

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 24-249
District Docket Nos. XIV-2021-0403E
and VC-2023-0900E

In the Matter of Ira Barry Karasick
An Attorney at Law

Argued
February 20, 2025

Decided
April 22, 2025

Corsica D. Smith appeared on behalf of the
Office of Attorney Ethics.

Michael S. Stein appeared on behalf of respondent.

CORRECTED DECISION

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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 VC Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 8.4(g) (engaging, in a professional capacity, in conduct involving discrimination).

For the reasons set forth below, we determine to dismiss the charge against respondent.

Ethics History

Respondent earned admission to the New Jersey bar in 1989 and to the New York bar in 1980. At the relevant time, he served as Township Attorney for Montclair Township, New Jersey, until December 2, 2021, when he retired from that position. Thereafter, he maintained a practice of law in Montclair, New Jersey.

On October 4, 2001, the Court reprimanded respondent, in a default matter, for his violation of RPC 1.4(a) (now (b)) (failing to communicate), RPC 1.5(b) (failing to set forth, in writing, the basis or rate of the legal fee), and RPC

8.1(b) (failing to cooperate with disciplinary authorities). In re Karasick, 169 N.J. 570 (2001).

In that matter, respondent failed to communicate with his client for almost three years, but for a single telephone call, notwithstanding her attempts to reach him by mail, telephone, and facsimile. In the Matter of Ira Barry Karasick, DRB 00-166 (April 11, 2001) at 2. In addition, for almost two years after the client retained him, he failed to communicate to her the basis or rate of his legal fee and, even then, failed to do so in writing. Ibid.

We now turn to the matter currently before us.

Facts

This matter stems from interactions that occurred on September 21, 2021, in connection with respondent's appearance, as the Township Attorney for the Township of Montclair, in connection with an argument before the Superior Court of New Jersey, Appellate Division, at the Richard J. Hughes Justice Complex in Trenton, New Jersey (the Hughes Complex). The case involved the Township Clerk's rejection of a petition for a referendum on a recently enacted rent control ordinance, submitted to the Clerk by individuals "[d]esirous of challenging the ordinance," who already had "sought and obtained a trial court order tolling the ordinance's effective date" due to circumstances relating to the

COVID-19 pandemic. Tp. of Montclair Committee of Petitioners v. Tp. of Montclair, 470 N.J. Super. 1, 3 (2021).

Four Montclair residents and housing advocates attended the hearing: William Scott (Co-Chair of Montclair’s Housing Commission and Chair of the Montclair NAACP’s Housing Committee); Deirdre Malloy (Co-Chair of Montclair’s Housing Commission and Chair of the Montclair NAACP’s Economic Development Committee); Ahava Felicidad (President of the Tenants Organization of Montclair); and Toni Martin (Vice-President of the Tenants Organization of Montclair). They attended as Montclair residents and advocates who had been very involved in bringing the ordinance before the Township council.

For purposes of the disciplinary investigation, respondent described Scott, Malloy, and Felicidad as “African American, or persons of color” and Martin as “white.”

Scott, as an advocate for affordable housing and, since about 2009, an appointee to the Montclair Housing Commission, had interacted with respondent on multiple occasions, given respondent’s role as Township Attorney. Moreover, before respondent became Township Attorney, he served as the Montclair Township Planning Board Attorney during a period when Scott served on that

board.¹ Malloy, Felicidad and Martin were likewise acquainted with respondent through his various official capacities within the Township's government.

The hearing took place on the fifth floor of the Hughes Complex. After it concluded, respondent, who had noticed that Scott, Malloy, Felicidad, and Martin were present in the courtroom, spoke with them in the lobby. Respondent thanked them for attending, they thanked respondent for advocating before the court, and the five discussed the argument, the judges' questions and demeanors, and the potential outcome of the case.

They then proceeded to an elevator. Malloy, Felicidad, and Martin entered the elevator first, with respondent entering next.

Scott stopped before entering the elevator and pointed out a notice stating that, due to COVID, the elevator's maximum capacity was four individuals. According to Scott, respondent then said to him, "don't worry you're only three-fifths of a human." According to respondent, he said, "don't worry, you only count three-fifths," without adding "of a human," and may have prefaced his comment with "no problem" or "it's okay" rather than "don't worry." The OAE based the subsequent disciplinary charge on respondent's acknowledged statement "you only count three-fifths."

¹ Respondent served as Township Attorney for Montclair starting in 2010. Prior to this, from about 2005 to 2010, he served as the Montclair Township Planning Board Attorney.

Respondent said that Scott, upon hearing his statement, gave him a “quizzical” look before entering the elevator. He further stated that, having noticed Scott’s expression, he immediately told Scott he “didn’t mean to be offensive;” that, in connection with being in the courthouse, he was “thinking of the 3/5 compromise in the Constitution;” and that “it’s important to remember history.”² He stated neither Scott nor anyone else in the elevator commented on his remark at the time. Scott concurred that he did not immediately respond to the remark but stated that two of the other activists voiced their concerns, and that respondent offered his explanation or justification during his exchange with them.

Scott recounted that he did not say anything to respondent or otherwise address the remark at that time. He stated:

I was stunned. I had never heard anything like that directed at me in my life. And you know, the whole day was focused on being an advocate for rent control in the Township of Montclair. And you know, we had been working on this for, you know, at least in this particular situation for over two years, maybe a little bit longer. So we had put a lot of time in, so you know our full

² The reference is to a passage of the Constitution, stating that “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” U.S. Const. art. I, § 2, cl. 4. In 1865, the Thirteenth Amendment abolished slavery, and in 1868, the Fourteenth Amendment provided in relevant part that “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed,” thereby superseding the original Constitutional provision.

mind set was how the litigation was going to turn out. So we were really focused on that. So it was just a comment that was so far and completely unexpected. It was just, I'm not sure I had the opportunity to process it because of all of the things that I was thinking about. Okay. So that's probably why I didn't say anything, because I try to be a very civil person, respectful person. . . . I just really wanted to just handle myself in a professional way.

[P-8 at 11:1-12:3.]³

Scott later testified that:

I didn't want to do anything to create a disturbance. Obviously, I knew exactly where I was at, I was in the courthouse of the state of New Jersey. I didn't want to do anything that caused a disturbance, and these are the things that were going through my head or mind at that point. I didn't want to strike Mr. Karasick because of a comment that could – that I took as a problem, which was an attack on me as a person, as a human being. So I had to process that pretty quickly and I felt that the best thing to do, in my response, I didn't do anything.

[T68:22-69:7.]

After riding the elevator downstairs together, the party exited the building and, at the request of one of the other three members of the group, took a

³ “P-” refers to the presenter’s exhibits admitted during the March 5, 2024 ethics hearing.

“T” refers to the transcript of the ethics hearing.

“MTDb” refers to respondent’s brief in support of his motion to dismiss.

“RS” refers to respondent’s post-hearing submission to the DEC hearing panel, dated April 24, 2024.

“C” refers to the formal ethics complaint, dated June 30, 2023.

“HPR” refers to the hearing panel’s report, dated October 2, 2024.

photograph together with the Hughes Complex in the background. In the photograph, Scott is pictured sitting next to respondent.

The members of the group then went their separate ways.

That evening, the Township Council met. Scott testified that he thought he had attended the meeting virtually but could not recall if he had spoken. According to respondent, Felicidad stated at the meeting that she was “very proud of [respondent] for the way he represented our community.”⁴

At the Council’s subsequent meetings, between September 29 and November 15, 2021 (the last meeting attended by respondent as Township Attorney), Scott did not bring up the September 21, 2021 incident, nor did others who had been present.

According to Scott, Malloy brought the incident up at an executive session of the Montclair Branch of the NAACP. Thereafter, by e-mail message dated September 28, 2021, the secretary of the Montclair NAACP, on behalf of then-president of the Montclair NAACP, sent the Mayor of Montclair, Sean P. Spiller, the members of the Council, the Township Manager, and the Chair of the

⁴ The corresponding entry in the minutes from the meeting states: “Ahava Felicidad, president of the Tenants Organization of Montclair, spoke in support of the rent freeze. She thanked and commended Township Attorney Ira Karasick regarding today’s court hearing on rent control. She finished her comments by providing the public on [sic] the upcoming meeting schedule for the Tenants Organization of Montclair.” Township of Montclair, Township Council Conference Meeting, Minutes of a Conference Meeting of the Township Council held on September 21, 2021. See <https://ecode360.com/MO0769/document/646312982.pdf> (last visited February 4, 2025).

Montclair Civil Rights Commission, a demand that respondent's conduct be investigated.

According to Scott, in or around October 2021, he was interviewed but never received any documentation, response, or report regarding the investigation.

According to respondent, an attorney investigating the incident interviewed him at length and "asked [him] not to communicate with any of the persons involved in the incident until the investigation was completed." Following his interview, respondent did not receive any information regarding any outcome of the investigation, nor was he disciplined by the Township; however, he did not know whether his retirement may have affected the course of the investigation.

In late November 2021, the NAACP – having not heard back from the council regarding its investigation of the incident – disclosed the interaction to the press.

By e-mail message dated November 23, 2021, with subject line "Apology," respondent wrote to Scott stating that he:

would very much appreciate if you would meet with me so that I can apologize to you in person for the hurtful and insensitive words I said to you when we were in Trenton last September 21. I truly did not intend to be demeaning to you, or to African Americans, but was blind to the harm those words could cause. I didn't

realize the real impact of what I said until I saw your comments in the newspaper today.^[5] I had wanted to speak with you earlier but an investigating attorney hired by the Council told me not to contact any of the people who were present with me in Trenton that day. Now I am sorry I complied and didn't reach out.

[P-4.]

Scott did not reply to this message. He testified he did not do so “because I had been in touch with my pastor Elizabeth Campbell, the president of the NAACP, the investigation or interview had been underway, so I just felt at this point in time that I did not and should not respond to that email.”

According to respondent, he and Scott ultimately “did meet in person both by accident and design and he did discuss my email, among other things.”

By letter dated December 1, 2021, respondent wrote a public apology letter, on Township letterhead (identifying him as “Township Attorney”), addressed “To the Montclair community.” He wrote:

Last September, after arguing an appeal on behalf of the Township’s rent control ordinance at the courthouse in Trenton, I made a stupid, insensitive remark. It was hurtful to the four active, dedicated Montclair residents who had come all the way to Trenton to offer their support, among whom were three African American community members. It undoubtedly also caused pain to a broader community of Montclairians who believe in our town as a space dedicated to racial justice.

⁵ The article to which respondent referred is not in evidence.

My remark was a flippant play on the Constitution that popped out of my mouth lightly but served to remind African Americans of the systemic discrimination that they suffered and which I wrongly jokingly referenced. I was actually very grateful to those who came to Trenton to join me at the courthouse and I feel horrible about what I said. I am very, very sorry for the distress that I caused, both to the listeners and to everyone who has heard or read about my words.

I have lived in Montclair for 26 years, educated my four children in our public schools, and care deeply about my community. As Planning Board Attorney for 5 years and Township attorney for 11 years, I did my best to serve every resident of the Township faithfully, diligently, impartially and I hope compassionately. My work for the Township, and my entire 42-year legal career, have largely been in furtherance of social justice and equality under the law. Being called out for my own words has rightly forced me to focus the same scrutiny on myself that I have frequently applied to the words and actions of others.

For me, who has studied and worked with our Constitution nearly my entire life, my remark was not intended to demean my companions, but rather as an acknowledgement of the ingrained injustice upon which our country's institutions were built, and which is and has been our responsibility to correct. I fully understand why my words were not taken that way and I deeply apologize for my thoughtlessness.

[P-5.]

Before circulating this letter to others, respondent first sent it to Scott, Malloy, Felicidad, and Martin.

On or about December 2, 2021, respondent announced his retirement from his position as Township Attorney, effective July 1, 2022. At that time, he reported to the OAE, he was “73 years old and [had] practiced law for 44 years, including more than 30 years in public service.”

On December 2, 2021, the Montclair Newsletter (an online publication) publicized respondent’s retirement in an article entitled “Montclair Township Attorney Resigns, Issues Apology for Racist Remarks About NAACP Leader.”

On December 10, 2021, the Office of Attorney Ethics (the OAE) docketed a grievance based on the Montclair Newsletter article. Subsequently, the OAE sent respondent a letter with the article, asking him to reply in writing to the allegations therein.

On January 6, 2022, members of the Montclair African American Clergy Association (MAACA) and Montclair Interfaith Clergy Association, including several local pastors and rabbis, brought together Scott and respondent. According to Scott, the organizations brought the parties together to “discuss the impact of the statement not only on myself, but the African American community in the Township of Montclair as a whole.”

According to respondent, during the meeting, Scott “acknowledged and accepted my apology.” He further stated:

The purpose of the meeting as far as I understood it was healing, to use a general word, regarding what --

because what had happened subsequently was this remark and the fallout had become sensationalized, a lot by the press too, but it had become a public issue in which it had caused harm at least, apparently in the community. So, the purpose of the meeting was to try and heal and get past that, as I understood it.

[P-10 at 28:7-15.]

According to Scott, during the meeting, which lasted about two hours, respondent stated he was sorry but also “made other statements that specifically tried to justify what he was saying.” Scott acknowledged that respondent expressed “a commitment . . . that you know, he would really look internal to himself even if he committed to taking some classes on diversity and things of that nature so that he would have a better understanding of the effect of a comment that he had made like that, that would have effect on the entire community.” Scott added that, during the meeting, he told respondent he “didn’t want to have any negative feelings towards him.”

In addition, sometime after the incident at the Hughes Complex, Scott and respondent had a chance encounter when Scott saw respondent walking down the street. Respondent did not see Scott. Scott got out of his vehicle and greeted respondent, and the two hugged.

On February 4, 2022, respondent provided the OAE with his written reply to the newspaper article. Therein, regarding the incident on September 21, 2021, he wrote that on that date:

After an intense and fairly demanding argument, we exited the courtroom and gathered in the 5th floor lobby. I went over to the Montclair residents and thanked them for coming all the way to Trenton to support our ordinance, and they in turn thanked me for the work I had been doing to make the rent control ordinance a reality. They asked what I thought the Court would decide, and I said that I had no idea since the judges had been all over the place. As we talked, we moved over to the elevator, waited for someone to use the restroom, and entered an empty elevator when the door opened. The three women entered first and moved to the back of the elevator, then I entered, but Mr. Scott, who was right behind me, stopped and pointed to a sign that said something like "maximum 4 persons." I quickly said, "Don't worry, you only count three fifths." He looked at me and entered the elevator. Realizing that my remark might not be understood, I immediately said to Mr. Scott that I didn't mean to be offensive, and that I was thinking of the 3/5 compromise in the Constitution. He said something like "I know" and I said that being in the courthouse made the Constitution come to mind and that "the history is important." He agreed that the history was important.

[P-2 at 1-2.]

He further stated that:

After leaving Trenton I did not think any further about the incident. I thought Mr. Scott, whom I had known for more than 10 years, understood that no offense was intended. None of the other persons present, if they had even heard my remark, said anything. At Township Council meetings (virtual) that took place after the oral argument, one of those who had been in Trenton, and perhaps two, offered very complimentary remarks about the oral argument, and there was no mention of the elevator incident.

[P-2 at 2.]

He denied that he had used the phrase “3/5 of a human,” as stated in the news reports.

In addition, respondent wrote:

I do not believe that my three-second remark, that was not intended to be hurtful or demeaning, which I immediately explained and subsequently apologized for, violated the Rules of Professional Conduct. Although misunderstood, my remark was actually a recognition of an ingrained injustice in the original text of the Constitution, and an affirmation of the importance of remembering and exposing that history. To the extent it was taken differently, I acknowledged that and sincerely apologized.

Respondent continued, describing his work for the community and emphasizing that he had never been accused of racism or bias:

I note that I served Montclair Township as Township Attorney for more than 11 years, and Planning Board Attorney for an additional 5 years, and I was never once accused of making a statement, taking a position, or making a decision, that was “racist” or biased toward any race, religion, gender identity, etc. Quite the contrary, assuring inclusiveness and gauging the impact of Township policies, practices, and activities so that no group was subject to disparate treatment, was an essential component of my job. In a community where race is a sensitive and omnipresent issue, my record is exemplary.

For what it is worth, I also note that my career has largely been about social justice and public sector work. Examples are numerous. My first job post law school was to draft the Constitution of the Republic of the

Marshall Islands. I spent approximately 17 years as Tenant Advocate of the City of Union City. I represented tenant groups of many races and ethnicities in Jersey City, Newark, Hoboken and other municipalities. In Newark particularly, I represented many community-based nonprofits, such as Unified Vailsburg Services Organization, Ironbound Community Corporation, New Community Corporation, and City Hall Area Redevelopment Group. I was Borough Attorney in Roselle for a year. I was General Counsel to Gregory Park Cooperative Corporation, a huge ethnically and racially diverse residential cooperative, for three years. In Hoboken, I represented over 80 Gujarati families in a successful effort to stop their eviction, and purchase, finance, and rehabilitate the nine 10-unit building they occupied, completing the project by creating 90 condominiums which each family was able to purchase at a fraction of market value. I did the same for 30 other families in another part of Hoboken. I also ran for Mayor of Hoboken in 1993 in a highly publicized intense campaign. Never, in any of the work I described and in anything else that I did, was I accused of racism, bias or prejudice.

[P-2 at 3.]

On May 26, 2022, the OAE interviewed Scott. When asked how he felt in the moment when respondent made the comment, he replied:

I was stunned. You know, as I mentioned I've had engagements with Mr. Karasick at council meetings and things of that nature. But you know, being a 72-year-old Black, African-American male, we've all been called some pretty crazy things in our life, but that was the first time that I had ever had a comment directed at me in that fashion.

[P-8 at 9:15-21.]

When asked how he felt about the incident now, a year later, he replied:

it was so far out of the norm for me to have been confronted in that manner and such an important mark and important situation that we had been working on for many years, you know, you're just trying to process it. I didn't want to make anything about me. I wanted to make sure that we were fighting for rent control in Montclair for years and I didn't want anything to kind of take that off track. So, I'm trying to compartmentalize it. But it was – it was difficult. It still is a little difficult now because you know, I'm a father, grandfather, a great-grandfather, a respectable person, not to pat myself on the back, but I try to be upstanding in the community. If you take that, it is something that I just never imagined happening.

[P-8 at 18:14-19:6.]

Asked whether, while attending Montclair Council meetings, he had ever heard respondent make any similar comment in the past, he replied, “It was definitely the first time.”

On May 27, 2022, the OAE interviewed Malloy. However, Malloy could not attend the ethics hearing due to a work conflict and, upon objection by respondent, the hearing panel chair excluded from evidence a transcript of her unsworn statement.⁶

⁶ When the hearing panel chair sustained respondent's objection to the OAE's questioning of the investigator regarding Malloy's interview, the OAE sought to preserve the excluded evidence and reserve its questions for reconsideration. See R. 1:7-2 and 1:7-3.

On July 20, 2022, the OAE interviewed respondent. Asked if he had made the statement to Scott because of his racial identity, respondent replied, “Well it was – yes. I mean to be fair, I mean it was – we were – he was an African American, it was his group that had been subject to that Constitutional injustice. So, if he was a White person, would I have said that, no.”

In addition, respondent stated that the other three individuals in the elevator “didn’t seem to have any reaction” when he made his comment but that, in terms of facial expressions, they had been behind him, so he did not think he had seen their faces. He stated that “when we got downstairs, we got out and we were still chatting and let’s take a picture and we actually did the picture. And there was no . . . appearance of being upset or insulted or offended, or anything.”

Regarding his relationship with Scott, he stated that the latter was “an active participant in Montclair affairs” and, although the two were not friends and never had a social relationship, they had many discussions over the years. He explained that Scott was involved in housing matters and had “been involved in some litigation” (in which respondent “was on the other side”) challenging a zoning board ruling.

Regarding the other three individuals, he stated that he shared a friendly relationship with one of them, but they were not friends; he knew another as

someone who asked him questions during Council meeting; and he had a “much more contentious relationship” with the third person.

He stated he had not seen the letter that the Montclair NAACP wrote to the Council, but “at some point, somebody because I talked to the council every day, said they got some sort of letter regarding things that happened in Trenton [T]hat’s when I heard that there was possibly something.”

Asked if he would make the same statement again, he replied:

No. No. You know, first of all you know, it apparently – certainly – whether or not it was hurtful at the time, it certainly was ultimately hurtful to Mr. Scott. He was – I read his remarks and Mr. Scott is a person who is honest and he said he meant it. I wouldn’t want to do that. Number one. And number two, I learned a little bit about what you have permission to say and not say as you will. And also that you know, remarks no matter how clever, don’t necessarily -- it turned out to be a hurtful remark. And you know, I would not say it again. I didn’t mean it that way. You know, I could easily explain myself but the explanation doesn’t change the impact, which is why by the way I didn’t spend any time or try to or want to defend this you know, well saying this is the Constitution. I didn’t get into that. I recognize that it was harmful and I’m sorry I said it.

[P-10 at 30:1-18.]

When asked if he understood why it was hurtful, he replied:

I do I think. I say I think because you know, the injustice was – look I’m familiar with the injustice and in fact, and I’m not a supporter of the injustice. I think injustice was awful in the Constitution pointing out the injustice is okay in the history book. But, in the

casual remark like that it totally could be trivialized. I certainly didn't mean to do that. But I kind of learned what I did was essentially trivialize and tap into the reservoir of injustice that had been built up over the years. That's my understanding. And my understanding is that that hurt Mr. Scott, and generally speaking hurt the larger community

[P-10 at 30:22-31:25.]

In concluding the interview, he reiterated that he was sorry that he had made the remark. But “despite the fact that it . . . was a bad remark and something that shouldn't have been said, I don't see it as an ethics violation. I see it as just something that shouldn't have been said and learn from it.”

On June 30, 2023, the OAE filed a formal ethics complaint, alleging that respondent violated RPC 8.4(g)

in that Respondent's demeaning statement “you count as three-fifths,” to Scott, an African American person, and in front of three other members of the public following a judicial proceeding within the Richard J. Hughes Justice Complex, constitutes conduct in which he engaged, in a professional capacity, involving discrimination because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, and the conduct was intended or likely to cause harm.^[7]

⁷ At the time of the underlying conduct and continuing at the time of the oral argument before us, RPC 8.4(g) provided that “It is professional misconduct for a lawyer to: . . . (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.” It is this version of the Rule that we apply here.

[C¶53.]

On August 27, 2023, respondent filed a verified answer to the complaint, and, subsequently, submitted two revised and restated answers. He attached news articles and other documents highlighting his professional achievements and public service, as described more fully below.

The Ethics Proceeding

Respondent's Prehearing Motion to Dismiss

On December 21, 2023, respondent filed a motion to dismiss the complaint. In his supporting brief, he argued, first, that the DEC lacked jurisdiction to adjudicate the matter. More specifically, he urged that, because RPC 8.4(g) applies only to conduct in which an attorney “engage[s], in a professional capacity,” and the Rule’s other subsections do not include this limitation, “[t]reating [this phrase] as a jurisdictional prerequisite makes the most sense,” although he also recognized that it could be an element of the offense. Here, he asserted, the OAE had not met this threshold.

Effective April 1, 2025, RPC 8.4(g) was amended to state, “engage, in a professional capacity, in conduct involving bias or discrimination related to race, religion, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familiar status, liability for service in the Armed Forces of the United States, disability, or nationality, when the conduct is intended or likely to cause harm.”

Second, respondent asserted that the application of RPC 8.4(g) to his comment would violate the First Amendment to the United States Constitution and implicate doctrines of vagueness and overbreadth.

Third, respondent asserted that none of the elements of RPC 8.4(g) could be proven by clear and convincing evidence. Addressing the first element – that the attorney “engage, in a professional capacity,” in the conduct at issue – he urged that “the plain English meaning” of the term “professional capacity” requires that the conduct occur in the course of an attorney “practicing law, acting as an attorney, using legal expertise and skill.” Moreover, he highlighted the Court’s May 3, 1994 Official Comment to the Rule, wherein the Court wrote:

This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the courthouse, such as a lawyer’s treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer’s office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule

. . .

Following the initial publication of this proposed subsection (g) and receipt of various comments and

suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status

This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., In re Vincenti, 114 N.J. 275 (1989).

[MTDb10 (quoting Official Comment by Supreme Court (May 3, 1994)).]

He also stressed that the American Bar Association (the ABA), in its comment on Model Rule 8.4(g) (which refers to “conduct related to the practice of law”) stated that:

conduct related to the practice of law includes, “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” The nexus of the conduct regulated by the rule is that it is conduct lawyers are

permitted or required to engage in because of their work as a lawyer.

[MTDb11.]

In addition, surveying precedent, respondent urged that no reported ethics decision has extended RPC 8.4(g) beyond interactions with clients, judges, court officers and staff, opposing litigants, and other attorneys, or in circumstances similar to the instant case.

Turning to the second element – “involving discrimination” – he argued that his conduct differed from what he characterized as “the intentional, repetitive, mean-spirited examples” found in commentary and disciplinary precedent. He again highlighted the Official Comment, setting forth the Court’s intent that RPC 8.4(g) “not . . . cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive.” He also pointed out that Vincenti addressed an attorney’s “pervasive and recurrent” conduct, “continuing from the time of the trial call until after the filing of a motion for a new trial, which indisputably was, or had the clear capacity to be, disruptive, distracting, and unsettling to persons having significant responsibilities and important roles in the handling of the litigation.” 114 N.J. at 281. Further, the Court there had written:

[W]e cannot overemphasize that some of the [Vincenti’s] offensive verbal attacks carried invidious racial connotations. Such verbal abuse, we reiterate,

was directed against another lawyer in the context of the practice of law. We believe that this kind of harassment is particularly intolerable. Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, be it based on race or color, as in this case, or, in other contexts, on gender, or ethnic or national background or handicap, is especially offensive. In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.

[Id. at 283.]

Continuing, respondent asserted that, to date, RPC 8.4(g) has been applied only in cases involving “multiple incidents of severe or repetitive conduct.” Here, in contrast, he had made a single statement that was meant “to include, not exclude, Mr. Scott;” “friendly, not hostile;” and “expressed as ironic humor, not sarcastic or derisive.” He further asserted that, “[i]n order to avoid misinterpretation of meaning or intent, the remark was immediately followed with a disclaimer that it wasn’t meant to be offensive” and “an explanation of the historical context of the underlying constitutional compromise.”

Addressing the third element of RPC 8.4(g) – “the conduct is intended or likely to cause harm” – he argued that he had not intended the remark to cause harm and, “on the facts of the Complaint, and the inherent vagueness of the

phrase,” it could not be established “that at the time of the incident [his] conduct was ‘likely to cause harm.’”

Fourth, and alternatively, respondent argued that applying RPC 8.4(g) to the facts in the complaint “would be so novel as to require dismissal of the complaint and a finding that RPC 8.4(g) can only be applied prospectively” to the conduct at issue.

In its opposition to the motion to dismiss, the OAE argued that the DEC had jurisdiction to adjudicate the matter, citing R. 1:20-1(a), which provides that “every attorney . . . authorized to practice law in the State of New Jersey . . . shall be subject to the disciplinary jurisdiction of the Supreme Court.” Thus, as a New Jersey attorney, respondent came within the disciplinary jurisdiction of the Court and, by extension, the DEC.

Next, the OAE asserted it had alleged sufficient facts to state a cause of action for the charged violation of RPC 8.4(g) and had set forth facts legally sufficient to establish the charged violation of RPC 8.4(g).

Specifically, regarding the sufficiency of the facts set forth in the complaint, the OAE reiterated the RPC and the Official Comment to the Rule, stating that “‘discrimination’ is intended to be constructed broadly” and “includes . . . derogatory or demeaning language, and, generally, conduct towards the named groups that is both harmful and discriminatory.” Here, the

OAE recounted, respondent, on behalf of Montclair Township, was present in the Hughes Complex in his “professional capacity” as Township Attorney, to litigate a matter before the Appellate Division. Scott, Malloy, Felicidad, and Martin, in turn, attended the hearing as residents of Montclair, for which respondent served as Township Attorney, and were not merely “spectators,” as respondent urged, but “leaders for various Montclair housing advocacy groups who had a vested interest in the case [r]espondent was litigating.” Respondent said to Scott, “Don’t worry, you only count three-fifths,” with three-fifths being “a fraction of a whole number and a reference to the ‘Three-Fifth[s] Compromise’ that relegated enslaved people, who categorially were ‘African American or persons of color,’ to be counted as ‘three-fifths’ of a free person.” Moreover, respondent admitted that “he intentionally directed this statement to Scott because of his racial classification of African American.”

Regarding respondent’s contention that the matter should be dismissed because he was “not engaged, in a professional capacity,” based, in part, on his assertion that he was “not practicing law” when he made his remark, the OAE highlighted the Official Comment to RPC 8.4(g) which provided that “conduct engaged in by lawyers in their professional capacity” includes “activities in the courthouse,” “conduct . . . related to litigation,” “activities related to the practice of law outside of the courthouse,” and “activities in the lawyer’s office and

firm.” The OAE asserted that the Comment, as well as In re Vazquez, 253 N.J. 555 (2023), and In re Diego, 241 N.J. 542 (2020), “confirm that an attorney does not have to actively engage in the practice of law at the moment of the unethical conduct to violate RPC 8.4(g).”

Here, the OAE urged, because respondent was present in the courthouse in his professional capacity as Township Attorney and, while still in the courthouse, stated to Scott, “You only count as three-fifths,” he could be disciplined for his statement.

The OAE also argued that respondent’s substantive arguments regarding the adequacy of the OAE’s proofs needed to be litigated at a hearing, and that his constitutional arguments were reserved for the Court, pursuant to R. 1:20-15(h).

Next, the OAE argued that the novel facts did not provide a basis to dismiss the complaint and that cases of first impression do not shield an attorney from discipline. Moreover, it urged that, because only a limited number of cases have involved charged violations of RPC 8.4(g), such cases often have extended this Rule to specific situations for the first time.

On February 15, 2024, the hearing panel chair denied respondent’s motion to dismiss. First, the panel chair found that “professional capacity” constituted an element of RPC 8.4(g), not a jurisdictional threshold. Next, he noted that any

constitutional challenges were reserved for the Court's consideration. In addition, he declined to find that the purported novelty of the charge constituted grounds for dismissal. Finally, addressing the legal sufficiency of the complaint, he concluded that the hearing panel would need to hear the testimony of the witnesses to determine whether the OAE could establish the elements of RPC 8.4(g).

The Ethics Hearing

At the March 5, 2024 ethics hearing, the DEC heard testimony from respondent, Scott, and the OAE investigator. Respondent appeared pro se.

Respondent's Testimony

Respondent testified regarding his education and forty-five-year legal career. He graduated from Harvard Law School and explained that he had studied constitutional law with Laurence Tribe. He highlighted his years of advocacy for tenants' rights stating that, throughout this work, he "was never once even accused of discrimination, of racism, or even making a racist remark." This remained the case even when his work received publicity, as when he handled high profile cases and when he ran for mayor of Hoboken.

Addressing the events of September 21, 2021, respondent stated that, when the argument before the Appellate Division concluded, he, Scott, Malloy, Felicidad, and Martin “had a . . . conversation that you have when you come out of a courtroom.” He testified that, at the time he made the remark, he “said something which I thought was okay” but that, “[w]hen I found those who didn’t, I explained it. When I heard and read that Mr. Scott expressed hurt . . . I immediately apologized to him.” He added, “I didn’t apologize to him because I thought he was hurt or not hurt” but “because he expressed hurt and that’s what you do.”

As for whether he meant to demean Scott, he stated “[o]f course not. I didn’t mean to demean him. It was a joke. It was a jest. It didn’t seem like a bad joke at the time, he got right in, but he looked at me in a way, which I called quizzical.” Asked whether anyone on the elevator had laughed, he stated no one had and clarified that he had meant it as “a humorous clever statement, but didn’t get there,” not a joke in the sense of “ha ha ha, you’re only three-fifths.” He emphasized that he made his remark “to get Mr. Scott to come into the elevator. I wasn’t saying stay out, get lost, good-bye. I was saying Mr. Scott, come on in.”

Thus, once they were in the elevator, his response, which “was half apology, half explanation” upon seeing Scott’s expression, was to clarify that he had not meant his remark to be offensive but, rather, as they were in the

courthouse, he had been thinking about the Constitution, and the three-fifths compromise in the Constitution “came up in my mind.”

He denied that he had said “three-fifths of a human,” pointing out that the clause to which he was referring uses the word “person.” Further, he stated:

At the time I made this statement, it was a quick offhand statement, but the Constitutional provision was in my head because I had been working on voter suppression issues at the time, and one of the early ways of voter suppression was, of course, to manipulate the franchise and manipulate the legislatures in a way in which certain groups, in this case, you know, people who weren’t free were unable to vote. So there was a reason why it was in my head and it had nothing to do with discriminatory.

[T127:19-129:14.]

Respondent testified that Malloy, Felicidad, and Martin did not say anything to him in the elevator regarding the comment.⁸ He further stated that, once he “made the remarks I did about the fact that I didn’t mean to be offensive, et cetera, I thought that was the end of it, frankly. We went down, we all took a picture, there was no discussion, as Mr. Scott said, of any of this. Got in my car, went back, and that was basically the last I thought about it until this somehow became a public situation.”

⁸ When the OAE interviewed respondent in July 2022, he brought up the fact that “subsequently they’ve said that they did, but . . . either they didn’t or I don’t remember them doing so. I don’t want to call them liars. So I would rather say that . . . I just may have not heard them or something. But not that I know of[.]”

In reviewing his letter of apology to the community, he reiterated that “[i]t was wrong” to have “jokingly reference[d] systematic discrimination against African Americans,” “given the result and what happened.”

Respondent testified that he distributed a copy of the letter to Scott, Malloy, Felicidad, and Martin at least a day before he sent it to the local press or otherwise released it for publication.

Addressing the facts relating to whether his statement was “likely to cause harm,” respondent testified:

Was it likely to cause harm when it was said and explained in the elevator? It shouldn't have. . . . I didn't threaten to fire somebody because of their race. I didn't threaten to hire somebody because they weren't of a certain race. I didn't do any of . . . numerous possible things that could be called discrimination.

[T131:14-20.]

Turning to whether he engaged in the conduct at issue “in a professional capacity,” respondent asserted that Scott, Malloy, Felicidad, and Martin “were there as observers to watch” the hearing, and “I was there as the lawyer for the Township of Montclair.” He again acknowledged that he was friendly with some of the individuals but they were not friends, adding, “I’ve known Mr. Scott for a dozen years. We didn’t socialize, but we were friendly. We talked a lot. We had many interactions over those ten years.” He explained that his interactions with the four individuals occurred at Planning Board meetings and when “they spoke

at council meetings and I was sitting up there on the dais with the council. So my interactions with them were while I was a township attorney, and most of the time they weren't officials in the township, but they asked questions" and – I mean . . . they weren't clients."

The hearing panel chair asked respondent if he would view it as "acting in a professional capacity" if he had made the remark on the record during a Township Council meeting or a Planning Board meeting. After weighing a number of considerations, he replied, "if I was up on the dais in a council meeting, a member of the public asked me a question, I never spoke unless I was directed to by the chair, mayor usually. And if I spoke, directed by the chair, I think that would be on the side of professional capacity. Even if it was a rogue remark." The chair further asked whether, in his view, if he had made the same comment "right outside of the town council chamber, that would not be in a professional capacity?" He replied "Yes, that's right. Because I wasn't acting in my professional capacity."

Respondent also testified that "the publicity and everything that came out of this" had been "very hurtful" to him and "certainly put me through the ringer in terms of my family being upset." Further, although he had intended to retire at the end of 2022, the incident hastened his retirement.

Scott's Testimony

Regarding the litigation for which he had driven to the Hughes Complex on September 21, 2021, Scott explained that he was an advocate, had been involved in getting the ordinance before the township counsel following a thirty-year battle for rent control, and wanted to monitor the progress of the litigation.

When questioned about hearing respondent's statement, Scott explained:

I was stunned. I was just literally stunned that that comment was made.

. . .

You know, this was a very, very important occasion that we were involved in. Something that the individuals that came down to the courthouse had been working on for a couple of years, if not longer. . . . I was completely focused on the litigation, the possible next steps, and . . . I was just not prepared to think in any other terms as to just what was in front of me at that point in time. . . . my whole mindset was still wrapped around what we needed to do to move this ordinance forward.

[T66:1-15.]

Scott acknowledged that he had not replied to respondent's comment at the time, but explained:

I was stunned. Just trying to – I didn't even attempt to process it because I didn't how to process it. You know, being an individual, or a person of African American, 70 plus years old . . . I heard a lot of things and been called a lot of things in my life, but that was a first for me. So I just was not prepared to respond.

[T66:21-67:3.]

Asked why the group then took the photograph, Scott testified that he and his colleagues, in their respective roles as members of the Montclair NAACP Housing Committee, co-chairs of the Township's Housing Commission, and representatives of the Tenants Organization of Montclair, "wanted to take something back to the community, put it on social media that we were still engaged in the litigation process, trying to move the rent control ordinance . . . forward."

Scott also testified that he had not discussed the incident with anyone else that day.

Asked how the comment made him feel, Scott stated:

I was concerned. I was still kind of trying to process the comment. But you know, I think I kind of compartmentalized it. This was a very important situation that we were working on when it came to the rent control ordinance of the Township of Montclair and we had been fighting this battle for many, many years. 30 plus years. I worked on it starting in 2017 as one of the individuals that started the conversation to bring rent control back up in Montclair. So you know, I didn't want to make this about me. . . . I did not want to take away the amount of work that had been done with the rent control ordinance and the individuals that had been involved, and the meetings that had been occurring throughout the township and the media coverage of the rent control. Absolutely just wanted to keep the focus on what we were trying to accomplish.

[T102:6-103:1.]

Similarly, when asked why he had not brought it up at the Township Council meetings between September 21 and November 15, 2021, he stated that he was “focused on making sure that the ordinance . . . was the primary focus on [sic] our efforts.”

Regarding his description, in an e-mail to the OAE, of respondent’s remark as “racist,” he clarified that he was referring to “the fact that [respondent] . . . was identifying me as three-fifths of a human in the 21st century.”

As for the time that he encountered respondent and shared a hug with him, he stated

I’m a Christian, and we have to love one another under some very difficult circumstances in our lives. So that’s how I felt that day. It was a difficult situation for the both of us. But I wanted to show that I had no ill feelings towards [respondent], and I was just directed to do that because of the person I am.

[T103:25-104:17.]

Scott also testified regarding his and respondent’s meeting with local clergy, who brought them together “to have a sit-down and discuss the impact of the statement” on Scott, the African American community, and the Township of Montclair as a whole. Asked what he meant by “impact,” he stated

As it relates to myself, a lifelong resident of Montclair, at that time for 72 years, and highly active in advocating for affordable housing, also being a member of the Montclair NAACP, a member of the Montclair Housing Commission, my standing in the community, . . . even

though it was directed at me[,] as a representative of the community, it had far-reaching effects beyond me. Especially when the NAACP got involved and sent an email to the township looking for an explanation and an investigation of the situation.

[T82:22-83:11.]

Asked “[w]hat, if any, apologies were offered at this meeting,” Scott replied, “I indicated at that meeting that I had forgiven [respondent]” and that respondent also “said he was sorry again for the statement,” but that the meeting’s focus “was really on the comment and what we could do to mitigate the impact of the comment on the community to bring us together and not separate us further.”

Regarding respondent’s December 1, 2021 apology to the Montclair community, Scott observed that in it, respondent neither named the four individuals who were with him nor “mention[ed] the comment in any context.” However, he testified that “to make an apology . . . to the Township of Montclair, that was significant. It’s not like a one-on-one . . . you’re going out to thousands of individuals.”

In addition, Scott testified:

I’ve been, as an adult, an African American growing up in the north, my family’s from the south, you know, we were fully aware of racial comments that have been made over many, many years. But the three-fifths of a human has such implications because it’s a part of this country’s Constitution, is very, very concerning and

devastating to be framed in that manner. Now, you know, people could call you the N word or a number of other things, that's not in the Constitution, okay? So that comment was – it was just devastating. Beyond any of the things that you deal with on a daily basis, but it just brought back, you know, what African Americans have had to deal with in this country, even from a constitutional standpoint.

[T90:3-18.]

Asked if what he found “devastating” was “the entire statement,” the “three-fifths statement,” or “the adding of [‘]the human,” Scott stated

when you get pas[t] three-fifths, you either had to be a human or a person or an individual that was being referred to. So . . . I heard three-fifths of a human, you know, you look at the Constitution, it says . . . three-fifths of a person. But it reduces the human[ity] of a person as a whole, and it's hard to get beyond that.

[T90:24-91:5.]

Scott acknowledged that he previously had not heard respondent make racist, discriminatory, or derogatory comments and, consequently, the remark came as a shock. In addition, Scott testified that he had not filed a grievance with the OAE but willingly participated in the OAE's investigation.

Respondent's Written Summation and Supplemental Submissions

In respondent's April 24, 2024 post-hearing summation, he again argued that the complaint should not have been filed, terming it "an ultra vires exercise" of the OAE's authority.

Addressing each element in turn, beginning with "professional capacity," he urged that the Court, in the Official Comment to RPC 8.4(g), indicated that the Rule "excludes from professional capacity 'purely private' speech." He asserted that, when he made the remark, the appellate argument had concluded; he, Scott, Malloy, Martin, and Felicidad had left the courtroom; some of them had gone to the restroom; they were "leaving the building;" and four of them already had entered the elevator, while Scott was standing at its door. Moreover, he asserted that his remark had nothing to do with the rent control petition case, his being a lawyer, or Montclair Township.

He acknowledged that the Official Comment to the RPC indicated that professional capacity "would, for example, cover activities in the courthouse, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation." However, he urged that the reference to "a lawyer's treatment of court support staff" signaled that the conduct "must be linked in some way to the administration of justice or to a lawyer's functioning as a lawyer at the time he made the statement" – circumstances which, he

asserted, did not apply here. Moreover, he asserted that no disciplinary case had punished an attorney for violating RPC 8.4(g) where an attorney's words "had nothing to do with functioning as a lawyer, with the legal profession or with the administration of justice."

Second, respondent argued that his conduct was neither intended nor likely to cause harm, citing the Merriam-Webster dictionary's definition of that term as "physical or mental damage: injury."⁹ He asserted that he had no such intent and that the OAE had failed to establish that his remark was likely to harm Scott, the three other individuals in the elevator, or anyone else.

More specifically, he asserted that nothing in Scott's testimony or earlier interview by the OAE supported a finding that his words caused Scott mental injury or damage. He pointed out that when asked how he felt when he heard the words, Scott said he was "stunned;" the dictionary defines "stun" as "to shock or surprise someone very much;" and Scott also testified that the remark was "a shock" because he regarded the statement as "out of character" for respondent. He further urged that when Scott used the word "devastated," "he referenced the injustice of the Three-Fifths Compromise memorialized in Article I of the Constitution itself."

⁹ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/harm> (last visited March 21, 2025).

Respondent noted that, when Scott was asked how the comment made him feel, he testified that he was “concerned” by the remark but “compartmentalized it” to focus on the rent control ordinance that he and the other advocates had worked on since 2017.

In addition, respondent highlighted that Scott had not said anything in response to the remark at the time; he sat next to respondent when the group photograph was taken; he did not discuss respondent’s remark with others that day; he did not bring it up at the Township Council meetings between then and respondent’s retirement; Malloy, not Scott, brought up the incident at an NAACP meeting; and Scott had not filed a grievance with disciplinary authorities. In addition, he pointed out that Scott’s testimony that, other than this remark, he had not heard respondent make other such remarks since they met, in or around 2007; accepted respondent’s apology and forgave him; and approached respondent and hugged him.

Respondent argued that if Scott had suffered mental injury or damage, he would have told someone about the words or the harm they caused him. In addition, whereas the Court’s Official Comment indicated that RPC 8.4(g) applies where harm “is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive,” here, the conduct at issue was an isolated remark. Further, he asserted that the OAE had presented no evidence that his

statement “would probably cause injury or damage to Mr. Scott.” For example, the OAE “did not present testimony from a psychologist or other mental health professional with respect to the probable effect of this remark on one’s mental health.” In addition, he urged, absent testimony from Malloy, Felicidad, and Martin, the OAE had not established that his remark caused them mental injury or damage. Moreover, the latter two had not responded when the OAE sought to speak with them, and the OAE had not issued subpoenas for them to testify.

In addition, respondent asserted that the record did not illustrate that his comment “would probably cause or did cause mental injury or damage to persons who did not hear the words.” First, he observed, no one from the Montclair community had testified. Second, he asserted that no evidence showed that the December 2, 2021 online news article – which was published without his input and, in his view, “inaccurate” – “would probably cause injury or damage to Mr. Scott or other African-American readers.”

Respondent likewise argued that he did not engage in discrimination. He maintained that “numerous definitions of discrimination require the treatment to be unfair or unfavorable,” citing, as an example, the Cambridge Dictionary definition: “treating a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their

race, gender, sexuality, etc.”¹⁰ He also referenced that the Cambridge Dictionary defines “demeaning” as “causing someone to become or feel less respected,” and “derogatory” as “showing strong disapproval and not showing respect.”

Respondent asserted that the analysis of whether conduct constitutes “discrimination” involves an objective, not subjective, analysis. In support, he highlighted the Court’s Official Comment, referring to conduct “that is both harmful and discriminatory;” asserted that “an attorney needs fair notice of what words would violate the rule in order to avoid violation;” and cited In the Matter of Jonathan Eric Diego, DRB 19-160 (December 16, 2019).¹¹

Here, he argued, by referencing the Three-Fifths Compromise to invite Scott into the elevator, he “was not objectively treating Mr. Scott in a worse way, and was not objectively demeaning him, disparaging him, or disrespecting him.” Rather, his remark was “a bad and misunderstood joke.” Further, he reiterated his testimony that the three-fifths clause “is not discriminatory.”

On May 9, 2024, respondent submitted to the DEC a supplemental letter brief, highlighting recent Court decisions that, in his view, supported his

¹⁰ Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/discrimination> (last visited March 12, 2024).

¹¹ In Diego, we determined that arguments made by the attorney based on his “subjective view of the situation” did not absolve him of his misconduct. DRB 19-160 at 17-18.

constitutional challenges. He also expanded these challenges to include arguments based on the free speech clause of the New Jersey Constitution.

Finally, on June 14, 2024, at the hearing panel chair's request, respondent submitted a letter to address the quantum of discipline for his alleged misconduct. In his reply letter, he declined to weigh in on a sanction, asserting that it could be construed as an admission of misconduct.

The OAE's Post-Hearing Submissions

In its May 10, 2024 letter reply to respondent's supplemental letter brief, the OAE argued, among other positions, that the Court had imposed discipline in numerous ethics cases for statements made by attorneys; the First Amendment and the New Jersey Constitution "do not provide an impenetrable defense in disciplinary matters;" and every case is decided on its own facts.

In its May 24, 2024 written summation, the OAE argued that respondent engaged in the conduct at issue "in his professional capacity" insofar as he was in a courthouse – the Hughes Complex – in his capacity as the Montclair Township Attorney, to litigate on the Township's behalf in a case involving a rent control ordinance. Scott, Malloy, Felicidad, and Martin attended the proceeding as residents of Montclair and individuals who had advocated for years and played roles in developing that ordinance, and, after the hearing,

respondent and the others discussed the matter he was litigating. Respondent made the remark to Scott while still in the Hughes Complex, on the elevator with Malloy, Felicidad, and Martin, in a public space, and, immediately after leaving the building, he posed with Scott, Malloy, and Felicidad for a photograph “memorializing his work on the rent control ordinance in his capacity as the Montclair Township Attorney.”

The OAE also asserted that, subsequently, the NAACP sent an e-mail to the Mayor of Montclair Township regarding the statement made by respondent in his capacity as Township Attorney and asked that the Township Council investigate; and respondent retired from his position as Montclair Township Attorney due to the incident. Moreover, citing Vazquez, the OAE argued that an attorney can be acting in a “professional capacity,” even absent a traditional attorney-client relationship, when the misconduct occurs in a place related to the practice of law, like a courthouse or a law firm.

The OAE further asserted that respondent’s conduct involved discrimination because of race. He admittedly made the statement to Scott because the latter is an African American person. Moreover, three-fifths is a fraction of a whole number. Further, the OAE emphasized the Official Comment to RPC 8.4(g), stating that “[d]iscrimination’ is intended to be construed broadly” and “includes . . . derogatory or demeaning language.” In addition, the

OAE pointed out that the Merriam-Webster dictionary defines “derogatory” as “expressive of a low opinion: disparaging” and “detracting from the character or standing of something,” and “demeaning” as “damaging or lowering the character, status, or reputation of someone.”¹²

Citing Diego and In re Farmer, 239 N.J. 527 (2019), the OAE asserted that respondent, like the attorneys in those matters, engaged in discriminatory conduct by stating to Scott, “you only count three-fifths” in connection with his invitation to enter the elevator that had a capacity limit. The OAE urged that Scott’s testimony indicated he found the statement to be “racist” and comparable to the “n-word,” a racial slur. Further, it asserted that Scott described the statement as dehumanizing, testifying that it “was an attack on me as a person, as a human being” and noting his reference to “reduc[ing] the human[ity] of a person as a whole.”

Turning to the third element, “intended or likely to cause harm,” the OAE argued that respondent had admitted that his statement was harmful in his written apology to Scott, published letter of apology to the “Montclair Community,” and during the OAE’s investigation. In addition, the OAE asserted that Scott had testified about the harm caused by respondent’s statement. While

¹² Merriam-Webster Dictionary, <https://merriam-webster.com/dictionary> (last visited February 6, 2025).

acknowledging that Scott had not immediately discussed respondent's comments with others, the OAE urged that he subsequently discussed them with family, other members of the Montclair NAACP, the press, Town Council leaders, an investigative attorney, and the OAE. Moreover, he took part "in a multiple-hour meeting involving various religious leaders seeking to 'heal' from the damage and division" caused by respondent's statement, not just to Scott but to the broader community.

Citing Diego, Farmer, and In re Pinto, 168 N.J. 111 (2001), the OAE argued that the Court has "consistently rejected" the argument that, to violate RPC 8.4(g), an attorney must intend to cause harm or be a racist person. Here, it asserted, respondent's contentions that he did not intend to demean Scott, is not a racist person, and has not made discriminatory statements in the past did not preclude a finding that he violated RPC 8.4(g). Similarly, citing In re Witherspoon, 203 N.J. 343 (2010), and In re Laufer, 245 N.J. 265 (2019), the OAE argued that his intending his statement as a joke did not preclude the application of RPC 8.4(g), where the Court has, in the past, disciplined attorneys notwithstanding their assertions that they were "joking" when they made the remarks underlying the disciplinary charges against them.

Moreover, the OAE argued that respondent still "owe[d] a duty not to engage in discriminatory conduct" towards Scott, even though Scott was not a

client, a judge, court personnel, an adversary, another attorney, or, in respondent's words, "anyone involved with the administration of justice." It highlighted the Court's statements that, "[i]n addition to the duties and obligations of an attorney to his client, he is responsible to the courts, to the profession of the law, and to the public," and "is bound even in the absence of the attorney-client relation to a more rigid standard of conduct than required of laymen," In re Hurd, 69 N.J. 316, 330 (1976), and In re Gavel, 22 N.J. 248, 265 (1956). Further, "[t]he courts and the public are entitled to the highest standard of conduct on the part of the members of the bar," In re Stein, 1 N.J. 228, 237 (1949).

Turning to the quantum of discipline and surveying applicable precedent, including Diego, Farmer, Vazquez, and In re Regan, 249 N.J. 17 (2021), the OAE urged that a reprimand or censure would be appropriate for respondent's misconduct.

In mitigation, the OAE acknowledged respondent's public service, spanning more than four decades, as set forth in his testimony and the news articles that accompanied his verified answer to the complaint.

In aggravation, the OAE argued that respondent refused to accept his wrongdoing and acknowledge that he had violated his ethical duties. Although, initially, he acknowledged the harm that his statement had caused and expressed

remorse, subsequently – after the OAE issued the formal ethics complaint – he “retreated from acknowledging the harm caused and denied that his statement was demeaning and discriminatory.”

Moreover, in the OAE’s view, respondent minimized and appeared to question the genuineness of the harm to Scott, and “even proceeded to assert that Mr. Scott’s choice to forgive [him] indicated a lack of harm instead of acknowledging the efforts Mr. Scott made to forgive and look beyond the demeaning statement.” Further, he defended his statement by asserting that the Constitutional clause setting forth the Three-Fifths Compromise was not discriminatory, while “ignore[ing] the fact that enslaved people, who categorically were African American, were already subjected to a long list of indignities, and with the ‘Three-Fifth[s] Compromise,’ they were counted as a fraction of a freed person in the United States’ Constitution, one of the most important documents in history.”

Also in aggravation, the OAE urged that respondent, as the Montclair Township Attorney, held a “position of public trust” when he made his statement and, further, based on his substantial experience in the practice of law, “should have been aware that he should not make statements that an African American person ‘counts as three-fifths,’ even as a joke.”

The DEC’S Findings

The DEC found, by clear and convincing evidence, that respondent had violated RPC 8.4(g). In concluding that he was acting in his professional capacity at the time of his statement, the hearing panel reasoned that, although no longer on the court record, “he was still at the courthouse having just argued on behalf of the Township of Montclair and speaking with constituents who had attended that hearing as interested parties.” The DEC likened the case to Vazquez and Diego, in which the attorneys were not practicing law at the time of their sanctioned transgressions but were in a courthouse and addressing, respectively, a drug court participant and courthouse staff. The hearing panel continued:

Part of the practice of law is discussing with clients or other interested parties the progress, status or outlook on pending matters. Doing so while in a courthouse immediately following a hearing clearly constitutes acting in a professional capacity. Put simply, when an attorney is in the courthouse, their conduct continues to be governed by RPC 8.4(g) even after they are done addressing the court.

[HPR¶32.]

In addition, the DEC found that respondent’s conduct “involv[ed] discrimination” on the basis of race or color. It concluded that his remark “called out Mr. Scott as being different on the basis of his skin color” and that, although he testified that he intended “to include Mr. Scott on the elevator rather than

exclude him, it is clear that the words served to point out that Mr. Scott was different on the basis of his race or color, and therefore involved discrimination regardless of Respondent's intent."

As for the third element of RPC 8.4(g), the DEC found that clear and convincing evidence did not establish that respondent intended to cause harm. Rather, he had testified that his statement to Scott constituted a poor and misguided attempt at humor. However, the DEC concluded that the OAE did establish that his statement was likely to cause harm. Specifically, the DEC found, "[i]n light of the context for the statement – speaking to constituents in the courthouse immediately following a hearing on behalf of a municipality – invoking a hurtful and shameful chapter in American history in a way that obviously offended Mr. Scott and the other people in that elevator was likely to cause harm." Moreover, respondent "acknowledged in his open letter of December 1, 2021 that his statement caused pain not only to the individuals who heard the comment, but 'to a broader community of Montclairians.'"

In aggravation, the DEC weighed his position as a public officer, acting in his capacity as Township Attorney, "in the courthouse in addressing constituents at the time of the subject comment." Although it also considered his prior reprimand in aggravation, it noted that this discipline was remote in time and involved quite different circumstances.

In mitigation, the DEC found that respondent had a lengthy history of community service and, further, was unlikely to repeat his misconduct, having retired from his position as Township Attorney.

On balance, the DEC recommended that respondent receive a reprimand for his misconduct.

The Parties' Positions Before the Board

The OAE did not submit a brief for our consideration. However, during oral argument, the OAE reiterated the facts established below and the arguments set forth in its summation to the DEC. Further, it characterized Scott's testimony that he was "stunned" as referring to him being stunned into silence, having never heard a comment like that directed to him in his more than seventy years of living; that he was unable to process the comment, interpreting it as racist; and accentuated that he compared it to being called a racial slur, the "N word."

The OAE further asserted that Scott had indicated that, being in a courthouse at the time, he had not wanted to do anything in response to respondent's comment that could result in him potentially, as the OAE put it, "get[ting] locked up." It accentuated Scott's testimony that he found the statement, made by respondent, whom he had known for a decade, to be "devastating." The OAE further asserted that he took part in the group

photograph because he had compartmentalized the situation, was still processing respondent's remark, and "wanted to take something back to his community about the rent control ordinance litigation" – "[t]he reason everyone was there in the first place, including respondent."

In reply to respondent's contention that Scott was not harmed by his statement, the OAE asserted that respondent ignored all the subsequent instances in which Scott expressed that he was harmed, including his "subsequent complaints and discussions with multiple media outlets, the NAACP, his loved ones, Montclair public officials, the law firm conducting the internal investigation," and later the OAE, during its investigation. Further, the OAE expressed its concern that respondent was attempting to use Scott's forgiveness of respondent, and the associated hug that he later gave respondent, as evidence of the purported lack of harm. Rather, the OAE argued, the forgiveness extended by Scott to respondent spoke to Scott's "good character and big heart," in that, "despite being the subject of this demeaning racist statement, he still could offer grace and forgiveness."

The OAE further asserted that respondent's argument constituted an attempt to dictate how Scott, an African-American person, "is supposed to react to being demeaned in a courthouse and told he only counts as three-fifths by

respondent, a person in a position of power” as the Montclair Township Attorney.

Moreover, the OAE emphasized that the DEC had the benefit of hearing Scott’s testimony and witnessing his facial expressions, including what the OAE described as “his struggle to put in words the harm experienced by respondent’s three-fifths comment even years after.”

In his December 27, 2024 brief to us and during oral argument, respondent, through his newly retained counsel, again asserted that the OAE had failed to prove the elements of RPC 8.4(g) and, more generally, that application of the Rule to respondent’s conduct would be unprecedented and inconsistent with the Court’s purpose and intent in enacting it.

Addressing the elements of RPC 8.4(g), respondent again argued that the evidence did not clearly and convincingly establish that his words constituted “discrimination,” where his remark was “an attempt to humorously include Mr. Scott with the other four people inside the elevator.” In his view, he was not calling Scott “less than a whole person, especially after [he] immediately explained that he was referring to the Three-Fifth[s] Compromise.” Moreover, he would have attempted to include any of the other individuals, regardless of their race. While acknowledging that the “joke” would have made no sense if

directed to a white person, he urged that “that fact standing alone ought not convert a stupid joke into discriminatory conduct.”

In asserting that his remark was not discriminatory, respondent also emphasized Scott’s response. Specifically, he argued that “[i]f Mr. Scott had felt disrespected and disparaged by the comment, it strains credulity that he would have walked onto the elevator without responding to the remark.” Moreover, he asserted that, at the time, Scott found his remark ambiguous, based on Scott’s testifying, “I just didn’t understand it, so I interpreted it as a racist comment” and “I didn’t even attempt to process it because I didn’t know how to process it.”

Second, respondent pointed out that the OAE did not assert he had intended to cause harm, and that the evidence did not clearly and convincingly establish that his words were “likely to cause harm.” He contrasted his solitary remark with the repeated disruptive conduct, directed toward multiple persons, by the attorney in Vincenti, and again asserted that every matter applying RPC 8.4(g) to an attorney’s speech involved “repetitive speech,” not just a single sentence.

In response to the DEC’s conclusion that his words “invoke[ed] a hurtful and shameful chapter in American history in a way that obviously offended Mr. Scott and the other people in the elevator,” respondent argued that any pain

invoked by the Three-Fifths Compromise stemmed not from his words but rather from the “Compromise itself and the fact that the United States allowed slavery at the time of its founding and for years until the adoption of the Thirteenth and Fourteenth Amendments.”

As for the DEC’s reliance on his acknowledgment, in his letter of apology, that his words were hurtful, he asserted that his “apologies made two months later cannot in fundamental fairness be used against him in this proceeding to prove that the words, when spoken, were likely to cause harm.” Rather, he had recognized that he “made a mistake in referencing the Three-Fifths Compromise and reasonable people apologize for mistakes.” He urged that “application of the likely to cause harm standard . . . cannot be made without considering the context and balancing all the factors existing at the time the attorney spoke.”

Further, respondent disagreed with the DEC’s determination that Scott and others in the elevator were “offended” by his comment. He pointed out that Scott did not use the word “offended” when he testified. He also asserted that evidence regarding the reactions of others in the elevator constituted hearsay that lacked the corroboration required pursuant to the Residuum Rule.

Respondent also pointed out that, when a panel member asked Scott how he felt when he heard the words, Scott replied, “It was just, for me, for something

to be directed to me from [respondent], based on his background, was just – it was just out of character. I just couldn't – I just didn't understand it, so I interpreted it as a racist comment.” He further urged that when Scott described the comment as “devastating,” he explained that what made it so was the Constitution's inclusion of the “three-fifths reference.” When a panel member again asked Scott how the comment made him feel, he stated he was “concerned” by the remark but “compartmentalized it” to focus on the rent control ordinance that he and the other advocates had worked on since 2017.

In addition, respondent highlighted that Scott sat next to him, smiling, when the group photograph was taken; did not discuss respondent's remark with others that day; did not bring it up with the Council that day (even when Felicidad commended his representation of the community) or at later meetings prior to his retirement; did not file a grievance with attorney disciplinary authorities; acknowledged that, other than this remark, he had not heard respondent make other such remarks since they met, in or around 2007; accepted respondent's apology and forgave him; and approached respondent and hugged him. Moreover, he alleged that respondent “didn't complain to the NAACP about the remark.”

Third, respondent reiterated his arguments that the evidence did not clearly and convincingly establish that he made his remark “in his professional

capacity.” He contrasted his misconduct with that of the attorney in Vincenti and emphasized the Official Comment to the Rule. Additionally, he cited the 2018-2024 Report of the Professional Responsibility Rules Committee (PRRC Report), which addressed that phrase, in conjunction with the Court’s determination, following the ABA’s 2016 amendments to Model Rule 8.4(g), to continue to use the phrase “in a professional capacity.” The Committee advised that the phrasing used in the Model Rule – “conduct related to the practice of law” – “has a slightly broader sweep” and that RPC 8.4(g) “should be reserved for lawyer conduct that occurs squarely in the lawyer’s professional capacity and not in an even broader sweep.”

He asserted that the DEC improperly concluded that he engaged in the conduct in a professional capacity, in part, based on its purportedly erroneous view that he was speaking to a “constituent.” In his view, based on a dictionary definition of “constituent” as “a person represented by an elected official,” Scott, Malloy, Martin, and Felicidad were not his “constituents.” Rather, they were simply “observers of an oral argument.”

Continuing, he again argued that he had made his remark in a purely private capacity. He asserted that his statement “had nothing to do with [his] representation of Montclair, nothing to do with being a lawyer at all, and nothing to do with the legal process or any case,” and was not addressed to “a client,

court staff, a judge, an adversary, a party, a law clerk, another attorney, a witness, or anyone involved with litigation or the administration of justice.” He, again, asserted that we have never “extended professional capacity this far” and claimed that, in all cases applying RPC 8.4(g), “the attorney was functioning as a lawyer or interacting with court personnel, adversaries, persons involved in litigation, or clients at the time the professional misconduct occurred.” He asserted that, under the OAE’s interpretation, he would be subject to discipline even if he had made the same remark, in the same elevator, to an old friend, a second cousin, or an acquaintance from Montclair who decided to watch him argue that day.

Respondent further argued that the fact that he made the remark while in a courthouse did not, in and of itself, bring his remark within the scope of the Rule. Although the Official Comment provides that “professional capacity [] would, for example, cover activities in the courthouse, such as a lawyer’s treatment of court support staff, as well as conduct more directly related to litigation . . .” he asserted that the reference to “treatment of court support staff” indicated that for an attorney’s speech in a courthouse to come within the scope of RPC 8.4(g), it “must be directly and clearly linked to a lawyer’s functioning as a lawyer at the time he made the statement.”

Finally, respondent again asserted that the application of RPC 8.4(g) here would expand the “professional capacity” and “likely to cause harm” standards in such a way that the newly expanded standards should be given prospective effect only.

Asked specifically to address the fact that Scott and the other three Montclair residents, although not clients, were related to his practice of law in the courthouse on the date in question, he asserted that this would be “unchartered territory.” In response to our questioning about whether the Rule would apply if the comment was made right outside the door of the courthouse in the course of the discussion about how the argument went, respondent’s counsel replied that such a scenario also would fall outside the ambit of the Rule. He asserted that this hypothetical was distinguishable from the facts of the present matter, insofar as respondent made his comment after a “temporal separation between any substantive discussion and what happened when they got to the elevator.”

Respondent, through counsel, further urged that this case calls for grace, understanding, and “maybe forgiveness,” as “who among us has not said something stupid that we’ve later regretted?” He asserted, during oral argument before us, that his client “effectively lost his job over this” and the press and notoriety caused shame and anguish to respondent and his family. He stressed

that imposing an ethics sanction would serve no purpose, as respondent has been punished and the public does not need protection from him; and there is no reason to use this unique case as a means to set precedent. In closing, he asked us to inject “compassion, empathy and humanity” into our disposition of this matter.

Respondent’s Motion to Supplement the Record

On December 27, 2024, respondent filed with us a motion to supplement the record, along with a certification of Laurence Tribe and three attachments: Tribe’s curriculum vitae (CV); Tribe’s article, “Where Freedom Ends,” The New York Review of Books, November 7, 2024; and a November 2004 letter of recommendation written by Tribe on respondent’s behalf to the Montclair Township Attorney search committee. Citing In the Matter of Nelson Gonzalez, DRB 19-129, DRB 19-130, and DRB 19-131 (December 4, 2019), respondent, through counsel, urged us to permit the supplementation of the record on grounds that respondent had represented himself during the DEC proceeding and failed to appreciate the importance of character evidence in disciplinary proceedings. He also argued that Tribe’s statement would assist us in understanding respondent’s statement to Scott.

The OAE opposed the motion on grounds that respondent failed to present the materials during the hearing, arguing that his introduction of them before us would be prejudicial and fundamentally unfair and, in addition, the supplemental materials were partially inadmissible. The OAE emphasized that Tribe lacked firsthand knowledge of the statement at issue; did not testify; and was not cross-examined by the OAE. In addition, his submission contained hearsay, and the trier of fact had no opportunity to review Tribe's statements and supporting documents. The OAE also highlighted respondent's offering of the supplemental materials, in his words, to "contextualize the at-issue statement" – a use that went beyond that of character evidence and, the OAE argued, an improper attempt to alter the findings of fact set forth by the DEC.

The OAE also argued that, where it was denied the opportunity to introduce a statement by Malloy, because the OAE could not produce her as a witness, it would be inconsistent to permit respondent to supplement the record at this stage with the Tribe materials, given that he had the opportunity to call Tribe to testify at the hearing and failed to do so. Moreover, it asserted that many portions of the materials ran afoul of the Rules of Evidence. In addition, it argued that the supplemental materials accepted by us in Gonzalez were letters attesting to the attorney's good character, not offering an opinion on the underlying misconduct.

In respondent's counsel's reply to the OAE's opposition, he again stated that previously, he failed to "fully appreciate the importance of a character reference in providing mitigating circumstances." However, he also argued that Tribe's submission put respondent's comment "into perspective" and made the nature of his remark "crystal clear."

Analysis and Discipline

As a preliminary matter, we note that respondent's constitutional arguments are reserved for the Court. R. 1:20-15(h).

Next, we partially grant respondent's motion to supplement the record with the December 27, 2024 character reference from Tribe and its three attachments. Although respondent had the opportunity at the hearing below to offer character witnesses' testimonials, he did not do so while pro se, and he retained current counsel more recently, in connection with proceedings before us. See Gonzalez, DRB 19-129, 19-130, and 19-131, at 34-35.

However, we determine to grant respondent's motion only for purposes of introducing character evidence, declining his seeming invitation to consider the supplemental materials as proof of the context and nature of his remark to Scott. Tribe was not a witness to the incident and lacks firsthand knowledge of how respondent's statement was received. Even so, had respondent wished to call

him as a witness in support of his case in chief, he had ample opportunity to do so. In connection with the OAE's investigation and the proceedings before the DEC, respondent testified regarding his studies and work with Tribe, and submitted evidence in support of his contention that he was not a racist; thus, even while pro se, he recognized the importance of materials such as those now included in his supplemental submission. The DEC, having had the opportunity to hear and observe the testimony of Scott and respondent, issued its report and recommendation based on evidence from each party, with testimony subject to cross-examination. The panel also had the opportunity to raise questions, and respondent and the OAE had the opportunity timely to object to testimony and documentary evidence. Under these circumstances, we do not consider the supplemental materials as substantive evidence relevant to the elements of RPC 8.4(g).

From a practical standpoint, however, respondent's supplemental materials have little bearing on the charge, making the risk of prejudice to the OAE quite low. Rather, Tribe's certification and its attachments corroborate information regarding respondent's background and character which he had introduced before the DEC, and which the DEC already credited. The DEC accepted that respondent did not intend to cause harm; that his statement was a poor and misguided attempt at humor; and that he has long provided service to

the community. Tribe's assertion that respondent "is not bigoted, racist, or prejudiced" is appropriately presented as character evidence; however, the OAE never argued, and the DEC did not find, that he was any of these things. Similarly, respondent's knowledge and experience in the field of constitutional law is not disputed.

As for the attachments to the certification, Tribe's CV is benign. His 2024 article was submitted in conjunction with his and respondent's work on Grendel's Den, which respondent already had described at an earlier stage of the proceeding. Finally, his 2004 letter of recommendation is comparable to other character references commonly admitted in disciplinary matters.

Accordingly, we grant respondent's motion to the extent that Tribe's certification bears on respondent's character and accomplishments.

Violations of the Rules of Professional Conduct

Following a de novo of the record, we determine to respectfully part company with the DEC's finding that respondent violated RPC 8.4(g). Although respondent's remark was indisputably insensitive and understandably hurtful to Scott, we are unable to find clear and convincing evidence that it was made "in a professional capacity" or that it was "intended or likely to cause harm," two essential elements to finding a violation of the Rule.

Specifically, RPC 8.4(g), at the relevant time and prior to its recent amendment, provided that “[i]t is professional misconduct for a lawyer to . . . (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.” Thus, to establish an attorney’s violation of the RPC, the OAE must prove, by clear and convincing evidence, the following three elements:

- (1) The attorney was acting “in a professional capacity” when the misconduct occurred,
- (2) The conduct involved discrimination based on race, and
- (3) The conduct was either “intended” or “likely to cause” harm.

We address each element, in turn, below.

First, regarding the requirement that an attorney engage in the conduct “in a professional capacity,” the Court’s Official Comment to RPC 8.4(g) states that the Rule:

would, for example, cover activities in the courthouse, such as a lawyer’s treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of

other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule.

In our view, the mere fact that respondent made the remark in the courthouse, following an appellate argument, is not dispositive of whether he engaged in the conduct at issue in his professional capacity. Indeed, we find that extending the Rule's reach to the circumstances under scrutiny here, where, in our view, there was no longer a nexus to the practice of law, would be unsupportable.

Unlike the examples set forth in the Court's Official Comment to the Rule, the context in which respondent's isolated statement was made no longer had to do with his role as an attorney, or the litigation for which the parties were in the courthouse. Thus, the statement was unrelated to the practice of law and, at the time it was made, respondent was not acting as a lawyer. Respondent's statement was not related to the litigation. Neither Scott nor any of other housing advocates were respondent's clients, nor were they parties to the litigation. The statement did not impact the administration of justice and, unlike in Diego, was not directed toward court personnel. Rather, the conversation occurred outside of the courtroom, while respondent, Scott, and the other housing advocates were

leaving the Hughes Complex. Further, the statement was intended to encourage Scott to join them on the occupancy-restricted elevator, albeit via an insensitive and extremely misguided joke.

We conclude that “in a professional capacity” requires more than the mere fact that the statement was made by an attorney in a courthouse. The interaction between respondent and Scott simply was too remote to the practice of law to fall within the scope of the Rule. Accordingly, on this record, we are unable to conclude that the evidence clearly and convincingly establishes the first prong of the analysis.

The second element of RPC 8.4(g) requires that the conduct at issue “involv[e] discrimination . . . because of race.” As set forth above, the Official Comment to the Rule states that “‘discrimination’ is to be construed broadly. It includes derogatory and demeaning language, and, generally, any conduct towards the named groups that are both harmful and discriminatory.” Respondent maintains that his words do not constitute “discrimination” because his remark was an attempt to humorously include Scott with the others on the elevator and, further, that he would have attempted to include any other individual on the elevator, regardless of race. He acknowledged however, that the “joke” would have made no sense if directed to a white person.

To analyze this element, we consider disciplinary cases involving charged violations of RPC 8.4(g) that have addressed discrimination based on race or national origin. Three cases that provide an analysis of the Rule in such a context are Diego, Farmer, and In re Geller, 177 N.J. 505 (2003).

In Diego, the attorney, who was reprimanded, stated “I’m tired of this racist ghetto B.S.” in the aftermath of an adversarial encounter with three African American court employees, in a public space within a courthouse, stemming from a disagreement between the attorney and court staff regarding paperwork that he sought to file on a client’s behalf. In the Matter of Jonathan Eric Diego, DRB 19-160 at 2, 16. The attorney denied that his comments were racist, contending that he had perceived himself to be the victim of racism and, also, had not intended to cause harm to court staff; in addition, the record established that he had been improperly physically accosted, by a court employee, prior to losing his composure. Id. at 14, 19. Nevertheless, we found that the attorney engaged in conduct involving discrimination, in violation of RPC 8.4(g). Id. at 16.

In Farmer, the attorney received a reprimand for engaging in conduct involving discrimination by making statements that were discriminatory and demeaning on their face, ascribing misrepresentations purportedly made by his adversary to his adversary’s Chinese heritage. In the Matter of George Louis

Farmer, DRB 18-276 (January 15, 2019) at 8. We rejected the attorney’s arguments, among other defenses, that he was not racist and was absolved by his reliance on information regarding Chinese culture as set forth in “expert opinions” included in internet articles. Id. at 8-9.

In Geller, the attorney was reprimanded for his wide-ranging misconduct during his own child support and custody hearings. In the Matter of Larry S. Geller, DRB 02-467 (May 20, 2003) at 2, 47. In respect of RPC 8.4(g), Geller was found to have “exhibited ethnic bias” toward a Superior Court judge by remarking, during a deposition conducted after the judge had entered adverse rulings, that “Monmouth County Irish have their own way of doing business.” Id. 44. In concluding that Geller had violated RPC 8.4(g), we cited both RPC 8.4(g) and In re Vincenti, 114 N.J. 275, 283 (1989), which predated the RPC, wherein the Court stated that:

we cannot overemphasize that some of the respondent’s offensive verbal attacks carried invidious racial connotations . . . We believe this kind of harassment is particularly intolerable. Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions . . . is especially offensive.

[Id. at 44.]

Here, we reject any argument that respondent’s comment to Scott, which he admittedly made because of Scott’s race, stating that Scott “only count[ed]

three-fifths,” was not, by its very nature, discriminatory. Quite the contrary, it was discriminatory on its face. That respondent meant to encourage Scott to enter the elevator – to include, not exclude, him – does not lessen the discrimination inherent in a declarative statement informing Scott, in 2021, that he counted as less than a whole person. Respondent conceded that he would not have made the remark if Scott was white. Thus, construing this element broadly, as we are required to do, we conclude that it was discriminatory based on race. Respondent’s deep knowledge of the Constitution does not alter our conclusion.

Although respondent asserted that his statement was not “objectively demeaning [Scott], disparaging him, or disrespecting him,” his argument in this respect does not invoke the objective standard we are required to apply, but rather his own subjective view of the remark at issue. Previously, we rejected a similar argument in Diego, where the attorney denied that his comments about “racist ghetto B.S.” that he had directed to court personnel were racist, contending that he had perceived himself to be the victim of racism. DRB 19-160 at 17-18. In that matter, we found that the attorney had chosen “racially and socioeconomically charged, demeaning words, which, by their very nature, were likely to cause harm” and “[t]hus, regardless of [his] subjective view of the situation, his conduct cannot be tolerated.” Id. at 18.

For these reasons, we determine that respondent's statement constituted discrimination because of race, notwithstanding his underlying aim of including Scott on the elevator, thereby satisfying the second prong of the analysis.

We now turn to the third element of RPC 8.4(g), which requires that the conduct be "intended or likely to cause harm." Respondent's uncontested testimony regarding his goal of encouraging Scott to join the group on the elevator, along with other information in the record, strongly supports his defense that he did not specifically intend his words to cause harm. Thus, the application of the Rule to his conduct depends on whether his remark was "likely to cause harm."

We are unable to conclude, on the record before us, that respondent's remark objectively was "likely to cause harm." Respondent has an impeccable record, with a long history of promoting civil rights. He made the comment while inviting Scott, who he knew well, to join them in the elevator, without anticipating the reaction or hurt his remark would cause. Further, he immediately followed his remark with an explanation that the reference pertained to the three-fifths compromise. The record lacks any evidence that respondent had ever acted or spoken in a discriminatory manner prior to the instant conduct consisting of a single, isolated remark. In fact, Scott testified that, despite knowing respondent

for years, this was the first time he had ever heard him utter a discriminatory remark.

We are mindful that Scott expressed, in myriad ways, his perception of the harms caused by the statement. For instance, he testified that he found respondent's remark "devastating," compared it unfavorably, based on his experience as an African American, to being called "the N word" or other "racial comments that have been made over many, many years," and offered other, similar insights, in testimony that the DEC credited, having heard Scott's testimony firsthand and observed his demeanor. However, we are required to apply an objective, rather than a subjective, standard to assess whether the statement was "likely to cause harm." Considering the context in which the remark was made – as a joke during a time when the elevator capacity was limited due to the pandemic – by an individual who prides himself as being a constitutional scholar, we are unable to conclude that the remark was likely to cause harm. Thus, the evidence fails to satisfy the third prong of the analysis.

Conclusion

In conclusion, respondent's conduct in this matter simply does not satisfy the necessary elements to establish a violation of RPC 8.4(g). Although respondent's statement was discriminatory – in that he would not have made the

statement to Scott if he was not African American – the evidence fails to establish that the statement was made “in a professional capacity” or that it was “intended or likely to cause harm.” Accordingly, we determine to dismiss the charge.

Chair Cuff, Vice-Chair Boyer, and Member Modu voted to sustain the charge, would impose an admonition, and filed a separate dissent.

Member Spencer was recused.

Disciplinary Review Board

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Ira Barry Karasick
Docket No. DRB 24-248

Argued: February 20, 2025

Decided: April 22, 2025

Disposition: Dismiss

<i>Members</i>	Dismiss	Admonition	Recused
Cuff		X	
Boyer		X	
Campelo	X		
Hoberman	X		
Menaker	X		
Modu		X	
Petrou	X		
Rodriguez	X		
Spencer			X
Total:	5	3	1

/s/ Timothy M. Ellis

Timothy M. Ellis
Chief Counsel