Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-254
District Docket Nos. XIV-2010-0577E;
XIV-2010-0578E; XIV-2012-0276E; and
XIV-2012-0662E

In the Matter of	:
Dennis Aloysius Durkin	:
An Attorney at Law	:

Decision

Argued: February 20, 2020

Decided: June 3, 2020

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a one-year suspension filed by Special Master Miles S. Winder, III. The formal ethics complaint charged respondent with having violated RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with the client); RPC

1.5(a) (unreasonable fee); RPC 1.5(b) (failure to set forth in writing the basis or rate of the attorney's fee); RPC 1.5(c) (failure to enter into a written contingent fee agreement, improper calculation of a contingent fee, and failure to provide the client with an accurate settlement statement on conclusion of a contingent fee matter); RPC 1.15(b) (failure to promptly deliver to the client funds that the client is entitled to receive); RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-6); RPC 1.16(d) (upon termination of representation, failure to take steps to the extent reasonably practicable to protect a client's interests); RPC 3.1 (filing a frivolous claim); RPC 3.2 (failure to expedite litigation and treat with courtesy and consideration all persons involved in the legal process); RPC 4.1(a)(1) (false statement of fact or law to a third person); RPC 5.5(a)(1) (unauthorized practice of law); RPC 5.5(a)(2) (assisting a person who is not a member of the bar in the unauthorized practice of law); RPC 8.1(a) (false statement of material fact in connection with a disciplinary matter); RPC 8.1(b) (failure to cooperate with disciplinary authorities); RPC 8.4(a) (attempted violation of the RPCs, specifically, RPC 1.8(a) (improper business transaction with a client)); RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness

or fitness as a lawyer in other respects); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to impose a one-year suspension, with conditions.

Respondent was admitted to the New Jersey bar in 1982 and to the New York bar in 1990. At the relevant times, he maintained an office for the practice of law in Roseland, New Jersey.

In 1994, respondent received a private reprimand (now, an admonition) for gross neglect, lack of diligence, and failure to communicate with a client. In the Matter Dennis A. Durkin, DRB 93-435 (February 16, 1994).

On February 24, 2014, the Office of Attorney Ethics (OAE) filed a five-count, 702-paragraph formal ethics complaint against respondent, who filed a 208-page first amended answer. The special master presided over a twenty-three-day hearing between October 12, 2016 and March 23, 2018. More than 700 exhibits were admitted in evidence.

Given the size of the record, for each count, we will set forth the facts, followed by the special master's findings, and then our analysis. In light of the more complex nature of the fourth count, we will address it last. The OAE withdrew the first count of the complaint underlying District Docket No. XIV-

2010-0577E, because the grievant was unable to testify.[1] Therefore, we begin with the second count of the complaint.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

THE JOSEPHINE PONTORIERO MATTERS (XIV-2010-0578E)

The second count of the complaint charged respondent with unethical conduct in three matters arising from injuries that grievant Josephine Pontoriero sustained in a March 1, 2004 automobile accident in Union, New Jersey. The first matter stemmed from personal injury litigation against Capalbos Gift Baskets (the Capalbos matter). The second and third matters involved a personal injury protection (PIP) arbitration and a PIP lawsuit between Pontoriero and NJM Insurance Group (NJM), which insured Pontoriero's and Capalbos' vehicles. A fourth matter involved respondent's request for a loan from Pontoriero.

[1] Because the OAE withdrew the first count of the complaint underlying District Docket No. XIV-2010-0577E, the special master dismissed the alleged violations of RPC 1.1(a); RPC 1.3; RPC 1.4(b); RPC 1.5(a); RPC 1.5(b); RPC 1.8(a); RPC 3.1; RPC 3.2; RPC 8.1(b); RPC 8.4(a); RPC 8.4(c).

A. The Capalbos Matter

Pontoriero claimed that, on March 1, 2004, while she was stopped at a red light, the driver of a commercial van that Capalbos owned, rear-ended her vehicle. Respondent was her fourth attorney in the personal injury matter. Pontoriero testified that she had entered into retainer agreements with two of the three prior attorneys. In December 2004, Pontoriero's second attorney filed a complaint.

On April 6, 2005, respondent began to represent Pontoriero in the Capalbos matter. Although Pontoriero testified that respondent never provided her a written fee agreement, on April 8, 2008, she asked him to provide a copy of the retainer agreement that she had signed. In turn, respondent testified that he had entered into a standard plaintiff's personal injury contingent fee agreement with Pontoriero.

On June 20, 2007, Pontoriero and NJM agreed to settle the matter for $160,000. The next day, the terms of the settlement were placed on the record in a proceeding before the Honorable Lisa F. Chrystal, J.S.C. (now P.J.F.D.).

Respondent estimated his fee and expenses to be $65,000. Pontoriero testified that she and respondent had heated exchanges regarding the settlement; that he kept reminding her that she needed him to assist her with the PIP claim,

which, in Pontoriero's estimation, involved $50,000 in medical bills; and that, when she asked for documentation regarding the medical bills, respondent replied that "friends don't question friends." Because Pontoriero did not want to hire another attorney at that point, she continued in the attorney-client relationship with respondent.

Respondent denied Pontoriero's account of events, claiming that they had discussed the settlement in a jury room at the courthouse; that he had itemized the distribution of settlement proceeds on a yellow pad; and that, as Pontoriero requested, he had given her the paper so that she could make a copy for herself and return the original to him. During the ethics investigation, respondent was unable to produce the handwritten document.

When the terms of the settlement were placed on the record, Pontoriero confirmed that she had accepted and was pleased with the $160,000 settlement; that respondent had answered all her questions; that she was satisfied with his professional services; and that she agreed to the proposed distribution of funds between them. Respondent claimed that the settlement numbers were not placed on the record, because Pontoriero did not want her mother, who attended the proceeding, to find out the amount of money that Pontoriero would receive.

According to Pontoriero, although she was pleased with the amount of the settlement, she was not satisfied with respondent's fee. Moreover, she claimed that respondent had stated that he would provide her with a closing statement, but never did, despite her requests. On July 6, 2007, she authorized respondent to endorse the settlement check and to issue a $95,000 check to her and a $65,000 check to himself.

The ethics investigator instructed respondent to reconstruct the handwritten accounting of fees and expenses. Respondent did not maintain a disbursements journal or ledger book. Therefore, to reconstruct the accounting, he relied on his memory and the memory of his secretary, Melissa Merwin, as well as the documents in the Pontoriero file. Merwin testified that she tried to recreate the fee and expense itemization by reviewing the file and examining transmittal letters and checks. Merwin then sent the reconstructed settlement statement to Pontoriero for her review, but never heard from Pontoriero.

The OAE contested the validity of many of the $16,900 expenses listed on the reconstructed settlement statement. Specifically, the complaint alleged that a $2,000 charge for photocopying, postage, phone, and fax was improper, because overhead charges may not be passed on to a client. In addition, although respondent disbursed $900 to a medical doctor, he could substantiate only $775.

Further, respondent conceded that a $1,000 payment to Atlantic Spine Specialists and an $800 payment to another medical doctor were erroneous, because those payments had been made in 2010, three years after the Capalbos matter had settled. Indeed, Atlantic Spine Specialists returned the check to respondent, because it was owed no fees.

The OAE alleged that respondent failed to document a $3,500 fee for investigation services paid to Stephen J. Filipow, a retired police chief who operated an investigation company. Respondent failed to provide bills, invoices, or other documents to support that expense. Instead, Filipow submitted an affidavit, claiming that respondent had paid him approximately $10,000 for services rendered in behalf of Pontoriero. In turn, Pontoriero denied that she had authorized respondent to retain an investigator, or that he had even asked her whether he could do so. According to respondent, he had paid Filipow between $6,000 and $7,000 for his services, but Filipow had reduced his charge to $3,500. Filipow did not provide bills, however.

In respect of $500 paid to Trukmann's Reprographics (Trukmann's), respondent produced a $492.31 check issued to the vendor, but he was unable to link the payment to Pontoriero's matter. Pontoriero, however, produced a letter from Trukmann's, stating that the $492.31 check involved another client matter.

Trukmann's was able to confirm only a $187.39 charge in respect of the Pontoriero matter, which respondent had paid.

The complaint further alleged that a $200 transcript charge was improper, because the payment preceded the date of the settlement proceeding before Judge Chrystal, and the copies of Pontoriero's deposition transcripts would have been provided to respondent without charge. Finally, respondent acknowledged that a $1,000 lien attributable to one of Pontoriero's prior attorneys should have been paid from respondent's fee and should not have been charged to the client.[2]

Based on the above facts, the formal ethics complaint charged that respondent failed to provide Pontoriero a written contingent fee agreement and, on conclusion of the matter, a written statement setting forth the outcome of the matter and showing the remittance of the recovery to Pontoriero and the method of its determination, separate violations of RPC 1.5(c); that the reconstructed settlement statement that respondent prepared at the ethics investigator's direction reflected fraudulent expenses, a violation of RPC 8.4(c); and that, in turn, the fraudulent expenses improperly increased respondent's share of the settlement proceeds, a violation of RPC 1.5(a).

[2] In December 2008, a fee arbitration committee ordered respondent to return the entire $16,990 in costs and expenses that he had deducted from the $160,000 recovery. He satisfied that award.

B. PIP Arbitration

On October 11, 2006, eight months before the June 2007 settlement of the Capalbos matter, respondent submitted to the National Arbitration Forum (NAF) a demand for arbitration in respect of Pontoriero's outstanding medical bills. On October 16, 2006, the NAF acknowledged receipt of the claim, and set a deadline for respondent to forward copies of the bills submitted to NJM. Respondent admitted that he did not comply with the letter, explaining that NJM already had the information, which he had provided along with Pontoriero's answers to interrogatories, presumably in the Capalbos matter.

As a result of respondent's failure to submit the requested bills, the NAF closed the case. Respondent claimed that the NAF's disposition had "zero or less than zero" significance, asserting that he "was simply trying to setup an additional level of cutting [NJM] off at the pass at the trial," by creating a "pincer" on NJM in the Capalbos matter. He explained that the statute of limitations applicable to PIP claims is six years, and that four years remained before the expiration of that deadline. Thus, he strategically permitted the dismissal of the PIP arbitration.

Pontoriero testified that respondent had neither informed her of the dismissal of the PIP arbitration nor copied her on any of the correspondence

between the NAF and respondent. She continued to receive medical bills, all of which went into collection.

At the June 21, 2007 settlement proceeding in the Capalbos matter, the following exchange occurred between respondent and Pontoriero regarding the PIP arbitration:

> Q. You [sic] claims for health benefits, what we call PIP benefits, that's a first party case.
>
> And I have – you've asked me about that and I've told you that there is a proceeding pending in the [NAF] related to your PIP benefits. I've said that to you, haven't I?
>
> A. Yes.
>
> [Ex.C37,p.14.]

The PIP arbitration had been closed in November 2006, about seven months prior to the date of the above exchange. On further questioning before Judge Chrystal, Pontoriero agreed that respondent had informed her that her claims for income continuation, prescription benefits, and future medical treatment would be resolved in the NAF proceeding, and that the release of the defendants in the Capalbos matter would not affect the PIP proceeding. She understood, however, that there was no guarantee as to how the PIP proceeding would be resolved.

On June 18, 2008, Pontoriero terminated respondent's representation in the PIP matter, because, in her view, he was not "handling" her medical bills, which remained unpaid. On August 24, 2008, another attorney notified the NAF that he represented Pontoriero, requested information about the status of her claim, and learned that the case had been closed. Ultimately, Pontoriero recovered about $1,500 from NJM.

Based on the above facts, the ethics complaint charged respondent with gross neglect; lack of diligence; failure to set forth in writing the basis or rate of his legal fee; and failure to inform Pontoriero that the PIP arbitration against NJM had been dismissed – violations of RPC 1.1(a); RPC 1.3; RPC 1.5(b); and RPC 8.4(c), respectively.

C. PIP Litigation

In February 2008, respondent told Pontoriero that he was taking care of the PIP claim. On April 3, 2008, Pontoriero asked respondent for a copy of the PIP complaint that she believed he had filed, in February 2008, in Essex County. The next day, respondent replied, in a lengthy e-mail, that her PIP case is "in suit." Two days later, Pontoriero e-mailed respondent, asking why she had not received a copy of the filed complaint. As it turned out, the complaint was filed

on April 7, 2008. Despite Pontoriero's requests, respondent did not send a copy of the complaint to her. Two years later, she finally received a copy of it.

As stated previously, on June 18, 2008, Pontoriero terminated respondent's representation in the PIP matter. She also requested the return of her file. On the same date, in response to the termination letter, respondent filed a motion to be relieved as counsel, but he did not return her file.

On June 20, 2008, Pontoriero asked respondent to send her entire file to her home address as soon as possible. On June 23, 2008, she informed respondent that she would neither pay for a copy of her file nor pay him more money, mentioning, among other things, the absence of a signed retainer agreement or a closing statement. Respondent did not tell her when she could pick up the file. On that same date, Pontoriero submitted a letter to the court, requesting assistance in obtaining her file.

On July 19, 2008, the court ordered respondent to deliver to Pontoriero the entire original file no later than July 31, 2008. Pontoriero testified that, thereafter, two or three unsecured boxes were left on her porch without notice. She claimed that no one rang the doorbell, or let her know that the file had been delivered.

In turn, respondent claimed that his office called Pontoriero to tell her that Filipow was bringing the file to her; that when Filipow arrived, he saw Pontoriero inside her home, but she did not answer the doorbell; and that Filipow, therefore, left the boxes on the doorstep, drove to a nearby parking lot, and observed someone open the door and retrieve the boxes.

Based on the above facts, the ethics complaint alleged that respondent misrepresented to Pontoriero the date that the PIP complaint had been filed; failed to comply with her requests for information about the matter; and, on termination of the representation, failed to protect Pontoriero's interests, by leaving her file on her front porch – violations of RPC 1.4(b), RPC 1.16(d), and RPC 8.4(c), respectively.

D. Loan Request

In late August 2007, respondent asked Pontoriero for a $35,000 loan, at a very high interest rate, so that he could pay for his children's school tuition. Pontoriero declined the request, stating that her money was invested and that, in any event, she would not have lent him money under any circumstances.

Based on the above facts, the ethics complaint charged respondent with having attempted to enter into an impermissible loan transaction with Pontoriero, a violation of RPC 8.4(a). On October 5, 2017, on respondent's

motion, the special master dismissed the charged violation of RPC 8.4(a). The OAE did not challenge the special master's determination.

The Special Master's Findings

The special master found that the record lacked clear and convincing evidence that respondent violated RPC 1.5(b) or (c) in the Capalbos matter. On the one hand, respondent testified that he and Pontoriero had entered into a written contingent fee agreement, although he was unable to locate it. On the other hand, despite Pontoriero's testimony that there was no agreement, just before she terminated respondent's representation, she requested a copy of the retainer agreement that she had signed. Thus, the special master considered the evidence to be in equipoise, precluding a finding that respondent had violated RPC 1.5(b) or RPC 1.5(c).

The special master found that respondent violated RPC 8.4(c) when, on June 21, 2007, as the settlement terms were placed on the record in the Capalbos matter, he had misrepresented that the PIP arbitration remained open. In addition, the special master determined that respondent violated R. 1:21-7(g) and RPC 1.5(c) by failing to provide Pontoriero with a signed closing statement following the settlement of the Capalbos matter.

Finally, the special master found that respondent violated RPC 1.5(a) and RPC 8.4(c), because the reconstructed settlement statement, prepared seventeen months after the settlement of the Capalbos matter, contained expenses that were "overstated and thus the fee charged was per se, unreasonable." The special master remarked that the reconstructed settlement statement improperly charged overhead expenses; unsubstantiated payments to various medical providers; commercial printing services that were performed in an unrelated client matter; fees for a transcript that respondent had received free of charge; and satisfaction of an attorney lien, which respondent admittedly should have paid from his fee. He further found that the inaccuracies constituted misrepresentations because they were the "direct result of his faulty and deficient record keeping system."

In respect of the PIP arbitration, the special master found that respondent did not violate RPC 1.1(a) or RPC 1.3 by allowing the NAF arbitration to be dismissed. As to the PIP litigation, the special master found that respondent violated RPC 1.4(b) by failing to comply with Pontoriero's requests for a copy of the filed PIP complaint, in addition to the retainer agreement and the closing statement in the Capalbos matter. He further found that respondent violated RPC 1.16(d) by the manner in which he left Pontoriero's file on her front step.

The special master did not find a violation of RPC 8.4(c). In the special master's view, although respondent did not file the PIP complaint until April 2008, the record lacked clear and convincing evidence that respondent told Pontoriero that he had filed the PIP complaint in February 2008, rather than having told her that he was "taking care of it," as she testified.

As stated previously, the special master dismissed the RPC 8.4(a) charge, finding that RPC 1.8(a) "does not prohibit a lawyer from initiating discussions about potential business transactions with clients." Thus, an "[a]ttempt at an improper business transaction with a client, although fraught, is not a violation of our ethical codes."

Analysis

A. The Capalbos Matter

RPC 1.5(c) requires a contingent fee agreement to (1) be in writing and (2) "state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement . . ." and the expenses that will be deducted from the recovery. Respondent testified that he and Pontoriero had entered into a written contingent fee agreement, but he could not locate it. Pontoriero's testimony that she and respondent had not entered into a fee agreement was undercut by her April 2008

letter to respondent in which she requested a signed copy of the agreement. Thus, we determine to dismiss the RPC 1.5(c) charge, in connection with the absence of a written fee agreement.

We, however, conclude that respondent violated RPC 1.5(c) by failing to provide Pontoriero with a written settlement statement, following the settlement of the Capalbos matter. Under RPC 1.5(c), respondent was required to provide Pontoriero with a written statement reflecting the $160,000 recovery, the remittance to Pontoriero, and the method of its determination. Respondent's unsupported claim that he provided this information to Pontoriero in the form of a handwritten piece of paper is insufficient to satisfy the requirements of the RPC, given his inability to locate and produce the document.

The complaint further alleged that respondent charged an unreasonable fee, a violation of RPC 1.5(a), because he calculated his $65,000 fee based on "fraudulent" costs. To be sure, of the $16,900 in expenses, some were mistakenly itemized, while others were not. The $2,000 for in-house photocopying, postage, phone, and fax represented office overhead, which as the special master noted, is not deductible from a recovery. Estate of Vafiades v. Sheppard Bus Service, 192 N.J. Super. 301, 314 (L.Div.1983). As discussed below, in respect of the fifth count of the complaint, respondent testified that he

did not know that he could not charge overhead until it was pointed out to him. In addition, respondent testified that he had mistakenly deducted the prior attorney's lien from the recovery. In the absence of clear and convincing evidence that respondent intended to mislead Pontoriero by including these improper charges, the RPC 8.4(c) charge cannot stand. See, e.g., In re Uffelman, 200 N.J. 260 (2009) (noting that a misrepresentation is always intentional "and does not occur simply because an attorney is mistaken or his statement is later proved false, due to changed circumstances").

In respect of the payments to various third parties, although respondent could not substantiate payment of the exact figures, he was able to account for a portion of those expenses. As shown below, respondent lacked any semblance of a recordkeeping system, which forced him and Merwin to sift through files to determine costs and other information. Thus, in our view, the record does not clearly and convincingly establish that these expenses were fraudulent, rather than the product of mistakes and a lack of recordkeeping.

It is clear, however, that, at the time respondent calculated the contingent fee, he had not paid $1,000 to Atlantic Spine Specialists, $800 to a medical doctor, or $200 for a transcript. There also was no evidence that he had paid any

funds to Filipow. Thus, respondent could not justify identifying and deducting these "expenses." In this respect, we find that he violated RPC 8.4(c).

We must next decide whether the deduction of the above expenses resulted in respondent's charging Pontoriero an unreasonable fee. Precedent holds that an attorney who takes a contingent fee greater than that to which the attorney is entitled violates RPC 1.5(a). See In re Weston-Rivera, 194 N.J. 511 (2008) (in eighteen cases, the attorney computed the contingent fee based on the gross sum recovered, and deducted charges from her client's share of the proceeds, a violation of RPC 1.5(a)). We, thus, find that respondent violated RPC 1.5(a).

B. PIP Arbitration

The complaint charged that respondent violated RPC 1.1(a) and RPC 1.3 by failing to correct the deficiency in the demand for arbitration, which resulted in the NAF's closing of the case. Respondent testified that he filed a demand for arbitration as a matter of strategy for the purpose of using it as a "pincer" to get NJM's attention and, thus, the NAF's decision to close the case had zero significance to him. Accordingly, the record lacks clear and convincing evidence that the NAF closed the case due to respondent's negligence or lack of diligence.

The ethics complaint also charged respondent with failure to prepare a written fee agreement, a violation of RPC 1.5(b), in respect of his representation

of Pontoriero in the NAF matter. The complaint, however, did not allege any facts in respect of a fee agreement, and no evidence was presented at the ethics hearing in this regard. We, thus, determine to dismiss the RPC 1.5(b) charge.

Finally, we find that respondent violated RPC 8.4(c) when he questioned Pontoriero about the NAF arbitration at the proceeding before Judge Chrystal. He clearly led his client and the court to believe that the NAF matter was active, even though the case had been closed.

C. PIP Litigation

In April 2008, Pontoriero requested that respondent provide her with certain documents, including the request for arbitration filed with the NAF and the complaint filed in the PIP litigation. He did not comply with her request, a violation of RPC 1.4(b).

The record lacks clear and convincing evidence that respondent misrepresented to Pontoriero that he had filed the PIP lawsuit in February 2008, when he did not file it until April. As the special master noted, in February 2008, respondent told Pontoriero that he was "taking care of" the PIP claim, which she interpreted to mean that he was "handling" it. These facts are insufficient to support a finding that respondent misrepresented that he had filed the complaint.

Thereafter, on April 4, 2008, respondent told Pontoriero that the PIP claim "was in suit," even though the complaint was not filed until April 7. Although respondent's statement was not accurate, on April 3, 2008, he had mailed the complaint to the court for filing, which would render respondent's statement less than an intentional misrepresentation. Thus, we dismiss the RPC 8.4(c) charge.

Finally, we dismiss the charged violation of RPC 1.16(d), which requires an attorney, upon termination of representation, to take steps to the extent reasonably practicable to protect the client's interest, such as returning the client's papers. Here, Pontoriero requested, and the court ordered, the return of her file. Respondent complied with the order, and Pontoriero received the boxes containing her client file.

D. Loan Request

We find that, by asking Pontoriero for a loan, respondent did not violate RPC 8.4(a), which prohibits an attorney from attempting to violate the RPCs. The complaint alleged that respondent violated RPC 8.4(a) by asking Pontoriero for a loan. RPC 1.8(a) sets forth a number of requirements that must be met when a lawyer and a client enter into a business transaction, such as a loan. Here, Pontoriero rejected outright respondent's request for a loan. Thus, he did not

attempt to violate RPC 1.8(a) simply by asking Pontoriero whether she would consider a loan. We dismiss the RPC 8.4(a) charge.

To conclude, in the Pontoriero matters, we find clear and convincing evidence that respondent violated RPC 1.4(b); RPC 1.5(a); RPC 1.5(c) (for failure to provide the client with a written settlement statement); and RPC 8.4(c). The record lacks clear and convincing evidence that he violated RPC 1.1(a); RPC 1.3; RPC 1.5(b); RPC 1.5(c) (written contingent fee agreement); RPC 1.16(d); or RPC 8.4(a).

THE A.A. MATTER (XIV-2010-0276E)

The third count of the complaint arises from respondent's representation of grievant A.A. in a domestic violence matter involving her husband, P.A. Notably, Pontoriero referred A.A. to respondent.

On November 30, 2006, A.A. filed a domestic violence complaint against P.A. with the Piscataway Police Department. A temporary restraining order was entered against P.A., who was arrested for simple assault, and a final restraining order hearing was scheduled for December 6, 2006.

A.A. stated that, on Pontoriero's recommendation, she met with respondent on Sunday, December 3, 2006. At A.A.'s request, respondent agreed

to attend the December 6 hearing with her. Although A.A. asked respondent the amount of his fee, he replied that she should not worry about it. Respondent and A.A. never entered into a written fee agreement.

On December 5, 2006, respondent sent an e-mail to A.A. confirming that she had offered to pay a $17,500 non-refundable fee for his representation in the pending domestic violence matter and that a portion of the fee, to be determined, would be applied to his representation in the divorce case. The e-mail further stated that respondent had retained investigators, obtained records from the police department and from her medical doctor, and issued subpoenas. Further, the e-mail provided, in part:

> to be clear i only keep fees a client agrees i earned so i do not expend time disputing fees and costs, a use of time i see as counterproductive to the object of the exercise. to counsel you effectively we need a relationship of reciprocal trust and confidence in an uncertain environment with important and time critical questions. i want you to be pleased and if otherwise i expect you to speak your mind plainly. for both of us i keep in mind the financial aspect is an important component of our relationship but not at the price of integrity. . . .
>
> you acknowledge that as a practice i do not maintain time records of my professional activity. if i have omitted any important term of our understanding the oversight is inadvertent and i invite you to correct me. if i have correctly outlined all important terms of our

> understanding may i please ask that you provide confirmation by return email.
>
> [Ex.C3.]

A.A. did not consider the e-mail to be a fee agreement and did not reply to it. She denied that she had asked respondent for legal services other than to appear at the December 6, 2006 hearing with her; that she had asked respondent to hire investigators or to represent her in a matrimonial action against P.A.; or that respondent had obtained records from the police department or her treating physician. A.A. claimed that she had obtained the police records, and that she had not authorized respondent to contact her doctor.

Respondent told a very different story. He testified that the $17,500 was the estimated fee for representing A.A. up to the entry of a judgment of divorce. He claimed that he met with A.A. for four to five hours on November 25, 2006, which was the Saturday following the incident, and that Filipow accompanied A.A. to the police department to file the complaint. Respondent produced no evidence to document his claim. A.A. denied that respondent had any involvement in her reporting the incident to the police.

Respondent also claimed to have prepared and served subpoenas on P.A. and the officer who took A.A.'s report. Respondent asserted that he had retained private investigators to investigate P.A.'s financial assets. He further claimed

that, on the day of the hearing, Filipow was stationed outside the courtroom to ensure that P.A. did not attack his wife.

Just before the December 6, 2006 hearing commenced, respondent met with P.A., who was unrepresented, outside the courtroom. P.A. agreed to the entry of a final restraining order, as well as the settlement of other issues. Thus, the matter was resolved without testimony or a judicial determination. In a December 9, 2006 e-mail to respondent, A.A. stated that she was "quite pleased" with his representation and that he "certainly came through" for her.

A.A. paid respondent $6,500 for the representation. She and respondent provided different accounts of how they agreed on that amount. A.A. testified that, after the December 6 hearing, she and respondent had another conversation about his attorney fee. He asked A.A. what she thought he should charge her. She was taken aback and said she did not know. According to A.A., respondent suggested an "astronomical number," at which point they began negotiating the fee. She described him as "bullyish and aggressive" in this regard. Eventually, they agreed to $6,500, which she paid on December 16, 2006.

According to respondent, the week after the December 6 hearing, A.A. informed him that she and P.A. were reconciling. Respondent testified that the $17,500 was no longer applicable, as that figure was an estimate for him to

represent her through the judgment of divorce. Respondent told A.A. that, after he determined the amount of the investigators' charges, he would communicate to her the amount of the fee. According to respondent, the charges were either $4,500 or $5,500 and, thus, he told A.A. that $7,500 would be a "fair fee." A.A. asked whether respondent would accept $6,500, and he agreed. Respondent denied that he had ever demanded $17,000 from her.

On December 17, 2006, A.A. sent respondent an e-mail requesting an itemized list of the legal expenses involved in the representation. He ignored the communication, as well as A.A.'s subsequent e-mail, sent three days later. Respondent has never produced an itemized bill.

Based on the above facts, the ethics complaint charged respondent with having violated RPC 1.5(a) and (b).[3]

The Special Master's Findings

The special master found that respondent violated RPC 1.5(b) because there was no written fee agreement. In respect of RPC 1.5(a), the special master recognized that, although respondent sent an e-mail to A.A. quoting a $17,500 non-refundable fee for representing her in the domestic violence and subsequent

[3] On February 4, 2011, pursuant to A.A.'s fee arbitration request, a fee arbitration committee awarded a refund of the entire $6,500, which respondent paid.

divorce action, she determined not to proceed with a divorce. The special master also acknowledged that A.A. paid respondent $6,500 for the domestic violence representation. The special master apparently considered $6,500 unreasonable, finding that respondent's claims about the amount of time he spent on the matter were not credible. For example, respondent could not substantiate his claim to A.A. that investigator charges totaled $4,500 or $5,000. In addition, he told the disciplinary investigator that he had met with A.A. for eight to ten hours, but testified at the disciplinary hearing that they had met for five or six hours

The special master also observed that the representation in the domestic violence matter was limited to four days; that the defendant was unrepresented in the matter; that there was no testimony at the hearing on the final restraining order; and that respondent negotiated a settlement.

Analysis

RPC 1.5(b) requires a lawyer to communicate to the client, in writing, the basis or rate of the fee. Although respondent's communication of the $17,500 fee to A.A. via the December 5, 2006 e-mail constitutes a writing, respondent utterly failed to communicate the "basis or rate" of his fee for his representation of A.A. in the domestic violence matter. The e-mail contains no details of respondent's fee for the contemplated divorce action, and informs A.A. that he

does not maintain time records. In short, the e-mail is entirely unclear in respect of the basis or rate of respondent's fee in either the domestic violence or the divorce matter. Accordingly, we find that respondent violated RPC 1.5(b).

In our view, a $17,500 flat fee for representing A.A. in an uncontested domestic violence matter, which involved little effort on respondent's part, would have been per se unreasonable. Ultimately, however, A.A. paid $6,500 for the representation in the domestic violence matter. Her reconciliation with P.A. rendered the fee for representation in the divorce case moot.

We find that the record lacks clear and convincing evidence that the $6,500 fee was unreasonable. Certainly, the manner by which the fee was determined was entirely unreasonable. Respondent kept no time records and never informed A.A. of an hourly rate for his services. He claimed, without support, that the investigators charged either $4,500 or $5,500 and, based on that, proclaimed that $7,500 seemed "fair." Despite A.A.'s requests, he did not provide her with an itemized billing statement. A.A. was forced to negotiate the fee, after the fact, based on unsubstantiated numbers, which is not reasonable. Yet, these facts still beg the question of whether the fee itself was unreasonable.

RPC 1.5(a) requires consideration of eight enumerated factors to be considered when determining whether a fee is unreasonable. No evidence was

presented regarding these factors. We find that the OAE did not meet its burden to prove that respondent's fee was unreasonable.

To conclude, we find that respondent violated RPC 1.5(b). We dismiss, for lack of clear and convincing evidence, the RPC 1.5(a) charge.

THE MISCELLANEOUS MATTERS

The fifth count of the ethics complaint charged respondent with failing to comply with multiple provisions of the recordkeeping rule (R. 1:21-6), a violation of RPC 1.15(d); failing to maintain professional liability insurance while operating his law practice as a professional corporation, a violation of RPC 5.5(a)(1); forging the endorsement of two checks issued to "J. Bango," a violation of RPC 8.4(b) and (c); and listing fraudulent expenses on the closing statement issued to his client, Toni Lind, a violation of RPC 1.5(a), RPC 1.15(b), and RPC 8.4(c).

A. Recordkeeping Violations

The ethics complaint charged respondent with failing to comply with twelve provisions of R. 1:21-6, which, in turn, constituted violations of RPC 1.15(d). Respondent admitted the charges, which were established by clear and convincing evidence. We highlight the most egregious violations: the failure to

maintain trust and business account receipts and disbursements journals, and the failure to perform attorney trust account three-way bank reconciliations.

OAE random compliance auditor Tiffany Keefer, who was a disciplinary auditor at the time of these events, testified that, during respondent's interview, he claimed a belief that he had complied with all recordkeeping requirements, based on the services of his certified public accountant (CPA). Although the OAE informed respondent that his CPA had only a Quickbooks register and no other records, such as client ledger cards, respondent failed to provide or to attempt to recreate those records. According to the OAE, the Quickbooks register was insufficient to satisfy the requirement of receipts and disbursements journals, because it did not contain sufficient detail, such as client names.

At the ethics hearing, respondent explained that, in 2004, when he opened a solo practice, he hired an accountant and instructed him "to set up whatever we need to do . . . make sure everything is right." Respondent neither performed three-way reconciliations nor instructed his accountant to do so. Indeed, he had never heard of three-way reconciliations. Respondent asserted that he has corrected his recordkeeping practices and complies with all requirements.

B. Failure to Maintain Professional Liability Insurance

Respondent admitted that he had operated his law practice as a limited liability corporation (LLC) without maintaining professional liability insurance, a violation of RPC 5.5(a)(1). He stated that, when the OAE informed him of the violation, he began to operate as a sole proprietor. He was not certain whether he had dissolved the LLC, because his CPA had instructed him to maintain it for tax purposes, but he denied using it in the practice of law.

C. Forged Endorsements on Attorney Business Account Checks

One of the most serious charges against respondent is that he forged two attorney business account checks issued to Joseph Bango – a $500 check issued in September 2005 and a $1,000 check issued in December 2005. Respondent testified that Bango operated a company that provided expert witness services, that he knew Bango well, and that he had given him money on other occasions. He estimated that, over time, he had given Bango between $3,500 and $4,500. Bango repaid none of it, and respondent never asked him to do so.

According to respondent, in September 2005, when Bango asked respondent for money, respondent issued a $500 attorney business account check to "J. Bango," endorsed it, cashed it, put the cash and the check in an envelope, and mailed it to Bango. Respondent explained that he had signed

Bango's name to the check because Bango "was up against it," and respondent, thus, sent him cash. Respondent could not explain why he had not made a notation on the memo line of the check.

Respondent claimed that, in December 2005, a distraught Bango again asked for money; although respondent offered to send a check, Bango replied that he needed cash immediately; and, on respondent's instruction, Bango drove from his home in Connecticut to meet respondent at a restaurant in Montclair. Respondent testified that he had signed Bango's name on the back of the check for audit purposes; regretted that he had not issued the check to himself; and could not explain why he had not made the check payable to cash. According to respondent, he cashed the check at the bank and gave Bango the cash and the check at the restaurant.

In addition, Merwin testified that she knew Bango through his work as an expert witness on some of respondent's cases and was aware that he had financial troubles. She related that, on one occasion, as respondent had directed, she inserted about $500 in cash inside a box of chocolates and sent it to Bango.

In turn, Bango denied having received the September or December 2005 checks, having authorized respondent to sign his name on the checks, and having endorsed the checks. According to Bango, at the time the checks were issued,

his company was not expecting payment from respondent for services performed. Bango further denied ever having borrowed money from respondent and claimed that he had received funds from respondent only for work performed. He testified that, although he was in dire financial straits at the time the checks were issued, he did not ask respondent for cash, respondent did not offer him cash, and respondent did not issue those checks to him. Bango also denied that Merwin had sent him $500 in cash, because he needed money so desperately that he could not wait to negotiate a check. Finally, he denied that, in December 2005, he drove from Connecticut to a Montclair restaurant to pick up $1,000 from respondent.

D. Toni Lind Settlement Statement

The final miscellaneous charge alleged that the settlement statement in a personal injury matter for a client named Toni Lind contained two improper expenses. The first was $250 for copies, postage, and phone, which comprised overhead. Respondent testified that, until this ethics proceeding, he was unaware of the impropriety of charging for overhead expenses.

The second improper charge was a $1,000 expense for private investigation services provided by Crowe & Associates, which was owned by John D. Crowley, a former agent of the Federal Bureau of Investigation and

former municipal police officer. Keefer testified that, when she reviewed respondent's records, she found evidence of a $100 check, rather than a $1,000 check. According to Crowley, he sent respondent an invoice for $100 in the Lind matter, which respondent had paid.

Respondent and Merwin testified that, when Merwin drafted the transmittal letter for the $100 check to Crowe, she mistakenly typed $1,000 instead of $100. Thereafter, when Merwin prepared the settlement statement, she based the $1,000 figure on the transmittal letter, rather than on the check. When the mistake came to respondent's attention, he directed Merwin to send a $1,000 check to Lind to "at least correct, maybe more than correct" the error.

The Special Master's Findings

Based on respondent's admission to the R. 1:21-6 violations, the special master determined that respondent violated the Rule and, thus, RPC 1.15(d). Noting respondent's further admission that he practiced law as a professional corporation without maintaining professional liability insurance, the special master found that respondent violated RPC 5.5(a)(1).

The special master determined that the record lacked clear and convincing evidence that respondent violated either RPC 8.4(b) or (c) by forging the endorsements on the two checks issued to Bango. In this regard, the special

master noted that, although Bango denied that he had endorsed the checks, the evidence was insufficient to establish that respondent had signed Bango's name to either of them. Further, Bango testified that he never received cash from respondent, but Merwin testified to the contrary.

Finally, the special master determined that respondent did not violate RPC 1.5(a), RPC 1.15(b), or RPC 8.4(c) in the Lind matter. Although the settlement statement reflected a $1,000 expense for Crowe & Associates, Crowley testified that the bill was only $100. Thus, the $1,000 expense resulted from a clerical error, which respondent corrected when it was brought to his attention. Respondent also admitted that, due to the error, he had miscalculated his fee in the Lind matter. The special master concluded that respondent improperly listed the $1,000 and $250 in office overhead as expenses, in violation of R. 1:21-7(d), but that the mistake did not rise to the level of an RPC violation.

Analysis

Respondent admitted having violated R. 1:21-6. Moreover, the clear and convincing evidence established that, among many recordkeeping violations, he had failed to maintain attorney trust and business account receipts or disbursements journals and individual ledger cards for each client (R. 1:21-

6(a)(1)(A) and (B)), and he failed to perform monthly three-way reconciliations (R. 1:21-6(c)(1)(H)). He, thus, violated RPC 1.15(d).

RPC 5.5(a)(1) prohibits an attorney from practicing law when doing so violates the regulation of the legal profession. R. 1:21-1A(a)(3) requires a New Jersey attorney who practices law as a professional corporation to maintain professional liability insurance. Respondent admitted having failed to maintain professional liability insurance while he operated his law practice as a professional corporation. He, thus, violated RPC 5.5(a)(1).

Respondent admitted that he had signed Bango's name to the back of the September 2005 and December 2005 checks. However, the complaint fails to identify any criminal statute that he violated in doing so, and the record lacks clear and convincing evidence that he committed a crime. Consequently, we determine to dismiss the RPC 8.4(b) charge.

Still, respondent's actions were fraudulent. The checks were issued to Bango. Respondent signed them, presented them to the bank, and obtained $1,500 in cash. He, thus, violated RPC 8.4(c). Because, however, there is no claim or evidence that respondent issued those checks for a nefarious purpose, we consider the violation de minimis.

In the Lind matter, the record supports a finding that respondent and Merwin made mistakes, but lacks clear and convincing evidence of unethical conduct. Again, due to the lack of any recordkeeping system, the $1,000 expense for Crowe & Associates was the result of Merwin's clerical error, which respondent later corrected. Further, respondent was unaware that he could not charge for overhead expenses, another result of his utter lack of understanding of his recordkeeping obligations. Thus, we dismiss the charged violations of RPC 1.5(a), RPC 1.15(b), and RPC 8.4(c).

THE MARTIN BRENNAN MATTERS (XIV-2012-0662E)

The fourth count of the ethics complaint arises from respondent's representation of former Township of Fairfield (Township) Police Department Sergeant Martin Brennan in multiple, overlapping matters. Respondent represented Brennan in six matters stemming from an October 2006 incident. A seventh matter pre-dated October 2006. According to respondent, all matters eventually led to, and formed the basis for, a federal civil rights action filed in September 2007, which we refer to as Fed II. A summary of each matter follows.

A. Fed I

On March 29, 2004, prior to respondent's involvement in the Brennan matters, Patrick P. Toscano, Jr., Esq., filed a complaint in the United States District Court for the District of New Jersey in behalf of Brennan, Lieutenant Anthony Manna, and Lieutenant Charles Voelker against the Township, its governing body, and Police Chief C. Lynn Centonze (Fed I). According to respondent, the underlying basis of the claim was that, in response to the plaintiffs' exposing municipal fraud, waste, and corruption, the Township retaliated and discriminated against them. In February 2009, Fed I was dismissed as part of a global settlement of all matters that Brennan had filed against the Township and others, as discussed below.

In addition, six matters arose from an incident that took place on October 16, 2006. During a Township council meeting, a member of the public became loud and abusive toward Township Mayor Rocco Palmieri and the council members, causing the mayor to push a panic button. Brennan and another police officer, who were watching the meeting on the television at police headquarters and wondering what the alarm signified, answered the call, after Lieutenant Steven Gutkin, of the Internal Affairs Department, who also was present, stated that the alarm was for them and twice told them to proceed to the meeting. On

their way to the meeting, Brennan refused to answer Gutkin when he asked Brennan whether he had a rapport with the member of the public whose behavior caused the mayor to request police involvement.

On October 20, 2006, Chief Centonze suspended Brennan with pay, as "necessary to maintain the safety, health, or effective direction of public services including the immediate necessity for the welfare of the Fairfield Police Department." The immediate suspension notice did not identify the basis for the suspension.

Chief Centonze assigned Detective Sergeant Louis Cammarata to investigate the matter, with Gutkin's assistance. As part of the investigation, Cammarata sent Brennan "white sheets,"[4] the original of which Brennan was required to complete and return no later than November 17, 2006. Instead, the completed white sheets were faxed to Cammarata.

B. 2006 Conduct Unbecoming Matter

On November 29, 2006, Chief Centonze issued two formal disciplinary charges against respondent arising from the October 16, 2006 incident. Chief Centonze alleged that Brennan delayed in responding to the panic alarm and,

[4] Respondent explained that white sheets, which contained questions an officer was required to answer, replaced "proper investigation," and that although the courts had declared white sheets improper, certain police departments continued to use them.

when he arrived at the meeting, "allow[ed] a disorderly person to continue committing an act of disorderly conduct in his presence without taking action," thus, "exposing the Mayor and Council to possible harm . . .," and "then publicly admonish[ed] the Mayor." The second charge was based on Brennan's "fail[ure] to submit to a confidential official report as ordered by a supervisory officer," that is, the white sheets.

For Brennan's conduct in both matters, Chief Centonze charged him with conduct unbecoming a public employee, failure to perform duties, neglect of duty, insubordination, and violations of Police Department rules and regulations. Initially, the Township sought termination of Brennan's employment, but reduced the maximum penalty to a five-day suspension.

After the 2006 conduct unbecoming charges were instituted, Brennan terminated Toscano's representation and retained respondent. In turn, Toscano terminated his representation of Brennan in Fed I, which respondent also agreed to assume.

On January 15, 2008, following a twelve-day hearing conducted over an eight-month period, the hearing officer, the Honorable Frank M. Donato, Jr., J.S.C. (Ret.), found that Brennan had engaged in conduct unbecoming a public employee, based on his failure to answer Gutkin's question on their way to the

meeting and his conduct at the Township council meeting. Judge Donato recommended a two-day suspension, which Brennan never served.

C. PERC Matters

On March 29, 2007, the West Essex Patrolmen Benevolent Association (PBA) Local #81 filed an unfair practice charge against the Township (CO-2007-276), based on its alleged unilateral determination to close Brennan's disciplinary hearing and to delegate to Judge Donato, rather than someone from the Police Department, authority to impose discipline (PERC I). In 2008, Local #81 grieved Brennan's two-day suspension (AR-2008-633) (PERC II). We will refer to the matters, individually, as the "CO matter" and the "AR matter," and collectively, as the "PERC matters."

In August 2008, respondent assumed the representation of Local #81 in both PERC matters, which, ultimately, were dismissed as part of the global settlement.

D. 2007 Fitness for Duty Matter

At the ethics hearing, Brennan testified that he had failed a fitness for duty examination, which had been conducted by staff at the Institute for Forensic Pathology (IFP). In late 2006, because respondent had anticipated that the Township would call into question Brennan's mental health, respondent referred Brennan to psychiatrist Edward A. Latimer, M.D. for treatment.

On May 7, 2007, Chief Centonze ordered Brennan to identify his treating mental health professional; to authorize the Department to send necessary documentation to the treating professional; and to assure that the treating professional would send bi-weekly progress reports directly to Chief Centonze, beginning May 28, 2007. Brennan failed to meet the deadline.

On August 2, 2007, Dr. Latimer provided Chief Centonze with a letter. Nevertheless, on August 8, 2007, Chief Centonze issued a preliminary notice of disciplinary action, based on Brennan's failure to comply with the May 7, 2007 order. Chief Centonze charged Brennan with insubordination, neglect of duty, conduct unbecoming a police officer, and violations of department rules and regulations.

On November 9, 2007, following a hearing, Lieutenant Voelker, who had become the Officer-in-Charge[5] dismissed the fitness for duty charges, on procedural grounds.

E. <u>Fed II</u>

On September 11, 2007, respondent filed, in the United States District Court for the District of New Jersey, a federal civil rights complaint, in Brennan's behalf, against Mayor Rocco Palmieri, Chief Centonze, the

[5] Eventually, Voelker formally replaced Centonze as chief of police.

Township, and others (Fed II). According to the December 16, 2008 pre-trial order in Fed II, the action alleged a conspiracy among Township officials to retaliate against Brennan for his exercise of his First Amendment right of free speech to expose the Township's official wrongdoing. The retaliation consisted of the various disciplinary charges lodged against Brennan, and the manner in which they were handled, commencing with the October 20, 2016 suspension with pay, among other actions.

On December 19, 2009, Fed II was settled for $179,825, as part of the global settlement.

F. IFP Matter

In December 2008, respondent filed, in the Superior Court of New Jersey, a civil action in Brennan's behalf against the IFP and two of its doctors. According to respondent, the basis of the complaint was that, as part of the conspiracy that was the subject of Fed II, the IFP doctors had "provide[d] bogus psychological opinions when they were not possessed of the minimum competency required by the licensing statute." As part of the global settlement, Brennan agreed to dismiss the complaint against IFP.

THE RPC CHARGES AGAINST RESPONDENT

Before we turn to the ethics charges filed against respondent in each of the Brennan matters, we describe certain unorthodox practices of respondent at issue in the individual matters and in Fed II.

Specifically, regardless of the individual matter, respondent repeatedly testified that he did not "bill by time," but based on "the value of the work . . . necessarily provided on a reasonable basis;" "the standard of work actually reasonably done and the skill needed to do it;" "the value of the services I provided;" or the "reasonable value of the services actually and necessarily provided." He claimed that Brennan was capable of discerning the reasonable value of respondent's services based on "personal observation, his discussion with others, his discussion with [respondent], [and] what various third party regulators and judges told him."

Despite respondent's claim that he did not bill by time, he stated that he "had done multiples of $9,000 worth of work" in respect of the 2006 conduct unbecoming matter, spending forty to fifty hours on the case during hearing weeks and fifteen to twenty hours during non-hearing weeks; that "a very substantial amount of work" had been done in the PERC matters; that, between May and July 2007, he never spent "less than fifteen hours a week and not

uncommon thirty, forty hours a week," collectively, on the Brennan matters; and that the 878.7 hours of attorney time reflected on the draft time log in Fed II, discussed below, represented only a "portion" of the work he had actually performed, as he had spent "several thousand hours, at a minimum."

Indeed, in respect of the "Fairfield project," as he described the cases involving Brennan, respondent testified that he devoted at least twenty hours a week, with many weeks involving seventy to eighty hours. During the ethics hearing, respondent estimated the value of his services at $450,000 to $550,000.

In addition to respondent's unorthodox manner of charging legal fees, his understanding of the term "expense" and his method of identifying an expense were unique. Respondent testified that most of the expert "expenses" were "anticipated" or "estimated." For example, an expense might represent the expert's charge if the expert were called to testify. Yet, respondent testified, it was not his practice to indicate that an identified expense was "anticipated." He considered an expense incurred once the service had been provided.

A. 2006 Conduct Unbecoming Matter

After Brennan retained Toscano to represent him in the 2006 conduct unbecoming matter, Toscano filed a claim with the PBA's legal protection plan (LPP), which capped attorney fees and expenses at $20,000 per claim.

On October 25, 2006, Christopher U. Andrews, Local #81's state delegate, sent a claim form to Toscano, who completed and sent it to Lorenzo Harris at Protection Management Services (PMS), which managed the PBA's LPP claims. On October 26, 2006, Harris confirmed coverage and authorized Toscano to represent Brennan at a $125 hourly rate.

Brennan testified that, on December 14, 2006, after he had decided to replace Toscano with respondent, he met with respondent and Filipow to discuss respondent's fee for the representation. Respondent required $25,000, which Brennan paid.

When respondent took over the 2006 conduct unbecoming matter, he and Brennan had known one another for twenty years. During that time, respondent had represented Brennan in other police-related matters, beginning in approximately 1987, and continuing through approximately 2001. In 2003, Brennan was promoted to sergeant.

At a December 20, 2006 meeting, respondent and Brennan discussed strategy and taking further legal action against the Township.[6] After the meeting, respondent sent a lengthy e-mail to Brennan identifying a number of meetings that had taken place between and among respondent, Brennan, and others during

[6] At times, Brennan and his wife Tia were mentioned together. For the sake of consistency, we will refer only to Brennan, except when necessary for context.

the prior two weeks, and detailing work that respondent had performed. They agreed, as stated in the e-mail, that respondent would continue to represent Brennan in the 2006 conduct unbecoming matter, as well as Fed I, and any cases going forward. Brennan, however, did not consider the e-mail to be constitute a fee agreement.

Respondent's e-mail discussed three options for handling the matters. Brennan chose the third option, which included prosecuting Fed I and required a "large" legal budget and more time to reach a resolution.

The e-mail continued:

> as i said when we met, the only guarantee ever in litigated matters is that a result will occur. what that result will be, when it will occur, and at what precise expense is unknown and anyone who say [sic] anything to the contrary is mistaken. on the facts as i know them or reasonably believe them to exist i am of the opinion the federal case can result in a recovery of money, the basic reasons for which are outlined in my "demand" letter. . . . the benefit is "vindication" and perhaps the recovery of monetary damages but the legal budget in time is more than 6 months and money well more than $25,000. in my professional opinion the "discipline" case must be "defended" with the federal case in mind if that is the option selected. work done "now" will impact the federal case "later".
>
> [Ex.C114.]

Respondent stated that, because Brennan had chosen the third option, he "contemplate[d]" amending the Fed I complaint to include Tia as a plaintiff and the Township mayor, council members, and other officials as defendants, and to plead additional facts to support additional claims.

Brennan and respondent did not enter into a signed fee agreement. Respondent's only mention of a fee in the above e-mail was the reference to "legal budget in time is more than 6 months and money well more than $25,000." Respondent testified, however, that he told Brennan that he charged a fee for "the value of the work that has been . . . necessarily provided on a reasonable basis, between October and . . . December". Respondent acknowledged that there was no "specific and unique" fee agreement in respect of Fed I.

In both March and June 2007, Brennan paid respondent an additional $10,000 toward his representation in the 2006 conduct unbecoming matter. By June 2007, respondent had not provided Brennan with an invoice or any billing information in respect of how he had used the $45,000 that Brennan had paid him to that point. The complaint alleged that respondent charged Brennan an unreasonable fee in the 2006 conduct unbecoming matter and failed to set forth in writing, the basis or rate of his fee, violations of RPC 1.5(a) and (b).

On May 3, 2007, at respondent's request and on Local #81 state delegate Andrews' recommendation, the LPP added respondent to the list of approved attorneys, effective April 3, 2007. Thus, any billings after that date would be covered by the plan. Respondent signed the LPP's attorney acknowledgment of participation, which required him to keep "careful and accurate time records" and to retain receipts for reimbursable expenses. At this point, however, only $9,678.78 of the $20,000 remained available from the $20,000 LPP cap on legal fees, as PMS had paid Toscano $10,321.22 for his representation of Brennan.

The resolution of the 2006 conduct unbecoming matter was a lengthy process. On October 1, 2007, the twelfth and final hearing took place before Judge Donato. On that same date, respondent sent PMS an undated invoice for "Certain (but not all) Professional Services Rendered" between April 1 and September 26, 2007, and requested payment of the remainder of the $20,000 benefit. The fees totaled $15,537.50 (124.3 hours at $125 per hour), $2,125 of which was not eligible for reimbursement because it represented time billed prior to April 4, 2007.

The invoice also listed $9,734.50 in costs, $9,000 of which represented expert testimony. The ethics complaint alleged that these costs were fraudulent because respondent had not paid any money to the five experts. Thus, the OAE

charged respondent with knowingly making a false statement of material fact to third persons, committing a criminal act, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, violations of RPC 4.1(a)(1) and RPC 8.4(b) and (c).

Although respondent listed five experts, only Crowley, who was involved in the Lind matter discussed above, testified as an expert in the 2006 conduct unbecoming matter. Keefer testified that, during the OAE's investigation, she found no evidence of payments to the other four experts. Respondent admitted that all expert expenses identified in the 2006 conduct unbecoming matter were "anticipated," but that none of them had been paid. When asked how PMS was to know that the payments had not been made, respondent answered: "Presumably he asked and presumably we told him." Respondent insisted that the entire invoice was correct, because the expenses were identified in anticipation of a fee affidavit that was yet to be filed in Fed II.

In 2007, Crowley and respondent entered into a $4,000 verbal contract for Crowley's services as an expert in internal police department investigations. At respondent's request, Crowley reviewed documents, video recordings, and statements of other officers; interviewed "numerous people;" had a number of conversations and meetings with Brennan and other Fairfield police officers;

and issued his report. According to Crowley, respondent was satisfied with his report.

In October 2007, Crowley, who had never been qualified as an expert, testified before Judge Donato. Prior to that hearing, respondent spent about two hours preparing Crowley regarding his opinion on whether proper procedures were used in the disciplinary matter.

In approximately November 2007, after Crowley had made multiple requests for payment of his $4,000 bill, respondent told Crowley that the LPP would not pay more than $2,750 for his services and asked him to reduce his charge and submit a bill for that amount. Respondent's statement to Crowley about the LPP's position, however, was not true. The issue of Crowley's bill is discussed in greater detail in the 2007 fitness for duty matter.

On January 28, 2009, the PBA paid respondent $9,678.78, representing the balance of the $20,000 available for his work on the 2006 conduct unbecoming matter. Crowley, who never received any payment for his services, stated that respondent kept putting him off and, eventually, Crowley gave up on the matter. He has not had contact with respondent since 2008.

The formal ethics complaint alleged that respondent had double-billed and overcharged Brennan in the 2006 conduct unbecoming matter, violations of RPC

1.15(b) and RPC 8.4(b) and (c). On October 5, 2017, however, the special master granted respondent's motion to dismiss the ethics charges based on the alleged double-billing, because, given respondent's "unique billing practices," the record lacked clear and convincing evidence that a refund was due to Brennan. The OAE accepted that determination.

B. 2007 Fitness for Duty Matter

On August 23, 2007, respondent requested PMS's approval to retain Crowley and Dr. Latimer as expert witnesses in the 2007 fitness for duty matter. On September 28, 2007, respondent sent PMS a $12,044.20 invoice for "Certain (but not all) Professional Services Rendered" between August 17, 2007 and September 28, 2007. The invoice included $6,475 in fees (51.8 hours at $125 per hour) and $5,250 in costs for Crowley's and Latimer's expert testimony. Yet, as of September 28, 2007, PMS had not approved respondent's request to retain Crowley and Dr. Latimer, and the hearing had not yet taken place. Indeed, PMS did not confirm LPP coverage for the claim until October 6, 2007, and authorized respondent to retain only Crowley.

Respondent testified that, when he included the expenses for Crowley and Dr. Latimer on the September 2007 invoice, he did not know whether they had been paid. As stated previously, he claimed that the purpose in listing the

"expenses" was to provide disclosure in anticipation of the fee to be obtained in Fed II. He testified that, ultimately, Crowley was not paid $2,750.

Crowley testified that respondent did not retain him for the 2007 fitness for duty matter. He did not testify at the October 2007 hearing. As stated above, on November 9, 2007, Voelker dismissed the charges against Brennan in the 2007 fitness for duty matter.

On November 20, 2007, respondent sent an updated invoice to PMS, which covered his services from August 17 through November 16, 2017, and totaled $14,217.95, including $2,750 for Crowley's expert testimony, even though Crowley had not been retained in the 2007 fitness for duty matter. The total also included a five-hour conference with Crowley, on September 27, 2007, which had taken place in respect of the 2006 conduct unbecoming matter.

On November 26, 2007, Harris requested a copy of Crowley's $2,750 bill, stating that payment of respondent's invoice could not be processed until PMS had received it. On December 3, 2007, respondent sent the $2,750 invoice that Crowley had prepared, at respondent's direction, in respect of the 2006 conduct unbecoming matter. On January 7, 2008, the PBA paid respondent $13,787.95, after adjusting the hours billed from 90.75 to 85.75. Thus, the payment included

the $2,750 for Crowley. Respondent, however, did not disburse $2,750 to Crowley.

Based on the above facts, the OAE charged respondent with knowingly making a false statement of material fact to third persons; committing a criminal act; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, violations of RPC 4.1(a)(1) and RPC 8.4(b) and (c), respectively.

C. Fed I

The OAE alleged that respondent charged an unreasonable fee (RPC 1.5(a)); failed to communicate to Brennan, in writing, the basis or rate of his fee (RPC 1.5(b)); and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)). In respect of the first two charges, we incorporate by reference the facts surrounding Brennan's retention of respondent in the 2006 conduct unbecoming matter, as Brennan hired him to represent him in that matter, as well as Fed I.

The RPC 8.4(c) charge is based on respondent's failure to file an amended complaint, as he had represented he would do in his December 20, 2006 e-mail to Brennan, and on respondent's failure to inform Brennan of the eventual dismissal of the Fed I complaint, as detailed below.

On April 8, 2008, the defendants filed a motion for summary judgment on Brennan's claims, followed by motions against Lieutenants Manna and Voelker. The defendants also filed motions for Rule 11 sanctions against the plaintiffs. Subsequently, Manna and Voelker entered into a settlement with the defendants. As a result, on December 3, 2008, the Honorable William J. Martini, U.S.D.J., dismissed their claims. On December 5, 2008, Judge Martini set a peremptory trial date of January 5, 2009 for Brennan's claims.

At a meeting to discuss the trial, respondent told Brennan that they were "going to be busy over the next couple weeks or few weeks," preparing for the Fed I trial, and asked Brennan for $15,000, which he paid that month. Yet, Brennan testified that they did not prepare for the trial and that respondent did not tell Brennan what he was doing to prepare for the trial.

In a December 15, 2008 e-mail, respondent confirmed receipt of the $15,000 "on account of fees and costs for the work I've done on your behalf" and stated that, based on his records, Brennan had paid him $90,000 to date. Thus, respondent testified, the use of the $15,000 was not limited to trial preparation for Fed I. Rather, the $15,000 was for "all work" that he had done.

On December 19, 2008, Judge Martini granted the defendants' motion for summary judgment on Brennan's claims and dismissed his complaint. In his

letter decision, Judge Martini remarked that respondent should have filed his own reply to the motion for summary judgment. The judge denied the defendants' motions for sanctions and marked the case closed.

According to Brennan, he learned of the dismissal from "a guy at work" and called respondent, who then confirmed the fact. Respondent, however, claimed that he informed Brennan within an hour of learning of the dismissal.

D. PERC Matters

Local #81 state delegate Andrews testified that, on August 7, 2008, he learned that respondent would assume Brennan's representation in the PERC CO matter, contesting the hearing procedure. Respondent was approved at a $150 hourly rate for services rendered in both the CO and AR matters from inception to conclusion.

On October 1, 2008, respondent submitted to Andrews an invoice in each matter for "Certain (but not all) Professional Services Rendered" from June 1, 2008 through September 30, 2008. He sought $7,500 for the CO matter, and $4,500 for the AR matter. Neither bill contained an itemization of time or expenses. Thus, Andrews testified, it was impossible to ascertain the amount of time that respondent had spent working on the tasks identified.

On October 8, 2008, at Andrews' request, respondent submitted revised invoices, which identified tasks per date, but provided neither time detail nor itemized expenses. In addition, each bill now reflected a $12,500 balance. On November 16, 2008, Local #81 paid respondent $12,000, representing the total charge for the original invoices that Andrews had directed him to revise. The union paid respondent nothing toward the revised invoices.

On December 4, 2008, respondent submitted a $12,500 invoice in the CO matter for "Certain (but not all) Professional Services Rendered" from October 1, 2008 through December 4, 2008. Tasks identified in the invoice referred to the AR matter, however. Once again, because the invoice contained only a broad description of services, with no detail regarding dates, time, or expenses, Andrews told respondent to submit a revised bill.

On January 27, 2009, respondent submitted a revised invoice for the AR matter, which identified tasks per date and provided time detail, but did not itemize expenses. The invoice reflected $12,500 due for 33.8 hours of work. Andrews testified that he reviewed the bill with Local #81 President Brian Joy. They questioned the amount of the invoice, given the number of hours billed.

On January 27, 2009, Brennan sent an e-mail to Andrews and Joy, stating that respondent had done "a tremendous amount of work" and "gets the job

done." On February 4, 2009, Andrews sent an e-mail to respondent, observing that the $12,500 for 33.8 hours of work amounted to $355 per hour, whereas the agreed-upon rate was "in the vicinity of $150 – 175 per hour." Thus, at $175 per hour, the charge for 33.8 hours would be $5,915, which is the amount the PBA paid him. In total, the PBA paid respondent $17,915 for his work in behalf of Brennan on the PERC matters.

Andrews testified that, "upon getting money back," Brennan was required to reimburse the PBA. On Brennan's request, the PBA waived its claim to the monies. On June 30, 2009, respondent was removed from the LPP's list of approved attorneys.

Based on the above facts, the OAE charged respondent with having violated RPC 4.1(a)(1), RPC 8.1(a), and RPC 8.4(c).

E. Fed II

The complaint charged respondent with having violated RPC 1.5(c) and RPC 5.5(a)(2) (assisting another in the unauthorized practice of law), as well as RPC 1.5(a), RPC 4.1(a)(1) and RPC 8.4(b) and (c), based on his billing practices and various misrepresentations allegedly made to Brennan.

In September 2007, Brennan retained respondent to file Fed II, a federal civil rights action against the Township and others. On September 6, 2007,

respondent sent a letter to the Brennans generally outlining his policy of not maintaining time records, and requesting a $30,000 fee to be applied to his "modified contingent fee." Although respondent represented in the letter that he would send the Brennans a written retainer agreement, he failed to do so.

The Brennans signed the letter upon respondent's assurances that the fees they paid would be recovered in Fed II. Brennan testified that respondent did not explain the modified fee agreement, and that the Brennans did not expect to pay fees beyond the $30,000 they had paid for Fed II. Respondent admitted that he failed to provide a written fee agreement.

On January 13, 2009, Brennan paid respondent another $10,000 after he said that he required more money to work on Fed II.

On January 22, 2009, Eric L. Harrison, Esq., counsel for the Township, filed a motion for summary judgment in behalf of the Township, Palmieri, and Centonze. On January 28, 2009, Harrison informed respondent that the Township had authorized him to attempt a global resolution by paying Brennan's legal expenses. Harrison, therefore, asked respondent for a copy of his fee agreements with Brennan, itemized billing statements, and an accounting of all fees and costs paid to date, by or on behalf of Brennan.

Respondent directed Brennan to prepare a list of expenses and potential earnings that he would have received during his period of suspension. On January 29, 2009, Tia informed respondent, via e-mail, that Brennan had expended $158,828.54, including $100,000 in attorney fees and $663.71 for photocopies at Staples.

By letter dated February 3, 2009, respondent sent to Harrison a "draft time log of certain but not all activity and expenses." Respondent stated that the draft time log did not include the December 2 PERC hearing or the January 26 telephone conference with the Honorable Patty Shwartz, U.S.M.J., the magistrate judge assigned to Fed II. The letter continued:

> [a]s you can also see, it does not include the fees and expenses in [Fed I], IFP or the two PERC arbitrations. The PBA lien for the two disciplinary matters and the related PERC matters is $53,000, including $12,000, approximately, paid to Mr. Toscano for fees and expenses in October-December 2006.
>
> Mr. and Mrs. Brennan have personally paid $100,000, and the PBA (Legal Protection Plan and Local 81), have (or will shortly) paid $53,000. The interest expense paid by the Brennans to date is $6,811.79. It does not include the $5,000 anticipated negative tax impact created by the early withdrawal. Mr. and Mrs. Brennan have miscellaneous expenses of $635. As defendants know from discovery proceedings, Mr. Brennan has a lost wage claim of $45,000.
>
> [Ex.C212.]

The "partial itemization" of the Brennans' expenses totaled $385,466.79, including $333,000 in legal fees. As for the draft time log, from October 30, 2006 to January 21, 2009, respondent's fees, 878.7 hours at $275 per hour, amounted to $241,642.50, plus expenses of $35,574, for a total of $277,216.50.

Respondent testified that the point of the draft log was to offer "just a partial disclosure of the activity that the Brennans were obliged to go through as a result of the deprivation of their constitutionally protected rights through . . . improper municipal activity." Respondent stated: "I don't know how many more times I could have said [of the draft log], it's not evidential, it is a settlement negotiation, it's a draft." He purposely kept the draft log "non-specific as to many things, to prevent any effort to claim that it could be used to cross-examine Mr. Brennan."

On February 5, 2009, Harrison offered a $179,825 lump sum payment, comprising $131,805 in legal fees (878.7 hours at $150); $35,574 in out of pocket expenses; and $12,446 in Brennan expenses. From the $179,825, Brennan was to reimburse the PBA "whatever portion of the $53,000 in legal fees it had previously made."

At a February 5, 2009 meeting, respondent handwrote a letter to Brennan, which respondent described as an agreement between them regarding the global

settlement. The letter provided that Brennan would receive $100,000 and that $79,825 would be used to pay fees, expenses, and liens. Brennan understood that all other fees associated with the case, including the $14,000 PBA lien, would be paid. Later, Brennan and respondent agreed that, if the PBA reduced its lien to $7,000, Brennan would receive $110,000. On February 6, 2009, Brennan instructed respondent to accept the offer, and, that evening, the parties reached a settlement in Fed II.

On February 9, 2009, respondent and the Brennans met again to discuss the distribution of the settlement proceeds. In an e-mail of that date, respondent confirmed their latest understanding:

> the LLP . . . indicated (but did not guarantee) it would accept $7,000 in satisfaction of its lien. i have not spoken to Local 81 but will in advance of the proceeding. its lien is $18,000 (approximately). we agreed from the $59,825 difference between the $120,000 guaranteed payment and the $179,825 settlement figure the LLP lien, the Local 81 lien (if any) and my legal fees and expenses will be paid, and that such payment will be in full and final satisfaction of those obligations. The Toscano bill is not my responsibility.
>
> [Ex.C235;3T194.]

Brennan agreed, stating that he would be "guaranteed $120,000 from the settlement," and "[a]t the end we are square." Despite the "square" comment, on

cross-examination, Brennan testified that he "was always under the impression that [he] was going to be responsible for those three, Toscano, and PBA and LPP." He stated that he and respondent had subsequent conversations about the liens.

On February 11, 2009, Magistrate Judge Shwartz entered an order scheduling a February 13, 2009 proceeding for the purpose of the parties' placing the terms of settlement on the record. At some point between the February 9 agreement that respondent and Brennan reached and the February 13 proceeding, the relationship between Brennan and respondent soured.

Brennan, who was confused about the division of funds, retained a friend, Carl Mazzie, Esq., to represent him in respect of the settlement distribution. In a February 12, 2009 letter, Mazzie informed respondent that Brennan had consulted him regarding the settlement; summarized the settlement terms, which differed from those contained in the February 9 agreement; and stated that he would be present with Brennan at the February 13 proceeding. The letter did not mention the payment of respondent's fee or certain expenses.

According to Brennan and Mazzie, prior to the February 13, 2009 hearing before Judge Shwartz, respondent stated that he did not want additional fees from the Brennans. Mazzie, thus, understood that respondent would not seek any

fees from the $179,825 settlement. Respondent denied having told Mazzie that he did not want a fee.

At the February 13, 2009 proceeding before Judge Shwartz, respondent placed the settlement terms on the record: the Township would pay Brennan $179,825; Brennan would dismiss "any and all claims" against all defendants, including the PERC matters, Fed I, and the IFP case; and Brennan would serve the two-day suspension.

On February 27, 2009, respondent withdrew "[a]ny and every offer . . . to settle or compromise attorney's fees and expenses owed by the Brennan's [sic] or on their behalf in the matters handled for them." On March 9, 2009, respondent sent Harrison a notice of lien for attorney fees and expenses incurred "for [or on behalf of]" the Brennans. Consequently, on June 1, 2011, the settlement funds were deposited in the Martin Brennan Trust Account, as to which Mazzie and Scott Harty, Esq. served as trustees.

On July 21, 2010, respondent sued the Brennans in state court for payment of his fee. During a June 28, 2011 mediation session, the parties reached a settlement whereby the Brennans would receive $135,000 and respondent would receive $44,825, which was $15,000 less than the amount he was to receive

under the original agreement. On July 28, 2011, the funds were disbursed in accordance with the settlement.

During the OAE's investigation, Keefer discovered inaccuracies in the February 3, 2009 draft time log, which identified $35,574 in expenses. Her investigation revealed that respondent was unable to document some of the expenses. For example, respondent listed $4,500 for expert testimony. However, according to Keefer, the record lacked evidence that experts were used in Fed II and the file contained no invoices. Respondent claimed that the figures on the draft time log were estimates. In respect of a $5,774 charge for computer research, respondent had used the services of John Prince, whom he identified as an attorney and either a current or former law professor at a Philadelphia school. Keefer determined that Prince was not a licensed New Jersey attorney; rather, he was disbarred by consent in Pennsylvania, in 2003.

Based on Keefer's testimony and her review of respondent's records, of the $35,574 in expenses, respondent actually had paid only $20,736.99. Thus, he inflated the charges by $14,837.01.

To prepare the draft time log, Merwin, acting under respondent's direction, reviewed the files, listed some expenses, and sent the document to the Brennans, who added other expenses. In respect of the allegedly fraudulent

expenses listed on the draft log, respondent asserted, "[l]ook, I never submitted anything that was false to anybody ever in my life." He added, "I don't know how many more times I could have said [of the draft log], it's not evidential, it is a settlement negotiation, it's a draft."

Mitigation

Three witnesses offered testimony in respect of respondent's character. Merwin testified that, in addition to working for respondent, she maintained a friendship with him. She described respondent as "a great man" who does "a lot of great things for a lot of people, family, friends, clients, strangers." He never puts himself first.

Harty, who had served about eight years on district ethics committees in Camden and Gloucester counties, testified that he had known respondent for about twenty years. Over the previous five to seven years, they had become friendly. Harty expressed the opinion that respondent was "extremely thorough" in keeping his clients informed and "does a much better job than a lot of lawyers . . . in terms of giving his clients monthly updates, communicating in detail with them."

Donald S. DeDio, Esq., counsel for NJM in the Pontoriero matter, testified that he had known respondent for more than twenty years. In DeDio's opinion, respondent is "a very competent attorney" and a trustworthy person.

The Special Master's Findings

In respect of Fed I, the special master found that respondent violated RPC 1.5(a), because he charged Brennan $15,000 to prepare for a trial that did not take place. The special master did not find clear and convincing evidence that respondent violated RPC 1.5(b), however, because, by late 2008/early 2009, respondent had been representing Brennan in the 2006 and 2007 disciplinary matters and the PERC matters. Finally, the special master did not find that respondent violated RPC 8.4(c) by failing to amend the complaint in Fed I, as he had contemplated.

As to Fed II, the special master considered the unreasonable fee charge within the context of the global settlement, which encompassed all matters in which respondent represented Brennan, from approximately November 2006 through February 2009. Respondent received $186,206.73 for his services in all matters, including $41,000 that the LPP and the PBA paid, and $44,000 received in the settlement. Although the special master criticized respondent's modified contingent fee agreement in Fed II, as well as his failure to keep appropriate

records, the special master did not find the fee unreasonable, given the length of the representation, including the numerous hearings, and the $85,000 in third-party payments.

In respect of the 2006 conduct unbecoming matter, the special master found that respondent violated RPC 1.5(b), because he did not enter into a written fee agreement with Brennan. Although the special master acknowledged that respondent had represented Brennan in three prior legal matters, at the time, respondent was employed by the law firm of Durkin & Durkin. Further, Brennan testified that other attorneys from the firm had appeared with him in court. In the special master's view, Durkin & Durkin had represented Brennan in the previous matters, whereas respondent, as a sole practitioner, represented Brennan in the matters at issue in this ethics case. Thus, respondent was required to enter into a written fee agreement with Brennan in respect of the first disciplinary charge matter.

The special master observed that, in connection with respondent's alleged fraudulent itemization of expert costs of $9,000, respondent had not maintained sufficient records to document his payments to vendors. Specifically, the OAE found no record of a $4,500 payment to Crowley, who testified that he had received none, a fact which respondent eventually admitted. In respect of the

remaining charges, no payments were made, no reports were produced or located, and none of the experts ever testified. The special master concluded that, although respondent violated RPC 4.1(a)(1) and RPC 8.4(c) by misrepresenting the fees paid to the experts, he did not commit a crime and, thus, did not violate RPC 8.4(b). For the same reasons, the special master made the same findings in respect of the 2007 fitness for duty matter.

The special master found no support in the record for the charged violations of RPC 4.1(a)(1), RPC 8.1(a), and RPC 8.4(c) in respect of the PERC matters. According to the special master, there was no connection between respondent's alleged misrepresentations and the OAE's investigation. He, thus, rejected the RPC 8.1(a) charge. Although the special master acknowledged the various issues with respondent's invoices, he found no clear and convincing evidence that respondent violated RPC 4.1(a)(1) or RPC 8.4(c).

The special master determined that, in Fed II, respondent violated RPC 1.5(c), because he did not provide Brennan with a contingent fee agreement. He also violated RPC 1.5(c) by failing to provide Brennan with a settlement statement at any point, despite the global settlement.

The special master further found that respondent violated RPC 8.4(c), but not RPC 8.4(b), by submitting the draft time log, which contained expenses that could not be verified.

Finally, the special master determined that the record lacked clear and convincing evidence that respondent had assisted Prince in the unauthorized practice of law because respondent did not know that Prince had been disbarred in Pennsylvania.

The special master recommended a one-year suspension, plus completion of an ethics course and a law office management course as a condition precedent to reinstatement.

Analysis

A. 2006 Conduct Unbecoming Matter

We find that respondent violated RPC 1.5(b) because he failed to communicate to Brennan, in writing, the basis or rate of his fee when he agreed to represent him in the 2006 conduct unbecoming matter. Respondent's prior representations of Brennan do not qualify as regular representations within the meaning of the Rule. As the special master found, those representations were carried out, between the late 1980s and 2000, under the umbrella of the Durkin & Durkin firm. Respondent produced no evidence that he had regularly

represented Brennan after he opened his solo practice in 2004. Thus, under RPC 1.5(b), respondent was required to communicate his fee to Brennan, in writing, in respect of the 2006 matter.

Respondent's only reference to anything close to a fee arrangement was the December 20, 2006 e-mail that he sent to the Brennans, following the initial meeting regarding his representation in the 2006 conduct unbecoming and Fed I matters. In that e-mail, respondent stated that the "legal budget" would be "well more than $25,000." His testimony did not clarify the fee issue. In respect of the first $25,000 that he collected from Brennan, respondent testified that he told Brennan that the fee represented "the value of the work that has been . . . necessarily provided on a reasonable basis, between October and . . . December." Simply put, because the above statements do not detail the basis or rate of respondent's fee, we find that he violated RPC 1.5(b).

Brennan paid respondent $45,000 to defend him in the 2006 conduct unbecoming and Fed I matters. In addition, the LPP paid respondent $9,678.78 in the 2006 conduct unbecoming matter, for a total of $54,678.78. As we stated previously, to determine whether a lawyer has charged an unreasonable fee, RPC 1.5(a) requires the consideration of eight factors. Yet, the OAE offered no evidence in respect of any of them. Thus, it is impossible for us to determine

whether the fee actually received by respondent in respect of the 2006 conduct unbecoming matter was unreasonable. This is especially so, given that twelve hearing dates were conducted in the 2006 matter. Therefore, we dismiss the RPC 1.5(a) charge.

In respect of the itemization of expert costs on the October 1, 2007 invoice, which could not be substantiated, the complaint charged respondent with having violated RPC 4.1(a)(1) (knowingly making a false statement of material fact to a third party), RPC 8.4(b) (commission of a crime), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent testified that the expenses listed on the invoice for all experts, including Crowley, were identified in "anticipation" of being charged and that none of them had been paid. When he was asked how PMS was to know that the payments had not been made, respondent retorted that, presumably, Harris had asked and, presumably, "we" told him. In our view, respondent's claim that he had incurred expenses, knowing that he had not, was knowingly false and intentionally made for the purpose of receiving payment from the LPP. By including those expenses on the October 1, 2007 invoice, he violated RPC 4.1(a)(1) and RPC 8.4(c). The record, however, contains insufficient evidence

that respondent's conduct constituted a crime (RPC 8.4(b)), as the OAE did not identify a criminal statute against which we may evaluate his conduct.

The OAE did not challenge the special master's finding that, due to respondent's "unique billing practices," he did not violate RPC 1.15(b) and RPC 8.4(b) and (c). We accept the special master's finding because respondent joined all individual matters in Fed II and, thus, the question arises whether respondent's total fee was unreasonable, given the total amount of work he performed for Brennan. This issue is discussed in further detail under the analysis of the Fed II matter.

To conclude, in the 2006 conduct unbecoming matter, we find that respondent violated only RPC 1.5(b), RPC 4.1(a)(1), and RPC 8.4(c). We dismiss the additional RPC 1.5(a), RPC 1.15(b), and RPC 8.4(b) and (c) charges.

B. 2007 Fitness for Duty Matter

The complaint charged respondent with having violated RPC 4.1(a)(1) and RPC 8.4(b) and (c), by submitting the November 20, 2007 bill, which included a five-hour conference with Crowley in the 2006 conduct unbecoming matter and a $2,750 expert expense for Crowley. The $10,718.75 payment from PMS covered the $2,750 Crowley expense, which was not incurred in this matter, but rather the 2006 matter, and as to which respondent had paid Crowley nothing.

We, thus, find that respondent violated RPC 4.1(a)(1) and RPC 8.4(c) by including the Crowley expense.

The record, however, contains insufficient evidence that respondent's conduct constituted a crime, because the OAE did not identify a criminal statute against which we may evaluate his conduct. We, therefore, dismiss the alleged violation of RPC 8.4(b).

C. Fed I

Brennan retained respondent to represent him in the 2006 conduct unbecoming matter and Fed I at the same time, in December 2006. As stated above, respondent did not meet the writing requirement of RPC 1.5(b) at that time and, therefore, we find that he violated the Rule in Fed I as well.

The special master found that respondent violated RPC 1.5(a) because, although he had requested, and Brennan paid, $15,000 for trial preparation in Fed I, which had a peremptory trial date of January 5, 2009, respondent took no action to prepare for the trial. Meanwhile, on December 19, 2008, the court dismissed Fed I. According to the special master, the $15,000 that Brennan paid for preparation of a trial that did not occur was an unreasonable fee.

Respondent denied that the $15,000 was for trial preparation. Indeed, his December 15, 2008 e-mail stated that the money was "on account of fees and

costs for the work i've done on your behalf." In our view, in light of the divergence in proofs, the record lacks clear and convincing evidence that the $15,000 fee was for trial preparation, rather than for prior legal services performed. Thus, we dismiss the RPC 1.5(a) and RPC 8.4(c) charges.

Further, the complaint charged respondent with having violated RPC 8.4(c) because he failed to follow through on his representation that he would amend the complaint in Fed I. However, an attorney's failure to follow through on a promise to take a certain action does not render the representation false, because the attorney's representation might have been true when the offer was made. See, e.g., In re Bhalla, 233 N.J. 464 (2018) and In re Carlin, 208 N.J. 592 (2012). The record here contains no evidence that respondent's statement was other than aspirational.

Finally, the complaint alleged that respondent violated RPC 8.4(c) by failing to inform Brennan that the Fed I complaint had been dismissed. Respondent testified that he informed Brennan of the Fed I dismissal within an hour of learning of that event. Thus, the charge cannot be sustained.

To conclude, we find that respondent violated RPC 1.5(b). We determine to dismiss the RPC 1.5(a) and RPC 8.4(c) charges.

D. PERC Claims

We agree with the special master's determination that the record lacked clear and convincing evidence that respondent violated RPC 4.1(a)(1), RPC 8.1(a), or RPC 8.4(c) in respect of the bills submitted in the two PERC matters.

First, RPC 8.1(a) prohibits an attorney from knowingly making a false statement of material fact in connection with a disciplinary matter. Nothing in the record supports the finding that respondent made a false statement about the PERC invoices during the OAE's investigation.

Second, although respondent's replacement of the $7,500 and $4,500 invoices with invoices that charged $12,500 was odd and unexplained, and none of the bills complied with the union's requirements for invoices, there is insufficient evidence for us to determine that the bills were fraudulent.

E. Fed II

Respondent represented Brennan in Fed II, purportedly on a modified contingent fee basis. He did not provide Brennan with a written contingent fee agreement and, thus, violated RPC 1.5(c). He also violated RPC 1.5(c) by failing to provide Brennan with a signed settlement statement, as R. 1:21-7(g) requires.

Based on the record, it is impossible for us to determine whether respondent's fee in Fed II was unreasonable. For that representation, respondent

received $40,000 from Brennan, plus $44,825 from the global settlement. The Fed II litigation was hotly contested; respondent claimed that the case was an amalgamation of all six matters arising from the October 2006 incident; and the record contains no proof regarding the eight factors under RPC 1.5(a). Therefore, the record does not support a finding that respondent's $84,825 fee for representing Brennan in Fed II was unreasonable. For the same reason, it is impossible for us to determine whether respondent's receipt of $186,206.73, from all sources, was unreasonable for his representation of Brennan in all seven matters. We, thus, dismiss the RPC 1.5(a) charge.

In Fed II, respondent violated RPC 8.4(c) by submitting the draft time log with expenses that were not incurred, but, rather, were "anticipated," at best. Respondent's assertion that the log was not complete and that it was offered as some kind of non-evidential inkling of what was at stake does not save him from the consequences of the clearly intentional act of misleading the Township in an effort to secure a favorable settlement for Brennan.

We determine to dismiss the RPC 5.5(a)(2) charge because the record contains no evidence that respondent knew or should have known that Prince was not a member of the New Jersey Bar.

Finally, we find that the record was insufficient to establish that respondent had submitted false billing entries.

Accordingly, we find that the clear and convincing evidence supports the two separate violations of RPC 1.5(c) and RPC 8.4(c). The record lacks clear and convincing evidence that respondent violated RPC 1.5(a), RPC 5.5(a)(2), or RPC 8.4(b).

In sum, we have made the following findings in the matters before us. In the Pontoriero matters, we find that respondent violated RPC 1.4(b), 1.5(a) and (c), and RPC 8.4(c). We dismiss the additional RPC 1.1(a); RPC 1.3; RPC 1.5(b) and (c); RPC 1.16(d); and RPC 8.4(a) and (c) charges.

In the A.A. matter, we find that respondent violated RPC 1.5(b). We dismiss the RPC 1.5(a) charges.

In the Miscellaneous matters, we find that respondent violated RPC 1.15(d), RPC 5.5(a)(1), and RPC 8.4(c). We dismiss the RPC 1.5(a), RPC 1.15(b), and RPC 8.4(b) charges.

In the Brennan matters, we find that respondent violated RPC 1.5(b) (two instances) and (c) (two instances), RPC 4.1(a)(1) (two instances), and RPC 8.4(c) (three instances). We dismiss the additional RPC 1.5(a); RPC 1.15(b);

RPC 4.1(a)(1); RPC 5.5(a)(2); RPC 8.1(a) and (b); and RPC 8.4(b) and (c) charges.

The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

Ordinarily, a reprimand is imposed on an attorney who knowingly makes a false statement of material fact to a client or a third person. See, e.g., In re Kasdan, 115 N.J. 472, 488 (1989) (client) and In re Lowenstein, 190 N.J. 58 (2007) (third party insurance company).

Respondent's other infractions, individually, typically result in the imposition of an admonition. See, e.g., In the Matter of Raymond L. Hamlin, DRB 09-051 (June 11, 2009) (unreasonable fee; attorney also failed to set forth in writing the terms of his fee); In the Matter of Genesis A. Peduto, DRB 19-369 (February 24, 2020) (attorney failed to set forth in writing the basis or rate of her legal fee in an immigration matter, a violation of RPC 1.5(b)); In the Matter of Kyle G. Schwartz, DRB 19-222 (September 20, 2019) (attorney failed to communicate with the executrix in an estate matter, a violation of RPC 1.4(b); he also lacked diligence in handling the matter, a violation of RPC 1.3); and In re Lindner, 239 N.J. 528 (2019) (attorney practiced law as a limited liability

corporation without maintaining professional liability insurance, a violation of RPC 5.5(a)(1)).

An admonition also is the usual form of discipline for recordkeeping violations. See, e.g., In the Matter of Andrew M. Newman, DRB 18-153 (July 23, 2018) (attorney failed to maintain trust or business account cash receipts and disbursements journals, proper monthly trust account three-way reconciliations, and proper trust and business account check images; in mitigation, we considered the attorney's unblemished disciplinary record in his thirty-three years at the bar, and his admission of wrongdoing) and In the Matter of Eric Salzman, DRB 15-064 (May 27, 2015) (attorney did not maintain trust or business receipts or disbursements journals, or client ledger cards; did not properly designate the trust account; made disbursements from the trust account against uncollected funds; withdrew cash from the trust account; and did not maintain a business account; in mitigation, we considered the attorney's unblemished disciplinary history and admission of wrongdoing).

This, however, is not an ordinary RPC 1.15(d) case, as respondent's recordkeeping infractions were hardly routine. Respondent did not simply violate multiple provisions of R. 1:21-6, he had no recordkeeping system whatsoever, maintaining only a running balance of his attorney trust and

business accounts in the form of a Quickbooks check register, which contained no information identifying discrete client matters.

Respondent's testimony in the various matters clearly established that he failed to keep track of expenses, choosing instead to rely on estimates, which consisted of ranges. Bluntly stated, he had no clue and made no effort toward transparency in the basis or rate of his legal fee. The lack of a recordkeeping system, or even basic records, resulted in the absence of any tracking mechanism for expenses incurred and paid in his client matters, leaving Merwin to sift through individual files in order to determine those numbers when drafting settlement statements, such as those in the Pontoriero and Lind matters, or in drafting invoices, such as those submitted in the various Brennan matters.

The clash of respondent's failure to track his time and to comply with the requirements of R. 1:21-6 resulted in exactly the outcome that he told A.A. he had hoped to prevent, that is, the expenditure of time "disputing fees and costs," which respondent viewed as a "counterproductive" use of his time. Yet, that is exactly what happened in the Pontoriero, A.A., and Brennan matters. Not only was time wasted in discussions with his clients, but the disputes required the intervention of the fee arbitration system and, in the case of Fed II, the courts.

In In re Kim, 222 N.J. 3 (2015), the Court imposed a six-month suspension on an attorney who had no formal recordkeeping system in place, but, rather, kept track of his financial matters in his head. In the Matter of Daniel Donk-Min Kim, DRB 14-171 (December 11, 2014) (slip op. at 5). Like respondent, Kim opened a solo law practice without having any knowledge of his recordkeeping obligations. Id. at 6. For example, he did not perform – or even know how to perform – three-way reconciliations, maintain ledger cards, or identify the client matter on deposit slips. Id. at 13. Kim tracked his receipts and disbursements in his head.

Unlike respondent, Kim regularly used his trust account into which he deposited personal loans, fees, and client trust funds intended for use in their business transactions. Id. at 9-10, 14-15. Respondent rarely used the trust account. Further, unlike respondent, Kim's attorney trust account eventually suffered a shortage. Id. at 59. Respondent did not invade client funds.

In Kim, we described the attorney's accounting system and recordkeeping practices as "so horrendous as to be reckless." Id. at 63. Further, his "willful disregard of his recordkeeping obligations placed his clients' funds at great risk," and "[h]is arrogance in believing that his mental juggling of his trust funds was sufficient [was], in a word, astonishing." Id. at 63-64. Finally, we noted,

Kim's "'accounting system,' of which he was proud, was more than deficient -- it was non-existent." Id. at 64. Due to Kim's "extreme recklessness in handling client and escrow funds for so many years," we imposed a three-month suspension. Id. at 65. As stated above, the Court suspended him for six months.

Here, in addition to respondent's lack of any recordkeeping system, we consider the multiple submissions of false expenses, be they "estimated," "anticipated," or never incurred in the first place. These were not the result of poor recordkeeping practices, but rather a course of conduct designed to inflate the value of his clients' claims and, ultimately, his fees. We are particularly chagrined by respondent's manipulation of the Crowley invoice in the PERC matters. This is especially so given respondent's involvement of the unwitting Crowley in his charade. Like the egregious nature of respondent's recordkeeping violations, respondent's submissions of false expenses also warrants a suspension. See, e.g., In re Schultz, ___ N.J. ___ (2020) (six-month suspension imposed on attorney who filed with the county Surrogate a claim against an estate for more than $57,000 in outstanding attorney fees without having made any effort to determine the actual amount owed by the estate, a violation of RPC 8.4(c); the attorney also engaged in multiple conflicts of interest involving his client, violations of RPC 1.7(a) and RPC 1.8(a); the attorney also made

misrepresentations to the OAE, contrary to RPC 8.1(a), and committed various recordkeeping violations (RPC 1.15(d)) and In re Brent, 240 N.J. 222 (2019) (three-month suspension imposed on attorney who, for five years after his clients' complaint had been dismissed, led them to believe that the matter was proceeding and that he was engaged in settlement negotiations with the defendants, a violation of RPC 8.4(c); the attorney also failed to communicate with his clients, failed to communicate the rate or basis of his fee in writing, failed to comply with another attorney's request for a copy of a client's file; in another matter the attorney exhibited gross neglect and lack of diligence, failed to communicate with the client, and failed to set forth in writing the basis or rate of his fee).

The picture painted in this case is of an attorney devoted to the zealous pursuit of justice for his clients. However, respondent's pursuit of justice has come at a price, paid by the very clients he has sought to represent so ardently. To be sure, respondent did not invade trust account funds. However, his lack of any recordkeeping system resulted in mistake after mistake when he calculated the distribution of proceeds between his clients and himself and when he submitted invoices to third-party payers. More troubling are the "estimates," which he passed off – to clients, adversaries, and the courts – as expenses

actually incurred and paid when, to the contrary, they were only "anticipated," at best. Equally alarming is respondent's failure to keep time records and to charge his non-contingent fee clients a normal hourly rate.

Based on the above precedent, we determine to impose a one-year suspension. Further, respondent must take a step back and begin anew, with proper training, and proper recordkeeping and office management practices in place.

We note that, when respondent commenced the Pontoriero representation, in 2004, he had been practicing law for more than twenty years with only the equivalent of an admonition, in 1994, for dissimilar conduct. However, given the totality of misconduct in this case, in numerous client matters, and the absence of any useful recordkeeping system, this mitigation cannot serve to justify a suspension of less than one year.

Moreover, we determine that respondent be required to attend five hours of courses in recordkeeping requirements and five hours of courses in law office management, in addition to the mandatory continuing legal education requirements imposed on all New Jersey attorneys. On reinstatement, respondent should be required to provide the OAE with monthly reconciliations of his attorney trust account, on a quarterly basis, for two years. Further, the

OAE should conduct semi-annual audits of respondent's attorney accounts and records for a period of two years.

Chair Clark and Member Singer voted to impose a six-month suspension. Vice-Chair Gallipoli was recused. Members Joseph and Petrou did not participate.

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

Disciplinary Review Board
Bruce W. Clark, Chair

By: **/s/ Ellen A. Brodsky**
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Dennis Aloysius Durkin
Docket No. DRB 19-254

Argued: February 20, 2020

Decided: June 3, 2020

Disposition: One-Year Suspension

Members	One-Year Suspension	Six- Month Suspension	Recused	Did Not Participate
Clark		X		
Gallipoli			X	
Boyer	X			
Hoberman	X			
Joseph				X
Petrou				X
Rivera	X			
Singer		X		
Zmirich	X			
Total:	4	2	1	2

/s/ Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel