SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-244
District Docket No. XIV-2009-0448E

IN THE MATTER OF	
NEIL M. DAY	
AN ATTORNEY AT LAW	

Decision

Argued: November 21, 2013

Decided: December 20, 2013

Timothy J. McNamara appeared on behalf of the Office of Attorney Ethics.

John D. Arseneault appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (three-month suspension), filed by Special Master Michael R. DuPont. The four-count complaint charged respondent with violating RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) in all counts. The parties entered

into a stipulation of facts, in which respondent admitted that he violated RPC 8.4(c) in counts two through four.[1] The presenter withdrew the first count of the complaint.

The OAE recommends a six-month or one-year suspension. We agree with the special master that a three-month suspension is appropriate.

Respondent was admitted to the New Jersey bar in 1998. He has no history of discipline.

Respondent was employed by the law firm of Coughlin Duffy, LLC (the firm), from July 2004 to March 2009.[2] He became a partner in January 2007. The misconduct at issue took place between 2007 and 2008, during the course of respondent's tenure as a partner. Specifically, as to count two, his law firm was retained in connection with a litigation matter. In the course of the litigation, respondent submitted time entries to the firm indicating that he had attended depositions on fifty-one dates. The firm billed the client for respondent's preparation and

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[1] The misconduct alleged in counts two through four is essentially the same, except for the identity of the clients.

[2] In order to protect the identities of the firm's clients, the special master signed a protective order covering documents the firm produced in response to an OAE subpoena.

attendance at those depositions. An internal audit performed by the firm revealed that respondent had attended depositions on only twenty of those dates.

As to count three, respondent admitted that he recorded a time entry indicating that he had prepared for and attended depositions on six occasions, when he had not done so. With respect to count four, too, respondent conceded that, on one occasion, he recorded a time entry stating that he had prepared for and attended depositions on a date that he had not done so.

The firm reimbursed its clients $123,050.49, presumably the total amount of respondent's bills for the depositions that did not occur.

Respondent admitted that he violated RPC 8.4(c) in each of the three counts.

Before the special master, respondent acknowledged that this was "severe, serious conduct." He explained that his intent, when he made the time entries and then, later, when he received the pre-bills, was "to cover for [his] time not being spent in the office," but never to have the clients pay for the improper charges. He testified that he had reviewed the "pre-bills," crossed off time that he had not spent on the file, and given the bills to the firm's billing attorney. He stipulated

that, although obligated to verify the accuracy of the final bill, before it went to the client, he consciously avoided doing so. He expressed his remorse for his actions, which he called "incredibly stupid and wrong."

As indicated previously, the bills were sent to the clients with the improper time entries. There is no explanation in the record as to why the "corrected bills" were not the ones forwarded to the clients. As to the pre-bills, the following exchange took place between the presenter and the special master, at the ethics hearing:

> [Special Master]: Okay. And, [presenter], I had one question for you. Did you have an opportunity to look at any of those hand marked bills?
>
> [Presenter]: We looked at all of the discovery that was provided to us and also met with the firm on more than one date. We also made sure that the firm understood that we were entering into the Stipulation of Facts. They're aware that it was taking place. They're also aware that we're actually having this hearing today. They're aware of the Office of Attorney Ethics' recommendation in this matter as well.
>
> [Special Master]: And when you asked him about — or, obviously, you confirmed that [respondent] crossed off the time that he didn't actually perform. Did the firm ask or tell you as to why or how that marked up bill was forwarded to the client or didn't [respondent] do that?

[Presenter]: Well, [respondent] had an obligation to give all new reflective actual time that he had worked, which he consciously avoided doing, and so the firm did not – was not aware that he was doing this.

There came a time where there was an issue as to what bill had been submitted, and so when the client questioned that, they did an extensive investigation and as you can see from the exhibits that were given to you, Exhibit-1 provides a summary of their investigation –

. . .

[Presenter]: But in terms of this with regard to the Stipulation of Facts throughout, there was [sic] time entries of what was recorded. The time entries that [respondent] gave were not accurate. He consciously avoided doing that and he agrees to that, that is what the stipulation –

[Special Master]: I see. I was just trying to understand the mechanism because when you asked what the routine was, I thought he had said that he revised it and struck it.

[Presenter]: He had, and one of the – it's not to be discussive, but just to put it in context, one of the major discovery issues during the course of this entire investigation was our inability to get the prebills that mysteriously couldn't be found.

[Special Master]: I guess the big issue, though, is the stipulation has been submitted. I needed clarification for myself. Having practiced close to 30 years and also, you know, had the privilege of

> looking at bills, which can be a little tiring but we all need to bill.
>
> Did you have anything else, [presenter]?
>
> [Presenter]: No, just to say that we did receive, you know, numerous documents from the law firm. I don't remember seeing items marked off by [respondent].
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> [Special Master]: That's okay. As long as everyone understood what his actions were. I don't think his actions were disputed.
>
> [Presenter]: No, but I just — I did not recall seeing whether they were marked off and I was just asking my investigator and he doesn't recall them either.
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> [T22-1 to T25-3.][3]

During oral argument before us, respondent's counsel stated that the pre-bills have never been located. According to counsel, the OAE investigator referred to them as "the mystery pre-bills that we could never get our hands on."

By way of mitigation, respondent testified about his involvement in a number of community activities, including youth sports and his prior pro bono work. He is no longer practicing law. He is currently teaching in the Elizabeth, New Jersey,

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[3] "T" refers to the transcript of the hearing before the special master.

school system. He submitted a number of letters, attesting to his good character and extensive community involvement.

In his brief to the special master, respondent's counsel remarked that respondent had received no additional compensation from his actions and again pointed to respondent's community involvement, his good reputation, and his pro bono activities, as well as the character letters submitted on his behalf.

In his brief to the special master, the presenter acknowledged respondent's contrition and remorse, cooperation with the OAE, and admission of wrongdoing. In aggravation, however, the presenter noted that respondent engaged in a continuing course of dishonesty and misrepresentation for over a year.

The special master concluded that respondent had violated RPC 8.4(c), as stipulated. In determining the correct measure of discipline, the special master considered the following mitigating factors: respondent's acceptance of responsibility, his execution of the stipulation of facts, his lack of prior disciplinary history, and his community involvement and pro bono work. The special master also reviewed the character letters that respondent submitted, particularly one from respondent's supervising attorney at his prior law firm. The special master

agreed with the supervisor's description of respondent's conduct as a "once in a career transgression." The special master also noted that respondent is no longer practicing law.

The special master looked to prior cases of similar misconduct, In re Hecker, 109 N.J. 539 (1988), In re Cohen, 114 N.J. 51 (1989), and In re Denti, 204 N.J. 566 (2011), noting that, unlike the case at hand, those three cases shared similar facts, "namely long standing and pervasive schemes of defrauding, lack of accountability and acceptance of responsibility for conduct and untruthful testimony." The special master disagreed with the OAE's view that a six-month or a one-year suspension is appropriate. Based on the mitigating factors, the special master recommended that respondent be suspended for three months, explaining that respondent's admission of wrongdoing and cooperation with the OAE weighed heavily in his decision.

Following a de novo review, we agree with the special master's conclusion that the record supports a finding that respondent was guilty of unethical conduct.

Respondent conceded that he violated RPC 8.4(c) by grossly inflating the time that he had spent doing legal work for the clients. We note, however, that neither the complaint, nor the

stipulation, nor the special master's report mentions the scope of the RPC 8.4(c) violation that was either charged or stipulated.

At the ethics hearing, respondent told the special master that his conduct had been "incredibly stupid and wrong" and that, when he had reviewed the pre-bills, he had crossed off the false entries. He acknowledged, however, that he had not reviewed the final bills that were sent to the clients and that he had consciously avoided doing so. He added that he never intended for the clients to pay the fabricated fees.

The question then is whether, by claiming that he had crossed off the improper time entries, respondent intended to show the special master that he had attempted to cure his initial wrongdoing, which he stipulated to have been dishonest, deceptive, and fraudulent. In other words, was respondent saying that, by deleting the false entries, he expected that the final bills would accurately reflect the hours spent on the clients' matters? In that case, if respondent's testimony that he crossed off the improper entries may be believed -- the pre-bills are not in the record -- then his admission that he violated RPC 8.4(c) relates only to his intended false entries for his partners, not for the clients. We find that the clear

and convincing evidence allows the conclusion that respondent's violation of RPC 8.4(c) arose solely from his misrepresentations to the law firm, with no intent to deceive his clients. Nevertheless, his dishonest conduct toward his firm was pervasive, in that it continued for a year.

As to the appropriate measure of discipline, in their briefs to the special master, both the presenter and respondent's counsel cited In re Hecker, supra 109 N.J. 539, and In re Cohen, supra, 114 N.J. 51.

Hecker, a part-time municipal attorney, prepared and submitted bills for services purportedly rendered to the township, certifying them to be accurate, when he knew otherwise. In the Matter of Laurence A. Hecker, DRB 85-419 (April 15, 1987) (slip op. at 1-2). Those bills totaled $320,000. The township paid Hecker approximately $280,000. Id. at 2. In addition, he filed a meritless appeal for the sole purpose of delay; acquired tax-sale certificates, while serving as a municipal attorney, without filing the required disclosure statement; withheld files for sixteen months, after he resigned as municipal attorney; sued township officials, prior to a general election, forcing them to rehire him; hid assets to prevent recovery on a judgment; and frustrated efforts to take his deposition. Id. at 7-9.

The Court found that Hecker's conduct, taken in its entirety, "reflected 'a lack of awareness of the degree of professionalism expected of every member of the bar . . . and particularly of every member of the bar engaged in public service.'" Hecker, supra, 109 N.J. at 553. The Court imposed only a six-month suspension on Hecker, in light of his prior unblemished disciplinary history and the passage of fifteen years, since the misconduct had occurred.

In In re Cohen, supra, 114 N.J. 51, the attorney, in five matters and over roughly a six-year period, engaged in conflicts of interest twice by suing a former client, recklessly prepared a statement of services, which amounted to a misrepresentation, paid for a transcript with a trust account check, and was twice grossly negligent. Cohen, who had previously been privately reprimanded, was suspended for one year.

The presenter also cited In re Ort, 134 N.J. 146 (1993), and In re Denti, 204 N.J. 566 (2011). In Ort, the attorney, while representing a widow in settling her husband's estate, mortgaged the estate residence without his client's permission and then used that loan to take excessive and unauthorized legal fees. He also overstated and exaggerated his legal fees, charged legal fees for non-legal work and made misrepresentations to his

client concerning his representation. Ort was disbarred.

In Denti, the attorney engaged in conduct very similar to respondent's. While a partner at two law firms, Denti submitted false entries in the firms' time-keeping systems, in an effort to mislead them into believing that he was performing legal work. His intent was to ensure the continuation of his agreed compensation. Denti also engaged in a conflict of interest by entering into an intimate relationship with a divorce client and submitted vouchers for meals with individuals who he alleged were either potential clients or potential sources of client referrals. In reality, they were women he was dating.

Although we found Denti's lack of a disciplinary history a mitigating factor, we concluded that it was outweighed by the many aggravating factors, including the length and breadth of Denti's dishonesty, the premeditated nature of the misconduct, the fiduciary relationship that he abused, his refusal to admit that his conduct was unethical, his incredible testimony at the ethics hearing, his lack of remorse, his experience as a member of the bar for more than twenty years, and the self-interest by which he was motivated. Moreover, at a minimum, Denti had permitted, if not persuaded, others to submit false certifications or testimony on his behalf. Denti was disbarred.

In this case, the presenter argued that respondent's misconduct resembles "the extensive pattern of false billings" in Ort and Denti and that, as in Denti, respondent's false charges were a fraud on his firm, as well as on the clients. The presenter conceded, however, that, unlike Ort and Denti, respondent gained no financial benefit from his misconduct. Thus, in the presenter's view, respondent's actions do not require disbarment but, rather, a stern sanction in the range of the suspensions imposed in Hecker and Cohen — six months or one year.

Respondent's counsel, in turn, argued that respondent's misconduct did not rise to the level of that seen in Hecker and Cohen, where the attorneys engaged in numerous infractions, in addition to billing for services not rendered. Counsel urged the imposition of a sanction no more severe than a six-month suspension.[4]

We agree with the presenter that this case is distinguishable from Ort and Denti. In Ort, the attorney engaged

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[4] Although counsel argued that respondent's sanction should be no more than a six-month suspension, he also asserted that it should be less than the sanction in Hecker, which was a six-month suspension.

in nefarious conduct solely to enrich himself, at the expense of a widow. Denti, like respondent, created false time entries to mislead his partners into thinking that he had been working. Unlike respondent, however, he took no steps to correct those time entries, before the bills were sent to clients. True, respondent's steps were ineffectual and, at some point, he suspected that to be the case. His attempted actions, however, in some degree serve to mitigate his conduct. In addition, Denti engaged in a conflict of interest and submitted vouchers for meals with women he was dating, alleging that they were potential clients or sources of referrals.

On the other hand, like the above two attorneys, respondent acted for his own benefit, not like Hecker, who "padded his bills," but indirectly, by "padding his hours." Presumably, respondent thought that he needed to "cover for his time not being spent in the office" because he feared for his compensation, if his hours were too few. His plan was calculated to indirectly serve his financial ends.

Undisputedly, respondent's conduct was serious. Clients paid for $123,000 in legal fees not earned by the firm. Although the fees were refunded to them, presumably that was done years after they had been paid. Thus, although respondent may not have

intended that his clients be harmed, the fact remains that they were, at least for a time. In addition, respondent's misconduct was repeated numerous times between 2007 and 2008, thereby forming a pattern of dishonesty.

There is, however, mitigation to consider. Respondent is involved in numerous activities for the betterment of his community; seven years have passed since his misconduct took place; and he has an unblemished disciplinary history. As in Hecker, these strong mitigating factors weigh heavily in the fashioning of the right quantum of discipline for respondent's deceptive practices. We find that a three-month suspension is adequate discipline in this matter.

Member Baugh would censure respondent. Member Gallipoli did not participate. Members Hoberman and Singer abstained.

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
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Neil M. Day
Docket No. DRB 13-244

Argued: November 15, 2012

Decided: December 20, 2013

Disposition: Three-month suspension

Members	Disbar	Three-month suspension	Censure	Dismiss	Abstained	Did not participate
Frost		X				
Baugh			X			
Clark		X				
Singer					X	
Yamner		X				
Doremus		X				
Gallipoli						X
Hoberman					X	
Zmirich		X				
Total:		5	1		2	1

Isabel Frank
Acting Chief Counsel