuit would actually work to respondent's disadvantage, because his contingent compensation was tied to the criminal restitution; (2) the potential for the criminal prosecution to have secured an improper advantage in the lawsuit was minimal; (3) the plan to arrest Land and Pessiki was not to influence the lawsuit, as Land and Pessiki were not aware of respondent's activity until "after the fact;" (4) even if the third mediation session had been arranged by "NFI in bad faith," there was no evidence that respondent participated in such a ruse; (5) respondent could not effect the arrest, or set the bail, or seal the indictment; (6) there is no support to the theory that the criminal prosecution was intended to allow NFI to outmaneuver other creditors; and

(7) Trident had no significant assets for distribution to unsecured creditors and, thus, "[t]he assets of the Trident Estate were not in any jeopardy based on [respondent's] conduct."

The special master sharply criticized the OAE's pursuit of the RPC 3.4(g) allegation:

> "[t]he OAE elected to proceed with a case of first impression based on the facts presented in the absence of any demonstrable advantage having been achieved in the related civil cases. [Respondent] was not directly involved in the civil cases purportedly subject to being influenced by his actions . . . No evidence in this case shows [respondent] attempting to leverage the criminal proceeding to resolve the [civil lawsuit], or influence testimony in it."
>
> [SMR14-15.]

The special master concluded that, "[i]f [respondent] had managed to somehow recover money through criminal restitution, there exists no clear and convincing evidence that recovery would have constituted an improper advantage in the [civil lawsuit] or Trident's bankruptcy."

The Special Master's Findings Regarding RPC 8.4(a)

Following his conclusion that the OAE had not met its burden of proof on the RPC 3.4(g) allegation, the special master determined that the alleged violation of RPC 8.4(a) was

"derivative of the RPC 3.4(g) charge, and fails for the same reason." Specifically, he wrote

> [RPC 8.4(a)] has an intent component in that it requires knowing conduct, at least in part. [Respondent] would have had to act "knowingly" in violating the RPC through the acts of another, or in assisting or inducing another to violate the RPC. No evidence demonstrates [respondent] "knowingly" doing this, or others violating the RPC. The RPC 8.4(a) charge here has no existence apart from the RPC 3.4(g) charge which does not require a showing of intent.
>
> [SMR13-14.]

The Special Master's Findings Regarding RPC 8.4(d)

The special master also concluded that the OAE had not met its burden of proof in respect of RPC 8.4(d), stating that the OAE's theory "entirely discounts the independent conduct of at least two prosecutors in the CCPO . . . and it overlooks the involvement of several judges in that process." The special master stated

> [i]n short, [respondent] did not control the prosecutors or judges involved in the prosecution of Land or Pessiki. The fact that the CCPO subsequently determined that the prosecution had been conducted improperly does not prove that [respondent] acted improperly in the representation of NFI . . . [Respondent] did not bribe or blackmail anyone. No one testified that [respondent] controlled their conduct. The internal disciplinary measures subsequently taken by the CCPO do not prove that

> [respondent's] conduct prejudiced the administration of justice.
>
> [SMR20-21.]

The OAE asserts that respondent violated all of the charged RPCs by taking or attempting to take "myriad actions to present or participate in presenting criminal charges . . . in an effort to collect a civil debt for his client and enrich himself," and urges us to impose a six-month suspension on respondent for his misconduct. In turn, respondent maintains that the special master's determinations were sound, that he represented NFI aggressively and to the best of his ability, and that the appeal and underlying ethics complaint should be dismissed.

* * *

Following a de novo review of the record, we are satisfied that the record clearly and convincingly establishes that respondent was guilty of unethical conduct. Specifically, we determine that respondent violated both RPC 8.4(a) and RPC 8.4(d). Respondent leveraged his forty years of experience in the criminal justice system, and his special access to members of the CCPO, couched in the retainer agreement as his "unique background and contacts in [Cumberland] County," to manipulate the criminal justice system on behalf of NFI. Using the Crime Victim's Bill of Rights as a sword and a shield, and believing his actions would, thus, be beyond reproach, respondent

orchestrated an improper scheme to obtain NFI's desired monetary damages. He did so with the complicity of Branco and Walters, whom we do not view as "independent prosecutors."

As to the RPC 3.4(g) charge, however, we conclude that the OAE has failed to meet its burden, as there is insufficient evidence to conclude that respondent committed his misconduct with the intent or purpose to obtain an improper advantage in a civil matter. Accordingly, we determine to dismiss that charge. In so doing, however, we do not adopt the special master's specific findings of fact and conclusions of law in this respect, many of which we view as unsupportable and either inconsistent with applicable law or based on a misinterpretation of the law.

The special master, however, correctly noted that, pursuant to New Jersey's Crime Victim Bill of Rights (N.J.S.A. 52:4B-36), crime victims have the right to be informed about available remedies and "[t]o be compensated for their loss whenever possible." Moreover, he correctly stated that, pursuant to N.J.S.A. 2C:44-2(f), restitution ordered as a result of a criminal conviction or an agreement shall not bar a victim's civil recovery, based on the incident underlying the criminal conviction. Thus, it is true that a victim of a crime may be represented by counsel "in seeking simultaneously both criminal

restitution and civil recovery for the same loss," and that RPC 3.4(g) does not require these tracks to "be undertaken sequentially."

The special master also correctly determined that "[r]epresentation provided pursuant to these statutes does not present a per se violation of RPC 3.4(g), and, in turn, a violation of RPC 3.4(g) cannot be defended by reliance upon these statutes." However, we conclude, that, although criminal and civil proceedings to recover for the same injury may be simultaneously pursued, the attorney who is retained to pursue criminal restitution proceeds at substantial risk if he does not operate with the utmost caution and with strict observance of the RPCs – especially RPC 3.4(g). The special master rejects, outright, the OAE's theory of the case, stating that it "would impose restrictions on, if not completely prevent, an attorney's zealous representation of criminal victims seeking restitution under the current statutory scheme." However, all legal representation in New Jersey occurs under "restrictions" – that is, the framework, prohibitions, and guidance provided by the RPCs.

That said, in this case, it is undisputed that respondent participated, knowingly and eagerly, in presenting criminal charges against Trident, Land, and Pessiki. The record is clear,

and respondent admits, that his role in this case was to represent NFI in seeking that criminal prosecution, with the primary goal of securing monetary restitution in favor of NFI, rather than the conviction and imprisonment of Land and Pessiki. Respondent was well aware that any criminal prosecution would be contemporaneous with the civil and bankruptcy proceedings in which NFI sought personal liability against Land and Pessiki.

Undoubtedly, NFI had the right to retain respondent to serve as its victim advocate, despite the pendency of both the civil and bankruptcy proceedings against Trident. The pertinent question in this case is: did respondent's conduct, in respect of the pursuit of the criminal matter against Trident, Land, and Pessiki, cross the line contemplated by RPC 3.4(g) and constitute unethical conduct? To answer that question, we look to the language of RPC 3.4(g) and to the cases applying it.

RPC 3.4(g) was adopted on July 18, 1990, effective September 4, 1990. The precursor to this rule was DR 7-105(A), which stated that

> [a] lawyer shall not present, participate in presenting, or threaten to present criminal charges in a civil matter.

By comparison, RPC 3.4(g) states that

> [a] lawyer shall not present, participate in presenting, or threaten to present criminal charges **to obtain an improper advantage** in a civil matter. (emphasis added).

Cases applying both DR 7-105(A) and RPC 3.4(g) consistently have examined whether the attorney had the intent or purpose to obtain an improper advantage in a civil matter. A plain reading is that the clause inserted in RPC 3.4(g), versus the former language of DR 7-105(A), essentially codified the element of intent always required to find a violation of the Rule. Thus, although we determine to dismiss the RPC 3.4(g) charge, we do not agree with the special master's conclusion that intent to gain an improper advantage in a civil matter is not required to establish a violation of that Rule.

In order to determine whether respondent committed misconduct, the context of the timing of his retention and his resulting advocacy is crucial. Under the facts known to respondent, were his actions intended "to obtain an improper advantage in a civil matter?" Did his actions offend RPC 3.4(g)? Given respondent's unique role, the required analysis under this Rule is a matter of first impression for us, as the case law addressing RPC 3.4(g) has examined factually different scenarios.

For example, in In re McDermott, 142 N.J. 634 (1995), the attorney filed criminal charges against a client and her parents, alleging theft of services, after the client stopped payment on a check for legal fees. In the Matter of John V.

McDermott, DRB 94-385 (May 23, 1995) (slip op. at 7-9). Those criminal charges were dismissed, on motion of the prosecutor, who concluded that the attorney's claim against his client was civil, not criminal. Id. at 10. We found that "[a] fair reading of the record leaves no doubt that respondent's sole design was to frighten [his client] and her parents into paying him his fee, not later, but immediately." Id. at 13. We characterized the attorney's threat of criminal prosecution as "calculating," since he was "not merely interested in recovering his fees. He also wanted to avoid a lawsuit [alleging malpractice]" by leveraging a dismissal of the criminal charges in return for a full release from his client. Ibid. For his violation of RPC 3.4(g), the attorney received a public reprimand.

In In re Neff, 185 N.J. 241 (2005), when a dispute arose at a real estate closing over the payment of the attorney's $750 legal fee, the attorney seized his adversary's file, took documents from it, and refused to identify the items taken or to return them to the adversary. In the Matter of H. Alton Neff, DRB 05-124 (August 31, 2005) (slip op. at 5-7). Moreover, he unilaterally terminated the closing, called the police, and directed them to either remove the adversary from his building or to arrest him for trespass. Id. at 6-7. In addition to the attorney's threat to charge his adversary with trespassing, he

considered theft charges. Ibid. We characterized the attorney's threats of criminal prosecution of his adversary as "abominable," determining that "[a]n inference may be raised that respondent's purpose in threatening criminal prosecution was to coerce [his adversary] into agreeing" with his position that the transaction was nullified due to the failure to pay his fee, and "to obtain an improper advantage in the transaction." Id. at 22. For his violation of RPC 3.4(g), the attorney received a censure, after we weighed aggravating circumstances, including a prior reprimand.

In In re Beckerman, 223 N.J. 286 (2015), the attorney threatened to pursue the federal prosecution of his pro se adversary, his client's former husband, during post-divorce civil proceedings. In the Matter of David M. Beckerman, DRB 14-176 (September 18, 2014) (slip op. at 7). We concluded that the purpose of the attorney's threats of criminal prosecution "was to gain an advantage in the post-divorce litigation," a violation of RPC 3.4(g). Id. at 23. For his violation of RPC 3.4(g), accounting for the "prolonged" nature of his misconduct, which spanned five years, the attorney received a censure.

Discipline imposed for similar misconduct under the Canons of Professional Ethics, which predated the Disciplinary Rules, also examined the intent of the attorney where criminal

prosecution was threatened or pursued. The Canons prohibited attorneys from assisting, cooperating, and participating in the filing of a criminal charge by a client in order to obtain an advantage in a civil suit. See, e.g., In re Krieger, 48 N.J. 186 (1966) (three-month suspension for filing criminal complaint against an adverse witness, in the hope that an indictment would make it difficult for the judge to rely on the adverse witness' testimony in deciding the civil case); In re Cohn, 46 N.J. 202 (1966) (one-year suspension for filing a criminal complaint against an opposing party in a civil suit, and then denying the misconduct, as well as for participating in a conflict of interest); and In re Dworkin, 16 N.J. 455 (1954) (one-year suspension for attorney who wrote a letter threatening criminal prosecution against an individual, who forged an endorsement on a government check, unless the individual paid the amount of the claim against him and the legal fee that the attorney ordinarily charged in a criminal matter "of this type;" the Court found that the attorney had resorted to "coercive tactics of threatening a criminal action to effect a civil settlement").

Based on jurisprudence, thus, to determine whether respondent's advocacy crossed the line contemplated by RPC 3.4(g), we must examine respondent's state of mind and conduct in the context under which he was operating. For purposes of

that analysis, we determined to view the potential criminal case against Trident in a light most favorable to both respondent and NFI. Simply put, we accept, as fact, that Trident, Land, and Pessiki engaged in fraudulent, criminal conduct, as the bankruptcy trustee also alleged, and that a prosecutorial agency, such as the CCPO, after a proper investigation, could have charged them, in good faith.

In that light, NFI was permitted to pursue criminal charges against Trident, Land, and Pessiki, and to obtain legal representation for that purpose. Respondent did not automatically violate any RPC by agreeing to represent NFI in that pursuit. Admittedly, both respondent and NFI were generally aware of RPC 3.4(g), and acknowledged its application to a scenario in which civil and criminal remedies are simultaneously pursued. In other words, their "antennae" were up in respect of RPC 3.4(g).

Specifically, Barron testified that he was aware of the potential ethics issues associated with mixing the criminal and civil proceedings, and "certainly wasn't trying to use the criminal matter as leverage." Respondent, too, acknowledged the interplay, testifying that an order of restitution, in connection with a criminal matter, would not be dischargeable through bankruptcy, and that Land and Pessiki could be held

"personally responsible if they were accomplices." Thus, we cannot ignore respondent's actual knowledge of NFI's posture in respect of Trident, Land, and Pessiki at the time it retained him as its victim advocate, and the interplay among the three proceedings. Both the bankruptcy and civil litigation predated respondent's involvement in the case and he was, therefore, required to adhere to and navigate RPC 3.4(g) while acting as NFI's victim advocate.

In that respect, the evidence paints an unfavorable picture of NFI's intentions vis-à-vis RPC 3.4(g), as the record and associated timeline strongly suggest that NFI pursued the criminal charges to obtain an improper advantage in respect of the pending civil matters. Specifically, in May 2008, NFI sued Trident, Land, and Pessiki in Superior Court. Five days later, on May 16, 2008, NFI's Vice President of Security, Willard Graham, warned Land and Pessiki, in writing, that NFI would pursue a criminal prosecution if Trident did not make NFI whole within twenty days. Had Willard been NFI's attorney, this action would constitute a textbook violation of RPC 3.4(g). After the involuntary bankruptcy proceedings began in September 2008, NFI, an unsecured creditor of a debtor with over $28 million in liabilities, saw its opportunity to be made whole through the civil litigation.

The bankruptcy trustee was harshly critical of the improper advantages that NFI sought via the civil lawsuit and the criminal prosecution. In a 2011 brief to the bankruptcy court, the trustee characterized NFI's continuing civil suit as "nothing more than an attempt by NFI to override or circumvent the automatic stay" and the exclusive jurisdiction of the bankruptcy court, in order to "only benefit NFI," rather than inuring "to the benefit of all of Trident's creditors." She claimed that NFI had sought to "misappropriate" estate assets for its singular benefit.

Walters testified that the bankruptcy trustee contacted him during the prosecution of Trident, told him that there was "a long line of creditors," and expressed concern about a potential "criminal penalty . . . supersed[ing] any part of the payment to the creditors." Respondent was aware of this issue, and sought to take advantage — he specifically stated that an order of restitution, in connection with a criminal matter, would not be dischargeable through bankruptcy, and that Land and Pessiki could be held "personally responsible if they were accomplices" to a crime, stating that they couldn't play "three-card Monte with the money."

Perhaps most damning is the conversation between Barron and respondent during the negotiation of his retention. Although

respondent testified that he wanted to negotiate a flat fee to represent NFI in the criminal action, Barron had expressed some concern, noting that his clients would not benefit by having Land and Pessiki go to prison. Rather, Barron viewed respondent's retention as beneficial only if it was contingent upon restitution.

NFI was seeking to be made whole and appeared to realize that it was operating from a position of major weakness in both the bankruptcy and civil proceedings. Thus, it turned to the criminal justice system as potentially the quickest and easiest way to pierce the corporate veil and reach Land and Pessiki's personal assets — by charging them, personally, with the commission of crimes. It is in this context that respondent, by his own admission, hatched the "plan," which was, admittedly, designed for a "swift resolution" of the case, and to secure as much money as possible for NFI.

Simply put, the "plan" devised by respondent was to obtain cash for NFI, from Land and Pessiki, as quickly as possible. NFI and respondent knew that NFI was "at the back of the line" in respect of the bankruptcy proceedings. The criminal prosecution, therefore, was used as an avenue to obtain financial compensation. In that context, even though NFI, as a victim, had a right to avail itself of the criminal justice system,

respondent's orchestration of the criminal case was, under the totality of the circumstances, unethical in many respects.

Although respondent was aware that the RPCs governed his conduct, he ran several ethics "red lights" in his representation of NFI. First, he agreed to pursue the criminal prosecution, knowing that (1) NFI sought to pierce the corporate veil in both the bankruptcy and civil proceedings, in order to subject Land and Pessiki to personal liability, and pursue an avenue of compensation not necessarily available to Trident's other, secured creditors; and (2) the criminal prosecution was based on the same alleged misconduct pursued by NFI in both the civil and bankruptcy proceedings. This knowledge should have raised a red flag for respondent, and prompted him to make sure that his representation of NFI, in the criminal matter, was "by the book" in respect of the RPCs. Instead, he proceeded in a manner that was less than transparent, and leveraged his special access to Branco. It was no accident that respondent, Branco, and Walters also were not transparent with other members of the CCPO, including both the First Assistant and the Prosecutor, as their "plan" was to get in and get out — without drawing any significant attention within the office.

The second "red light" respondent ran was the use of his special access to resuscitate the CCPO's review and prosecution

of the case. Despite knowing that Wettstein had reviewed the case and declined to prosecute, respondent went around him and his chain of command, instead bringing the matter directly to Branco, with whom he had a close personal relationship. Their relationship was so close that, according to former First Assistant Pagliughi, during his tenure, police had expressed concern, citing possible preferential treatment for respondent's criminal clients. Consequently, Pagliughi had instructed Branco to recuse himself from respondent's cases, "to avoid any appearance of impropriety, and try to . . . keep the integrity that I was trying to reestablish with law enforcement and the office." Additionally, Pagliughi had instructed Branco to brief him on any plea agreements that he reached with respondent on behalf of his clients. During his testimony, Branco admitted that he had disregarded this instruction and failed to apprise Pagliughi of respondent's request that he review the NFI/Trident matter.

Moreover, respondent urged Branco to pursue a criminal prosecution of Trident, but did not inform him of Wettstein's prior decision not to prosecute it. Again, respondent conceded, in his answer and during his testimony, actual knowledge that Wettstein had declined the prosecution.

The third "red light" that respondent ran, with the assistance of Branco, was the manipulation of Walters, a relatively inexperienced assistant prosecutor, whom respondent described as "a line guy" and a "rookie." Walters undoubtedly ran several "red lights" of his own in the handling of the prosecution, but it was respondent and Branco who orchestrated his role in the "plan."

The fourth "red light" was in respect of the "plan" itself, hatched at the May 27, 2009 meeting at the CCPO, which respondent designed with no regard to convention or justice. Walters testified that, on that date, shortly after the case was assigned to him, Branco unexpectedly called him into that meeting, where respondent and representatives of NFI, including its general counsel, Barron, were already present. Branco confirmed that Walters was summoned into the meeting at the "tail end of it," and that he and respondent jointly ran the meeting. Walters recounted that he had no input in the "plan" to prosecute Trident. Rather, it was a "fait accompli." According to Walters, the "plan" for "swift resolution" of the Trident prosecution was set in motion at the meeting: the CCPO would obtain a sealed indictment against Trident principals Land and Pessiki; arrest Land and Pessiki in New Jersey, by surprise; request high bail amounts; initiate a bail source inquiry

alleging that the bail money posted represented the proceeds of a crime; and seek to seize the bail monies toward restitution to NFI. Walters added that the bail would be required to be posted as cash, and that, even though the indictment would be for second-degree charges, the State would offer Pre-Trial Intervention in exchange for restitution.

During the meeting, respondent, Branco, and Walters specifically discussed NFI's civil suit against Trident, and NFI's status, as an unsecured creditor, at the "back of the line" in respect of Trident's bankruptcy proceeding. Walters had the distinct impression, without knowing the background of the civil matters, that NFI was seeking "to jump the line [over other creditors] in the bankruptcy."

The "plan" was improper in multiple respects, as witnesses explained during the ethics hearing. The bankruptcy trustee expressed serious concern, telling Walters that Trident had "a long line of creditors," and that a "criminal penalty . . . [would] supersede any part of the payment to the creditors." Respondent's role in the "plan," and orchestration of the prosecution, was well outside the norms of a typical county-level prosecution.

Notably, respondent's testimony before the "seasoned" grand jury, as the sole witness, was highly irregular, and was

exacerbated by the self-serving, incorrect, and incomplete facts he presented, including the opinions that he provided on the actual mens rea of Land and Pessiki and their guilt - the ultimate issue to be proven in a potential prosecution. Respondent admitted that, prior to testifying before the grand jury, he had conducted neither an independent investigation of NFI's allegations nor any interviews; he made no effort to verify the accuracy of NFI's information; he did not know what percentage of NFI's services remained unpaid; he had not reviewed Trident's bank statements prior to testifying; he had never spoken to Land or Pessiki; and he had reviewed no deposition transcripts.

The CCPO later condemned respondent's role and inaccurate testimony before the grand jury, stating that, "as a matter of professional responsibility," the presentation to the grand jury "was not proper and shall not be sanctioned or condoned" by the Cumberland County Prosecutor.

The motivation for the bail amounts set for Land and Pessiki, as part of the "plan," is concerning. Although Branco attempted to justify the $150,000 amounts for Land and Pessiki, both of whom lived in Pennsylvania and had no prior records, claiming that Trident's misconduct was the most egregious bad check case he had seen in his career, Walter had testified that

no investigation had been conducted prior to grand jury presentment. Moreover, Branco admitted that the reason the "plan" called for the high bail amounts was to "get as close to the restitution amount as possible . . . you have at least $168,000 of bad checks," despite the fact that, pursuant to R. 3:26-1(a), restitution is not a factor to be considered in making bail recommendations. First Assistant Shapiro was very concerned about the $150,000 full cash bail amounts, testifying that it was not justified, because the case was a "business dispute," Land and Pessiki had "no prior record," and, thus, the high bail "didn't make sense." Shapiro explained that bail was intended, by Court Rule, to ensure a defendant's appearance, "not to create a fund to settle a claim which would have to be played out in court on the merits."

The component of the plan to arrest Land and Pessiki, by surprise, in New Jersey, was motivated solely by the desire for restitution, as well. The special access that respondent had to Branco and Walters was evident over the course of August 5 and 6, 2009, as the efforts to effectuate the arrest of Land and Pessiki unfolded, when a series of eight cellular telephone conversations occurred among the trio. It is unquestionable that respondent coordinated that third mediation session, through

Barron, to lure Land and Pessiki into New Jersey with bad faith negotiation tactics.

Respondent's myopic focus on procuring restitution for NFI was another "red light" that he ran. Pursuant to statute, restitution usually is not addressed and imposed until a defendant has been convicted. The exception to that norm is PTI, where restitution, from a practical standpoint, is often a driving force behind a prosecutor's decision to support a defendant's application to the program. At the arraignment of Land and Pessiki, Walters represented that the CCPO would support PTI for Land and Pessiki, notwithstanding the second-degree charges pending against them, if they made full restitution to NFI, characterizing restitution a "big chunk" of any plea deal. Walters testified that he was willing to offer PTI "because that was . . . part of the plan. It was trying to get the swift resolution, trying to get it done."

Respondent admitted telling Carl Poplar, Land's attorney, that Land would not "get a sentence less than five years," but that NFI would support PTI or probation if NFI received significant restitution. As to the amount of restitution, respondent made clear that NFI wanted compensation for "the cost expended by [NFI], including, but not limited to, the repair and replacement of damaged equipment, the cost of services

unlawfully taken, investigation expenses, and attorney fees," the same bases for liability NFI pursued in both the civil and bankruptcy matters, and the same consequential damages sought therein.

Respondent's conduct in this case constituted a clear abuse of New Jersey's criminal justice system, and violated RPC 8.4(d). Respondent improperly orchestrated the prosecution of Land and Pessiki, never intending to seek justice for a victim of a crime, but, rather, intending to secure as much monetary compensation as possible for NFI, which was at the back of the line in the bankruptcy proceedings, and had seen its civil litigation stayed. Such manipulation of the system was clearly prejudicial to the administration of justice, and wasted public resources, including those of the CCPO, four Superior Court judges, and a county grand jury panel. Respondent's irresponsible and reckless testimony before the grand jury, taken alone, violated RPC 8.4(d).

Respondent knowingly recruited both Branco and Walters into his scheme of misconduct. Respondent's conduct, thus, also violated RPC 8.4(a), as he orchestrated the "plan," and therefore knowingly assisted and induced Branco and Walters in violating RPC 8.4(d) through the implementation of the plan. Respondent also knowingly assisted Barron and NFI in violating

the RPCs, especially in respect of the component of the "plan" where NFI, through its counsel, induced Land and Pessiki, in bad faith, to attend the third mediation session.

As to the appropriate quantum of discipline, violations of RPC 8.4(d), conduct prejudicial to the administration of justice, comes in a variety of forms, and the discipline imposed for the misconduct typically results in either a reprimand or a censure, depending on other factors present, including the existence of other violations, the attorney's ethics history, whether the matter proceeded as a default, the harm to others, and mitigating or aggravating factors. See, e.g., In re Gellene, 203 N.J. 443 (2010) (reprimand for attorney found guilty of conduct prejudicial to the administration of justice and knowingly disobeying an obligation under the rules of a tribunal for failing to appear on the return date of an appellate court's order to show cause and failing to notify the court that he would not appear; the attorney was also guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients; mitigating factors considered were the attorney's financial problems, his battle with depression and significant family problems; his ethics history included two private reprimands and an admonition); In re Geller, 177 N.J. 505 (2003) (reprimand for attorney who failed to comply with

court orders (at times defiantly) and the disciplinary special master's direction not to contact a judge; the attorney also filed baseless motions accusing judges of bias against him, failed to expedite litigation and to treat with courtesy judges, his adversary, the opposing party, an unrelated litigant, and a court-appointed custody evaluator, used means intended to delay, embarrass or burden third parties, made serious charges against two judges without any reasonable basis, made unprofessional and demeaning remarks toward the other party and opposing counsel, and made a discriminatory remark about a judge; in mitigation, the attorney's conduct occurred in the course of his own child custody case); and In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who, although required to hold in trust a fee in which she and another attorney had an interest, took the fee in violation of a court order).

Censures were imposed in In re D'Arienzo, 207 N.J. 31 (2011) (attorney failed to appear in municipal court for a scheduled criminal trial, and thereafter failed to appear at two orders to show cause stemming from his failure to appear at the trial; by scheduling more than one matter for the trial date, the attorney inconvenienced the court, the prosecutor, and complaining witness; prior three-month suspension and two admonitions, along with a failure to learn from similar

mistakes, justified a censure); and In re LeBlanc, 188 N.J. 480 (2006) (attorney's misconduct in three client matters included conduct prejudicial to the administration of justice for failure to appear at a fee arbitration hearing, failure to abide by a court order requiring the production of information, and other ethics violations; mitigation included, among other things, the attorney's recognition and stipulation of his wrongdoing, his belief that his paralegal had handled post-closing steps, and a lack of intent to disregard his obligation to cooperate with ethics authorities).

Suspensions were imposed where attorneys either had significant ethics histories or were guilty of violating a number of ethics rules, or both. See, e.g., In re DeClemente, 201 N.J. 4 (2010) (three-month suspension for attorney who arranged three loans to a judge in connection with his own business, failed to disclose to opposing counsel his financial relationship with the judge or failed to ask the judge to recuse himself, made multiple misrepresentations to the client, engaged in an improper business transaction with the client, and engaged in a conflict of interest); In re Block, 201 N.J. 159 (2010) (six-month suspension where attorney violated a court order that he had drafted by failing to transport his client from prison to a drug treatment facility, instead leaving the client at a

church while he made a court appearance in an unrelated case; the client fled and encountered more problems while on the run; the attorney also failed to file an affidavit in compliance with R. 1:20-20, failed to cooperate with disciplinary authorities, failed to provide clients with writings setting forth the basis or rate of the fees, lacked diligence, engaged in gross neglect, and failed to turn over a client's file; prior reprimand and one-year suspension); and In re Bentivegna, 185 N.J. 244 (2004) (motion for reciprocal discipline; two-year suspension for attorney who was guilty of making misrepresentations to an adversary, negotiating a settlement without authority, filing bankruptcy petitions without authority to do so and without notifying her clients, signing clients' names to documents, making misrepresentations in pleadings filed with the court, and violating a bankruptcy rule prohibiting the payment of fees before paying filing fees; the attorney was guilty of conduct prejudicial to the administration of justice, gross neglect, failure to abide by the client's decision concerning the objectives of the representation, failure to communicate with clients, excessive fee, false statement of material fact to a tribunal, and misrepresentations).

In aggravation, respondent has taken no responsibility, and has shown no remorse for his conduct in this case. He continues

to staunchly defend his conduct as that of a zealous victim advocate, with no recognition of the impropriety of his manipulation of the criminal justice system on behalf of NFI. Given his vast experience with the criminal justice system, he, of all attorneys, should know better than to seek to bend the system to his ways under the guise of victim advocacy. Moreover, it appears that his conduct was, in part, financially motivated, given his contingent fee agreement.

In mitigation, respondent has practiced law for almost forty years with an unblemished record. He has enjoyed a good reputation within the legal community for his legal acumen and his good character, and has made many contributions to the bar.

That said, respondent's misconduct was serious. Respondent manipulated and abused the criminal justice system and involved others who held positions of public trust in his scheme. We are alarmed by respondent's steadfast and strongly-held belief that he committed no misconduct in this matter, signaling both a jaded view of the purpose of the criminal justice system, and a perverted view of the boundaries of proper victim advocacy. Simply put, respondent leveraged his access and influence within the CCPO to pursue an improper "plan" versus a legitimate criminal prosecution. He never intended to seek justice nor ensure, as a victim advocate, that the law was objectively and

impartially enforced. Rather, he sought to manipulate the system, using calculated shortcuts, to appease his client and reap his own reward. By doing so, he foreclosed any chance for legitimate justice for his client, as the CCPO ultimately refused to pursue a criminal prosecution after the administration discovered the nefarious qualities of the "plan." In our view, given the totality of the circumstances, a censure is the appropriate quantum of discipline in this matter.

Although Members Rivera and Zmirich agreed with the imposition of a censure, they would find a violation of RPC 3.4(g), in addition to RPC 8.4(a) and (d). Member Gallipoli also would find a violation of RPC 3.4(g), and voted for the imposition of a six-month suspension. Members Boyer and Singer voted to dismiss all of the charges against respondent, and have filed a separate dissenting decision.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel