SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-168

IN THE MATTER OF

EMILIO SANTIAGO

AN ATTORNEY AT LAW

Decision

Argued: September 12, 2002

Decided: December 4, 2002

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Alan Silber 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 stipulation signed by the Office of Attorney Ethics ("OAE") and respondent. Respondent acknowledged that he violated *RPC* 3.3(a)(1) (false statement of material fact to a tribunal), *RPC* 3.3(a)(5) (failure to disclose a material fact to a tribunal with knowledge that the tribunal may be misled by such failure), *RPC* 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and *RPC* 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1995 and the New York bar in 1982. He has no disciplinary history.

* * *

On January 24, 1999, Eugene Rosado was charged in Colts Neck with driving while intoxicated ("DWI"), reckless driving and failure to keep right. Riding as a passenger in the vehicle at the time of the offense was Rosado's relative, Norbert Matos. Breathalyzer test results revealed that his blood alcohol content was .12 percent, above the legal limit. Rosado retained respondent to defend him against these charges. Respondent was not experienced in criminal defense in general or in DWI defense in particular.

To defend the charges, respondent formulated a strategy whereby Matos would accompany him to the municipal court hearing and sit with him at the counsel table during the presentation of the state's case. Respondent hoped that the arresting police officer would become confused and, therefore, unable to identify the driver of the vehicle, whereupon the charges against Rosado would be dismissed. If it became necessary to present a defense, respondent intended to call Rosado and Matos to testify as themselves.

At the first trial date, in August 1999, respondent appeared in court with Rosado and Matos. The case was adjourned and rescheduled for December 10, 1999. On that date, respondent expected that both Rosado and Matos would appear in court and intended to implement his "misidentification" plan. Rosado, however, arrived at respondent's office alone, explaining that Matos was unavailable. As respondent and Rosado traveled from respondent's office in Clifton to Colts Neck, Rosado suggested that his brother-in-law, Leonides Santiago,[1] might be able to appear in Matos' place. Leonides was on active duty with the United States Navy at Naval Weapons Station Earle.

After Rosado's attempt to reach Leonides by telephone was unsuccessful, he went to the naval station and convinced Leonides to accompany him to court. Rosado denied offering Leonides compensation or discussing the details of his arrest to enable Leonides

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1 Leonides is not related to respondent.

to answer questions about the incident. According to Rosado, Leonides' only role was to prevent the police officer from identifying Rosado as the driver of the vehicle, in an effort to obtain the dismissal of the motor vehicle charges.

Respondent arrived late at the Colts Neck Municipal Court. He proposed to the municipal court prosecutor, Debra Gelson, that the charges against Rosado be dismissed, alleging that someone had stolen Rosado's driver's license and had used it when arrested. That was untrue. Respondent presented Leonides as his client, stating to Gelson that he was not the individual who had been arrested. Gelson reviewed the photographs of Rosado, which had been placed in the file on the night of the arrest.[2] When Gelson determined that Leonides was not the same individual depicted in the photographs, she began to question Leonides in respondent's presence. In response to her inquiries, Leonides denied knowing the identity of the individual who had been arrested while using his driver's license. Furthermore, Gelson became suspicious after Leonides claimed that he was a teacher[3] and could not recall his home telephone number. Gelson then informed respondent that she believed that Leonides knew the individual in the photographs and that he was obstructing justice.

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2 Apparently due to his inexperience, respondent was not aware that the file would contain these photographs.

3 When Rosado was arrested, he stated that he was a teacher.

When the case was called before the court, Gelson told the judge that she would not dismiss the charges until Leonides provided the name of the person who had been arrested. The following exchange took place between the judge and respondent:

> A. As far as I know your honor, uh, my client lost his license and perhaps someone is using it.
>
> Q. Okay. And this gentleman's [Leonides] a teacher?
>
> A. Yes.
>
> Q. Does he have any identification from the Board of Ed?
>
> A. We, we weren't prepared for that your honor (unintelligible) he doesn't have anything (unintelligible).
>
> Q. But he can get that, right?
>
> A. Yes.
>
> [Exhibit 8 at 2-3]

After they left the courtroom, Gelson asked Leonides to produce an identification. When he replied that he had none, Gelson directed him to police headquarters, where he would be fingerprinted and photographed. At this point, however, while respondent and Gelson were meeting with the judge in chambers, two police officers appeared with Rosado. The officers reported that they had observed Rosado, whose pictures appeared in the arrest file, sitting in a car in the municipal court parking lot. After Gelson advised the officers to place respondent, Rosado and Leonides under arrest, she notified the Monmouth County Prosecutor's Office.

Respondent was indicted in Monmouth County for conspiracy to commit perjury, in violation of *N.J.S.A.* 2C:5-2 and *N.J.S.A.* 2C-28-1, third-degree crimes; making a false report to law enforcement authorities, in violation of *N.J.S.A.* 2C:28-4(a), a fourth-degree crime; and contempt of court, in violation of *N.J.S.A.* 2C:29-9, a fourth-degree crime. On November 6, 2000 respondent was admitted into the Pretrial Intervention Program ("PTI"). On April 8, 2002, the charges were dismissed upon respondent's successful completion of the program. As part of the PTI program, respondent performed numerous hours of community service for a women's shelter.

On November 8, 2000, after Rosado retained another attorney, he pleaded guilty to the charge of driving while intoxicated. The other two motor vehicle charges were dismissed.

The OAE urged us to suspend respondent for three months, relying on *In re Mark*, 132 *N.J.* 268 (1993), and *In re Kress and Norton,* 128 *N.J.* 520 (1992). Respondent, in turn, opposed the imposition of a suspension.

The stipulation contains two letters from Elliot Atkins, a psychologist retained by respondent. One letter had been presented in support of respondent's application for admission into PTI; the other was submitted in mitigation of his conduct. Dr. Atkins opined that respondent suffered from post-traumatic stress disorder and depressive disorder. Dr. Atkins noted that, at age 17, respondent had been placed in jail, when an

uncle with whom he resided had been arrested for selling illegal drugs. Although respondent had remained in custody for fewer than twenty-four hours, he characterized the event as the "most traumatic" of his life, asserting that he had felt powerless and became depressed. Other factors cited by Dr. Atkins were: (1) respondent's father was an alcoholic, who neither resided with nor supported his family; (2) respondent's mother was immature, irresponsible and emotionally unavailable; (3) respondent's wife was diagnosed with cancer in 1994; and (4) respondent's childhood, marked by instability and limited supervision, included traumatic events, such as his hospitalizations after he was hit by a car and after he suffered severe cuts and burns, his observation of his younger sister's being hit by a car, physical and sexual abuse by his uncle over a three-year period and his witnessing of his uncle's attempt to kill his grandmother.

With respect to the incidents of December 10, 1999, Dr. Atkins' report stated as follows:

> Once his plan had become unraveled, Mr. Santiago was incapable of extricating himself from the situation. Instead of bringing an explanation of his 'plan' to the attention of the prosecutor, Mr. Santiago froze as his witness, Leonides Santiago, responded to Ms. Gelson's questions with answers that revealed the absurdity of the plan.
>
> Emilio Santiago spoke of the events that began unfolding at that point in time wherein he 'froze' and was incapable of providing exculpatory information:
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> > My initial plan was to bring in Eugene Rosado when the police officer failed to identify him. When that didn't happen,

> I lost control of the whole situation. All of a sudden, I was no longer counsel; I was the defendant. At that point, I lost control; I felt powerless to act. I remember seeing my whole world falling apart around me. I asked the officer for my bible; he got it for me. I got down on my knees and prayed. All I did was read the Scriptures and pray for some comfort. When I was in the Judge's chambers I should have explained exactly what I had intended to do. But the prosecutor was on top of me and the police officers were yelling at me. At one point, I asked the police officer if I could speak to the judge, but he said no. I was now under their exclusive control. I wanted to tell the judge exactly what I had in mind, but there was no opportunity to do that. It is not in me to lie on the stand; it was not my intention to deceive the legal system; it was my intention to create reasonable doubt. I didn't get the opportunity to tell them this. It all happened so fast. The police just handcuffed me and arrested me. I was intimidated by their actions. I was surrounded. The prosecutor was there. I wanted to leave. I felt the need to escape the situation. It happened so quickly, I didn't know what to do. I was totally overwhelmed; I felt out of control. The situation was totally out of my hands. The fear seized me and seized control of my perceptions.

Mr. Santiago was extremely emotional as he informed this examiner that the feelings he began to experience when he was handcuffed were identical to those that he had experienced when he had been wrongfully incarcerated as a teenager.

* * *

It is my opinion that any misrepresentations made to Prosecutor Gelson resulted from his unique history and personality, his naiveté and his idealism; they were not made purposefully and knowingly. He did not enter the courtroom that day with any plan to make an affirmative misstatement to anyone either by testimony or unsworn statement. His actions did not reflect a calculated, wrongful taking advantage of the system; his actions reflected his naiveté, inexperience and a desire to be more effective than he

was capable of being. It is also apparent that bad judgment, as opposed to greed or a need to manipulate the system, better explains his offense-related behavior. It certainly wasn't for the money (his fee was miniscule). Why would he be willing to risk so much for so little?

[Exhibit 10 at 9-11]

In his supplemental letter, Dr. Atkins reported on the positive results that respondent gained from this matter:

> The traumatic experiences surrounding Mr. Santiago's arrest and prosecution, as well as this program of treatment, have allowed him to revisit his offense-related decisions and behaviors from a different perspective. Mr. Santiago has come to understand the extent to which his views of his role as an attorney were based upon a naïve and often misguided sense of duty to his clients. In reference to his offense-related behavior, he recently commented:
>
> > My plan was a lie; a lie is a lie. No matter how much zeal you have in wanting to help someone, if the *method* is wrong, then your efforts are wrong. I allowed my desire to get my client off overcome my sense of what was morally and ethically right. . . . I still believe that we should do all that we can for our clients, but there's a line that shouldn't be crossed under any circumstances. Sometimes that line isn't easy to see. I'm extremely conscious, now, about where that line might be. It's not always about winning.
> >
> > [Exhibit 13 at 2]

* * *

Respondent acknowledged that he violated *RPC* 3.3(a)(1) and (5) and *RPC* 8.4(b), (c) and (d). The stipulation provides ample basis to support those violations.

Respondent represented Eugene Rosado in connection with a charge of driving while intoxicated. With no experience in drunk driving cases, respondent intended to place at counsel table the passenger, rather than his client. Respondent claimed that his intent was to create a reasonable doubt. Once the passenger, Matos, became unavailable, respondent proceeded with Leonides instead.

When respondent's initial plan failed, he reacted to the unexpected events by embarking on a course of deception. Upon arriving in court, respondent lied to Gelson, the prosecutor, presenting Leonides as his client and telling her that his client's driver's license had been stolen and used by someone else. Respondent, thus, made a misrepresentation almost immediately upon meeting the prosecutor. Because Gelson suspected that Leonides knew the identity of the person who had allegedly used his driver's license, she refused to dismiss the motor vehicle charges, as respondent urged. Instead, she insisted on appearing before the judge and asking that Leonides be compelled to provide the name of the person who had used his driver's license. At that time, respondent was presented with the opportunity to disclose his plan and to produce Rosado, the true defendant. Instead, respondent continued his deceptive conduct and lied to the court. He misrepresented that (1) his client's license had been lost and perhaps was being used by someone else, (2) Leonides

was a teacher and (3) although Leonides did not have with him identification from the board of education, he could produce it in the future. Respondent made those misrepresentations despite his knowledge that Rosado's license had not been lost and that Leonides was not a teacher. Respondent was given another opportunity to reveal the truth when, after they left the courtroom, Gelson again asked Leonides to produce identification. Finally, after the police spotted Rosado in the municipal court parking lot, respondent was arrested and the entire scheme came to light.

In cases involving misrepresentation to a tribunal, although suspensions are the most frequent sanctions, the range of discipline is wide. *See, e.g., In the Matter of Robin K. Lord* DRB 01-250 (2001) (admonition where attorney failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias, thus resulting in a lower sentence because the court was not aware of the client's significant history of motor vehicle infractions; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); *In re Whitmore*, 117 *N.J.* 472 (1990) (reprimand where a municipal prosecutor failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a charge of driving while intoxicated intentionally left the courtroom before the case was called, resulting in the dismissal of the charge; attorney did not have an improper motive and "may not have clearly seen the distinct line that must be drawn

between his obligations to the court and his commitment to the State, on the one hand, and, on the other, his feelings of loyalty and respect for the police officers with whom he deals on a regular basis." *Id.* at 480); *In re D'Arienzo*, 157 *N.J.* 32 (1999) (three-month suspension where attorney made a series of misrepresentations to a municipal court judge to explain his repeated tardiness and failure to appear at hearings; we noted that, if not for mitigating factors, the discipline would have been "much harsher"); *In re Mark*, 132 *N.J.* 268 (1993) (three-month suspension where attorney misrepresented to the court that his adversary had been supplied with an expert's report and then created another report when he could not find the original; in mitigation, the Court considered that the attorney was not aware that his statement was untrue and that he was under considerable stress from assuming the caseload of three attorneys who had recently left the firm.); *In re Norton and Kress*, 128 *N.J.* 520 (1992) (both the prosecutor and defense counsel were suspended for three months for permitting the dismissal of a charge of driving while intoxicated; although the attorneys represented to the municipal court that the arresting officer did not wish to proceed with the case, they failed to disclose that the reason for the dismissal was the officer's desire to give a "break" to someone who supported law enforcement); *In re Forrest*, 158 *N.J.* 429 (1999) (attorney suspended for six months for failure to disclose the death of his client to the court, to his adversary and to an arbitrator; the attorney's motive was to obtain a personal injury settlement); *In re Brennan*, 153 *N.J.* 29(1998)

(six-month suspension in a default matter where attorney, in representing a second offender in connection with a charge of driving while intoxicated, represented to his client that for a fee he could arrange to conceal the prior conviction so that the client would receive a lesser sentence and that, for an additional fee, he could arrange to avoid a mandatory incarceration sentence even if the client were sentenced as a second offender; the attorney's plan to remove the client's driving abstract from the municipal court file was unsuccessful); *In re Marshall*, 165 *N.J.* 27 (2000) (one-year suspension where, to assist a client in avoiding a civil judgment, attorney backdated a stock transfer agreement and stock certificate, suborned false testimony from his client and removed documents from a corporate record before the trial); *In re Cillo*, 155 *N.J.* 599 (1998) (one-year suspension where, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, attorney obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve); *In re Kornreich*, 149 *N.J.* 346 (1997) (three-year suspension where attorney, who had been in an automobile accident, misrepresented to the police, her lawyer and a municipal court judge that her babysitter had been operating her vehicle and presented false evidence in an attempt to falsely accuse another of her own wrongdoing; two

members of the Court voted for disbarment). *But see In the Matter of Donald B. Mark*, DRB 90-229 (1991) (private reprimand where attorney misrepresented to a judge that he had his law firm's authority to settle a legal malpractice action and then moved to vacate the settlement because he lacked the law firm's authority to settle the case; in mitigation we considered that the attorney acted out of fear because he had appeared in court expecting to settle the case and then learned that he would be selecting a jury and that his adversary had almost forty years of experience; that the attorney had recently experienced numerous personal problems; and that he faced unforeseen financial responsibilities after he had entered into the settlement agreement).

Respondent's wrongdoing in this matter was serious. As respondent himself said, "My plan was a lie; a lie is a lie." "Candor and honesty are a lawyer's stock and trade. Truth is not a matter of convenience. Sometimes lawyers may find it inconvenient, embarrassing, or even painful to tell the truth." *In re Scavone*, 106 *N.J.* 542, 553 (1987) Here, respondent failed to tell the truth, despite numerous opportunities to do so.

In the stipulation, respondent admitted that he made a false statement of material fact to a tribunal, failed to disclose a material fact to a tribunal with knowledge that the tribunal might be misled by such failure, committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer, engaged in conduct involving

dishonesty, fraud, deceit or misrepresentation and engaged in conduct prejudicial to the administration of justice.

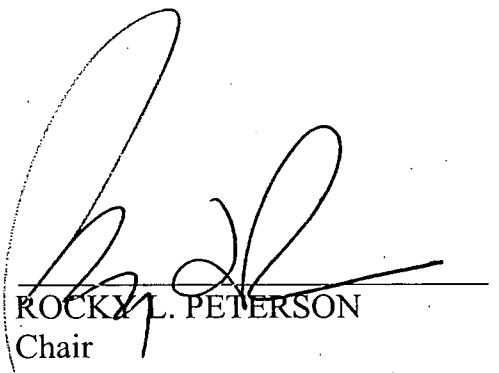
With respect to mitigating factors, we found that, Dr. Atkins' report notwithstanding, respondent entered the municipal court with the intent to deceive the judge and the prosecutor. Respondent's argument that, upon being handcuffed, he suffered a "flashback" to his arrest at age seventeen has no merit. His improprieties occurred before he was placed under arrest. Those circumstances were not responsible for his misconduct. Rather, they were the natural consequences of his misdeeds.

On the other hand, we also recognized that respondent's lies came on the heels of his initial falsehood; that he had little opportunity to reflect and reconsider his actions because his misconduct was confined to a very short period of time; and that he did not engage in a series of misrepresentations over an extended period. Moreover, the OAE presenter, who had the opportunity to interact with respondent, must have recognized that respondent's conduct was aberrational, since he recommended only a three-month suspension.

Based on the foregoing, a six-member majority voted to impose a three-month suspension. But for the compelling mitigating factors present in this case, those members would have imposed a six-month suspension. Three members voted to impose a

reprimand. In addition, for a period of two years, respondent must practice law under the supervision of a proctor approved by the OAE.

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

By: 
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Emilio Santiago
Docket No. DRB 02-168

Argued: September 12, 2002

Decided: December 4, 2002

Disposition: Three-month suspension

Members	*Disbar*	*Three-month 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:		6	3				

Robyn M. Hill 12/4/02
Robyn M. Hill
Chief Counsel