Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 23-036
District Docket No. XI-2021-0001E

In the Matter of

Amit Deshmukh

An Attorney at Law

Decision

Argued: April 20, 2023

Decided: July 31, 2023

Susan E. Champion appeared on behalf of the District XI Ethics Committee.

Respondent waived appearance for oral argument.

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

On February 16, 2023, this matter was before us on a recommendation for an admonition filed by the District XI Ethics Committee (the DEC). We determined to treat the admonition as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4), and to bring the matter on for oral argument.

The formal ethics complaint charged respondent with having violated RPC 3.1 (engaging in frivolous litigation).

For the reasons set forth below, we determine that a three-month suspension is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 2014 and has no disciplinary history. From the inception of the events underlying this matter through January 2021, he maintained a practice of law in Clifton, New Jersey. Thereafter, he maintained a practice of law in Florham Park, New Jersey.

We now turn to the facts of this matter.

On September 11, 2019, respondent filed a complaint on behalf of Francis J. Pellegrino in the Superior Court of New Jersey, Hunterdon County, Law Division (the Law Division), alleging that Pellegrino's former business partners – David Nogaki and David Shulim – had engaged in civil malfeasance during the parties' joint business venture. According to the complaint, between July 8, 2013 and December 10, 2015, the parties co-owned a gymnasium under the trade name Meridian Evolution of Energy, LLC (Meridian). Pellegrino alleged that Nogaki and Shulim "controll[ed] . . . account receivables" and, in the course of performing their duties, misappropriated Meridian's funds and "syphon[ed] new customers to [their] side business." Pellegrino asserted seven causes of action

based on these allegations: (1) breach of fiduciary duty; (2) promissory estoppel; (3) fraudulent inducement; (4) conversion; (5) negligence; (6) fraud and misrepresentation; and (7) unjust enrichment.

On October 8, 2019, Shulim, through his attorney, Craig Weinstein, Esq., filed an answer, asserting a number of affirmative defenses, including that counts one and five were barred by a bankruptcy discharge granted on June 30, 2017, by the United States Bankruptcy Court for the District of New Jersey (the Bankruptcy Court), pursuant to 11 U.S.C. § 727.[1]

By way of background, on March 28, 2017, Shulim had filed for bankruptcy protection pursuant to Chapter 7 of the United States Bankruptcy Code, 11 U.S.C §§ 701–784.[2] His matter proceeded as a no-asset case,[3] and Shulim listed Pellegrino as a creditor, with the claim type noted as "Other . . . Business partnership, Meridian Evolution of Energy." Pellegrino received notice but did not file an objection to Shulim's bankruptcy petition. On June 30, 2017, the Bankruptcy Court granted Shulim discharge.

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[1] The record does not reveal why Weinstein did not assert the same defense with respect to the remaining counts.

[2] A Chapter 7 bankruptcy petition "provides for [the] 'liquidation' or the sale of a debtor's non[-]exempt property and the distribution of the proceeds to the creditors." Bisbing v. Bisbing, 468 N.J. Super. 112, 116 n.1 (App. Div. 2021).

[3] In a no-asset Chapter 7 matter, no assets are available to distribute to creditors.

Respondent failed to serve Nogaki with Pellegrino's September 2019 Law Division complaint until March 16, 2020. Thereafter, Nogaki did not file an answer and, consequently, on July 6, 2020, the Law Division entered default against him.

On March 19, 2020, respondent moved to amend the complaint, alleging that, following the initiation of suit, Pellegrino was found liable "for taxes resulting from the business in the amount of $73,963.57." Respondent sought to add a claim for this amount, which he maintained represented "damages incurred as a result of [Shulim and Nogaki's] actions."

One month later, on April 23, 2020, respondent withdrew the motion to amend the complaint and, instead, filed a motion, on behalf of Pellegrino, to determine dischargeability with the Bankruptcy Court, pursuant to F.R.B.P. 4007(b). In support of his motion, Pellegrino submitted a certification, stating that Shulim and Nogaki had misappropriated business funds during the parties' joint venture, and that, on December 10, 2015, Pellegrino had reported the theft to the police. He then "fire[d] both [Shulim] and . . . Nogaki" and, "[a]bout a year" later, he received a notice from the New Jersey Department of the Treasury, Division of Taxation (the New Jersey Division of Taxation) that Meridian "had never in fact paid sales/use taxes." He, therefore, "ma[d]e this Motion . . . [to] proceed with a civil litigation case to recover the damages . . .

incurred regarding the sales use [sic] tax liability."

In his certification, Pellegrino acknowledged that he had been listed as a creditor in Shulim's bankruptcy matter. Nonetheless, he sought a determination that the tax debt was exempt from discharge, pursuant to 11 U.S.C. § 523(a)(1)(C). That provision bars discharge "for a tax or custom duty . . . with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." On June 9, 2020, following a notice of docketing error by the Bankruptcy Court, respondent withdrew his motion, conceding that it "was procedurally improper." Moreover, as a matter of law, respondent's non-dischargeability claim could not be considered after Shulim's bankruptcy matter had been closed.[4]

Thus, on June 16, 2020, respondent moved to reopen Shulim's bankruptcy, seeking leave to file a complaint "pursuant to 11 U.S.C. § 523(a)(1)(C)." Pellegrino submitted a supporting certification, reiterating that he had learned of Meridian's tax debt "about a year after [he] fired Shulim."

On July 6, 2020, Shulim opposed the motion to reopen through his bankruptcy counsel, Stephen Zullo, Esq. As part of his opposition, Shulim submitted a final determination made by the New Jersey Division of Taxation,

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[4] See In re Fellheimer, 443 B.R. 355, 359 (Bankr. E.D. Pa. 2010) ("A bankruptcy court has no jurisdiction over a dispute filed after a case is closed until it is reopened . . . .").

dated June 22, 2020, which indicated that Shulim was not a "responsible person"[5] for Meridian's taxes.

While the motion to reopen was pending before the Bankruptcy Court, respondent continued to prosecute the Law Division matter. Specifically, on July 2, 2020, he moved to extend the discovery deadline and, on July 7, 2020, he submitted a mediation statement, asserting that Pellegrino was seeking to recover "a portion of the tax imposition to be paid by all business owners, including Mr. Shulim." Respondent elaborated that "the business never turned a profit while it was operating. After conducting research as to why . . . Pellegrino learned that money was being stolen and taxes/liabilities were not being paid. Both . . . Shulim and . . . Nogaki were fired immediately."

On July 14, 2020, the Bankruptcy Court issued an order denying respondent's motion to reopen Shulim's bankruptcy proceeding. The next day, July 15, 2020, Zullo served the order on respondent.

[5] In this context, a "responsible person" is an individual who is required to collect sales or use taxes on behalf of a business, pursuant to N.J.S.A. 54:32B-2(w), but fails to do so and becomes personally liable for such taxes, pursuant to N.J.S.A. 54:32B-14(a). The mere fact that someone is a business owner does not in and of itself give rise to "responsible person" status. Rather, to determine if an owner is a "responsible person," courts consider nine factors enumerated in Cooperstein v. State, Div. of Taxation, 13 N.J. Tax 68, 89 (Tax.1993). These factors tend to place an emphasis on whether the owner exercises influence and control over business affairs. Ibid.; McGlone v. Dir., Div. of Taxation, 28 N.J. Tax 65, 71 (2014).

Meanwhile, on July 16, 2020, Weinstein opposed respondent's motion to extend discovery in the Law Division matter. Among other arguments, Weinstein alleged that respondent's breach of fiduciary duty and negligence theories in Pellegrino's complaint violated the terms of Shulim's bankruptcy discharge injunction.[6]

On July 21, 2020, respondent sent the Law Division a letter in reply to Weinstein's opposition. In his letter, respondent stated that he had received the Bankruptcy Court's order denying his motion to reopen and, thus, would seek to recover only the "debts incurred and assessed after the [bankruptcy] filing date . . . . Specifically, [Pellegrino] will limit [his] recovery and discovery to the tax indebtedness incurred on September 5, 2018." In support of this proposition, respondent attached a September 5, 2018 letter from the New Jersey Division of Taxation, advising that it had granted an abatement of Meridian's taxes, in the amount of $73,963.57. The letter included two schedules: the first labeled "before abatement" and the second labeled "[a]fter abatement." Both schedules displayed sales and use taxes pertaining to the return periods between 2013 and 2016.

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[6] A discharge in bankruptcy operates as an injunction upon attempts to collect discharged debts. 11 U.S.C. § 524.

On July 27, 2020, Weinstein demanded that respondent sign a stipulation dismissing all counts against Shulim. Weinstein warned, "[i]f this Stipulation is not returned by close of business Friday, July 31, 2020, Mr. Shulim will seek bankruptcy court intervention and all appropriate remedies."

On July 28, 2020, respondent informed Weinstein that he refused to sign the stipulation because he was "limiting discovery to the debt incurred after Mr. Shulim filed bankruptcy."

Thereafter, on August 4, 2020, Zullo wrote to respondent regarding his refusal to sign the stipulation, stating:

> I understood that to mean that you are pursuing discovery. However, Mr. Shulim informed me that there is a mediation scheduled for tomorrow. As you should be aware, you are barred by the discharge injunction under 524 from pursuing any claims against Mr. Shulim arising out of the business venture which terminated in 2015. Therefore, you must cease activity seeking affirmative relief immediately.
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> [PHC74.][7]

Also on August 4, Zullo sent respondent an e-mail, stating "[p]lease see attached. I was told that there is mediation on this matter tomorrow. I was under the impression that you were only seeking discovery in the law division case." It is unclear whether the attachment Zullo referenced was the above-referenced

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[7] "PHC" refers to Panel Chair Exhibits, which are printed with bates number starting with "PHC."

August 4, 2020 letter.

On September 1, 2020, Zullo filed a motion with the Bankruptcy Court, seeking to hold respondent and Pellegrino in contempt for violating the discharge injunction. Zullo contended that respondent had refused to dismiss Shulim from the Law Division matter and had attempted to recover damages from Shulim at mediation.

Respondent opposed Zullo's motion, arguing that the tax liability in question was imposed after Shulim's bankruptcy, and that Pellegrino "had no reason to believe" that Meridian owed any taxes until he received a notice from the New Jersey Division of Taxation, in June 2018.

At a hearing on October 6, 2020, the Bankruptcy Court granted Zullo's motion and directed him to submit a certification setting forth the attorney's fees Shulim had incurred in connection with respondent and Pellegrino's violation of the discharge injunction. Thereafter, both Zullo and Weinstein submitted certifications and, on October 22, 2020, respondent submitted a reply certification, contending that he "did not intentionally set up the mediation nor intend to have any legal proceedings that were not discovery related." He also claimed that mediation had been mandated by the Law Division.

Meanwhile, on October 8, 2020 – two days after the Bankruptcy Court sanctioned him – respondent once again moved to extend discovery in the Law

Division matter. Respondent contended that he needed additional time to obtain interrogatory answers from Shulim, who had failed to respond, in violation of a court order.

On November 18, 2020, the Bankruptcy Court issued a letter decision holding respondent and Pellegrino in contempt for violating the discharge injunction. The Bankruptcy Court stated that, even though it had denied respondent's motion to reopen, "litigation continued in state court. Specifically, Pellegrino continued to pursue a motion to extend discovery," and respondent "moved forward with a scheduled state court mediation in early August."

The Bankruptcy Court also emphasized that, according to Pellegrino's earlier certifications, he had discovered the tax debt in December 2016, approximately one year after he had fired Shulim and Nogaki. Yet, in his submission opposing any sanction, Pellegrino claimed that he was unaware of the debt until June 2018. Moreover, the Bankruptcy Court stressed that, prior to Shulim's 2017 bankruptcy petition, Pellegrino had filed a July 2016 bankruptcy petition, on behalf of Meridian, wherein he expressly identified $175,000 in tax liability to the State of New Jersey. Following Meridian's bankruptcy filings, the State of New Jersey filed a proof of claim in the amount of $179,080.83 for sales and use taxes dating from July 2013 through September 2016. The proof of claim contained an exhibit that showed the same taxes that Pellegrino now

claimed were assessed in June 2018. The only difference was that Pellegrino's June 2018 tax statement included "additional interest and penalties on the liability." Based on the foregoing facts, the Bankruptcy Court ordered respondent and Pellegrino to compensate Shulim for reasonable attorney's fees. The exact amount due was to be established via a more detailed certification from Weinstein.

On November 26, 2020, respondent submitted a brief to the Bankruptcy Court, arguing, among other things, that he did not violate the discharge injunction because, in filing the "discovery motions and motion to amend complaint," he was not to seeking "affirmative relief" against Shulim. Rather, in respondent's view, he was merely seeking to obtain discovery from Shulim in order to pursue Pellegrino's tax appeal and causes of action against Nogaki. Respondent also argued that "[t]he mediation was not initiated by Desh Law."

On December 4, 2020, Weinstein provided respondent with answers to the set of interrogatories previously served on Shulim in connection with the Law Division matter. Weinstein also repeated his demand that Shulim be dismissed from the lawsuit.

On December 10, 2020, the Bankruptcy Court issued a supplemental letter decision rejecting respondent's argument that he was merely seeking discovery from Shulim. The Bankruptcy Court stated:

> This argument may be persuasive if Shulim had not been named as a defendant in the lawsuit. Shulim was required to participate in the mediation because Deshmukh served him as a named defendant in the state court complaint. If Shulim had not been named as a defendant, and merely had been subpoenaed to provide discovery in the case, Deshmukh's argument may have made more sense.
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> [PHC89-90.]

The Bankruptcy Court also stated that Shulim should have moved to hold respondent in contempt sooner:

> . . . Shulim must take some responsibility for protecting his discharge. While this Court finds that Weinstein's hourly rate is reasonable, many of the services he provided could have been avoided if Weinstein had brought the discharge violation to the attention of the State Court on a motion to dismiss the complaint, or to this Court's attention as Zullo did many months later. Either would have eliminated the need to incur additional fees in the State Court. Of course, as noted above, Shulim may still have been served with subpoenas in connection with the State Court action, but he would have had no liability for the underlying debt and, therefore, no need to incur fees for his defense.
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> [PHC91.]

On the same day, the Bankruptcy Court entered an order requiring respondent and Pellegrino to pay $12,665 to Shulim "immediately." On December 21, 2020, respondent filed an appeal of the Bankruptcy Court's order.

On January 6, 2021, respondent once again moved to extend discovery in the Law Division matter. Respondent contended that additional time was necessary because Shulim had been dilatory in replying to interrogatories, which respondent needed time to review before conducting a deposition.

On January 14, 2021, respondent informed Weinstein that Shulim's responses to interrogatories were unacceptable and threatened to file a motion to compel. Respondent refused to dismiss Shulim from the matter, claiming that "[a] voluntary dismissal with prejudice [sic] w[ould] be filed . . . upon completion of discovery."

On January 26, 2021, Zullo sent respondent an e-mail, stating that respondent had not provided the payment ordered by the Bankruptcy Court and had refused Shulim's proposed payment arrangement plan. Zullo asked respondent to confirm that payment was forthcoming.

On January 29, 2021, respondent replied to Zullo, expressing his intent to have Pellegrino deposit half of the judgment amount with the Bankruptcy Court while his appeal of the Bankruptcy Court's decision was pending. In reply, Zullo stated "[t]hat's fine, but you haven't paid."

On February 2, 2021, Zullo again moved before the Bankruptcy Court to hold respondent and Pellegrino in contempt, this time for failing to pay the court-imposed sanction. On February 17, 2021, respondent sent Zullo a $12,665

check in satisfaction of the sanction. The next day, on February 18, 2021, respondent opposed Zullo's motion, asserting that the sanction had been satisfied and stating "[p]ayment plans have been offered and payment has never been denied. I was under the presumption debtor's counsel would motion for payment to be made with the court pending the appeal, by his own statements, and now [he] asks for additional sanctions before I could respond."[8]

Meanwhile, on February 4, 2021, respondent filed a motion to compel discovery with the Law Division, alleging that Shulim's interrogatory answers were inadequate. Respondent also sought an award of his attorney's fees against Shulim for this motion, along with the three previous motions to extend discovery. On February 24, 2021, Weinstein opposed respondent's motion, arguing that only parties could be served with interrogatories, and that respondent should have agreed to dismiss Shulim from the suit pursuant to the Bankruptcy Court's order.

On March 2, 2021, nearly eight months after the Bankruptcy Court denied respondent's attempt to reopen the bankruptcy, and five months after having been sanctioned by the Bankruptcy Court for violating the discharge injunction,

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[8] An e-mail exchange included in respondent's opposition shows that, at one point, respondent proposed a settlement, but insisted on proceeding with the appeal even if Zullo accepted the settlement. Zullo responded: "You have to withdraw the appeal. It's a settlement. You have no reason to appeal. You don't get the money back." The Public Access to Court Electronic Records (PACER) system shows that, ultimately, Zullo withdrew his motion, presumably following receipt of respondent's payment.

respondent executed a consent order dismissing Shulim from the case.

Meanwhile, on December 8, 2020, Shulim filed an ethics grievance against respondent, accusing him of pursuing the Law Division matter in violation of the Bankruptcy Court's discharge injunction. Shulim contended that respondent was not inexperienced in bankruptcy law and attached printouts from PACER demonstrating that respondent was the attorney of record in at least eight bankruptcy matters.

On November 18, 2021, the DEC filed a formal ethics complaint, alleging that respondent had (1) repeatedly refused to dismiss Shulim from the Law Division matter, and (2) moved to compel discovery even after the Bankruptcy Court imposed sanctions, in violation of RPC 3.1.

On December 14, 2021, respondent filed an answer, admitting most of the allegations but offering the following defenses: (1) he was not afforded an opportunity to reply to certain allegations prior to the filing of the formal ethics complaint, as these allegations were not disclosed to him during the investigation, in violation of his due process rights; (2) he had no personal stake in Pellegrino's matter and was acting solely to promote the interests of his client; and (3) he reasonably believed that it was acceptable to seek discovery from Shulim to press Pellegrino's claims against Nogaki. Respondent also urged, as mitigation, his prior service as a member of the District XI Fee Arbitration

Committee, his completion of ten to twenty-five hours of pro bono legal services from 2017 through 2020, and the fact that he was a solo practitioner with limited resources.

On May 9, 2022, the DEC held a hearing at which Shulim and respondent were the sole witnesses. Shulim testified regarding the inconvenience respondent had caused him. Respondent, in turn, expressed his view that his discovery motions in the Law Division matter were "acceptable" because the Bankruptcy Court had observed that Shulim could be served with a subpoena. However, respondent admitted that he could have obtained discovery "without keeping [Shulim] as a defendant."

Following the hearing, both parties submitted briefs to the panel. Respondent argued that he did not violate RPC 3.1 based on his failure to dismiss Shulim as a defendant. He claimed that the DEC had relied exclusively on his discovery motions, all which, in his view, were authorized by both the Bankruptcy Court and Zullo, who acknowledged, in his August 4, 2020 letter to respondent, that "I understood that to mean you are pursuing discovery." Respondent also contended that Shulim could not recall the discovery motions while testifying.

In its brief, the DEC argued that the "key date" for the panel's consideration was July 14, 2020 – the date the Bankruptcy Court denied

respondent's motion to reopen. The DEC contended that respondent should have withdrawn his claims against Shulim after this date, if not sooner, noting that, by then, he had received notice that the New Jersey Division of Taxation had found Shulim not liable for Meridian's taxes. Finally, the DEC stressed that respondent continued to file discovery motions even after the Bankruptcy Court had held him in contempt and rejected his argument that he was merely pursuing discovery.

The DEC hearing panel found that respondent violated RPC 3.1 by failing to abide by the Bankruptcy Court's discharge injunction and by filing discovery motions after having been sanctioned by the Bankruptcy Court.

To determine the appropriate quantum of discipline, the DEC found, in aggravation, respondent's "lack of remorse and understanding" regarding how his actions impacted Shulim. Indeed, despite "multiple notices and [c]ourt [o]rders," the DEC emphasized that respondent continued to pursue the Law Division matter despite knowing that his actions were barred by the Bankruptcy Court's discharge injunction. The DEC noted that respondent's inexperience in bankruptcy matters did not excuse his obligation to become familiar with the law or to seek the advice of a more experienced attorney. In mitigation, however, the DEC acknowledged respondent's lack of prior discipline and cooperation with disciplinary authorities.

The DEC also relied on R. 1:20-3(i)(2)(A), which states:

> Minor unethical conduct is conduct, which, if proved, would not warrant a sanction greater than a public admonition. Unethical conduct shall not be considered minor if any of the following considerations apply: (i) the unethical conduct involves the knowing misappropriation of funds; (ii) the unethical conduct resulted in or is likely to result in substantial prejudice to a client or other person and restitution has not been made; (iii) the respondent has been disciplined in the previous five years; (iv) the unethical conduct involves dishonesty, fraud or deceit; (v) or the unethical conduct constitutes a crime as defined by the New Jersey Code of Criminal Justice (N.J.S.A. 2C:1- 1, et seq.). Classification of unethical conduct as minor unethical conduct shall be in the sole discretion of the Director.

The DEC concluded that respondent's actions merited no more than an admonition because they "d[id] not arise to a level above a minor ethical conduct."

In his brief to us, respondent reiterated the arguments that he had made below. He also maintained that the DEC had found Shulim's testimony to be "not very strong."

Although the presenter did not submit a brief for our consideration, at oral argument before us, it emphasized respondent's delay in dismissing Shulim from the Law Division matter. The presenter also urged, in aggravation, respondent's lack of remorse and understanding regarding the improprieties of his conduct. However, the presenter acknowledged, in mitigation, respondent's lack of prior

discipline and the fact that his misconduct amounted to an isolated incident. Weighing the aggravating and mitigating factors, the presenter recommended that respondent receive a reprimand.

Following our de novo review of the record, we are satisfied that the DEC's determination that respondent violated RPC 3.1 is supported by clear and convincing evidence.

RPC 3.1 states: "A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous." Respondent violated this Rule by repeatedly refusing to dismiss Shulim as a defendant in the Law Division matter, even though he had no reasonable basis in law or fact to proceed against him following the Bankruptcy Court's discharge order.

In general, a successfully bankruptcy petition discharges the debtor from all pre-petition debts. Judd v. Wolfe, 78 F.3d 110, 113–14 (3d Cir. 1996); 11 U.S.C. § 727(b). Certain types of debts are excepted from this rule, and the facts in this case potentially implicate two such types: (1) intentional tort debts within the meaning of 11 U.S.C. § 523(a)(2), (4) and (6), and (2) tax debts within the meaning of 11 U.S.C. § 523(a)(1). However, intentional tort debts are dischargeable where the creditor has notice of the bankruptcy but fails to file a

complaint to determine dischargeability within "60 days after the first date set for the meeting of creditors." 11 U.S.C. § 523(a)(3) and (c); F.R.B.P. 4007(c). Tax debts within the meaning of 11 U.S.C. § 523(a)(1) are not subject to the same deadline. F.R.B.P. 4007(b). However, a private person cannot assert non-dischargeability of tax debts without first being subrogated to the right of the taxing authority. See In re Goldstein, 66 B.R. 909, 919–20 (Bankr. W.D. Pa. 1986). Absent a contract with the taxing authority, subrogation can only occur if, among other things, the private person paid the debtor's tax liability in whole or in part. In Re LTC Holdings, Inc., 10 F.4th 177, 185–86 (3d Cir. 2021); In re Trustees of Conneaut Lake Park, Inc., 592 B.R. 64, 70-71 (Bankr. W.D. Pa. 2018); 11 U.S.C. § 509(a).

On the instant facts, neither of the above-mentioned exceptions applies. Any intentional tort debt Shulim may have had would have been discharged because Pellegrino had notice of the bankruptcy and chose not to participate. Regarding respondent's tax debt theory, the record is devoid of any suggestion that Pellegrino fulfilled a tax obligation on Shulim's behalf. Accordingly, there was no basis in law or fact for respondent's course of action and, thus, his refusal to dismiss Shulim as a defendant in the Law Division case cannot be justified.

Moreover, respondent continued to treat Shulim as a defendant in the Law Division matter even after the Bankruptcy Court had sanctioned him. Although

respondent claimed he was merely seeking discovery to advance his lawsuit against Nogaki, this claim rings hollow, because respondent was demanding Shulim's answers to interrogatories, which can only be served upon a party, pursuant to R. 4:17. Further, respondent actively sought a contribution from Shulim at mediation. Respondent did so even after Zullo had warned him, the day before mediation, that Pellegrino had no right to affirmative relief, given Shulim's bankruptcy discharge.

In any event, the Bankruptcy Court explicitly rejected respondent's argument that he was merely seeking discovery. On December 10, 2020, the Bankruptcy Court stated that respondent's position:

> may be persuasive if Shulim had not been named as a defendant in the lawsuit. Shulim was required to participate in the mediation because Deshmukh served him as a named defendant in the state court complaint. If Shulim had not been named as a defendant, and merely had been subpoenaed to provide discovery in the case, Deshmukh's argument may have made more sense.
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> [PHC89-90.]

Yet, after this decision, respondent sought an award of attorney's fees against Shulim for allegedly failing to answer interrogatories.

In our view, respondent's remaining arguments do not warrant extensive discussion. Due process does not demand that the formal ethics complaint in this matter be limited to allegations expressly disclosed during the investigation.

Although respondent may have been surprised by certain allegations in the complaint, he had a full and fair opportunity to prepare a defense against those allegations, and to present such a defense at the ethics hearing. See R. 1:20-4(b) and In re Roberson, 210 N.J. 220 (2012). Contrary to respondent's contention, neither Zullo nor the Bankruptcy Court authorized his conduct in the Law Division (or had the requisite authority to do so). In fact, the Bankruptcy Court specifically rejected the assertion that respondent could keep Shulim in the suit for discovery purposes. Finally, whether Shulim could recall certain events during the ethics hearing is irrelevant. The undisputed documentary evidence is sufficient to establish all relevant facts, including respondent's misconduct.

In sum, we find that respondent violated RPC 3.1. The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

The DEC recommended an admonition, citing R. 1:20-3(i)(2)(A). This Rule, however, governs eligibility for diversion, not the quantum of discipline following presentment. Moreover, in our view, an admonition is inadequate under New Jersey disciplinary precedent.

Indeed, attorneys who engage in frivolous litigation generally receive terms of suspension. See, e.g., In re Rheinstein, __ N.J. __ (2022), 2022 N.J. LEXIS 514 (one-year suspension imposed, on a motion for reciprocal discipline,

in a matter concerning a construction loan agreement; the attorney filed a motion to vacate and revise the judgments that had been entered prior to his involvement in the matter; during the hearing on the motion, the attorney interjected irrelevant accusations against his adversary's client and, thereafter, began sending threatening and erratic e-mails to opposing counsel; the attorney also began filing multiple frivolous lawsuits in different venues against the opposing party); In re Garcia, 195 N.J. 164 (2008) (fifteen-month suspension imposed, in a reciprocal discipline matter, where the attorney filed several frivolous lawsuits and lacked candor to a tribunal; after her husband, with whom she practiced law, was suspended from the practice of law, the attorney aided him in the unauthorized practice of law and used the firm's letterhead with his name on it during his suspension; the attorney also lacked candor to a tribunal and made false and reckless allegations about judges' qualifications in court matters); In re Khoudary, 213 N.J. 593 (2013) (two-year suspension imposed for misconduct in a bankruptcy matter; the attorney formed a corporate entity, SSR, to hold his investments in several assignments of mortgage and a default judgment for three tracts of land, investments that were in foreclosure at the time; the ownership of SSR was vested in his then-wife; four days after forming SSR, the attorney filed a barebones Chapter 11 bankruptcy petition, ostensibly to reorganize SSR, but actually designed to stay the foreclosure proceedings pending in state court;

fewer than two months into the Chapter 11 proceeding, the bankruptcy court dismissed the petition as a bad faith filing and lifted the automatic stay, allowing the matters to proceed in state court; four weeks later, the attorney filed a second bankruptcy petition for SSR, which again stayed the foreclosure proceeding; the bankruptcy court immediately dismissed that petition as a bad faith filing and imposed more than $11,000 in sanctions against the attorney; violations of RPC 3.1, RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice); in aggravation, the attorney had a prior two-year suspension for unrelated conduct); In re Shearin, 172 N.J. 560 (2002) (three-year suspension imposed on the attorney who previously had received a one-year suspension for misconduct concerning her representation of a church; the attorney sought the same relief as in prior unsuccessful lawsuits against her client's rival church, regarding a property dispute; the attorney burdened the resources of two federal courts, defendants, and others in the legal system with the frivolous filings; she knowingly disobeyed a court order that expressly enjoined her and the client from interfering with the rival church's use of the property, and she made disparaging statements about the mental health of a judge).

However, in two recent matters, after assigning weight to compelling mitigating factors, we recommended the imposition of censures on attorneys who filed frivolous lawsuits. In In the Matter of William P. Munday, the attorney was asked by a client to oppose a building development project. DRB 22-191 (March 24, 2023) at 3-5. Because the client wished to remain anonymous, he provided Munday with names of other individuals who he claimed were willing to publicly object to the project and had agreed to be represented by Munday. Id. at 4-8. Munday never spoke to these individuals to verify their existence or position with respect to the project. Ibid. Nonetheless, he purported to appear before a zoning board of adjustment on their behalf and later filed suit in the Superior Court of New Jersey in their names. Id. at 10-13. When the developer moved for summary judgment, alleging that the plaintiffs had not authorized the suit, Munday investigated the matter and discovered that the plaintiffs had not consented to being represented by him. Id. at 17-18. As a result, he refused to oppose the summary judgment motion. Id. at 20. After summary judgment was granted, the developer sued Munday for interfering with the project through frivolous litigation; Munday, eventually, settled the dispute with the developer. Id. at 22-24. Weighing these facts against Munday's unblemished forty-three-year career at the bar, we determined that a censure was the appropriate quantum of discipline. Our decision remains pending with the Court.

Our recent decision in In the Matter of Virginia T. Fiocca, DRB 22-098 (November 1, 2022), provides further guidance in this matter. There, Fiocca registered a non-profit company, purportedly for her daughter's future medical practice, using substantially the same name as her former brother-in-law's cardiology practice. Id. at 2- 3. At the time, her daughter was still attending medical school in Italy and had not decided whether she would return to the United States once she completed her education. Id. at 2-4. After registering the non-profit company, Fiocca brought suit against her former brother-in-law's cardiology practice, alleging that the cardiology practice was misappropriating the non-profit company's name. Id. at 5. She then served a subpoena on the cardiology practice's banking institution, seeking certain records that her sister had been denied access to in the divorce litigation against her former brother-in-law. Id. at 3-16. Fiocca did not serve either the subpoena or the complaint upon the cardiology practice. Ibid. Once the bank informed her former brother-in-law of the subpoena, he successfully moved to quash it, and Fiocca withdrew the lawsuit. Id. at 7-8. On these facts, we determined that a censure was the appropriate quantum of discipline, after weighing Fiocca's unblemished career of over forty years at the bar against her "evasive and incredible" testimony at the ethics hearing, among other considerations. Id. at 22-23. The Court agreed with our recommended discipline. In re Fiocca, __ N.J. __ (2023).

In contrast, attorneys who merely have asserted a frivolous issue in a proceeding have received discipline ranging from an admonition to a censure. See, e.g., In re Resnick, 249 N.J. 1 (2021) (the attorney engaged in extensive frivolous motion practice in several cases over the course of several years; violations of RPC 3.1; RPC 3.2 (failing to expedite litigation and failing to treat with courtesy and consideration all persons involved in the legal process); RPC 3.4(e) (in trial, alluding to a matter the lawyer does not reasonably believe is relevant or supported by admissible evidence); RPC 8.2(a) (making a statement the lawyer knows to be false, or with reckless disregard as to its truth or falsity, concerning the qualifications of a judge); and RPC 8.4(d); we distinguished the attorney's conduct from the suspension cases, noting that such cases "tend to deal with frivolous lawsuits," whereas the attorney asserted frivolous issues within "legitimate" lawsuits; we noted that the baseline level of discipline was either a censure or a short-term suspension; however, we determined that a censure was the appropriate quantum of discipline due to the attorney's community service and otherwise unblemished disciplinary history, coupled with the significant passage of time since the misconduct); In re Giannini, 212 N.J. 479 (2012) (the attorney was censured for various instances of "unprovoked, inflammatory, disparaging, and fictitious statements" about various judges and parties in pleadings that the attorney filed on behalf of his

sister; the attorney also made frivolous discovery requests and alluded to matters that were either not relevant or not supported by admissible evidence, when he made outrageous statements in his pleadings knowing them to be untrue; no prior discipline).

Here, respondent's misconduct clearly aligns with the cases in which attorneys filed frivolous lawsuits versus those in which attorneys merely asserted frivolous issues. Given the prior bankruptcy discharge and resulting injunction, respondent's entire lawsuit against Shulim was unjustified. Yet, even after the Bankruptcy Court sanctioned him for violating the injunction without justification, respondent refused to stipulate to Shulim's dismissal from the Law Division action.

In our view, based on the above precedent, respondent's conduct merits at least a censure. Arguably, respondent's frivolous litigation was more extensive than that of the attorney in Fiocca. Like Fiocca, respondent pursued a frivolous lawsuit. However, unlike Fiocca, who stopped after her ex-brother-in-law's motion to quash a subpoena was granted, respondent persisted in spite of the Bankruptcy Court's sanction. Given respondent's recalcitrant behavior, we must decide whether a three-month suspension is warranted.

In that vein, we find instructive In re Smith, 250 N.J. 44 (2022), where the attorney received a one-year suspension on a motion for reciprocal discipline.

Among numerous other infractions, the attorney violated RPC 3.1 by including an individual named Daymond John as a defendant in a multi-defendant lawsuit, even though his client's claims against John were frivolous. In the Matter of Brian J. Smith, DRB 20-318 (July 28, 2021) at 3. The attorney ignored repeated requests by John's counsel to dismiss John from the suit and eventually was sanctioned for engaging in frivolous litigation. Id. at 3-6. As of the time of oral argument before us, the attorney had not satisfied any part of the sanction amount. Id. at 6. In discussing the appropriate quantum of discipline, we stated that the attorney's conduct towards John alone merited a suspension, as he filed a frivolous lawsuit, refused to dismiss it, and defied the sanction order. Id. at 21.

Arguably, although his lawsuit against Shulim was frivolous, respondent did not attempt to intimidate Shulim's business contacts or seek to force a withdrawal of the ethics grievance. On the other hand, respondent is hardly less culpable than the attorney in Smith. Admittedly, respondent satisfied the sanction amount, and Smith failed to do so. However, Smith did not continue to pursue a frivolous lawsuit after a tribunal instructed him to stop, whereas respondent persisted in ignoring the Bankruptcy Court's explicit directive. Additionally, Smith merely failed to withdraw his claims, whereas respondent sought an award of attorney's fees against Shulim.

Accordingly, we determine that the baseline quantum of discipline is a three-month suspension, given the parity between respondent and the attorney in Smith. In any event, that quantum of discipline is favored by the balance between the mitigating and aggravating factors.

In limited mitigation, respondent's conduct was not motivated by personal gain. See In re Clayman, 186 N.J. 73 (2006) (recognizing, as mitigation, the fact that the attorney did not act out of venality but was seeking to advance his client's interests). Additionally, respondent performed pro bono work for North Jersey Legal Services, and his nine-year unblemished career at the bar also merits some consideration, although it is not a significant mitigating factor. See In the Matter of Christopher Corsi, DRB 18-335 (April 5, 2019) at 13 (stating, in considering mitigation, that "[a]lthough [the attorney] ha[d] no prior discipline, he ha[d] been a member of the Bar for only nine years."), so ordered, 440 N.J. 180 (2019). However, the fact that respondent is a solo practitioner is unavailing, as it does not explain why he defied the Bankruptcy Court's clear and definite order.

In aggravation, respondent made several baseless statements to the Bankruptcy Court and the Law Division. For instance, he represented to the Bankruptcy Court that Pellegrino "had no reason" to know about the taxes until 2018, even though Pellegrino had repeatedly admitted knowing about them in

2016, including in certifications to the Law Division, and respondent's own mediation statement suggested that Pellegrino knew of the taxes before Shulim was even terminated. Similarly, respondent represented to the Law Division that he was pursuing contribution for taxes assessed on September 5, 2018, even though that date was the date of the abatement, not the assessment. Lastly, respondent asserted to the Bankruptcy Court that his motion to amend the complaint was intended to seek affirmative relief from Nogaki, not Shulim. The motion itself did not mention any such limitation and, in fact, it referred to damages caused by the "defendants" in the plural. Even if these statements were not intentionally false, they were part and parcel of respondent's willingness to litigate without a reasonable basis in law or fact.

In our view, the applicable aggravating factors clearly outweigh the limited mitigation supported by this record and cement our conclusion that a three-month suspension is warranted.

Vice-Chair Boyer and Members Campelo and Rodriguez voted to recommend the imposition of a censure.

Members Petrou and Rivera were absent.

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: *<u>/s/ Timothy M. Ellis</u>*
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Amit Deshmukh
Docket No. DRB 23-036

Argued: April 20, 2023

Decided: July 31, 2023

Disposition: Three-month suspension

Members	Three-month suspension	Censure	Absent
Gallipoli	X		
Boyer		X	
Campelo		X	
Hoberman	X		
Joseph	X		
Menaker	X		
Petrou			X
Rivera			X
Rodriquez		X	
Total:	4	3	2

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