Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-288
District Docket No. XIV-2020-0097E

In the Matter of	:
Hercules Pappas	:
An Attorney at Law	:

Decision

Argued: March 18, 2021

Decided: July 27, 2021

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

Marc D. Garfinkle appeared on behalf of respondent.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (the OAE), pursuant to R. 1:20-14(a), following an order from the Supreme Court of Pennsylvania suspending respondent for one year and one day, effective January 23, 2020. The OAE asserted that

respondent was found guilty of violating the equivalents of New Jersey RPC 1.1(a) (gross neglect); RPC 1.2(a) (failure to abide by the client's decisions concerning the scope and objectives of representation); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with the client); RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions); RPC 1.5(b) (failure to communicate in writing the basis or rate of the legal fee); RPC 1.15(a) (failure to safeguard funds); RPC 1.15(b) (failure to promptly deliver funds to the client or a third party); RPC 1.15(c) (failure to keep separate funds in which the attorney and a third party claim an interest); RPC 1.15(d) and R. 1:21-6 (recordkeeping); RPC 1.16(d) (failure to protect the client's interests upon termination and to refund the unearned portion of a fee); RPC 3.2 (failure to expedite litigation); RPC 3.3(a)(1) (false statement to a tribunal); RPC 3.4(c) (failure to comply with a court order); RPC 8.1(b) (failure to cooperate with an ethics investigation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).[1]

For the reasons set forth below, we determine to grant the motion for final discipline and to impose a one-year, prospective suspension.

[1] The OAE also charged respondent with a violation of R. 1:20-4(f)(1) (failure to respond to an ethics complaint shall be deemed an admission of the allegations set forth therein). However, this Rule is one of consequence and not of commission.

Respondent was admitted to the New Jersey bar in 1997, the Pennsylvania bar in 1998, and the New York bar in 2009. At the relevant times, he maintained an office for the practice of law in Haddonfield, New Jersey.

In 2019, respondent received an admonition for violating RPC 8.1(b). In re Pappas, 237 N.J. 121 (2019). In that matter, he also was charged with having violated RPC 5.5(a)(1) (unauthorized practice of law). Despite the default nature of the matter, we determined to dismiss the RPC 5.5(a)(1) charge. The facts of that matter are pertinent to the instant matter and are as follows.

Respondent's 2019 matter first came before us by way of a certification of the record (default) filed by the District IV Ethics Committee (the DEC), pursuant to R. 1:20-4(f). On September 10, 2014, a bankruptcy judge in the Eastern District of Pennsylvania (the EDPA) issued an order requiring respondent to complete six hours of continuing legal education (CLE) credits on bankruptcy law, with at least one of those credits related to bankruptcy ethics. Id. at 2.

The order further purported to enjoin respondent from filing bankruptcy cases or otherwise participating in bankruptcy cases "in the District, or any other District where he may be licensed. (Although he shall be permitted to complete and participate in the above caption [sic] matter.)" That prohibition was to

remain in place until respondent certified to the EDPA that he had completed the required CLE credits. Ibid.

Subsequently, on October 28, 2015 and March 30, 2016, respondent filed Chapter 7 and Chapter 11 petitions, respectively, in the United States Bankruptcy Court, District of New Jersey (the DNJ). At the time he filed these two petitions in the DNJ, respondent had not yet complied with the order entered by the EDPA. According to the terms of the EDPA order, respondent's failure to comply with the CLE requirements set forth therein rendered him ineligible to practice in the DNJ. Ibid.

Despite initially communicating with ethics authorities, respondent ultimately failed to comply with requests for information or to otherwise cooperate in the matter. Id. at 4. It, thus, proceeded as a default.

Upon reviewing the case, we first addressed the question of whether the EDPA had the authority to enjoin an attorney from practicing in other federal districts. Id. at 4-5. We recognized that a judge has the inherent authority to discipline an attorney who is before her court for the attorney's unethical behavior in that court, but determined that the reach of that discipline is limited, especially when it implicates an attorney's license to practice in another jurisdiction. Thus, that discipline reaches no further than the jurisdiction – in this case, district – from which it originated; at least until the attorney has been

given the full panoply of due process rights inherent to reciprocal discipline in other jurisdictions. Id. at 6.

We observed that the DNJ and the EDPA share a similar construct regarding the due process rights of attorneys disciplined in another jurisdiction – stated simply, the districts have equivalent reciprocal discipline rules. Because the case arose from respondent's purported ineligibility to practice in the DNJ, the DNJ's local rules were relevant to us. Id. at 7.

Local Civil Rule (L.C.R.) 104.1(b)(1) specifically addresses discipline imposed on attorneys by other courts and states that "[a]ny attorney admitted to practice before this Court shall, upon being subjected to public discipline by any other court . . . promptly inform the Clerk of this Court of such action." Ibid. Once the district court becomes aware of the discipline imposed in another court, the due process protections afforded an attorney are initiated, beginning with L.C.R. 104.1(b)(2)(B) and the issuance of an order to show cause directing the attorney to inform the court, within thirty days, why the imposition of identical discipline would be unwarranted and the reason(s) therefore. Id. at 7-8.

After the thirty days, the court shall impose identical discipline unless it can be demonstrated that on the record, it clearly appears:

> (A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(B) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that [the Court] could not, consistent with its duty, accept as final the conclusion on that subject; or

(C) that the imposition of the same discipline by [the Court] would result in grave injustice; or

(D) that the misconduct established is deemed to warrant substantially different discipline.

Id. at 8 (citing [L.C.R. 104.1(b)(4)(A-D)]).

Moreover, L.C.R. 104.1(c)(1) provides:

> Any attorney admitted to practice before this Court who shall be disbarred on consent or resign from the bar **of any other court of the United States or the District of Columbia,** or from the bar of any state, territory, commonwealth or possession of the United States, while an investigation into allegations of misconduct is pending, shall, upon the filing with this Court of a certified or exemplified copy of the judgment or order accepting such disbarment on consent or resignation, cease to be permitted to practice before this Court and be stricken from the roll of attorneys admitted to practice before this Court (emphasis supplied).
>
> [Ibid.]

Based on the foregoing, we concluded that the condition in the EDPA order purporting to enjoin respondent from practicing in any jurisdiction where he was licensed was unenforceable. Hence, we determined to dismiss the alleged violation of RPC 5.5(a)(1). Id. at 9. We found, however, that respondent had violated RPC 8.1(b) by failing to cooperate with disciplinary authorities and imposed a reprimand. Id. at 10.

The decision in that matter was transmitted to the Court on January 22, 2018. Three weeks later, on February 12, 2018, respondent filed a notice of petition for review with the Court. In the Matter of Hercules Pappas, DRB 18-317 (November 30, 2018) (slip op. at 2). On September 7, 2018, the Court remanded the matter to us to allow respondent to file a motion to vacate the default. The Court further ordered us to file a supplemental decision following the disposition of respondent's motion to vacate the default. The Court retained jurisdiction. Ibid.

On October 29, 2018, respondent filed a motion to vacate the default. We determined to deny the motion and to rely on our previous decision to impose a reprimand based solely on the violation of RPC 8.1(b). Id. at 2, 8.

As noted above, the Court imposed an admonition for respondent's violation of RPC 8.1(b). In re Pappas, 237 N.J. 121 (2019).

We now turn to the facts of this matter.

On October 15, 2018, the Pennsylvania Office of Disciplinary Counsel (the ODC) filed a Petition for Discipline charging respondent with multiple violations of the Pennsylvania Rules of Professional Conduct (the Pa. RPCs). Respondent failed to file an answer to the petition. On January 14, 2019, the Pennsylvania District II Hearing Committee (the Committee) conducted a prehearing conference, but respondent failed to appear. On February 25, 2019,

however, respondent appeared, pro se, for the disciplinary hearing before the Committee.

Respondent testified and presented two witnesses but offered no exhibits into evidence. Following the disciplinary hearing, the Committee held the record open for seven days to permit respondent to submit the documents he referenced during his testimony. By order dated March 6, 2019, the Committee admitted into the record all documents submitted by respondent, except one.

On March 27, 2019, the ODC filed a brief seeking respondent's suspension for one year and one day. On May 2, 2019, respondent, through newly retained counsel, filed a brief urging a private or public reprimand, a public censure, or a stayed suspension with probation.

On June 25, 2019, the Committee determined that respondent had violated the Pa. RPCs charged in the Petition for Discipline and recommended that he be suspended for one year and one day. Subsequently, on July 9, 2019, respondent filed a brief urging the Disciplinary Board of the Pennsylvania Supreme Court (the PADB) to reject the Committee's recommendation and to impose either a private or public reprimand with probation, recommend to the Supreme Court of Pennsylvania that respondent be publicly censured with probation or, at most, recommend to the Supreme Court of Pennsylvania a stayed suspension with probation and a practice monitor. Respondent also requested oral argument. On

July 17, 2019, the ODC filed a brief urging the PADB to adopt the Committee's recommendation and to recommend that the Supreme Court of Pennsylvania suspend respondent for one year and one day.

On September 16, 2019 a three-member panel of the PADB held oral argument and, on November 12, 2019, the panel issued its report and recommendations, which the Supreme Court of Pennsylvania adopted in determining to suspend respondent for one year and one day.

The following facts are taken from the PADB's November 12, 2019 Report and Recommendations to the Supreme Court of Pennsylvania.

The Bankruptcy Matters

On August 8, 2013, respondent filed a bankruptcy petition in the EDPA on behalf of his client, Bryn Michael Wevodau. On September 26, 2013, the EDPA dismissed the petition for respondent's failure to timely file necessary schedules and statements.

Six months later, on March 6, 2014, respondent filed a second bankruptcy petition on behalf of Wevodau, but did so without Wevodau's signature or a required Certificate of Credit Counseling. Consequently, on April 10, 2014, the EDPA dismissed the second petition. A week later, on April 17, 2014, respondent filed an emergency motion for the reconsideration of the second

dismissal. To effectuate the filing, respondent used the electronic filing account of Paul A.R. Stewart, Esq. On April 30, 2014, the EDPA granted respondent's motion.

Three months later, on July 28, 2014, the United States Trustee, George M. Conway, filed a Motion for an Order Disgorging Counsel's Fees based on inaccuracies and omissions in several of respondent's filings on behalf of Wevodau. Thereafter, on September 10, 2014, the EDPA issued the order detailed above, which required respondent to complete six hours of CLE by April 1, 2015, on the subject of bankruptcy, with at least one hour dealing with ethics in bankruptcy proceedings. Again, the order further purported to enjoin respondent from filing or otherwise participating in bankruptcy proceedings in any United States District, apart from the Wevodau matter, until he satisfied the CLE requirement. The EDPA also ordered respondent to file a certificate of completion, with the EDPA, once he obtained the CLE credits, and directed respondent to cease the use of Stewart's, or anyone else's, electronic filing account. Respondent consented to the EDPA's order. Thereafter, respondent failed to satisfy the ordered CLE requirement.

On October 29, 2015, despite his failure to comply with the EDPA's September 10, 2014 order, respondent filed a Chapter 7 Bankruptcy petition in the DNJ on behalf of Roman P. Osadchuk. Then, on March 30, 2016, respondent

filed a Chapter 11 bankruptcy petition in the DNJ on behalf of Roman P. Osadchuk, LLC.

On April 21, 2016, Adam D. Greenberg, Esq. notified the judge presiding over the Osadchuk matters of the EDPA's September 10, 2014 order, and the possibility that respondent had not completed the required CLE credits. In response, on April 26, 2016, respondent represented to the DNJ that he only recently had realized that the EDPA order "sought to prohibit filings not only in [the EDPA], but in any jurisdiction," and that he was pursuing the required CLE credits.

One month later, on May 26, 2016, the DNJ enjoined respondent from filing any bankruptcy pleadings in that jurisdiction until he complied with the CLE component of the EDPA order; enjoined respondent from filing any bankruptcy pleadings in the DNJ for six months following the satisfaction of the provisions of the EDPA order; ordered respondent to complete an additional six hours of CLE credits in bankruptcy law; and ordered respondent to submit a certification of completion to the United States Trustee in order to reinstate his privileges of filing bankruptcy pleadings in the DNJ. Despite consenting to the DNJ's order, as of the date this matter was argued, respondent had yet to complete the required CLE obligations ordered by the DNJ.

The Papa Matter

In March 2015, Therese Papa retained respondent in connection with personal injury claims.[2] On May 28, 2013, when she was seventeen years old, Papa sustained injuries during a motor vehicle accident in which the driver of the opposing vehicle, James K. Taviano, died at the scene. The statute of limitations for Papa's claims was due to expire on September 5, 2015.

On August 31, 2015, respondent filed a complaint against the Estate of James K. Taviano (the Estate) in the Court of Common Pleas of Delaware County. On December 28, 2015, Joseph Branca, Esq. entered an appearance on behalf of the Estate. Almost one year later, on September 13, 2016, Branca filed preliminary objections to Papa's complaint on behalf of the Estate, asserting that no estate had been raised for Taviano, that the complaint failed to join indispensable parties, and that service was improper.[3] Respondent did not reply to those preliminary objections.

One month later, on October 14, 2016, Papa's father sent respondent a text message, complaining that respondent had failed to properly file the complaint and asking respondent to contact him. Respondent replied that he would contact

[2] The record indicates that respondent accepted the Papa matter on a contingency fee basis but provides no further information regarding the fee agreement.

[3] To "raise an estate" refers to the process of opening an estate file with the relevant Registrar of Wills.

Branca and the court. The next day, on October 15, 2016, Papa's father sent another text message inquiring whether respondent thought the misfiling would cause any problems. Respondent replied, "I do not." In a follow up text, respondent added, "[y]ou just file to reopen the case. Its [sic] standard stuff."

On November 16, 2016, the court sustained Branca's preliminary objections and dismissed Papa's case, with prejudice. Respondent received the court's order but failed to inform Papa that her matter had been dismissed. At some point during the same month, Papa retained Louis F. Hornstine, Esq. and requested that he obtain her case file from respondent.

On November 21, 2016, Hornstine sent an e-mail to respondent requesting that he contact Hornstine's firm to arrange for delivery of Papa's file. Despite numerous subsequent attempts to communicate with respondent, Hornstine never received a reply and respondent never produced Papa's file. Ultimately, Papa secured a malpractice award against respondent.

The Tillman Matter

On October 7, 2016, William Tillman was arrested, charged with rape and involuntary deviant sexual intercourse, and detained on $750,000 bail. He was unable to post bail and remained incarcerated for the duration of his criminal proceedings. On October 25, 2016, having been contacted by Tillman's mother,

Roxanne Hozwell, respondent agreed to represent Tillman for a flat fee of $5,000. Respondent failed to communicate the rate and basis of his fee, in writing, as RPC 1.5(b) requires, to either Tillman or Hozwell. That same day, Hozwell paid respondent $2,500. Subsequently, on November 14, 2016, Hozwell paid respondent $500. Finally, on December 13, 2016, Hozwell made another $500 payment to respondent. Respondent testified before the PADB that he deposited these funds in his business account because of the flat-fee structure of the representation.

On December 1, 2016, respondent appeared at a preliminary hearing on Tillman's behalf. Two months later, Hozwell paid respondent another $700, which he did not deposit in his attorney trust account. Thereafter, on February 14, 2017, respondent failed to appear at a scheduled hearing. Nevertheless, in March 2017, respondent informed Hozwell that he was increasing his legal fee for the Tillman matter to $10,000. Again, respondent failed to communicate the rate or basis of his fee increase, in writing, to Tillman or Hozwell. Hozwell, however, continued to pay respondent. Specifically, she paid respondent $600 on March 17, 2017, and $500 on April 27, 2017. Respondent deposited these funds directly in his business account.

On July 20, 2017, Tillman terminated respondent's representation and R. Patrick Link, Esq. entered his appearance in the criminal proceedings on

Tillman's behalf. On July 21, 2017, Link sent a letter to respondent, notified him that he now represented Tillman, and requested that respondent produce Tillman's file. Despite several additional requests by Link, respondent failed to turn over the file. Respondent also failed to refund any unearned portion of Hozwell's advance fee payments.

The Pennsylvania Disciplinary Matter

On February 6, 2017, the ODC directed respondent to provide his reply to the allegations of misconduct flowing from his representation of Papa. In his reply, regarding the improper service of the complaint, respondent claimed that an individual named Daniel DiConno had effectuated service of the Papa complaint but had failed to provide a required "affidavit of service form." In Delaware County, Pennsylvania, however, proper service may only be effectuated by the Sherriff's office. DiConno is not a Sherriff's officer in Delaware County. In his reply, respondent conceded that he had failed to oppose Branca's preliminary objections and to turn Papa's file over to Hornstine.

Eight months later, on October 31, 2017, the ODC sent respondent a third letter, this time seeking his reply regarding allegations of misconduct arising from his conduct in the Tillman matter. Having received no response, on December 28, 2017, the ODC sent another letter to respondent, cautioning him

that his failure to reply would constitute an independent basis for discipline and requesting his submission by January 8, 2018. Respondent failed to reply.

On April 9, 2018, the ODC sent respondent another letter, this time requesting his reply regarding allegations of misconduct in the Wevodau and Osadchuk bankruptcy matters. Despite his prior cooperation in the Papa matter, respondent failed to reply.

On October 15, 2018, the ODC charged respondent with multiple violations of the Pa. RPCs. Despite proper service, respondent failed to file an answer and therefore, the factual allegations of the ODC's petition for discipline were deemed admitted, pursuant to Pa.R.D.E. 208(b)(3). On January 14, 2019, respondent failed to appear for a prehearing conference; however, on February 25, 2019, he appeared, pro se, for the disciplinary hearing.

On November 12, 2019, the PADB issued its Report and Recommendations, finding that, although respondent testified, his testimony "was not credible and, at times, [was] deliberately false and misleading." Specifically, the PADB concluded that respondent had falsely testified regarding (1) his completion of the CLE credits ordered by the EDPA and the DNJ; (2) prior ethics investigations in New Jersey; and (3) despite having previously admitted that he had failed to turn the Papa file over to Hornstine, he falsely testified that he had provided Hornstine an electronic version of the file.

The PADB emphasized that respondent falsely claimed, twice, that he had obtained the court-ordered CLE credits, and had failed to provide any proof. The PADB found it "incomprehensible" that respondent failed to comply with the federal court orders for years, appeared for the hearing without having completed the CLE credits, and had the "temerity to lie repeatedly . . . that he complied . . . and took the required credits."

Exacerbating the PADB's concerns was respondent's false testimony that we had found no ethics violations in our proceedings stemming from respondent's failure to comply with the September 10, 2014 EDPA order, when, in fact, we had determined to impose a reprimand.[4]

Finally, despite respondent's admissions that his misconduct resulted in Papa's case being dismissed, with prejudice, the PADB found his apology incredible and emphasized that he had not taken responsibility for his actions in other disciplinary matters but, instead, had blamed others and made excuses. The PADB found that respondent lacked genuine remorse. Further troubling the PADB were the two character witnesses who testified on respondent's behalf. One was an attorney who lacked any knowledge of the allegations against respondent and was still referring client matters to him, and the other was

[4] As noted above, although we imposed a reprimand, the Court determined that an admonition was the appropriate quantum of discipline for respondent's failure to cooperate with disciplinary authorities.

respondent's fiancée, who also was unaware of the substance of the disciplinary matter, or that respondent had been the subject of the malpractice action by Papa.

The PADB further determined that respondent had engaged in a pattern of misconduct in his representation of several clients and had acted "in flagrant defiance" of the federal courts' orders. The PADB emphasized that, despite being paid his fee in the serious Tillman criminal matter, respondent had neglected the matter, performing minimal work and failing to appear for a hearing.

The OAE, thus, urged the imposition of a three-month suspension for respondent's violation of the Pennsylvania equivalents of New Jersey RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b); RPC 1.4(c); RPC 1.5(b); RPC 1.15(a); RPC 1.15(b); RPC 1.15(c); RPC 1.15(d) and R. 1:21-6; RPC 1.16(d); RPC 3.2; RPC 3.3(a)(1); RPC 3.4(c); RPC 8.1(b); and RPC 8.4(d).[5]

In seeking a shorter term of suspension than imposed in Pennsylvania, the OAE cited several lines of case law. First, the OAE noted that short-term suspensions have been imposed on attorneys in matters involving the mishandling of multiple client matters.

[5] The OAE did not identify how many instances of each RPC respondent violated. Given the multiple client matters at issue, the following analysis will address all the instances for each violation present.

The OAE cited In re Johns, 233 N.J. 79 (2018), where the Court imposed a three-month suspension on an attorney found guilty of gross neglect; pattern of neglect; lack of diligence; failure to keep the client reasonably informed about the status of the matter; failure to promptly deliver funds to the client; failure to protect the client's interests upon termination of the representation; and conduct involving dishonesty, fraud, deceit, or misrepresentation in a motion for reciprocal discipline. Johns had previously been reprimanded and admonished for lack of diligence and a failure to communicate with clients.

In Johns, we found there was no mitigation and, in aggravation, cited Johns' failure to learn from his previous discipline, his failure to notify the OAE of his Pennsylvania suspension, and the harm to a client.

The OAE also cited numerous cases regarding the several additional violations respondent committed and asserted many aggravating factors, including: the duration of the unethical conduct; the multiple client matters; the lack of remorse for his misconduct; the negative impact upon clients; the prior discipline for failing to cooperate with disciplinary authorities; and the misleading testimony respondent provided at his hearing in Pennsylvania. The OAE did not proffer any mitigating factors.

In conclusion, the OAE argued that a three-month suspension was the appropriate quantum of discipline, emphasizing In re Avery, 194 N.J. 183

(2008). In Avery, the Court imposed a three-month suspension, in two default matters, on an attorney with no disciplinary history who grossly neglected four matters; lacked diligence; failed to communicate with clients; and failed to cooperate with disciplinary authorities. Here, respondent is guilty of those same ethics violations and more.

On February 22, 2021, counsel for respondent submitted a brief in opposition to the imposition of reciprocal discipline (Rb). Specifically, respondent asserted that we are limited to the findings of the PADB and that the OAE's recommendation of a three-month suspension is fair. In the alternative, respondent argued that no suspension should be imposed and urged us to consider his matter pursuant to R. 1:20-14(d), maintaining that the procedure followed by Pennsylvania was "so lacking in notice or opportunity to be heard to constitute a deprivation of due process."

Although respondent conceded that he had notice of the Pennsylvania disciplinary proceedings, he claimed that he was denied an opportunity to be heard because of a "procedural fiat" which denied him the benefit of counsel. Respondent recounted that he had requested a continuance based on having recently retained counsel, but that the request was denied, respondent was forced to appear pro se, and the result was a presentation "rife with blunders." (Rbp.1).

Respondent further asserted that New Jersey practice and procedure would not have allowed a disciplinary hearing to go forward without respondent's counsel, who had been retained entered an appearance in the matter. Additionally, he maintained that the acceptance of facts as alleged, based on the default nature of the matter, which were contested and "were part of the disciplinary algorithm" in Pennsylvania, would never have become so in New Jersey. Hence, he argued that a New Jersey matter "would never move to suspension in the summary manner that this was done, even if suspension would ultimately be the correct quantum." (Rbp.2).

Respondent urged us to consider his fourteen-page Petition for Review to the Supreme Court of Pennsylvania, submitted by respondent's prior counsel, and to find that respondent was denied the due process that New Jersey guarantees (Rbp.2;Ex.R1). In that petition, respondent argued that many of the allegations in the complaint were inaccurate, and that he should not be bound by them because he failed to answer the petition. He also objected to the Committee's rejection of his proffered mitigation. (Ex.R1).

While appearing before us at oral argument, counsel for respondent once again conceded that a three-month suspension would be fair but argued for a lesser form of discipline.

Following our review of the record, we determine to grant the OAE's motion for reciprocal discipline and to impose a one-year suspension. However, we did not find clear and convincing evidence to support all the violations charged by the OAE.[6] 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 Pennsylvania, the standard of proof in attorney disciplinary matters is that the "[e]vidence is sufficient to prove unprofessional conduct if a preponderance of the evidence establishes the conduct and the proof . . . is clear and satisfactory." Office of Disciplinary Counsel v. Kissel, 442 A. 2d 217 (Pa. 1982) (citing In re Berland, 328 A.2d 471 (Pa. 1974)). Moreover, "[t]he conduct may be proven solely by circumstantial evidence." Office of Disciplinary Counsel v. Grigsby, 425 A. 2d 730 (Pa. 1981) (citations omitted).

[6] Although the OAE's motion and brief is the equivalent of a charging document in a motion for reciprocal discipline, and we are bound by the facts as determined by the originating jurisdiction, the OAE is still required to meet its burden to prove all charged violations by clear and convincing evidence. Of course, the OAE's failure to do so for each charge, as is the case here, does not render the entire motion legally deficient.

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;
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> (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.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E). We, thus, determine to impose a one-year suspension, substantially the same quantum of discipline imposed in Pennsylvania.

Respondent violated RPC 1.1(a) and RPC 1.3 in the Wevodau matter by failing to include the necessary schedules and statements in the first bankruptcy

petition he filed. Thereafter, in further violation of RPC 1.1(a) and RPC 1.3, respondent filed the second petition without Wevodau's signature or the inclusion of a required certificate of credit counseling.

In the Papa matter, respondent failed to raise an estate, failed to properly effectuate service of the complaint, failed to reply to opposing counsel's objections resulting in the dismissal of the complaint with prejudice, and, thus, appears to have allowed the statute of limitations to run on Papa's claims. There is no information in the record as to whether subsequent counsel was able to revive the matter.

Finally, in the Tillman matter, respondent performed minimal work, despite receiving his fee, and failed to appear at a hearing before the client terminated the representation.

Further, respondent violated RPC 1.4(b) and (c) in the Papa matter, first by failing to explain to the client exactly what the ramifications were regarding Branca's motions, and then by failing to inform Papa that her matter had been dismissed, with prejudice.

Further still, in the Tillman matter, respondent first failed to establish the rate and basis of his fee in writing upon initiating the representation and then failed to do so a second time, despite increasing his fee during the course of the representation, in violation of RPC 1.5(b).

Nonetheless, respondent collected fees from Tillman's mother and did little to no work, resulting in the termination of the representation. Upon termination, respondent failed to return the unearned portion of his fee or to turn over Tillman's file to subsequent counsel, in violation of RPC 1.16(d). Similarly, respondent committed an additional violation of RPC 1.16(d) by failing to turn over the client file to subsequent counsel in the Papa matter.

Respondent also failed to expedite litigation in the Papa matter. Typically, we will find a violation of RPC 3.2 when, as here, an attorney files a complaint and thereafter does little to no work, including failing to file opposition to motions made by the adversary. Respondent committed such a violation by filing the complaint that initiated Papa's personal injury action but failing, thereafter, to reply to Branca's motions, and eventually allowing the matter to be dismissed, with prejudice.

Additionally, respondent repeatedly violated RPC 3.3(a)(1) via his sworn testimony before the PADB, during which he displayed a shocking lack of candor. He repeatedly asserted he had satisfied the CLE requirement imposed by both the EDPA and DNJ, but was unable to produce any evidence to support his representations. The PADB sharply criticized his repeated misrepresentations and, even more so, respondent's temerity, appearing before it, five years after the fact, without having completed the CLE requirements.

The PADB also found respondent lacking in candor when he testified that we had not imposed discipline, in New Jersey, based on his prior disciplinary matter.

Unlike the result of our prior decision, however, respondent now must receive discipline for his failure to comply with the EDPA order. Specifically, he failed to complete the CLE requirements by April 1, 2015, the established deadline in the order, in violation of RPC 3.4(c) and RPC 8.4(d). Respondent's filing of bankruptcy petitions in the DNJ, however, as previously determined by us, and the Court not having explicitly disagreed, is not a violation since the EDPA order was unenforceable in the DNJ without the proper due process set in the local rules of both the EDPA and the DNJ. This has no effect on the appropriate quantum of discipline since respondent has not been charged with practicing in the DNJ while ineligible.

Nonetheless, respondent's failure to complete the CLE requirements of the EDPA order violated RPC 3.4(c) and RPC 8.4(d). See In re Cerza, 220 N.J. 215 (2015) (reprimand for attorney who failed to comply with a bankruptcy court's order compelling him to comply with a subpoena, which resulted in the entry of a default judgment against him; violations of both RPC 3.4(c) and RPC 8.4(d); he also failed to promptly turn over funds to a client or third person, violations of RPC 1.3 and RPC 1.15(b); prior admonition for recordkeeping

violations and failure to promptly satisfy tax liens in connection with two client matters, even though he had escrowed funds for that purpose);

Finally, respondent violated RPC 8.1(b) by failing to reply to the Pennsylvania equivalents of ethics grievances in the Wevodau, Osadchuk, and Tillman matters, despite Pennsylvania disciplinary authorities' proper and repeated demands that he do so. He further violated that Rule by twice failing to appear at prehearing conferences.

We determine to dismiss the remaining alleged violations. Specifically, in Pennsylvania, respondent was found to have violated Pa. RPC 1.4(a)(2) (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished). In its brief, the OAE asserts that the foreign Rule is equivalent to New Jersey RPC 1.2(a). That Rule states that a lawyer shall abide by a client's decisions concerning the scope and objectives of the representation. There is no evidence that respondent ignored or acted in contravention to explicit instructions by his clients, which normally would constitute a violation of RPC 1.2(a). Rather, respondent failed to communicate with his clients about their matters or to reasonably explain the matters to them. Therefore, respondent's misconduct in violation of Pa. RPC 1.4(a)(2) is adequately addressed by respondent's RPC 1.4(b) and (c) violations, as

discussed above. Accordingly, we determine to dismiss the alleged violation of RPC 1.2(a).

Additionally, respondent was alleged to have violated RPC 1.15(a) - (d) in connection with his failure to deposit prepaid legal fees in his trust account. RPC 1.15(a) requires an attorney to hold "property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." In New Jersey, a general retainer may be deposited into the lawyer's business account, unless the client requires that it be separately maintained, in which case the retainer must be deposited into the trust account. In re Stern, 92 N.J. 611, 619 (1983).

In Stern, the Court noted "we have never held that the expenditure of a retainer is a conversion of trust funds." Further, the Court held that "absent an explicit understanding that the retainer fee be separately maintained, a general retainer fee need not be deposited in an attorney's trust account." Id. at 619.

Stated differently, unless the client instructs otherwise, in New Jersey, an attorney is permitted to place legal fees in a business or operating account, not a trust account. Id. at 619. Where the attorney initially deposits such legal fees in the trust account, before transferring them to the business account, at most, a brief commingling has occurred. Moreover, in the case of a proper advance

retainer agreement, failing to return an unearned legal fee is not the same as stealing or borrowing client funds. Instead, RPC 1.16(d) is the applicable Rule.

In 2003, the Court's Pollack Commission rejected modifying New Jersey's retainer rules to model the ABA/Pennsylvania rule (RPC 1.15(i)), which states "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance to be withdrawn by the lawyer only as fees are earned or expenses incurred." Therefore, there is no equivalent RPC violation in New Jersey for this form of misconduct committed by respondent in Pennsylvania. Similarly, the alleged violation of RPC 1.15(b) and (c) are subsumed by respondent's violation of RPC 1.16(d) and no recordkeeping violations have been asserted to support a finding that respondent violated RPC 1.15(d). As such, we determine to dismiss the alleged violations of RPC 1.15(a) - (d).

In sum, we determine to grant the OAE's motion and find that respondent violated RPC 1.1(a); RPC 1.3; RPC 1.4(b); RPC 1.4(c); RPC 1.5(b); RPC 1.16(d); RPC 3.2; RPC 3.3(a)(1); RPC 3.4(c); and RPC 8.1(b). We determine to dismiss the additional charges that respondent violated RPC 1.2(a) and RPC 1.15(a) - (d). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

A term of suspension is appropriate for respondent's misconduct. As the OAE emphasized, attorneys who commit gross neglect, lack of diligence, and failure to communicate, in multiple client matters, and also fail to cooperate with disciplinary authorities, typically receive a three- or six-month suspension. In re Avery, 194 N.J. 183 (2008) (three-month suspension in two matters, where the attorney mishandled four estate matters and was guilty of gross neglect, lack of diligence, failure to produce a court-ordered accounting, failure to communicate with clients, and failure to cooperate with disciplinary authorities; violations of RPC 1.1(a); RPC 1.3; RPC 1.4(b); RPC 3.4(c); RPC 8.1(b); and RPC 8.4(d); no prior discipline).

In addition to the RPC violations committed by Avery, respondent has committed several other significant violations; the most serious of which was his brazen lack of candor, under oath, before the PADB.

Generally, the discipline imposed on an attorney who makes misrepresentations to a court or exhibits a lack of candor to a tribunal, or both, ranges from a reprimand to a long-term suspension. See, e.g., In re Marraccini, 221 N.J. 487 (2015) (reprimand imposed on attorney who attached to approximately fifty eviction complaints, filed on behalf of a property management company, verifications that had been pre-signed by the manager, who had since died; the attorney was unaware that the manager had died and,

upon learning that information, withdrew all complaints; violations of RPC 3.3(a), RPC 8.4(c), and RPC 8.4(d); in mitigation, we found that the attorney's actions were motivated by a misguided attempt at efficiency, rather than by dishonesty or personal gain); In re Duke, 207 N.J. 37 (2011) (attorney received a censure for failure to disclose his New York disbarment on a form filed with the Board of Immigration Appeals, a violation of RPC 3.3(a)(5); the attorney also failed to adequately communicate with the client and was guilty of recordkeeping deficiencies; prior reprimand; the attorney's contrition and efforts at rehabilitation justified only a censure); In re Trustan, 202 N.J. 4 (2010) (three-month suspension for attorney who, among other things, submitted to the court a client's case information statement that falsely asserted that the client owned a home, and drafted a false certification for the client, which was submitted to the court in a domestic violence trial; violations of RPC 3.3(a)(1) and (4); other violations included RPC 1.8(a) and (e), RPC 1.9(c), and RPC 8.4(a), (c), and (d)); In re Forrest, 158 N.J. 428 (1999) (six-month suspension imposed on attorney who, in connection with a personal injury action involving injured spouses, failed to disclose the death of one of his clients to the court, to his adversary, and to an arbitrator, and advised the surviving spouse not to voluntarily reveal the death; violations of RPC 3.3(a)(5), RPC 3.4(a), and RPC 8.4(c); the attorney's motive was to obtain a personal injury settlement); In re

Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve; violations of RPC 3.3(a)(1) and (2), RPC 3.5(b), and RPC 8.4(c) and (d); two prior private reprimands [now admonitions]); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney who had been involved in an automobile accident and then misrepresented to the police, to her lawyer, and to a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing; violations of RPC 3.3(a)(4), RPC 3.4(f), and RPC 8.4(b)-(d)).

Respondent's remaining violations of RPC 1.5(b), RPC 1.16(d), and RPC 3.2 would each merit their own admonition. Here, they serve to further enhance respondent's discipline. See, e.g., In the Matter of Peter M. Halden, DRB 19-382 (February 24, 2020) (attorney failed to set forth in writing the basis or rate of the legal fee, and failed to abide by the client's decisions concerning the scope of the representation; violations of RPC 1.5(b) and RPC 1.2(a); no prior

discipline); In the Matter of Larissa A. Pelc, DRB 05-165 (July 28, 2005) (attorney failed to return an unearned portion of a fee upon termination of the representation in violation of RPC 1.16(d)); In the Matter of Gary A. Kraemer, DRB 14-085 (June 24, 2014) (attorney failed to file his appearance for several months in two litigation matters and, in one of the matters, he also failed to take prompt action to compel an independent medical examination of the plaintiff; violations of RPC 1.3; in addition, throughout the representation, the attorney repeatedly failed to reply to his client's – and his prior counsel's – numerous requests for information about the two matters; violations of RPC 1.4(b); finally, several months after final judgment was entered against his client, the attorney failed to turn over the file to appellate counsel, a violation of RPC 1.16(d); we considered his unblemished record of thirty-five years at the bar); and In the Matter of Leonard B. Zucker, DRB 12-039 (April 23, 2012) (after the attorney had filed a foreclosure complaint against a California resident, the defendant retained a New Jersey attorney, who provided proof that the defendant was not the proper party and requested the filing of a stipulation of dismissal; the attorney ignored the request, as well as all telephone calls and letters from the other attorney; only after the other attorney had filed an answer, a motion for summary judgment, and a grievance against him did he forward a stipulation of dismissal; this particular foreclosure matter had fallen through the cracks in the

attorney's office due, in part, to the large number of foreclosure matters that the firm handled and the failure to direct the attorney's calls and letters to the staff members trained to handle the problems that arose therefrom; violations of RPC 3.2 and RPC 5.3(a); we considered that the attorney had an otherwise unblemished record of fifty-two years, was semi-retired at the time of the events, his firm apologized to the grievant and reimbursed the legal fees, and the firm's institution of new procedures to avoid the recurrence of similar problems).

In aggravation, respondent's misconduct caused serious harm to Papa, whose matter was dismissed with prejudice, allowing the statute of limitations to expire. There is reference in the record to an award to Papa in a malpractice action, but that does not mean that she was made whole or eliminate the aggravating factor that respondent's misconduct caused her harm. Respondent also caused harm to Tillman and his mother by collecting fees from Hozwell while doing little to no work on the matter, all while Tillman remained incarcerated. Further, according to the OAE, respondent failed to report his Pennsylvania discipline to New Jersey disciplinary authorities. There is also respondent's prior admonition for failure to cooperate with disciplinary authorities to consider, in light of his failure to do so in the Pennsylvania disciplinary matter.

The OAE suggests there is no mitigation. Respondent asserted mitigation during the disciplinary process in Pennsylvania, including health issues his assistant was facing. The PADB rejected respondent's mitigation as well as his apology for his misconduct.

Based on the foregoing, especially considering the harm to clients, respondent's refusal to accept responsibility for his misconduct as evidenced by his lack of candor with the PADB, his failure to report his discipline in Pennsylvania to New Jersey disciplinary authorities, and the lack of any assertion on his part that he has completed the court-ordered CLE requirements, we find no reason to impose different discipline in New Jersey than that imposed in Pennsylvania. Thus, a one-year suspension is appropriate. We recommend that the Court impose this suspension prospectively. To impose a retroactive suspension would amount to no meaningful sanction on respondent in his New Jersey practice for his misconduct. See In re Martin, 226 N.J. 588 (2016); In the Matter of Jefferey K. Martin, DRB 15-275 (May 20, 2016) (slip op. at 16).

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/ Timothy M. Ellis**
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Hercules Pappas
Docket No. DRB 20-288

Argued: March 18, 2021

Decided: July 27, 2021

Disposition: One-Year Suspension

Members	One-Year Suspension
Clark	X
Gallipoli	X
Boyer	X
Hoberman	X
Joseph	X
Petrou	X
Rivera	X
Singer	X
Zmirich	X
Total:	9

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel