

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-039
District Docket No. XIV-04-354E

IN THE MATTER OF
JAMES P. HENRY
AN ATTORNEY AT LAW

:
:
:
:
:
:
:

Decision

Argued: April 20, 2006

Decided: June 7, 2006

Janice Richter appeared on behalf of the Office of Attorney Ethics.

John Dell'Italia appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (three-month suspension), filed by Special Master Bernard A. Kuttner, Esq.

Respondent was admitted to the New Jersey bar in 1967. By Supreme Court Order dated February 25, 2004, he was suspended from the practice of law for three months, effective March 22, 2004, for violating RPC 1.1(a), RPC 1.3, RPC 1.15(a), RPC

8.4(c) and (d), and RPC 8.1(b). According to the record before us, respondent has sought reinstatement.¹

A two-count amended complaint alleged that respondent violated R. 1:20-20 and RPC 8.1(b) (failure to cooperate with ethics authorities) for his failure to file an affidavit of compliance with the rules governing suspended attorneys, and RPC 5.5(a) (practicing law while suspended). On November 21, 2005, respondent and the Office of Attorney Ethics ("OAE") entered into a stipulation of facts regarding this matter ("S").

R. 1:20-20 requires suspended attorneys to file an affidavit with the OAE, within thirty days of the suspension Order, showing that appropriate steps have been taken to comply with the rule, such as notifying clients and adversaries of their suspension and providing clients with their files. Respondent failed to do so. In addition, attorneys are required to remove all signs announcing their status as a lawyer, and to otherwise comply with the provisions of R. 1:20-20.

Because respondent did not file the affidavit promptly, on July 22, 2004, the OAE sent an investigator to

¹ Office of Board Counsel called the OAE and learned that respondent had prepared documentation seeking his reinstatement, but that the materials were incomplete. Therefore, no motion for reinstatement has been filed with us.

respondent's office location, 527 Bangs Avenue, Suite 9, Asbury Park, New Jersey.

Once on the premises, the OAE found four business signs for "James P. Henry, Counsellor at Law," located inside the building. Two signs were in a hallway leading to respondent's office, while the other two signs were on nearby office doors.

Inside respondent's office, the investigator found numerous files scattered about, and respondent seated behind a desk that also had several files on it.

The investigator asked respondent why he was in the office during his suspension. Respondent replied that he had waited three months from March 22, 2004, the effective date of the suspension, and thought that he could, thereafter, resume his law practice. Respondent also told the investigator that he was actively representing six to eight clients at that time.

When asked why he had not filed the R. 1:20-20 compliance affidavit, respondent replied that he had "missed that part of the Order."

Subsequently, the OAE learned that respondent had substantially complied with R. 1:20-20, having notified his clients in writing of his suspension by letters dated March 12, 2004, well before the effective date of his suspension, but had not prepared the affidavit. Respondent later furnished copies

of those letters to ethics authorities in the normal course of the investigation.

Respondent stipulated that, by resuming the practice of law without first seeking reinstatement, he violated RPC 5.5(a), and that, by failing to file the compliance affidavit, he violated RPC 8.1(b) and R. 1:20-20.

The stipulation noted that, in mitigation, respondent's conduct was negligent, not intentional. Respondent knew that he was required to notify his clients of the suspension and to refrain from practicing law for three months. He was unaware, however, that he had to apply for reinstatement before resuming his law practice.

Finally, the OAE acknowledged that respondent has since then provided the required affidavit and accompanying documentation required by the rule.

The OAE withdrew the charged violation of RPC 8.4(d), acknowledging at the hearing before the special master that there was no clear and convincing evidence to support it.

The OAE recommended a three-month suspension, retroactive to January 19, 2006. The OAE selected that date because it marks six months after the date respondent filed the compliance affidavit (October 2005), as contemplated by R. 1:20-21(i)(A), which calls for a waiting period of six months for attorneys

seeking reinstatement after a R. 1:20-20 compliance affidavit violation.

The special master found respondent guilty of violating RPC 8.1(b) and R. 1:20-20, as well as RPC 5.5(a). He recommended a three-month suspension, retroactive to September 22, 2004.

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

R. 1:20-20 requires all suspended attorneys to file an affidavit showing that they have taken all steps required by the rule. Respondent failed to do so. He is, therefore, guilty of failure to cooperate with ethics authorities, a violation of RPC 8.1(b). In addition, respondent violated RPC 5.5(a) by resuming the practice of law without first seeking reinstatement.

As to respondent's failure to file an affidavit in compliance with R. 1:20-20, a reprimand is the presumptive discipline. That sanction has been enhanced when an attorney has defaulted in the ethics matter or has an extensive ethics history, neither of which is the case here. Recent cases, most of which are defaults, have generally resulted in suspensions. See,

e.g., In re Raines, 181 N.J. 537 (2004) (three-month suspension in a non-default matter, where the attorney's ethics history included a private reprimand, a three-month suspension, a six-month suspension, and a temporary suspension for failure to comply with a previous Court Order); In re Girdler, 179 N.J. 227 (2004) (three-month suspension in a default matter; ethics history included a private reprimand, a public reprimand, and a three-month suspension); In re McClure, 182 N.J. 312 (2005) (one-year suspension where the attorney's ethics history included an admonition and two concurrent six-month suspensions; the matter proceeded as a default); In re King, 181 N.J. 349 (2004) (one-year suspension where the attorney had an extensive ethics history, including a reprimand, a temporary suspension for failure to return an unearned retainer, a three-month suspension in a default matter, and a one-year suspension; the attorney remained suspended since 1998, the date of the temporary suspension; default matter); and In re Mandle, 180 N.J. 158 (2004) (one-year suspension in a default case where the attorney's ethics history included three reprimands, a temporary suspension for failure to comply with an order requiring that he practice under a proctor's supervision, and two three-month suspensions; in three of the matters, the attorney failed to cooperate with disciplinary authorities). But see In re Moore,

181 N.J. 335 (2004) (reprimand in a default matter, where the attorney's disciplinary history included a one-year suspension).

Respondent's conduct regarding the affidavit is much less serious than the suspension cases above because respondent complied with the heart of the rule – that portion requiring him to promptly notify clients of his suspension. Respondent showed significant compliance in this regard, having sent letters to his clients before the effective date of the suspension.

So, too, the practicing-law-while-suspended aspect of respondent's conduct is not as serious as is ordinarily found. Such cases have been met with stern discipline ranging from a two-year suspension to disbarment, depending on a number of factors, including the attorney's level of cooperation with the disciplinary proceedings, the presence of other misconduct, and the attorney's disciplinary history. See In re Wheeler, 140 N.J. 321 (1995) (attorney suspended for two years for practicing law while suspended, making multiple misrepresentations to clients, displaying gross neglect and a pattern of neglect and engaging in conduct that involved negligent misappropriation, conflict of interest, and failure to cooperate with disciplinary authorities); In re Cubberley, 178 N.J. 101 (2003 (three-year suspension for attorney who solicited and continued to accept fees from a client after

being suspended, misrepresented to the client that his disciplinary problems would be resolved within one month, failed to notify the client or the courts of his suspension, failed to comply with R. 1:20-20(a), and failed to cooperate with ethics authorities; the attorney also had a significant disciplinary history); In re Kasdan, 132 N.J. 99 (1993) (three-year suspension where the attorney continued to practice law after the Court denied her request for a stay of her suspension, failed to keep complete trust records, and failed to advise her adversary of the location and amount of escrow funds; the attorney was also guilty of conduct involving dishonesty, fraud, deceit or misrepresentation); In re Beltre, 130 N.J. 437 (1992) (attorney suspended for three years for appearing in court after having been suspended, misrepresenting his status to the judge, failing to carry out his responsibilities as an escrow agent, lying to this Board about maintaining a bona fide office, and failing to cooperate with an ethics investigation); and In re Goldstein, 97 N.J. 545 (1984) (attorney disbarred for misconduct in eleven matters and for practicing law while temporarily suspended and in violation of an agreement with the disciplinary authorities that he limit his practice to criminal matters). But see In re Dupre', 183 N.J. 2 (2005) (five-year suspension imposed for practicing law

while suspended, gross neglect, lack of diligence, failure to communicate with the client, failure to use written fee agreement, failure to protect client's interests on termination of representation, failure to cooperate with ethics authorities, conduct involving dishonesty, fraud, deceit or misrepresentation, and conduct prejudicial to the administration of justice; the attorney failed to appear on the return date of the Court's order to show cause).

Once again, however, respondent's conduct does not rise to the level of the typical case wherein an attorney practices law while suspended. The common thread in those cases is the attorney's defiance in practicing law while knowing that he or she is suspended. Here, respondent did not practice law during the three months after the effective date of his suspension — the time during which he knew he could not engage in the practice of law. Respondent was truly unaware, however, that he could not thereafter resume the practice of law without first seeking reinstatement. For this reason, we find that respondent did not have the mens rea present in the suspension cases above.

We find that respondent's practice of law was, under the unusual circumstances presented, more akin to those cases where attorneys, unaware that they have been declared ineligible to

practice law for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF"), continue to practice law. Such cases generally result in an admonition. See, e.g., In the Matter of Edward Wallace, Docket No. DRB 97-381(1997), and In the Matter of Joseph V. Capodici, Docket No. DRB 00-294 (November 21, 2000).

Respondent's overall conduct, however, merits more than an admonition, insomuch as there are two components to his misconduct - the failure to file an affidavit and practicing while suspended.

Finally, we factored into our determination that suspended attorneys who file late affidavits indirectly receive a three- to a six-month suspension because they are precluded from seeking reinstatement for six months from the date that the affidavit is filed. R. 1:20-21(i)(A). We have recently waived that waiting period where, as here, the attorney has at least protected the client.

In aggravation, there is respondent's disciplinary history, which includes the three-month suspension that triggered his duties herein, and a prior private reprimand.

For all of the above reasons, we find that the imposition of a retroactive term of suspension, as both the special master and the OAE have suggested, is appropriate in this case. We

determine to impose a three-month suspension, retroactive to January 19, 2006. Vice-Chair Pashman did not participate.

We also require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
William J. O'Shaughnessy,
Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

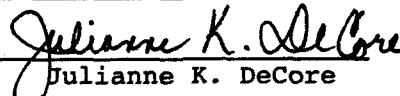
In the Matter of James P. Henry
Docket No. DRB 06-039

Argued: April 20, 2006

Decided: June 7, 2006

Disposition: Three-month suspension

Members	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy	X				
Pashman					X
Baugh	X				
Boylan	X				
Frost	X				
Lolla	X				
Pashman	X				
Stanton	X				
Wissinger	X				
Total:	8				1


Julianne K. DeCore
Chief Counsel