SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-070
District Docket No. XIV-2012-0606E

IN THE MATTER OF	
YARON HELMER	
AN ATTORNEY AT LAW	

Dissent

Argued: June 15, 2017

Decided: September 26, 2017

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

We respectfully dissent from the majority determination in this matter and write to set forth our reasons. Although there is an extensive record with multiple days of hearings and thousands of pages of documents in evidence, the most pertinent facts are not in dispute and, indeed, are affirmatively pleaded in the ethics complaint, which framed the issues for the hearings and subsequent proceedings in this matter.

The complaint alleges that Trident was in the business of selling bottled water and that, in pursuit of that business, it entered into an agreement with NFI, a trucking and distribution company, to transport bottled water for it. Pursuant to that

agreement, NFI purchased a dedicated fleet of tractors and trailers to be used to ship water from Trident's Hamburg, Pennsylvania location, and thereafter transported water for Trident from approximately October of 2007 until early May of 2008.

Sometime after the contractual arrangement began, Trident began experiencing financial difficulties. On March 17, 2008, Trident issued a $100,000 check in payment for services rendered by NFI. When NFI deposited the check, it was returned for insufficient funds. In follow up communications, NFI was advised not to redeposit the check and that, instead, separate checks for $17,000 each would be issued daily to make good on the $100,000 check that had been dishonored. In reliance upon these assurances, NFI continued to provide transportation services to Trident. Four of those checks, dated April 23, April 24, April 25, and April 28, 2008 were also returned for insufficient funds. Subsequently, Trident shut down operations and, a few months later, went into bankruptcy through an involuntary bankruptcy proceeding.

The checks in question were signed by James Land ("Land"), a principal owner of Trident, and Michael Pessiki ("Pessiki"), Trident's President and Chief Financial Officer. Although Land and Pessiki apparently believed that they would be able to

secure advances under a line of credit to fund the amounts written on the checks, they were aware, at the time the checks were written, that the balances in the account on which they were drawn were zero.

N.J.S.A. 2C:21-5, entitled "Bad Checks" provides as follows:

> A person who issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee, commits an offense as provided for in subsection c. of this section. For the purposes of this section as well as in any prosecution for theft committed by means of a bad check, an issuer is presumed to know that the check or money order (other than a post-dated check or order) would not be paid if:
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> a. The issuer had no account with the drawee at the time the check or order was issued; or
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> b. Payment was refused by the drawee for lack of funds, or due to a closed account, after a deposit by the payee into a bank for collection or after presentation to the drawee within 46 days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal or after notice has been sent to the issuer's last known address. Notice of refusal may be given to the issuer orally or in writing in any reasonable manner by any person.
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> c. An offense under this section is:
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> (1) a crime of the second degree if the check or money order is $75,000.00 or more;

> (2) a crime of the third degree if the check or money order is $1,000.00 or more but less than $75,000.00;
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> (3) a crime of the fourth degree if the check or money order is $200.00 or more but is less than $1,000.00;
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> (4) a disorderly persons offense if the check or money order is less than $200.00.
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> (emphasis added)

Believing that it was the victim of a crime, as defined in the Bad Check statute, NFI filed a private criminal complaint against Trident and the two corporate officers who had signed checks that were dishonored, Land and Pessiki. The Cumberland County Prosecutor's office ("CCPO") initially declined to prosecute, expressing the view that the matter was civil in nature. Thereafter, NFI retained respondent, Yaron Helmer, a former prosecutor and experienced criminal attorney, to advise it and to advocate on its behalf for reconsideration of the decision not to prosecute.

Respondent's goal on behalf of his client, which was expressly and openly articulated, was to attempt to secure financial restitution through the criminal proceedings, an objective expressly authorized by N.J.S.A. 52:4B-36,[1] which provides, in pertinent part, as follows:

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[1] The rights of victims to secure restitution for losses sustained as a result of the commission of a crime are also

> 52:4B-36. **Rights of crime victims, witnesses**
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> The Legislature finds and declares that crime victims and witnesses are entitled to the following rights:
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> h. To be informed about available remedies, financial assistance and social services;
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> * * *
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> i. To be compensated for loss sustained by the victim whenever possible;
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> * * *
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> k. To be advised of case progress and final disposition and to confer with the prosecutor's representative so that the victim can be kept fully informed;
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> * * *
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> o. To have the opportunity to consult with the prosecuting authority prior to the conclusion of any plea negotiations, and to have the prosecutor advise the court of the consultation and the victim's position regarding the plea agreement, provided however that nothing herein shall be construed to alter or limit the authority or discretion of the prosecutor to enter into any plea agreement which the prosecutor deems appropriate
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> . . . .

In part as a result of respondent's efforts on NFI's behalf, the CCPO reconsidered the matter, took the matter before a grand jury, and secured an indictment. Land and Pessiki retained counsel who filed a motion to dismiss the indictment

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recognized in the New Jersey Constitution. N.J. Const., Art. 1, Para 22.

alleging, among other things, improper involvement of counsel for NFI in the grand jury proceeding. The motion was denied, with the court expressly finding that "the role Respondent played before the Grand Jury was appropriate." At some point thereafter, the matter was reviewed further within the CCPO and a decision was made to allow the indictment to be dismissed on technical grounds, with the result that the criminal proceeding was dismissed, with prejudice. Land and Pessiki filed a civil lawsuit for malicious prosecution in the United States District Court for the District of New Jersey. That lawsuit was dismissed based upon a finding by the U. S. District Judge that probable cause existed to find a violation of the criminal statute.

This ethics proceeding was initiated by the filing of a grievance by the CCPO Prosecutor, Jennifer Webb-McRae, along with her First Assistant, Harold Shapiro, which was investigated by the Office of Attorney Ethics ("OAE"), ultimately resulting in the filing of a formal complaint alleging violations of RPC 3.4(g), 8.4(a) and 8.4(d). After extensive hearings and testimony before a special ethics master, the master issued a decision dismissing all charges. We heard an appeal from that determination, resulting in the majority's decision finding no violation of RPC 3.4(g) (which had been the primary focus of the

proceedings below), but finding violations of RPC 8.4(a) and 8.4(d) and recommending a censure of respondent, a member of the bar for over forty years with an otherwise unblemished ethics history. Although we agree with the majority's finding of no violation of RPC 3.4(g), we do not agree that there is clear and convincing evidence supporting a violation of RPC 8.4(a) and (d), for the reasons that follow.

1. RPC 3.4(g).

We concur with the majority's conclusion that the OAE failed to meet its burden with respect to the RPC 3.4(g) charge. Our reasons for reaching this conclusion go further than those expressed in the majority decision, and we would adopt the findings of the special master on this point as additional support for the conclusion that no violation of RPC 3.4(g) has been shown, by clear and convincing evidence. We observe, in doing so, that the special master heard all of the testimony and had the opportunity to evaluate the witnesses and consider the documentary evidence in the context of that testimony, something that the Board does not have the ability to do on the cold record before it.[2]

[2] The record is extensive, consisting of 12 days of testimony and over 150 documents admitted into evidence during the hearing.

2. RPC 8.4 (a) and 8.4 (d).

Having found no violation of RPC 3.4, the majority, nevertheless, found that respondent, by the totality of his conduct, violated RPC 8.4(a) and 8.4(d), as conduct "prejudicial to the administration of justice." The majority's opinion on these points is aptly summarized, at pages 43-44, as follows:

> Respondent leveraged his forty years of experience in the criminal justice system, and his special access to members of the CCPO, couched in the retainer agreement as his "unique background and contacts in [Cumberland] County," to manipulate the criminal justice system on behalf of NFI. Using the Crime Victim's Bill of Rights as a sword and a shield, and believing his actions would, thus, be beyond reproach, respondent orchestrated an improper scheme to obtain NFI's desired monetary damages.

This summary reveals much about the rationale for the majority's opinion. While concluding that the primary violation alleged was not established, the majority accepted the OAE's use of colorful language to characterize respondent's conduct in derogatory language in order to support a more generalized conclusion of impropriety under RPC 8.4(a) and (d). However, the above language does not, in our view, accurately describe the underlying conduct.

A seasoned attorney would be expected to use his wealth of knowledge and experience in an effort to accomplish a client's objective. Yet, respondent is described as having "leveraged"

that experience, suggesting, by the use of that word, that there was something improper about using his skills and experience to advance his client's objectives. Zealous advocacy designed to accomplish an objective expressly authorized by the New Jersey Crime Victims Bill of Rights (to secure restitution for financial loss sustained as a result of the criminal activity) is characterized as a "manipulation of the criminal justice system." Implementation of a strategic plan intended to accomplish that objective is described by the majority as the orchestration of "an improper scheme to obtain NFI's desired monetary damages," as though there were something improper about NFI wanting to pursue restitution for what it believed to be criminal conduct that caused it harm, and about a New Jersey attorney advocating a plan to assist a New Jersey client in seeking that relief. We find nothing improper in this conduct.

In further explanation of its determination to impose discipline, the majority focuses on what it characterizes as ethics "red lights" that it believes were "run" by respondent in his representation of NFI. It is telling, in our view, that these "red lights" that form the basis of the majority's ultimate conclusion of unethical conduct, are not themselves supported by any specific Rule of Professional Conduct. We find

each of these points to be both substantively without merit and unsupported by clear and convincing evidence.

a. Going Around the Bankruptcy Proceeding

First, it is asserted, at pages 53-55 of the majority decision, that respondent improperly sought to secure compensation against Land and Pessiki as a way of doing an end run around the pending bankruptcy proceedings involving Trident. Yet, the majority acknowledges, at page 33 of its decision, that the parties stipulated in the underlying proceeding that "[a]ny restitution paid by Mr. Land or Mr. Pessiki to NFI in the criminal matter would be personal funds outside the purview and not subject to the control or disposition of the bankruptcy court overseeing the involuntary bankruptcy of Trident, LLC."

Then, in a footnote, the majority says that "the import of the stipulation is unclear." We find it to be not only clear, but also self-evident. Land and Pessiki were not in bankruptcy and their assets were not part of the pool of assets of Trident being administered by the Bankruptcy Court. Any recovery against Land and/or Pessiki individually would not reduce the possible recovery of creditors of Trident who were seeking compensation from the assets of Trident in the Trident Bankruptcy Proceedings. Thus, we find the special master's conclusion that "[t]he assets of the Trident Estate were not in

any jeopardy based on [respondent's] conduct" to be both consistent with the terms of the Stipulation of the parties and accurate based upon the evidence of record.

It is not unusual for multiple parties to have potential liability for damages allegedly sustained by an aggrieved party. It is similarly neither unusual nor unethical for an attorney to develop and implement a strategy that seeks to recover from a party with culpability and available assets where there is some legal or financial impediment to recovery against the primary actor. We believe this is particularly true here, where virtually everyone who looked at the underlying facts found a basis for potential criminal liability under the bad check statute. We cannot agree that an attorney's efforts to find alternate sources of recovery for his aggrieved client constitute improper conduct in violation of any Rules of Professional Conduct. Characterizing otherwise proper conduct as an "end run" around pending bankruptcy proceedings does not make it improper.

b. Use of "Special Access" to Seek Reconsideration of the CCPO's Initial Decision to Decline Prosecution

The record demonstrates that an initial effort by NFI, acting without counsel, to pursue criminal remedies was unsuccessful and that the CCPO decided not to pursue the matter. After NFI retained respondent, he approached the CCPO to seek

reconsideration of that decision, and did so by contacting a member of that office whom he knew, Assistant Prosecutor Branco. While it is not disputed that respondent and Branco knew each other,[3] it is also undisputed that Branco was "Chief of Major Crimes" within the prosecutor's office. The majority characterizes this contact as improper, yet there is no ethical prohibition against a criminal attorney in private practice contacting a former colleague many years after his employment terminated, and, in fact, that happens on a regular basis, given that the criminal defense bar includes a significant number of former prosecutors. To hold otherwise would effectively impose a lifetime ban on former government employees from dealing with the office with which they had previously been employed. In this case, the facts giving rise to this proceeding occurred almost twenty years after respondent left the CCPO to go into private practice.[4]

In further support of its contention that respondent crossed the line into unethical conduct, the majority asserts

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[3] The record indicates that respondent, a former prosecutor in the CCPO, knew many of the prosecutors in that office, including the prosecutor (Wettstein) who initially made the determination not to pursue criminal proceedings in response to NFI's private criminal complaint.

[4] RPC 1.11(a) (3) limits a former government attorney from being adverse to his former government agency for a period of six months following termination of his service. The undisputed evidence of record was that respondent left the CCPO in 1989.

that, when respondent contacted Branco on NFI's behalf, respondent "did not inform him [Branco] of Wettstein's prior decision not to prosecute it."[5] The evidence of record is to the contrary and includes testimony by respondent at the ethics hearing that, when he first reached out to Mr. Branco, "[he] gave him some of the facts as [he] understood them and asked him whether they could be re-reviewed by someone in the prosecutor's office because the matter had been summarily rejected" (1T141).[6] In addition, Branco himself testified that he was made aware of the prior decision of the CCPO to deny prosecution when he first spoke to Mr. Helmer about the matter (2T6).[7]

Given this evidence of record, there was no finding by the special master that respondent did not inform Branco of the prior decision of the CCPO, through Wettstein, to decline prosecution, and there is no clear and convincing evidence before us to support a *de novo* finding in this regard. Accordingly, we believe that respondent's efforts to secure reconsideration of the CCPO's initial decision not to prosecute NFI's private criminal complaint were authorized by the New

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[5] This assertion of alleged misconduct was not pleaded in the ethics complaint. In fact, paragraph 37 of the complaint acknowledges disclosure by respondent of the CCPO's prior determination not to pursue the matter.

[6] "1T" refers to the transcript of the April 4, 2016 hearing before the special master.

[7] "2T" refers to the transcript of the April 5, 2016 hearing before the special master.

Jersey Crime Victims Bill of Rights and that they did not violate any Rule of Professional Conduct.

c. "Manipulation of Walters"

The third ethics "red light" referenced by the majority was what it characterized as respondent's "manipulation of Walters, a relatively inexperienced assistant prosecutor, whom respondent described as a 'line guy' and a 'rookie.'" The majority apparently feels that respondent should have accounted for Walters' lack of experience in his dealings with him.[8] There is no Rule of Professional Conduct supporting this assertion. It is not unusual for younger, less experienced attorneys in a prosecutor's office to deal with and litigate against more seasoned and experienced defense attorneys. The ability of a more seasoned lawyer to use his skill and the benefit of his or her experience to advance his or her client's cause is neither a "manipulation" of the process nor a violation of the Rules of Professional Conduct. Use of lawful means and methods to secure a client objective is at the heart of what attorneys do, and characterizing those efforts as a "manipulation of the process" puts an ominous spin on otherwise lawful and appropriate

[8] The majority opinion points to no evidence, and our review of the record reveals no evidence, to suggest that Respondent was somehow involved in the process of selecting Walters for the assignment.

conduct. We find no evidence, much less clear and convincing evidence, that respondent's dealings with Walters were improper.

d. The "Hatching" of a "Plan"

The majority characterizes a meeting attended by respondent and representatives of NFI in the offices of CCPO as the implementation of a "plan" that was hatched "with no regard for convention or justice." The majority goes on to take issue with the assignment of the case by Branco to Walters and the fact that Walters was brought into the meeting after it had begun. The majority seems to assume that respondent was somehow responsible for the decision to involve Walters and for the timing of his appearance at the meeting. We find no evidence in the record to support that conclusion. In short, we believe that respondent's efforts to advocate for his client at the meeting were not in any way improper.

e. Testimony Before the Grand Jury

The majority makes a general reference to respondent's testimony before the grand jury as "highly irregular." The fact that something is irregular, without more, does not make it a violation of the Rules of Professional Conduct. Moreover, given the secrecy accorded grand jury proceedings, whether or not something is "irregular" is not a matter of general public knowledge and would, as a result, be an issue as to which one

would expect evidence to be presented by the parties. The only evidence presented at the hearing regarding the propriety of this conduct is the expert testimony of witnesses called by respondent at the hearing, none of which was challenged or rebutted by the OAE. Specifically, former prosecutor Stephen Sand and former prosecutor James Gerrow, Jr. testified that there was nothing improper about an attorney for the victim appearing before the grand jury, especially given the fact that hearsay evidence is properly considered in grand jury proceedings (11T24, 12T49).[9] Both testified, without objection, as expert witnesses and, in response, the presenter offered no countervailing testimony and cited no specific rule of criminal practice or procedure that would proscribe such conduct. The credibility of their testimony was buttressed by the fact that a motion to dismiss the indictment on grounds of improper conduct by respondent in appearing before the grand jury was denied by the court, with the criminal motion judge expressly finding that there was no impropriety in respondent's appearance before the grand jury.

[9] "11T" refers to the transcript of the May 20, 2016 hearing before the special master. "12T" refers to the May 24, 2016 hearing before the special master.

f. Setting of Bail

The majority finds fault with the strategy of fixing bail in an amount sufficient to provide the restitution sought as part of a plea agreement and PTI, asserting that this is not the purpose of bail. While the evidence supports a conclusion that respondent advocated that high bail be set, the decision to seek bail in that amount was a decision of the CCPO. The ultimate decision to fix bail was for the court. We find nothing improper about counsel for a victim who is seeking restitution advocating for a high bail.

g. Focus on Securing Restitution

At the heart of the majority's analysis is the conclusion that respondent's efforts, as an advocate for the victim of a crime, to secure restitution for the victim was somehow improper. For example, the majority states, "[r]espondent's myopic focus on procuring restitution for NFI was another 'red light' that he ran." We cannot agree that an attorney's advocacy for restitution, a remedy specifically authorized under the Crime Victims' Bill of Rights, constitutes a violation of the Rules of Professional Conduct.

A few additional points merit brief discussion. The majority takes issue with the fact that the retainer agreement signed by respondent provided for a contingent fee based upon a

potential recovery of amounts owed as restitution in the criminal proceeding. Neither the OAE nor the majority reference any ethics rule prohibiting a contingent fee under these circumstances, and we could find none.

The majority references the fact that when respondent left the CCPO to go into private practice, he invited members of the CCPO to attend an Army Navy football game, at his expense. The evidence of record is that some members of the office reimbursed him for the tickets, while others did not. He left that decision up to them. There is no specific allegation in the complaint regarding this conduct and we do not believe it is properly before us as a basis for the imposition of discipline.[10] In any event, given that the conduct alleged to have occurred was over twenty years ago, it is of questionable relevance to the issues framed by the complaint in this case, which relate to events occurring in 2008 and 2009.

Finally, the majority's decision to impose discipline appears to be based, in part, on its conclusion that there was misconduct in the CCPO's office and that respondent should be held accountable for that misconduct. The evidence of record

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[10] R. 1:20-4(b) requires that an ethics complaint shall set forth "sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." There is no mention in the complaint of football tickets distributed in or about 1989.

shows that Mr. Branco was told to recuse himself from matters involving respondent because of their longstanding friendship and that Mr. Branco violated that instruction in this case. Indeed, the conduct of both Mr. Branco and Mr. Walters was the subject of an internal review within the CCPO that resulted in discipline against each of them for violating internal CCPO guidelines. We could find no evidence in the record, much less clear and convincing evidence, that respondent knew of those guidelines and/or that he actively encouraged conduct by Branco and Walters that he knew to be improper.

Although the merits of the underlying criminal charges are not properly a subject for adjudication by us, there is certainly evidence of record supporting an assertion that checks were written for monies in excess of $100,000, with knowledge that there would not be sufficient funds to allow them to be honored, and without making the injured party whole within the time provided in the criminal bad check statute. A state court judge ruling on a motion to dismiss the indictment found that there was sufficient evidence to allow the case to go forward. A federal court judge dismissed a malicious prosecution suit brought by Land and Pessiki after the criminal proceedings were concluded, finding that, as a matter of law, the complaint failed to state a claim because the plaintiffs could not

establish a lack of probable cause. Even the prosecutor in the CCPO, who recommended discipline against Branco and Walters for their violations of internal CCPO policies, concluded that "criminal acts may have been committed" by Trident, Land and Pessiki. The CCPO imposed discipline on Branco and Walters, not because the case lacked probable cause, but, rather, because it had not been properly investigated before presentation to the grand jury. Given these facts, we concur with the special master's conclusion that there was no clear and convincing evidence of a violation of RPC 8.4(a) or (d).

Many of the Rules of Professional Conduct are very specific with respect to what conduct will cross the line and expose the attorney to discipline for unethical conduct. RPC 8.4(d) is not one of them. It proscribes conduct "prejudicial to the administration of justice." It is a Rule that is most often applied in the context of other misconduct that has such an effect. Thus, an attorney who knowingly makes a false statement of material fact or law to a tribunal may be guilty of both RPC 3.3 and RPC 8.4(d).

Where, as here, an attorney is charged with violating RPC 8.4(d), and the other underlying offenses are found to be unsupported by clear and convincing evidence, we believe that particular care should be taken to ensure that there is clear

and convincing evidence of a separate violation of a clear ethical guidepost resulting in conduct "prejudicial to the administration of justice." Tallying up individual actions that do not themselves violate the Rules of Professional Conduct should not be sufficient, in our view, to constitute conduct prejudicial to the administration of justice. This is especially true in this case, given the probable cause for the criminal proceeding advocated by respondent and the statutory recognition of a crime victim's rights to seek restitution as part of the criminal process.

In summary, we believe, as did the special master, that the evidence of record does not support a finding that respondent violated the Rules of Professional Conduct by clear and convincing evidence and would, as a result, dismiss the complaint and impose no discipline.

Disciplinary Review Board
Peter J. Boyer, Member
Anne C. Singer, Member

By: 
Ellen A. Brodsky
Chief Counsel