

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-322
District Docket No. VB-08-036E

IN THE MATTER OF
MELVIN DUKE
AN ATTORNEY AT LAW

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Decision

Argued: January 20, 2011

Decided: March 23, 2011

Louis Balk appeared on behalf of the District VB Ethics Committee.

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 recommendation for discipline filed by the District VB Ethics Committee (DEC). The three-count complaint charged respondent with violating RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to keep a client reasonably informed about the status of a matter), RPC 3.3,

presumably (a)(5) (candor toward a tribunal), and R. 1:21-6)(recordkeeping deficiencies); the complaint did not cite RPC 1.15(d).

The DEC recommended that respondent be suspended for thirty days. We determine that a censure is the appropriate discipline in this case.

Respondent was admitted to the New Jersey bar in 1990. He was reprimanded in 2002, on a motion for reciprocal discipline arising out of his disbarment in New York for negligently misappropriating trust funds, commingling trust and personal funds, improperly drawing a trust account check to cash, failing to maintain required attorney records, and failing to timely cooperate with disciplinary authorities. In re Duke, 174 N.J. 371 (2002).

In January 2008, respondent was suspended by the Board of Immigration Appeals (BIA), following his disbarment in New York. He was disbarred by the immigration court in June 2008.

Count One (The Juman Matter)

Bo Juman retained respondent, in October 2006, in connection with an immigration matter. Juman was attempting to obtain entry into the United States for his wife, a resident of

Guyana. Juman paid respondent \$3,500 for his services.¹ Respondent did not prepare a written fee agreement.

A number of documents pertaining to Juman's immigration proceeding were placed in evidence below. Respondent and Juman disagreed on who had prepared some of the documents and on how a review of Juman's matter before the Office of U.S. Citizenship and Immigration Services (Immigration Services) had come about, Juman testifying that the review occurs in the natural course of the proceeding and respondent testifying to the contrary, that he had requested the review and forwarded the documents to Immigration Services. Respondent had no proof of mailing for the documents, but asserted that he would have sent them via regular mail only.

Juman testified that he received no written communication from respondent or copies of what he submitted to Immigration

¹ Juman testified that respondent's fee was supposed to be \$2,500. When respondent told him that a \$1,000 check had been misplaced, he issued a replacement check. Juman later learned that both checks had been cashed. Respondent, contrarily, testified that the second \$1,000 check was for an immigration matter involving Juman's son. Juman denied retaining respondent to represent his son. Because the complaint was silent on this issue, the panel declined to consider the evidence about the propriety of the second \$1,000 check and deferred to the presenter, to the DEC, and to us on how to deal with Juman's contentions about the funds.

Services. Further, he would leave numerous messages for respondent before getting a call back. Ultimately, respondent's phone was disconnected.²

According to Juman, respondent never disclosed his New York disbarment to him and never told him that he was admitted in New Jersey. Respondent contended, in turn, that Juman knew, although not directly from respondent, that he was no longer able to practice before the immigration board. As to his New Jersey admission, respondent pointed out that Juman signed a notice of appearance form on which respondent had indicated his membership in the New Jersey bar. Moreover, his business card listed his New York and New Jersey offices. Respondent conceded that Juman did not know that he had been disbarred in New York.

By letter dated October 22, 2009, Immigration Services decided against Juman, revoking his petition for alien relative and concluding that his marital relationship with his wife was not bona fide.

² According to Juman's grievance, he lost contact with respondent in December 2008.

Count Two (Non-Disclosure to the BIA)

Respondent admitted that he failed to disclose to the BIA that he had been disbarred in New York or reprimanded in New Jersey. In a "Notice of Entry of Appearance as Attorney or Representative," dated January 2, 2007, respondent indicated his Brooklyn, New York, address and filled in certain lines representing that he was an attorney in good standing in the State of New Jersey and was "not under a court or administrative agency order suspending, enjoining, restraining, disbaring or otherwise restricting" his practice of law.

Respondent argued that his dereliction had been unintentional. Apparently, he did not interpret the form as requiring disclosure of his New York status, given his reliance on his admission to the New Jersey bar to pursue immigration matters.

In January 2010, in a prior matter involving respondent, (the Edwards matter, District Docket No. VB-09-037E) the same allegation about respondent's omission on the BIA appearance form had been raised and dismissed by a different DEC hearing panel. There was no appeal taken from the DEC's

determination.³ There, too, respondent contended that his violation was not knowing.

Respondent filed a motion with the DEC, in which he argued that, in light of the Edwards proceeding, the charge that he violated RPC 3.3(a)(5) was precluded by the doctrine of collateral estoppel.⁴

Count Three (Recordkeeping Violations)

Respondent deposited the fee he received from Juman in his personal bank account, rather than in his business or trust

³ According to the presenter, there had been an agreement that the panel hearing the Edwards matter would not issue a decision until the same panel had also heard the Juman matter and could issue a decision on both. For undisclosed reasons, the Office of Attorney Ethics advised the panel to render its decision in Edwards and a new panel was convened to consider Juman.

⁴ Collateral estoppel is defined as follows:

[A] prior judgment between same parties on different causes of action is an estoppel as to those matters in issue or points controverted, on determination of which finding or verdict was rendered When an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation [citations omitted].

[Black's Law Dictionary, Fifth Edition, West Publishing Company (St. Paul, Minn. 1979).]

account. Respondent explained that, because the fee arose in a federal immigration matter, he was "not certain of the fees deposit procedures."

In mitigation of the conduct described in the three counts of the complaint, respondent urged a consideration of his role as support for his family.

The DEC concluded that both Juman and respondent "had certain credibility issues" and that a number of fact disputes remained, following the hearing. In count one, the DEC was unable to find clear and convincing evidence that respondent violated RPC 1.1(b) or RPC 1.3, in light of "the questions raised by the competing factual evidence presented, the lack of expert or other evidence on the proper handling of an immigration matter, and various witness credibility issues." The DEC noted that, "[w]hile Respondent's handling of the Juman immigration matter may not have met the highest legal standards of quality," there was evidence that respondent made reasonable efforts in his preparation and handling of Juman's wife's submissions to immigration authorities. Although the DEC recognized that respondent took no action, following the Immigration Services October 2009 determination denying Juman's wife entry, the DEC found no competent evidence to indicate what

additional proofs respondent should have presented to facilitate her entry into the U.S. Indeed, the DEC noted the absence of expert or other evidence on the "standard of care" in an immigration matter or on how respondent's actions may have adversely affected Juman's wife's entry into the U.S.

Similarly, the DEC found no credible documentary evidence supporting Juman's claim that he, not respondent, had prepared documents submitted to immigration authorities.

The DEC found, however, that respondent failed to communicate with Juman in a manner that would permit the client's informed decisions regarding the representation, based on his failure to disclose his prior discipline.⁵ The DEC found such failure to be a violation of RPC 1.4(b).

The DEC concluded that respondent also violated RPC 1.4(b) for his lack of communication with Juman about the immigration matter. Specifically, respondent did not send or provide copies of submissions to Juman and never told Juman that he was no longer working on his case. The DEC noted that, even accepting respondent's argument that there was little, if any, work for

⁵ The DEC considered only respondent's failure to disclose the New York discipline, given that it was the only prior discipline referenced in the complaint.

him to do, while immigration authorities considered the case, his communication with Juman fell short.

As to count two, the DEC found no clear and convincing evidence of a violation of RPC 3.3(a)(5). The DEC concluded that respondent's representation of his New Jersey status on the BIA appearance form was "arguably" accurate because the form did not appear to require the disclosure of his prior New Jersey reprimand, which did not restrict his practice of law. Nevertheless, the DEC found, his representation on the form was inaccurate because he was disbarred in New York.⁶ The "threshold question" for the DEC was whether respondent had made a misleading statement about his New York status knowingly. To begin, the DEC noted that, although respondent handled numerous immigration matters, the BIA notice in Juman was the only notice introduced in evidence. As a result, there was insufficient evidence to assess whether this was an isolated incident or whether a misrepresentation had been made in connection with other matters.

⁶ The DEC noted that the form refers to "a court or administrative agency order," not specifically the court in the jurisdiction where the attorney is admitted in good standing.

The DEC considered respondent's contention that he did not interpret the form to require disclosure of his New York status, given his reliance on his admission in New Jersey to handle immigration matters, following his New York disbarment. Because RPC 3.3(a)(5) requires a showing of intent or knowledge, the DEC could not conclude by clear and convincing evidence that respondent had violated RPC 3.3(a)(5).

In the alternative, the DEC found the doctrine of collateral estoppel to be a second basis for the dismissal of that charge because it was virtually the same charge that had been considered and dismissed in the Edwards matter.⁷ The DEC found the fact that the grievants were different in the two matters was of no moment.

As to count three, the DEC concluded that respondent violated RPC 1.15 and R. 1:21-6(a)(2) and (i) by depositing fees in his personal bank account. Although the DEC noted respondent's contention that he had been unaware of the rules and of the requirement that he maintain a separate account, the DEC found that the rule does not require intent.

⁷ The presenter in Juman was also the presenter in Edwards.

In determining the appropriate quantum of discipline, the DEC considered respondent's disciplinary history, "the allegedly mitigating circumstances" of his need to support his family through his practice, the DEC's conclusion that his derelictions resulted from "sloppiness and lack of training," rather than from an intent to mislead or harm, and the DEC's belief that respondent needs assistance and education with regard to the management of his practice and obligations as a member of the bar. The DEC recommended that respondent be suspended for thirty days; that, during that time, he take twelve hours of CLE classes (in addition to the CLE classes required for all New Jersey attorneys) in immigration law and attorney ethics; and that his "business accounts, client retention files and fee records" be monitored by this Board or its designated representative for two years, following his return to practice.

Upon a de novo review of the record we are satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence. In one instance, however, the DEC's conclusion was flawed, as seen below.

As to count one, the DEC correctly dismissed the charged violation of RPC 1.1(b), but for the wrong reason. Typically, that rule is not violated when an attorney is guilty of multiple instances of neglect in one matter but, rather, when three or more instances of neglect in separate client matters occur.

As to RPC 1.3, the DEC was correct in its determination that it could not find, by clear and convincing evidence, that respondent had violated that rule. Nothing in the record demonstrates in what way respondent was less than diligent in representing Juman.

The DEC was also correct in finding that respondent violated RPC 1.4(b). His communication with Juman was not adequate. Juman made numerous calls to respondent, in an attempt to reach him. He was unsuccessful. Moreover, respondent did not provide Juman with copies of documents.

As to count two, charging a violation of RPC 3.3(a)(5), respondent contended that a finding of misconduct in this regard was barred by collateral estoppel. Respondent argued that this allegation has already been reviewed and decided by the DEC, albeit by a different hearing panel and that, under the doctrine of collateral estoppel, the issue cannot be re-tried. The

presenter, in turn, argued that, because the parties in interest are different (Edwards and Juman), the doctrine does not apply.

We do not need to resolve the issue of the identity of the parties to determine that collateral estoppel does not apply to this situation. The doctrine applies to final judgments. A recommendation from a district ethics committee is not a final judgment. The determination of the panel that heard and dismissed the Edwards matter was not appealed and has never been reviewed by this Board or the Court. We, therefore, dismiss respondent's argument.

That being the case, we have to determine if respondent intentionally lacked candor toward the BIA, when he failed to note his New York disbarment. We find it difficult to conclude that respondent's omission was not intentional. What reason could there have been for respondent to fail to report his New York bar status on the form, other than to hide his disbarment? We find, thus, that he deliberately failed to disclose to the BIA a material fact, a violation of RPC 3.3(a)(5).

Lack of candor to a tribunal has resulted in discipline ranging from an admonition to a long-term suspension. See, e.g., In the Matter of Lawrence J. McGivney, DRB 01-060 (March 18, 2002) (admonition for attorney who improperly signed the name of

his superior, an Assistant Prosecutor, to an affidavit in support of an emergent wiretap application moments before its review by the court, knowing that the court might be misled by his action; in mitigation, we considered that the superior had authorized the application, that the attorney was motivated by the pressure of the moment, and that he brought his impropriety to the court's attention one day after it occurred); In the Matter of Robin K. Lord, DRB 01-250 (September 24, 2001) (admonition for attorney who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias; unaware of the client's significant history of motor vehicle infractions, the court imposed a lesser sentence; 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 for municipal prosecutor who failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a DWI charge had intentionally left the courtroom before the case was called, resulting in the dismissal of the charge); In re Mazeau, 122 N.J. 244 (1991) (reprimand for attorney who failed to disclose to a court his representation of a client in a prior lawsuit, when that representation would have been a factor

in the court's ruling on the attorney's motion to file a late notice of tort claim); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension for attorney who made multiple misrepresentations to a judge about his tardiness for court appearances or failure to appear; mitigating factors considered); In re Chasan, 154 N.J. 8 (1998) (three-month suspension for attorney who distributed a fee to himself after representing that he would maintain the fee in his trust account pending a dispute with another attorney over the division of the fee and then led the court to believe that he was retaining the fee in his trust account; the attorney also misled his adversary, failed to retain fees in a separate account, and violated recordkeeping requirements); In re Poreda, 139 N.J. 435 (1995) (three-month suspension for attorney who presented a forged insurance identification card to a police officer and to a court); In re Kernan, 118 N.J. 361 (1990) (three-month suspension for attorney who in his own divorce matter submitted to the court a case information statement with a list of his assets and one day before the hearing transferred to his mother one of those assets, an unimproved 11.5 acre lot, for no consideration, intending to exclude the asset from marital property subject to equitable distribution; the attorney did not disclose the conveyance at a settlement conference held immediately prior to the court hearing

until directly questioned by the court; prior private reprimand); In re Forrest, 158 N.J. 428 (1999) (six-month suspension for attorney who failed 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 Telson, 138 N.J. 47 (1994) (six-month suspension for attorney who concealed a judge's docket entry dismissing his client's divorce complaint and obtained a divorce judgment from another judge without disclosing that the first judge had denied the request; the attorney then denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was scared); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the 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); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney who was involved in an automobile accident and then misrepresented to the police, to her lawyer, and to a municipal court judge that her babysitter had been

operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing).

In the admonition and reprimand cases, the attorneys acted on behalf of clients. Respondent's misconduct fits more closely into the three-month suspension cases, where the attorneys were self-motivated. In D'Arienzo, the attorney made multiple misrepresentations to a judge about his own tardiness or failure to appear. Mitigating factors were considered. In Chasan, the attorney distributed a fee to himself after representing that he would maintain the fee in his trust account, and led the court to believe that he was retaining the fee in his trust account; he also misled his adversary, failed to retain fees in a separate account, and violated recordkeeping requirements. In Poreda, the attorney presented a forged insurance identification card to a police officer and to a court. In Kernan, the attorney, in his own divorce matter, submitted to the court a case information statement with a list of his assets, then transferred to his mother one of those assets, intending to exclude it from equitable distribution.

He did not disclose the conveyance at a settlement conference until questioned by the court. Kernan had a prior private reprimand.

There is no question that respondent acted in his own interest in failing to disclose his New York disbarment. There was clearly no possible gain to Juman from respondent's deceit. That misconduct, combined with his failure to communicate with Juman, his recordkeeping violations, and his prior reprimand would justify a three-month suspension. We were persuaded, however, that respondent's contrition was sincere and that his efforts at rehabilitation were significant, as he represented to us at oral argument. We are, therefore, convinced that a censure is sufficient sanction for respondent.

There remains the question of the \$1000 check that, according to respondent, was a fee for an additional matter and, according to Juman, was a replacement check after respondent said he lost the first one. The DEC was correct in reaching no conclusion on this issue because it was not alleged in the complaint. Moreover, the testimony of respondent and Juman on this question is in equipoise. We make no finding on this issue.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and

actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

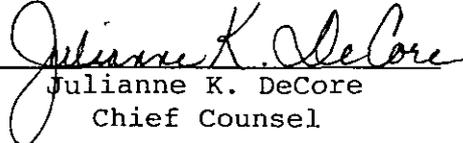
In the Matter of Melvin Duke
Docket No. DRB 10-322

Argued: January 20, 2011

Decided: March 22, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			


Julianne K. DeCore
Chief Counsel