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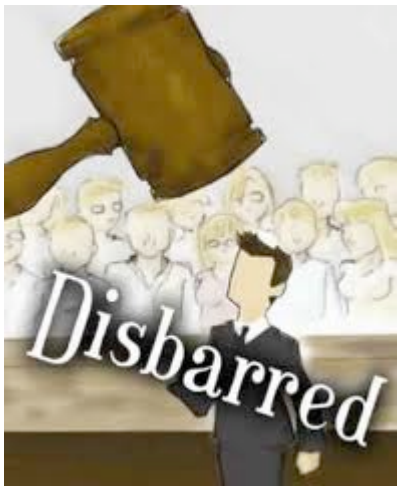

Defending a Colleague in a Disbarment Case

Lesson Plan

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I. Introduction – Procedural Issues

Agencies Charged with the Discipline of Attorneys

a. NJ Constitution of 1947 – Art VI, Section 2, Paragraph 3

The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

b. Office of Attorney Ethics – Founded 1983 (Rule 1:20-2)

c. District Ethics Committees

d. Disciplinary Review Board

e. Supreme Court *en banc* (Disbarments (Rule 1:20-16(a) & and any other matter at all via order to show cause.)

NOTE:

Many unnecessary disbarments result from the following:

Rule 1:20-16 - The Court may, on its own motion, decide to review any determination of the Board where disbarment has not been recommended.

Compare In re Kantor, 180 NJ 226 (2004) with In re Kivler, 193 NJ 332 (2008)) Rule 1:20-16(b)

Common Reasons for Orders of Disbarment

1. Knowing misappropriation of entrusted funds; (Wilson Rule)
2. An ongoing pattern of ethical deficiencies that are intractable and irremediable and, show a profound lack of professional good character and fitness; (The main event: Vincenti vs. McAlevy)
3. Bribery of a public official:
4. Conduct related to the practice of law that directly poisons the well of justice;
5. Serious misconduct committed while serving in public office;
6. Distribution of illegal controlled dangerous substances done for profit;
7. Conviction for serious criminal violations that involve massive fraud, theft, or violence;
8. Misconduct motivated by greed or self-enrichment involving fraud, dishonesty or deceit;
9. Misconduct in another jurisdiction that requires disbarment via reciprocal discipline
10. Disbarment by consent.

Important Rules of Court

1:20-16. Action by the Supreme Court

- (a) Review of Recommendations for Disbarment. The Supreme Court shall review all decisions of the Board that recommend disbarment. The review shall be on the basis of the decision, the transcript of the hearing before the Board, any briefs filed with the Board, and the record of the proceedings before the Ethics Committee, if any. The record shall be supplemented by the filing of briefs and by oral argument before the Supreme Court in accordance with R. 2:5, 2:6 and 2:11, insofar as applicable.
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- (b) Review of Other Final Disciplinary Determinations. In all matters other than those in which disbarment has been recommended, the Board's decision shall become final on the entry of an appropriate Order by the Clerk of the Supreme Court. Unless the Court otherwise orders, entry of a final Order of discipline shall

be stayed by the filing of a timely petition for review of the Board's decision by the respondent or the Office of Attorney Ethics or by the entry of an Order scheduling the matter for briefing and, where appropriate, oral argument on the Court's own motion.

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- (c) **De Novo Review**. **Supreme Court review shall be de novo on the record.**

1:20-10. Discipline by Consent

- (a) Disbarment by Consent.
  - (1) General Procedure. An attorney against whom a grievance has been filed may submit a consent to disbarment as a member of the bar to the Supreme Court through the Director, who shall transmit the consent in due form together with a report and recommendation. If accepted, the disbarment by consent shall be equivalent to disbarment, and the order accepting it shall be published as in cases of disbarments.
  - (2) Affidavit of Consent. Consents to disbarment shall be by affidavit in the form approved by the Supreme Court in which the respondent asserts:
    - (A) the respondent has consulted with an attorney; and
    - (B) the respondent's consent is freely and voluntarily given; the respondent has not been subjected to coercion or duress; the respondent is fully aware of the implications of submitting the consent; and
    - (C) the respondent is not under any disability, mental or physical, nor under the influence of any medication, intoxicants or

other substances that would impair the respondent's ability to knowingly and voluntarily execute the disbarment by consent; and

- (D) the respondent is aware that there is presently pending an investigation or proceeding involving allegations of unethical conduct, which allegations are set forth in the consent form; and
- (E) an acknowledgement that the material facts so alleged are true; and

- (F) an acknowledgement that the allegations of unethical conduct could not be successfully defended against; and
- (G) the understanding that the disbarment by consent, if accepted by the Supreme Court, is tantamount to disbarment and constitutes an absolute bar to reinstatement to the practice of law; and
- (H) the understanding that disciplinary costs will be assessed by the Supreme Court in accordance with R. 1:20-17.

The affidavit of consent to disbarment shall not be received by the Director unless accompanied by a letter from the respondent's attorney certifying that an attorney has consulted with respondent and that, in so far as the attorney is able to determine, respondent's consent is knowingly and voluntarily given and that respondent is not under any disability affecting respondent's capacity knowingly and voluntarily to consent to disbarment.

- (3) Action by Supreme Court. The Supreme Court may either reject the tendered consent or accept it and enter an order of disbarment. Otherwise, the Court shall reject the consent. If rejected, the disciplinary proceeding shall resume as if no consent had been submitted, and the consent to disbarment shall not thereafter be admitted into evidence.

1:20-15A. Final Disciplinary Determinations; Sanctions

- (a) Categories of Discipline. **The imposition of final discipline may include any of the following sanctions, all of which shall be public:**
  - (1) Disbarment. **An attorney who is disbarred shall have his or her name permanently stricken from the roll of attorneys.**
  - (2) Indeterminate Suspension. **Unless the Court's Order provides otherwise, an indeterminate suspension shall prohibit the attorney from seeking**

reinstatement for a minimum of five years.

- (3) Term of Suspension. **Absent special circumstances, a suspension for a term shall be for a period that is no less than three months and no more than three years.**
- (4) Censure.
- (5) Reprimand.
- (6) Admonition.

Procedural Disbarments

a. Reciprocal Discipline (Rule 1:20-14)

No collateral Attacks allowed

Typically will track discipline imposed in foreign jurisdiction …but not always – may be more or less.

In re Samay, 166 N.J. 25 (2001); 175 N.J. 438 (2003)

b. Failure to Pay Client Security Funds

c. Revocation of License to Practice - In re Matthews, 94 N.J. 59 (1983)

II. Cases that will result in disbarment every time.

a. *Wilson* Violations (In re Wilson, 81 NJ 451 (1979))

b. Bribery of a Public Official

c. Certain other Criminal Offenses

a. Wilson Violations

In this case, respondent knowingly used his clients' money as if it were his own. We hold that disbarment is the only appropriate discipline. We also use this occasion to state that generally all such cases shall result in disbarment. We foresee no significant exceptions to this rule and expect the result to be almost invariable.

What are the merits in these cases? The attorney has stolen his clients' money. No clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined. The public is entitled, not as a matter of satisfying unjustifiable expectations, but as a simple matter of maintaining confidence, to know that never again will that person be a lawyer. That the moral quality of other forms of misbehavior by lawyers may be no less reprehensible than misappropriation is beside the point. Those often occur in a complex factual setting where the applicability or meaning of ethical standards is uncertain to the bench and bar, and especially to the public, which may not even recognize the wrong. There is nothing clearer to the public, however, than stealing a

client's money and nothing worse. Nor is there anything that affects public confidence more much more than the offense itself than this Court's treatment of such offenses. Arguments for lenient discipline overlook this effect as well as the overriding importance of maintaining that confidence.

In summary: maintenance of public confidence in this Court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will be crippled institutions. Functioning properly, however, in the best traditions of each and with full public confidence, they are the very institutions most likely to develop required reform in the public interest.

Defenses to a *Wilson* Case

In re Noonan, 102 NJ 157 (1986)

The misappropriation that will trigger automatic disbarment under [*Wilson*], disbarment that is "almost invariable," consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking.

[T]he OAE's position was not that knowing misappropriation had been established, but rather that respondent's negligence in handling money was sufficiently gross to warrant disbarment even if he did not *know* it was client's money. That is *not* the rule of *Wilson.*

1. Typical Defenses Include:

2. Lack of Clear & Convincing Proof (In re Simone, 108 NJ 515, 521-22 (1987))
3. Taking via Negligence or Recklessness

(In re Orlando, 104 NJ 344 (1986))
(In re Gallo,117 NJ 365 (1989))

4. Consent

5. Not Client Funds

6. In re Jacob, 95 NJ 132, 137 (2000) (Diminished capacity – "**Disbarment is all but certain in misappropriation cases unless there has been a "demonstration by competent medical proofs that respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful.")**

Other Types of *Wilson* Cases

Escrow Funds

In re Hollendonner, 102 NJ 21 (1985)

Law Firm fees & Expenses

In re Greenberg, 155 NJ 138 (1998)
In re Siegel, 133 NJ 162 (1993)

Defenses:

Lack of Proofs - (In re Gross, 202 NJ 39 (2010); case not proven by clear and convincing evidence.)

Claim of Right – In re Bromberg, 152 NJ 382 (1998); In re Greenberg, 155 NJ 138, 173 (1998).

b. Bribery of a Public Official

However, even if it is unlikely that the attorney will repeat the misconduct, certain acts by attorneys so impugn the integrity of the legal system that disbarment is the only appropriate means to restore public confidence in it. Bribery of a public official is surely one of those cases. It has devastating consequences to the bar, the bench, and the public, and especially the public's confidence in the legal system. No sanction short of disbarment will suffice to repair the damage. In re Hughes, 90 NJ 32, 36-37 (1982) (Bribing an IRS Agent)

Examples:

In re Conway, 107 NJ 168 (1987);
In re Coruzzi, 98 NJ 77 (1984);
In re Rigolosi, 107 NJ 192 (1987) (Following Acquittal at Trial)
In re Hyett, 61 NJ 518 (1972)
In re Callahan, 70 NJ 178 (1976)

Defenses:

Rule 1:20-13(c) - A criminal conviction is conclusive evidence of unethical conduct.

- **The sole issue to be determined shall be the extent of final discipline to be imposed. The Board and Court may consider any relevant evidence in mitigation that is not inconsistent with the essential elements of the criminal matter for which the attorney was convicted or has admitted guilt as determined by the statute defining the criminal matter. No witnesses shall be allowed and no oral testimony shall be taken; however, both the Board and the Court may consider written materials otherwise allowed by this rule that are submitted to it. Either the Board or the Court, on the showing of good cause therefore or on its own motion, may remand a case to a trier of fact for a limited evidentiary hearing and report consistent with this subsection.**

c. Other Criminal Offenses

Criminal Conduct that poisons the well of justice (Verdiramo, 96 N.J. 183 (1984))

On-going pattern or profit motive (Kinnear, 105 N.J. 391 (1987))

Immoral, venal or corrupt (Templeton, 99 N.J. 365 (1985))

Runners (Pajerowski, 156 NJ 509 (1998)

Sex Cases:

In re Thompson, 197 NJ 464 (2009) (Federal - Sexual Exploitation of a child)

In re X, 120 NJ 459 (1990) (Daughters)

In re Sosnowski, 197 NJ 23 (2008) (Federal - Kiddie Porn)

Suborning perjury – In re Edson, 108 N.J. 464 (1987)

Length of Jail Term as an independent factor

III. Defenses – In General

"Our system of discipline, as a result, includes few bright line rules, because few indeed are the acts for which one sanction will be invariably appropriate. Considering how best to protect the public from a particular attorney ordinarily involves considering the ethical lapses both in comparison to our relevant disciplinary precedents and in the context of that attorney's history rather than merely identifying the attorney's specific unethical act. Our evaluation of the appropriate quantum of discipline, therefore, is necessarily fact sensitive." In re Witherspoon, 203 NJ 343, 358-59 (2010) (Rejecting expansion of Wilson Rule to other forms of misconduct)

In order to implement the foregoing policy objectives, the Court takes the following five steps to determine the quantum of discipline:

Review specific acts in respondent's case & the proven RPC violations;

Review respondent's personal disciplinary history;

Review any relevant disciplinary precedents for type conduct & the relevant, proven RPC violations;

Weigh & Evaluate aggravating and mitigating factors, and finally,

Order a level of discipline that will protect the public and deter future violations by respondent

IV. Mitigating Factors – In General

1. Prior unblemished record as a New Jersey attorney.
2. Reputation for honesty and trustworthiness as evidenced in writing from persons who know the attorney and are aware of the alleged misconduct.
3. Cooperation with ethics officials and law enforcement authorities.
4. Admission of guilt and display of sincere contrition.
5. Evidence that the criminal misconduct was an aberration.
6. Evidence that the misconduct is unlikely to be repeated.
7. Health concerns.
8. Family problems.
9. Passage of time since the criminal misconduct.
10. Evidence of rehabilitation from drug or alcohol

abuse.
11. Any other evidence tending to show that the public interest would be served by allowing the respondent attorney to return to the practice of law at some point.

Note: The absence of a mitigating factor is an aggravating factor and the absence of an aggravating factor is a mitigating factor.

Mitigating factors are relevant in determining whether the public interest requires the ultimate sanction of disbarment. Extenuating circumstances may demonstrate that there is little or no likelihood that the attorney will repeat the transgressions. *In re Hughes*, 90 *N.J.* 32, 36 [446 *A.*2d 1208] (1982). See also In re Sears, 71 NJ 175 (1976) (Review of all relevant mitigating factors)

V. Affirmative Defenses

a. Diminished Capacity – In re Jacob, 95 N.J. 132 (1984)

[All of the following are *Not Available* in *Wilson* Cases]

b. Alcoholism – In re Hein, 104 N.J. 297 (1986); In re Barbour, 109 N.J. 143 (1988); In re Willis, 114 N.J. 42 (1989)

c. Drug addiction – Generally not a mitigating factor- In re Zauber, 132 N.J. 87 (1991)

d. Gambling addiction – In re Goldberg, 109 N.J. 163 (1988)

e. Correction through treatment (Templeton Defense)

In re Templeton, 99 N.J. 365, 374 (1985)

In all disciplinary cases, we have felt constrained as a matter of fairness to the public, to the charged attorney, and to the justice system, to search diligently for some credible reason other than professional and personal immorality that could *374 serve to explain, and perhaps extenuate, egregious misconduct. We have always permitted a charged attorney to show, if at all possible, that the root of the transgressions is not intractable dishonesty, venality, immorality, or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment. An inquiry into such possible causes of ethical misconduct not only can be instructive and enlightening, it may also hold the promise of a resolution of the disciplinary charges in terms of

personal rehabilitation, which will serve to protect the public interest without ruining a lawyer's career and life.

Implementation of *Templeton* Defense

In re Farr, 115 NJ 231, 237 (1989)

Approximately nine years ago, respondent-then a young, even immature, but hardworking assistant county prosecutor-went through a period of extreme personal stress. During that period, he lost his ethical compass and went astray. In the interim, he has found his bearings. When, as here, ethics transgressions are remote in time, we may consider intervening events and current circumstances in determining the appropriate sanction. As offensive as was respondent's conduct, we are persuaded that "the root of his transgressions is not intractable dishonesty, venality, immorality, or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through

treatment." By receiving needed psychotherapy and performing various good works, respondent has rehabilitated himself.

See also:

In re Asbell, 135 N.J. 446 (1994)

In re Peterman, 134 N.J. 201 (1993) (Bar admission)

VI. Appendix

1:20-20. Future Activities of Attorney Who Has Been Disciplined or Transferred to Disability-Inactive Status

- (a) Prohibited Association. No attorney or other entity authorized to practice law in the State of New Jersey shall, in connection with the practice of law, employ, permit or authorize to perform services for the attorney or other entity, or share or use office space with, another who has been disbarred, resigned with prejudice, transferred to disability- inactive status, or is under suspension from the practice of law in this or any other jurisdiction.

- (b) Notice to Clients, Adverse Parties and Others. An attorney who is suspended, transferred to disability-inactive status, disbarred, or disbarred by consent or equivalent sanction:
  - (1) shall not practice law in any form either as principal, agent, servant, clerk or employee of another, and shall not appear as an attorney before any court, justice, judge, board, commission, division or other public authority or agency;
  - (2) shall not occupy, share or use office space in which an attorney practices law;
  - (3) shall not furnish legal services, give an opinion concerning the law or its application or any advice with relation thereto, or suggest in any way to the public an entitlement to practice law, or draw any legal instrument;
  - (4) shall not use any stationery, sign or advertisement suggesting that the attorney, either alone or with any other person, has, owns, conducts, or maintains a law office or office of any kind for the practice of law, or that the attorney is entitled to practice law;
  - (5) shall, except for the purposes of disbursing trust monies for the 30-day period stated in this subparagraph, cease to use any bank accounts or checks on which the attorney's name appears as a lawyer or attorney-at-law or in connection with the words "law office". If the suspension is for a period greater than six months, or involves

a temporary suspension that lasts for more than six months, or involves transfer to disability-inactive status, disbarment, disbarment by consent or their equivalent sanction, the attorney shall, within the 30 day period prescribed in subparagraph (15), disburse all attorney trust account monies that are appropriate to be disbursed and shall arrange to transfer the balance of any trust monies to an attorney admitted to practice law in this state and in good standing for appropriate disbursement, on notice to all interested parties, or dispose of the balance of funds in accordance with R. 1:21-6(j), "Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners"; however, it shall not be a violation of this subparagraph for an attorney to take appropriate action to comply after the stated 30-day period;

- (6) shall, from the date of the order imposing discipline (regardless of the effective date thereof), not solicit or procure any legal business or retainers for the disciplined attorney or for any other attorney;
- (7) shall promptly request the telephone company to remove any listing in the telephone directory indicating that the attorney is a lawyer, or holds a similar title;
- (8) shall promptly request the publishers of Martindale-Hubbell Law Directory, the New Jersey Lawyers Diary and Manual, and any

other law list in which the attorney's name appears, including all websites on which the attorney's name appears, to remove any listing indicating that that attorney is a member of the New Jersey Bar in good standing;

- (9) shall notify the admitting authority in any jurisdiction to whose bar the attorney has been admitted of the disciplinary action taken in the State of New Jersey;
- (10) shall, except as otherwise provided by paragraph (d) of this rule, promptly notify all clients in pending matters, other than litigation or administrative proceedings, of the attorney's suspension, transfer to disability-inactive status, disbarment, or disbarment by consent, and of the attorney's consequent inability to act as an attorney due to disbarment, suspension, or disability-inactive status, and shall advise said clients to seek legal advice elsewhere and to obtain another attorney to complete their pending matters. Even if requested by a client, the attorney may not recommend another attorney to complete a matter. When a new attorney is selected by a client, the disciplined or former attorney shall promptly deliver the file and any other paper or property of the client to the new attorney or to the client if no new attorney is selected, without waiving any right to compensation earned as provided in paragraph (13) below;

- (11) shall, except as otherwise provided by paragraph (d) of this rule, as to litigated or administrative proceedings pending in any court or administrative agency, promptly give notice of the suspension, transfer to disability-inactive status, disbarment, or disbarment by consent and of the consequent inability to act as an attorney due to disbarment, suspension, or disability-inactive status, to: (1) each client; (2) the attorney for each adverse party in any matter involving any clients; and (3) the Assignment Judge with respect to any action pending in any court in that vicinage, or the clerk of the appropriate appellate court or administrative agency in which a matter is pending. The notice to clients shall advise them to obtain another attorney and promptly to substitute that attorney for the disciplined or former attorney. Even if requested by a client, the disciplined or former attorney may not recommend an attorney to continue the action. The notices to opposing attorneys and the Assignment Judge or Court Clerk shall clearly indicate the caption and docket number of the case or cases and name and place of residence of each client involved. In the event a client involved in litigation or a pending proceeding does not obtain a substitute attorney within 20 days of the mailing of said notice, the disciplined or former attorney shall move pro se in the court or

administrative tribunal in which the action or proceeding is pending for leave to withdraw therefrom. When a client selects a new attorney, the disciplined or former attorney shall promptly deliver the file and any other paper or property of the client to the new attorney or to the client if no attorney is selected, without waiving any right to compensation earned, as provided in paragraph (13), below;

- (12) shall, in all cases in which the attorney is then acting, or who thereafter attempts to obtain letters of appointment from a Surrogate to act, in any specified fiduciary capacity, including, but not limited to, executor, administrator, guardian, receiver or conservator, promptly notify in writing all (1) co-fiduciaries, (2) beneficiaries, (3) Assignment Judges and Surrogates of any vicinage and county out of which the matter arose, of the attorney's suspension, transfer to disability-inactive status, disbarment, or disbarment by consent. Such notice shall clearly state the name of the matter, any caption and docket number, and, if applicable, the name and date of death or current residence of the decedent, settlor, individual or entity with respect to whose assets the attorney is acting as a fiduciary;
- (13) shall not share in any fee for legal services performed by any other attorney following the disciplined or former attorney's prohibition from practice, but

may be compensated for the reasonable value of services rendered and disbursements incurred prior to the effective date of the prohibition, provided the attorney has fully complied with the provisions of this rule and has filed the required affidavit of compliance under subparagraph (b)(15). The reasonable value of services for the disciplined or former attorney and the substituted attorney shall not exceed the amount the client would have had to pay had no substitution been required. If an attorney-trustee has been appointed under R. 1:20-19, all fees for legal services and other compensation due the attorney shall be paid solely to the attorney-trustee for disbursement as directed by the court in accordance with the provisions of that rule. Compensation shall include any monies or other thing of value paid for legal services due or that is related to any agreement, sale, assignment or transfer of any aspect of the attorney's share of a law firm;

- (14) shall maintain:
  - (A) files, documents, and other records relating to any matter that was the subject of a disciplinary investigation or proceeding;
  - (B) files, documents, and other records relating to all terminated matters in which the disciplined or former attorney

represented a client prior to the imposition of discipline;

- (C) files, documents, and other records of pending matters in which the disciplined or former attorney had responsibility on the date of, or represented a client during the year prior to, the imposition of discipline or resignation;
- (D) all financial records related to the disciplined or former attorney's practice of law during the seven years preceding the imposition of discipline, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports; and
- (E) all records relating to compliance with this rule.

- (15) shall within 30 days after the date of the order of suspension (regardless of the effective date thereof) file with the Director the original of a detailed affidavit specifying by correlatively numbered paragraphs how the disciplined attorney has complied with each of the provisions of this rule and the Supreme Court's order. Signed copies of that affidavit shall be provided at the same time to the Clerk of the Supreme Court and to the Disciplinary Review Board. The affidavit shall be accompanied by a copy of all correspondence sent pursuant to this

rule and shall also set forth the current residence or other address and telephone number of the disciplined or former attorney to which communications may be directed. The disciplined or former attorney shall thereafter inform the Director of any change in such residence, address, or telephone number. The affidavit shall also set forth whether the attorney maintained malpractice insurance coverage for the past five years and, for each policy maintained, the name of the carrier, the carrier's address, the policy number, and the dates of coverage. The affidavit shall also attach an alphabetical list of the names, addresses, telephone numbers, and file numbers of all clients whom the attorney represented on the date of discipline or transfer to disability-inactive status.

- (c) Failure to Comply. Failure to comply fully and timely with the obligations of this rule and file the affidavit of compliance required by paragraph (b)(15) within the 30-day period, unless extended by the Director for good cause, shall, in the case of a suspension, preclude the Board from considering any petition for reinstatement until the expiration of six months from the date of filing proof of compliance in accordance with R.1:20-21(i)(A). Such failure shall also constitute a violation of RPC 8.1(b) (failure to cooperate with ethics authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice). The Director also may

file and prosecute an action for contempt pursuant to R. 1:10-2.