

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-007
District Docket No. XIV-07-332E

IN THE MATTER OF
ANDREW K. POLEY
AN ATTORNEY AT LAW

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Decision

Argued: April 17, 2008

Decided: June 10, 2008

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter came before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), following respondent's guilty plea in the Superior Court of New Jersey, Law Division, Bergen County, to fourth degree false swearing, in

violation of N.J.S.A. 2C:28-2a. The OAE requested the imposition of either a censure or a three-month suspension. Respondent concurred with this recommendation. We determine to impose a three-month suspended suspension.

Respondent was admitted to the New Jersey bar in 1999. At the relevant times, he maintained an office for the practice of law in Fair Lawn. Respondent has no disciplinary history.

On October 6, 2006, the Wyckoff police were called to the home of respondent and his wife, Tatiana, after she called 9-1-1 and reported that he had hit her and slammed her head against a wall, during an argument. When the officers questioned respondent, he stated that Tatiana had become irrational and violent during the argument and had assaulted him with a small pair of cosmetic scissors. The officers observed five-to-six small puncture wounds on respondent's upper left arm. Respondent declined medical treatment.

The parties gave written statements at police headquarters. Respondent repeated the claim that Tatiana had stabbed him with the scissors. Tatiana was charged with aggravated assault, possession of a weapon for an unlawful purpose, and unlawful possession of a weapon. She claimed, however, that respondent's wounds had been self-inflicted.

Both parties requested a temporary restraining order (TRO) against the other. Respondent stated to the municipal court judge (presumably under oath or by affirmation) that Tatiana had stabbed him with the scissors. The judge granted respondent's request only. Tatiana received a mental health assessment, but the assessor concluded that there was no reason to have her committed.

On November 22, 2006, detective Ronnie Petzinger from the Bergen County Prosecutor's Office called respondent to ask him what "his position was in prosecuting his wife." According to Petzinger, respondent stated that he did not want Tatiana prosecuted. Respondent requested a meeting with Petzinger "to discuss mitigating circumstances regarding the case."

On November 27, 2006, Petzinger interviewed respondent, in the presence of another detective. The interview was under oath and was recorded on audiotape and videotape. When respondent began to describe how Tatiana had stabbed him with the scissors, Petzinger confronted him with photographs of his injuries and informed him that the injuries were inconsistent with his claim that Tatiana had inflicted them. At that point, respondent admitted that he had self-inflicted the injuries "in an attempt to de-escalate the argument with his wife." Respondent admitted

that he had lied about the injuries when he orally reported them to the police officers who responded to the incident, when he completed his written statement at headquarters, and when he testified before the judge in support of his request for a TRO.

On July 11, 2007, respondent notified the OAE that he had been "charged with several indictable criminal offenses pending disposition with the Bergen County Prosecutors [sic] Office."

On September 26, 2007, the Bergen County Prosecutor's Office charged respondent with fourth degree false swearing, in violation of N.J.S.A. 2C:28-2a.¹ On that same day, respondent pleaded guilty to the criminal offense. At the plea, the following exchange took place between respondent and his lawyer:

Q. Mr. Poley, on October 6th, 2006, were you in Wyckoff, New Jersey?

A. Yes, I was.

Q. On — and, on that date, was there an incident between you and your former wife?

¹ N.J.S.A. 2C:28-2a provides: "A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a crime of the fourth degree."

A. Yes.

Q. And were you in contact with the Wyckoff Police Department?

A. Yes.

Q. And did you swear or affirm to [sic] Wyckoff Police Department that your wife had assaulted you with a scissors?

A. Yes.

Q. And did you know that it was untrue at the time that you made it?

A. Yes.

[Transcript of Plea, dated September 26, 2007, p.8,l.19 to p.9,l.14.]

Respondent was admitted to the pre-trial intervention program (PTI), assessed fines and penalties, and ordered to undergo "psychological counseling and alternatives to domestic violence," medication monitoring, and urine testing.

On October 3, 2007, respondent wrote to Johnson and notified the OAE that the criminal matter had been "adjudicated" and that he had been admitted into the PTI program.

Upon receiving a copy of the motion for final discipline, respondent sent a letter to the OAE in which he stated that he accepted the OAE's recommendations (presumably as to discipline). Respondent also submitted letters from eleven

individuals, who, he claimed, had requested "sentencing mitigation."

Following a review of the full record, we determine to grant the OAE's motion for final discipline.

A criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Respondent's guilty plea establishes his violation of RPC 8.4(b). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Hence, the sole issue is the extent of discipline to be imposed. R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, supra, 139 N.J. at 460 (citations omitted). Fashioning the appropriate penalty involves a consideration of many factors, including the "nature and severity of the crime, whether the crime is related to the

practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997) (citation omitted). Offenses that evidence ethical shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995).

In addition to RPC 8.4(b), respondent's false swearing establishes a violation of RPC 3.3(a)(1) (knowingly making a false statement of material fact to a tribunal), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice). Thus, the only determination that we are required to make is the quantum of discipline to be

imposed for the misconduct. R. 1:20-13(c)(2); In re Lunetta, supra, 118 N.J. at 445.

The appropriate measure of discipline imposed on an attorney who lies under oath is a three-month suspension. See, e.g., In re Coffee, 174 N.J. 292 (2002) (on motion for reciprocal discipline in matter where attorney received a one-month suspension in Arizona, three-month suspension imposed for attorney's submission of a false affidavit of financial information in his own divorce case, followed by his misrepresentation at a hearing under oath that he had no assets other than those identified in the affidavit) and In re Brown, 144 N.J. 580 (1996) (three-month suspension imposed on attorney who, during the trial in the plaintiff-hospital's collection suit for recovery of expenses incurred in the treatment of attorney's drug and alcohol dependency, testified untruthfully that he had never used cocaine, had never been treated for cocaine dependency, that his treatment at the hospital was limited to alcoholism, and that he had been treated fewer than the number of days billed; we noted that the attorney's misrepresentations at trial were made nearly five years after his alleged successful completion of a rehabilitation program).

In February of this year, the Supreme Court reaffirmed that a three-month suspension is the appropriate measure of discipline to be imposed when an attorney lies under oath. The Court rejected the view of some members of this Board that mitigating factors may serve to reduce the suspension to a censure. In re Perez, 193 N.J. 483 (2008) (attorney, a former municipal prosecutor, pleaded guilty to fourth degree false swearing after he testified falsely, in a domestic violence hearing, that he did not ask the assistant prosecutor to seek an increase in his paramour's bail in the criminal matter filed against her as a result of the domestic incident and an outstanding warrant).

In Perez, we recognized that the ordinary measure of discipline for false swearing is a three-month suspension. However, some of the Board members considered the attorney's forfeiture of his position as a municipal prosecutor to be a mitigating factor sufficient to reduce the discipline to a censure. The Supreme Court disagreed and suspended respondent for three months. Ibid.

This case presents several mitigating factors, including respondent's unblemished disciplinary history, the fact that the misconduct involved a personal matter, respondent's cooperation

with the OAE, and his remorse. Respondent offered the letters of eleven individuals attesting to his good character.

At oral argument, we heard further from respondent. He expressed extreme remorse for, and was visibly distressed by, his misconduct. He explained that his former wife has returned to Moscow and that he is the sole support of their young daughter. Respondent also informed us that the balance on his mortgage exceeds the value of his house. Thus, he stated, a suspension would amount to a "death sentence" for him and his daughter.

We recognize, on the one hand, that respondent's misconduct warrants a three-month suspension. On the other hand, however, we realize the devastating impact that a three-month suspension would have on him and his family. In light of this factor, as well as respondent's sincere contrition, we choose to impose a three-month suspended suspension.

Member Wissinger voted to impose a censure. Member Doremus 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

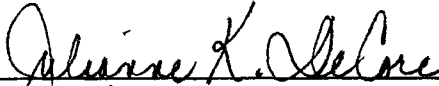
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Disposition: Three-month suspended suspension

Members	Disbar	Three-month Suspended Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Boylan		X				
Doremus						X
Lolla		X				
Stanton		X				
Wissinger			X			
Total:		6	1			1


Julianne K. DeCore
Chief Counsel