Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-021

IN THE MATTER OF	:
WILLIAM J. DE MARCO,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 20, 1991

Decided: May 6, 1991

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

John Fiorello appeared on behalf of respondent.

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

This matter is before the Board on an appeal filed by the Office of Attorney Ethics ("OAE") of a post-hearing dismissal of the ethics charges against respondent by the District XI Ethics Committee R. 1:20-4(e)(1)(ii). The OAE seeks the imposition of a public reprimand based on respondent's conduct in the present matter and on the receipt of two prior private reprimands.[1]

[1] On May 16, 1978, respondent was privately reprimanded for conduct involving misrepresentation prejudicial to the administration of justice and conduct prohibiting the knowing use of false evidence (no further details are available). On December 23, 1986, respondent received a private reprimand for his failure to review, prior to its filing, a brief prepared by a law clerk misrepresenting the proceedings.

FIRST COUNT

Respondent was found guilty beyond a reasonable doubt of two separate counts of contempt in the face of the court by the Honorable Adolph A. Romei, J.S.C., Law Division - Passaic County, Criminal Part. R. 1:10-1. The contemptuous conduct took place on December 15, 1986 and February 25, 1987, during a criminal trial where respondent represented one of several co-defendants. Respondent was also ordered to pay a penalty of $500 for each offense. On March 23, 1988, the Appellate Division affirmed the judgments of conviction.

The two instances of contemptuous conduct are described in the Appellate Division opinion:

> On December 15, 1986, while the judge was hearing arguments about the admissibility of transcripts of certain intercepted telephone conversations, DeMarco indicated to the judge that he would use in cross-examination the fact that there were mistakes as to dates and times. The prosecutor then argued:
>
> > MR. CAMPOLO: What I wanted to say, we even got back to format here, the format for each one of these transcripts vary (sic) significantly. There's not even any assumption that any of this introductory matter, other than the actual transcripts, will ultimately be permitted to the jury because someone who sponsors in this evidence will have to testify about the date and time.
> >
> > This is a question of really housekeeping for the Court, whether you want to allow this sort of introductory information on the transcript, whether some counsel may reserve the right (to) redact it altogether.
> >
> > Again, I'm looking for some simplicity here, and defense counsel even concedes that we're correcting these transcripts as we go through.

> Some of the words are inaccurate, some of them are misspelled, there are differences of interpretation.
>
> And for them now to argue that somehow the mistyping of the day of the week on one of these transcripts by some unknown person somehow raises a crucial issue of cross-examination, is preposterous. I think it's a fraud, and I would -- (Emphasis supplied).

DeMarco objected, arguing that if the prosecutor wanted to get personal, he was "fooling with the wrong crowd." [footnote omitted]. The following colloquy occurred:

> THE COURT: I would urge counsel --
>
> MR. DE MARCO: Urge the Prosecutor, he started it and I'll finish it.
>
> THE COURT: Please at all times conduct yourselves as attorneys. And if you avoid the use of strong language, please avoid it when referring to the argument of your adversaries.
>
> MR. DE MARCO: I object to when I raise an argument that it be called a fraud, and I want an apology.
>
> MR. CAMPOLO: I will not apologize.
>
> MR. DE MARCO: Your Honor --
>
> THE COURT: We were going to proceed.
>
> MR. DE MARCO: Wait a minute.
>
> THE COURT: We are going to proceed.
>
> MR. DE MARCO: I think that language was more contemptuous than what I said to this Court, and you let him get away with (it).
>
> THE COURT: We are going to proceed. I've got to have this case completed. I'm not going to have counsel obstruct the continuation of this case.
>
> MR.DE MARCO: Judge, you overlook if defense counsel in pursuit of a Constitutional issue uses strong language, you want to hold him in contempt. But the Prosecutor can get up and

> patch his case and call the defense a fraud and you let him get away with.
>
> I don't think you're being fair now, Judge. You have to be evenhanded to both sides, and you're not being that way.
>
> THE COURT: All right. The Court notes that once again Mr. De Marco is attacking the integrity of the Court; and I want a copy of this transcript.
>
> MR. DE MARCO: See, Judge, it's another example, the State can get up and make remarks and the Court just let's [sic] it go. When defense counsel stands up and defends his clients in defense of his client's rights, you use every intimidating method you know how to try and silence the defense. [Emphasis supplied].

The judge recessed the trial and requested a copy of the transcript from the court reporter.

Additional pre-trial proceedings took place on February 25, 1987 with respect to a subpoena issued at the request of a codefendant to the Superintendent of the State Police for the production of certain documents and records. The Attorney General and the State Commission of Investigation had moved to quash the subpoena, in part based on lack of relevance and materiality. The judge reserved decision and gave the Deputy Attorney General until the next day to prepare affidavits concerning the difficulty of retrieving the information requested. DeMarco interjected "[h]ow about testimony rather than an affidavit?" When the judge indicated that he would accept an affidavit, the following exchange occurred:

> MR. DE MARCO: How about if we don't accept an affidavit? Maybe we want to cross-examine.
>
> Could we have the name who's going to prepare the affidavit so we can issue a subpoena so we can question him? I think we have the right.
>
> MR. CISZAK: I imagine I will prepare the affidavit based on the facts that were given to me.
>
> MR. DE MARCO: Then it's no one's affidavit except his affidavit. We can't ask him questions because it's going to be double

hearsay.

MR. PETRINA: I can't see how Mr. Ciszak is going to tell you he is going to prepare an affidavit. An affidavit is sworn testimony, in effect.

Is he going to tell whoever is giving this what he's going to say? That person is suppose [sic] to say it, Judge.

MR. CISZAK: Hopefully counsel doesn't think that the Court is so ignorant to think that every client prepares his own affidavit and the attorney just allows him to put it in the proper form obviously for our clients. And every person who made it out of law school knows that.

MR. DE MARCO: I understood it was going to be your affidavit.

MR. CISZAK: I said I'll prepare it.

MR. DE MARCO: You're not going to sign it?

MR. CISZAK: Of course not.

MR. DE MARCO: Can you tell us whose affidavit it's going to be?

MR. CISZAK: I imagine the person who signs it.

MR. DE MARCO: I would like to know the person so I can subpoena him.

I mean Mr. Ciszak thinks this is funny. It's not funny to us.

Since December 1 we tried to pick a jury. I would like to continue it.

Can we find out whose affidavit it's going to be?

THE COURT: I'm sure Mr. Ciszak doesn't think these proceedings are "funny".

MR. PETRINA: He's laughing.

THE COURT: All right. Let's proceed.

MR. DE MARCO: He's somebody from the State, it's got to be, right?

THE COURT: I'm going to take drastic action, I'm warning counsel, I'm going to take drastic action if counsel don't behave in these proceedings.

MR. DE MARCO: Is the Court threatening me? Are you threatening me, Judge? Is that a threat?

THE COURT: Let's proceed.

MR. DE MARCO: Is it a threat to me?

THE COURT: Mr. De Marco.

MR. DE MARCO: Are you threatening me?

THE COURT: Mr. De Marco, not a further word from you.

MR. DE MARCO: There will be further words from me in defense of my client.

There's not a judge nor a man who would quiet me in a courtroom when I'm defending a client.

THE COURT: You constantly demean the Court.

MR. DE MARCO: I demeaned you?

I think the State has served to demean you throughout these entire proceedings.

After some additional discussion about when the affidavits could be available, De Marco informed the court that he would not be satisfied with an affidavit, but rather wanted a subpoena for the two individuals and persistently asked why they could not be brought in. The judge determined that they would meet at 11 a.m. and work through the lunch hour to accommodate De Marco and Afflito. De Marco replied 'you're not accommodating me at all, you're accommodating an order from Judge Bissel, not me.'

De Marco again requested the names of the individuals and when the Deputy Attorney General replied he was not sure who they would be, the judge determined that he would

respond to defense counsel's request the next day. DeMarco then remarked:

> Another waste of time. So when I get the names, then I'll waste more time by issuing a subpoena and we'll have to wait until they come.
>
> Your Honor, talking about dancing to the tune. You are dancing to the tune of the State. I can't believe an Attorney General comes in here and tells you I'm going to submit an affidavit of two people tomorrow, but I'm not going to give up their names and you're going to sustain that.
>
> That record is going to look beautiful when someone sees that, it looks beautiful.
>
> I have nothing further, Judge.
>
> Thank you for the justice today.

Apparently Judge Bissel had scheduled the two attorneys to appear before him at 2:30 p.m. the next day. In any event, De Marco's entire attitude as reflected in the exchange was unprofessional. R.P.C. 3.5(c) and 8.4(a) and (d).

The next day, February 26, 1987, the judge found that De Marco's statements to the court constituted contempt of court under R. 1:10-1. An order was entered to this effect on March 6, 1987 and recited that a hearing regarding the penalty would take place upon conclusion of the trial of State v. Mancinelli, the underlying proceeding. The order specifically found the following quoted statements contumacious and attached copies of the transcript page to the order:

> (1) 'HE'S SOMEBODY FROM THE STATE, IT'S GOT TO BE RIGHT?' (See attached transcript page 81, lines 22-23) [footnote omitted].
>
> (2) 'YOUR HONOR, ..., YOU ARE DANCING TO THE TUNE OF THE STATE.' (See attached transcript -- page 93, line 11).
>
> (3) 'THANK YOU FOR THE JUSTICE TODAY.' (See attached transcript -- page 93, line 20).

SECOND COUNT

On March 23, 1987, after the trial had been concluded, the jury had been excused, and the judge had left the bench, the codefendants and their attorneys -- who were still in front of the bar -- engaged in a discussion about what they perceived as a discrepancy of the jury's verdict on the charges of conspiracy. Several newspaper reporters were in the courtroom. Upset about a particular charge to the jury, which, in his view, did not reflect the state of the law, respondent turned to one of the codefendant's counsel and made the following comment:

> This genius on the bench couldn't give the right charge on conspiracy. He doesn't know the law of conspiracy, but he expects 12 laymen to know.

This statement was overheard by a newspaper reporter and published in the newspaper three days thereafter.

Although the court issued an order to show cause why respondent should not be held in contempt for the above statement and for the conduct displayed on December 15, 1986, the court did not expressly rule on the newspaper statement matter, but referred it to the OAE for appropriate action.

By letter dated April 6, 1988, the OAE forwarded this matter to the Secretary of the District XI Ethics Committee. In that letter, the OAE instructed the committee to hold a plenary hearing on the newspaper comment only, inasmuch as the contempt findings constituted res judicata. As stated by the OAE,

> [t]he first aspect [of this case] relates to the contempt proceedings, wherein Mr. De Marco has already been found

> guilty beyond a reasonable doubt of contempt of court. This finding is res judicata and Mr. De Marco may not retry those issues. In re McAlevy, 94 N.J. 201 (1983), In re Yengo, 92 N.J. 9 (1983). He may, however, make whatever legal argument he wishes that such conduct does not require the imposition of discipline. In this regard, of course, he may introduce any evidence in mitigation which is not inconsistent with the Judgment of Contempt.
>
> [Hearing Panel Report, Exhibit C at 2.]

On November 21, 1988, the committee filed a two-count complaint, charging respondent with violation of RPC. 3.5 (engaging in conduct intended to disrupt a tribunal) (first count) and of RPC 3.5 and 3.6 (a) (trial publicity) (second count). The complaint did not specifically cite RPC 8.4 (conduct prejudicial to the administration of justice).

At the conclusion of the district ethics committee hearing, the panel dismissed both counts of the complaint, finding, as to the first count, that respondent had not attempted to influence or to intimidate the judge, because respondent had tried numerous matters before that judge and the two had known each other for many years. The panel also concluded that respondent's conduct in the first count was not intended to disrupt a tribunal, as it had taken place outside the presence of the jury. The panel reasoned that, although respondent's conduct had not been a model of decorum, it had not risen to the level of the unprofessional conduct contemplated in RPC 3.5.

As to the second count, the panel concluded that, while respondent had acted improvidently, his comment did not have a "substantial likelihood of materially prejudicing an adjudicative

proceeding," because the trial had already ended.

It is from the dismissal of the above two counts that the OAE appealed, pursuant to R. 1:20-4(e)(1)(ii).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board reverses the dismissal of the first count of the complaint by the District XI Ethics Committee. Unlike the committee, the Board finds that the evidence clearly and convincingly establishes that respondent's conviction of two counts of contempt constitutes unethical conduct. Indeed, a contempt conviction is conclusive evidence of professional misconduct. In re McAlevy, 94 N.J. 201,206 (1983). See also In re Rosen, 88 N.J. 1 (1981).

The Board's independent review of the record persuades it that, as to the first count of the complaint, respondent's conduct was unethical and violative of RPC 3.5(c) and 8.4(d). As found by the Appellate Division,

> . . . the record amply demonstrates beyond a reasonable doubt that De Marco exhibited a pattern of abusive and unwarranted behavior directed at the trial judge. His statements far exceeded the bounds of colloquy and constituted rude, uncalled for attacks upon the objectivity and integrity of the judge, thus disrupting the trial proceedings. [citations omitted].
>
> [Hearing Panel Report, Exhibit E at 22.]

Parenthetically, in his brief to the Board, respondent contended that RPC 8.4(d) applies only to an attorney in his capacity as an ordinary citizen, citing In re Hinds, 90 N.J. 604 (1982), which dealt with newspaper comments made by an attorney not

connected with the relevant criminal trial. Respondent relied on the Court's ruling, in that case, that misconduct by an attorney who is not specially connected with or involved in a pending criminal matter triggers the application of DR 1-102(A)(5) (conduct prejudicial to the administration of justice), the predecessor of RPC 8.4(d), rather than DR 7-107, which more properly regulates conduct by an attorney who is specially connected with an ongoing criminal trial.

Respondent's contention, however, is wrong. All Hinds states is that DR 1-102(A)(5) is the better disciplinary rule to invoke in reviewing the impropriety of comments to the press made by an attorney not directly associated with the ongoing criminal trial, as opposed to DR 7-107, which applies to trial publicity when the attorney is participating or involved in the criminal matter. Hinds does not stand for the proposition that RPC 8.4(d) is applicable only to an attorney acting as an ordinary citizen. It applies to all attorneys, whether they act as such or in any other capacity.

The Board is aware that the ethics complaint does not cite RPC 8.4(d). This fact, however, is not crucial to a finding of violation of that disciplinary rule. Respondent was put on notice of the facts alleged to have been unethical both in the contempt proceedings and in the Appellate Division's affirmance. See In re Logan, 70 N.J. 222 (1976). Indeed, the Appellate Division opinion makes specific mention of RPC 8.4(d) (Hearing Panel Report, Exhibit E at 11, footnote 3, and at 23).

As to the second count of the complaint, the Board agrees with the committee's conclusion that respondent's conduct was not unethical. The committee properly found that respondent's statement did not violate RPC 3.5(c) or 8.4(d). The trial had already ended and the jury had left the courtroom, as had the judge. In addition, the statement was not made in response to a question posed by the reporter but, rather, overheard by him when respondent complained to counsel for a co-defendant. Under those circumstances, the Board is unable to conclude that respondent's conduct was intended to disrupt a tribunal or to impede the administration of justice. While respondent's conduct might have been imprudent or improvident, it had no effect upon the adjudication of the case. To prohibit or restrict extrajudicial statements under the circumstances present in this matter might violate the freedom of speech guaranteed by the First Amendment. As the Court recognized in Hinds, "attorneys are entitled to the full protection of the First Amendment, even as participants in the administration of justice." Id. at 614.

There remains the question of appropriate discipline. Unaccompanied by other egregious conduct, disrespectful behavior to the court has merited a private or a public reprimand. By way of example, the Board recently imposed a private reprimand on an attorney who, during the course of the proceeding before a municipal court judge, on numerous occasions verbally assaulted the court by charging it with prejudice. Even after the court's admonitions, the attorney continued with his insulting remarks, at

which time he was cited for contempt and fined $150. Twice again, the attorney persisted with his disrespectful behavior, as a result of which two additional fines of $150 were imposed. The Board found that respondent's conduct had demeaned the judicial proceeding and obstructed the administration of justice. The attorney had no prior disciplinary record.

A public reprimand was imposed when an attorney shouted at the court and exhibited disrespectful behavior in three separate cases. The attorney was virtually retired from the practice of law and had no prior ethical infractions. Matter of Stanley, 102 N.J. 244 (1986). Similarly, in In re Mezzaca, 67 N.J. 387 (1975), the Court publicly reprimanded an attorney who referred to a departmental review committee as a "kangaroo court," and who made other discourteous comments. Cf. In re Vincenti, 91 N.J. 591 (1983).

Although, here, respondent's actions toward the court were not egregious, they disrupted the proceedings and obstructed the administration of justice on two separate occasions, as charged in the first count of the complaint. Viewed in conjunction with the receipt of two prior private reprimands, respondent's conduct merits a public reprimand. The requisite majority of the Board so recommends. Two members would have also affirmed the committee's dismissal of the first count. Two members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: May 6, 1991 By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board