SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-439
District Docket No. XIV-2010-0449E

IN THE MATTER OF	
ITZCHAK E. KORNFELD	
AN ATTORNEY AT LAW	

Decision

Argued: March 17, 2011

Decided: June 14 2011

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

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 motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), based on respondent's two-year suspension in Pennsylvania for violations of disciplinary rules comparable to New Jersey RPC 1.3 (lack of diligence), RPC 3.4(a) (unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or concealing a document having potential evidentiary value), RPC 3.4(b) (falsifying evidence), RPC 8.4(c) (conduct

involving dishonesty, fraud, deceit or misrepresentation, and RPC 8.4(d) (conduct prejudicial to the administration of justice). The OAE recommended a two-year suspension. For the reasons stated below, we determine that a two-year retroactive suspension is the appropriate discipline.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1993. He has no history of discipline in either jurisdiction. On July 1, 2008, he voluntarily transferred to inactive status in Pennsylvania.

Respondent filed with us a motion to supplement the record. His accompanying certification asserted that the Pennsylvania Office of Disciplinary Counsel (PODC) had given him the option of consenting to discipline or proceeding to a hearing. He chose the former to guarantee the outcome because, he claimed, the panel chair had issued an order denying him the opportunity to present testimony from his treating physicians about his physical and mental state during the relevant period. He asserted that this was a denial of his due process rights. Respondent, however, did not produce a copy of the panel chair's order and did not claim that he attempted to appeal the ruling in that jurisdiction.

Respondent sought to supplement the record here with only a portion of a transcript, purportedly from the Pennsylvania

disciplinary proceedings, the cover sheet of a transcript from a January 19, 2011 hearing on respondent's petition for reinstatement to practice in Pennsylvania (presumably, he intended to supply the remainder in the future), and statements from a psychologist, colleagues and friends, which he had previously submitted in connection with his Pennsylvania reinstatement.

Respondent's claimed objective was (1) to provide "sworn testimony" on the impact that his hypoglycemia had on him during the relevant period; and (2) to show that individuals who had known him for years believed that he held the appropriate qualifications for reinstatement.

After reviewing respondent's motion and accompanying documents, we determine to deny it because of the hearsay nature of the documentation and the OAE's lack of opportunity to cross-examine its authors. Also, the portions of the transcripts appended to respondent's certification lack authentication. In addition, the Pennsylvania disciplinary authorities did, in fact, consider respondent's medical condition (reactive hypoglycemia and his "major depression"), as mentioned in the Joint Petition in Support of Discipline. Finally, the documents offered have no independent bearing on the outcome of these proceedings. Under R. 1:20-14(a) we are bound by the findings of

the Pennsylvania courts. Moreover, respondent failed to establish that he was denied due process in the Pennsylvania proceedings, a claim that he should have pursued in that jurisdiction.

On April 17, 2009, respondent and the PODC filed a Joint Petition in Support of Discipline on Consent and Supporting Affidavit. According to the joint petition, over a period of approximately six months, respondent engaged in an ongoing pattern of unethical conduct. The facts set forth in the joint petition are as follows:

Vintex, LP owned realty in Philadelphia, Pennsylvania, where a gasoline station had been operating since 1936. Four underground storage tanks were located on the site. Vintex leased the gas station to Sargon, Inc. John Ciccone was the principal and sole shareholder of both Vintex and Sargon.

When Ciccone sought refinancing for the gas station, his bank "requested performance of a Phase II site assessment for compliance with the Storage Tank and Spill Prevention Act, 35 P.S. §6021.101, et. seq." In January 1994, one or more environmental consulting firms determined that the station's soil was contaminated with high levels of MTBE and benzene.

In January 2004, Sargon retained respondent to pursue a claim for indemnification through the Underground Storage Tank Indemnification Fund (USTIF).

On February 27, 2004, respondent filed a claim with USTIF. Sargon's claim was denied. By letter dated April 15, 2005, respondent requested a review of the denial. In a letter to USTIF, dated June 6, 2005, he inquired about the status of the "notice of appeal."

By letter dated June 14, 2005, the USTIF upheld the decision to deny coverage for Sargon's claim, enclosed a Request for Formal Administrative Hearing form, and cautioned respondent that the form had to be filed with the Administrative Hearings Office of the Pennsylvania Insurance Department (AHO) within thirty-five days of the mailing date of the USTIF's determination or the request for a hearing would be denied as untimely. In addition, the signed request form had to be filed together with all of the pages of the June 14, 2005 letter.

Ciccone instructed respondent to file the appeal. Respondent had thirty-five days from June 14, 2005, that is, until July 19, 2005, to perfect the appeal with AHO on Sargon's behalf. Respondent, however, failed to file the appeal before that date.

On July 30, 2005, respondent obtained a certificate of mailing from the post office, bearing the date of July 30, 2005. He then used correction fluid to alter the certificate of mailing postmark to reflect a mailing date of July 3, 2005. Thereafter, by letter dated August 17, 2005 to the AHO, with a copy to Sargon, respondent asked for an explanation as to why neither he nor his client had received a reply to the appeal "purportedly filed" and mailed on July 3, 2005. Respondent informed the AHO that he had obtained a certificate of mailing to verify the July 3, 3005 mailing.

After receiving respondent's letter, the AHO conducted a thorough search of its records, but found no evidence of the notice of appeal and so notified respondent. Respondent then drafted a letter to the AHO, advising it that he and his client were appealing USTIF's denial of coverage. As with the certificate of mailing, he backdated the letter to July 3, 2005. He faxed to AHO a letter, together with copies of the documents that he had purportedly already sent, including the backdated July 3, 2005 letter and the altered certificate of mailing. Because respondent faxed the documents, the AHO could not detect that respondent had used correction fluid to "obscure the '0' on the 'July 30' postmark."

An August 30, 2005 letter from the AHO presiding officer for Sargon's appeal notified respondent, among other things, that, despite respondent's assertion that the request for an administrative hearing had been mailed on July 3, 2005, the AHO's records showed that the first communication received by that office was on August 17, 2005 and that Sargon's appeal was "facially untimely." Consequently, an initial decision had to be made pertaining to the timeliness of the appeal. The letter also noted a discrepancy between the payment information on the certificate of mailing, which contained a date of July 30, 2005, and the stamped postmark of July 3, 2005, a Sunday, which discrepancy, the presiding officer stated, merited an evidentiary hearing. Respondent was given the option of either requesting an evidentiary hearing on the timeliness issue and presenting the original documentation or withdrawing the appeal, in writing, which would result in the closing of the AHO file, without further proceedings. By letter dated September 4, 2005, respondent requested an evidentiary hearing.

AHO then scheduled a bifurcated hearing, eventually held on October 17, 2008, limited to the issue of the timeliness of the appeal. Before that date, respondent tried to restore the "0" on the postmark on the certificate of mailing to its original condition. He also drafted a letter, which he backdated to July

30, 2005, stating that the notice of appeal had been sent on July 3, 2005 and that he had neglected to include a request for formal administrative hearing with the July 3 letter, which he was then enclosing. The letter also requested that the AHO "forgive" this oversight.

At the October 17, 2005 hearing, respondent testified falsely about the steps that he had taken to file the appeal, including that he had found the request for formal administrative hearing with another file and, therefore, had sent it to the AHO under cover letter dated July 30, 2005. Prior to the hearing, respondent had consistently maintained that he "had a Certificate of Mailing for a July 3, 2005 mailing." The first time he stated that he did not have the certificate for July 3, was at the October 17, 2005 hearing.

On December 21, 2005, the AHO presiding officer issued a recommendation to dismiss the appeal for lack of jurisdiction, due to the untimely filing of a request for a hearing. The hearing officer found that the first document that the AHO had received about Sargon's appeal was dated August 17, 2005; that the original certificate of mailing that respondent had submitted at the hearing, bore "unmistakable traces of correction fluid;" that the certificate of mailing was altered or fabricated to support a mailing on July 3, 2005, which did

not occur; that the certificate of mailing "was [subsequently] altered to support a mailing on July 30, 2005," which did not occur; that the evidence had been fabricated and that the testimony regarding any mailing in July 2005 had not been credible; and that the certificate of mailing for July 2005 had been fabricated or altered twice. The USTIF Board adopted the AHO's recommendation in full. Respondent did not appeal that decision.

On August 7, 2006, the USTIF Special Counsel determined that disciplinary proceedings were warranted.

On September 20, 2007, the USTIF's chairman and respondent entered into a consent order, concluding that respondent's conduct before the agency had been unethical and improper. The consent order indicated that, from June 15 to October 17, 2005, respondent had suffered from a variety of medical conditions, including hypoglycemia; that respondent's physicians and an independent medical expert had opined "to a reasonable degree of medical certainty, [that] the Respondent's conditions were a substantial factor in his conduct;" and that "the causative relationship between the misconduct of [respondent] and his medical condition has been established by clear and convincing evidence." Respondent was suspended "from the privilege of

appearing or practicing before the Board for a period of 30 months."

The Pennsylvania Joint Petition stated that respondent's conduct had violated RPC 1.3, RPC 3.4(a), RPC 3.4(b), RPC 8.4(c), and RPC 8.4(d). The Joint Petition noted that respondent had no record of discipline, that he had cooperated with the Office of Disciplinary Counsel's investigation and had expressed remorse for his misconduct, and that, if the matter had proceeded to a hearing, respondent might have proffered mitigation evidence that he had been treated for major depression and reactive hypoglycemia.

By order dated June 24, 2009, the Supreme Court of Pennsylvania suspended respondent for two years, retroactive to July 1, 2008, the date that he was transferred to inactive status.

Respondent did not report his disciplinary sanction to the OAE, as required by R. 1:20-14(a). Instead, by letter dated September 7, 2010, the Pennsylvania disciplinary authorities informed the OAE of respondent's Pennsylvania suspension.[1]

[1] At oral argument before us, respondent maintained that he had sent a letter to the OAE, notifying it of the Pennsylvania action. However, the OAE has no such letter in its files. Moreover, respondent was unable to produce evidence of such letter.

In recommending a two-year suspension, the same discipline imposed in Pennsylvania, the OAE stressed that respondent had neglected the appeal, had altered a document presented to a tribunal to bolster his false claim that the appeal had been timely filed, and, for the next six months, had "persisted in repeating and embellishing his lie, both orally in his sworn testimony and in writings submitted to the tribunal."

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of disciplinary proceedings. We, therefore, adopt the findings of the Supreme Court of Pennsylvania and find respondent guilty of the rule violations that he admitted.

Specifically, respondent lacked diligence by failing to file the appeal within the time prescribed by the AHO; altered a certificate of mailing from the post office to make it appear as if the appeal had been timely filed; by letter dated August 17, 2005, inquired of the AHO why neither he nor his client had received a reply to the appeal that he had purportedly filed; backdated a letter advising the AHO that his client was appealing the denial of coverage; faxed the altered certificate of mailing and backdated document to the AHO so that the AHO could not detect the alteration

on the certificate of mailing; compounded his improprieties by requesting an evidentiary hearing and then offering at the hearing the certificate of mailing, which he again attempted to alter, as well as a backdated letter misstating that he had neglected to include a request for a formal hearing with his original July 3, 2005 letter; and offered false testimony at the hearing on why the request for the appeal had not been sent, claiming that he had found it with another file. In all, respondent's conduct violated RPC 1.3, RPC 3.4(a), RPC 3.4(b), RPC 8.4(c), and RPC 8.4(d).

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that fall within the scope of subparagraphs (A) through (D). The only issue is whether, under subparagraph (E), respondent's conduct warrants substantially different discipline from the two-year suspension imposed in Pennsylvania. We determine that it does not.

Backdating documents is a serious ethics offense. See, e.g., In re Marshall, 165 N.J. 27 (2000) (one-year suspension for attorney who backdated a stock transfer agreement and stock certificate to assist the client in avoiding the satisfaction of a $500,000 judgment; the attorney claimed a belief that he was memorializing a transaction that had taken place four years earlier; the attorney also remained silent at the client's deposition, when the client falsely testified that the documents had been signed four years earlier; the attorney did not disclose the backdating to the court and to his adversary in a lawsuit to set aside the transfer of the stock); In re Hall, 195 N.J. 187 (2007) (motion for reciprocal discipline; retroactive eighteen month suspension for attorney who backdated an appeal to cover up his failure to timely file it; the attorney also made misrepresentations to the client, to the adversary, and to an unemployment referee); In re Konigsberg, 132 N.J. 263 (1993)

(thirty-three month suspension retroactive to date of temporary suspension for attorney who pled guilty to a federal information charging him with making a false statement to an agency of the United States in violation of 18 U.S.C.A. § 1001, for backdating a contract for a client in order to obtain insurance proceeds); and In re Bode, 186 N.J. 585 (2006) (motion for reciprocal discipline; three-year suspension for attorney who backdated three certificates of mailing in connection with matters pending before the United States Patent and Trademark Office (USPTO); failed to keep clients informed about the status of their patent applications, which resulted in the abandonment of eight patent and trademark applications; neglected legal matters, failed to carry out professional contracts of employment; failed to reply to requests for information from the USPTO disciplinary authorities; failed to protect clients' interests on termination of the representation, and engaged in misrepresentations and conduct prejudicial to the administration of justice). But see In re Ginsberg, 174 N.J. 349 (2002) (reprimand for attorney who backdated estate planning documents to avoid possible adverse consequences by newly proposed legislation; had the legislation been passed, the attorney's conduct would have constituted tax fraud; in mitigation, it was considered that the attorney was forthright and contrite in his admission of wrongdoing, his

conduct was not motivated by self-gain, it caused no harm to the client, he had no disciplinary record until the incident, and thirteen years had passed since the misconduct occurred).

Respondent's conduct is somewhat similar to Hall's (eighteen-month suspension), who also backdated an appeal to conceal his failure to timely file it and then made misrepresentations to an unemployment referee. However, respondent's conduct here was more serious, warranting greater discipline, because he engaged in a pattern of misconduct. He perpetuated his lie for six months, orally and in sworn testimony, and in writings submitted to a tribunal. Moreover, even though he claimed that he had notified the OAE of his Pennsylvania suspension, the OAE had no such notice in its file. Moreover, respondent was unable to produce proof that he had mailed any such notice to the OAE.

Thus, nothing in this case warrants deviation from the discipline imposed in Pennsylvania. We, therefore, determine that a two-year suspension, retroactive to June 24, 2009, the actual date of the Pennsylvania Supreme Court's order of suspension, is appropriate discipline here. We do not make it retroactive to July 1, 2008, the date that respondent voluntarily placed himself on inactive status, because it was not a suspension imposed by a Court order. See In re Farr, 115 N.J. 231 (1989).

We also determine to make respondent's reinstatement in New Jersey contingent on his prior reinstatement in Pennsylvania.

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 Itzchak E. Kornfeld
Docket No. DRB 10-439

Argued: March 17, 2011

Decided: June 14, 2011

Disposition: Two-year retroactive suspension

Members	Disbar	Two-year Retroactive Suspension	Reprimand	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
Chief Counsel