Supreme Court Of New Jersey
Disciplinary Review Board
Docket Nos. DRB 18-187 and 18-188
District Docket Nos. XIV-2014-0651E
and XIV-2014-0653E

In The Matters Of	:	
Gregory Karl Mueller and Vincent Chirico	:	Dissent
Attorneys At Law	:	

Argued: September 20, 2018

Decided: December 6, 2018

We agree with the majority that respondents Mueller and Chirico both violated RPC 1.7(a)(1) in that there was an inherent conflict arising out of the fact that they were on opposite sides of a business transaction at the same time that they shared an "of counsel" affiliation within Chirico's law firm. For that violation, the majority recommends a reprimand for Mueller, and we join in that portion of the majority's decision.

As to Chirico, the majority is recommending a three-month suspension, which we believe is unduly harsh under the circumstances. Our recommendation for discipline as to Chirico is a censure, for the reasons that follow.

The majority characterizes Chirico's conduct as "significantly more serious than Mueller's" and states, as part of the reason for that conclusion, that Chirico "initiated the conflict of interest." We disagree that Chirico's action in referring Heckel to Mueller was more culpable conduct than Mueller's decision to take on the matter. We believe they each had an independent duty to identify and take appropriate action based upon the conflict of interest. With respect to the conflict issue, we find Mueller and Chirico to be equally culpable.

The second area of disagreement we have with the majority is with the degree of Chirico's misconduct in responding to a question by the motion judge asking whether he had referred Heckel to Mueller. While we agree that Chirico made a misrepresentation to the court, and that, in doing so, he violated RPC 3.3(a), we do not believe that conduct is sufficient to warrant a suspension under the case law in respect of the appropriate level of discipline. In reaching that conclusion, we are influenced in part by the fact that, in the proceedings before the motion judge, Chirico was surprised by Heckel's testimony that he had gotten Mueller's name from a telephone book.

The context in which the claimed misrepresentation was made is described in the majority opinion as follows:

> The [motion] judge inquired how Heckel came to be represented by the Mueller Law Group (MLG), which was located in Bergen County. Heckel replied, "through the phonebook". When the judge asked

> Chirico whether he had referred the matter to MLG, Chirico denied having done so, and at no time corrected the statement.
>
> At the DEC hearing, "in hindsight," Chirico admitted that his denial that he had referred the matter to the MLG was not true. . . .
>
> During an OAE interview. . . Chirico stated that he was "taken aback" by Heckel's response about the phone book "and thought that there may have been some other means that he communicated that he found the Mueller Law Group".
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> [In the Matter of Mueller and Chirico, DRB 18-187 and 18-188 (slip op. at 6-7).]

The actual explanation provided by Chirico was as follows, according to his interview at the OAE:

> The reason that the statement came out was because of my serious confusion as to whether or not there's a possibility that Mr. Heckel had sought Mr. Mueller separately. And I wanted to give him the benefit of the doubt. And (inaudible) there's a possibility that he reached out before I did and you know he got him himself. That's the best explanation I can give you.
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> [OAE Exhibit 26.]

Under these circumstances, and in the midst of a hearing in which the record reflects that the motion judge was aggressively challenging the validity of the proposed transaction, Chirico answered "no" to the question of whether he had referred Heckel to Mueller. With the passage of some time and the opportunity to reflect on what had transpired, Chirico acknowledged, both in his interview with the OAE investigator and at the ethics hearing, that he had not

been accurate in his response to the motion judge. Both the hearing panel and the majority find this to support violations of RPC 3.3 (a), RPC 8.4(c) and RPC 8.4(d). Based upon Chirico's subsequent admission, we agree that the unequivocal denial to the motion judge, that a referral had been made, was a misleading answer and a violation of RPC 3.3(a). Whether it is also a violation of RPC 8.4(c) and 8.4(d) is of little moment, in our view, because it is the same conduct that gives rise to a finding of a violation of RPC 3.3(a).

Viewing all the circumstances presented, we do not believe that this misrepresentation rises to the level of misconduct in cases in which the court has imposed a suspension, even given the conflict of interest issue. The majority finds this case to be most like In re Trustan, 202 N.J. 4 (2010). We disagree. In addition to conflict of interest violations, Trustan involved the submission of a knowingly false written case information statement and a knowingly false written certification to the court. Submitting a carefully drafted and knowingly false written certification to the court is a more serious ethics breach, in our view, than answering a question from a judge, in the midst of a heated proceeding, under the circumstances presented here. Moreover, Trustan also involved the use of confidential information of a former client to the former client's disadvantage, serious misconduct neither alleged nor established in Chirico's case. We believe the conduct at issue here, while improper and

deserving of discipline, does not rise to the level of misconduct sufficient to warrant a suspension.

In addition to the fact that the claimed misrepresentation was not written and not premeditated, there is no evidence in the record that it resulted in any harm to the client. Had Chirico told the motion judge that he had made the referral either directly or through Patriot, there is nothing in the record to suggest that the outcome would have been different. Indeed, logic suggests that a "yes" answer would have reinforced the motion judge's view that the petition should be denied. The majority acknowledges as much when it states, at page 50 of its decision, that it would be speculative to find any injury to the client under the circumstances presented.

A few other facts are relevant, in our view, to the determination of an appropriate level of discipline for Chirico. The evidence of record shows that Heckel had entered into transactions of this type before, and that Heckel had negotiated the business terms of the transaction before engaging counsel. He appeared to understand the financial risks and benefits of accepting a lump sum in lieu of a payout over time that would vary depending upon how long he lived, and wanted to proceed with the transaction in order to raise cash to save a house that would otherwise be lost through foreclosure. The record also shows that

after the motion judge dismissed the petition, Heckel filed a new proceeding in Florida to approve the very same transaction, and the Florida court approved it.

Finally, we find it meaningful that Chirico had an unblemished ethics record over twenty years before the transaction giving rise to this proceeding, and that evidence was presented at the hearing, through character witnesses, regarding his reputation for honesty and integrity. To impose a suspension on Chirico under these facts is, in our view, an unduly harsh result that goes well beyond what is necessary or appropriate under the Rules of Professional Conduct and the decisions of the Board and the Supreme Court in other cases involving similar misconduct.

In summary, our view is that (1) the circumstances under which the misrepresentation was made, (2) the mitigating factors (no prior ethics record and strong character evidence), and (3) the lack of any harm to the client from the misconduct, warrant a recommendation of a censure, not a suspension, as to Chirico. For this reason, we dissent from that portion of the majority decision recommending a three-month suspension for Chirico.

Disciplinary Review Board
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