SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-160

IN THE MATTER OF :
:
RICHARD C. SWARBRICK :
:
AN ATTORNEY AT LAW :

Decision

Argued: June 19, 2003

Decided: September 4, 2003

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

Robert E. Margulies 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 Martin Greenberg, J.S.C., (retired), sitting as a special master.

Respondent was admitted to the New Jersey bar in 1958. During the time relevant to the within matter he was engaged in private practice in Piscataway, Middlesex County. He was privately reprimanded in 1988, for his verbal assault on a municipal court judge during a court proceeding, for which he was cited three times for contempt and fined $450. In the Matter of Richard C. Swarbrick, Docket No. DRB 87-105 (1988).

The within charges stemmed from respondent's handling of three separate client matters:

In 1994, respondent represented Mark E. Wallace in a civil action in Middlesex County Superior Court before the Honorable Douglas K. Wolfson, J.S.C. Following a mistrial, the matter was heard by Thomas B. Mannion, J.S.C., (retired).

Also in 1994, respondent represented Gale Ann Lynch and Robert Lynch, an infant, in a medical malpractice proceeding in Middlesex County Superior Court before a series of judges - Jack Lintner, J.S.C.; Amy Chambers, J.S.C. and, on remand, Donald Hague, J.S.C.

In 2000, respondent represented Lucinda and Joaquim Nunes in a personal injury matter, which included a trial in Union County Superior Court before Rudy B. Coleman, J.S.C. This matter is relevant only to the allegations of count five, regarding respondent's behavior toward Judge Coleman.

The complaint charged respondent with a violation of RPC 1.2(d) (assisting a client in conduct the attorney knows is fraudulent) in count one; RPC 3.2 (failure to expedite litigation) in count two; RPC 3.3(a)(1),(2),(4) and (5) (candor to a tribunal) in count three; RPC 3.4(a),(b) and (e) (fairness to opposing counsel) in count four; RPC 3.5(c) (conduct intended to disrupt a tribunal) in count five; and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice) in count six.

Respondent and the Office of Attorney Ethics ("OAE"), entered into a stipulation of facts as to counts one, two, five and six of the complaint. Counts three and four

alleged different violations arising from the same set of facts as set forth in count one. Neither the stipulation nor the special master's report address counts three or four. Upon our inquiry to both parties concerning the status of these counts, the OAE advised that, given the special master's determination that the OAE had not carried its burden of proof in count one (that respondent had assisted his client in conduct he knew was fraudulent), there was similarly an absence of clear and convincing evidence (based on the same set of facts), that respondent was not candid with the judge (count three) or was unfair to opposing counsel (count four).

First Count (Wallace)

Respondent had originally represented Wallace in connection with a minor motor vehicle accident in 1981, and had represented other members of the Wallace family in numerous matters over a number of years. The 1994 representation stemmed from Wallace's claim that he had sustained permanent injuries in 1988, due to excessive force by police officers. The interrogatories served made no inquiry about prior accidents.

On May 7, 1993, Wallace testified during his pretrial deposition, that he had been represented by attorney Jack Wurgaft in a lawsuit stemming from a 1981 motor vehicle accident. On October 4, 1994, during a discussion of pretrial matters in Wallace before Judge Wolfson, defense counsel asked respondent specific questions about the 1981 accident, including who had represented Wallace in the lawsuit. Respondent replied that he "didn't know." Several days later, during trial, defense counsel advised the court that they had learned that respondent had represented Wallace in connection with the 1981

accident. After the court questioned respondent about the accident, he reviewed his 1981 files, located the Wallace file, and brought it to court the following day. The court determined that defense counsel had been misled and allowed counsel to depose Wallace. Wallace testified that his recollection had been refreshed and "the best he could recollect" was that respondent had represented him in the 1981 accident case. The court later determined that it was "a fair inference of what has transpired over the last several weeks is that this is all part of a calculated attempt to conceal from the defendants and the court, for that matter, relevant salient material information damaging to the case of the plaintiff."

The complaint charged respondent with a violation of RPC 1.2(d).

Count Two (Wallace and Lynch)

On multiple occasions during both the Wallace and Lynch trials, respondent continued objecting to the same or similar questions, after being overruled by the court. In addition, on multiple occasions during both the Wallace and Lynch trials, respondent made statements in front of the jury and the court that the judge was unfair, was prejudiced against respondent's client and treated respondent differently than defense counsel. As a result, the jury was excused to permit the court to address the allegations. At side bar, respondent attempted to clarify the record for appeal as to his perceptions of the trial court's inclinations.

Respondent announced the time on the record more than 130 times throughout the Lynch trial, despite the judge's direction that his actions were unnecessary. In addition,

on one occasion, respondent left the courtroom without first seeking permission from the court.

The complaint charged respondent with violating RPC 3.2.

Count Five (Lynch, Wallace and Nunes)

During the Lynch trial, respondent announced the time more than 130 times, despite the judge's advising him that there was no need to do so for the record.[1] In addition, respondent accused Judges Lintner, Chambers, Wolfson, and Coleman of being unfair and prejudiced against the plaintiff. Some of these comments were made in front of the jury. Respondent continued his comments despite warnings, admonishments, and fines by the court.

The complaint charged respondent with a violation of RPC 3.5(c).

Count Six (Wallace and Lynch)

During the Wallace and Lynch trials, respondent made references to Nazis and Gestapo, and used other similar terms. While trying to pay a contempt fine, respondent complained to the court, outside of the presence of the jury, that he had "not been able to present his offer of proof when he had been falsely accused of labeling his adversary a Nazi, when in fact, the issue was much more cerebral, contemplating 'National socialism and Nazism.'"

[1] The stipulation repeated this information, which was already presented under count two.

Respondent was later quoted in an interview with local press, in which he made similar claims. The case was already completed when respondent gave the interview.

The complaint charged respondent with a violation of RPC 8.4(c) and (d).

By way of explanation as to Wallace, respondent stated that he did not recall the 1981 accident at the time of the 1993 pre-trial deposition. Further, as a result of the deposition testimony, defense counsel learned of a 1985 accident, which was not disclosed to him until trial. According to respondent, the parties were confused as to the 1981 and 1985 accidents. As to the in-court inquiries of respondent about the accidents, he stated that, at that point, he still did not recall having represented Wallace in connection with the 1981 accident and had no knowledge of the 1985 accident. Respondent asserted that the court was incorrect in finding that defense counsel had been intentionally misled.

With regard to count two, respondent contended that it is not inappropriate to object to similar or identical questions to preserve the record for appeal upon the court's failure to clearly rule on prior objections. As to respondent's claims of prejudice in Wallace and Lynch, he claimed that he and his clients were treated differently than defense counsel and their clients and that he was consistently disparaged by the judges.

Respondent asserted that his announcement of the time was a trial tactic that did not disturb the proceedings. He explained that, expecting an appeal, he used the time statements as markers to find testimony in the preparation of the appellate brief. In addition, respondent contended that the court was rushing plaintiff's case but defense

counsel was allowed wide latitude. Respondent claimed that his time references were also intended to subtly remind the court of the disparity.

With regard to respondent's exiting the courtroom in Lynch, he stated that he did not think permission was necessary because co-counsel continued to represent the client in his absence. In addition, he did not seek leave to go to the men's room after his client's request, in front of the jury, was denied. Respondent added that he suffered from a prostate condition.

In connection with respondent's accusations of prejudice by Judges Lintner, Chambers, Wolfson and Coleman, he asserted that he lodged his objections to preserve the record for appeal as to each judge and to record his concerns about their bias. Respondent noted that he withdrew the objection as to Judge Coleman and apologized. He denied that his conduct was inappropriate under the circumstances.

As to respondent's comments about Nazis in Wallace, his comment was based on a long program of harassment by the East Brunswick Police Department. Concerning Lynch, respondent contended that he had intended to make a point to the judge outside the presence of the jury that the defendant's argument was consistent with Nazi ideology. Respondent denied having called opposing counsel a Nazi.

With regard to his comment in the newspaper about the Gestapo, respondent denied that his comment fell within the conduct proscribed by RPC 3.6 (trial publicity).

In addition to the above explanations, respondent added that: 1) he has no previous history of discipline in his forty-five years of practice (a statement which, as noted above, is not accurate); 2) a substantial period of time has passed since his alleged misconduct;

3) he cooperated fully with disciplinary authorities; 4) he has a long list of achievements at the bar; 5) he served as an arbitrator in both Hudson and Middlesex Counties; 6) his alleged improper comments are protected by the first amendment to the United States Constitution and the New Jersey Constitution, Article I, Paragraph 6;[2] and 7) his accusations that the judges in the underlying cases were prejudiced and his references to Nazis were within the bounds of zealous advocacy under RPC 1.3.

With regard to count one, the special master was unable to conclude that respondent had violated RPC 1.2(d). In the special master's view, it was just as likely that respondent did not remember his 1981 representation of Wallace, as it was that he did recall the matter and, by his silence, lied about it. Similarly, the special master dismissed the allegations of count six, which charged respondent with a violation of RPC 8.4(c) and (d), stemming from his comments about Nazi ideology. In the special master's opinion, "it was advocacy, right at the cutting edge of advocacy," but not directed at counsel and did not merit a finding of unethical conduct.

The special master's conclusions were different as to counts two and five. Count two charged respondent with a violation of RPC 3.2 stemming from several different actions before the court, including his continuing objections to questions after his objection had been overruled. In the special master's view, respondent knew he could have made the objection once and then asked that the record reflect his standing objection

[2] Pursuant to R.1:20-4(e), constitutional questions shall be held for consideration by the Court as part of its review of our Decision.

to the same or similar questions. Likewise, his numerous statements in front of the jury that the judge was unfair and prejudiced were inappropriate. Respondent's comments should have been made at sidebar and in a more expeditious fashion, without the delay resulting from the public utterance. Also considered in this count was respondent's stating the time on over 130 occasions during the Lynch trial. The special master found the conduct disruptive of the proceeding, particularly in light of the judge's instruction to stop. Finally, under count two, the special master determined that it was improper for respondent to leave the courtroom without seeking the court's permission. At a minimum, respondent should have asked at sidebar to leave the courtroom.

Count five charged that respondent's claim, in front of the jury, that the judges were prejudiced, was intended to disrupt the tribunal. Here, too, respondent had a right to preserve the record, but should have done so at sidebar, rather than in front of the jury. Respondent's alleged justification was no defense to his having disrupted the proceeding, in violation of RPC 3.5(c).

By way of mitigation the special master relied heavily on respondent's supposed previously unblemished forty-five year career. In addition, he noted the passage of time since the infractions and respondent's cooperation with disciplinary authorities. The special master characterized respondent's conduct as aberrational and recommended that he receive a reprimand.

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

The special master properly dismissed the alleged violation of RPC 1.2(d) (count one). There is no indication in the record that respondent's in-court failure to recollect his representation of Wallace in 1981 was anything more than a simple lapse in memory. Similarly, the evidence does not support the conclusion that it was part of a scheme to perpetrate a fraud on the court or the defendant. Dismissal of counts one, three and four was, therefore, appropriate.

The special master was also correct in dismissing the allegations in count six, of violations of RPC 8.4(c) and (d).[3] Respondent's comments about Nazis and the Gestapo were distasteful at best and, as the special master stated, at the cutting edge of advocacy, but they were not unethical.

The special master found clear and convincing evidence of violations of RPC 3.2 and RPC 3.5(c), counts two and five respectively. We agree. Respondent could easily have achieved his claimed goal of making a record for appeal in a less disruptive fashion. For example, his repeated objections to similar questions could have been handled with a simple statement on the record that his initial objection continued throughout the proceedings. Respondent's announcement of the time more than 130 times was similarly disruptive. Although we question respondent's stated motive for his announcements of the time, even if respondent had a legitimate reason to record the time in anticipation of

[3] It was unclear to us how RPC 8.4(c) was implicated by respondent's references to Nazis.

preparing an appellate brief, the judge told him his actions were unnecessary and he failed to stop. The repeated interruptions no doubt delayed the process of the trial. In addition, with regard to respondent's leaving the courtroom without asking the court's permission, he had to know that he should have approached the bench and asked at sidebar to leave the courtroom. Respondent violated RPC 3.2 and RPC 3.5(c).

As to the appropriate level of discipline, the special master pointed to In re Mezzacca, 67 N.J. 387 (1975). In Mezzacca, a reprimand was imposed where the attorney, who had no previous history of discipline, referred to a departmental review committee as a "kangaroo court," and made other discourteous comments. The Court stated:

> While we cannot condone what he said and did, it appears that he may have become so personally involved in the cause of his client and the alleged injustice he anticipated, that he allowed his emotional state to affect his judgment as an attorney.
>
> Id. at 390-391.

More recently, a reprimand was imposed where the attorney engaged in intimidating and contemptuous conduct towards two administrative law judges. In particular, the attorney filed approximately one hundred motions for one of the judge's disqualification on the basis that he was blind and, therefore, unable to observe the claimant or review the documentary evidence. The motion papers repeatedly referred to the judge as "the blind judge." In re Solow, 167 N.J. 55 (2001). Solow had a previous admonition for unrelated conduct.

In Solow, like Mezzacca, it appeared that the attorney had become emotionally involved in his client's cause. The same appears to be true in the within matter. That

cannot, however, excuse respondent's conduct. As an experienced practitioner, he knew better than to comport himself the way he did before these judges. As to respondent's claims that the judges were biased against his clients, the proper forum for that argument is the appellate tribunal or a judicial review board. Further, respondent's conduct was not an aberrational outburst, but a continued course of conduct throughout the proceedings.

That being said, the within conduct did not rise to the level seen in Solow, where a reprimand was imposed. Absent respondent's disciplinary history, we might have imposed only an admonition here. As noted above, however, respondent was privately reprimanded in 1988 for conduct quite similar to that before us today. We unanimously determined that both the existence of prior discipline and the similarity of that prior matter to the case now before us required the imposition of a reprimand.

We further determined 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
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard C. Swarbrick
Docket No. DRB 03-160

Argued: June 19, 2003

Decided: September 5, 2003

Disposition: Reprimand

Members	*Disbar*	*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:			9				

Julianne K. DeCore
Acting Chief Counsel