

No.

In The
Supreme Court of the United States

KEVIN KEVENG TUNG, P.C., AND KEVIN TUNG, ESQ.
PETITIONER

v.

JANET YIJUAN FOU

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of New Jersey denied the Petition for Certification from decisions of the Appellate Division of the Superior Court of New Jersey, which had affirmed the decisions of trial court denying the motion to vacate the judgment.

In the history of American Jurisprudence, this case is likely the first instance where an astronomic attorney fee award in the amount of \$1,311,832.94, more than 1,300 times the \$1,000 fee received by the Petitioner, was compounded with attorney fees in a legal malpractice case of an uncontested divorce case involving a mere \$1,000 in legal fees, where the elements of causation and damage were never established by the Plaintiff.

Five questions are presented:

1. Whether a plaintiff in a legal malpractice action can manufacture damages merely by commencing litigation and incurring attorney fees as her sole damages, without proving any underlying substantive loss in the alleged malpractice case.

2. Whether, in a legal-malpractice action arising from an uncontested divorce matter, an attorney's fee award of \$1,311,832.94 may be affirmed as recoverable damages where the Appellate Division found that the Plaintiff sustained no financial damages in the underlying uncontested divorce malpractice case other than subsequent legal fees incurred in later proceedings, to vacate an uncontested divorce judgment and the legal fees incurred by plaintiff for subsequent contested divorce action, notwithstanding New Jersey's rule that malpractice damages are compensatory and may include only losses proximately caused by the alleged malpractice.

3. Whether affirmance of an attorney's fee award of \$1,311,832.94 under these circumstances violates the due

process protections secured by the Fourteenth Amendment and by Article I, Paragraph 1 of the New Jersey Constitution, where Petitioner contends the award operates as a non-compensatory deprivation of liberty and property interests untethered to proven loss.

4. Whether, in reviewing the constitutionality of such an attorney's-fee award, a court may treat the dismissal of related attorney-disciplinary grievances as irrelevant to the fairness and reliability of imposing a seven-figure fee judgment based on the attorney's handling of the underlying uncontested divorce case.

5. Whether the Supreme Court of New Jersey's denial of certification warrants review where Petitioner contends the decision below presents issues of general public importance and calls for the Court's supervisory intervention, including the proper application of New Jersey's limited exceptions to the American Rule in attorney-malpractice matters and the constitutional constraints on extraordinary fee awards.

LIST OF PARTIES

The parties to this proceeding are as follows:

Kevin Tung, Esq.
Kevin Kerveng Tung, P.C.
Janet Yijuan Fou

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Kevin Kerveng Tung, P.C. has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks review of the Supreme Court of New Jersey's denial of certifications from decisions of the Appellate Division of the Superior Court of New Jersey affirming the trial court's orders denying Petitioner's motion to vacate the judgment and award sanctions against the Petitioner. (Appendix ("Pet. App." 1a)

This petition arises from a legal-malpractice action stemming from an uncontested divorce matter in which the underlying legal fees were \$1,000, yet the courts affirmed an attorney's fee award of \$1,311,832.94.

The Appellate Division determined that the plaintiff sustained no financial damages in the underlying uncontested-divorce malpractice matter other than (1) legal fees incurred in a subsequent motion to vacate the uncontested divorce judgment and (2) legal fees incurred in a subsequent contested divorce action, unrelated to the representation by the Petitioner.

OPINION BELOW

The Appellate Division of the Superior Court of New Jersey's opinions (per Currier and Marczyk, Appellate Judges) affirming the orders of the Superior Court of New Jersey ("Pet. App." 3a-14a) are not otherwise published. The decisions of the Disciplinary Review Board of the Supreme Court of New Jersey dismissing all grievance charges against the Petitioner ("Pet. App." 15a-34a) are not otherwise published.

STATEMENT OF JURISDICTION

The Supreme Court of New Jersey entered its orders on March 27, 2026, denying both petitions for certification of judgments in A-003377-22 and in A-000557-23. ("Pet. App." 1a) Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257 and Rule 12.4 seeking review of both judgments.

The federal question, whether the Petitioner's liberty right was violated when the Appellate Division of the Superior Court of New Jersey affirmed the decision of the trial court to award astronomic attorney fees in the amount of \$1,311,832.94 to the Plaintiff in a legal malpractice action where the Appellate Division found that the Plaintiff sustained no financial damages in the underlying uncontested divorce malpractice case involving a mere \$1,000 in legal fees other than the legal fees incurred by Plaintiff in the subsequent motion to vacate an uncontested divorce judgment and the legal fees incurred by Plaintiff for subsequent contested divorce action, which had nothing to do with the Petitioner, and where the Disciplinary Review Board of the Supreme Court of New Jersey has affirmed the District VII Ethics Committee's decision to dismiss all grievance charges against the Petitioner for handling the underlying uncontested divorce matter involving a mere \$1,000 in legal fees. Petitioner raised the following questions in the petition for certification and in the appellate brief before the Supreme Court of New Jersey:

I. Did the Courts below err in not vacating the wrongful judgment pursuant to Rule 4:50-1(a) and (f), when there is clear and convincing evidence that the judgment was mistakenly awarded on the law by the Courts below without analyzing the facts and the application of the law on the facts that the Appellate Division found that Respondent Janet Fou suffered any actual damages beyond the fees incurred to vacate the Property Settlement Agreement and the original judgment of divorce, which is in contradiction to New Jersey law that attorney fees and litigation expenses alone are not recoverable as damages in tort actions unless they are a mere portion of the damages suffered by the plaintiff?

II. Did the Courts below err in not vacating the wrongful judgment pursuant to Rule 4:50-1(c) and 4:50-3, when there is clear and convincing evidence that the judgment was awarded based on fraud, misrepresentation, or misconduct of an adverse party and her attorneys, when newly discovered

evidence showing Janet Fou's attorney James Plaisted' open admission to the investigator from Office of Attorney Ethics that he committed a fraud upon the court by making false statements to courts in the proceeding to vacate Property Settlement Agreement and the original judgment of divorce in the absence participation of Petitioner Tung in 2019, a year after the completion of the trial for malpractice in 2018 and the recent decision of dismissal of all charges against Petitioner Tung by the Supreme Court of New Jersey District Ethics Committee and the Disciplinary Review Board of the Supreme Court of New Jersey demonstrates the fact that Plaisted's open admission to mislead the court to render false decision if known before the trial, which had an impact on the jury's deliberation, will definitely change the outcome of the malpractice trial?

III. Did the Court below abuse its discretion in awarding sanctions against the Petitioner under the totality of circumstances, when an innocent attorney is fighting for his honor, his license to practice law, his career, and his life?

Since the Supreme Court of New Jersey had issued a final order that denied the petition for certification. Rule 11(g)(i) that directs a specific showing in the petition for certiorari as to how the federal questions were raised and passed upon in the state court proceedings is satisfied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

...[N]or [any person] be deprived of life, liberty, or property, without due process of law; ...

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

...[N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This matter arises from a twelve-year effort by Petitioner, an out-of-state attorney and member of the New Jersey Bar, to set aside a judgment that he contends resulted from fabricated allegations and fundamental errors of law. Petitioner asserts that he was subjected to baseless claims of attorney misconduct in connection with his representation of Respondent Janet Fou in an uncontested divorce matter, and that these claims led to an extraordinary and legally unsupportable award of attorney's fees.

1. Background and Underlying Representation

Petitioner Tung is a first-generation Asian immigrant who became an attorney at age 40 after earning Bachelor of Science and Master of Science degrees in Electrical Engineering from Columbia University's School of Engineering. Before attending law school, Petitioner worked as an engineer for AT&T Bell Laboratories and Hewlett Packard. Inspired by the film "A Few Good Men," Petitioner changed careers to study law and serve the public. Petitioner is licensed to practice law in New Jersey but maintains his primary practice in the State of New York and has no personal connections within the New Jersey judicial system. Petitioner represented Respondent Janet Fou in a simple, uncontested divorce matter in the case Fou v. Fou. Petitioner received a legal fee of \$1,000 for this representation. The divorce proceeding was straightforward and involved no contested issues at the time of Petitioner's retention.

2. The Claims Against Petitioner

After the conclusion of the representation, Respondent Janet Fou and a group of attorneys initiated legal proceedings alleging that Petitioner had engaged in misconduct during his representation of Janet Fou. Specifically, the allegations claimed that Petitioner manipulated his client and colluded with her husband, Joe Fou, to Janet Fou's disadvantage in the uncontested divorce matter. Petitioner was not a party to the underlying matrimonial proceeding Fou v. Fou. Petitioner maintains that these allegations were fabricated and that the claims constituted a coordinated effort to frame him for conduct he did not commit. According to Petitioner, the group of attorneys manipulated the judicial system by constructing a false narrative unsupported by any evidence of actual damages sustained by Respondent Janet Fou.

3. The Attorney's Fee Award

The courts below awarded Respondent attorney's fees in the amount of \$1,311,832.94. This award consists entirely of legal fees, compounded with additional legal fees awarded to a prominent New Jersey law firm for (1) legal fees incurred in a subsequent motion to vacate the uncontested divorce judgment and (2) legal fees incurred in a subsequent contested divorce action, which had nothing to do with the Petitioner. No other damages were ever proven or awarded to Respondent Janet Fou. Petitioner contends that this award—more than 1,300 times the \$1,000 fee he received for the underlying representation—was baseless in both law and fact. Petitioner argues that Respondent never demonstrated she sustained any actual damages as a result of Petitioner's representation. The magnitude and composition of the judgment, Petitioner asserts, shocks the conscience and reflects a fundamental miscarriage of justice.

4. Ethics Proceedings and Exoneration

Parallel to the civil proceedings, the Office of Attorney Ethics ("OAE") investigated and prosecuted charges against Petitioner based on the same allegations. This disciplinary

investigation and prosecution continued for more than eight years. More than ten years after Judge Barry A. Weisberg of the Superior Court of New Jersey issued his September 12, 2012 decision (Docket No. FM-12-1685-09E), and in a subsequent opinion of the Appellate Division dated July 21, 2016 (Docket No. A-1569-14T3), arising from the matrimonial action (Fou v. Fou, 2020 N.J. Super. Unpub. LEXIS 1135), Petitioner Tung was afforded an opportunity to defend himself in an attorney ethics proceeding. In the decision rendered by judge Weisberg, the essential basis for the decision on the part of Petitioner Tung's unethical representation of Mrs. Fou was that Mr. Tung failed to incorporate all the terms in the Chinese Agreements into the English Property Settlement Agreement ("PSA") prepared by Mr. Tung. Judge Weisberg condemned Mr. Tung in his decision that the failure to incorporate Chinese Agreements into English PSA "was a knowing concealment of a relevant fact," which "rises to the level of a fraud upon the Court". Judge Weisberg's conclusion was based on the false statements made by attorney James Plaisted against Petitioner Tung in the absence of Petitioner Tung's participation in the proceeding that Petitioner Tung was given all Chinese Agreements between the Fous. The truth is that Petitioner Tung was not given nor was he aware the existence of all the Chinese agreements between the Fous. ("Pet. App." 26a-27a)

Petitioner asserts that both courts made adverse findings and criticisms about him—despite his non-party status and without his participation—that effectively amounted to a public reprimand and therefore a sanction. Petitioner further asserts that when judicial criticism of an attorney in an opinion or order rises to the level of a public reprimand, due process requires notice and an opportunity to be heard before such criticism is imposed. All of the false accusations against the Petitioner Tung could have been avoided if there were appropriate pertinent due process procedures implemented as outlined in *Bowers v. NCAA*, 475 F.3d 524 (3rd Cir. 2007).

On January 8, 2024, the District Ethics Committee of the Supreme Court of New Jersey rendered a decision dismissing all charges against Petitioner. (18a). On March 22, 2024, the Disciplinary Review Board of the Supreme Court of New Jersey affirmed the dismissal. (15a). The Hearing Panel for the Disciplinary Review Board consisted of Angelo A. Stio III, Paul Maselli, and Andrew Usmiani. (18a) Susan Perry Slay, Disciplinary Investigator of the Office of Attorney Ethics, conducted the investigation. After a thorough investigation and hearing, the panel cleared Petitioner's name and found no basis for the charges that had been pursued against him. The hearing panel specifically pointed out in the hearing report that Respondent Janet Fou's testimony was evasive and her story lacked credibility. (26a)

Petitioner further alleges that Judge Weisberg's decision was materially influenced by false statements made by attorney James Plaisted, Esq., and that Mr. Plaisted later acknowledged to a disciplinary investigator, Susan Perry Slay, in 2019 that he had made misstatements to the court. Petitioner contends that, had he been provided notice and an opportunity to participate, he could have rebutted those alleged misstatements and defended his conduct, and that the outcome would have been different.

5. Conflict with Lower Court Decisions and Need for Review

Despite Petitioner's complete exoneration by the Supreme Court of New Jersey's disciplinary authorities in 2024, the courts below have not vacated the \$1,311,832.94 attorney's fee judgment entered against Petitioner. Petitioner contends that the Appellate Division's decision conflicts with prior decisions of the Supreme Court of New Jersey and that no court in the State of New Jersey other than the Supreme Court can correct the errors perpetrated in this matter. The practical effect of the \$1,311,832.94 judgment, Petitioner argues, is equivalent to the revocation of his license to practice law. The judgment has

destroyed his aspiration to build a successful law practice and has devastated his career and his family. Petitioner asserts that this case warrants review because an attorney's professional license, livelihood, and reputation are at stake, and because the disciplinary exoneration by the Supreme Court's own branch office creates an irreconcilable conflict with the continued enforcement of the civil judgment.

Petitioner contends that this case warrants review by the Supreme Court of the United States because a monetary judgment in the amount of \$1,311,832.94 levied against an innocent attorney based on findings later determined to be unfounded, operates as the functional equivalent of depriving that attorney of the ability to practice law and can devastate the attorney's career and family. Petitioner further contends that notwithstanding the dismissal of all ethics charges against him, the \$1,311,832.94 judgment remains enforceable and continues to impair his constitutionally protected liberty and property interests.

THE SUPERIOR COURT OF NEW JERSEY DECISION

In or about June 23, 2023, the Superior Court of New Jersey denied Petitioner's cross motion to vacate the judgment dated January 11, 2019, the Court denied the cross motion on the ground that the relief requested is inconsistent with the decision of the Appellate Division in this matter without any analysis. In the mean, the Court granted Plaintiff's motion to amend the January 11, 2019 Final Judgment.

THE APPELLATE DIVISION DECISION

1. Legal Fees Alone Cannot Constitute Damages Without Proof of Underlying Loss

The Appellate Division failed to address whether a plaintiff in a legal malpractice action can establish damages merely by commencing litigation and incurring attorney fees,

without proving any underlying substantive loss. Under New Jersey law, the incurrence of legal fees alone does not constitute compensable damages in a legal malpractice action. To establish a legal malpractice claim, a plaintiff must demonstrate three elements: an attorney-client relationship creating a duty of care, breach of that duty, and proximate causation of actual damages. Actual damages must be real and substantial, not speculative.

In order for attorney fees incurred in underlying litigation to constitute recoverable damages in a malpractice action, those fees must represent only a portion of the total damages suffered by the plaintiff in the underlying matter. In *re Estate of Lash*, 169 N.J. 20 (2001). As the New Jersey Supreme Court established in *In re Estate of Lash*, a plaintiff has the right to recover attorney fees incurred in litigation with a third person if the plaintiff became involved in that litigation as a result of a breach of contract or tortious act by the defendant. In *re Estate of Lash*, 169 N.J. 20 (2001). However, this principle presupposes that the plaintiff suffered actual damages in the underlying litigation beyond the mere incurrence of legal fees.

2. The Plaintiff Failed to Prove Causation and Actual Damages

The attorney fees incurred in the underlying uncontested divorce case cannot stand alone as damages sustained by the Plaintiff, because Plaintiff failed to prove both causation and actual damages resulting from the attorneys' alleged negligence in the underlying divorce proceeding. When a plaintiff fails to prove that she suffered any actual damages in the underlying matter, she necessarily fails to prove that the defendants' negligence caused any compensable loss. *See Lovett v. Estate of Lovett*, 250 N.J.Super. 79, 593 A.2d 382 (CDAC 1991) (Even if attorney was negligent and breached his duty in his representation, plaintiffs must demonstrate that they suffer a loss proximately caused by attorney's negligence).

In *Lovett v. Estate of Lovett*, the court found that even where an attorney breached his duty, the plaintiffs failed to demonstrate a causal connection between that breach and any proven losses. The court further found that the attorney fees incurred were neither reasonably necessary nor a foreseeable result of the attorney's breach. *Lovett* is directly on point and establishes that plaintiffs must demonstrate they suffered a loss proximately caused by the attorney's negligence, even when the attorney's breach of duty is established.

3. The Appellate Division Misapplied Controlling Precedent

The Appellate Division relied on *Lovett* as one of two cases supporting its conclusion that Defendants are responsible for Plaintiff's legal fees to vacate the property settlement agreement and judgment of divorce. However, the Appellate Division misapplied *Lovett* by awarding attorney fees without requiring the Plaintiff to first prove that she suffered underlying substantive damages in the matrimonial action. *Lovett* stands for the proposition that attorney fees are not recoverable absent proof of causation and actual damages, yet the Appellate Division awarded such fees despite the absence of any showing that Plaintiff suffered actual loss beyond the fees themselves. This misapplication of controlling New Jersey Supreme Court precedent constitutes reversible error.

4. Application of New Jersey Court Rule 4:50-1 to Vacate the Amended Final Judgment

New Jersey Court Rule 4:50-1 permits a court to relieve a party from a final judgment or order for mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, void judgments, or any other reason justifying relief from the operation of the judgment. N.J. Court Rules, R. 4:50-1, Grounds of Motion. Relief under Rule 4:50-1(f) is available only when truly exceptional circumstances are present and is as expansive as the need to achieve equity and justice. The rule is limited to

situations in which, were it not applied, a grave injustice would occur. See, *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 38 A.3d 570 (2012)

The Superior Court's denial of Petitioner's cross-motion to vacate without any substantive analysis was an abuse of discretion. The court's conclusory statement that the relief requested was inconsistent with the Appellate Division's decision failed to engage with Petitioner's arguments or articulate the equitable factors it considered. Where a trial court denies relief under Rule 4:50-1(f) without meaningful analysis, it fails to exercise the discretion required by the rule. See, *257-261 20th Ave. v. Roberto*, 259 N.J. 417 (2023).

In addition, The Appellate Division did not analyze and address the issues raised in the appeal that the newly discovered evidence that Plaintiff's attorney James Plaisted's open admission to investigator of OAE will definitely change the outcome of the trial. The Appellate Division disregarded altogether the recent decision of dismissal of all charges against Petitioner Tung by the Supreme Court of New Jersey District Ethics Committee and the Disciplinary Review Board of the Supreme Court of New Jersey will definitely change the outcome of the malpractice trial. In fact, if the analysis is carried out, there would be only one conclusion to vacate the wrongful judgment.

Instead, the Appellate Division affirmed the decision below to award sanctions against the Petitioner here. Where does the justice lie in awarding the astronomical attorney fees of \$1,311,832.94 to attorneys who had openly admitted to commit fraud upon the court before the investigator from the Office of Attorney Ethics at the expense of the innocent victim and who had failed to establish the elements of causation and actual damage in the underlying matrimonial case within the legal malpractice case.

5. The Award of Sanction Against the Petitioner Is Groundless

Under the totality of the circumstances, the award of sanction against the Petitioner by the court below is groundless on the law and facts, when an innocent attorney is fighting for his honor, his license to practice law, his career, and his life and is fighting to undo what he had been framed by the unscrupulous attorneys in the legal proceedings. The process to undo the damages sustained by the Petitioner is a very long process, especially under the situation where the Petitioner had been casted by various negative courts' published decisions, which were resulted by Respondent and her attorneys' malicious prosecution.

REASONS FOR GRANTING THE WRIT

This case presents issues of exceptional public importance warranting this Court's review. Petitioner submits that the decision below departs from established principles governing legal malpractice actions and attorney fee awards, threatens the integrity of the bar and public confidence in the judiciary, and establishes a dangerous precedent that will encourage abuse of the legal process.

1. The Award of \$1,311,832.94 in Attorney's Fees to Counsel Who Allegedly Committed Fraud Upon the Court Constitutes a Miscarriage of Justice

The attorney's fee award in this case is unprecedented and unconscionable. According to the record, Respondent's counsel James Plaisted openly admitted to an investigator from the Office of Attorney Ethics that he committed fraud upon the court in 2019 during a Family Court reopening proceeding to set aside the Property Settlement Agreement and Judgment of Divorce. This admission came one year after the 2018 trial in the underlying malpractice action had concluded.

Despite this alleged admission of professional misconduct, Respondent's counsel received no discipline, sanction, or even a modest admonishment. Instead, the Court below awarded him and his firm \$1,311,832.94 in legal fees. Petitioner submits that this outcome sends a troubling message to the public and the bar: that attorneys who allegedly lie to courts may nonetheless be rewarded with extraordinary fee awards funded by opposing parties.

The integrity of the judicial system depends upon the honesty of the lawyers who appear before it. When a court awards substantial fees to counsel who have allegedly perpetrated fraud upon a tribunal, public confidence in the administration of justice is undermined. This case calls for the exercise of this Court's supervisory authority to address conduct that threatens the reputation of the New Jersey Bar and the credibility of the courts.

2. The Award of Attorney's Fees Compounded with Attorney's Fees in a Legal Malpractice Case Where Causation and Actual Damages Were Never Established Is Unsupported by Precedent

Petitioner submits that this case represents the first instance in American jurisprudence where an astronomical and excessive attorney fee award exceeding \$1.3 million was granted to Respondent's attorneys for legal fees consisting of attorney fees compounded with attorney fees in a legal malpractice case where the essential elements of causation and actual damage were never proven.

In the case at hand, Respondent sustained no actual damages other than the legal fees she incurred to reopen her matrimonial case and obtain a different amended judgment of divorce based on the alleged breach of duty by Petitioner during his representation. The entire \$1,311,832.94 judgment consists solely of legal fees awarded to a prominent New Jersey law firm.

No other economic loss, no injury to person or property, and no demonstrable harm beyond the cost of new legal representation was established.

This ruling is unsupported by any precedent in the State of New Jersey or perhaps across the entire nation. Petitioner is not aware of any case in which such a massive fee award was sustained in a legal malpractice action absent proof that the plaintiff suffered actual damages independent of the fees incurred in remedying the alleged malpractice.

3. The Decision Below Establishes a Dangerous Precedent That Plaintiffs Can Manufacture Damages in Legal Malpractice Cases Simply by Incurring Legal Fees

The decision below creates a perverse incentive structure that will invite abuse. If the ruling stands, it establishes the precedent that a plaintiff can create recoverable damages in any legal malpractice case simply by commencing litigation and incurring legal fees, so long as there is some evidence that the defendant attorney breached a duty in providing legal services.

Under this framework, the causation element of a malpractice claim—traditionally requiring proof that but for the attorney's negligence, the plaintiff would have obtained a more favorable result—is effectively eliminated. A plaintiff need only show that the defendant attorney made an error and that the plaintiff then hired new counsel. The fees paid to the new counsel become the "damages," which in turn justify an award of yet more fees under a fee-shifting theory.

This construction allows damages to be manufactured through the very act of pursuing the malpractice claim. It transforms what should be a remedial action—compensating clients for losses caused by attorney negligence—into a lucrative opportunity for attorneys willing to pursue speculative claims. The compounding effect is exponential: attorney fees

become damages, damages justify fee awards, and the cycle continues without any requirement that the client demonstrate she was left in a worse position than she would have occupied absent the alleged malpractice.

4. By Permitting Fee-Shifting in a Legal Malpractice Case Where Causation and Damage Were Never Established, the Decision Below Will Encourage Unscrupulous Attorneys to Abuse the Legal Process for Personal Financial Gain

Petitioner respectfully submits that the decision below will embolden unscrupulous attorneys to fabricate or exaggerate malpractice claims for their own financial benefit. When legal fees alone—disconnected from any showing of actual harm to the client—can support a multimillion-dollar judgment, the temptation to manipulate the system becomes overwhelming.

In the instant matter, Petitioner contends that the attorneys for Plaintiff fabricated a nonexistent malpractice case for their personal financial gain. According to Petitioner, these attorneys repeatedly misrepresented facts to various courts. Petitioner alleges that these misrepresentations were ultimately admitted by Plaintiff's attorneys to an investigator from the Office of Attorney Ethics after the completion of the malpractice trial.

Now, despite these alleged admissions and the absence of proven actual damages, the courts below seek to reward Plaintiff's attorneys with an astronomical and excessive fee award. This outcome, Petitioner submits, rewards rather than deters the abuse of legal process. It signals to the bar that even allegations of fraud upon the court will not bar recovery, and that speculative malpractice claims unsupported by proof of actual harm can yield extraordinary windfalls.

**5. The Decision Below Undermines Public Confidence
in the Integrity and Fairness of the
New Jersey Judiciary**

The effect of this judgment is to create the appearance that well-connected attorneys and prominent law firms may manipulate the judicial process with impunity, while out-of-state practitioners and solo practitioners are subjected to ruinous judgments without regard to established legal standards.

Petitioner is an out-of-state attorney with no personal connections to the New Jersey judiciary. He received a modest \$1,000 fee for representing Plaintiff in a simple, uncontested divorce matter. More than a decade later, he faces a \$1,311,832.94 judgment based on alleged misconduct in that representation—despite the fact that no actual damages were proven and despite his complete exoneration by the Disciplinary Review Board of the Supreme Court of New Jersey in 2024.

The public has a right to expect that courts will apply the law evenhandedly, that attorneys will be held to consistent standards of conduct, and that judgments will rest on evidence rather than influence. When a court awards over \$1.3 million to attorneys who have allegedly committed fraud upon the court, while requiring no showing of actual harm to the client, public confidence in the fairness and integrity of the judicial system is shaken.

This case calls for the exercise of this Court's supervisory power to restore public trust, correct a manifest injustice, and reaffirm the fundamental principle that attorney fee awards and damages in legal malpractice actions must rest on proof of actual harm, not on manufactured claims designed to enrich counsel at the expense of their colleagues and the credibility of the bar.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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263 N.J. 303
Supreme Court of New Jersey Petitions for
Certification. This disposition is referenced in the
Atlantic Reporter.
Supreme Court of New Jersey.

Janet Yijuan Fou, Plaintiff-Respondent,

v.

KEVIN KERVENG TUNG, PC, and Kevin Tung,
Esq., Defendants-Petitioners.

C-435 September Term 2025 090341
March 27, 2026

ORDER

A petition for certification of judgment in A-003377-22 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 24th day of March, 2026.

CLERK OF THE SUPREME COURT

All Citations

263 N.J. 303

263 N.J. 304
Supreme Court of New Jersey Petitions for
Certification. This disposition is referenced in the
Atlantic Reporter.
Supreme Court of New Jersey.

Janet Yijuan Fou, Plaintiff-Respondent,

v.

KEVIN KERVENG TUNG, PC, and Kevin Tung,
Esq., Defendants-Petitioners.

C-437 September Term 2025 090342
March 27, 2026

ORDER

A petition for certification of judgment in A-000557-23 having
been submitted to this Court, and the Court having considered
the same;

It is ORDERED that the petition for certification is denied,
with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at
Trenton, this 24th day of March, 2026.

CLERK OF THE SUPREME COURT

All Citations

263 N.J. 304

2025 WL 260915 and 2025 LX286663
Only the Westlaw and Lexis citations are currently available.
UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Janet Yijuan Fou, Plaintiff-Respondent,

v.

KEVIN KERVENG TUNG, PC, and Kevin Tung,
Esq., Defendants-Appellants.

DOCKET NO. A-3377-22
Argued November 20, 2024

Decided January 22, 2025

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Docket No. L-6259-12

Attorneys and Law Firms

Kevin K. Tung, Esq. attorney for appellant Kevin Kerveng
Tung, PC

Kevin K. Tung, Esq., appellant pro se.

Kevin K. Tung, Esq. argued the cause for appellants

Pashman Stein Walder Hayden, PC, attorneys for respondent
(James A. Plaisted and Michael J. Zoller, on the brief)

James A. Plaisted argued the cause for respondent
Before Judges Currier and Marczyk

Opinion

PER CURIAM

This matter arises out of post-judgment proceedings following
a legal malpractice trial in which the jury awarded plaintiff

\$500,000 in damages against defendants (Tung), finding Tung was negligent in his representation of plaintiff in a matrimonial action. The verdict was for legal fees plaintiff's new counsel incurred to invalidate the property settlement agreement (PSA) and final judgment of divorce (FJOD) and obtain an amended FJOD.

This court affirmed the jury's finding of negligence but modified the award to \$449,798.59 to reflect the evidence regarding the attorney's fees and costs required "to remedy the errors in the PSA and original judgment of divorce." *Fou v. Tung*, No. A-4690-18 (App. Div. Aug. 25, 2021) (slip op. at 34). We remanded for the trial court to enter a revised judgment in accordance with our opinion.

Following the remand, and before the trial court revised the judgment, Tung moved to vacate the original final judgment: the same final judgment he had challenged on appeal, and which had just been affirmed, as modified, by this court. The trial court denied the motion in a June 23, 2023 order, explaining the relief Tung sought was inconsistent with this court's decision. On July 10, 2023, the trial court revised the FJOD to reflect this court's decision. Tung appeals from both orders. We affirm.

The facts and procedural history are set forth in our prior decision and need not be repeated here. Essentially, after plaintiff was divorced from her husband, she retained new counsel who successfully moved to vacate the FJOD and reopen discovery as to Fou's assets and income. As stated, the court entered an amended FJOD. We affirmed the order and award of counsel fees. See *Fou v. Fou*, No. A-1569-14 (App. Div. July 21, 2016) (slip op. at 25).

After a trial in the subsequent legal malpractice case, the jury found Tung negligent and awarded plaintiff \$500,000 in damages. The trial court denied Tung's motion for judgment notwithstanding the verdict (JNOV), or alternatively, for a

new trial, finding the trial evidence supported the jury's verdict and noting plaintiff's damages included "those legal fees required to invalidate" the PSA and procure an amended FJOD. The court also awarded plaintiff's counsel \$702,000 for fees incurred in prosecuting the action.

In appealing the judgment, Tung raised numerous issues, as described in our decision, including that plaintiff did not establish she suffered any financial damages, and the \$500,000 damages award was not supported by the evidence or applicable law. We considered and rejected all of Tung's arguments, affirming the orders denying Tung's motions for JNOV and for a new trial and for reconsideration of that order.

However, we slightly modified the judgment amount to conform with the evidence. Plaintiff and her expert testified she incurred legal fees of \$449,798.59 to vacate the PSA and judgment of divorce and obtain the amended FJOD. Therefore, we vacated the damages award in the final judgment and remanded for the court to enter a revised judgment of \$449,798.59 in damages and for interest on the attorney's fee award.

In a July 10, 2023 order, the trial court entered the revised judgment as follows: \$449,798.59 in damages; \$58,698.72 in "[p]rejudgment interest on the damages award in accordance with R[ule] 4:42-11"; \$702,000 for fees and costs; and \$101,335.63 in "[p]rejudgment interest on the award for fees and costs calculated in accordance with the Court Rules[.]"

In this appeal, Tung contends, among other arguments, that: this court violated his due process rights in establishing a damages award of \$449,798.50; the FJOD should be vacated under Rule 4:50-1(a), (c), and (f); and plaintiff is not entitled to counsel fees in either the legal malpractice case or for the work performed in procuring the amended FJOD. In great part, Tung reiterates arguments previously presented in his two

prior appeals that were considered and rejected by this court.¹ We will not address those points again.

After a careful review, we can quickly dispense with Tung's contentions regarding the orders on appeal. In the first appeal following the legal malpractice verdict, we affirmed the orders denying JNOV and for a new trial. *Fou*, slip op. at 55 (App. Div. Aug. 25, 2021). Therefore, Tung's motion before the trial court to vacate the judgment was meritless as the arguments were moot. On July 10, 2023, the trial court properly amended the judgment to conform with this court's decision modifying the damages award. The court did not err in following this court's instructions.

Any arguments we have not directly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

2025 WL 365574 and 2025 LX 262316
Only the Westlaw and Lexis citations are currently available.
UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Janet Yijuan Fou, Plaintiff-Respondent,

v.

KEVIN KERVENG TUNG, PC, and Kevin Tung,
Esq., Defendants-Appellants.

DOCKET NO. A-0557-23
Submitted November 20, 2024

Decided February 3, 2025

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Docket No. L-6259-12

Attorneys and Law Firms

Kevin K. Tung, Esq. attorney for appellant Kevin Kerveng
Tung, PC

Kevin K. Tung, Esq., appellant pro se.

Pashman Stein Walder Hayden, PC, attorneys for respondent
(James A. Plaisted and Michael J. Zoller, on the brief)

Before Judges Currier and Marczyk

Opinion

PER CURIAM

In this matter, heard back-to-back with *Fou v. Tung*, No. A-377-22 (App. Div. (Jan. 22, 2025)), we consider the award of attorney's fees to plaintiff under N.J.S.A. 2A:15-59.1 as a sanction for defendants' (Tung) frivolous filing. Because we

discern no abuse of discretion in the court's order awarding the fees, we affirm.

The facts and lengthy procedural history are set forth in our prior opinions and need not be repeated here. Essentially, Tung represented plaintiff in a matrimonial action against her husband. *Fou v. Tung* (Fou), No. A-4690-18 (App. Div. Aug. 25, 2021) slip op. at 2-3. After the entry of final judgment of divorce, plaintiff sued Tung, alleging he was negligent in his representation of her. *Id.* at 13-14. The jury agreed and awarded plaintiff damages. *Id.* at 24-25. We affirmed the finding of negligence but slightly modified the final judgment to comport with the evidence presented at trial. *Id.* at 55-56. We remanded to the trial court to enter a revised judgment reflecting the proper award of damages. *Id.* at 56.

After the New Jersey Supreme Court denied certification, *Fou v. Tung*, 251 N.J. 192 (2022), Tung moved for leave to file a petition for writ of certiorari to the United States Supreme Court. The petition was denied in January 2023. *Tung v. Fou*, 143 S.Ct. 746 (2023).

Tung also sought to collaterally attack the judgment by attempting to intervene in the divorce proceedings. *Fou*, slip op. at 13. The trial court and this court denied the motions. Thereafter, Tung again petitioned for certification to the New Jersey Supreme Court, which denied the petition in April 2021. *Fou v. Fou*, 246 N.J. 49 (2021). The United States Supreme Court subsequently denied certification. *Tung v. Fou*, 142 S.Ct. 100 (2021).

When Tung had exhausted all avenues for appeal, plaintiff requested the trial court enter the revised final judgment in accordance with this court's August 25, 2021 opinion. In response, Tung moved to vacate the final judgment.

The trial court denied Tung's motion and subsequently entered an amended final judgment. The trial court also entered an

order finding Tung's motion was a frivolous filing under the Frivolous Litigation Statute (FLS), N.J.S.A. 2A:15-59.1., and awarding plaintiff attorney's fees of \$7,965 as a sanction permitted under the statute.

Tung appealed from both orders. We affirmed the order entering an amended final judgment. *Fou v. Tung*, No. A-3377-22 (App. Div. Jan. 22, 2025) (slip op. at 5).

We now address the order for sanctions. In granting plaintiff's application for attorney's fees under the FLS, the court stated:

The motion is granted because [Tung's] motion to vacate judgment, which essentially asked a trial . . . court to take action which was refused by the Appellate Division, the [New Jersey] Supreme Court and the United States Supreme Court in the course of [Tung's] unsuccessful appeals, was frivolous per se as a matter of law, a fact that would be evident to anyone with a cursory knowledge of the structure of the state judiciary under Article VI of the NJ Constitution, let alone someone licensed to practice law in this State.

After considering the documents supporting the application, the court reduced the requested hourly rate, denied an enhancement and awarded plaintiff \$7,965 in attorney's fees relating to the work performed regarding Tung's motion to vacate final judgment.

On appeal, Tung contends the court erred in awarding fees because he filed the motion in good faith, and plaintiff did not serve the appropriate notice under the FLS prior to requesting sanctions.

We review a trial judge's decision on a motion for sanctions under the FLS for an abuse of discretion. *Wolosky v. Fredon Tp.*, 472 N.J. Super. 315, 327, 277 A.3d 1 (App. Div. 2022) (citing *McDaniel v. Man Wai Lee*, 419 N.J. Super. 482, 498, 17 A.3d 816 (App. Div. 2011)).

The FLS "serves a punitive purpose, seeking to deter frivolous litigation," and "a compensatory purpose, seeking to reimburse 'the party that has been victimized by the party bringing the frivolous litigation.'" *Toll Bros., Inc. v. Twp. of W. Windsor*, 190 N.J. 61, 67, 918 A.2d 595 (2007) (quoting *Deutch & Shur, P.C. v. Roth*, 284 N.J. Super. 133, 141, 663 A.2d 1373 (Law Div. 1995)).

The FLS provides that a trial judge may find a filing of a non-prevailing party frivolous when:

- (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
- (2) The non-prevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

[N.J.S.A. 2A:15-59.1(b)].

In our decision affirming the final judgment with modification, we instructed "the [trial] court to enter a revised judgment awarding plaintiff \$449,798.59 in damages and providing for interest on the attorney's fee award in accordance with the Rules of Court." *Fou*, slip op. at 56. The remand was only for

a clerical task; the remainder of our lengthy thorough opinion considered and rejected every argument proffered by Tung to overturn the jury verdict and other components of the final judgment. There was no provision for Tung to retry or relitigate previously raised issues. Tung then appealed our decision to our Supreme Court and through the federal court system, including the United States Supreme Court. All appeals were denied.

Therefore, Tung's motion to vacate the final judgment could only be construed as being brought in bad faith. The procedural history left Tung without any grounds to attack a trial court order that was entered pursuant to this court's order. Tung's motion reiterating arguments as to previously decided issues was made in bad faith. As an attorney, Tung knew or should have known that after he pursued and exhausted every avenue of appeal, that any prior litigated and decided issues would be precluded and in turn deemed frivolous.

We turn to Tung's procedural argument regarding the sanction. As we have stated, the FLS and *Rule 1:4-8* are interpreted restrictively so that "the right of access to the court [is] not . . . unduly infringed upon, honest and creative advocacy [is] not . . . discouraged, and the salutary policy of the litigants bearing, in the main, their own litigation costs, [are] not . . . abandoned." *Borough of Englewood Cliffs v. Trautner*, 478 N.J. Super. 426, 444, 315 A.3d 800 (App. Div. 2024) (quoting *Wolosky*, 472 N.J. Super. at 327).

Prior to seeking sanctions under *Rule 1:4-8*, the movant must provide written notice to the offending party demanding withdrawal of the frivolous pleading. *Toll Bros.*, 190 N.J. at 69. Specifically, *Rule 1:4-8(b)(1)* requires the

notice and demand . . . shall (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that

the paper be withdrawn, and (iv) give notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within [twenty-eight] days of service of the written demand. If, however, the subject of the application for sanctions is a motion whose return date precedes the expiration of the [twenty-eight]-day period, the demand shall give the movant the option of either consenting to an adjournment of the return date or waiving the balance of the [twenty-eight]-day period then remaining. A movant who does not request an adjournment of the return date as provided herein shall be deemed to have elected the waiver. The certification shall also certify that the paper objected to has not been withdrawn or corrected within the appropriate time period provided herein following service of the written notice and demand.

Rule 1:4-8(f) states: "[t]o the extent practicable, the procedures prescribed by this rule shall apply to the assertion of costs and fees against a party other than a pro se party pursuant to N.J.S.A. 2A:15-59.1." "Thus, a litigant moving for counsel fees and costs pursuant to N.J.S.A. 2A:15-59.1 is required to comply with *Rule 1:4-8(b)(1)* . . . , but only [t]o the extent practicable." *Bove v. AKPharma Inc.*, 460 N.J. Super. 123, 150-51, 213 A.3d 948 (App. Div. 2019) (second alteration in original) (quoting *R. 1:4-8(f)*).

The *Rule* requires a court "to assess whether it is practicable under all the circumstances to require strict adherence to the requirements of *Rule 1:4-8*." *Toll Bros.*, 190 N.J. at 72. "If a court determines that compliance could have occurred earlier, the sanction should be reduced concomitantly." *Id.* at 72-73.

"Counsel fees and costs should be calculated from the point when compliance was practicable." *Id.* at 73. When the court determines compliance was practicable from the time ordinarily required under the rule, sanctions may be entirely denied. *Ibid.* Further, the law does not automatically excuse noncompliance with the safe-harbor provision just because the moving party believes that any notice and demand would be meaningless and ignored by the offending party. *Id.* at 71-73.

Here, plaintiff did not provide notice to Tung as required under *Rule* 1:4-8(b)(1)'s safe-harbor provision and the trial court did not conduct a practicability analysis. However, the *Toll Brothers* Court has advised the practicality element of the *Rule* "requires a fact-sensitive analysis." 190 N.J. at 71.

In reviewing the unique circumstances presented here, we are satisfied it was not practicable for plaintiff to serve a safe-harbor letter. The initial matrimonial action began more than fifteen years ago. The trial in the malpractice action took place in 2018. Our opinion was issued in August 2021, affirming the jury's finding of negligence and remanding solely for the trial court to enter an amended judgment in accordance with our decision. For the next two years, Tung pursued appeals in our Supreme Court and in the federal judicial system. All of his arguments regarding the trial court's and this court's orders were rejected. Nevertheless, in May 2023, Tung moved to vacate the final judgment. As explained above, this was undisputably a frivolous filing. Thereafter, plaintiff moved for sanctions under the FLS and *Rule* 1:4-8.

In light of the unprofessional behavior exhibited by Tung in bad faith throughout this litigation, we cannot reward Tung by requiring strict adherence to the *Rule* in this case. To do so would undermine the principles behind the FLS and *Rule* 1:4-8, including "the policy interests of deterrence and reparations." *Toll Bros.*, 190 N.J. at 72. Therefore, we are satisfied the trial court did not abuse its discretion in awarding plaintiff counsel fees under *Rule* 1:4-8.

Affirmed.

All Citations

DISCIPLINARY REVIEW BOARD
OF THE SUPREME COURT OF NEW JERSEY

TO: Jennifer Iseman, Assistant Ethics Counsel
Office of Attorneys Ethics
P.O. Box 963
Trenton, NJ 08625

RE: In the Matter of Kevin Kerveng Tung
Docket No. DRB 24-015
District Docket Nos. XIV-2016-0491E and VII-2021-
0902E

FROM: Barry R. Petersen, Jr.
Deputy Counsel

Date: March 22, 2024

Dear Ms. Iseman:

The Disciplinary Review Board has considered your appeal from the post- hearing dismissal of this matter by the District VII Ethics Committee (DEC). Upon full review and consideration of the matter, the Board has affirmed the Committee's action. The Board's determination is based on its review of the entire file, including your appeal, the hearing panel report, and all underlying documentation. Following this review, the Board adopted the conclusions of the DEC, as reflected in its report, and found no clear and convincing evidence of unethical conduct. The Board, therefore, has dismissed your appeal.

Very truly yours,

Barry R. Petersen, Jr. Deputy Counsel

SUPREME COURT OF NEW JERSEY
DISTRICT VII ETHICS COMMITTEE
FOR MERCER COUNTY

TO: Jennifer Iseman, Assistant Ethics Counsel
Office of Attorneys Ethics
P.O. Box 963
Trenton, NJ 08625

RE: Office of Attorney Ethics v. Tung
Docket Nos. XIV-2016-0491E and VII-2021-0902E

FROM: John J. Zefutie, Jr.
Secretary, District VII Ethics Committee

Dated: January 8, 2024

Dear Ms. Iseman:

The District VII Ethics Committee has conducted a formal hearing into the charges set forth in the Complaint in the above-referenced matter. On review of all the evidence presented to it, the hearing panel concluded that the evidence did not support the finding that clear and convincing evidence supported any of the charges against the respondent. A copy of the Hearing Report Dismissing Complaint is enclosed. As a result, I have been directed to advise you that the grievance has been dismissed and the file closed.

If you believe that the disposition of the matter is in error, you may appeal this decision to the Supreme Court's Disciplinary Review Board within **twenty-one (21)** days of your receipt of this letter. For your convenience, a copy of the Notice of Appeal form is enclosed. You may also download additional copies of the

same form from the Disciplinary Review Board's website:

<https://www.njcourts.gov/attorneys/drbfri.html>
(click on "Ethics Notice of Appeal Form").

On the Notice of Appeal form, you would specify the name of the attorney complained against, the docket number, and your name and address. In the space provided on that form, or on additional pages, you would specify your reasons for disagreeing with the dismissal. When you submit your notice of appeal to the Disciplinary Review Board, you must attach a copy of this letter and a copy of the Hearing Report Dismissing the Complaint.

Within 21 days of your receipt of this notice, the appeal form and any attachments should be submitted to the Disciplinary Review Board at the following address:

Disciplinary Review Board, Appeals Unit Supreme Court
of New Jersey Richard J. Hughes Justice Complex
P.O. Box 962 Trenton,
New Jersey 08625
(phone:609 815-2920)
(fax: 609 815-2921)

Sincerely,

John J. Zefutie, Jr.
Secretary,
District VII Ethics Committee

SUPERIOR COURT OF NEW JERSEY
DISTRICT XIV ETHICS COMMITTEE

OFFICE OF ATTORNEY ETHICS, Complaint,
v.
KEVIN K. TUNG, Respondent

Disciplinary Action, Complex Misconduct R.1:20-4

DOCKET NO.: XIV-2016-0491E

HEARING REPORT RECOMMENDING
DISMISSAL OF THE CHARGES AGAINST
RESPONDENT

HEARING PANEL: Angelo A. Stio III, Chair
Paul Maselli, Esq.
Mr. Andrew Usmiani, Public Member

TO THE HONORABLE CHAIR AND MEMBERS OF
THE DISCIPLINARY REVIEW BOARD:

The above-referenced Hearing Panel held hearings on February 27, February 28, and March 1, 2023 in the above referenced matter and respectfully submits the below Findings of Fact and Conclusions of Law in accordance with R. 1:20-6 (c) (2) (E).

PROCEDURAL HISTORY

1. On August 28, 2018, the Office of Attorney Ethics ("OAE") filed a Complaint ("Comp.") against Kevin K. Tung, Esq. (Respondent) alleging Respondent violated the following Rules of Professional Conduct ("RPC"):

a. R.P.C. 1.1(a) by engaging in gross negligence

in his representation of client Janet Fou ("Client");

b. R.P.C. 1.4(b) and (c) for failure to communicate with the Client and keep Client properly informed about the status of her matter;

c. R.P.C. 1.7 (a) (1) by having a conflict of interest based on allegedly representing both parties in a divorce proceeding;

d. R.P.C. 5.4(c) by allegedly allowing his Client's husband (i.e., the adversary) to direct the representation of his Client;

e. R.5.3-5 by failing to comply with the requirements for fee agreements in matrimonial matters.

2. The hearing in this matter was initially scheduled to occur on March 11, 2019. The hearing began and proceeded for approximately half a day. However, due to Respondent raising the issue of there being civil litigation pending that was directly related to the matters addressed in the OAE's Complaint, the hearing did not continue, and this matter was placed on untriable status from March 12, 2019 through September 10, 2021.

3. On October 13, 2021, Respondent filed a Motion to Dismiss the OAE's Complaint. Respondent claimed the OAE's investigation and prosecution of this matter violated Respondent's due process rights. Respondent's motion was denied by way of an Order and Opinion entered by the Chair on October 31, 2022.

4. On November 7, 2022, a Scheduling Order was entered, which set forth production deadlines and scheduled the hearing to take place via Zoom from February 27, 2023

through March 3, 2023.

5. On December 16, 2022, Respondent filed with the New Jersey Supreme Court (the Court) a Motion for Leave to Appeal to Seek Interlocutory Review of A Constitutional Challenge to Proceedings. The Court denied this Motion by Order dated September 12, 2023.

6. On February 27, 2023, February 28, 2023, and March 1, 2023, a three-day hearing of this matter was conducted remotely via Zoom. The hearing panel ("Panel") heard testimony from (i) the OAE's witness, Janet Fou, who was the client of Respondent and (ii) Respondent on his own behalf.

7. The exhibits listed on Exhibit A were considered and admitted into evidence at the hearing:

FINDINGS OF FACT

1. Respondent was admitted to the Bar of the State of New Jersey in 1998 and at all relevant times maintained an office in the State of New Jersey at 1744 Highway 27, Edison, New Jersey. [Comp. at ¶¶1 and; Ans. at ¶¶1 and 2].

2. There was no evidence introduced that the Respondent has been disciplined by the Bar of the State of New Jersey.

3. Respondent did not know the Janet Fou and Joseph Fou prior to the meeting on February 15, 2009. [2/28/2023 OAE Transcript at T74: 20 to T75:20].

4. Client Janet Fou spoke Shanghainese and met with Respondent and her husband Joseph Fou (collectively Janet Fou and Joseph Fou are referred to as "Fous") at

Respondent's office on February 15, 2009. [2/27/2023 OAE Transcript at T43:35].

5. The Fous met with Respondent for the purpose of obtaining an uncontested divorce. [2/28/2023 OAE Transcript at T84:15 to T86:23].

6. At the meeting Respondent advised the Fous that he could only represent one party and asked, which of the Fous would be the Plaintiff and which would be the Defendant. [2/27/2023 OAE Transcript T43:6 to T44:25 and T75:3 to T76:23].

7. Ms. Fou was designated as the Plaintiff and Respondent's client. [Comp., ¶28; Ans. at ¶28].

8. Joseph Fou and Client advised Respondent that they had worked out the division of their property already. [2/28/2023 OAE Transcript at 86:8 - 23].

9. During the February 15, 2009, the Fous asked Respondent to notarize an agreement written in Chinese that outlined their separation (the "Chinese Agreement"). [Ex. P-4; Comp. at ¶30-31 and Ans. at ¶30-31].

10. Respondent notarized the Chinese Agreement and was given a copy of it for purposes of drafting a Property Settlement Agreement for the divorce. [Comp. at ¶37].

11. On February 15, 2009, the Fous also signed a Supplemental Divorce Agreement ("SDA") that was written in Chinese and outlined an agreement of the distribution of the Fous' property. [Exhibit, P-5].

12. Respondent was not asked to notarize the SDA and Respondent was never given a copy of the SDA.

[2/28/2023 OAE Transcript 8:8 to 21].

13. The Fous also did not tell Respondent about the existence of the SDA. [Id., 8:15 to 21].

14. After the February 15, 2023 meeting, Respondent prepared a Property Settlement Agreement ("PSA") consistent with the terms of the Chinese Agreement. [Id., 108:4 to 19].

15. On February 27, 2009, Respondent met with Mrs. Fou and Mr. Fou to go over the PSA and other documents. The meeting lasted for approximately one hour. [Id., 15:20 to 16:21].

16. During the meeting Respondent reviewed the Summons, Complaint and the PSA with Mrs. Fou and Mr. Fou in their native language. [2/28//2023 OAE Transcript, 55:19 to 56:4].

17. No one expressed disagreement or questioned the contents of the Summons, Complaint or the PSA. [Id.]

18. On February 27, 2009, Mrs. Fou signed a fee agreement for \$1,000, wherein she retained Respondent to prepare an uncontested divorce document. The \$1,000 fee included a \$275 Court filing fee. [Exhibit P-15].

19. On March 5, 2009, Respondent filed the Complaint for Divorce on behalf of Janet Fou. [Comp. at ¶78; Exhibit P-21].

20. On March 24, 2009, Respondent's Office emailed an Acknowledgement of Service and Waiver of Right to Answer (Waiver) to Joseph Fou, which Mr. Fou signed and returned that same day. [Comp. at ¶79; Exhibit P-22].

21. On March 26, 2009, Respondent's office emailed Joseph Fou, confirmed receipt of the Waiver, and stated, "[b]efore mailing documents to the court for filing, we want to make sure that your wife is still alive. I tried to call her, but the line was busy. Therefore, please ask her to call us as soon as possible." [Exhibit P-23].

22. Respondent's client, Janet Fou, was not copied on or informed about this correspondence between her attorney and the opposing party. [See Exhibits P-22 and P-23; Comp. at ¶81; Ans. at ¶81].

23. On March 26, 2009, Respondent's office forwarded to the Court the documents required for an uncontested divorce hearing. [Exhibit P-24].

24. The terms of SDA were not included into the PSA that was submitted to the Court for purposes of obtaining an uncontested divorce. [Compare Exhibit P-5 to P-17].

25. In the PSA, both Mr. and Mrs. Fou acknowledge "Each party has represented to the other and has made full disclosure of assets and income as is contained on their Case Information Statements and other discovery." [Exhibit P-17].

26. On April 18, 2023, Respondent communicated alone with Mrs. Fou by phone. During this conversation Respondent asked Mrs. Fou if she still wanted to proceed forward with an uncontested divorce. [3/1//2023 OAE Transcript, 56:5 to 57:4]. Respondent advised Mrs. Fou that if she did not feel comfortable the proceeding on the divorce could be adjourned or cancelled. Id.

27. Ms. Fou confirmed that she wanted to proceed

forward. [Id., 56:21 to 24].

28. On May 4, 2009, Mr. Tung met with Mrs. Fou in the courthouse without Mr. Fou present and spent about one-half hour going over the Complaint. [2/27/2023 OAE Transcript, T110:5 to T111:10].

29. On May 4, 2009, Respondent and Janet Fou appeared in Court for an uncontested divorce hearing, which was held before The Honorable James Hyland, J.S.C. and a Final Judgment of Divorce was entered on that date. [Exhibit P-27].

30. After the Final Judgment of Divorce was entered, Mrs. Fou received funds from Mr. Fou in accordance with the SDA, and Mrs. issued a receipt to Mr. Fou for funds he paid. [Exhibit R-27].

31. Mrs. Fou also detailed the assets the couple held and by emails dated December 5, 2009, she advised her husband of the amount she is entitled to for a "buyout" of the assets. [Exhibit R-28].

32. In July 2011, after she discovered that Mr. Fou remarried and the company was about to close, Mrs. Pou retained James Plaisted to represent her in a malpractice case against Respondent claiming, among other things, that Respondent failed to incorporate the terms of the SDA into the PSA. [2/27/2023 OAE Transcript, T115:12 to T117:6].

33. In September 2011, Mr. Plaisted proceeded to set aside the Final Judgment of Divorce and the PSA. [2/27/2023 OAE Transcript, T63:6 to T64:13].

34. On October 22, 2014, the Court entered an Amended Judgment of Divorce and invalidated the PSA;

based on the PSA's failure to incorporate the terms of the SDA. [Exhibit P-33; R-2 T67:3 to T71:22].

35. In 2012, Mr. Plaisted filed a malpractice complaint against Respondent. [2/27/2023 OAE Transcript, T64:16 to T65:7].

36. On May 10, 2018, an Order for Judgment for malpractice was entered in favor of Mrs. Fou and against Respondent. [Exhibit P-33].

CONCLUSIONS OF LAW

Burden of Proof

37. Pursuant to R. 1:20-6(c), a presenter has the burden of establishing, by clear and convincing evidence that a violation of the Rules of Professional Conduct occurred.

38. Clear-and-convincing evidence is "that which 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,' evidence 'so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.' "In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324,339 (App.Div.1981), modified, 90 N.J. 361 (1982) (quoting Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162, 165 A.2d 531 (App.Div.1960)).

The Presenter has not met its burden of establishing the Respondent engaged in gross neglect or a pattern of neglect in violation of R.P.C. 1.1(a) or (b).

39. Under RPC 1.1 a lawyer shall not handle or neglect a matter in such manner that the lawyer's conduct

constitutes gross negligence or exhibits a pattern of negligence or neglect.

40. RPC 1.1, however, does not require a guaranteed result and is not violated if a lawyer engages in negligence. Micaela P. Bennett, Petitioner, No. 2018, 2021 WL 7629613, at *6 (EPPS Aug. 2, 2021).

41. During the hearing, the Presenter's position was that Respondent engaged in gross neglect by failing to ensure his client's interests were protected and served and failed to review with his client her right to alimony. See OAE Summation dated May 30, 2023 at 13 ("OAE Brf.").

42. The Panel finds that the Presenter has not met her burden of proving by clear and convincing evidence that a violation of RPC 1.1 occurred.

43. During the hearing Mrs. Fou was the only witness that Presenter called to testify. The Panel, having the benefit of seeing her testimony and mannerisms live, feel that her testimony was evasive, and her story lacked credibility.

44. For example, the record reveals that Mr. Fou and Mrs. Fou advised Respondent that they had worked out the division of their property already at the initial meeting on February 15, 2009. [2/28/2023 OAE Transcript at 86:8 to 23 and P-4].

45. The record reveals that Mrs. Fou and her husband took steps to intentionally conceal the SDA and the amount of assets they held from the Respondent. [2/28/2023 OAE Transcript, 8:15 to 21].

46. At the time of the February 15, 2009 meeting, Mrs.

Fou knew she and her husband had \$2.2 million in assets, but she never provided this information to Respondent. [2/28/2023 OAE Transcript at 88:1 to 9].

47. The record also reveals that Mrs. Fou gave false information to the Respondent in the form of the 2008 IRS Form 1040 Tax Return, which she certified was true. [P-18 (2008 Tax Return); see also P-5].

48. Mrs. Fou admitted that she negotiated the SDA with her husband (Ex. P-5) and she expected her husband would honor it after the divorce was finalized. [2/28/2023 OAE Transcript, 80:7 to 12].

49. The documentary evidence presented at the hearing demonstrates that Mrs. Fou was very knowledgeable of her rights under the SDA. After the divorce was finalized, Mrs. Fou sent Mr. Fou detailed emails outlining the specific amounts paid and the specific amounts still owed to her under the SDA. [R-27, R-28, R-29, R-30].

50. These emails demonstrate that Mrs. Fou knew her rights and was well versed and confident in asserting them and telling the Respondent about those rights if she wanted to disclose that information. [R-27, R-28, R-29, R-30].

51. Given Mrs. Fou's active participation in withholding information from Respondent and given her knowledge of the financial assets and knowledge of her rights the Presenter has not shown by clear and convincing evidence that Respondent engaged in gross neglect or a pattern of neglect in violation of RPC 1.1.

The Presenter failed to show by clear and convincing evidence
that Respondent violated RPC 1.4.

52. Under RPC 1.4 (b), "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." RPC 1.4(c) goes on to require a lawyer to explain any matters to the client to the extent reasonably necessary to permit the client to make informed decisions.

53. The Presenter claims that the Respondent violated RPC 1.4 because Respondent's communications regarding the underlying divorce proceedings "were almost entirely with Joseph Fou, the husband of his client Janet Fou and adverse party to his client, rather than with Janet Fou." OAE Brf. at 15. This position is an exaggeration of the record.

54. During the hearing, Respondent testified credibly that he was engaged to work on an uncontested divorce. [2/28/2023 OAE Transcript, T102:1 to 25].

55. He testified that he met with Mr. Fou and Mrs. Fou twice on February 15, 2009 and on February 27, 2009. [2/28/2023 OAE Transcript, T74:20 to T74:20; 90:5 to 14].

56. The record also reveals that Respondent tried to contact Mrs. Fou by phone but was unable to reach her. [Exhibit P-23].

57. Respondent testified that he spoke with Mrs. Fou by phone on April 18, 2009 to see if she still wanted to go through with the divorce, [3/1//2023 OAE Transcript, 56:5 to 57:4] and he sat with her and went over the divorce filings and the PSA at the Courthouse and she raised no concerns, [2/27/2023 OAE Transcript, T110:5 to T111:10].

58. The Panel also believes from the evidence presented

that if Mrs. Fou had concerns about the documents, she asked Respondent to prepare, she was quite confident and assertive and would have no issue raising those issues. [See e.g. R-27, R-28, R-29, R-30].

59. For these reasons and the reasons explained above with regard to the charge for a violation of RPC 1.1, the Panel finds that the Presenter has not met her burden of establishing that Respondent violated RPC 1.4. Indeed, Mrs. Fou's failure to provide information to the Respondent prevent such a finding based on the record before us.

The Presenter failed to show by clear and convincing evidence that Respondent violated RPC 1.7(a)(1) or RPC 5.4(c)

60. Under RPC 1.7(a)(1) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest when "the representation of one client will be directly adverse to another."

61. RPC 5.4(c) provides that a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

62. The Presenter's position is that RPC 1.7(a)(1) was violated because Respondent treated Mr. Fou as his client by including him in the two in-person client meetings held on February 15 and February 29, 2009. OAE Brf. at 18.

63. The Presenter's position is that RPC 5.4(c) was violated because Mr. Fou recommended Respondent, paid Respondent's fee and allegedly directed Respondent's

professional judgment in representing Mrs. Fou in the uncontested divorce proceedings.

64. The Panel rejects the Presenter's position that Respondent violated RPC 1.7(a)(1) and RPC 5.4(c).

65. There is no dispute that during the initial consultation for an uncontested divorce on February 15, 2009, Respondent advised Mr. Fou and Mrs. Fou that he could only represent one party and that party would be the plaintiff, who would be Mrs. Fou. [2/28/2023 OAE Transcript, T89:1 to 11).

66. There is no dispute that during that initial consultation Mr. Fou advised Respondent that he would be representing himself pro se. [2/28/2023 OAE Transcript, T923:5 - 8].

67. While there was a joint meeting involving Respondent, Mr. Fou and Mrs. Fou on February 29, 2009 to go over documents to be submitted to the Court, including financial information about joint assets, that meeting was to discuss factual information and there was no evidence presented that Respondent provided legal advice to Mr. Fou or led Mr. Fou in any way to believe he was being represented by the Respondent.

68. There also is no evidence that Respondent met with Mr. Fou outside of the meetings on February 15, 2009 and February 29, 2009 to provide legal advice.

69. There is evidence, however, that Respondent spoke with Mrs. Fou outside the presence of Mr. Fou on two occasions to discuss the matter with her: (a) on April 18, 2007, to ask if she still wished to proceed with the uncontested divorce, and (b) on May 4, 2007, to go over the

documents and her testimony in advance of the court hearing. [3/1/2023 OAE Transcript, 56:5 to 57:4; 2/27/2023 OAE Transcript, T110:5 to T111:10].

70. These meetings not only show that Respondent spoke privately with Mrs. Fou, but they also reveal Respondent's professional judgment was not impaired as Respondent asked Mrs. Fou if she still wanted to go forward with an uncontested divorce.

71. In addition, additional facts in the record show that the Presenter cannot meet the clear and convincing evidence burden of proof with regard to RPC 1.7(a)(1) and RPC 5.4(c).

72. The Presenter acknowledges in her summation brief, that Mr. Fou was not the client of the Respondent, OAE Brf. at 18, and she acknowledges that the two cases she relies upon to claim Respondent violated RPC 5.4 (c) are distinguishable, OAE Brf. at 21.

73. The Fee Agreement for the payment of Respondent's services was executed by Mrs. Fou and it states, in relevant part, that Respondent "acts as the attorney of Janet Yijuan Fou in filing of a divorce complaint in Superior Court of New Jersey." Exhibit P-15.

74. The claim that Mr. Fou paid Mrs. Fou's legal fees is not accurate. According to Exhibit P-16, the payment of legal fees came from a joint account in the name of Mr. and Mrs. Fou. Exhibit P-16.

75. In light of these facts, the Presenter has not established by clear and convincing evidence that Respondent violated either RPC 1.7(a)(1) or RPC 5.4(c).

The Presenter has not established by clear and convincing evidence that Respondent violated RPC 1.5(b)

76. The Presenter claims that Respondent's failure to include a Statement of Client Rights and Responsibilities in accordance with R. 5:3-5 (a) is a per se violation of RPC 1.5(b). [OAE Brf. at 21-22].

77. R. 5:3-5(a) requires that a lawyer must include in any retainer agreement a "Statement of Client Rights and Responsibilities in Civil Family Actions in the form appearing in Appendix XVIII."

78. In this case, the Respondent admitted that he did not include any Statement of Client Rights and Responsibilities in Civil Family Actions in the form appearing in Appendix XVIII. [2/28/2023 OAE Transcript, T103:24 to T104:18].

79. Respondent contends, however, that even though he failed to include the Statement of Client Rights and Responsibilities, no ethical violation occurred because there was no harm to the client, and he fully apprised the client of the fees associated with the representation. Respondent's Brf. at 44.

80. The Panel finds that even though the Respondent failed to include a "Statement of Client Rights and Responsibilities in Civil Family Actions," it cannot find that omission rises to the level of a violation of RPC 1.5(b), for the simple reason that RPC 1.5(b) does not require a "Statement of Client Rights and Responsibilities in Civil Family Actions" to be included in a retention agreement.

81. RPC 1.5(b) requires a lawyer to disclose, when the lawyer has not regularly represented the client, "the basis or

rate of the fee ... in writing ... before or a reasonable time after commencing the representation." It says nothing about the disclosure the "Statement of Client Rights and Responsibilities in Civil Family Actions." Accordingly, the language of RPC 1.5(b) does not support the contention that the failure to provide a "Statement of Client Rights and Responsibilities in Civil Family Actions," under R. 5:3-5(a) constitutes a per se violation of RPC 1.5(b).

82. Moreover, the case that the Presenter relies upon to claim a per se violation exists, *In re Gazdzinski*, 220 N.J. 218 (2015), involved the failure to disclose the basis and rate for calculation of fees and had nothing to do with failure to provide a "Statement of Client Rights and Responsibilities in Civil Family Actions." It is therefore inapplicable.

83. Finally, the case of *Hill Wallackv. Saint Gerard Jordan*, No. A-0759-09Tl, 2011 WL 2636986, at *7 (N.J. Super. Ct. App. Div. July 7, 2011), also undermines Presenter's position that a violation of R.5:3-5 constitutes a per se violation of RPC 1.5(b). In *Hill Wallack*, the Court faced a question of whether a fee agreement was invalid because it failed to have annexed to it a Statement of Client Rights and did not indicate the primary attorney who would be working on the case or a description of the services to be provided. The Court noted that even though R. 5:3-5 was violated, there was no prejudice as a result. *Id.* The Court found the defendant signed the agreement freely and voluntarily and "no ethical boundary was crossed, and defendant was fully apprised of his options." *Id.* (emphasis added).

84. The allegations of violations of the RPC before the Panel have nothing to do with the fees charged or the work being performed. In fact, both sides acknowledge that the

fee for the uncontested divorce would be \$1,000.00. [See Exhibit P-15].

DETERMINATION

85. The Panel has carefully considered the testimony at the hearing and the evidence admitted and have concluded that the Presenter has not met its burden of proving by clear and convincing evidence that Respondent violated the provisions of the RPC. Accordingly, the Panel unanimously recommends that all charges be dismissed.

86. The Panel's determinations are unanimous and are as follows:

- a. Angelo A. Stio III (Chair)-dismissal of charges.
- b. Paul Maselli, Esq. - dismissal of charges.
- c. Mr. Andrew Usmiani, Public Member-
dismissal of charges.

87. The Panel's determination is in no way indicative of the quality of the counsel, or the arguments presented at the hearing. The presentations and submissions prepared by counsel were excellent and counsel, at all times, conducted themselves in a professional and ethical manner.

Respectfully submitted,

Angelo A. Stio III (Chair)

Paul Maselli, Esq.

Mr. Andrew Usmiani (Public Member)

Dated: December 21, 2023