SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-309
District Docket No. XII-2011-0026E

IN THE MATTER OF	:
JEFFREY R. POCARO	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 17, 2013

Decided: March 8, 2013

Elizabeth A. Weiler appeared on behalf of the District XII Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a three-year suspension filed by the District XII Ethics Committee (DEC). The two-count complaint charged respondent with having violated RPC 1.9(c)(1) (a lawyer who has formerly represented a client in a matter shall not use information relating to the representation to the disadvantage of the former client) and RPC 8.4(d) (conduct prejudicial to the administration of justice)

for violating A.C.P.E. Opinion 721, 204 N.J.L.J. 928 (June 27, 2011), which prohibits an attorney from conditioning a settlement upon the client's withdrawal of a grievance.

For the reasons expressed below, we determine that a censure is the appropriate discipline.

Respondent was admitted to the New Jersey bar in 1982. He maintains a law office in Fanwood, New Jersey.

In 1995, respondent received a one-year suspension for violating RPC 8.4(b) (criminal conduct) and RPC 8.4(c) (misrepresentation). There, he misrepresented that a racehorse was not encumbered by a bank lien, in order to obtain a loan for a client through a "sale lease back" transaction. In re Pocaro, 142 N.J. 423 (1995). Respondent was charged in a federal complaint with a "scheme to defraud another person by use of interstate wire," 18 U.S.C 1343, and entered into a "deferred prosecution program." As part of the deferred prosecution agreement, respondent was required, among other things, to repay funds to his client, report the matter to the Office of Attorney Ethics (OAE) and, if so directed by the U.S. Pretrial Services Office, to continue participation in Gamblers' Anonymous. Respondent blamed his disease of compulsive gambling for engaging in the conduct "to reduce the 'crushing debt burden that the disease had brought about.'" Mitigating factors

advanced by respondent were his financial burden and the measures he had taken to combat his gambling problem. He was reinstated to practice law in December 1996. In re Pocaro, 146 N.J. 576 (1996).

In 2006, respondent was censured for misconduct in a civil rights action. He was found guilty of gross neglect, lack of diligence, failure to expedite litigation, and failure to communicate with his client. In imposing discipline, we considered that, once respondent's employer was suspended from the practice of law, he was left with the responsibility of overseeing 400 cases; that only one client matter had been involved; that he admitted his wrongdoing; and that he appeared truly remorseful for his conduct. In re Pocaro, 187 N.J. 411 (2006).

The facts of this matter have been culled from the stipulation, testimony, and documentary evidence.

Respondent represented grievant Bulletproof Enterprises, Inc. (BEI) in a number of matters, from October 2008 through November 2010. Jeffrey Brooks was BEI's owner and president. During the course of respondent's representation of BEI, he referred it to a Canadian lawyer for representation in a

Canadian lawsuit, "the Preszcator action." In November 2010, respondent stopped representing BEI.[1]

In December 2010, respondent represented defendant Barrey Danvers in an action filed by BEI in the Federal District Court for the District of New Jersey, captioned Bulletproof Enterprises Inc. v. Barrey Danvers."[2] During a telephone conversation about the Danvers action, respondent informed Malcolm Seymour, BEI's attorney, "in substance, that BEI had incurred considerable costs in the Preszcator Action and that the suit had not been financially viable for BEI. Respondent then asked Seymour whether BEI would be amenable to settling the Danvers Action."

After that telephone conversation, BEI filed a motion, in Danvers, to have respondent disqualified from further representing Danvers, based on a number of reasons, including the substance of the telephone conversation between respondent and Seymour.

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[1] Respondent asserted that, in November 2010, Brooks terminated his services over a dispute involving a recovery of funds owed to BEI from the sale of horses.

[2] In his answer to the ethics complaint, respondent stated that the suit was a declaratory judgment action seeking a ruling on whether BEI owed Danvers, a veterinarian, $175,000 for veterinarian services provided.

On March 31, 2011, respondent opposed the motion. Because the lawsuit settled, BEI withdrew its motion to disqualify respondent.[3]

According to respondent's certification in opposition to the disqualification motion, Jeffrey Brooks, through his in-house counsel, had asked respondent for the name of a Canadian attorney to represent BEI. Respondent recommended David Moore. Respondent asserted that Brooks criticized both him and Moore for the manner in which Moore proceeded and for slow progress of the case. Respondent certified further that "Brooks also complained to me that the lawsuit in Canada was 'costing Bulletproof a lot of money because Moore was expensive'."

However, respondent's answer to the ethics complaint averred that the source of the information relating to the expense incurred in the Preszcator action was Tony Monica, a horse trainer who conducted business with respondent's client, Danvers. Monica purportedly told respondent that "the less Brooks spends on lawyers, the more he'll have to pay a settlement, so why don't you try to settle the Danvers case

[3] Respondent's certification in opposition to the motion listed various actions in which he represented BEI: 1) a veterinarian collection case; 2) a trainer collection case; 3) review of a certificate of incorporation; 4) bidding for horses at a harness horse auction; and 5) dispute over the purchase of horses from BEI.

now?" Monica had been employed by BEI but, according to respondent, was no longer BEI's employee, when he relayed the information to respondent. Respondent added that he and Monica had become harness race horse partners, after Monica had stopped working for BEI.

BEI's grievance in this matter related to, among other things, the substance of the telephone call between respondent and Seymour about the expense of the Canadian litigation.

In March 2011, respondent filed a complaint on behalf of Colts Neck Equine Associates against BEI and Jeffrey Brooks in Monmouth County, Special Civil Part (Colts Neck Equine Associates, PC v. Bulletproof Enterprises, Inc. and Jeffrey Brooks). BEI filed a motion to disqualify respondent from that matter as well. The motion was never decided because the case was settled. BEI then withdrew the motion.

After the settlement, respondent asked Seymour if, in light of the settlement, he would write to the DEC on BEI's behalf to withdraw the grievance. At the DEC hearing, Seymour testified that respondent "suggested" that he would "refrain from bringing a defamation action" against BEI in connection with the disqualification motion in the Colts Neck action, if the grievance were withdrawn. Exhibit D to the stipulation, Seymour's October 4, 2011 letter to the presenter, states:

> [Respondent] asked me if I would agree to write the Committee, in light of the settlement of the Colts Neck Action, to request the withdrawal of BEI's grievance against [respondent]. [Respondent] stated that he would file a new action against BEI, suing BEI for defamation in connection with this grievance, unless BEI consented to write the requested letter. However, if BEI agreed to submit a letter requesting withdrawal of its grievance, [respondent] represented that he would execute a release against BEI, and would sign a further agreement pledging not to bring any further lawsuits against BEI.
>
> I replied that I considered [respondent's] threat to be unethical, but that I would convey his offer to my client. My client agreed with me that [respondent's] offer bordered on blackmail and requested that I advise the Committee of his telephone call.

Respondent's October 11, 2001 reply to Seymour's letter stated that he believed that he had a cause of action against Brooks and BEI for defamatory remarks made about him in the motion to disqualify him in the Colts Neck Equine case. In his letter, respondent denied that he had said anything unethical or that he had threatened to file a lawsuit if "the withdrawal letter was not written." He did not believe that the suggestion that the parties exchange mutual releases bordered on blackmail.

Respondent accused Seymour of misconstruing their telephone conversation. To his letter respondent attached a copy of emails between him and Seymour, relating to the terms of a release. Respondent wrote, "Your client would permit you to send a letter

to the ethics committee withdrawing the Complaint with prejudice." Seymour replied:

> I am writing in response to your phone call of yesterday, asking that our client [BEI] send a letter to the [OAE] to request that BEI's grievance against you be closed, and no further action be taken with respect thereto.
>
> As I stated in our telephone call, I am not sure that it is within BEI's power to terminate the grievance investigation that is now underway.
>
> [Exhibit to S.Ex.E.][4]

As a defense to the conflict charges, respondent asserted that he had learned about the existence of certain information relating to BEI's finances (a cost evaluation veterinarian spread sheet prepared by Monica and payroll records for grooms) from Monica. Respondent stated that Monica had prepared the spreadsheet while employed by BEI and had advised him to request the production of the documents, because they would help respondent with his case. Respondent admitted, however, that he had had conversations with Brooks about the Preszcator case "costing him a lot of money," but that Monica had been

[4] S refers to the disciplinary stipulation, dated February 17, 2012.

instrumental in giving him inside information about BEI, after he had stopped working for BEI.

Respondent accused BEI's attorney of filing a grievance that contained material misstatements; lies that respondent felt were defamatory. He added that, during the 1990s, he had sued Perfect World Enterprises (BEI's predecessor) and Brooks' brother, David, at least two dozen times, on behalf of harness drivers, trainers, veterinarians, and blacksmiths. He represented "virtually everybody in the industry." In every lawsuit, David had called him, had told him "you're not supposed to be suing me," and they had settled every case.

Respondent testified that Brooks had threatened to kill him over a recovery in another lawsuit and that his conversation with Seymour and the emails they exchanged were made in fear that he "would lose what it is I have." He added that he had wanted to get back at Brooks for threatening him and also wanted to make the ethics case "go away, whatever way it could go away, because I couldn't . . . handle it."

In mitigation, respondent "[threw himself] at the mercy of the [hearing] panel." He knew that he had to "face the music" for his wrongdoing, but asked that the DEC refrain from suspending or disbarring him, claiming that it had not been his intention to break any "rules." He admitted that he did not have

a defense for what he had done, but asked the hearing panel to be "fair and reasonable." He stated that, "[f]iguring that [he] was going to get either suspended or disbarred," he had sold four of his horses and had leased out a fifth horse to minimize his expenses. He remarked that, if he cannot practice law, he will be unable to afford to own racehorses, help his mother in Florida, or his thirty-nine-year old son in prison. He stated further that he has been in a live-in relationship for the last eleven years, that the house in which he lives belongs to his "significant other," that they share expenses, and that, if he can no longer practice law, even for a short period, their relationship will certainly end.

Respondent also stated that he is waiting for the result of a test to determine whether he has or is a carrier of ALS, Lou Gehrig's Disease, a disease from which his father suffered. He explained that there are two types of the disease, one of which is hereditary (he has four children and a grandson). Once the disease is triggered, an individual's life expectancy is three to five years. Respondent determined that he needed to find out where his life was headed, not only with the disease but also with his legal career.

According to the presenter, on two separate occasions, once when respondent filed a certification in 2011 in connection with

the federal court action and, again, in reply to the grievance, respondent admitted that Brooks was the source of information that the Canadian action had cost BEI a significant amount. The presenter stressed that respondent had learned that information while representing BEI and that, after he had ceased representing the company, he had used the information to BEI's detriment to "extract" a settlement in the matter.

The DEC panel noted that, in his answer, respondent admitted the relevant allegations of the complaint, with the exception of the source of some information. Respondent claimed that he had he gained information about BEI from Tony Monica, a former BEI employee, not Brooks.

The DEC found clear and convincing proof that respondent was guilty of violating RPC 1.9(c) and RPC 8.4(d). Because of respondent's ethics history, the DEC recommended a three-year suspension.

In his December 24, 2012 letter-brief to us, respondent argued that, because no criminal conduct was involved in this matter, the three-year suspension recommended by the DEC was too severe. Moreover, he asserted that the presenter had not proven that the information that respondent had relayed to Seymour had been used to the disadvantage of his former client.

According to respondent, BEI owed his client, Barrey Danvers, approximately $275,000 for veterinary services he had provided. BEI filed a declaratory judgment action "to eliminate the $256,000" balance owed and for a $500,000 refund by Danvers for overcharging BEI. Respondent asserted that the settlement he attained resulted in BEI paying Danvers and withdrawing the claim against Danvers for a $500,000 refund.

Respondent further alleged that BEI refused to produce, through discovery, a chart that had been prepared by Tony Monica. Monica purportedly informed respondent about the chart, after he left BEI's employ. According to respondent, after BEI refused to turn over the chart, it offered to settle the case with Danvers. Respondent denied that his statement to Seymour was used to BEI's disadvantage.

As to the Colts Neck Equine Associates case, respondent stated that BEI sought to disqualify him on the basis that he had used confidentially obtained information to gain an advantage over BEI. He pointed out that the motion that BEI filed was similar to the one filed in the Danvers case, except that the ethics "complaint" (presumably, the grievance) filed against him was attached to the motion. It was respondent's belief that attaching the grievance was an attempt to ruin his

reputation in the horse racing industry, as well as his legal career.

According to respondent, the mediator in the Colts Neck matter suggested that he seek a global settlement in the matter that would include the withdrawal of the ethics grievance. Respondent admitted that he called Seymour about withdrawing the grievance. In so doing, he was trying to "save a thirty year career from going down the tubes," did not know about the prohibition against asking that a grievance be withdrawn, and did not deliberately try to interfere with the judicial process, when he did so.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence.

The record clearly and convincingly establishes that respondent asked Seymour to withdraw BEI's grievance, in return for his forbearing from instituting a defamation action against BEI. In doing so, respondent violated RPC 8.4(d) and A.C.P.E Opinion 721, which prohibits the conditioning of an agreement on the withdrawal of a grievance. As the opinion emphasizes, "[a]ttorney discipline is not a private cause of action or private remedy for misconduct that can be negotiated between an

attorney and the aggrieved party. The discipline process furthers public, not private interests . . . ."

The totality of respondent's admissions, that is, 1) that he wanted to get back at Brooks; 2) that he wanted the ethics case to go away; 3) that he knew he had to "face the music;" and 4) that he did not have a defense for what he did supports a finding that he knew that his conduct was improper.

The discipline for an attorney's attempt to persuade a grievant to withdraw a grievance is typically either an admonition or a reprimand. See, e.g., In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (admonition for attorney who improperly conditioned the resolution of a collection case on the dismissal of an ethics grievance filed against the attorney by the client's parents) and In re Mella, 153 N.J. 35 (1998) (reprimand imposed on attorney who communicated with the grievant in an attempt to have the grievance against him dismissed, in exchange for a fee refund and some additional remedial conduct; the attorney was also guilty of lack of diligence and failure to communicate with clients).

The proofs also clearly and convincingly demonstrate that respondent represented BEI, ceased representing it, and learned from Brooks that "BEI had incurred considerable costs in the

Preszcator Action and that the suit had not been financially viable for BEI." In addition, respondent certified, in a court document, that the lawsuit in Canada was "costing Bulletproof a lot of money because Moore was expensive." It is of no moment that respondent may have obtained certain information from Monica, a former BEI horse trainer and his business partner. Respondent's certification in the declaratory judgment action listed a number of collection cases in which he had represented BEI and that he had bid on horses on BEI's behalf. Thus, respondent became familiar with BEI's finances during the course of his representation of that entity, separate and apart from any information Monica may have provided to him.

RPC 1.9(c)(1) states:

> A lawyer who has formerly represented a client in a matter . . . shall not thereafter:
> (1) Use information relating to the representation to the disadvantage of the former client except . . . when the information has become generally known . . . .

Here, however, the record is devoid of any evidence that respondent used information previously learned about BEI's finances to BEI's disadvantage. In fact, the settlement may have been advantageous to BEI, in that it avoided the additional expense of litigation and eliminated the possibility of BEI's

losing at trial. We, therefore, dismiss the charged violation of RPC 1.9(c)(1).

We find, however, that respondent's sole violation of RPC 8.4(d) is aggravated by his significant ethics history: a one-year suspension for fraud and misrepresentation and a censure. Based on his ethics history and guided by the cases previously cited, Tyler (admonition) and Mella (reprimand), we determine that a censure is warranted for respondent's propensity to violate the Rules of Professional Conduct.

Members Frost and Clark voted to impose a reprimand. Member Baugh did not participate.

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

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jeffrey R. Pocaro
Docket No. DRB 12-309

Argued: January 17, 2013

Decided: March 8, 2013

Disposition: Censure

Members	Disbar	Suspension	Reprimand	Censure	Disqualified	Did not participate
Pashman				X		
Frost			X			
Baugh						X
Clark			X			
Doremus				X		
Gallipoli				X		
Wissinger				X		
Yamner				X		
Zmirich				X		
Total:			2	6		1

Julianne K. DeCore
Chief Counsel