SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-106
District Docket No. XIV-03-316E

IN THE MATTER OF :
:
SCOTT L. WISS :
:
AN ATTORNEY AT LAW :

Decision

Argued: May 20, 2004

Decided: June 23, 2004

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

Respondent waived appearance for oral argument.

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

This matter was before us on a recommendation for reciprocal discipline filed by the Office of Attorney Ethics ("OAE") based on respondent's six-month suspension in New York for, among other things, his conviction for insurance fraud in the fifth degree.

Respondent was admitted to the bar of the State of New Jersey in 1991. He was admitted to the New York bar in the same year. He has no history of discipline.

In December 2001, respondent was the subject of a three-count indictment filed in the Supreme Court of New York, Queens County, charging him with insurance fraud in the third degree, employing an individual to illegally solicit clients and official misconduct. On October 10, 2002, respondent pleaded guilty to the reduced charge of insurance fraud in the fifth degree, a class A misdemeanor, in violation of New York Penal Law § 176.10.[1] On the same date, respondent was sentenced to a conditional discharge[2] and ordered to pay restitution of $5,000.

Following respondent's conviction, disciplinary proceedings commenced in New York. A hearing was held on April 10, 2003, at which both respondent and the Departmental Disciplinary Committee for the First Judicial Department jointly recommended a six-month suspension. In its September 17, 2003 report, however, the hearing panel recommended that respondent be suspended for nine months.

---

[1] New York Penal Law § 176.10 provides that "a person is guilty of insurance fraud in the fifth degree when he commits a fraudulent insurance act. Insurance fraud in the fifth degree is a class A misdemeanor."

An individual guilty of a class A misdemeanor is subject to a fine not to exceed $1,000 (New York Penal Law § 80.05) and a prison term not to exceed one year (New York Penal Law § 70.15(1)).

[2] In New York, a conditional discharge is not comparable to New Jersey Pretrial Intervention. A conditional discharge is an alternative to incarceration. It is imposed upon a plea of guilty or a conviction, and enrollment in it does not give a defendant an opportunity to escape prosecution; it only allows the defendant to avoid a custodial sentence. See New York Penal Law § 65.05.

The matter proceeded to the Supreme Court of New York, Appellate Division, First Judicial Department, which, in an Opinion and Order issued January 29, 2004, imposed a six-month suspension, effective March 1, 2004. The Appellate Division decision set forth the basic underlying facts:

> The charges against respondent arose from a fictitious personal injury case involving an individual named "Joseph Rousseau", who was an undercover officer investigating insurance misconduct at a medical clinic. On January 10, 2001, respondent sent one of his paralegals, Boris Aliev, to meet with a potential client, Joseph Rousseau, who was being treated at a Brooklyn medical clinic. Someone from the clinic had called respondent's office indicating that the clinic had recommended his firm to Rousseau and that he wanted to meet with someone from respondent's firm at the clinic. Because respondent was unable to meet with Rousseau, he sent Mr. Aliev who had Rousseau sign several blank forms including a retainer agreement, a no fault application, standard medical releases and a notice of intent to make a claim. However, the medical releases and notice of intent to make a claim were never notarized as required. Two and a half months later, as the 90-day no-fault filing deadline approached, respondent "panicked" realizing that they had not been notarized and his firm unsuccessfully tried to reach Rousseau.
>
> Respondent testified that he was concerned as to the consequences of his malpractice (and the several thousands of dollars in medical bills which would not be reimbursed), and told a staff member to falsely notarize the aforementioned documents using respondent's notary stamp, which also bore his signature. These forms were then filed with GEICO insurance company which was attempting to settle the case with

respondent's office. Subsequently respondent filed a retainer statement with the Office of Court Administration (OCA), prepared by a paralegal but signed by him, falsely stating that Rousseau had been referred to his firm through an advertisement. By waiting too long to check on Rousseau's file respondent resorted to falsely notarizing documents and admitted that he was "afraid of what I had done. I was trying to cover it up", and that it had never happened before. Respondent further acknowledged that he never met nor spoke with Rousseau and that he did not contact GEICO to try to obtain an extension of time beyond the 90-day deadline in order to file the no-fault application.

Compounding the mishandling of Rousseau's case was the fact that a part-time law student who was interning in respondent's office made an oral representation to a GEICO representative that Rousseau had refused a settlement offer, in part, because he had missed days from work as a result of the accident when, in fact, Rousseau had never had any such communication with respondent's office. Respondent testified that although he had authorized the student to engage in settlement negotiations with insurance companies he did not instruct him to make this false statement and respondent admitted that he was ultimately responsible for his employee's acts. The Hearing Panel noted that neither Boris Aliev nor the law student testified at the hearing.

In their joint submission, respondent and the Committee agreed, and the Panel concluded, that respondent fully admitted that he: falsely notarized documents in order to advance his own interests; failed to supervise his staff regarding their discussions with GEICO resulting in false statements designed to improperly secure insurance payments; and had his office file a retainer statement which he had signed

with OCA, which knowingly contained inaccurate information.

[OAEbEx.F3 to 5.][3]

The Appellate Division summarized the mitigating circumstances, which were persuasive in its decision to impose the six-month suspension jointly recommended by respondent and the disciplinary committee, rather than the nine-month suspension recommended by the hearing panel:

> In considering factors in mitigation the Panel noted that respondent is 37 years old and has two young children. When he was a full-time college student respondent also worked full-time as a skycap at MacArthur Airport in the early mornings and at night, and as a waiter on weekends. After graduating from law school in 1991, respondent worked for a number of firms both defending and prosecuting civil cases. Eventually, in 1999, he opened his own private practice which handles slip and fall cases, personal injury actions arising out of automobile accidents, some civil work and real estate closings. He is assisted by per diem attorneys, and by several paralegals who meet with clients when respondent is not in the office, investigate accident locations, meet with potential clients, and assist in the execution of necessary paperwork.
>
> In addition, the Panel concluded that respondent's evidence was "comprehensive and credible", including his character evidence, an absence of a prior disciplinary record, full and free disclosure to the Committee and a "cooperative attitude" toward the proceedings; his inexperience; his timely payment to GEICO of a restitution payment of $5,000 (apparently the amount of the "settlement" improperly obtained); and his

[3] OAEb refers to the brief submitted by the OAE.

"unequivocal" expression of remorse. The Panel also found that respondent had made "consistent and beneficial contribution to the community and that he enjoy[ed] a good reputation in his community for truthfulness and integrity." Respondent's character witnesses testified that respondent took full responsibility for his wrongful conduct, which was an aberration from his normal honest character. Respondent also presented letters from 23 individuals attesting to his integrity, his genuine contrition and the devastating consequences that have resulted from his misconduct.

Respondent also introduced evidence of his active community service, which the Panel determined should be considered as a "substantive" mitigating factor. That work included his membership in the Massapequa Lions and Kiwanis Clubs, his pro bono legal service to Variety Children's Learning Center, and his volunteer work with the Mid-Island Lodge of the Knights of Pythias, the last two which [sic] help handicapped children. The Panel also found that respondent has already been the subject of public embarrassment and humiliation, which included being taken out of his home in the middle of the night in handcuffs in front of his wife and children, and pleading guilty. Furthermore, it found that, since this episode, respondent has taken remedial steps with his staff to avoid a reoccurrence of such misconduct.

[OAEbEx.F5 to 7].

Respondent received a six-month suspension in New York for his criminal conviction for insurance fraud. During his disciplinary hearing, respondent admitted that he falsely notarized documents for the purpose of advancing his own interests, failed to supervise his staff in connection with

settlement negotiations with an insurance carrier, resulting in untruthful statements designed to improperly secure insurance payments, and had his office file a retainer statement with the New York Office of Court Administration, which knowingly contained inaccurate information. This conduct violates New Jersey RPC 8.4(b)(a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness), RPC 8.4(c)(conduct involving dishonesty, fraud, deceit, or misrepresentation), RPC 8.4(d)(conduct prejudicial to the administration of justice), and RPC 5.3(b) and (c)(failing to adequately supervise a non-lawyer employee).

The OAE argued that the law and facts of this case require the imposition of the same discipline imposed in New York, a six-month suspension. The OAE recommended that the suspension be retroactive to March 1, 2004, the date of respondent's suspension in New York.

Following a de novo review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Reciprocal disciplinary proceedings in New Jersey are governed by R.1:20-14(a)(4), which directs that:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the misconduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E).

In support of its position that a six-month suspension is the appropriate measure of discipline, the OAE cited In re Forrest, 158 N.J. 428 (1999) (six-month suspension imposed where the attorney, knowing that his injured client had died during the course of litigation, engaged in misrepresentation and deceit by failing to disclose that fact to the court, to an arbitrator and to his adversary, while continuing to process the case); In re Eskin, 158 N.J. 259 (1999) (six-month suspension imposed based on a motion for reciprocal discipline, where an attorney forged and falsely notarized his client's signature to a notice of claim served after the statute of limitations had expired, and served a second notice of claim containing a

material misrepresentation); In re Solvibile, 156 N.J. 321 (1998) (six-month suspension imposed where an attorney, in her application for admission to the Pennsylvania bar exam, misrepresented that her application for admission was mailed prior to the closing deadline, when she knew it was not; the attorney prepared and submitted a misleading letter, to the Pennsylvania Board of Law Examiners, signed by a post office worker, stating that her application and money order payment were timely); and In re Telson, 138 N.J. 47 (1994) (six-month suspension imposed where an attorney altered a court document to conceal the fact that a divorce complaint had been dismissed, and submitted the matter to another judge who granted the divorce; the attorney denied any misconduct when questioned by the assignment judge).

In further support of its position that a six-month suspension is appropriate, the OAE pointed out that "the record is replete with substantial mitigating factors," as set out in the Appellate Division decision. In addition, respondent notified the New Jersey disciplinary system of this matter shortly after entering his guilty plea to the criminal charges. Respondent advised the OAE that he is not currently practicing law in New Jersey, and that he will not do so while this matter is pending. Hence the OAE's recommendation that respondent's New

Jersey suspension be made retroactive to the effective date of his New York suspension, March 1, 2004.

In addition to filing a document containing a misrepresentation, which was the focus of the cases cited by the OAE, respondent failed to properly supervise a non-lawyer assistant and improperly notarized a document. As to the latter violation, the level of discipline in cases dealing with the improper execution of jurats, without more, is ordinarily an admonition or a reprimand. When an attorney witnesses and notarizes a document that has not been signed in his or her presence, but is signed by the legitimate party, the discipline imposed has ordinarily been a private reprimand (since 1994, an admonition). If there are aggravating factors, such as the attorney's personal stake in the transaction, or the direction that a secretary sign the party's name on a document that the attorney then notarizes, or a pattern of practice, then the appropriate discipline is a reprimand. See, e.g., In re Giusti, 147 N.J. 265 (1997) (reprimand where the attorney forged the signature of his client on a medical record release form. The attorney then forged the signature of a notary public to the jurat and used the notary's seal); In re Rinaldo, 86 N.J. 640 (1981) (public reprimand where an attorney permitted his secretaries to sign two affidavits and a certification in lieu of oath, in violation of R.1:4-5 and R.1:4-8); and In re Conti, 75

N.J. 114 (1977) (public reprimand where the attorney's clients told his secretary that it was impossible for them to come to the attorney's office to sign a deed and instructed her to do "whatever had to be done" to record the deed; the attorney had the secretary sign the clients' names on the deed; he then witnessed the signatures and took the acknowledgment).

Where the improper acknowledgment is accompanied by other unethical conduct, the discipline generally is more severe, as in In re Just, 140 N.J. 319 (1995). In Just, a three-month suspension was imposed where the attorney facilitated a conveyance that was questionable because of the grantor's apparent lack of competence and affixed a jurat to a signature he did not witness. More severe discipline also resulted in In re Surgent, 79 N.J. 529 (1979). In that case, a six-month suspension was imposed where the attorney took an improper jurat for various clients who had signed a verified complaint and affidavits filed with the court. In addition, he entangled his personal business relationship with clients and acted against a corporation in a matter substantially related to his former representation of the corporation. In another serious case, In re Friedman, 106 N.J. 1 (1987), the attorney entered a guilty plea to three counts of falsifying records for improperly affixing his jurat to three affidavits subsequently submitted to an insurance company. The Supreme Court found that the

attorney's conduct had not been an aberrational act done with the purpose of benefiting a client, but a pattern of practice that would undoubtedly have continued if not for the criminal prosecution. In that case, the Court's resolution was "time served" (the attorney had been temporarily suspended for more than one year).

Here, respondent involved a staff member in his scheme and acted out of self-interest to cover up his own negligence. At least a reprimand would be warranted for that misconduct alone. In addition, respondent violated RPC 5.3 (b) and (c) by failing to adequately supervise his non-attorney staff. On that score as well, a reprimand would be appropriate. See In re Weiner, 140 N.J. 621 (1995) (reprimand where the attorney delegated excessive authority to his non-lawyer staff and at least condoned the signing of client names by his staff).

While these latter violations are serious, they pale in comparison to respondent's conviction for insurance fraud. For that misconduct alone, a six-month suspension is warranted. See In re Eskin, supra, 158 N.J. 259, 260 (1999). No further discipline, however, need be imposed for the additional infractions. True, respondent violated several disciplinary rules, and involved his subordinates in his self-serving scheme. The record, however, reveals sufficient mitigating factors – his remorse, his reputation for integrity in the community, and his

community involvement – to justify the imposition of a six-month suspension for the totality of his misconduct. We agree with the OAE that the suspension should be made retroactive to March 1, 2004.

One member did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Scott L. Wiss
Docket No. DRB 04-106

Argued: May 20, 2004

Decided: June 23, 2004

Disposition: Six-month suspension

Members	*Disbar*	*Six-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy		X					
Boylan							X
Holmes		X					
Lolla		X					
Pashman		X					
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		8					1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel