SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 23-168
District Docket No. XB-2019-0012E

In the Matter of William J. Mac Naughton
An Attorney at Law

Argued
October 19, 2023

Decided
January 24, 2024

Joao F. Magalhaes appeared on behalf of the
District XB Ethics Committee.

Respondent appeared pro se.

Table of Contents

Introduction 1
Facts 1
The Ethics Hearing 21
Respondent’s Motion In Limine 21
Respondent’s Motions to Dismiss 23
The Hearing Panel’s Findings 30
The Parties’ Submissions to the Board 32
Analysis and Discipline 34
Violations of the Rules of Professional Conduct 37
Quantum of Discipline 49
Conclusion 54

Introduction

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

This matter was before us on a recommendation for a reprimand filed by the District XB Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.9(a) (representing a client whose interests are materially adverse to the interests of a former client, without obtaining the informed, written consent of the former client).

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

Respondent earned admission to the New Jersey bar in 1985 and to the New York bar in 1977. He has no disciplinary history. During the relevant timeframe, he maintained a practice of law in Newton, New Jersey.

Facts

The facts of this matter are largely undisputed, although respondent denied having violated RPC 1.9(a).

On June 30, 2006, Russian Media Group, LLC (RMG) filed, in the United States District Court for the Northern District of Illinois (the NDI), a lawsuit against Shai Harmelech and his companies, Cable America, Inc., and USA

Satellite & Cable, Inc. (the RMG action).[1] RMG operated a satellite television service providing Russian language programming to subscribers. In its lawsuit, RMG alleged that Harmelech distributed pirated Russian language television programming, via major satellite television providers, to the residents of twenty apartment buildings throughout the Chicago, Illinois area, in violation of Illinois law. RMG further alleged that it suffered financial harm due to the unfair competitive advantage Harmelech had received by distributing the pirated television programming at a discounted price. Consequently, RMG sought money damages and injunctive relief prohibiting Harmelech from distributing the pirated television programming.

In February and March 2009, the NDI issued orders granting RMG's request for a preliminary injunction based, in part, on its finding that Harmelech illegally distributed pirated television programming to the twenty apartment buildings throughout Chicago.

On April 7, 2009, the NDI issued an order directing that Perry Perelman, Esq., the Illinois attorney who represented Harmelech, hold, in escrow, all payments Harmelech received from the Chicago residents.

[1] For ease of reference, and unless otherwise noted, we refer to Harmelech and his companies, collectively, as "Harmelech."

On May 8, 2009, Harmelech retained respondent to defend against RMG's ongoing lawsuit before the NDI. In respondent's contemporaneously executed written fee agreement, he noted that he required a $6,000 advance retainer payment and that he charged a $300 hourly legal fee. Respondent further stated that any action to collect unpaid legal fees would be "determined in New Jersey" and, further, that Harmelech "consent[ed] to the jurisdiction of the New Jersey courts for any such action."

On May 9, 2009, the NDI held Harmelech in contempt for violating the preliminary injunction prohibiting the distribution of pirated television programming.[2]

On May 19, 2009, the NDI issued an order permitting respondent to appear, pro hac vice, in that jurisdiction. Between May 26 and July 16, 2009, following his pro hac vice admission, respondent prepared and filed several pleadings, motions, and briefs with the NDI in connection with his representation of Harmelech. Specifically, respondent filed: (1) a May 26, 2009 motion to stay the NDI's preliminary injunction; (2) a June 6, 2009 written request that no further sanctions be imposed on Harmelech; (3) a June 19, 2009 motion to terminate the NDI's April 7, 2009 "escrow order;" (4) a June 22, 2009

[2] In June and October 2010, the NDI imposed a total of $131,364.76 in contempt sanctions against Harmelech.

answer and counterclaim to RMG's June 2006 complaint; (5) a June 23, 2009 reply to RMG's opposition to Harmelech's May 26, 2009 motion to stay the NDI's preliminary injunction; (6) a July 6, 2009 emergency motion to modify the NDI's preliminary injunction; (7) a July 6, 2009 motion to compel RMG to post a $3 million bond as security to pay Harmelech's expenses associated with his compliance with the NDI's preliminary injunction; and (8) a July 16, 2009 reply to RMG's opposition to Harmelech's July 6, 2009 emergency motion to modify the NDI's preliminary injunction.

In his submissions to the NDI, respondent argued that RMG's claims that Harmelech had violated Illinois law were preempted by the federal Copyright Act of 1976, 17 U.S.C. §§ 101 to -810. Respondent also claimed that Harmelech's compliance with the NDI's preliminary injunction was initially "slowed down" following the "resign[ation]" of Harmelech's prior attorney. Nevertheless, respondent maintained that Harmelech since had complied with the NDI's preliminary injunction by or around May 19, 2009.[3] Additionally,

[3] On March 10, 2010, the United States Court of Appeals for the Seventh Circuit issued an opinion affirming the NDI's preliminary injunction, finding, among other things, that the NDI properly had framed its injunction because Harmelech's "business model, at least for the last several years, ha[d] been quite simply to steal television programming and then to resell it at a discount." Russian Media Group, LLC v. Cable Am., Inc., 598 F.3d 302, 307 (7th Cir. 2010). Additionally, by 2010, Harmelech ceased providing English language satellite television programming to the residents of the Chicago apartment buildings, conduct which was not expressly encapsulated by the NDI's 2009 preliminary injunction.

respondent alleged that RMG improperly took advantage of the preliminary injunction by utilizing Harmelech's equipment to transmit its own Russian language programming, conduct which jeopardized Harmelech's businesses.

Meanwhile, on May 26, 2009, respondent sent Harmelech an e-mail expressing his opinion regarding RMG's offer to settle the matter for (1) $440,000, and (2) the execution of a stipulated injunction prohibiting Harmelech from distributing Russian language programming throughout Chicago.

On July 16, 2009, respondent sent Harmelech a letter informing him that, effectively immediately, he was suspending all legal work on his matters due to Harmelech's failure to pay his legal fees. In his letter, respondent advised Harmelech that his unpaid legal fees "remain[ed] seriously in arrears" and that two of Harmelech's checks had been returned for insufficient funds. Respondent's letter contained the required R. 1:20A-6 pre-action notice advising Harmelech that he had right to request fee arbitration within thirty days. Respondent further stated that he would provide his Illinois co-counsel, Paul Korniczky, Esq., with a memorandum that he had prepared in reply to RMG's motion for a default judgment sanction.[4] However, respondent noted that he otherwise was "asserting an attorney's lien on all papers and electronic files in

[4] On July 23, 2009, Korniczky filed with the NDI the memorandum in opposition to RMG's motion for a default judgment sanction.

my possession."[5] Following respondent's letter, Harmelech did not request fee arbitration.

The presenter and respondent stipulated that, as of July 16, 2009, Harmelech became respondent's "former client" for "purposes of RPC 1.9(a)." Additionally, the parties stipulated that, prior to July 16, 2009, respondent had received "confidential information" regarding the "distribution," by Harmelech, "of Russian and English language programming" at the twenty apartment buildings throughout Chicago. The parties further stipulated that respondent had received confidential information regarding "the collection of fees from the residents of [the twenty apartment buildings] for that programming." Finally, respondent received confidential information regarding RMG's "complaints" concerning Harmelech's business practices in connection with his "distribution" of the Russian language programming.

On August 12, 2009, Harmelech executed a promissory note, agreeing to pay respondent $65,879, at a 12% annual interest rate, with the first $5,000 payment due on August 14 and the remaining payments, consisting largely of $10,000 monthly installments, due on the fifteenth day of each month, until

[5] An attorney's lien may be attached "only on 'a verdict, report, decision, award, judgment, or final order in [a] client's favor.'" Ippolito v. Ippolito, 465 N.J. Super. 428, 432 (App. Div. 2020) (quoting N.J.S.A. 2A:13-5). Similarly, in Illinois, an attorney's lien may be placed "'upon the proceeds, only, of the litigation or settlement of the claim.'" People v. Philip Morris, 759 N.E.2d 906, 913 (Ill. 2001) (quoting Process Color Plate Co. v. Chicago Urban Transp. District, 466 N.E.2d 1033 (1984)).

March 2010, in satisfaction of respondent's unpaid legal fees. Harmelech also agreed to provide respondent a "security interest in all of [his] right, title and interest in any and all real or personal property wherever located." Harmelech further agreed that he would neither transfer nor allow anyone else to obtain a security interest in his property during the term of the promissory note. Finally, the parties agreed that New Jersey would serve as the jurisdiction for all matters arising out of the collection or enforcement of the promissory note.

The next month – September 2009 – Harmelech defaulted on his obligations pursuant to the promissory note.

Meanwhile, on September 24, 2009, respondent filed a motion with the NDI for leave to withdraw as counsel for Harmelech. The NDI, however, denied respondent's motion, without prejudice, because it lacked jurisdiction to decide the motion pending the appeal of the preliminary injunction to the United States Court of Appeals for the Seventh Circuit.

On October 26, 2009, respondent filed, in the United States District Court for the District of New Jersey (the DNJ), a four-count complaint against Harmelech for defaulting on the promissory note, conduct which respondent alleged violated Illinois's Deceptive Practices Act, 720 ILCS 5/17-1, and constituted fraud and breach of contract (the DNJ action). Mac Naughton v. Harmelech, 2010 U.S. Dist. LEXIS 99597 (D.N.J. 2010) at *6. Respondent also

sought a declaratory judgment regarding the validity of his security interest on Harmelech's real and personal property in connection with the promissory note. Ibid.[6] On September 6, 2016, the DNJ issued a $71,763 judgment in favor of respondent, who, thereafter, "registered" that judgment in the NDI (the NDI registration action).

The presenter and respondent stipulated that, after July 17, 2009, the information respondent had obtained regarding Harmelech originated not only "from the public record," but also from "discovery" respondent had received in connection with both the DNJ action and the NDI registration action.

On January 19, 2011, the NDI, in the RMG action, granted respondent's renewed motion to withdraw as counsel for Harmelech, following (1) the Seventh Circuit's March 2010 affirmance of the NDI's preliminary injunction, and (2) the NDI's October 2010 decision to convert its preliminary injunction into a permanent injunction.

On April 28, 2011, Harmelech and RMG executed a settlement agreement in the RMG action. The agreement required Harmelech to provide RMG a

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[6] On September 22, 2010, the DNJ issued an opinion finding, in part, that respondent had no valid security interest on Harmelech's real and personal property. Mac Naughton v. Harmelech, 2010 U.S. Dist. LEXIS 99597 (D.N.J. 2010) at *12-13.

$131,374.76 lump sum payment,[7] via the release of funds held in escrow pursuant to the NDI's April 7, 2009 order, following which Harmelech would satisfy the remaining balance via "certified funds." In addition to the $131,374.76 lump sum payment, Harmelech agreed to pay RMG $130,000, via monthly installment payments commencing on May 25, 2011.[8] Moreover, in the event he defaulted on his payment obligations, Harmelech agreed to satisfy his debt from his accounts receivables, and he further granted RMG a security interest in those accounts. Harmelech also agreed to the issuance of a $286,374.76 stipulated judgment in favor of RMG, which judgment RMG would not seek to enforce unless Harmelech defaulted on his $261,374.76 total payment obligation. Finally, RMG agreed to release its claims against Harmelech.

On May 23, 2011, the NDI entered a $286,374.76 stipulated judgment in favor of RMG and against Harmelech, pursuant to the terms of the settlement agreement (the RMG judgment). Additionally, the NDI entered a separate May 23 order releasing, to RMG, the funds held in escrow pursuant to the April 7, 2009 order.

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[7] The $131,364.76 lump sum figure was the same amount as the NDI's total $131,364.76 contempt sanction against Harmelech for violating the preliminary injunction.

[8] The $131,374.76 lump sum payment combined with the $130,000 in total installment payments totaled $261,374.76.

On or before May 31, 2011, Harmelech provided a $62,863.02 payment to RMG's attorney, who disbursed to RMG not only those funds, but also the $68,511.74 held in escrow, in satisfaction of the $131,374.76 lump sum payment required by the settlement agreement. Following the $131,374.76 payment, Harmelech provided RMG an additional $10,000 payment. Thereafter, Harmelech appeared to have failed to make any further payments towards the remaining $145,000 balance owed to RMG.

On July 3, 2012, respondent filed, in the Superior Court of New Jersey, Law Division, a lawsuit against RMG and Harmelech alleging that he held a lien on the escrow funds RMG had received following the NDI's May 23, 2011 escrow release order (the Superior Court action). Respondent included, as his co-plaintiff, Casco Bay Holdings, LLC, (Casco Bay), an entity owned by respondent and his wife.[9]

On July 2, 2014, RMG filed, in the Superior Court action, a motion for summary judgment against respondent and Casco Bay. RMG's motion included a May 27, 2014 affidavit from its former Illinois attorney, Daniel M. Feeney, Esq., who prosecuted the RMG action before the NDI. Feeney's certification described the procedural history of the RMG action, including the April 2011

[9] During the ethics hearing, respondent claimed that he had formed Casco Bay to "consolidate" his various "intangible assets" into a "single entity" for "accounting . . . and tax purposes."

settlement agreement between RMG and Harmelech, and noted that Harmelech owed $145,000 to RMG in connection with his settlement of the RMG action. The presenter and respondent stipulated that "[t]he Feeney affidavit was the first time [r]espondent saw the RMG [s]ettlement [a]greement."

On August 1, 2014, respondent and Casco Bay executed a settlement agreement with RMG in connection the Superior Court action. Specifically, in exchange for the release of respondent and Casco Bay's claims, RMG agreed to assign Casco Bay its rights, pursuant to the April 2011 settlement agreement underlying the RMG action, to collect Harmelech's unpaid $145,000 debt. RMG also agreed to assign Casco Bay its rights to enforce the RMG judgment. Respondent, Casco Bay, and RMG further agreed that, should respondent or Casco Bay recover any funds from Harmelech, Casco Bay would provide RMG "fifty percent . . . of the first $50,000 so collected, and forty percent . . . of amounts so collected in excess of $100,000 but less than $145,000; the total remittance not to exceed $43,000." Finally, respondent agreed to keep RMG reasonably informed regarding his collection efforts against Harmelech. Also on August 1, 2014, RMG executed an assignment in favor of Casco Bay consistent with their simultaneously executed settlement agreement.

During the ethics hearing, respondent characterized RMG's assignment of its rights to Casco Bay as "a path of least resistance" because he was going to

"have to collect money from Harmelech anyway in Illinois." In respondent's view, Casco Bay's acquisition of RMG's rights allowed him to "go in with a . . . larger dollar figure" in order to "have a prospect of leverage and a more favorable . . . settlement."

Following RMG's assignment of its rights to Casco Bay, respondent, through Casco Bay, attempted to collect upon the RMG judgment.

Specifically, on December 14, 2014, respondent and his client, Casco Bay, filed, in the NDI, a lawsuit against both Harmelech, individually, and his son, Etan Harmelech (the Highland Park action). In their lawsuit, respondent and Casco Bay alleged that Harmelech, through his companies, illegally distributed Russian language television programming, in violation of Illinois law. Respondent and Casco Bay further maintained that, in 2005, Harmelech fraudulently had transferred funds to Etan to enable him to purchase a $440,000 home in Highland Park, Illinois. Respondent alleged that, "upon information and belief," because Etan was a young college student when he had purchased the home, Harmelech must have "delivered the money" to Etan to enable him to purchase and obtain sole title to the property. Respondent further asserted that, since 2005, Harmelech continuously had resided at the Highland Park home and paid its property taxes and maintenance costs. In respondent's view, Harmelech concealed his true ownership interest in the property from his creditors.

Respondent further alleged that he was a creditor of Harmelech, due to Harmelech's breach of their 2009 promissory note, and that Harmelech owed him more than $60,000 in attorney's fees.

Among other avenues of relief, respondent, through Casco Bay, sought a $145,000 judgment against Harmelech based on Casco Bay's assumption of RMG's rights to collect upon the RMG judgment. Respondent and Casco Bay also sought a judgment declaring Harmelech as the owner of Etan's residence and declaring the residence may be "levied upon and sold" to satisfy any future judgment against Harmelech, including any such judgments to be issued in connection with respondent's ongoing Superior Court and DNJ actions against Harmelech. In his verified answer, respondent alleged that the facts underlying his complaint in the Highland Park action originated from the "public record."

In or before March 2015, Harmelech filed a motion with the NDI, in the Highland Park action, seeking, among other relief, to disqualify respondent from representing Casco Bay and to prohibit Casco Bay from prosecuting its claims. On March 17, 2015, the NDI issued an order disqualifying respondent from representing Casco Bay, reasoning that respondent was "engaging in a position materially adverse to the interests of his former client[] in a substantially related matter in violation of New Jersey [RPC] 1.9(a)." The NDI, however, permitted Casco Bay to "remain a plaintiff," provided that it "proceed without using any

information that [respondent had] obtained from his prior representation of" Harmelech, including any information respondent "may have later obtained as an attorney to his former client[]."

During the ethics hearing, respondent conceded that, on March 16, 2015, the day before the NDI issued its March 17 order, the NDI judge had informed him, on the record during a court proceeding, that his representation of Casco Bay "violated the Rule of Professional Conduct under Illinois law."

In his verified answer, respondent asserted that he did not "misuse" Harmelech's confidential information by attempting to enforce the RMG judgment against his former client. Respondent further alleged that the facts underlying his 2009 representation of Harmelech "are irrelevant to [his] acquisition and enforcement of the RMG judgment . . . in 2014 and thereafter." Additionally, respondent claimed that, although he twice had attempted to seek the Seventh Circuit's appellate review of the NDI's March 17, 2015 disqualification order underlying the Highland Park action, the Seventh Circuit declined, each time, to review the merits of the order.

In September 2016, respondent filed, in the NDI, a lawsuit against Alden Management Services, Inc., one of Harmelech's largest customers, seeking to collect money that nursing home customers owed to Harmelech for satellite

television programming (the Alden action).[10] In his verified answer, respondent alleged that the information underlying the Alden action originated from the public record and from discovery underlying the DNJ action.

In January 2017, respondent filed, in the NDI, an additional lawsuit, this time against Harmelech, individually, among other entities, seeking to set aside Harmelech's transfer of his condominium in Palm Harbor, Florida (the Palm Harbor action).[11] In his lawsuit, respondent alleged that Harmelech fraudulently had transferred his condominium to evade creditors.

In his verified answer, respondent claimed that the information underlying the Palm Harbor action originated from the public record and from discovery underlying the DNJ action. Respondent also alleged that he had standing to file the Palm Harbor action based on his favorable September 6, 2016 judgment, in the amount of $71,763, against Harmelech in the DNJ action. Respondent further claimed that he had standing to sue Harmelech because, on September 4, 2017, Casco Bay had assigned to respondent its rights to collect upon the RMG judgment.

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[10] It appears that respondent represented himself, pro se, in the Alden action.

[11] Casco Bay was not named as a plaintiff in the Palm Harbor action.

On October 25, 2017, the NDI, in the Palm Harbor action, issued an order denying Harmelech's motion to disqualify respondent from representing himself as a pro se plaintiff. The NDI rejected Harmelech's position that respondent was prohibited, by American Bar Association (ABA) Rule of Professional Conduct 1.9(a),[12] from "profit[ing] from the enforcement of a judgment entered against his former client." Additionally, the NDI found that Harmelech had not demonstrated that respondent had "used any information obtained while representing [him] in the prior matter to [his] detriment in this matter." The NDI further observed that:

> [respondent] assert[ed] that the RMG action related to Harmelech selling illegal Russian language television programming to twenty apartment buildings in the Chicago area. It is not clear how that action has any bearing on this case. [Harmelech] rel[ies] on vague assertions relating to confidential matters as [he] did in [his] motion to dismiss, which the [NDI] denied. The RMG judgment was a matter of public record. [Harmelech has] not shown that there is any substantial connection between this case and the RMG [action] . . . . The RMG judgment was entered in 2011, which was a significant amount of time after [respondent] ceased his representation of Harmelech in the RMG action. [Harmelech has] not shown that [respondent] should be subject to the drastic remedy of being disqualified from representing himself in this matter and the motion to disqualify is denied.

[12] RPC 1.9(a) contains nearly identical language to the equivalent ABA rule.

[REx.6pp.1-2.][13]

Meanwhile, after Casco Bay assigned to respondent its rights under the RMG judgment, respondent removed Casco Bay as a plaintiff in the Highland Park action, leaving himself as the sole remaining plaintiff in that matter.

On November 28, 2017, Harmelech paid respondent the entire $71,763 judgment underlying the DNJ action.[14] One month later, on December 27, 2017, respondent filed, on behalf of himself only, a motion with the NDI to reopen the RMG action. In his motion, respondent noted that he recently had completed "supplementary proceedings" before the DNJ to collect upon the $71,763 judgment. Respondent alleged that, in connection with his supplementary enforcement proceedings before the DNJ, Harmelech failed to provide certain bank records to respondent. Respondent further expressed his concern that, based on the December 2017 deposition testimony of Harmelech's former attorney, Harmelech may have hidden funds in overseas bank accounts. Respondent maintained that his motion to reopen the RMG action "essentially pick[ed] up where" the supplementary DNJ enforcement proceedings "left off," because Harmelech still had not provided respondent the relevant bank records.

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[13] "REx." refers to respondent's exhibits that were admitted into evidence during the ethics hearing.

[14] In his verified answer, respondent claimed that Harmelech had satisfied the DNJ judgment in January 2018.

In his verified answer, respondent alleged that his standing to reopen the RMG action was "based solely on his status as the assignee of the RMG judgment."

Meanwhile, on June 5, 2018, the NDI dismissed the Highland Park action, with prejudice, based on respondent's failure to comply with its March 17, 2015 order disqualifying him from representing Casco Bay in connection with its efforts to collect upon the RMG judgment. In its opinion, the NDI noted that its March 2015 order permitted Casco Bay "to proceed with the case only on the condition that it not utilize any information [respondent had] obtained during his representation of [Harmelech]. That condition would be rendered meaningless if [respondent] were permitted to represent himself in pursuing the RMG judgment." Mac Naughton v. Harmelech, 338 F. Supp. 3d 722, 727 (N.D. Ill. 2018).

On June 22, 2018, the NDI denied respondent's motion to reopen the RMG action, reiterating its rationale underlying the dismissal of the Highland Park action – that respondent had violated its March 17, 2015 order by continuing to pursue the RMG judgment.

On June 27, 2018, the NDI dismissed the Palm Harbor action based on respondent's lack of standing to pursue the case. Mac Naughton v. Harmelech, 2018 U.S. Dist. LEXIS 106948 (N.D. Ill. 2018) at 4. In its decision, the NDI

noted that respondent's attempts to enforce the RMG judgment against Harmelech violated the NDI's March 17, 2015 order underlying the Highland Park action and constituted a violation of RPC 1.9(a). Id. at 3. Consequently, the NDI found that Casco Bay's assignment of the RMG judgment to respondent provided no basis for his standing to pursue the Palm Harbor action. Id. at 3-4. Similarly, the NDI found that, because Harmelech had fulfilled the September 2016 $71,763 judgment underlying the DNJ matter, respondent lacked standing to pursue the Palm Harbor action based on the DNJ judgment. Id. at 4.

On August 18, 2018, the NDI dismissed the Alden action, via which respondent further sought to collect upon the RMG judgment.[15]

On July 31, 2019, the Seventh Circuit issued an opinion, affirming the NDI's denial of respondent's motion to reopen the RMG action, as well as the dismissal of the Highland Park, Palm Harbor, and Alden actions. Mac Naughton v. Harmelech, 932 F.3d 558 (7th. Cir. 2019). In its opinion, the Seventh Circuit found that the NDI, in each of the matters, did not abuse its discretion by dismissing the cases (and denying respondent's motion to reopen the RMG action), given that respondent failed to abide by the NDI's March 17, 2015 order, in the Highland Park action, disqualifying him from representing Casco Bay in

[15] A copy of that decision is neither included in the record nor available in any publicly accessible databases. However, in respondent's verified answer, he claimed that the NDI made no reference, in its decision, to his alleged violation of RPC 1.9(a).

order to collect upon the RMG judgment. Id. at 565. The Seventh Circuit observed that respondent "willfully defied [his] disqualification" by having "Casco Bay assign its rights in the RMG judgment to himself, and he continued his pro se actions to collect it, in complete defiance of the [March 17, 2015] order." Ibid. Consequently, the Seventh Circuit found "no error in rejecting [respondent's] efforts to collect the RMG judgment." Id. at 566. However, the Seventh Circuit did not opine on whether respondent's actions violated RPC 1.9(a). Id. at 564.

Meanwhile, in 2015, Harmelech filed a lawsuit in the NDI, through one of his companies, alleging that respondent had committed legal malpractice by, among other actions, acquiring an interest in the RMG judgment (the malpractice action). On August 28, 2018, the NDI dismissed the malpractice action, finding that Harmelech had not demonstrated that respondent had "relied on confidential information to obtain or prosecute the [RMG] judgment or that he violated some other fiduciary duty by acquiring and litigating the interest." On August 14, 2019, following the dismissal of the malpractice action, Harmelech filed an ethics grievance against respondent, alleging that his conduct violated RPC 1.9(a).

The Ethics Hearing

Respondent's Motion In Limine

On October 31, 2022, respondent filed a motion in limine with the DEC hearing panel chair, seeking to exclude, among the presenter's other proposed exhibits, the NDI's June 5 and 27, 2018 opinions dismissing the Highland Park and Palm Harbor actions. Respondent also sought to exclude the Seventh Circuit's July 31, 2019 opinion affirming the NDI's respective opinions denying respondent's motion to reopen the RMG action and dismissing the Highland Park, Palm Harbor, and Alden actions. In support of his argument, respondent claimed that his disciplinary matter constituted "a judicial proceeding" in which the hearing panel was "bound by the New Jersey Rules of Evidence." Citing N.J.R.E. 803 (prohibiting the admissibility of hearsay unless an exception applies), respondent argued that the NDI's and the Seventh Circuit's opinions constituted irrelevant, inadmissible hearsay that did not address the ultimate issue of whether his conduct violated RPC 1.9(a).

In the presenter's November 9, 2022 reply to respondent's motion, he argued that the Rules of Evidence may be relaxed in disciplinary proceedings, pursuant to R. 1:20-7(b), and that the hearing panel could take judicial notice of the Seventh Circuit's and the NDI's opinions, among other court records. The presenter, however, made clear that he would not utilize the rationale of the

Seventh Circuit to prove the ultimate issue of whether respondent violated RPC 1.9(a). Nevertheless, the presenter argued that "potential admonitions by federal judges [are] a potentially aggravating circumstance in this matter."

On November 28, 2022, the hearing panel chair granted the motion in limine and excluded, among other exhibits, the Seventh Circuit's and the NDI's opinions. In his order, the panel chair observed that, although he could "take judicial notice that a court issued an opinion," he could not "take judicial notice of the content of the judicial opinion unless the contents of the judicial [opinion] are admissible under an exception or relaxation of the hearsay rule." The panel chair also noted that the NDI's June 5, 2018 and the Seventh Circuit's July 31, 2019 opinions did "not meet any of the . . . tests for relevancy." Additionally, although the panel chair found that the NDI's June 27, 2018 opinion constituted relevant evidence because it "decided the issue of whether respondent violated RPC 1.9(a) in attempting to enforce [the RMG judgment] against his former client," the panel chair concluded that the opinion constituted inadmissible hearsay. Nevertheless, the panel chair noted that the NDI's June 27, 2018 opinion could fall within an exception to the rule against hearsay, as a written statement made in the regular course of business, pursuant to N.J.R.E. 803(c)(6). Consequently, the panel chair allowed the presenter to renew its application, during the ethics hearing, to admit the NDI's June 27, 2018 opinion.

Respondent's Motions to Dismiss

On December 5, 2022, respondent filed with the hearing panel chair a motion to dismiss the formal ethics complaint, pursuant to R. 1:20-5(d)(1). In his motion, respondent did not dispute that his "acquisition and enforcement of the RMG judgment" was adverse to his former client and, further, he conceded that Harmelech "did not consent to [r]espondent's acquisition and enforcement of the RMG judgment." Respondent, however, argued that his acquisition and enforcement of the RMG judgment was neither "substantially related to" nor the "same" matter as his 2009 defense of Harmelech against RMG. Specifically, respondent noted that the facts underlying his 2009 representation of Harmelech concerned his refusal to comply with the NDI's preliminary injunction prohibiting him from distributing pirated television programming. Respondent asserted that those facts were "irrelevant to [his] acquisition and enforcement of the RMG judgment" and that he did not use his client's confidential information to enforce that judgment against him.

Additionally, relying on Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264 (2012), respondent argued that his enforcement of the RMG judgment against his former client did not constitute the "same" matter as his prior defense of his former client for violating the NDI's preliminary injunction. Respondent maintained that the legal relationship between Harmelech and RMG

changed, in 2011, from "an adversarial relationship based on tort and statute to a consensual relationship based on contract with the execution of the" April 2011 settlement agreement underlying the RMG action. In respondent's view, the facts underlying Harmelech's violation of the NDI's preliminary injunction were "very different" from the facts underlying his acquisition and enforcement of RMG's rights pursuant to the settlement agreement. Respondent argued that he did not "switch sides" in the "same dispute;" rather, he claimed that he "stepped into the shoes of RMG to collect the RMG judgment in 2014 – shoes that did not exist in 2009." However, "even if respondent 'switched sides' by aligning his interests with RMG in 2014," he maintained that "it was not for the same dispute RMG had with" Harmelech, in 2009.

Moreover, respondent maintained that he had a constitutional right "to collect and use information in the public record" and to "access" the courts by enforcing the RMG judgment against his former client. Respondent expressed his view that he "did nothing more than any other judgment creditor could lawfully do to enforce his rights." Respondent argued that the "only difference" between himself "and any other judgment creditor is that [he] represented [Harmelech] in the [RMG] action two years before the judgment was entered on consent . . . and four years before respondent acquired it." Respondent maintained that his actions "were the quintessential exercise of his

constitutionally protected rights to obtain information from the public record and [to] use it to his advantage in a court of law – even if doing so is 'materially adverse' to [Harmelech] and a violation of RPC 1.9(a)." Consequently, respondent asserted that the hearing panel lacked "the constitutional authority to levy any sanctions on [him] for his acquisition and enforcement of the RMG judgment."[16]

In his December 14, 2022 opposition brief, the presenter argued that respondent violated RPC 1.9(a) by acquiring an assignment interest in the RMG judgment, which he attempted to enforce against Harmelech, whom respondent previously had represented in the underlying RMG action. The presenter argued that respondent's interests in enforcing the RMG judgment were materially adverse to the interests of his former client. Moreover, such "adverse interests" arose from the same RMG action in which respondent had represented his former client. The presenter further asserted that whether respondent had misused confidential client information is irrelevant to establish a violation of RPC 1.9(a). Finally, given that respondent had agreed, pursuant to his August 1, 2014 settlement agreement with RMG underlying the Superior Court action, to provide RMG a certain percentage of the funds he sought to recover from

[16] In his verified answer, respondent advanced nearly identical theories that he did not violate RPC 1.9(a).

Harmelech, the presenter argued that respondent unethically had "switch[ed] sides."

On December 31, 2022, the panel chair denied respondent's motion to dismiss, finding that the formal ethics complaint properly set forth legally sufficient facts to sustain a cause of action under RPC 1.9(a).

Subsequently, on January 6, 2023, the presenter and respondent executed a stipulation in which the parties agreed to submit this matter to a hearing panel, in lieu of an evidentiary hearing, based on their agreed list of exhibits and stipulated facts. Also on January 6, 2023, respondent filed a renewed motion to dismiss the formal ethics complaint, pursuant to R. 1:20-5(d)(2), based on his view that the presenter's "case in chief ha[d] been concluded" because he did not request a hearing on "aggravating circumstances." Respondent did not a file a new brief in support of his renewed motion. Rather, he "incorporate[d] and relie[d]" upon the same submission in support of his pre-hearing motion to dismiss.

On February 23, 2023, the panel chair issued an order denying respondent's renewed motion to dismiss, finding that a "reasonable hearing panel member could conclude[,] based upon clear and convincing evidence[,] that respondent's 2014 collection activities merely continued the original RMG action, albeit in a collections phase." Consequently, the panel chair determined

that a "rational hearing panel could find that the [presenter] established a violation of RPC 1.9(a)."

The Parties' Positions to the Hearing Panel

During the ethics hearing, the presenter called no fact witnesses and limited his presentation to legal arguments underlying his theory that respondent violated RPC 1.9(a). Specifically, the presenter argued that respondent violated that Rule by attempting to enforce the RMG judgment against Harmelech, even though such efforts arose out of the "same matter" as respondent's prior representation of his former client. The presenter urged the hearing panel to recommend a three-month suspension, based on his view that respondent had engaged in "a protracted and deliberate course of conduct" against a "nonconsenting former client." The presenter further emphasized that respondent had continued his collection efforts against his former client "despite the warnings of a federal judge."

In his brief to the hearing panel, the presenter argued that respondent's position regarding the meaning of "the 'same' matter" for purposes of RPC 1.9(a) "represent[ed] a contortion of the plain and obvious meaning of 'same' matter." In the presenter's view, nothing in New Jersey's disciplinary jurisprudence prohibited applying an ordinary meaning to that term to the facts

of this matter – "that is, that subsequent action in connection with the RMG action is the 'same' matter" as respondent's prior involvement in the RMG action.

Respondent, in turn, argued that, prior to acquiring an interest in the RMG judgment, he had reviewed the Court's opinions in City of Atlantic City v. Trupos, 201 N.J. 447 (2010), and Twenty-First Century Rail Corp., concerning RPC 1.9(a). Based on his understanding of those cases, respondent argued that he did not engage in any unethical conduct because he did not use confidential client information to acquire or enforce the RMG judgment. Additionally, respondent maintained that the RMG judgment "did not arise . . . out of [his] 2009 representation" of Harmelech, given that his representation concerned his client's refusal to comply with the NDI's preliminary injunction in the RMG action. In respondent's view, if he "had switched sides in 2009 and started representing RMG against . . . Harmelech regarding his violation of the preliminary injunction, clearly that would have been the same matter" for purposes of RPC 1.9(a). However, respondent maintained that his subsequent attempts to enforce the RMG judgment against his former client was based on a "different set[] of facts" from his prior representation. Respondent argued that he had a constitutional right to acquire the RMG judgment and to petition a

court, using public information, "for redress to protect" his interests underlying the RMG judgment.

Also, during the ethics hearing, respondent acknowledged that Harmelech had satisfied all his unpaid legal fees "in excess of the $80,000" that he was owed. Respondent, however, did not specify the total amount he had obtained from Harmelech, despite being queried by the hearing panel regarding the total amount of his recovery. Respondent also acknowledged that he had not provided RMG any of the funds he had collected from Harmelech, despite his August 1, 2014 agreement to provide RMG fifty percent of the first $50,000 collected from Harmelech.

In his written summation, respondent argued that his attempt to reopen the RMG action was not a "continuation" of the underlying RMG action. Rather, he claimed that "[i]t was a new and separate claim based on breach of contract." In respondent's view, his attempts to enforce the RMG judgment and the 2011 settlement agreement between Harmelech and RMG "was not the 'same' matter as the disputes settled by the [2011] settlement agreement for purposes of RPC 1.9(a)." However, in the event that the hearing panel found that he had violated RPC 1.9(a), respondent urged the imposition of a "private reprimand,"[17] based

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[17] Effective March 1, 1995, R. 1:20-9(d) prohibited the imposition of all "private discipline" in New Jersey.

on his view that Harmelech had not suffered any injury from his conduct and that he "had reasonable grounds to believe that his conduct did not violate RPC 1.9(a)."

The Hearing Panel's Findings

The hearing panel found that the Court's opinion in Twenty-First Century Rail Corp. governed its determination of whether respondent's 2009 representation of Harmelech against RMG constituted the "same" matter, under RPC 1.9(a), as his subsequent efforts to enforce the RMG judgment against his former client.

The hearing panel observed that respondent's initial efforts to pursue his unpaid attorney's fees complied with RPC 1.9(a). Specifically, the hearing panel found no violation of RPC 1.9(a) based on respondent's filing of the October 2009 DNJ action and the July 2012 Superior Court action in which he sought to collect his unpaid legal fees and to assert an interest in the escrow funds RMG had recovered, in 2011.

However, the hearing panel found respondent's "subsequent actions" "problematic for purposes of RPC 1.9(a)." Specifically, respondent consented to receiving, through Casco Bay, an interest in (1) the RMG judgment issued against his former client, and (2) the 2011 settlement agreement executed by his

former client. The hearing panel found that respondent had "inserted himself – first through Casco Bay and then individually – into the original dispute between RMG and [Harmelech], which had advanced to a collection phase." The hearing panel stated that the "evidence for this" conduct included, but was not limited to, "the fact that respondent filed a motion to reopen the RMG action for the purpose of collecting the settlement and stipulated judgment entered in the RMG action."

The hearing panel determined that respondent's 2009 representation of Harmelech in the RMG action and his subsequent collection efforts to enforce the RMG judgment were the "same" matter under RPC 1.9(a). Like the circumstances in Twenty-First Century Rail Corp., which, as detailed below, "involved the pre-litigation and litigation phases of the same dispute," the hearing panel found that "the dispute here involved a progression of the same parties and dispute from one phase of the litigation to a later phase." Consequently, the hearing panel found, by clear and convincing evidence, that respondent violated RPC 1.9(a).

The hearing panel recommended the imposition of a reprimand, finding that respondent "should have known[,] at a minimum[,] that his conduct was approaching, if not exc[eeding], a violation of RPC 1.9(a)." The hearing panel noted that Harmelech had raised the issue of respondent's potential violation of

RPC 1.9(a) on multiple occasions and, further, that the Court's 2012 opinion in Twenty-First Century Rail Corp was published before he began his improper collection efforts, in 2014. The hearing panel found, in aggravation, the fact that respondent did not consult with the Office of Attorney Ethics or an experienced ethics attorney before undertaking his collection efforts, "even after courts and his adversaries began to question whether his conduct was violating RPC 1.9(a)." In further aggravation, the hearing panel weighed the fact that respondent's improper collection efforts yielded a windfall recovery for respondent, in excess of the amount of his unpaid legal fees. However, in mitigation, the hearing panel weighed respondent's otherwise unblemished thirty-nine-year career at the bar.

The Parties' Submissions to the Board

At oral argument and in his brief to us, respondent argued that the hearing panel applied an improper "progression theory" in finding that his 2009 representation of Harmelech constituted the same matter, for purposes of RPC 1.9(a), as his subsequent collection efforts against his former client. Respondent argued that the "fatal flaw" in the hearing panel's "progression theory" is that the RMG judgment "was not part of a 'progression' of the 2009 legal dispute between [Harmelech] and RMG." Respondent maintained that his enforcement

of the RMG judgment against his former client constituted "a separate matter altogether than the dispute it settled." Although respondent acknowledged that "the parties may be the same and the caption of the lawsuit may be the same," the "facts and legal basis for the 2009 'dispute' between RMG and [Harmelech] are substantially different than the facts and legal basis for [the] 2014 'dispute' in collecting the RMG judgment."

Respondent also argued that he had a good faith belief that his conduct complied with RPC 1.9(a), pursuant to the Court's opinion in Trupos, because he did not use Harmelech's confidential information against him in a "substantially related" matter. Additionally, when asked, at oral argument, whether he could have utilized the rights he had acquired underlying the RMG judgment to negotiate a settlement of that judgment with Harmelech, respondent replied that such a scenario would have been impossible based on his views of Harmelech's temperament and character. Rather, respondent repeatedly emphasized that he viewed his acquisition of the RMG judgment as a "hammer" that he could use as "leverage" to obtain financial recovery against Harmelech.

Finally, respondent argued that he had a constitutional right to obtain and enforce the RMG judgment against his former client, using publicly available information, and that we "cannot sanction [him] for" any violation of RPC 1.9(a)

"without infringing on his constitutional rights to acquire and use public record information in the courts to obtain and enforce property rights."

The presenter argued that respondent's acquisition and enforcement of the RMG judgment, without Harmelech's consent, constituted unethical "side switching." The presenter also emphasized that whether respondent had misused confidential information against his former client is irrelevant to our determination of whether he violated RPC 1.9(a), given that his subsequent enforcement actions constituted a continuation of the "same" matter as his 2009 representation of Harmelech. The presenter further asserted that the Court's opinion in Twenty-First Century Rail Corp governed our analysis of RPC 1.9(a) in this matter.

Analysis and Discipline

As a threshold matter, we determine to respectfully part company with the hearing panel chair's determination to exclude from evidence the NDI's June 5 and 27, 2018 opinions dismissing the Highland Park and Palm Harbor actions and the Seventh Circuit's July 31, 2019 opinion affirming, among other rulings, the dismissal of those actions.

The panel chair opined that each of these opinions constituted inadmissible hearsay and that the NDI's June 5, 2018 and the Seventh Circuit's

July 31, 2019 opinions did "not meet any of the . . . tests for relevancy" because they did not address whether respondent violated RPC 1.9(a).

R. 1:20-7(b) provides that the Rules of Evidence "may be relaxed in all disciplinary proceedings, but the residuum evidence rule shall apply."[18]

The NDI's June 5, 2018 opinion dismissed the Highland Park action based on respondent's failure to comply with the NDI's March 17, 2015 order disqualifying him from representing Casco Bay. Despite the March 2015 disqualification order, the NDI observed, in its June 5, 2018 opinion, that respondent continued his collection efforts, pro se. The NDI observed that the March 2015 order would have been "rendered meaningless if [respondent] were permitted to represent himself in pursuing the RMG judgment." Mac Naughton, 338 F. Supp. 3d at 727.

The NDI's June 27, 2018 opinion dismissed the Palm Harbor action based on respondent's continued attempt to enforce the RMG judgment against his former client, in violation of the NDI's March 17, 2015 order and RPC 1.9(a). Mac Naughton, 2018 U.S. Dist. LEXIS 106948, at 3-4.

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[18] Generally, the residuum rule provides that "hearsay evidence shall be admissible in the trial of contested cases." N.J.A.C. 1:1-15.5(a). "Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b).

Finally, the Seventh Circuit's July 31, 2019 opinion affirmed the dismissal of the Highland Park, Palm Harbor, and Alden actions (and respondent's motion to reopen the RMG action) based on his "willful" defiance of the March 17, 2015 order by having "Casco Bay assign its rights in the RMG judgment to himself," following which "he continued his pro se actions to collect it." Mac Naughton, 932 F.3d at 565. However, the Seventh Circuit did not decide whether respondent's actions violated RPC 1.9(a). Id. at 564. Regardless, the rendering of such an opinion by the Seventh Circuit would not bind either us or the Court.

We note that respondent and the presenter both described, in their pleadings, portions of the relevant content of the three opinions, each of which are publicly available. Additionally, respondent was a party to the proceedings underlying the NDI's June 2018 opinions, both of which were affirmed by the Seventh Circuit, in a published decision, following respondent's appeal. Consequently, the content of the opinions are sufficiently reliable to overcome any hearsay concerns regarding their admissibility. Based on these circumstances, we determine to give the opinions the appropriate weight in our consideration of aggravating factors – specifically, whether respondent was on notice that his efforts to enforce the RMG judgment against his former client were potentially unethical and, at times, in violation of a federal court order. However, as previously stated, we do not consider the opinions in connection

with the ultimate issue – our determination of whether respondent violated RPC 1.9(a) – because that analysis falls solely within our and the Court's purview.

Violations of the Rules of Professional Conduct

Turning to our de novo review of the record, we determine that the DEC's finding that respondent violated RPC 1.9(a) is fully supported by clear and convincing evidence.

RPC 1.9(a) prohibits a lawyer who has represented a client in a matter from thereafter representing "another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client[,] unless the former client gives informed consent confirmed in writing."

Here, between May and July 2009, respondent defended Harmelech in the RMG action concerning his client's illegal distribution of pirated Russian language programming throughout Chicago. During that timeframe, respondent filed numerous submissions, on behalf of Harmelech, in connection with his client's purported violation of the NDI's preliminary injunction, which directed that his client cease distributing the Russian language programming.

In July 2009, respondent suspended his representation of his client, following Harmelech's failure to pay his legal fees, and, in January 2011, the

NDI formally relieved respondent as counsel. Three months later, in April 2011, Harmelech and RMG executed a settlement agreement in which Harmelech agreed to pay RMG a total of $261,374.76, via the release of escrow funds, a lump sum payment of certified funds, and monthly installment payments. Harmelech also consented to the issuance of a $286,374.76 stipulated judgment against him, which judgment RMG would not seek to enforce provided that Harmelech satisfied his $261,374.76 payment obligation. Following the execution of the settlement agreement and the issuance of the stipulated judgment, Harmelech appeared to have satisfied only $131,374.76 of his total payment obligation.

Thereafter, in July 2012, respondent filed the Superior Court action against RMG and Harmelech, alleging that he had a lien on the escrow funds RMG had received from Harmelech. Two years later, in August 2014, respondent and Casco Bay, an entity owned solely by respondent and his wife, executed a settlement agreement with RMG in the Superior Court action. Specifically, RMG agreed to assign Casco Bay its rights against Harmelech under the April 2011 settlement agreement and the May 2011 stipulated judgment underlying the RMG action. Respondent agreed to share with RMG a portion of the funds he intended to recover from his former client and to keep RMG reasonably informed regarding his collection efforts.

Following RMG's assignment of its rights to Casco Bay, between December 2014 and January 2017, respondent, either through himself, pro se, or through Casco Bay, filed three lawsuits in the NDI, primarily against Harmelech, individually, seeking to enforce the RMG judgment against his former client by alleging, among other legal theories, that Harmelech fraudulently had concealed his assets from his creditors, such as respondent. In December 2017, after Harmelech had paid all of respondent's outstanding legal fees from the 2009 representation, respondent filed a motion with the NDI seeking to reopen the RMG action because of Harmelech's purported failure to disclose all his financial information. Respondent alleged that he had standing to reopen the RMG action "based solely on his status as the assignee of the RMG judgment." In July 2019, the Seventh Circuit affirmed the NDI's dismissal of respondent's three lawsuits against Harmelech, along with his motion to reopen the RMG matter.

Respondent conceded that his 2014 through 2017 enforcement actions were materially adverse to the interests of Harmelech, his former client, who did not provide respondent informed written consent to enforce the RMG judgment. Respondent, however, challenged the presenter's theory that his 2009 representation of Harmelech against RMG was the "same" matter as his subsequent actions to enforce the RMG judgment against his former client.

In Trupos, the Court addressed the "tension" between a lawyer's "fealty to a former client and zealousness in favor of a current client" under the framework of RPC 1.9(a). 201 N.J. at 450-51. Specifically, in Trupos, a law firm representing a municipality in connection with certain real estate tax appeals discontinued that representation, in 2008. Id. at 451, 454. Thereafter, several hundred taxpayers retained the law firm to file petitions with the county board of taxation challenging their 2009 property tax assessments imposed by the municipality. Ibid. Notably, none of the 2009 tax appeals against the municipality involved properties associated with the scope of the law firm's previous representation of the municipality. Id. at 461.

Nevertheless, the municipality moved to disqualify the law firm from representing the taxpayers, alleging that the firm "was privy to the municipality's confidences and that the . . . firm's representation of individual taxpayers was 'substantially related' to the . . . firm's prior representation." Id. at 451. Specifically, the municipality alleged that the law firm was privy "to the selection of the revaluation expert on whose assessments the 2009 appeals [were] based." Id. at 461.

The Court found that a determination of whether the prior and current representations involved "the same or substantially related matter[s]" "must be based in fact, as we have reject[ed] the appearance of impropriety as a factor to

be considered in determining whether a prohibited conflict of interest exists under RPC . . . 1.9." Id. at 464 (citations omitted) (alterations in original). The Court held that:

> for purposes of RPC 1.9, matters are deemed to be 'substantially related' if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.
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> [Id. at 467.]

The Court adopted the foregoing standard "because it protects otherwise privileged communications . . . while also requiring a fact-sensitive analysis to ensure that the congruity of facts, and not merely similar legal theories, governs whether an attorney ethically may act adverse to a former client." Ibid.

Applying those principles, the Court found that (1) the law firm did not receive confidential information from the municipality that could be used against it in the prosecution of the 2009 tax appeals, and (2) the facts relevant to the firm's prior representation were irrelevant and immaterial to the firm's current representation of the taxpayers. Id. at 470. Consequently, the Court found the municipality failed to meet its burden to establish that the current and prior representations were substantially related and, thus, vacated the lower court's order disqualifying the law firm. Ibid.

The Court's two-part test in Trupos, however, addressed only whether the prior and current representations are "substantially related." In the instant matter, the presenter alleged that respondent's 2009 representation of Harmelech was the "same" matter, under RPC 1.9(a), as his 2014 through 2017 enforcement actions against former client.

In Twenty-First Century Rail Corp., the Court considered whether an attorney who was retained to advise a client in connection with a construction project violated RPC 1.9 by subsequently representing another party involved in the same construction project, whose interests were materially adverse to those of the former client. 210 N.J. at 265.

In that matter, the subcontractor to the construction project retained the attorney to provide legal advice in connection with its work on the project; specifically, the subcontractor was concerned regarding its rights and obligations in connection with a series of delays to the project that were impeding the subcontractor's ability to complete its assigned work. Id. at 267-68. The subcontractor was concerned that the prime contractor would hold it responsible for delays to the project that may have been attributable to others. Id. at 268. Following the subcontractor's meeting with the attorney, another member of the same law firm provided the subcontractor the requested legal advice, via letter. Ibid. The law firm's advice letter identified work performed

by the project engineer as one of the causes to which the subcontractor attributed the delays on the construction project. Ibid. Upon issuing the advice letter, the law firm's representation of the subcontractor concluded. Id. at 269.

Approximately four years later, the prime contractor and subcontractor, allied through a "joint prosecution agreement," filed a complaint against the project engineer, alleging that the engineer was responsible for the construction delays because of "grossly defective" designs and slow responses to inquires needed to efficiently perform work on the project. Id. at 270. The project engineer retained the same law firm that previously had provided the legal advice to the subcontractor. Ibid. Moreover, the law firm continued to employ, as partners, the attorneys who had provided the subcontractor with legal advice. Ibid. Thereafter, the subcontractor unsuccessfully moved to disqualify the law firm before the trial court, and the Appellate Division affirmed the trial court's decision. Id. at 272-73.

As a threshold matter on appeal, the Court addressed "a far more fundamental aspect of RPC 1.9(a), and one not germane to [its] analysis in Trupos." Id. at 275. Specifically, the Court observed that:

> if the prior and subsequent matters are indeed the same, the representation, absent written consent of the former client, is prohibited. In that circumstance, we need not conduct the inquiry into whether the matters are substantially related that we deemed necessary to undertake in Trupos. Nor need we apply the Trupos

> two-part test that includes the consideration of whether client confidences were communicated to the lawyer.
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> [Id. at 276.]

Consequently, the Court found that its "analytical starting point" was "markedly different" than the one it utilized in Trupos because, if the current matter was "the same" as the matter in which "the lawyer previously represented [the subcontractor], then[,] because the lawyer failed to secure [the subcontractor's] written consent to it, this representation [was] prohibited by plain operation of RPC 1.9(a)." Ibid. The Court concluded that the matters were the "same" for purposes of RPC 1.9(a) because both matters involved "the same discrete phase of [the] overall project, the same contracts, the same parties[,] and . . . the same dispute" relating to delays in the construction project. Id. at 276-77. In reaching its conclusion, the Court observed that it "need not focus, as [it] did in Trupos[,] . . . on whether[,] in the context of seeking advice from counsel, [the subcontractor] revealed confidences, because disqualification, if the matter is indeed the same, does not turn on the identification of any particular confidence having been revealed." Id. at 278.

Applying the principles of Twenty-First Century Rail Corp to the instant matter, we determine to adopt the hearing panel's well-reasoned finding that respondent's 2009 representation of Harmelech against RMG was the "same matter" as his 2014 through 2017 efforts to enforce the RMG judgment against

his former client, in violation of RPC 1.9(a). In Twenty-First Century Rail Corp, the Court deemed the attorney's pre-litigation advice to the subcontractor "the same" matter as his subsequent representation of the project engineer, at the litigation stage, concerning the same construction dispute. Like the circumstances in Twenty-First Century Rail Corp, respondent's 2009 representation of Harmelech, at the preliminary injunction litigation stage, was the same matter as his subsequent efforts to enforce the judgment arising out of the earlier litigation against his former client. As the hearing panel observed, the dispute involved a "progression of the same parties and dispute from one phase of the litigation to a later phase." The fact that the preliminary injunction phase of the litigation had concluded by the time respondent attempted to enforce the RMG judgment against his former client is irrelevant, given that the judgment arose out of the same dispute regarding which respondent had defended his former client. See In re Blatt, 42 N.J. 522, 524 (1964) (finding that "[i]t is self-evident that where a member of the bar represents a litigant in a cause, he should not thereafter represent the opposing party in any step in the proceedings in or arising out the same cause.").

In this case, respondent, through Casco Bay, acquired RMG's rights underlying its settlement and judgment against his former client. Thereafter, respondent utilized those rights, first through his representation of Casco Bay,

and later through himself, as a pro se litigant, to step into the shoes of RMG, his former client's adversary. Stated differently, respondent "switched sides" and occupied the same legal position as RMG, in order to collect the funds his former client owed to RMG in connection with the earlier litigation – the same litigation in which respondent had defended his former client. Using RMG's rights against his former client, respondent filed three separate NDI collection lawsuits and even attempted to reopen the same RMG action in which he had defended his former client, in order to obtain additional information regarding Harmelech's finances. Moreover, respondent's actions were not merely for his own self-benefit. Specifically, pursuant to his August 1, 2014 settlement agreement with RMG, respondent was obligated to provide RMG a portion of the funds he had intended to recover from his former client and to keep RMG reasonably apprised of his collection efforts. Consequently, respondent not only inserted himself into the original dispute between RMG and his former client, but he also aligned himself with RMG by agreeing to share his recovery with the adversary of his former client.

Finally, although it is the sole province of the Court to decide constitutional questions in disciplinary matters, we recommend that the Court reject respondent's argument that he cannot be sanctioned for any violation of RPC 1.9(a) without infringing on his asserted constitutional right to use publicly

available information to obtain and enforce the RMG judgment through the courts. See R. 1:20-4(e)(5) ("[a]ll constitutional questions shall be held for consideration by the Supreme Court as part of its review of any final decision of the Board").

In In re Felmeister, 95 N.J. 431 (1984), the Court considered an ethics proceeding arising from one law firm's decision to deliberately violate DR 2-101(D), which prohibited radio advertising. The Court previously had written to the Advisory Committee on Professional Ethics (ACPE), expressing the two partners' view of the unconstitutionality of the Disciplinary Rule, and invited the Committee's opinion on an advertisement that the law firm had purchased, which would run one month later. Rather than await the ACPE's disposition of the Court's request for its opinion, the attorneys funded the advertisement and allowed it to air.

The Court commented on the comparatively low value of the asserted First Amendment right adhering to commercial speech, and determined that the Amendment could not be used as a shield against an ensuing disciplinary action, observing:

> Despite being fully aware of the Rule and its meaning, the respondents intentionally violated it. We do not view their actions as being substantially different from those of individuals who violate a court order and then seek to raise the unconstitutionality of the injunction as a defense to prosecution for the violation.

> Unconstitutionality is not a defense.
>
> * * *
>
> [J]udicial remedies of review were clearly established so that an acceptable method to challenge the restriction of conduct was available. Under these circumstances it is not unreasonable to expect attorneys to abide by the Rule and, if desired, to challenge it through an appropriate judicial procedure.
>
> * * *
>
> As officers of the Court, attorneys have a peculiar position with respect to the judicial process and compliance with the expressed or stated law. Respect for the law should be more than a platitude. It would be anomalous indeed to permit attorneys unnecessarily to flout regulations of this Court governing their conduct.
>
> [In re Felmeister, 95 N.J. 431, 445-48 (1984) (citations omitted).]

The same logic applies to the instant matter. Just as the First Amendment did not protect Felmeister's derogation of a disciplinary Rule, respondent's claimed constitutional right to acquire an interest in the RMG judgment against his former client and to petition courts for "redress to protect" his interests underlying that judgment is no defense to his violation of RPC 1.9(a).

In sum, we find that respondent violated RPC 1.9(a). The sole issue left for our determination is the appropriate quantum of discipline for his misconduct.

Quantum of Discipline

Generally, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). See In the Matter of Salvatore De Lello, DRB 16-139 (Dec. 16, 2016) (noting that Berkowitz and its progeny apply in cases involving conflicts of interest with former clients, in violation of RPC 1.9(a)).

Attorneys who have violated RPC 1.9(a) have received discipline ranging from an admonition to a short term of suspension depending on the presence of aggravating factors, including serious economic injury to clients and the attorney's refusal to comply with court orders directing that they cease the conflicted representation. See e.g., In the Matter of Robert James Stack, DRB 18-393 (February 25, 2019) (admonition for attorney who represented a client in an uncontested matrimonial matter, despite having previously represented both the client and her husband in a foreclosure action and in the sale of their marital residence; in mitigation, the attorney fully cooperated with the investigation, stipulated to the facts, and expressed remorse and contrition; no prior discipline); In re Lewinson, 252 N.J. 416 (2022) (reprimand for attorney who represented a wife in a divorce proceeding, which resulted in a final judgment that required the parties to equally split the proceeds of their marital home; sixteen years later, the attorney represented the wife's former husband,

who sought to enforce the terms of the final judgment; the attorney immediately withdrew from the conflicted representation upon the filing of an ethics grievance; we accorded minimal weight to the attorney's disciplinary history of a reprimand and two terms of suspension, given that the attorney had been without formal discipline for more than twenty years);[19] In re De Lello, 229 N.J. 388 (2017) (censure for attorney who, during the span of one-month, represented a client in a civil rights matter and in a guardianship matter involving his mother; more than two years later, following the mother's passing, the attorney filed a lawsuit against his former client on behalf of the client's sister, who alleged that the client improperly had gifted the mother's assets to himself after the resignation of the mother's guardian; despite the Superior Court's directive that the attorney cease representing the sister, the attorney, on behalf of the sister, re-filed a lis pendens and sent a letter to an attorney claiming that his former client's preparation of a deed for the mother's home constituted the unauthorized practice of law and may be voided; despite the attorney's inexcusable defiance of a court order, the attorney's conduct was not motivated by personal gain and did not result in any harm to a client or third party; prior three-year suspension, in 2001, for engaging in criminal conduct); In re Mason, 197 N.J. 1 (2008)

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[19] Although Lewinson was disciplined for violating RPC 1.7(a)(2) (engaging in a concurrent conflict of interest), we noted that RPC 1.9(a) would have been the more appropriate charge. In the Matter of Barbara K. Lewinson, DRB 21-210 (March 16, 2022) at 9.

(censure for attorney who, using information gathered during his representation of Marx Toys, switched sides to represent a competing entity; he violated a subsequent court order directing him to refrain from performing any legal work involving Marx Toys and from making any disclosures about Marx Toys; during his representation of the competing entity, the attorney used information obtained during his representation of Marx Toys; in aggravation, the attorney demonstrated a "steadfast refusal" to recognize any wrongdoing on his part; no prior discipline); In re Fitchett, 184 N.J. 289 (2005) (three-month suspension for attorney who represented a public entity, incapable of consenting to the conflict, and then accepted a position with a firm that represented the entity's adversary; the attorney was guilty of switching sides; aggravating factors included the entity's loss of over $1 million, its responsibility for repayment of outstanding loans, and the attorney's prior reprimand).

Unlike the reprimanded attorney in Lewinson, who immediately withdrew from the conflicted representation upon the filing of an ethics grievance, respondent continued his improper enforcement actions against his former client, even after the NDI issued its March 17, 2015 order, in the Highland Park action, expressing its concern that his conduct violated RPC 1.9(a).

The NDI's March 2015 order also prohibited respondent from representing Casco Bay to collect upon the RMG judgment. Like the censured

attorneys in De Lello and Mason, who willfully defied court orders directing that they cease the conflicted representation, the Seventh Circuit, in its July 2019 opinion, found that respondent "willfully defied" the NDI's March 2015 order by having Casco Bay assign its rights in the RMG judgment to himself, following which respondent continued his pro se actions to collect upon the judgment. As the NDI observed in its June 5, 2018 opinion dismissing the Highland Park action, the March 2015 order disqualifying respondent from representing Casco Bay would have been "meaningless" if respondent were allowed to represent himself in enforcing the RMG judgment against his former client.

Although the NDI, in the Palm Harbor action, issued an October 25, 2017 order denying Harmelech's motion to disqualify respondent, the NDI based its determination on the lack of evidence that respondent had misused confidential information. As the Court held in Twenty-First Century Rail Corp., whether respondent had misused confidential information against his former client is irrelevant, under RPC 1.9(a), given that that his efforts to enforce the RMG judgment against Harmelech constituted the same matter as his prior representation of his former client. Moreover, in the NDI's June 27, 2018 opinion dismissing the Palm Harbor action, it appeared to reverse its position regarding the propriety of respondent's actions, finding that respondent's

conduct violated its March 2015 disqualification order and constituted a violation of RPC 1.9(a). As the hearing panel found, given that Harmelech and the NDI repeatedly questioned whether respondent's conduct was unethical, respondent, at a minimum, should have known that his conduct was approaching, if not exceeding, a violation of RPC 1.9(a).

Additionally, respondent's conduct did not merely result in the recovery of his unpaid legal fees, which Harmelech had paid, in full, in November 2017, in accordance with the DNJ's September 2016 judgment. Rather, consistent with his view that he utilized his rights underlying the RMG judgment as a "hammer" to gain "leverage" against his former client, respondent recovered a windfall from his former client "in excess of the $80,000" that he was owed in connection with the 2009 representation. However, during the ethics hearing, respondent did not specify the total amount he had obtained from Harmelech, despite the hearing panel's specific request for that information.

Moreover, respondent filed the October 2009 DNJ action against Harmelech, despite not having been relieved as counsel by the NDI until January 2011. As the Court held in In re Simon, 206 N.J. 306, 319 (2011), "consistent with the mandate of RPC 1.7(a), . . . attorneys shall not sue a present or existing client during active representation." However, because the complaint did not charge respondent with having violated RPC 1.7(a), we cannot independently

sustain that violation. Nevertheless, consistent with disciplinary precedent, we have considered that uncharged conduct in aggravation. See In re Steiert, 220 N.J. 103 (2014) (evidence of unethical conduct contained in the record can be considered in aggravation, even though such unethical conduct was not charged in the formal ethics complaint).

Finally, in mitigation, like the censured attorney in Mason and the admonished attorney in Stack, respondent has had no prior discipline in his thirty-nine-year career at the bar.

Conclusion

In conclusion, despite his otherwise unblemished legal career, respondent's conduct in this matter demonstrated a total disregard for the duties he owed to his former client. Respondent not only acquired the rights to a judgment entered against his former client arising out of the very same matter in which he previously had defended that client, but he also agreed to provide his client's adversary with a portion of any recovery he had obtained pursuant to that judgment. Respondent's actions not only appeared, at times, to be in violation of the NDI's March 2015 disqualification order, but also constituted a clear example of "side switching" in the same matter, conduct which the Court has long viewed as "plainly and patently unethical." See Blatt, 42 N.J. at 524.

Consistent with applicable disciplinary precedent for violations of RPC 1.9(a), and considering applicable aggravation and mitigation, we determine that a censure is the appropriate quantum of discipline necessary to protect the public and preserve confidence in the bar.

Chair Gallipoli and Members Campelo and Petrou voted to recommend the imposition of a three-month suspension.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
Chair

By: */s/ Timothy M. Ellis*
Timothy M. Ellis
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William J. Mac Naughton
Docket No. DRB 23-168

Argued: October 19, 2023

Decided: January 24, 2024

Disposition: Censure

Members	Censure	Three-Month Suspension
Gallipoli		X
Boyer	X	
Campelo		X
Hoberman	X	
Joseph	X	
Menaker	X	
Petrou		X
Rivera	X	
Rodriquez	X	
Total:	6	3

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