

Conduct equivalent to New Jersey RPC 1.1(a) (gross neglect); RPC 1.2(a) (failure to abide by a client's decisions regarding the scope and objectives of the representation); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation); RPC 8.4(b) (criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice). Although the New York Court also found that respondent violated New York RPC 1.3(c) (failure to carry out a contract of employment) and RPC 8.4(h) (conduct that reflects adversely on a lawyer's fitness) the OAE's motion asserts that there are no equivalent RPCs in New Jersey, and therefore, the OAE did not include those charges in its motion for reciprocal discipline.

For the reasons set forth below, we determine to impose a six-month suspension.

Respondent was admitted to the New Jersey bar in 1993 and to the New York bar in 1994. He has no prior discipline in New Jersey.

On December 17, 2013, respondent received a private admonition in New York for a violation of New York RPC 8.4(d), after he had been sanctioned by a federal district court and fined \$5,000 for filing a fourth amended complaint previously found deficient. For sixteen months following the judge's imposition of the fine, respondent sought multiple hearings to challenge the validity of the sanction and his ability to pay the fine.

On September 12, 2016, the Court entered an Order revoking respondent's license to practice law, based on his failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection for seven consecutive years.¹

In this matter, on June 23, 2016, respondent entered into a stipulation of facts with the Departmental Disciplinary Committee of the New York Court (DDC), admitting violations of the New York Rules. Although this stipulation is not part of the record, the transcript of the New York disciplinary proceeding confirms that respondent signed the stipulation, and affirms the facts underlying the violations in New York.

On June 28, 2016, respondent, with counsel, appeared before the Honorable Rena Uviller, retired Justice of the Supreme Court of New York, who

¹ Rule 1:28-2(c) provides that an Order of revocation does not preclude the disciplinary system from exercising jurisdiction in respect of misconduct that pre-dated the Order.

served as a referee for the New York proceeding. The hearing addressed four matters.

The Apoian Matter

On or about April 30, 2009, Jeffrey Apoian, a freelance photographer, retained respondent to initiate a copyright infringement action against an advertising agency for its alleged unauthorized use of Apoian's photographs in the catalogs of the agency's clients. Pursuant to a retainer agreement, Apoian paid respondent a \$1,500 retainer and agreed to pay an additional fee of one-third of any net recovery. Respondent, however, never initiated the lawsuit. Thereafter, over a period of three years, respondent generally was unresponsive to Apoian's attempts to communicate with him. When Apoian was able to reach respondent, he misled Apoian to believe that the litigation was proceeding.

On a date not set forth in the record, another attorney wrote to respondent in Apoian's behalf, requesting a status update and an accounting of services; respondent failed to reply. By letter dated April 12, 2012, that attorney notified respondent that a disciplinary complaint would be filed if he continued to ignore inquiries about the Apoian matter, but, again, respondent failed to reply.

Consequently, on August 22, 2012, Apoian filed a complaint with the DDC regarding respondent's unresponsiveness and apparent inaction in Apoian's matter. On May 29, 2014, during a deposition in the disciplinary

matter, respondent admitted that, because he had failed to pursue Apoian's claims, some or all Apoian's copyright infringement claims were time-barred.

Based on respondent's factual stipulation and admissions, the referee found that he had neglected a legal matter entrusted to him, in violation of New York RPC 1.3(b); failed to carry out a contract of employment, in violation of New York RPC 1.3(c), failed to communicate adequately with Apoian, or to reasonably consult with him about his matter's status, in violation of New York RPC 1.4(a)(2); and misled Apoian that his litigation was proceeding, and, thus, engaged in conduct prejudicial to the administration of justice, a violation of New York RPC 8.4(d).

The Segan, Nemerov & Singer Matter

In June 2007, respondent sublet office space from the law firm of Segan, Nemerov & Singer, P.C. (Segan). In January 2009, he stopped paying rent, but continued to occupy the space until October 2010. In 2011, Segan filed a lawsuit against both respondent's professional corporation and respondent individually, for the unpaid rent in New York City Civil Court (the Civil Court).

On August 31, 2011, respondent served Segan with a motion to dismiss the complaint, based on lack of jurisdiction, failure to demand payment of rent, and improper designation of respondent as an individual defendant. Although

respondent served the motion on Segan, he had not filed the motion with the trial court.

Segan filed both a response to the motion to dismiss and a cross-motion for summary judgment. Respondent neither opposed the cross-motion nor appeared in Civil Court on the return date of the motion.

On September 29, 2011, the Civil Court awarded summary judgment in Segan's favor in the amount of \$26,695.30. As of the date of the disciplinary hearing, respondent had neither appealed the judgment nor paid any portion of it.

On March 12, 2013, Segan filed a disciplinary complaint against respondent, whose initial pro se answer advanced arguments similar to those raised in his unfiled motion to dismiss. In his May 29, 2014 deposition in the disciplinary matter, respondent conceded the validity of the judgment. He explained that he was overwhelmed at the time and simply forgot to file the motion.

Based on respondent's stipulation to these facts, the referee found that he engaged in conduct adversely reflecting on his fitness as a lawyer, in violation of New York RPC 8.4(h).

Failure to File Tax Returns

Respondent also stipulated that he had failed to file state and federal tax returns from 2009 through 2014. The referee, thus, found that respondent

engaged in illegal conduct that adversely reflected on his honesty, trustworthiness or fitness as a lawyer, a violation of New York RPC 8.4(b).

Additionally, the referee determined that, during respondent's deposition testimony, he deceptively implied that he had been granted multiple extensions of time to file his tax returns, but the extensions had expired. Thus, the referee found that respondent engaged in conduct that adversely reflects on his fitness as a lawyer, a violation of New York RPC 8.4(h).

Unpaid Judgments, Warrants, and Liens

Respondent graduated from law school in 1993. On July 12, 2002, the United States District Court for the Southern District of New York entered a judgment against him in the amount of \$116,606.71, plus interest and penalties, representing unpaid student loan debt. At the time of the referee's review, respondent had not paid any part of that judgment.

Additionally, between May 2002 and May 2015, other judgments, warrants, and liens, totaling \$59,321.71, were entered against respondent. At the time of the referee's review, they also remained unsatisfied. Thus, the referee found that respondent engaged in conduct prejudicial to the administration of justice, in violation of New York RPC 8.4(d).

Respondent admitted, and the referee found, that all the above misconduct adversely reflected on his fitness as a lawyer, in violation of New York RPC 8.4(h).

In her September 15, 2016 report, the referee found, in mitigation, that respondent had been in dire financial straits since graduating from law school, at the age of thirty-nine, and had continually sought legal employment beyond his solo practice, without success. Prior to attending law school, respondent had secured a \$70,000 student loan, which he had been unable to repay, resulting in a debt of \$125,000, with penalties and interest. Between 2009 and 2015, his annual income ranged between less than \$12,000 to \$25,000, and he has been living and earning below the poverty line.

Compounding this financial difficulty, respondent was the sole provider for his two young children and had experienced an acrimonious divorce, resulting in litigation over the marriage's only asset, a cooperative apartment valued at approximately \$600,000. Because respondent was unable to pay his monthly debts, his family was evicted and lost almost all equity in the apartment – after child support deductions, respondent realized only \$3,400 from the sale. Due to respondent's financial circumstances, he was unable to pay the various judgments and liens, including the Segan judgment for unpaid rent.

The referee found that, as early as 2008, and continuing to the date of the hearing, respondent had been in a state of substantial psychological turmoil and appeared overcome by anxiety and depression. Although respondent had not received a mental health diagnosis, the referee found that he clearly had difficulty functioning and fulfilling his professional and financial responsibilities.

Respondent acknowledged that he had failed to seek help for his mental health issues and for his law practice during the period of his misconduct. Subsequently, however, he had undertaken a course of psychotherapy and had joined Al-Anon, a twelve-step program that had helped him cope emotionally. Respondent recognized that he was overwhelmed with the cases he did have and described himself as “not fit to practice.”

The referee found that respondent was intelligent; appeared to have substantial legal skills; seemed genuinely remorseful and humiliated; and recognized that his misconduct was serious and reflected poorly on his fitness to practice law. Respondent also readily acknowledged that he had demonstrated a lack of professionalism by his neglect of the Apoian matter, his failure to file his tax returns, and his inability to satisfy the various judgments.

Before the referee submitted her final report, respondent had filed his tax returns for all the years in which he was delinquent, and had met his child

support obligations, but had been unable to satisfy the outstanding judgments and liens. The referee found that respondent's failure to meet his professional and financial obligations was not motivated by either greed or venality, and his lifestyle appeared modest.

In further mitigation, respondent had been involved in pro bono projects, and volunteered for a program to aid drug addicts and a program providing immigration services for children. Several law professors and attorneys attested to his legal acumen and willingness to serve people in need. Finally, the referee found that respondent cooperated with disciplinary authorities during the investigation and prosecution of the ethics charges.

In aggravation, the referee considered respondent's 2013 private admonition. The referee found that this prior discipline was exacerbated by respondent's willingness to employ his legal skills to impede the administration of justice, as his conduct in the Segan matter demonstrated. The referee rejected, as not credible, respondent's assertion that he "forgot" to file the motion.

The DDC had recommended a six-month suspension, while respondent requested a conditional private reprimand. After reviewing New York precedent, the referee found that a suspension was unnecessarily harsh, but a private reprimand was inadequate. Because respondent's neglect of the Apoian matter resulted in actual harm to the client, and respondent had used his legal skills to

prejudice the administration of justice, the referee recommended a public censure.

On December 14, 2017, the New York Court issued a written opinion sustaining the referee's findings, but imposing a three-month suspension.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), "a final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

In New York, the standard of proof in attorney disciplinary matters is "a fair preponderance of the evidence." In re Capoccia, 453 N.E.2d 49, 498 (N.Y. 1983). We note that, in this matter, respondent stipulated to all the charged misconduct.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the

record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

Subsection (E) applies in this matter because the unethical conduct warrants substantially different discipline.

Respondent's stipulation, supplemented by his testimony during the New York disciplinary hearing, supports multiple RPC violations. In the Apoian matter, respondent violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(b), RPC 1.4(c), and RPC 8.4(c) by his admitted failure to file a lawsuit, despite the client's direction; his failure to communicate with Apoian; and his misrepresentations to him when they did communicate.² As a result of

² Although the New York Court determined that respondent's misrepresentations to Apoian violated RPC 8.4(d), we find RPC 8.4(c) to be the applicable Rule.

respondent's failure to protect Apoian's interests, several of Apoian's copyright claims were time-barred. Respondent, thus, committed multiple, egregious violations in his representation of Apoian, and harmed the client in the process.

Next, respondent's actions, as a pro se litigant, in the Segan matter, violated RPC 8.4(c) and RPC 8.4(d). Although he served a motion to dismiss on opposing counsel, he failed to file it. The referee found not credible respondent's explanation that he simply forgot to file this motion with the trial court and, therefore, determined that respondent acted in a dishonest and deceitful way, in violation of RPC 8.4(c). Further, the referee found that respondent's actions prejudiced the administration of justice by causing the trial court to unnecessarily expend time and resources addressing the Segan firm's response to the unfiled motion to dismiss and its cross-motion for summary judgment.

Additionally, respondent's failure to file his income tax returns from 2009 through 2014, contrary to 26 U.S.C. § 7203, violated both RPC 8.4(b) and RPC 8.4(c), even though he was not prosecuted criminally. See, e.g., In re Garcia, 119 N.J. 86 (1990); In re Vecchione, 159 N.J. 507 (1999); In re Williams, 172 N.J. 325 (2002); and In re Cattani, 186 N.J. 268 (2006). Thus, respondent's prolonged failure to file his taxes violated these Rules.

Finally, although the referee found that respondent's failure to pay his unpaid judgments, warrants, and liens violated New York's RPC 8.4(d), New

Jersey precedent does not support such a violation. The record does not contain clear and convincing evidence that judicial resources were wasted. Moreover, because respondent was not able to pay these debts, his failure to do so was not unethical.

In sum, in the Apoian matter, we find that respondent violated the equivalents of New Jersey RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(b), RPC 1.4(c), and RPC 8.4(c); in the Segan matter, we find that he violated RPC 8.4(c) and RPC 8.4(d); and we find that respondent's failure to file his income tax returns from 2009 through 2014 violated both RPC 8.4(b) and RPC 8.4(c). The only remaining issue for our determination is the appropriate quantum of discipline to be imposed for respondent's misconduct.

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, the presence of additional violations, and the seriousness of the attorney's disciplinary history. See, e.g., In the Matter of Esther Maria Alvarez, DRB 19-190 (September 20, 2019) (admonition for attorney who was retained to obtain a divorce for her client, but for the next nine months, failed to take any steps to pursue the matter, and failed to reply to all but one of the client's requests for information about the status of her case,

violations of RPC 1.1(a) and RPC 1.4(b); in another matter, the attorney agreed to seek a default judgment, but waited more than a year-and-a-half to file the necessary papers with the court; although the attorney obtained a default judgment, the court later vacated it due to the passage of time, which precluded a determination of when the damage to the property actually had occurred, violations of RPC 1.1(a) and RPC 1.3); In the Matter of Michael J. Pocchio, DRB 18-192 (October 1, 2018) (admonition for attorney who filed a divorce complaint and permitted it to be dismissed for failure to prosecute the action; he also failed to seek reinstatement of the complaint, and failed to communicate with the client; violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 3.2); In re Burro, 235 N.J. 591 (2019) (reprimand for attorney who grossly neglected and lacked diligence in an estate matter for ten years and failed to file New Jersey Inheritance Tax returns, resulting in \$40,000 in accrued interest and a lien on property belonging to the executrix, in violation of RPC 1.1(a) and RPC 1.3; the attorney also failed to keep the client reasonably informed about events in the case (RPC 1.4(b)); failed to return the client file upon termination of the representation RPC 1.16(d)); and failed to cooperate with the ethics investigation (RPC 8.1(b)); in aggravation, we considered the significant harm to the client and the attorney's prior private reprimand; in mitigation, the attorney expressed remorse and had suffered a stroke that forced him to cease

practicing law); and In re Abasolo, 235 N.J. 326 (2018) (reprimand for attorney who grossly neglected and lacked diligence in a personal injury case for two years after filing the complaint; after successfully restoring the matter to the active trial list, the attorney failed to pay a \$300 filing fee, permitting the defendants' order of dismissal with prejudice to stand, in violation of RPC 1.1(a) and RPC 1.3; in addition, for four years, the attorney failed to keep the client reasonably informed about the status of the case, in violation of RPC 1.4(b)).

It is well-settled that a violation of either state or federal tax law is a serious ethics breach. In re Queenan, 61 N.J. 578, 580 (1972), and In re Duthie, 121 N.J. 545 (1990). “[D]erelictions of this kind by members of the bar cannot be overlooked. A lawyer’s training obliges him to be acutely sensitive of the need to fulfill his personal obligations under the federal income tax law.” In re Gurnik, 45 N.J. 115, 116-17 (1965). In In re Garcia, 119 N.J. at 89, the Court declared that, even in the absence of a criminal conviction, the willful failure to file an income tax return requires the imposition of a suspension. Willfulness does not require “any motive, other than a voluntary, intentional violation of a known legal duty.” In the Matter of Eugene F. McEnroe, DRB 01-154 (January 29, 2002) (slip op. at 2); In re McEnroe, 172 N.J. 324 (2002).

Generally, since Garcia, terms of suspension have been imposed on attorneys who fail to file income tax returns. See, e.g., In re McEnroe, 172 N.J.

324 (three-month suspension for attorney with no disciplinary history for violations of RPC 8.4(b) and (c), resulting from his seven-year failure to file joint federal and state income tax returns on behalf of himself and his wife; the attorney's payment of all outstanding federal and state tax obligations was considered as mitigation); In re Vecchione, 159 N.J. 507 (1999) (six-month suspension for attorney's failure to file federal income tax returns for twelve years; compelling mitigating factors); In re Waldron, 193 N.J. 589 (2008) (six-month suspension imposed on attorney who pleaded guilty to one count of knowing and willful failure to file a federal income tax return for a single calendar year, in violation of 26 U.S.C. § 7203); In re Kleinfeld, 58 N.J. 217 (1971) (six-month suspension following plea of nolo contendere to one count of tax evasion, for which a fine was paid; unspecified mitigating circumstances considered); In re Hand, 235 N.J. 367 (2018) (one-year suspension imposed on attorney who pleaded guilty to two counts of failure to file federal income tax returns for two calendar years, in violation of 26 U.S.C. § 7203, resulting in a \$50,588 tax loss to the United States government; the attorney was sentenced to three years' federal probation, which included a five-month period of home confinement, and was ordered to pay \$50,588 in restitution and to provide full cooperation with the Internal Revenue Service, among other things; she also had a disciplinary history); In re Rich, 234 N.J. 21 (2018) (two-year suspension

imposed on attorney who pleaded guilty in the New York Supreme Court to one count of fifth-degree criminal tax fraud, a Class A misdemeanor; he had failed to file state personal income tax returns for the years 2008 through 2013, and, for each year, he had a tax liability of more than \$50,000; he agreed to pay nearly \$1.2 million in back taxes, including penalties and interest); In re McManus, 179 N.J. 415 (2004) (two-year suspension imposed on attorney who pleaded guilty to one count of federal income tax evasion and one count of willful failure to file an income tax return; he failed to file an income tax return in 1993, a year in which he had earned \$313,386; he also underreported his income for the year 1998 by more than \$500,000; he was temporarily suspended following his guilty plea); and In re Gottesman, 222 N.J. 28 (2015) (three-year retroactive suspension for attorney guilty of tax evasion and willful failure to remit payroll taxes withheld from his employees' wages; he also used his trust account to conceal the true extent of his income; he was sentenced to concurrent six-month terms of imprisonment on both counts and three years of supervised release; prior censure).

Standing alone, the baseline level of discipline for respondent's failure to file income tax returns for six years is a one-year suspension. Although respondent's additional ethics infractions could justify a multi-year suspension, in our view, the compelling mitigating factors warrant a six-month suspension.

We acknowledge, in aggravation, that respondent received a prior private admonition in New York for engaging in conduct prejudicial to the administration of justice; that his misconduct in this case resulted in actual harm to the client; and that he failed to report to the OAE both this suspension and the private admonition.

In mitigation, since graduating from law school almost thirty years ago, respondent has struggled financially, resulting in his inability to pay his law school debts, as well as several other debts accrued through the years. Despite his financial insecurity, respondent served as the sole provider for his two children and has filed all delinquent tax returns. During the period of his misconduct, respondent was going through an acrimonious divorce and, as early as 2008, was overcome by anxiety and depression. During the New York proceedings, he was genuinely remorseful and humiliated; recognized that his misconduct was serious and reflected poorly on his fitness to practice law; and readily acknowledged his misconduct. Finally, he also has been involved in several pro bono projects; volunteered in a program to aid people suffering from drug addiction and a program providing immigration services for children; and several law professors and attorneys attested to his good character.

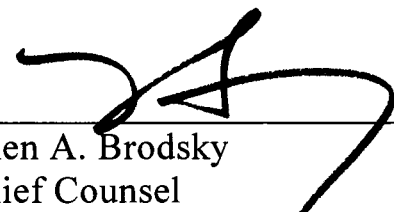
In our view, the significant and compelling mitigating factors far outweigh those in aggravation. We, thus, determine that a six-month suspension is the

appropriate quantum of discipline necessary to protect the public and to preserve confidence in the bar. Because respondent's license to practice law in New Jersey has been revoked, the suspension will be deferred until respondent seeks reinstatement to the practice of law in New Jersey.

Member Joseph voted to impose a three-month deferred suspension.

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: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

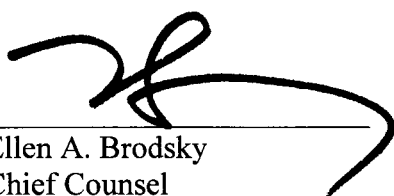
In the Matter of Nicholas A. Penkovsky
Docket No. DRB 19-359

Argued: May 21, 2010

Decided: June 23, 2020

Disposition: Six-Month Suspension

<i>Members</i>	Six-Month Suspension	Three-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:	8	1	0	0



For: Ellen A. Brodsky
Chief Counsel