

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-027
District Docket No. XIV-2016-0057E

In the Matter of
Keith Michael McWhirk
An Attorney at Law

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Decision

Argued: July 15, 2021

Decided: September 17, 2021

Lauren Martinez appeared on behalf of the Office of Attorney Ethics.

Amy S. Kline 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 a July 31, 2020 order by the Supreme Court of Pennsylvania suspending respondent, on consent, for four years, retroactive to February 25, 2016.

The OAE asserted that respondent was found guilty of having violated the equivalents of New Jersey RPC 1.1(a) (gross neglect); RPC 1.1(b) (pattern of neglect); RPC 1.2(a) (failing to abide by client's decisions concerning the scope and objectives of the 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 1.15(a) (commingling); RPC 4.1(a) (making a false statement of material fact or law to a third person); RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer – N.J.S.A. 2C:21-1(a)(1) to (3), forgery); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).¹

For the reasons set forth below, we determine to grant the motion for reciprocal discipline and to impose a four-year suspension, retroactive to April 28, 2016, with conditions.

Respondent earned admission to the New Jersey and Pennsylvania bars in 1999. At the relevant times, he was an associate and then a named partner at the firm Mandracchia and McWhirk, LLC, in Skippack, Pennsylvania.

¹ The OAE did not set forth the number of instances of each RPC violation in its brief in support of this motion, which serves as the charging document in this case. In the below analysis, we set forth the number of instances we found for each RPC.

Effective February 25, 2016, the Supreme Court of Pennsylvania temporarily suspended respondent, on consent.

Effective April 28, 2016, our Court temporarily suspended respondent, on consent, for his misconduct underlying this matter. The OAE then inactivated its investigation pending the outcome of the Pennsylvania disciplinary proceedings. In re McWhirk, 224 N.J. 491 (2016)

On March 27, 2020, respondent, represented by counsel, and the Office of Disciplinary Counsel of the Supreme Court of Pennsylvania (the ODC) filed a Joint Petition in Support of Discipline on Consent (the JP), on which the Supreme Court of Pennsylvania relied in determining to suspend respondent. The facts set forth in the JP are as follows.

From April 2007 through December 2015, respondent was an associate and then a named partner at the firm Mandracchia and McWhirk, LLC (the Firm), in Skippack, Pennsylvania. On December 3, 2015, while attending a work-related event, respondent lost consciousness and collapsed, apparently due to syncope, a condition that can cause fainting. Respondent's fall caused serious injuries, including fractures to his face and damage to his teeth. Consequently, respondent was hospitalized for five days and required surgery.

During respondent's hospitalization, associates at the Firm discovered that he had committed serious misconduct and, effective December 2015, respondent's employment at the Firm was terminated and the Firm modified its name to Mandracchia Law, LLC. On February 2, 2016, members of the Firm made an initial, limited disclosure to the ODC regarding respondent's misconduct. Two days later, respondent also reported his misconduct to the ODC.

Specifically, respondent admitted that, in eleven client matters, he had misrepresented the status of cases to the clients, including claiming that he had filed petitions and pleadings when he had failed to do so. In four of the matters, respondent had used personal funds – in the amounts of \$10,000; \$31,000; \$69,500; and \$424,000 – to mislead the clients into believing that he had achieved successful outcomes in their matters.

For confidentiality reasons, the specific details of respondent's misconduct were set forth via sanitized descriptions of each client matter.

The Client 1 Matter

Respondent represented Client 1, a commercial bank, in a mortgage foreclosure action. A sheriff's sale had been completed and the funds for the

judgment had been disbursed. In July 2013, respondent misrepresented to Client 1, through various means of communication, that he had filed a petition to pursue excess funds being held by the sheriff; subsequently, he misrepresented that the petition had been granted and the funds had been released. In furtherance of his misrepresentations, respondent disbursed \$31,000 of his personal funds to Client 1.

The Client 2 Matter

Respondent represented Client 2, the plaintiff in a mortgage foreclosure action in which the defendant had filed for bankruptcy protection. In February 2014, respondent misrepresented to Client 2, through various means of communication, that he had successfully filed a motion for relief from the automatic stay provisions of the Bankruptcy Code. Respondent further misrepresented to Client 2 that the foreclosure action was proceeding to sheriff's sale. In furtherance of his misrepresentations, respondent disbursed \$69,500 of his personal funds to Client 2.

Although Client 2's mortgage was not satisfied, beginning in July 2014, monthly distributions to the Firm began, in the amount of \$23,901.47, in satisfaction of Client 2's claim in the Bankruptcy Court.

Following his December 2015 fall, respondent misrepresented to the Firm the nature of those monthly distributions and withheld the fact that he had distributed to Client 2 \$69,500 of his own funds. In furtherance of his misrepresentations to the Firm, he fabricated a letter and deposit slip dated December 14, 2015, and told the Firm that Client 2 had received \$20,330.67, of which \$3,570.80 could be retained by the Firm as fees. Moreover, as detailed further below, respondent caused \$20,000 of the funds Client 2 should have received through the Bankruptcy Court to be distributed to an unrelated client.

The Client 3 Matter

Respondent represented Client 3, who sought to file breach of contract, unfair trade practice, and consumer protection claims against a company Client 3 had paid \$25,000 to restore an automobile. Although respondent sent the company a demand letter, he failed to file a complaint.

In September 2013, respondent misrepresented to Client 3 that he had both filed the complaint and won a summary judgment motion. In furtherance of his misrepresentations, respondent fabricated a court order – which included a forged judge’s signature – which purported to award \$25,000 to Client 3; he provided the bogus order to the client and placed it in the Firm’s file.

Respondent then misrepresented to Client 3 that the defendant had initiated an appeal, but then secured the client's approval for a bogus, \$40,000 settlement that purportedly included attorneys' fees, costs, and penalties. Respondent then fabricated a settlement agreement and provided \$10,000 in personal funds to Client 3, claiming it was an initial payment toward the \$40,000 settlement.

The Client 4 Matter

Respondent represented Client 4, a commercial bank, in a mortgage collection action that commenced with the filing of a confession of judgment. Subsequently, a court granted the defendants' motion to open/strike Client 4's judgment.

Client 4 then instructed respondent to file a mortgage foreclosure action against the relevant properties, which consisted of ten vacant lots and one lot featuring a model home occupied by a tenant. On various dates between September and December 2015, respondent misrepresented to Client 4 that he had filed the mortgage foreclosure action. In October 2015, respondent also misrepresented to Client 4 that a sheriff's sale had occurred.

Contemporaneous to respondent's December 2015 fall, Client 4 requested the funds from the bogus sheriff's sale. Between December 10 and December 14, 2015, in furtherance of his misrepresentations to Client 4, respondent deposited with the Firm \$424,000 in personal funds. Respondent then disbursed to Client 4 the \$424,000, along with the \$20,000 mentioned above, in the Client 2 matter, purportedly as the proceeds of the sheriff's sale. Client 4, however, promptly questioned the amount of the funds, noting that it was less than what the client had expected.

On or about December 17, 2015, in response to inquiries made by both Client 4 and the Firm, respondent fabricated a sheriff's distribution sheet and provided it to Client 4 and the Firm; the bogus distribution sheet included the letterhead of the Berk's County Sheriff's Department, set forth a fictitious sale number, and listed the net payment to Client 4 as \$444,435.35. Soon thereafter, Client 4 became aware that the funds it had received were respondent's personal funds. During a December 28, 2015 meeting with the Firm, respondent admitted his misconduct in Client 4's matter.

The Client 5 Matter

Respondent represented Client 5, three brothers, in connection with a property their deceased aunt had bequeathed to them. The brothers sought to file a lawsuit to recover the property. For years, beginning in late 2010 through fall 2015, respondent misrepresented to the brothers, through various means, that he had filed a civil action on their behalf.

The Client 6 Matter

Respondent represented Client 6, a commercial bank. In October 2011, he drafted a complaint in connection with potential civil litigation and, in June 2012, he misrepresented to Client 6, through various means, that he had filed the complaint.

The Client 7 Matter

Respondent represented Client 7, the plaintiff in an ongoing breach of contract action. Respondent failed to defend a summary judgment motion filed by the defendant, resulting in a January 8, 2015 adverse ruling against Client 7; thereafter, he failed to file a motion to reinstate the complaint. Through the

summer of 2015, respondent misrepresented to Client 7 and the Firm, through various means, the status of the matter.

The Client 8 Matter

Respondent represented Client 8, the plaintiff in a failure to diagnose case against her dentist; specifically, the client had an issue that was later discovered to be oral cancer. Client 8 was subsequently properly diagnosed and received treatment. On September 25, 2014, the case commenced with the filing of a Writ of Summons but, thereafter, respondent failed to file a complaint; consequently, Client 8's matter was dismissed. In the spring of 2015, respondent misrepresented to Client 8 that the matter was proceeding apace.

The Client 9 Matter

Respondent represented Client 9, who directed that respondent file a complaint in the United States District Court for the Eastern District of Pennsylvania. Respondent failed to file the complaint. In the summer of 2015, respondent misrepresented to Client 9, through various means, that the matter was proceeding apace.

The Client 10 Matter

Respondent represented Client 10, a commercial bank, in a matter arising from two commercial loans. One loan had been secured by a Philadelphia property, and had been closed. Client 10 instructed respondent to commence a foreclosure action regarding the second loan, which was secured by a New Jersey property. In the spring of 2012, respondent misrepresented to Client 10, through various means, that the foreclosure action was proceeding apace.

The Client 11 Matter

Respondent represented Client 11, the executor of an estate that had been administered and closed in Middlesex County, New Jersey. Subsequently, however, the State of New Jersey, Department of Taxation, filed a judgment for additional taxes allegedly owed by the estate. Respondent failed to reply to the Department of Taxation and a lien was filed against both the estate and the executor.

In November 2012, respondent misrepresented to Client 11, through various means, that he had filed a timely reply with the Department of Taxation.

In the Joint Petition, respondent admitted that his misconduct violated the equivalents of New Jersey RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and

(c); RPC 1.15(a); RPC 4.1(a); and RPC 8.4(c). Respondent and the ODC jointly requested the imposition of a four-year suspension, retroactive to February 25, 2016, the effective date of respondent's temporary suspension in Pennsylvania.

In mitigation, respondent emphasized that he had reported himself to the ODC; had consented to his temporary suspension; had been "forthright and specific as to the scope and nature of his misconduct;" had stipulated to his misconduct; had expressed contrition and remorse; had an unblemished sixteen-years at the bar; and that his misconduct was directly related to his diagnosis and treatment for anxiety and depressed mood, for which he was actively engaged in treatment.

On July 9, 2020, the Disciplinary Board of the Supreme Court of Pennsylvania recommended that the Supreme Court of Pennsylvania grant the Joint Petition.

On July 31, 2020, the Supreme Court of Pennsylvania granted the Joint Petition, and suspended respondent for four years, retroactive to February 25, 2016, the date of his temporary suspension in Pennsylvania. That same date, respondent reported his suspension to the OAE.

In its motion papers, the OAE recommended either a four-year suspension or respondent's disbarment. The OAE took no position on whether a term of

suspension should be prospective or retroactive but asserted that, if the Board imposes a term of suspension, respondent should be required to provide proof of fitness prior to his reinstatement.

In support of potential disbarment, the OAE focused on the most serious allegations of respondent's misconduct – his forgery of official documents, including a court order and sheriff's sale disbursement sheet, in violation of RPC 8.4(b). The OAE asserted that such forgeries of government documents constitute third-degree crimes in New Jersey, and emphasized disciplinary precedent, detailed below, which holds that crimes of dishonesty that touch upon an attorney's central trait of character may result in disbarment.

On March 1, 2021, respondent submitted a reply to the OAE's motion. He argued that the imposition of the identical discipline imposed in Pennsylvania – a four-year, retroactive suspension (in this case, retroactive to April 28, 2016, the effective date of his temporary suspension in New Jersey) – is the appropriate quantum of discipline for his misconduct, and that disbarment was not warranted. In support of a suspension, respondent emphasized the mitigation set forth in the Joint Petition, and his position that his mental health issues were directly linked to his misconduct. Moreover, respondent cited extensive New Jersey disciplinary precedent, discussed below, in support of a term of

suspension.

In an appendix to his brief, respondent supplied to the Board three character letters attesting to his reputation for honesty and integrity.

Also in his submission, respondent represented that, since February 2016, he has been in a course of therapy with Dr. Joshua Friedman, including weekly therapy sessions. Respondent has been diagnosed with anxiety and depressed mood (including suicidal ideations), consistent with Dysthymic Disorder and Major Affective Disorder. A psychiatric evaluation of respondent noted that he had a “significantly avoidant interaction pattern within the context of interpersonal conflict and confrontation,” stemming from childhood experiences. The evaluation further opined that respondent’s ethics infractions were directly triggered by the work environment he experienced as a litigator at the Firm.

At oral argument before us, the OAE reiterated the position set forth in its motion papers. Respondent again requested the imposition of discipline identical to that imposed in Pennsylvania, emphasizing the mitigating factors he had advanced in connection with the Pennsylvania disciplinary proceedings, especially the claimed nexus between respondent’s diagnosed psychological issues and his misconduct.

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

In 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).

Notably, in this case, respondent stipulated to the facts of his misconduct and to the corresponding ethics violations, except for RPC 8.4(b).²

² Although respondent objected to the OAE’s allegation that his misconduct violated RPC 8.4(b), emphasizing that he was not charged with the Pennsylvania equivalent, his objection is without merit. The OAE’s motion for final discipline and accompanying brief in this matter

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-

14(a)(4), which provides in pertinent part:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

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

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

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

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

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

Based on New Jersey disciplinary precedent, we follow the presumption set forth in R. 1:20-14(a)(4) and determine to grant the OAE's motion for reciprocal discipline, and impose the identical discipline – a four-year, suspension, retroactive to respondent's April 28, 2016 temporary suspension.

served as the charging document in this case. Thus, the OAE is within its discretion in charging RPC 8.4(b) for respondent's admitted forgery of documents and a judge's signature.

Specifically, respondent committed ethics violations as follows.

In eleven client matters, respondent committed serious misconduct, including misrepresenting to numerous clients and his own law firm that he had filed petitions and pleadings when he had failed to do so. In four of the matters, respondent had used personal funds – in the amounts of \$10,000; \$31,000; \$69,500; and \$424,000 – to perpetrate misrepresentations to clients that he had achieved successful outcomes in their matters.

In the Client 1 matter, respondent misrepresented to the client, through various means of communication, that he had filed a petition to pursue excess funds being held in connection with a sheriff's sale. Moreover, he misrepresented that the petition had been successful and that the funds had been released. In furtherance of his misrepresentations, he disbursed \$31,000 of his personal funds to Client 1.

Respondent's misconduct in the Client 1 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); RPC 1.15(a); and RPC 8.4(c).

In the Client 2 matter, respondent misrepresented to the client, through various means of communication, that he had successfully filed a motion for relief from a bankruptcy stay. He further misrepresented to Client 2 that a desired foreclosure action was proceeding to sheriff's sale. In furtherance of his

misrepresentations, respondent disbursed \$69,500 of his personal funds to Client 2.

Although Client 2's mortgage was not satisfied via a lump sum payment by the mortgagor, beginning in July 2014, monthly distributions to the Firm began, in the amount of \$23,901.47, in satisfaction of Client 2's claim made in connection with the bankruptcy proceeding.

Following his December 2015 fall, respondent misrepresented to the Firm the nature of those monthly distributions and the fact that he had distributed to Client 2 \$69,500 of his own funds. In furtherance of those misrepresentations, he fabricated a letter and deposit slip dated December 14, 2015, and falsely advised the Firm that Client 2 had received \$20,330.67, of which \$3,570.80 could be retained as fees. Moreover, as detailed further below, respondent caused \$20,000 of the funds Client 2 should have received through the Bankruptcy Court to be distributed to an unrelated client.

Respondent's misconduct in the Client 2 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); RPC 1.15(a); RPC 4.1(a); and RPC 8.4(c).

In the Client 3 matter, respondent sent to the client's intended defendant a demand letter, yet he failed to file a corresponding complaint. Subsequently,

he misrepresented to the client that he had both filed the complaint and won a summary judgment motion. In furtherance of his misrepresentations, he fabricated a court order – which included a forged judge’s signature – which purported to award \$25,000 to Client 3; he provided the bogus order to the client and placed it in the Firm’s file.

Respondent then expanded the ruse, misrepresenting to Client 3 that the defendant had initiated an appeal. He then secured the client’s approval for a bogus, \$40,000 settlement. Respondent then fabricated a settlement agreement and provided \$10,000 in personal funds to Client 3, claiming it was the first payment toward the settlement.

Respondent’s misconduct in the Client 3 matter violated RPC 1.1(a) and (b) (constituting the third client matter in which respondent committed gross neglect); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); RPC 1.15(a); and RPC 8.4(b) and (c).

In the Client 4 matter, respondent commenced a mortgage collection action by filing a confession of judgment against the mortgagors. Subsequently, however, a court granted the mortgagors’ motion to strike Client 4’s judgment.

Client 4 then directed respondent to file a mortgage foreclosure action. On various dates, respondent misrepresented to Client 4 that he had filed the

action. Subsequently, respondent misrepresented to Client 4 that a sheriff's sale had successfully occurred.

Contemporaneous to respondent's December 2015 fall, Client 4 requested the funds from the bogus sheriff's sale. In furtherance of his misrepresentations to Client 4, respondent deposited with the Firm \$424,000 in personal funds. Respondent then disbursed to Client 4 the \$424,000, along with the \$20,000 mentioned above, from the Client 2 matter, purportedly as the proceeds of the sheriff's sale. Client 4, however, promptly probed the amount of the funds, because it was less than expected.

In response to inquiries made by both Client 4 and the Firm, respondent fabricated a sheriff's distribution sheet and provided it to Client 4 and the Firm; the bogus distribution sheet included the letterhead of the Berk's County Sheriff's Department, set forth a fictitious sale number, and listed the net payment to Client 4 as \$444,435.35. Soon thereafter, Client 4 became aware that the funds it had received were respondent's personal funds. During a meeting with the Firm, respondent admitted his misconduct in Client 4's matter.

Respondent's misconduct in the Client 4 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); RPC 1.15(a); RPC 4.1(a); and RPC 8.4(b) and (c).

In the Client 5 matter, respondent represented three brothers who sought to secure ownership, through civil action, of a property their deceased aunt had left to them by bequest. For years respondent misrepresented to the brothers, through various means, that he had filed a lawsuit on their behalf.

Respondent's misconduct in the Client 5 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); and RPC 8.4(c).

In the Client 6 matter, respondent drafted a complaint for potential civil litigation but then misrepresented to Client 6, through various means, that he had filed the complaint.

Respondent's misconduct in the Client 6 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); and RPC 8.4(c).

In the Client 7 matter, respondent represented the plaintiff in an ongoing breach of contract action. Respondent failed to defend a summary judgment motion filed by the defendant, resulting in an adverse ruling against Client 7. Thereafter, respondent failed to file a motion to reinstate the complaint. Respondent repeatedly misrepresented to Client 7 and the Firm, through various means, the status of the matter.

Respondent's misconduct in the Client 7 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); RPC 4.1(a); and RPC 8.4(c).

In the Client 8 matter, respondent represented the plaintiff in a civil action against her prior dentist. The case commenced with the filing of a Writ of Summons but, thereafter, respondent failed to file a complaint; consequently, Client 8's matter was dismissed. Respondent then misrepresented to Client 8 that the matter was proceeding apace.

Respondent's misconduct in the Client 8 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); and RPC 8.4(c).

In the Client 9 matter, respondent was directed to file a complaint in federal court, yet he failed to file the complaint. Subsequently, he repeatedly misrepresented to Client 9 that the matter was proceeding apace.

Respondent's misconduct in the Client 9 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); and RPC 8.4(c).

In the Client 10 matter, respondent represented a commercial bank in a matter arising from two commercial loans. Client 10 instructed respondent to commence a foreclosure action regarding the second loan, yet he failed to do so. Subsequently, respondent misrepresented to Client 10, through various means, that the foreclosure action was proceeding apace.

Respondent's misconduct in the Client 10 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); and RPC 8.4(c).

Finally, in the Client 11 matter, respondent represented the executor of an estate in Middlesex County, New Jersey. When the State of New Jersey, Department of Taxation, filed a judgment for additional taxes allegedly owed by the estate, respondent failed to act. Consequently, a lien was filed against both the estate and the executor. Thereafter, respondent misrepresented to Client 11, through various means, that he had filed a timely reply with the Department of Taxation.

Respondent's misconduct in the Client 11 matter violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; RPC 1.4(b) and (c); and RPC 8.4(c).

In sum, we find that respondent committed extensive ethics violations, as follows. He violated RPC 1.1(a); RPC 1.2(a); RPC 1.3; and RPC 1.4(b) and (c) and RPC 8.4(c) in all eleven client matters; he violated RPC 1.1(b) by engaging in a pattern of neglect; he violated RPC 1.15(a) in four client matters (the Client 1; Client 2; Client 3; and Client 4 matters); he violated RPC 4.1(a) in three client matters (the Client 2; Client 4; and Client 7 matters); and he violated RPC 8.4(b) in two client matters (the Client 3 and Client 4 matters). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

After a full review of the record in this case, we determine that the ultimate sanction of disbarment is neither appropriate nor necessary. Specifically, we accord significant weight to the nexus between respondent’s mental health issues and the misconduct under scrutiny. We and the Court consistently have recognized – particularly in recent matters – the mitigating effect of mental health issues in disciplinary matters, where the respondent has been able to demonstrate a causal link between their diagnosis and their misconduct. See, e.g. In re Romanowski, 244 N.J. 426 (2020); In re Isa, 244 N.J. 265 (2020); In re Drinkwater, 244 N.J. 195 (2020); In re Natkow, 243 N.J. 290 (2020); and In re Acciavatti, 242 N.J. 517 (2020).

Further, as the OAE emphasized in its brief, in In re Giordano, 123 N.J. 362 (1991), the Court remarked that crimes of dishonesty touch on an attorney’s central trait of character. The Court declared that, when an attorney “participate[s] in criminal conduct designed to subvert fundamental objectives of government, objectives designed to protect the health, safety, and welfare concerns of society, the offense will ordinarily require disbarment.” Id. at 370 (citation omitted).

Unlike the attorneys disbarred pursuant to Giordano and its progeny, in the instant matter, respondent’s deceitful and sometimes criminal conduct was

not designed to subvert governmental objectives but, rather, was intended to conceal his gross mishandling of numerous client matters, as exacerbated by his layers of lies to unsuspecting clients and his own law firm. To that end, he expended more than \$500,000 of his own funds in a desperate effort to escape detection. Clearly, respondent's behavior was driven, at least in part, by his diagnosed and now documented struggles with his mental health. He was avoiding the debilitating conflict that he knew would occur the moment his misconduct was revealed.

For those reasons, we do not reach the conclusion that respondent is unsalvageable. Rather, we determine to impose a significant term of suspension for respondent's misconduct, which included the mishandling of eleven client matters and his criminal forgery, via the fabrication of official court and executive branch documents.

Attorneys who mishandle multiple client matters generally receive suspensions ranging from three months to one year. See, e.g., In re Pinnock, 236 N.J. 96 (2018) (three-month suspension for attorney who was found guilty of misconduct in ten client matters: gross neglect, lack of diligence, and failure to communicate with the client in nine matters; and pattern of neglect and conduct involving dishonesty, fraud, deceit, or misrepresentation in four matters; in

aggravation, he caused significant harm to his clients; in mitigation, the attorney suffered from serious physical and mental health issues; prior reprimand); In re Tarter, 216 N.J. 425 (2014) (three-month suspension for attorney who was found guilty of misconduct in eighteen matters: lack of diligence and a pattern of neglect in fifteen of those matters; gross neglect in one matter; and failure to withdraw from the representation and to properly terminate the representation in all eighteen matters; in mitigation, the attorney had no prior discipline and was battling alcoholism at the time of the misconduct); In re Tunney, 185 N.J. 398 (2005) (six-month suspension for misconduct in three client matters; the violations included gross neglect, lack of diligence, failure to communicate with clients, and failure to withdraw from the representation when the attorney's physical or mental condition materially impaired his ability to represent clients; in mitigation, the attorney suffered from serious depression; prior reprimand and six-month suspension); In re Pollan, 143 N.J. 305 (1996) (attorney suspended for six months for misconduct in seven matters, including gross neglect, pattern of neglect, failure to communicate with clients, failure to deliver a client's file, misrepresentation, recordkeeping improprieties, and failure to cooperate with ethics authorities; clinical depression alleged); In re Perlman, 241 N.J. 95 (2020) (one-year retroactive suspension for attorney who was found guilty of

misconduct in seven matters: lack of diligence in six matters; failure to communicate with the client and failure to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in five matters; failure to withdraw from the representation when continued representation would violate the RPCs and failure to comply with applicable law requiring notice to or permission of the tribunal when terminating a representation in one matter; conduct involving dishonesty, fraud, deceit or misrepresentation in one matter; engaging in conduct prejudicial to the administration of justice in one matter; and failure to notify clients of his suspension in three matters; in mitigation, the attorney suffered from serious mental health issues, and had a prior one-year suspension for misconduct in ten matters that occurred during the same time period as the above-described misconduct; in aggravation, he caused significant harm to his clients); In re Suarez-Silverio, 226 N.J. 547 (2016) (one-year suspension for an attorney who, over thirteen years, mishandled twenty-three client matters before the Third Circuit Court of Appeals, many of which ended by procedural termination; the attorney also disobeyed court orders and made a misrepresentation to the court clerk, which escalated the otherwise appropriate six-month suspension; previous admonition and reprimand for similar conduct); and In re Rosenthal, 208 N.J.

485 (2012) (in seven default matters, one-year suspension imposed on attorney for gross neglect in two matters; pattern of neglect; lack of diligence in four matters; failure to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information in seven matters; failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in one matter; charging an unreasonable fee in three matters; failure to communicate in writing the basis or rate of the fee in one matter; failure to expedite litigation in one matter; failure to cooperate with disciplinary authorities in seven matters; conduct involving dishonesty, fraud, deceit, or misrepresentation in two matters; and conduct prejudicial to the administration of justice in two matters; he also abandoned six of the seven clients; the attorney had an unblemished disciplinary history in his more than twenty years at the bar).

The fabrication of documents typically involves two scenarios: either to cover up the attorney's mistakes or to gain an advantage either for the attorney or the client. In either case, a significant term of suspension is imposed. See In re Steiert, 220 N.J. 103 (2014) (six-month suspension imposed on attorney for serious misconduct, in violation of RPC 8.4(c) and (d); through coercion, the attorney had attempted to convince his former client, who had been a witness in

the attorney's prior disciplinary proceeding, to execute false statements, which the attorney intended to use to exonerate himself in respect of the prior discipline; in aggravation, the attorney's conduct was found to amount to witness tampering, a criminal offense; he exhibited neither acceptance of his wrongdoing nor remorse; and he had a prior reprimand, in 2010, for practicing law while ineligible and making misrepresentations in an estate matter) and In re Carmel, 219 N.J. 539 (2014) (three-month suspension imposed on attorney for egregious misconduct, in violation of RPC 8.4(c)); to avoid duplicate transfer taxes, the attorney and the bank which he had represented in a successful real estate foreclosure proceeding against a borrower, chose not to immediately record the bank's deed in lieu of foreclosure; when a subsequent buyer for the property was under contract, the attorney discovered that, in the interim, an Internal Revenue Service (IRS) lien had been filed against the property; because the IRS lien was superior of record to the bank's interest, the IRS would levy against the bank's proceeds from the intended sale of the property; rather than disclose the prior IRS lien to his client, the attorney fabricated a lis pendens for the foreclosure action, which was intended to deceive the IRS into believing that its lien was junior to the bank's interest; the attorney then sent the false lis pendens to the IRS, represented that it had been filed prior to the IRS lien, and

attempted to engage the IRS in settlement discussions; rather than settle, the IRS referred the matter to the U.S. Attorney's Office, at which point the attorney finally admitted his misconduct; in mitigation, the attorney had an unblemished disciplinary history of thirty-seven years when he sent the false lis pendens to the IRS and paid off the IRS lien with his own funds, in the amount of \$14,186 plus interest, in order to make both his client and the government whole).

Criminal forgery alone warrants a one-year suspension. See, e.g., In re White, 191 N.J. 553 (2007) (one-year suspension imposed on attorney who, without her friend's authority, used the friend's credit to apply for a student loan and then forged the friend's signature on the application; the attorney admitted the forgery after she had been charged, in two counties, with forgery and uttering a false document with the purpose to defraud).

For the totality of respondent's misconduct, a significant term of suspension is warranted. In crafting the appropriate quantum of discipline, we also consider aggravating and mitigating factors.

Respondent's misconduct extended to matters involving eleven clients, all of whom paid him fees, over a prolonged period. He went to great lengths to conceal his misconduct, including the fabrication of government documents and a corresponding web of lies to his own clients and law firm.

In mitigation, respondent suffered significant mental health issues that directly contributed to his misconduct. Although the first time he sought medical attention for these issues was after his misconduct was discovered, respondent has established a clear causal link between his diagnoses and his misconduct.

Further, respondent reported his misconduct to Pennsylvania disciplinary authorities; consented to his temporary suspension in both Pennsylvania and New Jersey; has been “forthright and specific as to the scope and nature of his misconduct;” has stipulated to his misconduct; has expressed contrition and remorse; and had an unblemished sixteen years at the bar.

Based on the foregoing, and considering the breadth and scope of respondent’s misconduct, we find no reason to impose different discipline in New Jersey than that imposed in Pennsylvania – a four-year suspension. Considering respondent’s ongoing temporary suspension for this misconduct, we impose that term of suspension retroactive to April 28, 2016.

As additional protections, due to the nature of respondent’s admitted mental health struggles, we require respondent, within sixty days of the date of the Court’s Order in this matter, to provide to the OAE proof of continuing psychiatric treatment.

Moreover, as a condition precedent to his reinstatement, we require respondent to provide proof of fitness to practice law, as attested to by a doctor approved by the OAE.

Finally, we require respondent, upon reinstatement, to practice under the supervision of an OAE-approved proctor for at least two years and until further Order of the Court.

Chair Gallipoli and Members Campelo, Joseph, and Menaker voted to recommend to the Court that respondent be disbarred.

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
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
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 Keith Michael McWhirk
Docket No. DRB 21-027

Argued: July 15, 2021

Decided: September 17, 2021

Disposition: Four-Year Suspension

<i>Members</i>	Four-Year Suspension	Disbar
Gallipoli		X
Singer	X	
Boyer	X	
Campelo		X
Hoberman	X	
Joseph		X
Menaker		X
Petrou	X	
Rivera	X	
Total:	5	4

/s/ Timothy M. Ellis

Timothy M. Ellis
Acting Chief Counsel