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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-328

IN THE MATTER OF

IRA B. MARSHALL

AN ATTORNEY AT LAW

Decision

Argued: November 18, 1999

Decided: February 22, 2000

Mitchell J. Ansell appeared on behalf of the District IX Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter was before us based on a recommendation for discipline filed by the District IX Ethics Committee ("DEC"). The complaint alleged that, in order to assist his client in avoiding a 1994 civil judgment, respondent backdated to 1991 a stock transfer agreement and stock certificate that he prepared in 1995, suborned false testimony from his

client during a civil trial and removed documents from a corporate record prior to trial. The complaint alleged violations of RPC 3.3, RPC 3.4, RPC 4.1 and RPC 8.4, but did not cite specific sections of the rules. However, the factual allegations establish that the DEC intended to refer to RPC 3.3(a)(4) (knowingly offering evidence that the lawyer knows to be false); RPC 3.3(a)(5) (failing to disclose to a tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure); RPC 3.4(a) (obstructing another party's access to evidence or concealing a document having potential evidentiary value, or counseling or assisting another person to do such an act); RPC 4.1(a) (1) and (2) (knowingly making a false statement to a third person or failing to disclose a material fact when disclosure is necessary); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1969 and maintains an office for the practice of law in Matawan, New Jersey. Respondent has no prior disciplinary history.

* * *

This matter arose out of respondent's representation of Michael Wood, the president of B&H Metal Products, Inc. ("B&H"), in a 1995 civil action in which U.S. Amada, Inc. ("Amada"), a judgment-creditor of Wood, alleged, among other things, that Wood had fraudulently transferred his stock in B&H to his wife. Although the grievance arose out of a 1995 civil action, the history of the case goes back to 1988.

In 1988, an involuntary bankruptcy petition was filed against B&H. Amada was a

substantial creditor of B&H. At that time, Wood owned sixty percent of its stock. Two other shareholders, Albert Bruschi and Benjamin Rivera, held thirty percent and ten percent of the stock, respectively. However, prior to the bankruptcy, Bruschi and Rivera had resigned from their positions with the company and had not been involved in its business affairs.

Respondent represented B&H in the bankruptcy action. In September 1991, respondent filed a second amended disclosure statement on behalf of B&H, signed by Wood and respondent. According to the statement, Wood continued to hold sixty percent, Bruschi thirty percent and Rivera ten percent of the shares of B&H. However, under the reorganization plan, respondent was to be the sole shareholder of the reorganized company. B&H emerged from bankruptcy in November 1991.

On September 23, 1994, Amada obtained a judgment against Wood for $545,499. That judgment was the result of a July 1994 arbitration award. During the supplementary proceedings, Wood represented to Amada that he had transferred his B&H stock to his wife. Thereafter, Amada filed a civil action against Wood and his wife to set aside the transfer of the B&H stock.[1]

During Wood's April 1995 deposition, at which he was represented by respondent, Wood testified that he had transferred his B&H stock to his wife in March 1991. He further testified that the transfer documents - an agreement and a stock certificate - had been signed in respondent's office on March 11, 1991. The March 11, 1991 agreement, drafted by

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[1] The suit also sought to set aside Wood's transfer of his interest in his house to his wife.

respondent, stated that Wood "hereby sells and delivers to [his wife] ... his 100 shares for the sum of $40,000." In his notarization of the signatures of Wood and his wife, respondent stated that both appeared before him and signed the agreement on March 11, 1991. The March 11, 1991 stock certificate stated that Mrs. Wood owned 100 shares of B&H.

In Wood's answers to Amada's interrogatories, supplied by respondent, and in Wood's testimony at the trial, at which he was represented by respondent, Wood reiterated his deposition testimony regarding the signing of the stock transfer agreement and stock certificate. At the trial, Wood also testified that, after the transfer documents were signed in respondent's office on March 11, 1991, they were given to respondent to keep because respondent, as B&H's "corporate attorney," kept the "corporate kit."

There was also a March 11, 1991 $40,000 note from Wood to his wife indicating that the B&H stock was to secure the note, payable on demand at no interest. However, Wood testified at the trial that his wife had rejected the loan transaction and required that he transfer the B&H stock to her instead. He stated that the March 11, 1991 transaction was the transfer of his stock to his wife, not a loan secured by the stock.

Produced during discovery in the civil suit were four checks, totaling $65,500, from Mrs. Wood to B&H. The checks were dated March 14, 1991, October 1, 1991, December 12, 1991 and January 7, 1992. The first three checks, totaling $55,500, had the following notation: "loan to B&H Metals." Despite these notations and the fact that the checks were made out to B&H, not Wood, Wood asserted at the civil trial that the checks represented Mrs.

Wood's payment to him for his B&H stock, rather than loans to B&H.

During Wood's trial testimony, Amada's attorney, Michael McLaughlin, introduced copies of two documents obtained during discovery. The first was a stock transfer agreement, dated April 11, 1995 ("model agreement"), between an individual and a corporation unrelated to Wood or B&H. The model agreement had also been drafted by respondent. Handwritten modifications on the model agreement made it obvious that the document had been used by respondent as a sample for the Wood stock transfer agreement. The second document was an October 17, 1994 letter from respondent to Wood enclosing the "Collateral Stock Note as discussed" and requesting that Wood sign the note and return it to respondent. Wood had handwritten on the letter "Complete. Check the amount of stock. She needs one hundred percent ownership." The two documents made it obvious that the stock transfer documents had not been signed in 1991, but prepared and signed sometime after April 11,1995.

After the two documents were introduced by McLaughlin, the court stated the following:

> Okay. Okay, I have certain obligations under the law, I hope you all understand it. I'm going to give you a chance to mull it over. The Court has an obligation to notify the prosecutor if the Court believes that there may have been a crime that's committed and has an obligation to notify attorney ethics bodies if the Court feels that there may be some suggestion that an attorney may be involved in the problem and what I'm telling Mr. Wood this for, he may wish to consult with an attorney before he goes any further.

Immediately thereafter there was an adjournment of the trial. When the proceedings

resumed, a settlement was placed on the record.

McLaughlin testified at the ethics hearing that, when he received the stock transfer documents in discovery and deposed Mr. and Mrs. Wood, he had no reason to doubt that the documents had been signed in March 1991, particularly because respondent had witnessed the Woods' signatures on the stock transfer agreement. According to McLaughlin, the timing of the stock transfer was important for two reasons. First, the Uniform Fraudulent Transfer Act provides for a four-year statute of limitations. Therefore, Amada's complaint, filed more than four years after March 1991, was subject to a motion to dismiss for failure to file suit within the statute of limitations. Second, Amada had obtained its judgment against Mr. Wood only, not Mrs. Wood, in September1994, after the transfer. If the transfer had occurred in March 1991, Amada could not have executed on the stock.

In November 1997, according to McLaughlin, he and one of Amada's experts went to B&H's office to review its corporate books, pursuant to a discovery demand. Neither Wood nor respondent was at B&H, only B&H's accountant. In reviewing the corporate books, McLaughlin discovered the 1995 model agreement and respondent's October 17, 1994 letter to Wood. At the ethics hearing, McLaughlin testified that, when he discovered the two documents, he was "very shocked because the date of the transfer was so critical to my fraudulent conveyance case; and these two documents were totally contradictory to what had been testified to in deposition, what had been answered in interrogatories, and I was surprised." Of particular interest to McLaughlin were respondent's October 17, 1994 letter

to Wood and the handwritten notation that "she needs one hundred percent ownership." The letter was written just a few weeks after Amada obtained its judgment against Wood. McLaughlin made copies of the two documents on a nearby copier and returned the originals to the corporate books. McLaughlin testified that, when the corporate books were produced for the trial, the two documents were missing.

Prior to the trial, Amada had demanded $250,000 to settle the case and Wood had offered $100,000. According to McLaughlin, there was a recess in the trial after he introduced the model agreement, at which time Wood's offer was increased to $175,000. When the court stopped the trial after the introduction of the October 17, 1994 letter, Wood immediately agreed to pay Amada's $250,000 settlement demand. The only issues remaining when the parties went into the judge's chambers were the payment schedule and the security for the payment.

At the ethics hearing, Wood testified that the agreement to transfer the stock to his wife occurred in March 1991; he thought that respondent had prepared the necessary paperwork at that time, but it was not until several months after B&H emerged from bankruptcy (November 1991) that he questioned respondent about the stock transfer and learned that respondent had not prepared any of the documentation. Wood did not remember when he had actually signed the stock transfer documents.

Respondent testified that it was around October 1994 that Wood had asked him if he had taken care of the stock transfer to Mrs. Wood. According to respondent, he did not recall

having been requested, in March 1991, to make the transfer. Respondent testified that, when he told Wood that he did not remember having been asked about a stock transfer, Wood showed him copies of Wood's 1991 personal tax return and B&H's 1991 corporate tax return to demonstrate that the transfer had been made in 1991. The copy of Wood's personal tax return does not contain his signature, only that of his accountant. However, at the ethics hearing, Wood testified that both were true copies of the 1991 tax returns.

According to respondent, after doing some research, he had come to the following conclusion:

> . . . even though [Mrs. Wood] did not have the physical possession of the stock certificate and her name was not on the corporate books as being the shareholder, I thought that she had an equitable interest in the corporation. And that based upon the fact that the filing of the tax return was an admission by the corporation that she was - - a declaration by the corporation that she was a shareholder, the document - - the income tax return prepared for Mr. Wood was a declaration by him that he transferred this stock to her coupled with the fact that there were checks indicating payments made, and the fact that both Mr. Wood and Mrs. Wood had told me that these transactions took place, and also with the fact that Mr. Zimmerman had told me that this is what he was told - - he was told by Mr. Wood and he reflected it on the tax return, I came to the conclusion that if Mrs. Wood were to start a lawsuit to claim ownership of that stock based upon all that evidence, I felt that there would be a very, very strong chance that she would prevail in such a lawsuit.

Respondent testified that, although the stock transfer agreement and stock certificate were prepared and signed in 1995, he dated them March 11, 1991 because he believed he was "memorializing a transaction that had taken place on March 11th, 1991." Respondent added that, when he prepared the agreement and certificate, he considered that the disclosure statement filed with the bankruptcy court in 1991 did not reflect Mrs. Wood's ownership; he

also considered whether he should reopen the bankruptcy proceeding, but decided against such action:

> I elected not to do so, and the reason I elected not to do so was the fact that the creditors were concerned, particularly the largest creditor, the First Fidelity Bank, was concerned that Mr. Wood was the one who was running the corporation; and Mr. Wood was still running the corporation notwithstanding the fact that Mrs. Wood was the beneficial owner of the stock. As a matter of fact, one of the provisions that First Fidelity had in their agreement was to make sure that there was life insurance on the life of Mr. Wood so in case something happened to him that there would be money to protect the interest of the First Fidelity Bank. So I concluded that it would not be propitious at that time to open up the bankruptcy. So I left things as they were because as far as - - because I felt again that the creditors are not being hurt inasmuch as Mr. Wood was before the chief operating officer of the company and continued to be and still is the chief operating officer of the company.

With respect to the demand note, respondent testified that he probably prepared it in 1991 and that, when Wood confronted him in 1994 about the stock transfer, he found the note, unsigned, in his files. According to respondent, he sent the note to Wood and Wood returned it to him, signed, but told him that the 1991 transaction was the sale of his stock, not a loan.

Respondent denied having told his client to lie in the Amada case about the date of the signing of the transfer documents and denied having removed documents from the B&H corporate stock book to hide them from Amada and/or its counsel. There was no testimony elicited from Wood on those issues.

Respondent admitted that, when he prepared the transfer documents, he knew about the Amada judgment against Wood because he had represented Wood in that litigation.

Respondent also admitted that he was present, as Wood's attorney, when Wood falsely testified at his deposition that the transfer agreement and certificate had been signed in 1991. According to respondent, he had not discussed with his client beforehand the issue of the date of the signing of the documents. Respondent further testified that he did not bring to the attention of the trial court the question of the signing of the documents versus the date of the agreement, because the "case was strictly based on a valuation case" as to whether Mrs. Wood had paid adequate consideration for the stock. However, respondent conceded that the experts had based their valuation on a 1991 transfer and that the valuation would have been different if the transfer had occurred in 1995.

* * *

The DEC found McLaughlin to be a credible witness, noting that his demeanor was "professional" and "controlled" and that he was "extremely conversant about the facts." On the other hand, the DEC found Wood to be "combative, stubborn, and at times testy." The DEC noted that Wood was consistent in his contention that the stock transfer occurred in 1991. With respect to respondent, the DEC found his testimony "clear insofar as there's no doubt [sic] the panel so finds that he knowingly engaged in the backdating of an agreement and uttered same knowing that it could have had an adverse impact on [Amada] in recovery."

The only acts of misconduct found by the DEC were respondent's backdating of the

stock transfer agreement and stock certificate and the false notarization of the Woods' signatures on the agreement. The DEC found those improprieties to be a violation of RPC 4.1. The DEC recommended that respondent be reprimanded.

* * *

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

Respondent admitted that he backdated the stock transfer agreement and stock certificate and that his notarization of the Woods' signatures on the agreement showed a false date. He maintained that he was only attempting to memorialize, in 1995, a transaction that had actually occurred in 1991.

The timing of respondent's drafting of the transfer documents and the other documentary evidence indicate that there was no stock transfer in 1991. First, the documents were not drafted until 1995, after Amada had obtained a $545,499 judgment against Wood. It is undisputed that Amada had difficulty locating assets belonging to Wood to satisfy the judgment and had undertaken supplementary proceedings to locate Wood's assets. Second, both Wood and respondent had signed a bankruptcy court disclosure form in November 1991, six months after the alleged transfer, in which Wood, not Mrs. Wood, was shown to be the shareholder of B&H. Third, Mrs. Wood made the checks payable to B&H, not Wood.

Finally, on three of the four checks Mrs. Wood had written "loan to B&H."[2]

However, even assuming that respondent had a good-faith belief, in 1995, that there had been a stock transfer in 1991, that belief does not justify his later conduct. He knew that the stock transfer documents given to Amada in discovery were, if not fraudulent, at least misleading. Also, he submitted his client's answers to interrogatories, which contained false information (for example, the answers stated that the stock certificate was "executed" in March 1991). Finally, respondent was Wood's attorney during his deposition and at trial, when Wood gave false testimony about the stock transfer documents. Yet, respondent did nothing to correct the false statements.

Respondent's testimony at the ethics hearing that he did not consider it necessary to advise his adversary and the court about the fraudulent documents because the Amada case only involved the valuation of the stock strains credulity. As set forth above, McLaughlin testified at length about the importance of the timing of the stock transfer. Furthermore,

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[2] The two documents relied upon by respondent, namely, the copies of the 1991 tax returns for Wood and B&H, are suspect. Schedule B to Wood's 1991 personal tax return indicates that he sold one hundred percent of his ownership in B&H for $65,000 and that he incurred a short-term capital loss. Although the writing is unclear, it appears that the loss was $531. That loss was not shown on page one, line thirteen of the tax return, where it should have been reported and Wood did not take the loss as an adjustment to his income. Furthermore, according to Wood's answers to interrogatories in the Amada case, he acquired his B&H stock in 1979. Therefore, if he had sold the stock in 1991, he would have reported a long-term, not a short-term, capital loss. With respect to B&H's 1991 corporate tax return, Schedule E of the return shows that Wood owned none and Mrs. Wood owned all of the B&H stock. However, it appears that the type on the line containing Mrs. Wood's interest is different from the type on the remainder of the form, including the line for Mr. Wood that is directly above it. However, those issues were not addressed during the ethics hearing. Hence, there is no evidence that the tax returns were fraudulent or, if they were, that respondent had knowledge of that fact.

respondent admitted that, even if the only issue in the case was the value of the stock, its value in 1995 would have been different from its value in March 1991, when the company was in bankruptcy.

Although respondent admitted that he should not have backdated the agreement, he contended that the only thing he did wrong was failing to date the agreement "[as] of March 11, 1991." Furthermore, respondent continued to defend his failure to tell his adversary and the court about the documents. It is obvious that respondent still does not appreciate the gravity of his misconduct.

In a recent case, the Court suspended an attorney for six months because the attorney had not told his adversary and an arbitrator that one of his two clients in a personal injury action had died of unrelated causes, after the filing of the complaint. In re Forrest, 158 N.J. 428 (1999). When the arbitrator asked the attorney why his client had not appeared for the arbitration, the attorney replied that his client was "unavailable." Furthermore, the attorney did not reply to his adversary's requests that the attorney produce his client for a medical examination, which eventually led to a motion to compel the client's appearance. When the attorney did not reply to the motion, an order was entered requiring the client's appearance. It was only after the client failed to appear for the court-ordered medical examination, more than nine months after the client's death, that the attorney informed his adversary of the death. In the interim, the attorney had engaged in settlement negotiations with his adversary. The Court rejected the attorney's argument that he had made no misrepresentations during

the case, but had merely withheld certain information as a negotiation technique that he described as "bluffing" and "puffing." In imposing a six-month suspension, the Court found that the attorney's "deception of his adversary and the arbitrator [was] inexcusable." Id. at 438.

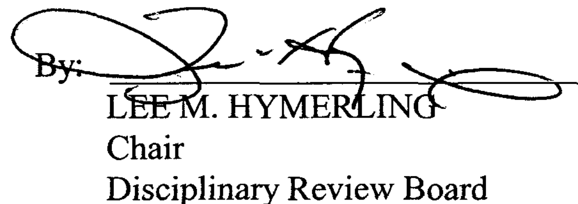
Likewise, respondent's deception of his adversary and the court in this matter was inexcusable. Indeed, respondent's misconduct was more grievous than that of the attorney in Forrest. He not only failed to reveal a material fact during the litigation, but he served false answers to interrogatories and either himself produced or permitted to be produced misleading documents to his adversary, thereafter relying on those documents in the litigation. Respondent also sat silent while his client falsely testified at a deposition and at trial. Finally, respondent backdated the stock transfer documents and put an incorrect date in his notarization of the transfer agreement, knowing that the timing of the transfer could have a material adverse effect on Amada. Although respondent had ample opportunity during the litigation and trial to correct these serious misrepresentations, he failed to do so. If McLaughlin had not accidentally discovered the model agreement and letter in B&H's file, the trial court would have rendered a decision based upon the false testimony and misleading documents.

We find, thus, that respondent violated RPC 3.3(a)(4) and (5), RPC 3.4, RPC 4.1(a)(1) and (2), RPC 8.4(c) and RPC 8.4(d). The only factor in respondent's favor is that he has practiced law for thirty years without any disciplinary history.

Because of respondent's serious unethical conduct, we unanimously determined to suspend him for one year. See, e.g., In re Nash, 127 N.J. 383 (1992) (one-year suspension, on a motion for reciprocal discipline, where the attorney backdated and notarized a separation agreement in a divorce action that contained several statements that the attorney knew were false and filed a divorce action in New York, knowing that both parties were residents of New Jersey) and In re Bartlett, 114 N.J. 623 (1989) (one-year suspension where the attorney attempted to obtain a mortgage under false pretenses by signing mortgage documents on behalf of his client and having his secretary notarize the signatures, even though he knew some of the statements were false; attorney also engaged in a conflict of interest). One member did not participate

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 2/22/00



By: LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Ira B. Marshall
Docket No. DRB 99-328

Argued: November 18, 1999

Decided: February 22, 2000

Disposition: One-Year Suspension

Members	Disbar	One-Year Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Cole		x					
Boylan		x					
Brody		x					
Lolla		x					
Maudsley		x					
Peterson							x
Schwartz		x					
Wissinger		x					
Total:		8					1

Robyn M. Hill 3/8/00
Robyn M. Hill
Chief Counsel