DRB 21-011
Supreme Court of New Jersey

In re Bernstein

Decided Sep 22, 2021

DRB 21-011

09-22-2021

In the Matter of David Jay Bernstein An Attorney at Law

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics. Respondent appeared pro se. Timothy M. Ellis Acting Chief Counsel

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

Argued: July 15, 2021

District Docket No. XIV-2020-0287E

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.
Respondent appeared *pro se*.

Timothy M. Ellis Acting Chief Counsel

DECISION

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

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (the OAE) pursuant to *R.* 1:20-14(a), following an order from the Supreme Court of Florida suspending respondent for one year and directing him to pay restitution to two clients. The OAE asserted that *1 respondent was found guilty of violating the equivalents of New Jersey *RPC* 1.1(a) (gross neglect); *RPC* 1.3 (lack of diligence); *RPC* 1.4(b) (failure to keep the client reasonably informed about the status of a matter); *RPC* 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); *RPC* 1.4(d) (failure to advise a client of the limitations of the lawyer's conduct, when a client expects assistance not permitted by the *Rules*); *RPC* 1.5(a) (unreasonable fee); *RPC* 3.3(a)(1) (false statement of material fact to a tribunal); *RPC* 4.1(a)(1) (false statement of material fact or law to a third person); *RPC* 5.5(a)(1) (unauthorized practice of law); *RPC* 8.4(a) (violating or attempting to violate *Rules of Professional Conduct*, knowingly assisting or inducing another to do so, or doing so through the acts of another); *RPC* 8.4(b) (criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer); *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and *RPC* 8.4(d) (conduct prejudicial to the administration of justice).

For the reasons set forth below, we determine to grant the motion for reciprocal discipline and to recommend to the Court that respondent be disbarred.

Respondent earned admission to the New Jersey bar in 1984, to the New York bar in 1985, and to the Florida bar in 1994. He has no disciplinary history. *2

On August 29, 2018, Florida disciplinary authorities filed a complaint against respondent for his misconduct in two client matters, which occurred in jurisdictions in which he was not licensed to practice law. The following facts are

taken from the April 16, 2019 Report of Referee following the conclusion of the Florida ethics proceedings.[1]

1 Florida disciplinary authorities informed the OAE that there were no transcripts available for the Florida ethics hearing.

The Angela Allen Matter

On June 23, 2011, Angela Allen was sentenced to serve eighty-five years in prison following her murder conviction in the Circuit Court of Shelby County, Alabama. On April 25, 2013, Allen's daughter, Tangela Allen, hired respondent to represent Allen in pursuit of post-conviction relief. Respondent was neither licensed nor otherwise eligible to practice law in Alabama.

On March 29, 2013, respondent sent a letter to Allen, confirming the terms of the representation, as he had discussed with Tangela. In the letter, respondent explained that he would file a motion for post-conviction relief in federal court on Allen's behalf, and that the fee for such representation was $4, 500. Respondent also stated in the letter that, if he had to pay any fees to file a *pro* *3 *hac vice* application in a foreign jurisdiction, Allen would be required to pay those fees prior to the filing of the motion.

Shortly thereafter, respondent prepared a retainer agreement, which Tangela signed on April 25, 2013. Although respondent's letter to Allen discussed seeking relief in federal court, the retainer agreement provided that respondent's representation would include researching and filing a "Rule 32 Motion for Post-Conviction Relief in the State of Alabama" (the Rule 32 petition).[2] Despite having informed Allen, in writing, that his fee was $4, 500, respondent testified at the ethics hearing that he charged Allen only $4, 000 for the representation. *4

2 Alabama Rule of Criminal Procedure Rule 32.1 provides: "subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that: (a) The constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief. (b) The Court was without jurisdiction to render judgment or to impose sentence. (c) The sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law. (d) The petitioner is being held in custody after the petitioner's sentence has expired. (e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because: (1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence; (2) The facts are not merely cumulative to other facts that were known; (3) The facts do not merely amount to impeachment evidence; (4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and (5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received. (f) The petitioner failed to appeal within the prescribed time from the conviction or sentence itself or from the dismissal or denial of a petition previously filed pursuant to this rule and that failure was without fault on the petitioner's part." Alabama Rule of Criminal Procedure Rule 32.2 lists the reasons remedies under Rule 32 may be precluded, including, but not limited to, successive petitions, failure to abide by the limitations period, and claims of ineffective assistance of counsel.

Subsequently, respondent prepared and filed a Rule 32 petition with the Circuit Court of Shelby County, Alabama. The court filed the motion on August 29, 2013. The Rule 32 petition contained respondent's name and address as the attorney representing Allen. However, the petition lacked both Allen's required signature under oath and respondent's required verification under oath.

In September 2013, respondent prepared a second version of the Rule 32 petition, which included Allen's notarized signature but removed respondent's name as attorney of record. On September 27, 2013, respondent sent the Rule 32 petition to the Circuit Court of Shelby County, Alabama, which filed it three days later. On January 21, 2014, the State of Alabama filed its response to the Rule 32 petition, along with a motion to dismiss.

On February 20, 2014, the court dismissed the Rule 32 petition, finding it was untimely filed; noncompliant with Rule 32 of the Alabama Rules of Criminal Procedure; not notarized; and was not signed by an attorney licensed to practice law in Alabama. The court specifically found that respondent's second attempt to file a Rule 32 petition could not cure its untimeliness.

The ethics referee found there was no evidence that respondent communicated the court's adverse ruling to Allen or Tangela. Indeed, on April 12, 2014, Allen wrote a letter to respondent asserting that she had never spoken to him regarding her matter and was confused. Allen explained that her *5 confusion stemmed from Shelby County's response to her Rule 32 petition, in which it did not acknowledge respondent as her attorney. Allen inquired whether respondent was permitted to practice law in Alabama, whether he was her attorney of record, and whether he had filed a response on her behalf to the state's motion to dismiss.

After receiving Allen's letter, respondent spoke to her by telephone. Thereafter, on May 9, 2014, respondent sent a letter to Allen, with bold, underlined, and uppercase letters stating: "*ATTORNEY/CLIENT CONFIDENTIAL CORRESPONDENCE TO BE OPENED ONLY IN PRESENCE OF INMATE*." With the letter, respondent provided a copy of a motion he had prepared requesting a copy of the state's response to the Rule 32 petition and requesting an extension of time to reply once Allen received the copy of the state's response. Respondent requested that Allen sign the motion and return it to his office so that he could finish the reply.

The referee found that respondent's letter was a "dishonest response to the questions" Allen asked in her April 2014 letter. Specifically, rather than clarify whether he was eligible to practice law in Alabama, respondent continued to hold himself out as her attorney and continued work on her case. Moreover, respondent failed to advise Allen that, months earlier, the court had dismissed the Rule 32 petition. *6

On May 28, 2014, Allen wrote a letter to respondent's paralegal, informing him that she received an order denying her motion for an extension of time in which to reply. Allen asked respondent whether anything else could be done on her case and requested that respondent communicate with Tangela regarding options.

The referee found that there was no evidence that respondent replied to Allen's question or communicated with her at all thereafter. Furthermore, the referee found that respondent's "bare testimony at the final hearing that he informed Tangela and/or [Allen] he was not authorized to practice in Alabama [was] unsubstantiated, self-serving and not credible."

On March 31, 2015, Tangela contacted Richard Jensen, Esq., an attorney licensed to practice law in Alabama. Jensen confirmed that respondent was not licensed to practice law in Alabama and asked Tangela why she had retained respondent for her mother's case; Tangela informed him that respondent had claimed to be a "national" attorney.

During the ethics hearing, Jensen testified that he had significant experience with Rule 32 petitions in Alabama and that, after he reviewed Allen's case, he identified meritorious claims that could have been raised in a Rule 32 petition. However, when he reviewed the Rule 32 petition respondent prepared, he determined that it was "a cut and paste of a form available in the Alabama *7 forms directory," rather than a complete Rule 32 petition. Specifically, the petition respondent filed lacked a significant amount of detailed information or argument. Indeed, respondent admitted that he submitted a last-minute petition using boilerplate language. Respondent claimed that he did so in an effort "get something before the court for [Allen], in hopes that the template motion would at least be sufficient to save the limitations period and preserve her right to collateral review." Respondent asserted that, based on his experience with other clients, he believed that Allen would have wanted him to file the petition prior to the deadline, notwithstanding the Alabama court rules and his ineligibility to practice law in Alabama.

The referee found that respondent had intentionally disregarded the Alabama Code and Bar Rules and that his attempt to justify his misconduct was misguided, unacceptable, and demonstrated a clear lack of judgment. Furthermore, the referee found that respondent caused injury to Allen and her case by virtue of his misconduct. Although Jensen later filed a Rule 32 petition alleging ineffective assistance of both trial and post-conviction counsel, the court dismissed the petition as a prohibited successive petition for post-conviction relief. Thus, the referee found that Allen

> had but one opportunity for post-conviction relief under Alabama Rule 32, and that opportunity was wrongfully taken from her by Respondent, who admittedly had no authority to practice law in Alabama, and never *8 familiarized himself with the law regarding the unauthorized practice of law or the requirements of Alabama's Rule 32 of Alabama Rules of Criminal Procedure. The defective Rule 32 Petition prepared and untimely filed by Respondent precluded her from any further chance of obtaining relief. Respondent was not competent to handle this matter.

The referee found that respondent's conduct violated Ala. Code § 34-3-1 and Ala. Code § 34-3-7, [3] both of which make it a misdemeanor for an unlicensed individual to practice law in Alabama. The referee found that respondent's preparation of a retainer agreement; correspondence to Allen holding himself out as an attorney able to practice law in Alabama; fee charged for legal services; drafting and filing of the first Rule 32 petition; drafting and filing of the second Rule 32 petition; drafting the motion for an extension of time to reply for Allen's signature; and offer to finish the reply all evidenced respondent's unlicensed practice of law in Alabama, in contravention of Alabama law. Respondent voluntarily executed a cease-and-desist affidavit regarding his unlicensed practice of law in Alabama. *9

[3] Ala. Code § 34-3-1 provides in pertinent part: "If any person shall, without having become duly licensed to practice, [. . .] or otherwise, practice or assume to act or hold himself or herself out to the public as a person qualified to practice or carry on the calling of a lawyer, he or she shall be guilty of a misdemeanor and fined not to exceed $500, or be imprisoned for a period not to exceed six months, or both." Ala. Code § 34-3-7 provides in pertinent part: "Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law is guilty of a misdemeanor and, on conviction, must be punished as provided by law. Any person, firm or corporation who conspires with, aids and abets another person, firm or corporation in

the commission of such misdemeanor must, on conviction, be punished as provided by law."

When respondent attempted to refund the retainer to Allen, he prepared a release and confidentiality agreement. The release provided that:

> The Parties agree that the existence and terms and conditions of this Release shall forever remain confidential. To that end, each party agrees never to disclose, testify, attest, declare, discuss, or publish the existence of this agreement or this agreement's terms unless the following conditions are met; (1) a lawful subpoena is served on either party; (2) the party so served gives the other notice in writing within five (5) days of being served; and (3) the party not served decides whether to object to the subpoena, and if the party not served decides to object, no disclosure, discussion, testimony, declaration, or attestation shall occur until the relevant adjudicative authority either grants a motion to compel or denies a motion to quash.
>
> Should either Party violate the terms of this agreement, the violating party shall pay to the other party liquidated damages in the amount of $3, 500 plus all costs and reasonable attorney's fees incurred to enforce the terms of this agreement.
>
> [Ex.C, p14.][4]

[4] "Ex." refers to the exhibits included in the appendix to the OAE's brief in this matter.

Although respondent sent the release to Jensen, along with Allen's partial refund check, the agreement was never executed. Nonetheless, the referee found that respondent's preparation of an agreement containing confidentiality provisions in connection with Allen's refund was improper because it could "reasonably be interpreted as designed to discourage [Allen] from reporting Respondent's *10 unlicensed practice of law," which is both a crime and a violation of the Rules Regulating the Florida Bar.

Furthermore, the referee found that respondent had refunded only $3, 500 of the $4, 000 fee Allen paid to him for the representation. Respondent testified that he believed he earned the $500 he did not refund; however, the referee found that respondent improperly charged Allen for the representation and that he was not entitled to keep any of the funds because the fee contract was void *ab initio*.

The Jerry Joshua Matter

Jerry Joshua hired respondent to seek post-conviction relief following Joshua's conviction in a criminal case before the United States District Court, Eastern District of Virginia (the federal court).

Specifically, on March 12, 2014, Joshua signed a retainer agreement for respondent to "research, prepare and file a 2255 Motion; reply to any government answer; and file objection to magistrate judge's Report and Recommendation if necessary." Joshua paid respondent a $5, 000 fee for his legal services.

Thereafter, respondent hired Matthew Hardin, Esq., an attorney licensed in Virginia, to serve as local counsel on Joshua's behalf and to assist respondent in seeking *pro hac vice* admission in the federal court. *11

On May 31 and June 2, 2016, respondent filed two separate applications to qualify for *pro hac vice* admission in federal court. On both applications respondent certified that he had "not been reprimanded in any court nor has there been any action in any court pertaining to [his] conduct or fitness as a member of the bar." On June 2, 2016, the federal court granted *pro hac vice* status to respondent.

The referee found that respondent's certifications were false, because on February 5, 2015, the Supreme Court of Florida had reprimanded him after he admitted he violated Rules Regulating the Florida Bar: 4-1.2(c) (lawyer may limit the scope of representation if the limitation is reasonable and the client gives informed consent); 4-1.3 (lack of diligence); 4-1.4(a) and (b) (failure to properly communicate with a client); 4-1.16(a)(2) (lawyer shall withdraw from representation of a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client); 4-5.3(a) (failure to supervise nonlawyer staff); 4-5.3(b) (failure of a lawyer having direct supervisory authority over a nonlawyer employee to make reasonable efforts to ensure that the conduct of the employee is compatible with the professional obligations of the lawyer and the lawyer shall be responsible for conduct of a nonlawyer employee that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer under certain circumstances); 4-5.3(c) (a lawyer shall *12 review and be responsible for the work product of paralegals or legal assistants); 4-7.9(c) (lawyer shall not advertise under a trade or fictitious name); 4-7.21(b) (misleading firm name); 4-7.18(b)(2)(H) (advertisement does not contain any information telling addressee how the lawyer obtained information about addressee); 4-7.18(b)(2)(C) (advertisement does not contain background information about the lawyer); 4-7.19(a) (advertisement was not filed in a timely manner with the bar for review before dissemination); 4-8.4(a) (violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another); and 4-8.4(d) (conduct prejudicial to the administration of justice).

Furthermore, respondent had failed to disclose to the federal court that, on April 13, 2016, the United States District Court for the District of Kansas had admonished him for his failure to adequately disclose his Florida reprimand in a *pro hac vice* application to that court. Respondent also failed to disclose to the Virginia federal court that two civil malpractice lawsuits had been filed against him by clients following bar complaints.

Indeed, at the ethics hearing, respondent testified that he knew his certifications were false, but claimed that his paralegal had attempted to alter the applications to provide space for respondent to explain his prior reprimand. Respondent asserted that he did not submit the altered form because he thought *13 it would be "outrageous" to submit an altered form to federal court. Instead, respondent explained that he submitted the false certification and had intended to call the federal court to explain why he denied being reprimanded. However, as the referee found, respondent never communicated to the federal court that he had been reprimanded. Rather, on June 30, 2016, Hardin notified the federal court that respondent had been reprimanded in Florida.

Hardin testified that he had conducted internet research on respondent after becoming concerned following interactions with respondent's office. After learning that respondent had been reprimanded in Florida, Hardin immediately notified the court. Consequently, the federal court issued an order to show cause to respondent regarding the misrepresentations on his *pro hac vice* applications.

At the federal court's order to show cause hearing, respondent testified that he had "failed to see and absorb" the application question about prior discipline or action in a court pertaining to his conduct or fitness as a member of the bar. Respondent claimed that, because he did not see a yes or no option to answer the question about discipline, he assumed that there was no such question on the application.

The federal court found that respondent had created a "more severe situation" for himself by virtue of his misrepresentation on the *pro hac vice* application because, at the order to show cause

14 hearing, respondent disclosed *14 not only that he had been reprimanded in Florida, but that the Kansas federal court had admonished him and that he had two civil malpractice lawsuits filed against him. Consequently, by order dated July 14, 2016, the federal court revoked respondent's *pro hac vice* admission in the *Joshua* case.

On July 15, 2016, the federal court issued a second order to show cause as to why respondent should not be barred generally from *pro hac vice* admission given his "extensive and serious misrepresentations resulting in the revocation of his pro hac vice [sic] status" in the *Joshua* case, as well as the additional misconduct he eventually disclosed. On July 25, 2016, the federal court issued an order barring respondent generally from *pro hac vice* admission until further order of the court.

Despite the federal court barring respondent from performing any legal work on the Joshua case, respondent refused to refund Joshua's retainer fee. At the ethics hearing, respondent admitted that he did not refund the fee, and conceded that Joshua should be refunded "some" of the fee.

The Florida Discipline

On April 16, 2019, the referee issued his report finding, by clear and convincing evidence, that respondent engaged in a series of acts involving the knowing and willful unlicensed practice of law

15 and a pattern of intentional *15 dishonesty. The referee also found that respondent's misconduct included incompetence, lack of diligence, and a failure to adequately communicate with Allen. The referee also found that respondent's misconduct caused "interference with the legal system" and injured Allen's ability to obtain relief pursuant to the Rule 32 petition. The referee further found that respondent had been intentionally dishonest when he made false certifications on his two *pro hac vice* applications to the Virginia federal court. The referee found that respondent's dishonesty "caused interference with the legal system" because it required the federal court to issue two orders to show cause to address his misrepresentations. In aggravation, the referee found that respondent had a dishonest or selfish motive for his misconduct; displayed a pattern of misconduct; committed multiple offenses; and committed the misconduct despite having substantial experience in the practice of law. In mitigation, the referee considered respondent's testimony that he was being treated for depression, had recently gone through a divorce, and had suffered the death of his mother. The referee also considered, in mitigation, that respondent suffered from several physical impairments which necessitated the use of a

16 wheelchair.[5] *16

[5] There is no evidence in the record that respondent provided anything but his own testimony to demonstrate that he was being treated for a mental health condition. Likewise, there is no evidence in the record establishing a causal link between respondent's mental health diagnosis, physical ailments, and his misconduct.

For respondent's violations of the equivalents of New Jersey *RPC* 1.1(a); *RPC* 1.3; *RPC* 1.4(b); *RPC* 1.4(c); *RPC* 1.4(d); *RPC* 1.5(a); *RPC* 3.3(a)(1); *RPC* 4.1(a)(1); *RPC* 5.5(a)(1); *RPC* 8.4(a); *RPC* 8.4(b); *RPC* 8.4(c); and *RPC* 8.4(d), the referee recommended that respondent pay restitution to both Allen and Joshua and receive a two-year suspension for his misconduct.

On July 3, 2019, the Supreme Court of Florida issued an order suspending respondent for one year and ordering him to pay $5, 000 in restitution to Joshua and $500 in restitution to Allen. The court issued the order after adopting the uncontested report of the referee.[6]

[6] On March 3, 2021, respondent received a three-year suspension in New York for his Florida misconduct. *See In re Bernstein*, 193 A.D.3d 162 (2021).

In its brief to us, the OAE asserted that a one-year suspension was the appropriate quantum of discipline for respondent's misconduct. The OAE argued that, although reprimands are typically imposed on attorneys who practice in jurisdictions in which they are not licensed, greater discipline is required in this case due to the nature and number of the ethics infractions involved.

Specifically, the OAE argued that the severity of respondent's misconduct fell between the three-month suspension imposed in *In re Lawrence*, 170 N.J. 598 (2002), and the two-year suspension imposed in *In re Davidoff*, 156 N.J. *17 418 (1998). The OAE noted that respondent attempted to represent two separate clients in two separate jurisdictions where he was not licensed to practice. In his attempt to provide representation, the OAE argued that respondent lacked competence and diligence; failed to properly communicate with his clients; charged an improper fee; made false statements to a third-party and to a tribunal; engaged in a criminal act; engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaged in conduct prejudicial to the administration of justice.

The OAE stated that, although respondent called the New Jersey Committee on Character, on July 15, 2020, to report that he had been suspended in Florida, he never informed the OAE of his discipline, despite the Committee's instruction that he do so.

At oral argument before us, the OAE maintained its position and asserted that, based upon New Jersey precedent, a one-year suspension was the appropriate quantum of discipline to be imposed.

Respondent did not provide us with a submission for consideration. However, he appeared before us for oral argument and noted that he had hoped to obtain counsel to represent him but had been unable to do so. Respondent informed us that he had not been reinstated to practice law in Florida, but that the attorney representing him in that state was trying to resolve that issue. *18 Respondent explained that he did not object to the imposition of a one-year suspension but requested that it be imposed retroactively. Respondent asserted that, despite maintaining a license to practice law in New Jersey, he has not practiced in this State.

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

In Florida, the standard of proof in attorney disciplinary matters is a "determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Rules Regulating The Florida Bar." *See*, *Florida Bar v. Forrester*, 916 So.2d 647 (2005).

Reciprocal discipline proceedings in New Jersey are governed by *R.* 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction
>
> *19
>
> was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

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

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

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

None of the above subsections apply to the instant matter.

As the Supreme Court of Florida found, respondent violated *RPC* 5.5(a)(1) by undertaking the representation in the *Allen* and *Joshua* matters even though he was not licensed to practice law in Alabama or Virginia, respectively. *See In re Ehrlich*, 235 N.J. 321 (2018) (attorney licensed to practice law in New Jersey, New York, Washington D.C., and Florida, but who maintained an office for the practice of law in Florida, violated New Jersey *RPC* 5.5(a)(1) when he undertook the representation of clients who resided in Maryland, where he was not admitted to the bar). Similarly, because respondent's representation of Allen was a misdemeanor in Alabama, it constitutes a violation of *RPC* 8.4(b). By *20 extension, any fee charged for such unlawful services was *per se* unreasonable, a violation of *RPC* 1.5(a).

Additionally, respondent violated *RPC* 1.1(a) and *RPC* 1.3 when he neglected to familiarize himself with the Alabama Rules of Criminal Procedure and subsequently filed a deficient Rule 32 petition, resulting in Allen being prohibited from seeking post-conviction relief. Furthermore, respondent failed to answer any of Allen's substantive questions and failed to communicate with her regarding the case, in violation of *RPC* 1.4(b), (c), and (d).

Furthermore, respondent violated *RPC* 3.3(a)(1) and *RPC* 4.1(a)(1) by making misrepresentations of material fact to the Virginia federal court regarding his prior discipline and lawsuits pending against him for legal malpractice, as well as his misrepresentation to Tangela that he was eligible to practice law "nationally" and could undertake representation of her mother. Likewise, respondent's misrepresentations violated *RPC* 8.4(c) and necessitated the Virginia court to issue two orders to show cause to address respondent's dishonesty, a violation of *RPC* 8.4(d).

In sum, we find that respondent violated *RPC* 1.1(a); *RPC* 1.3; *RPC* 1.4(b); *RPC* 1.4(c); *RPC* 1.4(d); *RPC* 1.5(a); *RPC* 3.3(a)(1); *RPC* 4.1(a)(1); *RPC* 5.5(a)(1); *RPC* 8.4(b); *RPC* 8.4(c); *RPC* and 8.4(d). We dismiss the *RPC* 8.4(a) charge as subsumed in respondent's violations of the other *RPC*s. The only *21 remaining issue for our determination is the appropriate quantum of discipline to be imposed for respondent's misconduct.

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, the presence of additional violations, and the attorney's disciplinary history. *See*, *e.g.*, *In the Matter of Esther Maria Alvarez*, DRB 19-190 (September 20, 2019) (admonition for attorney who was retained to obtain a divorce for her client but, for the next nine months, failed to take any steps to pursue the matter, and failed to reply to all but one of the client's requests for information about the status of her case, violations of *RPC* 1.1(a) and *RPC* 1.4(b); in another matter, the attorney agreed to seek a default judgment, but waited more than eighteen months to file the necessary papers with the court; although the attorney obtained a default judgment, the court later vacated it due to the passage of time, which precluded a determination on the merits; violations of *RPC* 1.1(a) and *RPC* 1.3); *In the Matter of*

Michael J. Pocchio, DRB 18-192 (October 1, 2018) (admonition for attorney who filed a divorce complaint and permitted it to be dismissed for failure to prosecute the action; he also failed to seek reinstatement of the complaint, and failed to communicate with the client; violations of *RPC* 1.1(a); *RPC* 1.3; *RPC* 1.4(b); and *RPC* 3.2); *In re Burro*, 235 *22 N.J. 413 (2018) (reprimand for attorney who grossly neglected and lacked diligence in an estate matter for ten years and failed to file New Jersey Inheritance Tax returns, resulting in the accrual of $40, 000 in interest and the imposition of a lien on property belonging to the executrix, in violation of *RPC* 1.1(a) and *RPC* 1.3; the attorney also failed to keep the client reasonably informed about events in the case (*RPC* 1.4(b)); to return the client file upon termination of the representation (*RPC* 1.16(d)); and to cooperate with the ethics investigation (*RPC* 8.1(b)); in aggravation, we considered the significant harm to the client and the attorney's prior private reprimand; in mitigation, the attorney expressed remorse and had suffered a stroke that forced him to cease practicing law); and *In re Abasolo*, 235 N.J. 326 (2018) (reprimand for attorney who grossly neglected and lacked diligence in a personal injury case for two years after filing the complaint; after successfully restoring the matter to the active trial list, the attorney failed to pay a $300 filing fee, permitting the defendants' order of dismissal with prejudice to stand, in violation of *RPC* 1.1(a) and *RPC* 1.3; in addition, for four years, the attorney failed to keep the client reasonably informed about the status of the case, in violation of *RPC* 1.4(b)).

Standing alone, an admonition is the appropriate sanction for an attorney's failure to promptly return the unearned portion of a fee. *See, e.g.*, *In re Gourvitz*, 200 N.J. 261 (2009), *In the Matter of Larissa A. Pelc*, DRB 05-165 (July 28, *23 2005), and *In the Matter of Stephen D. Landfield*, DRB 03-137 (July 3, 2003).

The discipline for conduct involving false statements in connection with bar admissions ranges from a reprimand to a suspension, depending on the severity of the misconduct and the presence of other rule violations or aggravating factors. *See*, *e.g.*, *In re Thyne*, 214 N.J. 107 (2013) (reprimand for attorney who failed to disclose on his application for admission to the United States Court of Appeals for the Second Circuit that he was no longer in good standing in Minnesota; prior reprimand); *In re King*, 197 N.J. 499 (2009) (reprimand for attorney who failed to disclose to Pennsylvania bar authorities that he had been arrested as a teenager; in mitigation, attorney cooperated fully with ethics authorities, lost a lucrative job at a prestigious law firm, and evidenced sincere remorse; no history of discipline); *In re Tan*, 188 N.J. 389 (2006) (reprimand for attorney who falsely represented to the New Jersey Board of Bar Examiners that he had achieved a bachelor's degree when he was one course shy of doing so; he also graduated from law school without disclosing the deficiency; extreme mitigating factors were his and his fiancée's medical problems while in college, which prevented him from successfully completing the course, his attempt to remedy the problem on two occasions; his eventual completion of the course work; his status as the sole support for his family; the passage of eight years since the misconduct; his acceptance of full responsibility *24 for his misconduct; and the character witness attestations to his reputation for truthfulness, honesty and compassion and his services to the Filipino community; no disciplinary history); *In re Duke*, 207 N.J. 37 (2011) (censure for attorney who failed to disclose to the Board of Immigration Appeals that he had been disbarred in New York, deposited his fee in his personal bank account, rather than in his business or trust account, failed to communicate with his client by not providing the client with copies of his submissions to the Board of Immigration Appeals, and failed to return his client's numerous phone calls; prior reprimand); *In*

re Solvibile, 156 N.J. 321 (1998) (six-month suspension for attorney who passed the Pennsylvania bar examination after three attempts, but whose application to the Pennsylvania bar was returned because it was received after the filing deadline; the attorney then misrepresented to the Pennsylvania Board of Law Examiners that the money order accompanying the application was misdated and that the application had been mailed prior to the closing deadline and also engaged the assistance of others to substantiate the misrepresentation; when her misrepresentations came to light, she admitted her actions; no disciplinary history); *In re Guilday*, 134 N.J. 219 (1993) (six-month suspension for attorney who failed to disclose on his bar admission application that, beginning when he was seventeen years old until he was twenty-seven, he had been arrested five times for driving while under the influence of alcohol and *25 once for disorderly conduct; his misconduct came to light when he applied for admission to the Delaware bar; shortly before a hearing before Delaware authorities, the attorney notified the New Jersey Board of Bar Examiners of his prior arrests); *In re Bernardino*, 198 N.J. 377 (2009) (three-year suspension for attorney following a motion for reciprocal discipline in which disciplinary authorities determined that the attorney failed to disclose in his application to practice before the United States Patent and Trademark Office that he was under criminal and disciplinary investigation for conduct with respect to his former employer, who had terminated him for dishonest conduct; prior one-year suspension); *In re Gouiran*, 130 N.J. 96 (1992) (attorney's revocation of his license was stayed for failing to disclose disciplinary proceedings in connection with his real estate broker's license by misrepresenting in his certified statement of candidate that he had not been a party to any civil proceeding, that he had not been disciplined as a member of any profession, and that disciplinary proceedings had not been filed against him; at the ethics hearing, the attorney explained that, because he had read the questions narrowly, he had answered them in good faith, adding that he would answer them differently now; the Court revoked his license, but stayed the revocation to permit the attorney to reapply for admission; the stay was based on the significant passage of time (eight years) since the attorney had applied for bar admission, the attorney's recognition of *26 his mistake, and his current awareness of a lawyer's duty of candor).

Attorneys who practice law in jurisdictions where they are not licensed have received discipline ranging from an admonition to a suspension, depending on the occurrence of other ethics infractions, their disciplinary history, and the presence of aggravating and mitigating factors. *See*, *e.g.*, *In the Matter of Mateo J. Perez*, DRB 13-009 (June 19, 2013) (admonition; although not admitted in New York, attorney represented a client there; attorney had represented several other clients in New York after having been admitted *pro hac vice* or having disclosed to the judges that he had not been admitted in New York; attorney, thus, believed that he could represent clients without admission; the clients were family and friends of the attorney and were not charged for the representation; mitigating factors included the absence of prior discipline and lack of personal financial gain; violation of *RPC* 5.5(a)); *In the Matter of Duane T. Phillips*, DRB 09-402 (February 26, 2010) (admonition; attorney, who was not admitted in Nevada, represented a client who was obtaining a divorce in that state; in mitigation, the conduct involved only one client, the attorney had no ethics history, and a recurrence of the conduct was unlikely; violation of *RPC* 5.5(a)); *In re Bronson*, 197 N.J. 17 (2008) (reprimand; attorney practiced law in New York, a state in which he was not admitted, failed to prepare a writing setting forth the basis or rate of his fee in a criminal matter, and failed to disclose to a *27 New York court that he was not licensed there; the unauthorized practice lasted for about one year and involved one client; violations of *RPC* 1.5(b), *RPC* 3.3(a)(5), and *RPC* 5.5(a)); *In re*

Lawrence, 170 N.J. 598 (2002) (three-month suspension; in a default matter, the attorney practiced in New York, where she was not admitted to the bar; the attorney also agreed to file a motion in New York to reduce her client's restitution payments to the probation department, failed to keep the client reasonably informed about the status of the matter, exhibited a lack of diligence, charged an unreasonable fee, used misleading letterhead, and failed to cooperate with disciplinary authorities; violations of *RPC* 1.3, *RPC* 1.4(a), *RPC* 1.5(a), *RPC* 5.5(a), *RPC* 7.5(a), *RPC* 7.1(a), *RPC* 8.1(b), and *RPC* 8.4(c)); and *In re Davidoff*, 156 N.J. 418 (1998) (two-year suspension for attorney who practiced law in New York where he was not admitted, negligently misappropriated clients' trust funds, made misrepresentations to his clients about the status of their litigation and about his status as a New York attorney, and failed to maintain a *bona fide* office and trust and business accounts in New Jersey).

Finally, it is well-settled that a violation of *RPC* 8.4(b) may be found even in the absence of a criminal conviction or guilty plea. *In re Gallo*, 178 N.J. 115, 121 (2003) (the scope of disciplinary review is not restricted, even though the attorney was neither charged with nor convicted of a crime) and *In re McEnroe*, *28 172 N.J. 324 (2002) (attorney found to have violated *RPC* 8.4(b), despite not having been charged with or found guilty of a criminal offense).

Based on the above analysis, we are left to consider the impact in New Jersey for the totality of respondent's misconduct, considering the wide range of discipline that has previously been imposed for discrete violations of the *RPC*s.

Respondent's conduct is most similar to that of the attorney in *Bernardino*, who received a three-year suspension consecutive to a one-year suspension imposed just one year prior. Like Bernardino, respondent lied on a bar admission application. However, when Bernardino's initial application was rejected, he lied on a second one regarding the circumstances of the disciplinary investigation. Here, when the Virginia federal court learned of respondent's misrepresentation, and issued an order to show cause, respondent appeared before the court and admitted the breadth of his misconduct in multiple jurisdictions.

In aggravation, respondent concealed, in two *pro hac vice* applications to the Virginia federal court, that he previously had been disciplined and that two legal malpractice lawsuits had been filed against him. Worse still, in concealing his prior discipline, respondent misrepresented the fact that, just two months prior, the Kansas federal court had admonished him for the same misconduct. In *29 further dishonest conduct, despite his testimony before the federal court that he did not see the question concerning prior discipline, respondent testified at the ethics hearing that, when he was preparing the *pro hac vice* applications, his paralegal altered the form so that he could answer the question. Therefore, respondent compounded his misrepresentation of his prior discipline either by lying to the federal court or by lying during the ethics hearing.

Respondent's lies on his application resulted in his *pro hac vice* admission to the Virginia federal court. However, once the court learned that respondent lied on his application, it issued two separate orders to show cause to address respondent's misrepresentations, ultimately resulting in the court revoking respondent's *pro hac vice* admission and barring him from future *pro hac vice* admission to the court.

Additionally, in the *Allen* matter, respondent misrepresented to Allen and Tangela that he was a "national" attorney who could represent Allen in Alabama state court. When Allen received notice from Shelby County that it did not recognize respondent as the attorney of record on her case, she sought clarity from respondent. Rather than honestly answer Allen's questions about his ability

to practice law in Alabama, respondent deflected her questions, and continued to lead Allen into believing that he was her attorney in Alabama. *30

Worse still, respondent's representation of Allen was incompetent because he failed to follow the rules of criminal procedure in Alabama, resulting in Allen's future inability to obtain relief under Rule 32. As Jensen testified, but for respondent's mishandling of the case, Allen had a colorable claim for post-conviction relief. However, she no longer has that avenue available to her due to respondent's misconduct. Respondent also failed to adequately communicate with Allen.

Furthermore, respondent refused to refund the entirety of the retainer fees that Allen and Joshua paid to him, even though the retainer agreements were void *ab initio*. Worse still, although respondent refunded Allen's retainer, he initially attempted to condition the refund on her silence regarding his misconduct.

There is limited mitigation for us to consider. The findings in Florida regarding respondent's mental and physical health are not supported by competent medical evidence establishing a causal link to respondent's misconduct. Therefore, we do not accord any weight to that proffered mitigation.

Although respondent has an unblemished disciplinary record in more than thirty-six years at the New Jersey bar, we do not accord this mitigating factor weight, considering the record and respondent's representation to us, during oral argument, that he does not practice law in New Jersey. However, he has been *31 disciplined to some degree in four different jurisdictions as an attorney licensed to practice in New Jersey.

Considering the totality of the circumstances, especially the grievous and irreparable harm caused to Allen, we determine to recommend to the court that respondent be disbarred. We further impose the condition that, within sixty days of the Court's disciplinary Order in this matter, respondent is required to provide to the OAE proof that he paid the court-ordered restitution to both Allen and Joshua.

Members Boyer, Campelo, Joseph, and Menaker voted to impose a two-year suspension with the same condition.

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

Disciplinary Review Board *32

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