SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 00-219

IN THE MATTER OF :
JACOB WYSOKER :
AN ATTORNEY AT LAW :

Decision

Argued: November 16, 2000

Decided: April 3, 2001

Tangerla M. Thomas appeared on behalf of the Office of Attorney Ethics.

Kevin H. Michels 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 based on a recommendation for discipline filed by the District VII Ethics Committee ("DEC"). The complaint charged respondent with a violation of RPC 3.3(a)(1) (lack of candor toward 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). Respondent and the Office of Attorney Ethics ("OAE") entered into a stipulation of facts. At the DEC hearing, at which respondent testified, a number of witnesses addressed respondent's good character and reputation in the community.

Respondent was admitted to the New Jersey bar in 1951. He is the senior partner at the firm of Wysoker, Glassner & Weingartner ("the Wysoker firm" or "the firm"), with offices in New Brunswick, Middlesex County. Respondent has no history of discipline.

The stipulated facts are as follows:

Respondent handles a significant amount of his law firm's intake of workers' compensation cases, which entails obtaining information to be included on the workers' compensation claim petitions. During the latter part of 1995, Chief Judge Paul A. Kapalko, Director, Division of Workers' Compensation ("the Division"), received complaints from attorneys, who alleged that respondent was filing workers' compensation claim petitions with inaccurate petitioner addresses, in order to improperly venue them in Middlesex County. At the direction of Director Kapalko, Supervisory Judge Matthew W. Parks telephoned respondent in April 1996 and instructed him to cease using incorrect addresses on the claim petitions. Respondent did not immediately discontinue this improper practice.

On July 19, 1996 Deputy Attorney General Michael O'Brien wrote to Director Kapalko, complaining that the Wysoker firm had filed approximately 1,000 claim petitions with incorrect petitioner addresses. The petitions were filed in 1994, 1995 and 1996, on behalf of employees of Trenton Psychiatric Hospital and North Princeton Developmental Center, the majority of whom lived in Mercer, not Middlesex County.

The Wysoker firm's use of incorrect addresses on the petitions had a direct impact on the county of venue. Under N.J.S.A. 34:15-53, a workers' compensation matter may be

venued in the county of either the employer's or the petitioner's address, or where the injury occurred. The Division's policy, however, was to venue claim petitions where the petitioner resided.

In the summer of 1996 the law library at the Division's District Hearing Office in New Brunswick had to be converted into a fifth courtroom to handle the backlog of cases that resulted from the large volume of claim petitions venued in Middlesex County. According to Director Kapalko, respondent's improper practice was not the only reason for the library's conversion to a courtroom. As of the date of the within stipulation, all five courtrooms were used to eighty-five percent capacity and the Division continued to derive a material benefit from the fifth courtroom.

On August 5, 1996 Director Kapalko sent correspondence to the Wysoker firm, scheduling an August 30, 1996 meeting among Lester Goldblatt, Esq., of the State Bar Association, O'Brien and Murray Weingartner, a partner of the firm. The purpose of the meeting was to discuss the claim petitions filed by the firm with incorrect addresses. Prior to the meeting, Weingartner filed with the Division a letter with the correct addresses of each employee of Trenton Psychiatric Hospital and North Princeton Developmental Center. The letter requested that the venue be changed without the need for a formal motion.

At the August 30, 1996 meeting, Director Kapalko informed Weingartner that the firm had to discontinue its practice of filing petitions with incorrect addresses. He also instructed Weingartner to take remedial action on the petitions incorrectly filed, by either filing

amended petitions or obtaining consent orders to have them re-venued.

On September 5, 1996 Weingartner held a meeting with members of the firm, which respondent attended. Weingartner advised respondent of Director Kapalko's instructions. Nevertheless, after Weingartner's meeting with the firm – and at least as late as December 1997 – respondent signed the jurat on an undisclosed number of claim petitions filed with incorrect addresses. In some instances, the address listed on the petition had a connection to the claim petitioner, such as that of a family member or friend with whom an out-of-state petitioner had stayed, while in the state. The address, however, was not the petitioner's home address. Respondent signed the jurat on the petitions knowing that they contained inaccurate information about the home address of the petitioners.

Respondent's improper filings caused the Division to incur substantial costs in re-venuing over 1,000 cases. The Division sanctioned the Wysoker firm $200, applied as a deduction against earned fees, for each improperly venued case that resulted in an award for the client. The firm paid the sanction. The Division, however, was not reimbursed for the cost incurred in re-venuing the cases improperly filed. The Division did not request reimbursement from respondent or take it from the sanction.

On October 16, 1998 the Division published a notice to the bar instructing workers' compensation practitioners to file all future claim petitions using the correct address for the petitioners. The notice was not issued solely because of the conduct of the Wysoker firm. Indeed, the Divisions's investigation revealed that at least three other law firms were filing

claim petitions with incorrect addresses, in order to obtain a convenient venue.

As noted in the stipulation, respondent's misconduct "took place prior to any such Notice to the Bar declaring this practice no longer acceptable." Furthermore, respondent represented, in his reply to the grievance, that he has stopped filing petitions with incorrect addresses. In addition, the incorrect addresses did not affect any substantive rights of the petitioners in the workers' compensation claims, such as the nature or extent of injuries or amount of recovery. Lastly, respondent cooperated fully with the OAE, admitted his wrongdoing and has not been disciplined during his forty-nine years as an attorney.

Seven character witnesses testified in respondent's behalf, including a retired Middlesex County assignment judge, the director of Middlesex County Legal Services Corporation, three professors, a partner in a New Brunswick law firm and the executive director of the Mae J. Strong Child Development Center.[1] The witnesses testified about respondent's good reputation in the community, their personal opinion of him and his decades of public service in the area of civil rights. All the witnesses testified that, despite their knowledge of the within stipulated facts, their opinion of respondent's good character remains unchanged.

Respondent, in turn, admitted that he had made a mistake, expressed his regret and apologized for his misconduct. He explained that he used incorrect addresses on the petitions

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[1]Respondent also submitted a number of character letters and evidence of awards he has received.

> . . . to concentrate the cases together in one venue to more easily dispose of them, and dispose of them quicker because we have a very large Workers' Comp practice, and the bulk of our practice is Middlesex County . . . . In this time period we send three lawyers to Middlesex County. We probably have more volume of Workers' Comp in Middlesex County than any other law firm, and when you send three lawyers, you know what that means. And concentrating the cases in that venue makes it easier to move them quicker than if they are in Mercer County or up in Essex County or Bergen County. That was the only, not very bright, rationale on my part.
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> [T3/22/2000 at 106-107]

* * *

The DEC determined that respondent had violated RPC 3.3(a)(1), RPC 8.4(c) and RPC 8.4(d). The DEC recommended the imposition of a reprimand.

* * *

Upon a de novo review of the record, we are satisfied that the conclusion of the DEC that respondent engaged in unethical conduct is supported by clear and convincing evidence. Respondent engaged in two types of misconduct. First, he filed workers' compensation petitions with inaccurate addresses in order to "forum shop." Second, after he was warned by Weingartner and Director Kapalko, he executed the jurats on an undetermined number of petitions that contained what he knew to be incorrect information.

Respondent's counsel argued that a finding of a violation of RPC 3.3(a)(1) was inappropriate because the rule applies only to misrepresentations of material facts. Counsel argued that the petitioner's address on a workers' compensation petition is not material, pointing out that, as stipulated, respondent's use of incorrect addresses had not detrimentally affected the cases substantively.

In the alternative, counsel argued, if respondent's misrepresentation is deemed to be material, then it should be viewed within the appropriate context. Counsel pointed out that other law firms engaged in the same misconduct and that respondent's behavior will not be repeated.

After considering counsel's arguments, we found that respondent knowingly executed documents containing misrepresentations and filed them with the Division of Workers' Compensation. We also found that respondent's misrepresentations were material. As seen in the above mentioned notice to the bar (exhibit 7 to the stipulation), the Division considers the petitioner's address to be "a material requirement of the verified petition." We concluded, thus, that respondent violated RPC 3.3(a)(1).

Counsel further argued that a finding of a violation of RPC 8.4(c) is equally inappropriate, remarking that the complaint alleged no independent basis for a finding of a violation of that rule. Counsel pointed to two cases from the federal circuit, Apple Corps Ltd., MPL v. International Collectors Society, 15 F. Supp.2d 456 (D.N.J. 1998), and Essex County Jail Inmates v. Treffinger, 18 F. Supp. 2d 418 (D.N.J. 1998), contending that those

cases stand for the proposition that RPC 8.4(c) is intended to encompass only 'grave misconduct,' of 'such gravity as to raise questions as to a person's fitness to be a lawyer.' Counsel argued that, in the Apple court's view, "if RPC 8.4(c) is interpreted to prohibit misrepresentations regardless of their materiality, then the RPC provisions expressly prohibiting material misrepresentations would be 'entirely superfluous.'"

Here, too, we rejected counsel's contention. Even assuming that his interpretation of those federal cases was correct, we have never limited a finding of misrepresentation to only those situations involving "grave misconduct." Our - and the Court's - steadfast view has always been that any misrepresentation is a violation of RPC 8.4(c). That RPC 3.3(a) may be an included offense within RPC 8.4(c), as counsel seems to argue, does not prevent a finding of a violation of both rules, just as findings of lack of diligence and gross neglect for the same type of misconduct are appropriate in some instances. We found, thus, a violation of RPC 8.4(c).

Respondent was also charged with a violation of RPC 8.4(d). Respondent's counsel argued that "[m]ost often, RPC 8.4(d) is the basis for discipline when an attorney's actions are calculated to affect the substance of the case." Counsel contended further that, "[e]ven when procedural wrongdoing is cited as the basis for a violation of RPC 8.4(d), the conduct in question most often is intended to affect the substance or outcome of the case, rather than a procedural convenience as here." Counsel also pointed to cases where a violation of RPC 8.4(d) was found because the power of the court had been misused for personal benefit.

Counsel summarized by urging the following:

> Here again, Respondent's actions were not intended to affect any finding of liability, increase the amount of any recovery, withhold, change or destroy evidence, intimidate persons into acting in his client's favor, any other action calculated to have any affect on the substantive outcome of any case. Because his use of incorrect addresses affected only venue, and the venue was changed prior to hearing, Respondent's actions did not prejudice the just outcome of any case, and therefore did not prejudice the administration of justice.

We found that counsel's argument missed the mark. It was the wasting of judicial resources that was prejudicial to the administration of justice. Respondent's conduct detrimentally affected the venuing of the cases and required time and effort of court personnel to have the cases transferred to the proper venues. A finding of a violation of RPC 8.4(d) is, thus, appropriate and we so found.

Misrepresentations to a court have resulted in discipline ranging from a reprimand to disbarment. After a review of those cases, we found that this matter falls within the range of a reprimand to a brief term of suspension.

In In re Chamish, 138 N.J. 91 (1992), a six-month suspension was imposed where the attorney forged another attorney's signature on a complaint to make it appear that the other attorney had instituted litigation, instead of Chamish. In addition, the attorney failed to respond to clients' requests for information, failed to act with diligence and, in one matter, impermissibly represented the driver and passenger in a motor vehicle case. A six-month suspension was also imposed in In re Telson, 138 N.J. 47 (1994). There, the attorney deleted the court's dismissal of his case from the file card and went into another judge's courtroom,

attempting to obtain a favorable judgment on a case that the first judge had dismissed. In addition, Telson lied to the judge that he had not altered the file card. In In re Johnson, 102 N.J. 504, 510 (1986), the attorney received a three-month suspension for lying to the court about an associate's purported illness, for the purpose of securing an adjournment of a litigated matter. More recently, a public reprimand was imposed in In re Mazeau, 122 N.J. 244 (1991). In Mazeau, the attorney knowingly made a false statement of material fact to a trial judge and failed to disclose to a trial court a material fact, knowing that the court might have been misled by such failure. Specifically, Mazeau misrepresented, in a brief, the date on which he had been retained. See also In re Marlowe, 126 N.J. 378 (1991) (public reprimand for misrepresentations to a trial court, failure to cooperate with disciplinary authorities and misrepresentation.)

As noted above, in addition to respondent's use of inaccurate addresses on the claim petitions, he executed the jurats on an undisclosed number of the petitions, knowing that the information on them was inaccurate. While the improper execution of jurats can never be tolerated, respondent's conduct here was considerably more serious, in the sense that, when he took the improper acknowledgment, he knew that the petitions would continue to be filed with incorrect addresses. It should be remembered that, by that time, respondent was fully aware of the court's warnings to cease this improper practice.

We concluded, however, that respondent's misconduct did not rise to the level of that seen in Telson and Chamish. Telson's misrepresentations to the court were egregious and

had a direct impact on the underlying litigation; Chamish's misrepresentation was undertaken to cover up his own mishandling of a matter. Here, the OAE agreed that respondent's misrepresentations had no impact on the underlying matters.

Instead, respondent's misconduct falls more properly into the category of cases generally warranting a reprimand or a brief suspension. In fashioning the appropriate degree of discipline for respondent's transgressions, mitigating circumstances must be considered. Respondent has had an unblemished career for nearly fifty years and unquestionably has dedicated himself to working toward the public good for a variety of causes in a number of settings. In addition, he admitted his misconduct, expressed remorse for his actions and caused no harm to his clients. The OAE suggested to the hearing panel that the appropriate measure of discipline for this respondent ranges from a reprimand to a three-month suspension. Respondent's counsel urged an admonition. The DEC, in turn, believed that a reprimand was sufficient. At argument before us, the OAE agreed with the DEC's recommendation for a reprimand, based on the mitigating factors present. At first blush, that seemed to us an appropriate resolution. We cannot ignore, however, that respondent repeated his misconduct after he was told twice to stop filing claim petitions with incorrect addresses. The first time the message came from Director Kapalko, through Judge Parks; the second time the message came from Director Kapalko through Weingartner, respondent's partner. Respondent chose to disregard these warnings. In addition, respondent's misconduct was not confined to a few, isolated instances. On at least one thousand occasions, he formed the

mens rea to misrepresent to the court his clients' addresses. Although to view this as one thousand instances of misrepresentation would produce an unreasonably harsh result, the opposite view of this matter as a single incident meriting a reprimand does not take into account the extent of respondent's misconduct and its ramifications.

In sum, we have considered respondent's years at the bar and his outstanding public service. In light, however, of the number of cases involved here and respondent's repetition of the misconduct, after he had been twice told to stop, eight members of the Board determined to impose a three-month suspension. One member dissented, voting to impose a suspended three-month suspension and 480 hours of community service.

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

Dated: April 3 2001

By: _____
ROCKY L. PETERSON
Vice Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jacob Wysoker
Docket No. DRB 00-219

Argued: November 16, 2000

Decided: April 3, 2001

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Three-month Suspended Suspension	Dismiss	Disqualified	Did not Participate
Hymerling				X			
Peterson		X					
Boylan		X					
Brody		X					
Lolla		X					
Maudsley		X					
O'Shaughnessy		X					
Schwartz		X					
Wissinger		X					
Total:		8		1			

Robyn M. Hill 7/16/01
Robyn M. Hill
Chief Counsel