Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-435
District Docket Nos. XIV-2017-0264E and
IV-2018-0908E

In the Matter of

Donald Lee Kingett

An Attorney at Law

Decision

Argued: May 21, 2020

Decided: November 10, 2020

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

Carl D. Poplar appeared on behalf of the respondent.

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

This matter previously was before us as an ethics appeal from a post-hearing dismissal by the District IV Ethics Committee (DEC). We determined to grant the appeal and to schedule the matter for oral argument. The formal ethics complaint charged respondent with having violated RPC 1.1(a) (gross

neglect); RPC 1.2(c) (a lawyer may limit the scope of the representation only if it is reasonable under the circumstances and the client gives informed consent); 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 1.7(a) (conflict of interest); RPC 5.3(a) (failure to supervise nonlawyer employees); RPC 5.4(a) (fee sharing with a nonlawyer); RPC 5.4(c) (permitting a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services); RPC 8.1(a) (making a false statement in connection with a disciplinary matter); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, four members vote to impose a reprimand, four members vote to impose a three-month suspension, and one member votes to dismiss all charges against respondent.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1987 and has no disciplinary history. During the relevant timeframe, he was a partner at Kingett and Warren, P.C., in Berlin, New Jersey.

The facts of this matter either were admitted in the pleadings or were unchallenged during testimony. Adam Baals, a nonlawyer, owns Fidelity Estate Planning (FEP), which specializes in trusts and annuities. From 2004 through

2009, respondent received 300 referrals from FEP, resulting in approximately 200 client matters. For each referral, respondent received $450, totaling approximately $90,000 in fees for those two hundred client matters. The FEP referrals continued through 2015.

On August 7, 2007, FEP referred Janet Bradford to respondent for legal services. At the time, Janet was seventy-three-years old and, according to her daughter, Brenda Varelli, Janet's symptoms of Alzheimer's disease, which began in 2003, were steadily worsening. Janet had been pre-deceased by her husband, with whom she had four children: Brenda, Kyle Bradford, Lyle Bradford, and Melodie White. Prior to Janet's involvement with FEP and respondent, her estate plan had appointed Brenda as executrix and provided for the equal distribution of her estate to her four children.

Jaqueline McGlinchey, an agent of FEP, met with Janet on July 16, 2007. Jennifer White, who was Melodie's daughter and Janet's granddaughter, worked with McGlinchey's daughter and had referred Janet to McGlinchey. During the July 16, 2007 meeting, McGlinchey completed an FEP "Estate Planning Workbook" (the workbook) for Janet. FEP and respondent had developed the workbook to gather information about FEP's clients.[1]

[1] There is very little in the record about what FEP explained to clients about the need for, or choosing, an attorney. Because respondent participated in developing FEP's workbook,
(footnote cont'd on next page)

The FEP workbook contained much of Janet's personal information. Notably, the workbook identified her granddaughter, Jennifer, as the person to be appointed as executor, trustee and successor trustee, general power of attorney, and power of attorney for healthcare. The workbook further provided that 80% of Janet's estate was to be distributed to Melodie and her three children – Jennifer, Woodrow White, and William White – with each receiving 20%. The remaining 20% was to be distributed to Brenda, Kyle, and Lyle – each receiving 6.66%. The workbook identified Janet's only asset as her home, valued at $200,000. Janet's home was to be left to Jennifer, with tenancy rights to Melodie, Woodrow, and William.

McGlinchey testified that Janet appeared coherent while completing the workbook, but that, other than one page of the workbook, Janet did not sign anything herself. Jennifer signed Janet's name on all other documents, including respondent's retainer agreement.

On July 16, 2007, Janet issued a $450 check to respondent as payment for his fee, but someone else signed the check. FEP required that both FEP and respondent receive full payment upon completion of the workbook. The next

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presumably, the clients had little to no choice but to retain respondent. There is an air of exclusivity in this arrangement. In his brief to us, dated February 21, 2020, counsel for respondent indicated that FEP clients "were to be referred" to respondent, which further supports the presumption of exclusivity in this relationship.

day, respondent received, via fax, a copy of Janet's workbook and a copy of the $450 check. On August 7, 2007, he received the signed retainer agreement, dated July 31, 2007.

Respondent denied any involvement in the separate, non-legal fee that FEP charged Janet, and denied having received any portion of it. McGlinchey confirmed that respondent "was adamant that the client understand that the fee of $450 was for him to prepare their legal documents in the trust, and if any other type of service was required, that would require a separate appointment as well as a separate fee." The retainer agreement clearly described which legal services would be provided, and which legal services were not included.

Respondent admitted that he neither spoke with Janet prior to the execution of the retainer agreement nor knew whether she had signed the agreement herself. Because respondent saw no material risks in representing Janet, he did not communicate any to her. He testified, however, that, in hindsight, a material risk existed.

In reply to the grievance, respondent had stated:

> [o]n August 7, 2007, a client by the name of Janet E. Bradford was referred to me for my professional estate planning services . . . I accepted the engagement of Ms. Bradford and quoted my regular fee for my estate planning services based upon the knowledge and understanding that FEP would compile the factual information necessary in order for me to consult with Ms. Bradford concerning her proposed estate planning.

[2T94-95;Ex.21.][2]

Respondent explained that, despite the above reply, he did not quote his fee to Janet on August 7, 2007, but did so on July 19, 2007, when the engagement letter was sent to her.[3]

During his testimony, respondent acknowledged that, for non-FEP estate planning clients, he typically conducted a thirty-to-ninety-minute interview with the client, either in his office or in the client's home, and that the interview included an assessment of mental capacity. Yet, according to respondent's telephone records, he spoke to Janet for only eight minutes, via an August 27, 2007 telephone conversation. Moreover, the workbook revealed that the telephone number that he called belonged to Jennifer, Janet's granddaughter.

Respondent claimed that he normally took the following actions during the interview call with an FEP client:

- confirm that the person on the phone did not want to come to his office, and that he would arrange for FEP to deliver documents to the client marked "to be signed;"
- confirm the person's name and social security number;
- confirm whether the person's spouse was deceased;
- confirm the names and addresses of children;

[2] "2T" refers to the transcript of the March 5, 2019 hearing before the DEC.

[3] As detailed below, the OAE charged respondent with misrepresenting the date that he informed Janet of the amount of his fee.

- explain the difference between a revocable trust and a will;
- confirm the names of the trustee, successor trustee, power of attorney, and health care agents;
- confirm whether there was an advanced directive for health care and identify the person who would serve in that capacity;
- confirm that the person appointed to be responsible for the advance directive would enforce the end of life decisions;
- confirm the disposition of the estate;
- confirm how assets would be distributed and why;
- explain the creation of a life estate for certain parties;
- discuss unequal distribution under a new trust;
- confirm that the client's initials were in the estate planning portfolio;
- confirm that the client participated in preparing the estate planning portfolio;
- confirm that the client wanted to avoid admission into a nursing home;
- discuss contingent allocation;
- discuss any inconsistencies in the workbook;
- discuss debt forgiveness;
- discuss life estates;
- discuss payment of last debts;
- explain the difference between probate and non-probate assets; and
- review assets.

As stated, respondent's phone call with Janet lasted just eight minutes. He testified that most of the above questions required only "yes or no" answers. He also asserted that the person he spoke with on August 27, 2007 seemed competent. During his interview with the OAE, respondent explained that, in his practice, he relied on the American Bar Association's Handbook for Lawyers,

"Assessment of Older Adults with Diminished Capacity." Admittedly, however, he did not know whether Janet understood the nature and extent of her assets at the time of the telephone call and did not know whether Janet had the requisite capacity before she signed his retainer agreement. He also failed to make any assessment of the history of the relationship between Janet and Jennifer.

Also on August 27, 2007, McGlinchey visited Janet's home to confirm that respondent had called. Melodie and Jennifer were present, but Janet was not. Melodie and Janet were excited and explained to McGlinchey that they had "pulled it off," and had completed a five-minute telephone call with respondent who "had no clue" that he was not speaking to Janet on the phone. Rather, Melodie had "changed her voice to sound like an elderly person." McGlinchey immediately left, but did not inform respondent of this deception.

Subsequently, respondent prepared a will, trust, power of attorney, and special warranty deed in behalf of Janet. He submitted the documents to FEP for delivery to Janet. He did not witness the execution of those documents, which purportedly occurred on September 18, 2007. McGlinchey notarized Janet's signature on the documents, and her husband served as one of two witnesses. McGlinchey later admitted that Jennifer, not Janet, had signed the documents. Respondent had no communication with McGlinchey and never confirmed that

the documents were properly executed. He did not supervise McGlinchey at any time during the handling of Janet's matter.

Ultimately, Janet's assets were transferred into a trust administered by an annuity company chosen by FEP. On February 6, 2008, Janet passed away and her estate was distributed according to the estate plan that respondent and FEP had drafted. Brenda, Kyle, and Lyle contested the documents that respondent had prepared.

On July 29, 2011, the Honorable Anne McDonnell, P.J.Ch., issued orders finding that Janet did not have the requisite capacity to participate in revisions to her estate planning and that Jennifer had exercised undue influence. On September 23, 2011, Judge McDonnell voided respondent's documents as invalid. Respondent was named as a defendant in the probate matter, but eventually was severed from the action, and the claims against him were transferred to the Law Division.

At the Law Division trial, respondent stipulated that the total damages based on negligence were $244,000, but the question of which defendant was responsible was left to the jury. The jury determined respondent to be twenty-five percent liable for the damages, amounting to $61,000. Assets totaling $256,298 were returned to Janet's estate. The jury found that respondent had not

been grossly negligent, that he had not exercised undue influence, and that he had not engaged in fraud.

The DEC panel determined that respondent's conduct was negligent, and that he could have taken simple steps that would have prevented the fraud that Janet's relatives committed. The panel, however, also accorded weight to the fact that Janet's family members committed the intervening fraud. In the panel's view, respondent had prepared documents consistent with the wishes that were conveyed to him. Therefore, the panel determined that the proofs were insufficient to establish gross neglect and dismissed the RPC 1.1(a) charge.

Additionally, the panel dismissed the charge that respondent violated RPC 1.2(c). The DEC reasoned that, because it was undisputed that respondent prepared the documents contemplated by the fee agreement, and the complaint did not allege that the limitation on the scope of services was unreasonable, the issue was whether Janet had given informed consent to the limitation. The panel noted that RPC 1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct," and determined that there were no material risks that respondent was required to explain to Janet. Relying again on the intervening fraud, the panel concluded that it could not find that

respondent failed to properly limit the scope of the representation, based on the lack of informed consent.

Citing the limited scope of respondent's representation of Janet and the intervening fraud, the panel determined that, based on the engagement letter, the workbook, and respondent's telephone conversation, he had adequately communicated with his client. The panel concluded that respondent was not required to take any further action to satisfy himself that the person with whom he spoke actually was Janet. Conversely, the panel found incredible respondent's testimony that, during an eight-minute telephone call, he was able to cover the entire list of questions and issues, as he had claimed. The panel concluded that respondent's version of events was impossible. Nonetheless, the panel determined to dismiss the alleged violation of RPC 1.4(c).

The panel rejected the OAE's contention that, because respondent was receiving referrals from FEP, a concurrent conflict of interest existed, based on the diverse interests of the client and FEP. The panel determined that the referrals were insufficient to establish a conflict, and that the record failed to establish that respondent owed a duty of loyalty to FEP. The panel, thus, dismissed the RPC 1.7(a) charge.

The panel agreed with respondent's position that McGlinchey was not his nonlawyer assistant and dismissed the alleged violation of RPC 5.3(a),

emphasizing that she worked for FEP as an independent contractor, and not for respondent.

In respect of the RPC 5.4(a) and (c) charges, the panel found no indication that respondent shared fees with FEP. The client issued separate checks to FEP and to respondent, and the record did not establish that respondent had any involvement in FEP's fee. The panel rejected the OAE's argument that Joint Opinion No. 716 of the Advisory Committee on Professional Ethics and Opinion No. 45 of the Committee on the Unauthorized Practice of Law, 197 N.J.L.J. 59 (July 6, 2009) applied to respondent. That opinion holds that an attorney "may not partner with or be separately retained by a for-profit loan modification company to provide legal advice to the company's customers." The panel determined that, because FEP had not retained respondent, Opinion 716 did not apply. The panel found no evidence that respondent's professional judgment was compromised by a nonlawyer. Therefore, the panel dismissed the alleged violations of RPC 5.4(a) and (c).

Finally, the panel rejected the OAE's allegation that respondent made a false statement to disciplinary authorities when, in response to the grievance, he stated that he "quoted" a fee to Janet, when that fee actually was contained in the estate planning packet. Further, the OAE argued that the purpose of the statement was to mislead the OAE into believing that respondent had reviewed

Janet's matter individually and then quoted her a fee based on the work he would perform.

The panel determined that the statement was neither material nor intended to deceive and remarked that the "statement is so far removed from any fact relevant to the case that it cannot support" the allegations. Therefore, the panel determined to dismiss the alleged violation of RPC 8.1(a) and RPC 8.4(c).

The panel, thus, determined to dismiss the entire complaint.

Following a de novo review of the record, we are satisfied that the record clearly and convincingly establishes that respondent was guilty of unethical conduct. Specifically, we determine that respondent violated RPC 1.4(c); RPC 1.7(a); RPC 5.3(a); and RPC 5.4(c). We further determine that the DEC correctly dismissed the alleged violations of RPC 1.1(a); RPC 1.2(c); RPC 5.4(a); RPC 8.1(a); and RPC 8.4(c).

Respondent did not neglect this matter in the way attorneys commonly commit gross neglect. For example, he did not ignore his client, fail to work on her matter, or allow deadlines to pass, injuring the client's ability to pursue her claims. Respondent's failure to ensure that his client actually signed the trust documents and engaged in the telephone conversation with respondent is more properly addressed by other RPC violations, as discussed below. Therefore, we determine to dismiss the alleged violation of RPC 1.1(a).

Further, we determine to dismiss the alleged violation of RPC 1.2(c). The OAE argued that respondent did not obtain Janet's informed consent to limit the scope of his representation because she was mentally incompetent at the time he initiated the representation; Jennifer forged Janet's signature on the fee agreement; and even if Janet had been competent, respondent still failed to obtain informed consent because his agreement failed to set forth material risks flowing from the limitations of the representation. In support, the OAE cited Lerner v. Laufer, 359 N.J. Super. 201, 218-20 (App. Div.) (2003), certif. denied, 177 N.J. 223 (2003). There, the Appellate Division ruled that "[c]onsent to limit the scope of representation under RPC 1.2(c) should be included in a single, specifically tailored form of retainer agreement[,]" which should either reference RPC 1.2(c) or describe itself as a limitation on the scope of the representation.

Respondent's fee agreement contained in the FEP workbook, despite the other issues that may have arisen from this business arrangement, properly limited the scope of representation. It clearly described which legal services respondent would and would not provide. Once again, the issues with this representation and the reasoning the OAE applied to support this RPC violation are more properly addressed in the other RPCs charged in the complaint. Indeed, the OAE admitted that the limitations contained in respondent's fee agreement

would have been suitable if he, rather than a nonlawyer, had explained the limitations to Janet at the beginning of the representation. Therefore, we determine to dismiss the alleged violation of RPC 1.2(c).

Moreover, the OAE alleged that respondent shared fees with FEP, a nonlawyer, in violation of RPC 5.4(a). Janet's total payment for estate services was $1,695, of which FEP received $1,245 and respondent received $450. RPC 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer, and provides five exceptions, none of which apply here. The question remains, however, whether respondent shared a legal fee.

Respondent's legal fees from FEP clients were paid separately from FEP's fees, as supported by Janet's separate check to respondent for his $450 legal fee. Additionally, McGlinchey testified that respondent was adamant that clients understand that the $450 fee was for him to prepare their legal documents. Therefore, his legal fees were not combined in one sum with FEP's charges, a scenario that would have left clients unaware of the amounts received individually by respondent and by FEP.

Similarly, this was not a situation where respondent was paying a referral fee to FEP or, as is sometimes the case, improperly paying a "runner" to send

him client referrals.[4] In fee-sharing matters with nonlawyers, the arrangement often provides a nonlawyer with a fixed percentage of the legal fee generated and collected. That is not the case here. Respondent charged and received a flat fee. The OAE, however, argued that respondent's conduct is akin to that of attorneys who partner with for-profit loan modification companies.

In New Jersey, loan-modification services constitute the practice of law. Joint Opinion No. 716 of the Advisory Committee on Professional Ethics and Opinion No. 45 of the Committee on the Unauthorized Practice of Law, 197 N.J.L.J. 59 (July 6, 2009). In Opinion No. 716, the ACPE determined that a New Jersey attorney may not provide legal advice to customers of a for-profit loan modification company, whether the attorney be considered in-house counsel to the company, formally affiliated or in a partnership with the company, or separately retained by the company.

An attorney typically violates RPC 5.4(a) when the attorney agrees to share with such a company the fees charged to the homeowners for loan-modification services. The joint opinion also makes clear that, when an attorney shares, with a for-profit loan-modification company, a fee charged to a homeowner for loan-modification services, the attorney violates RPC 5.4(b).

[4] A "runner" is an individual who, in exchange for compensation, solicits business for a lawyer. In New Jersey, it is a third-degree crime for a person to knowingly act as a runner or to use a runner. See N.J.S.A. 2C:21-22.1.

That RPC prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Here, the record does not support a finding that respondent formed a partnership with FEP, or that the activities of FEP constitute the practice of law. Indeed, respondent is not charged with assisting a nonlawyer in the unauthorized practice of law, in violation of RPC 5.5(a)(2). The record lacks evidence that respondent paid or received compensation for referrals from FEP. It also lacks information about the relationship between respondent and FEP, beyond the workbook and the procedure for respondent to receive the workbook, the client, and the fee. We observe that respondent's receipt of a separate check for a separate fee is a convenient workaround to facilitate this relationship without a technical sharing of legal fees. That relationship is more thoroughly addressed below. Consequently, the record lacks clear and convincing evidence that respondent violated RPC 5.4(a) and, accordingly, we determine to dismiss the allegation.

In respect of RPC 8.1(a) and RPC 8.4(c), the OAE alleged that respondent violated these Rules by representing, in his reply to the grievance, that, on August 7, 2007, Janet was referred to him, he accepted the engagement, and he quoted his regular fee of $450. The OAE pointed out that Janet executed a check for respondent's fee on July 16, 2007, respondent's fee agreement with her was

dated July 31, 2007, and the only time he spoke to Janet was on August 27, 2007. Thus, according to the OAE, respondent never "quoted" Janet a fee. Instead, pursuant to his long-standing requirement for FEP clients, his fee was paid in full at the time the workbook was completed, and the workbook and check were transferred to his office at the same time. The OAE contended that respondent's misrepresentation was designed to obscure the extent of his involvement with FEP.

We find plausible respondent's explanation that he meant to convey to the OAE that FEP would be collecting all the information necessary for respondent to consult with Janet. In any event, RPC 8.1(a) provides that an attorney may not knowingly make a false statement of material fact. As the DEC found, respondent's representation was not material and there is no clear and convincing evidence of an intent to deceive. We agree and, thus, determine to dismiss the RPC 8.1(a) and RPC 8.4(c) charges.

In our view, however, respondent engaged in unethical conduct. Specifically, he failed to counsel Janet as to the means by which to pursue her objectives. He did not personally consider Janet's assets, despite making cursory inquiries with her to estimate her total assets. He did not know whether she had the mental capacity to engage in estate planning. Respondent had the most negligible contact with Janet. Although he did prepare the estate documents for

her, he turned those documents over to FEP, thereby allowing nonlawyers to meet with her and to provide her information. At the end of it all, respondent's only involvement with Janet consisted of an eight-minute phone call, his preparation of several estate planning documents, and the collection of his fee. Respondent's conduct, thus, violated RPC 1.4(c).

Further, respondent violated RPC 1.7(a), because his representation of Janet was materially limited by his responsibilities to nonlawyer agents with a pecuniary interest in the sale of estate plans. Inherently, there was a significant risk that the representation of Janet would be materially limited by respondent's personal and financial interest in the referrals he received from FEP. Although only one client matter is involved here, respondent opened 200 client matters, over five years, through the referrals from FEP, and generated legal fees totaling $90,000. Moreover, these referrals continued for six more years, through 2015, presumably resulting in hundreds of additional clients and thousands of dollars in additional fees. Respondent's own pecuniary interests in the business that FEP conducted is the exact type of misconduct that the Rules intend to prevent, due to the likelihood that those interests could permeate his participation in the process and, thus, compromise his ability to act in his client's best interest.

Standing alone, the single referral at issue here, along with the hundreds of other referrals to which respondent has admitted, on their own, may not rise

to the level of a conflict of interest. Respondent's arrangement with FEP, however, pre-ordained the path that clients would take in their estate planning. Hence, respondent needed only an eight-minute telephone call to assess his client's circumstances, her intentions, the approach she was taking with and through FEP, and her capacity to move forward. Moreover, respondent admitted that he spent substantially more time with clients who were not referred to him by FEP. In this case, respondent used no judgment to measure whether such an arrangement was the best and least costly approach for this particular client, because, as stated, it is pre-ordained. Respondent was merely performing a mechanical function to give the plan a gloss of legitimacy.

The result in this case is that a client, whose only asset was a home of modest value, was assigned to a trust administered by a third party who likely took yet another cut of the pie. Respondent made no effort to evaluate whether any of these extra expenses were appropriate, because he was limited by the inherent nature of the referral and his business relationship with FEP to finalize a trust instrument as a forgone conclusion. We find this aspect of the arrangement more disturbing than respondent's earnings of $90,000 from 200 clients over eight years. By essentially setting up the client to use respondent as her attorney, FEP acted in concert with respondent to generate business for him, in addition to securing its own fee. This was a joint venture, pure and simple.

Finally, respondent violated RPC 5.3(a) by failing to make any reasonable efforts to ensure that the conduct of FEP and McGlinchey, both nonlawyers, was compatible with his own professional obligations. Similarly, respondent violated RPC 5.4(c) by permitting FEP, who recommended his services to Janet, to direct his professional judgment in rendering legal services. Respondent relied on FEP to collect all Janet's personal information, to witness her signatures, and to otherwise determine the course of the representation. During oral argument before us, counsel for respondent commented that respondent had known McGlinchey for years and had no reason to believe she would participate in a fraud against him. This position only serves to highlight the misplaced reliance respondent had on McGlinchey, rather than fulfilling his own professional responsibilities.

Respondent's only contribution to the representation was an eight-minute telephone call by which he could not possibly have ascertained the information he claims he was seeking. That telephone call supports a finding of this misconduct, illustrating how much respondent shirked his responsibilities. Respondent admitted to the OAE that he did not know whether Janet understood the nature and extent of her assets at the time of the phone call and did not know whether Janet had the requisite capacity before she signed his retainer agreement. He also did not make any assessment of the history of the

relationship between Janet and Jennifer. Instead, he relied on the judgment of the nonlawyer agents at FEP, specifically, McGlinchey. Therefore, respondent failed to meet the minimum standard of care expected of an attorney in an estate case. By admitting that he spends more time and effort on non-FEP clients, respondent conceded that he applied a lower standard of care in FEP cases.

In sum, we find that respondent violated RPC 1.4(c); RPC 1.7(a); RPC 5.3(a); and RPC 5.4(c). We determine to dismiss the remaining charges that he violated RPC 1.1(a); RPC 1.2(c); RPC 5.4(a); RPC 8.1(a); and RPC 8.4(c). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

It is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). See, also, In re Rajan, 237 N.J. 434 (2019) (the attorney engaged in a conflict of interest and an improper business transaction with a client by investing in a hotel development project spearheaded by an existing client; no prior discipline); In re Drachman, 239 N.J. 3 (2019) (the attorney engaged in a conflict of interest by recommending that his clients use a title insurance company in eight, distinct real estate transactions, without disclosing that he was a salaried employee of that company; there was no evidence of serious economic injury to the clients; the attorney also violated

RPC 5.5(a)(1) by practicing law while ineligible to do so; no prior discipline); and In re Allegra, 229 N.J. 227 (2017) (the attorney engaged in a conflict of interest by engaging in a sexual relationship with an emotionally vulnerable client; the attorney also engaged in an improper business transaction with the same client by borrowing money from her; he promptly repaid all the funds and had no prior discipline).

Periods of suspension have been imposed where an attorney's conflict of interest has caused serious economic injury or egregious circumstances exist. See, e.g., In re Fitchett, 184 N.J. 289 (2005) (three-month suspension for attorney who engaged in multiple conflicts of interest by continuing to represent a public entity after switching law firms and becoming associated with another party to the same litigation; the client suffered serious economic injury); In re Wildstein, 169 N.J. 220 (2001) (three-month suspension for attorney who engaged in a conflict of interest by serving as the executor and trustee to an estate that held an interest adverse to another estate of which the same attorney was the executor and beneficiary; he added himself as a residuary beneficiary to the second estate, thereby creating an improper testamentary gift; the attorney also failed to disclose material facts to the beneficiaries of both estates and made misrepresentations to disciplinary authorities during the investigation of the matters; he also was guilty of gross neglect, lack of diligence, and failure to

communicate with his clients); In re Butler, 142 N.J. 460 (1995) (three-month suspension for attorney who failed to inform his clients, the sellers, of the buyers' contract to sell the property to a third party; the contract had been executed before the closing of title with the attorney's client; he also represented both parties in negotiating a contract of sale and in negotiating a modification of its terms); and In re Feranda, 154 N.J. 4 (1998) (six-month suspension for attorney who engaged in a conflict of interest by simultaneously representing two parties to a real estate transaction; he also failed to safeguard the client's funds pending completion of the transaction; the harm to the client and his denial of wrongdoing were considered as aggravating factors).

Further, an attorney who, among other serious improprieties, allowed his professional judgment as a lawyer to be controlled by a corporation with which he was associated received a one-year suspension. In re Moeller, 177 N.J. 511 (2003). Moeller had been retained by a Texas corporation, as a "referral attorney," to review the living trust documents of the corporation's clients. The purpose of the corporation was to market and sell living trusts to senior citizens. The attorney filed a certification of incorporation for the corporation, became its registered agent, allowed the corporation to use his law firm's address, and became its New Jersey office manager. In the course of their association, the attorney and the corporation implemented a direct-mail marketing program that

contained numerous misleading statements. In fact, two county surrogates testified that elderly citizens, usually widows, had called their offices because they "were being scared out of their wits, they were being told that it would cost 18 to $24,000 for their next of kin or children . . . to admit a will [to] probate. And, of course, we know that's not true." In the Matter of G. Jeffrey Moeller, DRB 02-463 (June 19, 2003) (slip op. at 11). The attorney also allowed the corporation to control his professional independence as a lawyer, engaged in a conflict of interest by allowing his responsibilities to the corporation to materially limit his representation of his clients, did not explain the living trusts to the clients or discuss other estate planning options more suitable to their needs, assisted the corporation in the unauthorized practice of law, shared legal fees with the corporation, misrepresented to the clients the amount of his fee, charged an excessive fee, and misrepresented to disciplinary authorities the nature of his relationship with the corporation.

In 2017, relying on Moeller, we recommended a two-year suspension, on a motion for reciprocal discipline from Pennsylvania, for an attorney who violated RPC 1.2(a); RPC 1.4(c); RPC 1.5(e); RPC 1.7 (a); RPC 5.1(c)(1); RPC 5.5(a)(2); RPC 7.1(a)(1); RPC 7.3(d); RPC 8.4(a); and RPC 8.4(c). The Court agreed. In re Bohmueller, 232 N.J. 502 (2018).

In that matter, Bohmueller partnered with a nonlawyer who operated an estate planning business, similar to FEP, and failed to counsel his clients as to the means by which to pursue their objectives. The Pennsylvania Disciplinary Board had found that, "[Bohmueller] had no opportunity to personally consider the clients' assets or even know if these clients had the mental capacity to enter into a living trust, nor it seems, did he care." Nothing in the record indicated that Bohmueller had any contact with his clients or did any actual legal work for them. Instead, he allowed nonlawyers to meet with them and provide false and misleading information. His involvement with his clients consisted of collecting his fees. The attorney's conduct in this respect violated both RPC 1.2(a) and RPC 1.4(c). In the Matter of Barry O. Bohmueller, DRB 16-428 (July 12, 2017) (slip op. at 21-22).

Here, respondent's misconduct is not as egregious as Bohmueller's. Respondent engaged in a similar business model with a trust mill. However, he did not so completely abdicate his duties as an attorney that he was complicit in a larger fraud committed by the trust mill. Without a review of the several hundred other client matters that respondent handled on referral from FEP, we cannot find evidence of widespread fraud committed by FEP in this record as there was by the trust mill in the Bohmueller matter.

Additionally, Bohmueller violated RPC 1.5(e) by dividing his legal fees with a non-lawyer, without informing his clients; violated RPC 1.7(a) when his representation of numerous clients was materially limited by his responsibilities to nonlawyer agents with a pecuniary interest in the sale of living trusts; violated RPC 5.l(c)(1) when he acted in concert with the estate planning company to assist nonlawyers in the practice of law; violated RPC 5.5(a)(2) by aiding nonlawyers in the unauthorized practice of law through the acceptance of referrals from them and using delivery agents whom he knew were providing legal advice and counsel; violated RPC 7.1(a)(1) by participating in a direct mail marketing program that made material misrepresentations about his services; violated RPC 7.3(d) by compensating the delivery agents based on their referrals and recommendations that led to Bohmueller's retention by the estate planning clients; violated RPC 8.4(a) by assisting another in the violation of the RPCs, and by violating the RPCs through the acts of others; and violated RPC 8.4(c) by knowingly permitting nonlawyers to present incorrect and misleading written and oral information to his clients, using misleading direct mailings, and associating himself with business entities that falsely represented that they were estate planners. Id. at 21-23.

Among Bohmueller's additional violations, respondent shares only the conflict of interest. Clearly, the active deception and other aggravating factors

in Bohmueller make that case much more serious than the instant matter. This case is similar to Bohmueller, however, because respondent allowed FEP to handle most of the tasks for which he, as the attorney, was responsible. In the instant matter, respondent's laissez-faire attitude caused significant harm to his client, Janet, and her estate. His misconduct, however, was limited to a single client. Therefore, the appropriate starting point in assessing discipline is a short-term suspension.

Since Moeller, however, the Court has signaled harsher discipline for attorneys who victimize the elderly. In re Torre, 223 N.J. 538 (2015). In Torre, the Court suspended the attorney for one year, based on the egregious harm caused to a vulnerable, eighty-six-year-old victim. Id. at 546-47. Torre borrowed $89,250 from an elderly, unsophisticated client he had known for many years, repaid only a fraction of it during the client's lifetime, and barely reimbursed her estate. Ibid. Citing the protection of the public as a laudable goal of the attorney disciplinary system, the Court suspended Torre for one year. Id. at 548-50. It warned, however, that "misconduct of this nature will result in serious consequences going forward." Id. at 546-47.

Torre, however, was decided in 2015. The Court in Torre made it clear that misconduct such as respondent's would receive enhanced discipline "going forward." Therefore, the guidance offered in Torre is inapplicable to the instant

matter, because respondent's misconduct took place in 2007. Nonetheless, we consider Janet's vulnerability and the harm caused to her family and estate as aggravating factors that can be weighed against any mitigation.

In mitigation, respondent has an unblemished record in thirty-six years at the bar. This factor does not, on its own, outweigh the harm to respondent's client and her family. That harm, however, is not completely the fault of respondent, due to Jennifer's and Melodie's intervening fraud. Although the DEC absolved respondent of all misconduct because of that intervening fraud, had respondent not abdicated his professional responsibility as an attorney, he could have prevented the fraud.

Nevertheless, we are split on the appropriate quantum of discipline. Vice-Chair Gallipoli and Members Zmirich, Joseph, and Rivera voted for a three-month suspension, finding that the significant harm to the client and her heirs outweighs any of the proffered mitigation. Vice-Chair Gallipoli and Member Zmirich also found that respondent violated RPC 1.1(a). Specifically, respondent relied on nonlawyers to complete the workbook and then spent a mere eight minutes on the telephone with a person whom he believed to be Janet, going through a checklist of questions that respondent admits were mostly of a simple, yes or no nature. Further, the fact that he never verified the identity of the person with whom he was speaking, he never attempted to verify any of the

information from the workbook provided by nonlawyers, and he admitted that his standard of care when assessing the capacity and intent of clients that came to him directly, was exponentially more thorough than his standard for FEP clients, supports a finding that respondent committed misconduct, in violation of RPC 1.1(a).

Chair Clark and Members Boyer, Hoberman, and Petrou voted for a reprimand, finding that the intervening fraud and respondent's otherwise unblemished career of thirty-six years more than counterbalance the aggravating factors and serve to reduce the otherwise appropriate quantum of discipline.

Finally, Member Singer, who filed a separate dissent, voted to dismiss the complaint, and determined that respondent's misconduct amounted to simple negligence with no ethics repercussions.

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: _____
for: Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Donald Lee Kingett
Docket No. DRB 19-435

Argued: May 21, 2020

Decided: November 10, 2020

Disposition: Other

Members	Reprimand	Three-Month Suspension	Dismiss	Recused	Did Not Participate
Clark	X				
Gallipoli		X			
Boyer	X				
Hoberman	X				
Joseph		X			
Petrou	X				
Rivera		X			
Singer			X		
Zmirich		X			
Total:	4	4	1	0	0

For: Ellen A. Brodsky
Chief Counsel