SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-406
District Docket No. XII-2008-0058E

IN THE MATTER OF	:
MARC D'ARIENZO	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 17, 2011

Decided: May 16, 2011

Michael Margello appeared on behalf of the District XII Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for a censure filed by the District XII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.1, presumably (a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 8.4, presumably (d) (conduct prejudicial to the administration of justice). For the reasons stated below, we agree with the DEC's recommendation.

Respondent was admitted to the New Jersey bar in 1993. He maintains a law practice in Summit, New Jersey.

In 1999, respondent was suspended for three months for his false statements to a tribunal (RPC 3.3(a)(1)) and for conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)). In re D'Arienzo, 157 N.J. 32 (1999). Specifically, respondent twice misrepresented to a municipal court judge his reason for failing to appear in a criminal matter. At the ethics hearing in that matter, the municipal court judge testified that respondent "had a history of either failing to appear on matters before her or of being late in those instances when he did appear." In the Matter of Mark D'Arienzo, DRB 97-302 (June 29, 1998) (slip op. at 2). We found that, while ordinarily a reprimand would have been the appropriate degree of discipline for an isolated incident of misrepresentation, "respondent was brazen enough to lie to the same judge who had recently given him a very stern warning that his misconduct would not be tolerated. Respondent's misconduct was not a single, isolated event. Rather, his lies were almost seamless in their transition." Id. at 9.

Respondent was reinstated to the practice of law on June 14, 1999. In re D'Arienzo, 158 N.J. 448 (1999).

In 2001, respondent was admonished for recordkeeping violations (RPC 1.15(d) and R. 1:21-6). Specifically, he did not use his trust account in connection with his practice and did not maintain any of the required receipts and disbursements journals or client ledger cards. In the Matter of Marc D'Arienzo, DRB 00-101 (June 28, 2001).

In 2004, respondent received another admonition, this time for violating RPC 8.4(b) (committing a criminal act that reflects adversely on an attorney's honesty, trustworthiness, or fitness as a lawyer). In December 2003, he was charged with possession of fewer than fifty grams of marijuana (N.J.S.A. 2C:35-10(a)(4)) and possession of drug paraphernalia, a water bong (N.J.S.A. 2C:36-2). He received a conditional discharge. We considered, as mitigating factors, that respondent had cooperated with the Office of Attorney Ethics (OAE) and that, unlike his prior two infractions, the conduct did not relate to the practice of law. In the Matter of Marc D'Arienzo, DRB 04-151 (December 10, 2004).

This ethics complaint arises from respondent's failing to appear in a Bergen County Municipal Court for a scheduled criminal trial and, thereafter, not appearing at two orders to show cause stemming from his failure to appear at the trial. The

Municipal Court judge assigned to the criminal case reported respondent's conduct to the OAE.

Respondent is a solo practitioner whose practice is comprised solely of criminal and motor vehicle cases tried in the Superior and Municipal courts. He has an active practice, obtaining most of his clients by way of referral. Ordinarily, he has more than one court appearance on any given day. According to respondent, whenever he had a conflict with his cases, he would notify the courts directly.

The Honorable Roy F. McGeady, the presiding judge of the Bergen County Municipal Courts, testified that he supervised seventy-two municipal courts. While he presided over several different courts, the cases that he heard in Bergen County, Vicinage Two, were mostly high-profile cases. He generally resolved the vast majority of the standard municipal court cases by plea agreement.

On September 11, 2008, Judge McGeady was scheduled to preside over the case of State v. Sherri Duncan, a disorderly persons' offense case in which respondent had entered his appearance. Duncan had a co-defendant in the case. Although a private citizen had filed the complaint against both defendants, the municipal prosecutor was prosecuting the case.

Judge McGeady had only three or four matters scheduled that day. The Duncan matter was scheduled for trial at 1:30 p.m. Both of the defendants, the prosecutor, and the private citizen had appeared for the trial.

After disposing of other matters, at 2:30 p.m. the judge was ready to start the Duncan case. However, respondent was not present in court. The judge received no notice that respondent would not appear on that day. The judge then adjourned Duncan's case, on the basis that Duncan was not responsible for respondent's failure to appear. Although Duncan had told the judge that she intended to retain another attorney, she proceeded pro se at the rescheduled trial, at which both defendants were found guilty.[1]

According to respondent, on the day of Duncan's trial, September 11, 2008, he was representing a defendant, Emel Gonzalez,[2] in a "DWI" case in West Orange. The case was calendared for 10:00 a.m. In the days preceding the trial, respondent had received a favorable plea offer, which he understood Gonzalez would accept. Respondent testified that, because pleas normally do not take more than an hour and a half,

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[1] At the January 2010 DEC hearing, respondent testified that he was currently representing Duncan in another matter.

[2] Also spelled as Emil in the record.

he believed that he had "plenty of time to make it to Hackensack by 1:30" for Duncan's matter. However, by approximately 11 a.m., Gonzalez unexpectedly declined the plea. As a result, the court ordered respondent to remain for the trial. Respondent, thus, realized that he would be in West Orange for most of the day.

According to respondent, he believed that the proper protocol was to have the West Orange court make arrangements with the Hackensack court about "where to go from here or you should come later or what the situation might be." Contrary to his earlier statement, he claimed that, most of the time, he did not make the call himself because he felt that it was more "official" and the "correct protocol" for the court to call instead; he thought it would be more "powerful" coming from another judge, instead of him. Later, he explained that, if he were going to be late, he would call; if he could not appear at all, he would have one court contact the other court.

As to the Duncan conflict, respondent testified that he had asked the West Orange judge to have his staff notify Judge McGeady of respondent's whereabouts. According to respondent, although the West Orange judge assured him that someone would make the call, "something fell through the cracks." Respondent recalled, however, that someone from the West Orange staff had told him that they had contacted the Hackensack court about his

inability to appear there. He conceded that he did not follow up on it at that time, but asserted a belief that he had fulfilled his obligation that day. He recognized that he should have followed up to confirm that the call had actually been made and conceded, in his answer to the ethics complaint, that, "in hindsight," he should have cancelled his afternoon calendar (the Duncan case) well before the court date.

Respondent testified that he first learned that Judge McGeady had not been contacted when he received an order to show cause to explain his absence. Later, he testified that he did not learn about the lack of contact until he appeared before Judge McGeady at an order to show cause, in January 2009. According to respondent, initially, he believed that the judge had been notified, but had issued an order to show cause because he "was still irritated" that respondent had missed the trial.

Three orders to show cause were issued in all. According to Judge McGeady, the first order to show cause directed respondent to appear before him on October 2, 2008, at 9:00 a.m., to show cause why he should not be sanctioned for his failure to appear at the Duncan trial, pursuant to R. 1:2-4. Respondent told the hearing panel that, two days before the return date of the order to show cause, he had contacted the court to request that the matter be listed later in the day because of a conflict with

another case involving "a private client," scheduled to be heard in Essex County Superior Court. Respondent stated that he was "stuck" there until noon. He admitted that he could have first appeared before Judge McGeady in his own matter and then proceeded to his client's matter and that, if he had made that choice, he would not have been involved in this ethics proceeding. He explained that he did not make that choice, because he did not want his client to wait for an hour and a half to two hours, while he disposed of his own matter.

In addition, respondent claimed that the order to show cause was marked "ready hold" for 11:30. He stated that, usually, Judge McGeady's cases started at 9:00 a.m. and, sometimes, continued until 4:30. He added that he had asked the judge's staff if it "would be okay if [he] came at 11:30" and had been told "okay." He did not arrive, however, until approximately 1:15. He did not notify the court that he would be late.

On that day, Judge McGeady completed his calendar by 12:15 p.m., at which time he left for lunch. When the judge returned, his staff informed him that respondent had appeared at approximately 1:15 p.m, but had not waited. Respondent explained that he did not stay because the judge's secretary had given him

the impression that the judge was not "going to come back for any more court . . . or anything."

The judge, therefore, issued a second order to show cause, directing respondent to appear on October 16, 2008, at 1:30 p.m. As of approximately 2:30 or 3:00 p.m., respondent had neither appeared nor contacted the court. Respondent attributed his failure to appear on his own mistaken entry in his diary, listing the hearing for the following week.

According to respondent, sometime thereafter, possibly in November 2008, he contacted the West Orange court to obtain proof that he had been on trial there on September 11, 2008, the date of the Duncan trial. Later in his testimony he corrected himself about the date when he had obtained such proof. He explained that, in November 2008, he was still unaware that Judge McGeady had not been contacted by the West Orange court. He testified that he contacted the West Orange court sometime before the third order to show cause was issued, in December 2008. He claimed that, until then, he was under the mistaken belief that Judge McGready had been contacted by the West Orange court.

Exhibit R1, the proof to which respondent referred, is a January 12, 2009 letter from the West Orange Municipal Court Administrator, stating that, on September 11, 2008, the Gonzalez

matter had been listed for trial at 11:00 a.m. and that Judge Starrett had ordered respondent to remain there. The trial ended at approximately 4:55 p.m. The letter further states that respondent had requested that court to contact Judge McGeady, but that none of the court staff could recall making the call, since respondent's request had been made three months earlier.

Respondent claimed that, sometime between October 23, 2008 and January 22, 2009 (the return date of the third order to show cause), he sent to Judge McGeady the January 12, 2009 letter from the West Orange court, together with his own letter of apology. The January 20, 2009 cover letter, which he produced for our review, stated: "I was under the mistaken impression that [the West Orange Court] successfully made contact with you. I apologize for putting the court in such a difficult position to have to hold an order to show cause."

Although the sequence of the events described below was not clear from the record, in essence, the following occurred. At the DEC hearing, Judge McGeady testified that, after respondent missed the second order to show cause, the judge informed the assignment judge that he was planning to file contempt of ourt charges against respondent. The assignment judge, however, dissuaded Judge McGeady from filing the charges, which would have to be prosecuted by the county prosecutor. Instead, the

assignment judge suggested that respondent be ordered to appear before him. At some unknown point (sometime after October 23, 2008, but before January 12, 2009), the county prosecutor contacted respondent about appearing before the assignment judge. During their conversation, respondent agreed to appear on an order to show cause before Judge McGeady, rather than the assignment judge. Judge McGeady issued the third order to show cause in December 2008. The return date was scheduled for January 22, 2009, at which respondent appeared.

At the January 2009 show cause hearing, respondent apologized to Judge McGeady and told him about the unanticipated conflict that had prevented him from appearing at the Duncan trial. Judge McGeady imposed a $250 sanction against respondent.

At the DEC hearing, the judge acknowledged receiving the letter from the West Orange court about the conflicting trial on the DWI matter, but asserted that he had received it only after he had issued the first two orders to show cause. The judge did not mention receiving a letter of apology from respondent.

The judge testified that it was not a common practice for court staff to inform another court that an attorney was running late or needed to reschedule a case. The judge opined that, because respondent had inconvenienced so many people by failing to appear at Duncan's trial, it was probable that he would still

have sanctioned respondent or, at least, subjected him to an order to show cause, even if he had received notice from the other judge that respondent could not appear. The judge complained that, because of the lack of any notice from respondent, he had been unable "to schedule any judicial activity" for the remainder of September 11, 2008.

The judge testified that cases are ordinarily scheduled two-to-three months in advance and that, generally, if an attorney has a conflicting schedule, the attorney will request an adjournment in advance, instead of not appearing and later notifying the court about the conflict.

In his answer, respondent stated that he "will certainly change [his] perspective going forward and not have an afternoon calendar." He added that he has made efforts to insure that he has a per diem attorney working for him to cover cases that he cannot handle. At oral argument before us, respondent mentioned that he has two per diem attorneys available to handle cases that are scheduled at conflicting times.

At the DEC hearing, respondent's counsel pointed out that the client had not filed a grievance against respondent, that she was not dissatisfied with respondent's services, and that respondent's failure to appear before Judge McGeady was not within his control. Counsel noted that respondent neither had

been on vacation, nor had he called out sick, but, instead, had been defending a client in a trial.

The presenter, in turn, argued that respondent's failure to appear in court on a behalf of a client constituted neglect and proof that respondent did not manage his law practice well. The presenter asserted that attorneys cannot overburden themselves to the point that it affects their clients and that respondent's method of practicing law ran the risk of putting his clients' interests in jeopardy.

At the oral argument before us, respondent accepted responsibility for his actions and stated that he is trying to better manage his calendar by being proactive, in that he currently attempts to notify the courts of conflicts well in advance of scheduled hearings. He recognized that he may need a "mentor" to assist him.

The DEC found respondent's testimony inconsistent and, at times, not credible. For example, the DEC was suspicious about the existence of respondent's letter of apology to Judge McGeady, since respondent did not produce it at the ethics hearing. The DEC also found not credible respondent's testimony as to when and why he contacted the "Vicinage 2 Court." The DEC noted respondent's admission that he had not set the "wheels in motion" to obtain the letter from the West Orange Court, in

October or November 2008, and had not taken any action to rectify his failure to appear for the October 16, 2008 order to show cause, until after he had received a telephone call from the county prosecutor. The DEC pointed out that respondent took steps to appear before Judge McGeady only when he learned of the judge's referral of his conduct to the OAE or when he received a call from the prosecutor.

The DEC found that the record reflected respondent's cavalier attitude towards the court:

> The respondent's failure to timely appear for the first Order to Show Cause while court was in session was caused by the same conduct that caused the respondent not to appear for the underlying trial that precipitated three ensuing Orders to Show Cause. The respondent managed his calendar in such a way as to make it likely that he would not be able to meet all the obligations which he undertook. He also managed calendar [sic] admittedly without knowledge of the applicable rules or their requirements; a practice which he now acknowledges and offers to change.
>
> [HR13-HR14.][3]

The DEC found that respondent's failure to comply with the orders to show cause amounted to conduct prejudicial to the administration of justice (RPC 8.4(d)). The DEC considered

[3] HR refers to the hearing panel report, dated October 7, 2010.

respondent's prior misconduct as an aggravating factor requiring increased discipline. It, therefore, recommended a censure.

The DEC did not address the other charged violations (RPC 1.1(a) and RPC 1.3)). However, at oral argument before us, the presenter argued that respondent's mishandling of his calendar violated these rules.

On January 25, 2011, respondent filed a letter-brief with us, replying to the DEC's findings. In his brief, he admitted that he did not handle his appearances before Judge McGeady properly. He agreed that he was "discourteous and wrong," when he did not call the judge's chambers to notify him that he would be late for the October 2, 2008 order to show cause.

Respondent stated that, when he testified at the DEC hearing that the order to show cause was on "ready hold" for 11:30, he believed that the term was interchangeable with "returnable," that is, the time the matter was scheduled to be heard. He pointed out that, although his late arrival had been disrespectful, it would not have been as much of an issue if the judge's calendar had not concluded for the day, before his arrival.

As to his leaving the court before Judge McGeady returned from lunch, respondent conceded that it was another "gaffe" on his part. He added, however, that he did not "even consider that

the Judge would see [him]" after lunch, because the judge's court calendar was over for the day. He asserted that, if he had believed that the judge would have seen him informally, he would have waited.

Respondent denied that his testimony below had been inconsistent. He explained that, until he appeared at the January 2009 order to show cause, he had not known for certain that the judge had not received any communication from the West Orange court.

As to incorrectly diarying the October 23, 2008 order to show cause, respondent claimed that he had called the court, sometime around October 23, 2008, to ask what the next step would be and had been informed that he would be hearing from the court. He later received the call from the county prosecutor, after October 23, 2008, at which time the prosecutor had implied that Judge McGeady wanted to file criminal charges against him and had told him and that he would be hearing from the court. It was at that point, respondent claimed, that he had again contacted the court to make specific arrangements for another date for the order to show cause hearing.

Finally, as to the apology to Judge McGeady, respondent produced a portion of the transcript from the January 2009 hearing and a cover letter to the judge that corroborated that

respondent had sent the letter and that both the transcript and the cover letter contained an apology.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The testimony regarding when respondent learned that Judge McGeady had not received notice from the West Orange court, when respondent sought proof from the West Orange court, and when he contacted the Bergen County court about the third order to show cause was confusing and possibly inconsistent, but did not establish, to a clear and convincing standard, that respondent was untruthful at the DEC hearing. Unquestionably, however, respondent exercised poor judgment in the management of his calendar. By scheduling more than one matter for September 11, 2008, he inconvenienced the court, the prosecutor, the complaining witness, and two defendants. In addition, his failure to provide the court with advance notice of his conflicting calendar prevented the judge from scheduling other cases for that date. Respondent's conduct, thus, was prejudicial to the administration of justice, a violation of RPC 8.4(d).

In addition, on October 2, 2008, when respondent opted to attend to a client's matter, rather than to appear at his own order to show cause (the first order to show cause), he again

violated RPC 8.4(d). As the Supreme Court stated in In re Kivler, 193 N.J. 332, 343-44 (2008), albeit in another context,

> [a]n Order to Show Cause issued by this Court is neither a suggestion nor an invitation that an attorney is privileged to accept or reject as he or she wishes. Rather, it is an Order to appear with which a respondent's compliance is required. Absent some significant and compelling excuse for a failure to appear in response to our Order, we will consider such a failure to be a serious matter to be evaluated as a part of the record on which an appropriate penalty will be imposed; and we may, on that basis alone, as we have here, further enhance the resulting penalty accordingly.

Although the relevant order to show cause here was not issued by the Supreme Court, respondent should have treated it with equivalent deference.

There is no evidence to establish, however, that respondent's failure to appear at the second order to show cause was anything more than a mistake on his part, the poor management of his calendar. He entered the hearing on the wrong date.

Respondent was also charged with gross neglect and lack of diligence for failing to appear at Duncan's trial. The facts do not fully support the charged violations. Even though respondent did not appear at Duncan's initial trial, there was no evidence

to refute his testimony that he attempted to notify the court of his inability to appear. In fact, the West Orange court administrator corroborated respondent's claim that he was directed to remain for the Gonzalez trial and that he requested the West Orange court's staff to so notify Judge McGeady. Duncan was not harmed by respondent's non-appearance because the judge adjourned her matter. Although Duncan had the opportunity to retain another attorney, she chose to proceed pro se. Moreover, she bore no ill will toward respondent for his failure to appear, as demonstrated by the fact that she later retained him in another matter.

In sum, we find that the only clear and convincing evidence in the record is that of two violations of RPC 8.4(d).

Conduct prejudicial to the administration of justice comes in a variety of different forms and typically results in either a reprimand or a censure, depending on other factors present, including the existence of other violations, the attorney's ethics history, whether the matter proceeded as a default, the harm to others, and mitigating or aggravating factors.

Attorneys who have failed to obey court orders have been reprimanded, at times even when the conduct was accompanied by other violations. See, e.g., In re Gellene, 203 N.J. 443 (2010) (attorney found guilty of conduct prejudicial to the

administration of justice and knowingly disobeying an obligation under the rules of a tribunal for failing to appear on the return date of an appellate court's order to show cause and failing to notify the court that he would not appear; the attorney was also guilty of gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients; mitigating factors considered were the attorney's financial problems, his battle with depression and significant family problems; his ethics history included two private reprimands and an admonition); In re Geller, 177 N.J. 505 (2003) (attorney failed to comply with court orders (at times defiantly) and with the disciplinary special master's direction not to contact a judge; the attorney also filed baseless motions accusing judges of bias against him, failed to expedite litigation and to treat with courtesy judges, his adversary, the opposing party, an unrelated litigant, and a court-appointed custody evaluator, used means intended to delay, embarrass or burden third parties, made serious charges against two judges without any reasonable basis, made unprofessional and demeaning remarks toward the other party and opposing counsel, and made a discriminatory remark about a judge; in mitigation, we considered that the attorney's conduct occurred in the course of his own child custody case); In re Holland, 164 N.J. 246 (2000) (attorney was

required to hold in trust a fee in which she and another attorney had an interest took the fee, in violation of a court order); In re Milstead, 162 N.J. 96 (1999) (attorney disbursed escrow funds to his client, in violation of a court order); and In re Hartmann, 142 N.J. 587 (1995) (attorney intentionally and repeatedly ignored four court orders to pay opposing counsel a fee, resulting in a warrant for the attorney's arrest; the attorney also displayed discourteous and abusive conduct toward a judge with intent to intimidate her).

A censure was imposed in In re LeBlanc, 188 N.J. 480 (2006) There the attorney's misconduct in three client matters included conduct prejudicial to the administration of justice for failure to appear at a fee arbitration hearing, failure to abide by a court order for failure to produce information, gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation, charging an unreasonably fee, failure to promptly remit funds to a third party, failure to expedite litigation, failure to cooperate with disciplinary authorities, and failure to comply with the rule prohibiting non-refundable retainers in family law matters. Mitigation included the attorney's recognition and stipulation of his

wrongdoing, his change of law firms, the loss of important staff, his belief that his paralegal had handled post-closing steps, and his lack of intent to disregard his obligation to cooperate with ethics authorities. The attorney had no ethics history.

Le Blanc's conduct involved significant ethics violations in three client matters. Here, one client matter caused respondent's ethics problems. Based on the above precedent, thus, a reprimand would be justified for respondent's conduct, were it not for his ethics history. It is clear that, since his 1999 three-month suspension, his method of operating his law practice has not changed. In that earlier ethics matter, a municipal court judge testified that respondent had a history of either failing to appear or being late for scheduled matters. Obviously, respondent did not learn from his prior mistakes and did not change his practices before the current incidents. The only thing that saves him from a suspension is the passage of time since his 1999 discipline for inadequate office practices.

Altogether, then, we find that respondent's conduct here, his disciplinary record (a three-month suspension and two admonitions), and his failure to learn from similar mistakes warrant a censure.

We further determine to require respondent to practice law under the supervision of an OAE-approved proctor for two years and, within ninety days, provide proof to the OAE that he successfully completed courses in law office management.

Member Doremus did not participate.

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 Marc D'Arienzo
Docket No. DRB 10-406

Argued: March 17, 2011

Decided: May 16, 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:			8			1

Julianne K. DeCore
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Chief Counsel