SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-048

IN THE MATTER OF

ROBERT W. HOCK

AN ATTORNEY AT LAW

Decision

Argued: April 18, 2002

Decided: June 11, 2002

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 was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), pursuant to R.1:20-14, following a decision by the Supreme Court of New York, Appellate Division, Fourth Judicial Department, to suspend respondent for two concurrent one-year suspensions, effective June 16, 2000.[1]

[1] The OAE first learned of the matter by reviewing a compilation of New York disciplinary decisions for calendar year 2000. Respondent did not report the suspension, as required by R.1:20-

Respondent was admitted to the New Jersey bar in 1991. He was suspended in New York for violations of DR 1-102(a)(4), DR 1-102(a)(7), DR 7-102(a)(5) and DR 7-106(c)(7), corresponding respectively to our RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.4(b) (criminal act that adversely reflects on an attorney's fitness to practice law), RPC 3.3(a)(1) (knowingly making a false statement a fact to a tribunal) and RPC 3.3(a)(4) (intentionally violating an established rule of procedure in appearing as a lawyer before a tribunal).

Two Referees' Reports dated January 26 and October 24, 2000 detail respondent's misconduct in the separate matters. The Referee's Report dated January 26, 2000 established that respondent was employed by the law firm of Finkelstein, Levine, Gittlesohn and Partners ("The Firm"). Within the firm, employees communicated with each other by electronic mail ("e-mail") and made a printed record of the communication on documents known as "top sheets" or "top sheets notes." From March 5, 1997 to January 31, 1998 respondent was an associate in the Liverpool, New York, office of the firm. During that time, the only other attorney in the Liverpool office was his immediate supervisor, Robert Levey, who served as managing attorney.

In 1994, the firm began representing the plaintiff (who had not been wearing a seat-belt) in an automobile negligence action. On January 4, 1996, the defense attorney notified the firm that he would rely on expert testimony to prove that the plaintiff's injuries would not have occurred if she had been wearing a seatbelt. At Levey's direction, respondent contacted Dr. John States on September 9, 1997 to see if he could serve as an expert witness

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14(a)(1). In addition, since September 20, 1993, respondent has been on the ineligible list for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

for the plaintiff. States told respondent that there would have been a "ten percent force" that could have caused some injury if the plaintiff had been wearing her seatbelt. States told respondent that he could not testify that the plaintiff's injuries would have occurred if she had been wearing a seatbelt.

Respondent relayed States' analysis to Levey, apparently believing that injury could have resulted even if the plaintiff had been wearing her seatbelt, due to the speed of the car. In early October 1997, respondent sent an e-mail to Levey stating that he had spoken with States, who "understands [that] we will not be calling him." Levey then e-mailed the senior partner of the firm and informed him that he had asked respondent to speak with States to see if he would consent to being listed as an expert and that States had agreed. He further stated that "I figure we can use him to run a bluff and maybe get a better settlement. The defendant's attorney has withdrawn the $35k offer." Levey suggested to the senior partner that they could "bluff" about having a seatbelt expert, in response to the defendant's demand for disclosure of experts. In a subsequent e-mail to the partner, Levey stated that "we could run a better bluff with seatbelt expert listed in the 3101[2] which is due next week." He also referred to his efforts to get respondent involved in the case.

On October 14, 1997, Levey e-mailed the senior partner stating that he had asked respondent to call States "to tell him we would list him as an expert, but obviously would not call him at trial." The message also stated that he had informed respondent of his intention to seek approval to have the case transferred to him as the trial attorney.

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[2] CPLR 3101(d)(i) provides that "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify . . . ."

Respondent had been instructed to prepare a CPLR 3101 disclosure statement and to include States as an expert witness. Respondent inquired of Levey whether he should use the same format that the defendant had used to disclose its seatbelt expert and was instructed that that format was acceptable and to simply "reverse" what the defendant had said.

On October 17, 1997, respondent submitted the 3101(d) statement, which stated as follows:

> Dr. John States will testify to his opinion within a reasonable degree of mechanical engineering certainty that plaintiff's failure to use the seat belt restraint did not contribute to the occurrence and/or aggravation of the injuries sustained by plaintiff in the accident of May 1, 1992. He will testify that the injuries she sustained, under the circumstances of this collision, would not have been reduced by plaintiff's wearing of a seat belt at the time of the impact, and that she would have received the same or similar injuries to her head, neck and upper back as is alleged in this lawsuit.

This was not an accurate representation of what States had told respondent.

When respondent had informed Levey, who at the time was trial counsel in charge of the case, that States was not going to be helpful, Levey had replied, "[I]ts all taken care of. Don't worry about it."

Later that month, respondent instructed another of the firm's employees not to contact States because he would not be called as a witness. On November 17, 1997, before jury selection, respondent told the court and defense counsel that he would produce expert testimony from States to rebut the defendant's seatbelt defense. The court then encouraged the parties to settle the case, which they did for $40,000. The settlement was placed on the record.

On the next day, the defendant's counsel contacted States to satisfy his curiosity about the seatbelt analysis. States "faxed" to the attorney a copy of his file evaluation notes,

which indicated that he had advised respondent about his opinions regarding the potential effect that seatbelts would have had, if worn by the plaintiff. The notes stated that, if the plaintiff had been wearing a three point seatbelt she "would have encountered perhaps a tenth of the force which she experienced" and that she "would not have sustained a disk [sic] and probably no injury at all given her young age."

Afterwards, defense counsel obtained an order directing respondent to show cause on December 2, 1997 as to why the court should not vacate the settlement and impose sanctions against him. Although the order was served by personal delivery to a secretary at respondent's Liverpool office on November 26, 1997 and by mail to the same address, testimony at the hearing failed to disclose that either respondent or the managing partner had knowledge of the order. In any event, no one from the firm filed an affidavit in opposition or appeared for oral argument.

On December 4, 1997, the judge vacated the settlement and restored the case to the active trial calendar. The order also sanctioned respondent for his verbal misrepresentation to the court on November 17, 1997, but not for the contents of the 3101(d) statement.

The Supreme Court of New York, Appellate Division, Fourth Judicial Department affirmed the findings of fact made by the referee, concluding that respondent had violated DR 1-102, DR 1-102(a)(7), DR 7-102-(a)(5) and DR 7-106(c)(7). Respondent was suspended for one year, effective June 16, 2000.

The facts from the second case against respondent were set forth in the Referee's Report of October 24, 2000. It provided, in relevant part, that in June 1995 the firm filed a negligence action on behalf of the plaintiff. In October 1997, respondent prepared a

supplemental response to the defendant's demand for expert disclosure, pursuant to section 3101(d), for submission to the defendant's attorney. Respondent drafted the expert disclosure document by relying on other disclosure statements that had been submitted by the firm in other cases. He inserted the names of Drs. Jack Sproul and Mary Jo Dunbar. The disclosure document stated as follows, in relevant part:

> . . . . The doctors will testify that the injuries are casually connected to the accident. They will testify that the injury sustained is permanent and caused pain and discomfort. They will testify that the injuries were disabling.
>
> Based on the foregoing, the experts are expected to testify that the plaintiff sustained permanent injuries as a result of the accident on September 20, 1999. . . .
>
> The doctor's testimony will establish a causal connection between the plaintiff's injuries as described above and in her Bill of Particulars and the motor vehicle accident of September 20, 1991. The doctors's [sic] testimony will establish that plaintiff's injuries are permanent and disabling. (Citation omitted).

In a December 1997 proceeding, the court determined that respondent "materially misrepresented the nature of Dr. Spraul's anticipated testimony." Respondent admitted that he prepared the expert disclosure document misrepresenting Spraul's testimony and expressed remorse for his actions. He claimed that he was inexperienced in civil litigation and based his responses on a template form and instructions provided by the firm.

The Supreme Court of New York, Appellate Division, Fourth Judicial Department, confirmed the findings of fact made by the referee and concluded that respondent had violated the same disciplinary rules cited in the other matter. As a result, on February 7, 2001, respondent was suspended for a one-year period, retroactive to June 16, 2000, the date of his initial suspension. Respondent was reinstated to practice in New York on December 10, 2001.

* * *

Respondent's brief in opposition to the OAE's motion for reciprocal discipline states that he has moved to Florida to live with his seriously disabled father, who requires daily assistance from him. He is currently unemployed and unable to find a job that provides health benefits. At present, he has no savings and no bank accounts. He owns no real estate and has no investments or income of any kind. Respondent contends that he has had no health, dental or optical insurance or prescription plan for over three years.

Respondent suffered a major heart trauma in August 2000, just weeks following the suspension of his New York license. He was required to have immediate, emergency angioplasty, at the age of thirty-nine. Afterwards, without health insurance or any savings, he was unable to afford the recommended post-surgery rehabilitation and recovery program. Respondent claimed that he is required to take a number of heart medications but, because of his lack of coverage has been unable to purchase the prescriptions with regularity and has done without them, except when friends and family help defray the costs. He has also been unable to afford follow-up care with a cardiologist.

On November 1, 2001, respondent filed for Chapter 7 bankruptcy. The discharge order was issued March 4, 2002.

Respondent is now forty years old, has never been married and has no children. He claimed that, at this point, he is seeking to rebuild his life, including rebuilding his health and resuming the practice of law. To that end he hopes to seek admission to the Florida bar.

He has applied to take the Florida bar examination and hopes that this matter will not interfere with his ability to take and be admitted to the Florida bar.

Respondent explained that, after law school, he took a position as a law clerk for a criminal court judge. In 1996, he started as an associate for a law firm engaged in civil practice. He did almost exclusively commercial and matrimonial work. When that law firm began to disband in February 1997, he took a position with the Finkelstein firm. He had no civil trial experience. In April 1997, he started at the Liverpool, New York, satellite office. The office had only one other attorney, the office manager, Levey, who was responsible for respondent's training and supervision.

According to respondent, the two documents filed pursuant to CPLR §3101(d) were served within two weeks of each other in early November 1997. Respondent claimed that, once he became aware of the problems with the documents, he immediately and voluntarily tendered his resignation from the firm in January 1998. Respondent, thereafter, began practicing out of his home. In 1998, he was not required to file a federal income tax return because his gross income was below the requisite amount. The same held true in 1999. In June 2000, respondent's one-year suspension went into effect and he immediately closed down his office. By October 2001, respondent was no longer able to make minimum payments on his debts and his hospital, medical and attorney's bills were staggering. In November 2001, he failed for Chapter 7 bankruptcy.

The OAE first suggested to us that the imposition of an active one-year suspension adequately addresses respondent's behavior. At oral argument before us, however, the OAE modified its recommendation and suggested that either a suspended suspension or a one-

year suspension, retroactive to June 2000, would be sufficient discipline. In support of this modification, the OAE noted both the extensive mitigation presented by respondent and the fact that an active prospective suspension would hinder respondent's application for admission to the Florida bar by as long as two years.

Although respondent practiced law in New York, there is no indication that he did so in New Jersey or that he has any interest of doing so in the future.

* * *

Following a de novo review of the full record, we determined to grant the OAE's motion for reciprocal discipline. Pursuant to R.1:20-14(a)(5) (another jurisdiction's finding of misconduct shall establish conclusively the facts upon which the Board rests for purposes of a disciplinary proceeding), we adopt the findings of the Supreme Court of New York, Appellate Division, Fourth Judicial Department.

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

> [t]he 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.

We agree with the OAE that a review of the record does not reveal any conditions that would fall within sections (A) through (E). We are, therefore, bound by the Supreme Court of New York's findings that respondent's conduct violated our RPC 8.4(c), RPC 8.4(b), RPC 3.3(a)(1) and RPC 3.3(a)(4).

In determining the appropriate degree of discipline, we have considered that respondent had little, if any, civil trial experience at the time of his misconduct and that the firm failed to provide him with proper guidance and supervision. Respondent was somewhat of a novice at litigation matters and utilized a form from a prior case as a template for the documents that he created. Moreover, he was following the instructions of his supervisor. Respondent's conduct was, nevertheless, improper. He has paid a significant price for his poor judgment.

We agree with the OAE's analysis of the caselaw that, in New Jersey, a suspension of from six months to one year is generally appropriate. See, e.g., In re Marshall, 165 N.J. 27 (2000) (one-year suspension where attorney backdated stock transfer documents, put incorrect date in his notarization of the transfer agreement, knowing it could affect the outcome of his case, submitted answers to interrogatories known to be false, took no action when his client gave false testimony at a deposition and at trial and provided adversary with misleading documents, all in violation of RPC 3.3(a)(4) and (5); RPC 3.4(a); RPC 4.1(a)(1) and (2); RPC 8.4(c) and RPC 8.4(d); In re Cillo, 155 N.J. 599 (1998) (one-year suspension

where attorney violated RPC 3.3(a)(1) and (2), RPC 3.5(b), RPC 8.4(e) and RPC 8.4(d) by falsely advising the judge that a case had been settled and that no one was appearing for a conference, when he knew that at least one other attorney involved in the litigation was to appear and that the terms of the order he represented to the court violated other relevant agreements between the parties); and In re Telsen 138 N.J. 47 (1994) (six-month suspension for violating RPC 3.3(a)(1), RPC 3.3(a)(5) and RPC 8.4(c) and (d) where attorney "whited-out" court's disposition from file card after case was dismissed for lack of evidence and sought to obtain another ruling from a different judge; when questioned about his actions, he admitted his misconduct but denied having "whited-out" the dismissal entry).

Pursuant to R. 1:20-14(a)(4)(E), we would normally follow our sister state's lead and impose a one-year suspension. Here, however, it is clear both to us and to the OAE that an active suspension would be unfair and inappropriate under the circumstances of this case. Since respondent was disciplined in New York, he has moved to Florida to become the caregiver for his severely disabled father, is unemployed, is struggling financially — having declared bankruptcy — has suffered ongoing life-threatening illness and is unable to afford continuing health care or necessary medication. These post-New York suspension difficulties are both significant and overwhelming. In addition, we have considered that respondent has not practiced law in any jurisdiction since his New York suspension. To impose an additional term of suspension at this juncture would delay his ability to join the Florida bar for as long as two additional years. In our view, respondent's misconduct does not warrant this additional sanction. Moreover, it appears that he has learned from his mistakes and does not pose any threat to the public. In view of all of these factors, we

believe that a reprimand more adequately addresses the totality of the circumstances in this matter.[3] We, therefore, unanimously determined to impose a reprimand. Should the Court disagree with our determination, we urge it to impose a suspension retroactive to respondent's initial suspension in New York.

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

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

[3] While a suspended suspension may have the same ultimate result – an order of discipline based on a finding of unethical conduct – it is not appropriate here. Suspended suspensions have been applied in only a few matters, when the passage of time has intervened and, based on "considerations of remoteness," the goals or purposes of discipline would not be furthered by imposing a suspension. See In re Alum, 162 N.J. 313 (2000).

## *SUPREME COURT OF NEW JERSEY*
## *DISCIPLINARY REVIEW BOARD*
## *VOTING RECORD*

In the Matter of Robert W. Hock
Docket No. DRB 02-048

Argued: April 18, 2002

Decided: June 11, 2002

Disposition: Reprimand

| *Members* | *Disbar* | *Suspension* | *Reprimand* | *Admonition* | *Dismiss* | *Disqualified* | *Did not participate* |
|---|---|---|---|---|---|---|---|
| *Peterson* | | | X | | | | |
| *Maudsley* | | | X | | | | |
| *Boylan* | | | X | | | | |
| *Brody* | | | X | | | | |
| *Lolla* | | | X | | | | |
| *O'Shaughnessy* | | | X | | | | |
| *Pashman* | | | X | | | | |
| *Schwartz* | | | X | | | | |
| *Wissinger* | | | X | | | | |
| ***Total:*** | | | 9 | | | | |

Robyn M. Hill 6/19/02
Robyn M. Hill
Chief Counsel