SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-136
District Docket No. XIV-2008-0517E

IN THE MATTER OF

JOHN WILLIAM BJORKLUND, JR.

AN ATTORNEY AT LAW

Decision

Decided: August 12, 2009

This matter was before us on a certification of default filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-4(f)(2). The complaint alleged that respondent engaged in a conflict of interest by simultaneously representing two criminal defendants, a violation of RPC 1.7(a), presumably (1) and (2) (a lawyer shall not represent a client if the representation involves a concurrent conflict of interest; a concurring conflict of interest exists if the representation of one client will be directly adverse to another client (RPC 1.17(a)(1) or if there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client (RPC 1.7(a)(2)).

The OAE recommended an admonition. Although, in default matters, the appropriate level of discipline is enhanced to reflect a respondent's failure to cooperate with disciplinary authorities, (In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6)), we agree with the OAE that an admonition is sufficient discipline in this case.

Respondent was admitted to the New Jersey bar in 1986. He has no ethics history and no pending matters. He currently resides in Costa Rica. The New Jersey Lawyers' Fund for Client Protection report ("CPF") lists him as "retired."

Service of process was proper. On March 2, 2009, the OAE sent a copy of the complaint to respondent's P.O. Box in Costa Rica, where he currently resides.[1] On March 31, 2009, respondent advised the OAE that mail is delivered to his residence only once a month. He requested that the OAE forward him an acknowledgement of service via email, which the OAE did. Respondent then signed and emailed the acknowledgement of service back to the OAE, along with a note indicating that he has no intention to retain counsel or to dispute the basis of the Appellate Division decision that gave rise to this disciplinary matter.

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[1] The CPF form lists the P.O. Box as respondent's home address.

Along with the acknowledgement of service, respondent e-mailed a note to the OAE attorney assigned to this case. The note stated:

> Enclosed please find Acknowledgement of Service dated March 30th 2009. I do not intend on retaining counsel nor do I dispute the basis of the court's decision. The conflict is the result of an oversight on my part and unintentional. If I can be of additional assistance, please advise. Thanking you for your understanding and attention.
>
> [CEx.2.] [2]

Respondent did not file a verified answer to the complaint.

The conduct that gave rise to this matter is as follows. In January 1996, the Public Defender's Office hired respondent to represent a criminal defendant, Anthony Alexander, in connection with an indictment charging him with two counts of aggravated assault, unlawful possession of a weapon, tampering with evidence, hindering apprehension, and possession of a weapon by a convicted felon. Another attorney was representing Alexander in connection with three other indictments.

On June 7, 1996, Alexander entered into a plea agreement for the disposition of all the charges in the four indictments. The recommended aggregate sentence was for a twenty-four-year term of imprisonment, with a twelve-year period of parole

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[2] C denotes the formal ethics complaint.

ineligibility.

According to the Appellate Division opinion that led to the disciplinary grievance against respondent, State v. Alexander, 403 N.J. Super. 250, 253-54 (App. Div. 2008),[3] on June 13, 1996, the Public Defender's Office hired respondent to represent Charles Cottman, who had allegedly been involved in a robbery. On that same date, respondent received the Cottman discovery from the Public Defender's Office. He was still representing both Alexander and Cottman when Alexander was sentenced, on July 26, 1996. According to the Appellate Division opinion, the parties had stipulated that, "if called, [respondent] would testify that . . . he had no recollection of when he received the discovery in Cottman's matter; and that if he had known there was a conflict, he would have ceased representing [Alexander]." Id. at 254.

The formal ethics complaint recites that, allegedly, Alexander and Cottman had been involved in a robbery; after the robbery, they had gone to the victim's house and threatened the victim with a gun. Although Alexander was not charged in connection with this incident, he was a potential witness in the

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[3] This case, in slip opinion form, is attached to the formal ethics complaint as exhibit A.

case against Cottman. In fact, there was a potential that each defendant could be a witness against the other. State v. Alexander, supra, 403 N.J. Super. at 256.

On July 16, 1996, Alexander was sentenced in accordance with the plea agreement. Respondent represented Alexander at sentencing. As noted above, during this period, respondent was still representing Cottman.

In 2001, Alexander filed a petition for post-conviction relief ("PCR"), which was denied in 2004. The Appellate Division found that Alexander had made a prima facie showing that respondent had a conflict of interest in simultaneously representing Alexander and Cottman and that the conflict had created a potential for prejudice. The case was remanded for an evidentiary hearing.

On remand, the PCR judge denied Alexander's petition, finding that the State had not sought Alexander's cooperation in the Cottman prosecution and that, therefore, Alexander had not been prejudiced by the conflict of interest.

Alexander appealed. On September 24, 2008, the Appellate Division held that respondent had been involved in a per se conflict of interest because of his simultaneous representation of Alexander and Cottman. The Appellate Division found that

> [a]fter [Alexander] entered a plea of guilty but before he was sentenced, [respondent], a pool

> attorney, was assigned by the public defender's office to represent Cottman. Whether or not [respondent] was aware of it, [respondent] was in possession of discovery in both cases that revealed that the State believed [Alexander] and Cottman had approached and allegedly threatened a victim of a robbery they had allegedly committed. There was thus a potential that each client could be a witness against the other. [Alexander] had already pled guilty and was facing a potentially lengthy prison sentence; arguably, he could have provided useful information to the State regarding the conduct of Cottman [footnote omitted].
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> [State v. Alexander, supra, 403 N.J. Super. at 256.]

The Appellate Division noted the "accepted principle that a criminal defendant has the right to counsel 'whose representation is unimpaired and whose loyalty is undivided,'" citing State v. Murray, 162 N.J. 240, 249 (2000). State v. Alexander, supra, 403 N.J. Super. at 255.

The Appellate Division reversed the trial court's denial of PCR, holding that Alexander was entitled to be re-sentenced, following a determination of what might have occurred, had Alexander sought to cooperate with law enforcement in the Cottman prosecution.

On November 6, 2008, the OAE notified respondent of the docketing of an ethics grievance against him as a result of the Appellate Division ruling. The OAE informed respondent that, if he disagreed with the Appellate Division's conclusion, he should

provide the OAE with his position, in writing. He did not do so.

The complaint charged that respondent's simultaneous representation of two criminal defendants whose interests were directly adverse, if Alexander sought to cooperate with law enforcement in the Cottman prosecution, constituted a conflict of interest, a violation of RPC 1.7(a), presumably (1) and (2).

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1). In fact, respondent indicated to the OAE that he did not intend to dispute the basis of the Appellate Division findings that led to the disciplinary grievance against him.

As found by the Appellate Division, respondent engaged in a per se conflict of interest situation, when he simultaneously represented two criminal defendants with competing interests. Alexander and Cottman, who allegedly had been involved in criminal activity together, could have been a witness against each other. As noted in State v. Alexander, supra, 403 N.J. Super. at 255, the Court has held that the dual representation of co-defendants is a per se conflict of interest:

> In its recent decision in State v. Cottle, 194 N.J. 449, 465-70 (2008), the Court summarized our

> jurisprudence when criminal defense attorneys engage, whether intentionally or not, in the dual representation of individuals with competing interests. When a per se conflict has been found, "prejudice is presumed in the absence of a valid waiver [footnote omitted] and the reversal of a conviction is mandated [citations omitted]. The Court went on to describe the existing parameters of this rule:
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> > Thus far, we have limited the per se conflict on constitutional grounds to cases in which "a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representation of codefendants." In all other cases, "the potential or actual conflict of interest must be evaluated . . . ."
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> > [Cottle, supra, 194 N.J. at 467-68 (citations and footnote omitted).]

The Appellate Division noted that, although Alexander and Cottman were not strictly co-defendants, the Court had applied the per se conflict rule to "circumstances where defense counsel was the target of a criminal investigation in the same county in which he represented defendant. Cottle, supra, 194 N.J. at 468-69. Cottle and his attorney were not 'codefendants.'" State v. Alexander, supra, 403 N.J. Super. at 256 n. 3.

That respondent created for himself an impermissible conflict of interest situation is, thus, unquestionable. But his conduct is not without considerable mitigation. First, there is some evidence in the record that he may not have been aware that the Cottman discovery materials contained allegations that

Alexander and Cottman "had approached and allegedly threatened a victim of a robbery that they had allegedly committed." Id. at 256. In mentioning that respondent was in possession of such discovery, the Appellate Division used the following prefatory language: "Whether or not he was aware of it, [respondent] was in possession of discovery . . . [emphasis added]. Ibid. Indeed, the Appellate Division discerned from the trial judge's comments that the judge believed that respondent was "unaware of the contents of the Cottman discovery, which would have revealed [Alexander's] ability to incriminate Cottman." Id. at 258. Furthermore, respondent and the *prosecutor* stipulated that, if called, respondent would testify that he had no recollection of when he had received the Cottman discovery and that, if he had known of the conflict, he would have ceased representing Alexander. Id. at 254.

Second, until now, respondent enjoyed an unblemished ethics record for some twenty-three years; therefore, his conduct was either aberrational or episodic. Third, the passage of thirteen years since this incident is a significant mitigating factor. In re Kotok, 108 N.J. 314, 330 (1987). Fourth, respondent is retired from the practice of law. It was with those circumstances in mind that we assessed the appropriate quantum of discipline for respondent's ethics infraction.

Cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients, ordinarily result in a reprimand. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994). See, e.g., In re Mott, 186 N.J. 367 (2006) (attorney prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest in the company to the buyers, the attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a written waiver of the conflict of interest from them); In re Poling, 184 N.J. 297 (2005) (attorney engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned – a fact that he did not disclose to the buyers, as well as that title insurance could be purchased elsewhere); In re Nadel, 147 N.J. 559 (1997) (attorney represented a driver in a suit against the driver of another vehicle and then represented the passenger in a suit against both drivers); and In re Starkman, 147 N.J. 559 (1997) (attorney represented both the driver and two passengers involved in an automobile accident, withdrew from representing the driver, and

then sued the driver, his former client, on behalf of the two passengers).

In special situations, admonitions have been imposed for violations of the conflict of interest rules post-Berkowitz and Guidone. See, e.g., In the Matter of Cory J. Gilman, 184 N.J. 298 (2005) (attorney disciplined for an imputed conflict of interest (RPC 1.10(b)), among other violations, based upon his preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; in imposing only an admonition, we noted that this was the attorney's first brush with the ethics system, that he cooperated fully with the OAE's investigation and that he was a new attorney at the time (three years at the bar) and only an associate); In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (among other things, attorney engaged in a conflict of interest (RPC 1.7(b)) when she collected a real estate commission upon her sale of a client's house; in mitigation, we considered the attorney's unblemished fifteen-year career, her unawareness that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the client, and the passage of six years since the ethics infraction); In the Matter of Andrys S. Gomez, DRB 03-203

(September 23, 2003) (in addition to other improprieties, attorney engaged in a conflict of interest when he represented both driver and passengers in a motor vehicle accident; we noted "as mitigating circumstances the significant measures" taken by the attorney "to improve the quality of [his] practice"); and In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (attorney violated RPC 1.7(b) when he represented the plaintiffs in a contract matter, did not discuss defendant's settlement offer with clients and conditioned resolution of the matter on the defendant's parents' withdrawal of a grievance that had been filed against the attorney, thus preventing settlement from being reached; in mitigation, we considered the client's affidavit stating that she would not have settled the case if the grievance were not dismissed and that the attorney had discussed the case with her on several occasions). Here, an admonition, instead of a reprimand, would be justified because of the compelling mitigating circumstances mentioned at pp.8-9. It is true that, as noted above, in default matters, the appropriate discipline for the found ethics violations is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6). Nevertheless, that respondent did not file an answer in this

respondent did not file an answer in this instance does not appear to be an attempt to thumb his nose at the ethics system. Typically, respondents who are found guilty of failure to cooperate with disciplinary authorities ignore the ethics officials' attempts to investigate the grievances against them from the outset; they do not comply with the ethics investigators' requests for information about the grievance, do not reply to the investigators' letters, and do not produce requested documents or files, thereby frustrating the investigators' efforts to reach a complete and fair evaluation of the allegations of impropriety levied against them. Then, when a formal complaint is filed, they make themselves inaccessible for service and, when served, choose not to answer the charges. Those are the respondents who deserve increased discipline for their blatant indifference to their obligation to cooperate with ethics authorities.

Here, the grievance against respondent was prompted by findings made by the Appellate Division in a criminal case, rather than by a client's dissatisfaction with services rendered. When the OAE docketed the case against respondent, the OAE attorney assigned to the case wrote to respondent asking him to submit his position, in writing, if he disagreed with the conclusion reached by the Appellate Division. Although it is not known with certainty whether respondent submitted an objection to

the Appellate Division's findings, it is safe to assume that he did not because, later, when served with the complaint, he communicated to the OAE his intention not to contest the charges. It cannot be said, thus, that respondent did not cooperate with the OAE "investigation;" to the contrary, his communication to the OAE may be viewed as cooperation with that office, that is, an acknowledgement that his conduct was improper.

Moreover, respondent demonstrated a desire to facilitate the OAE's service of the complaint on him. He informed the OAE attorney that mail reached him in Costa Rica only once a month; he suggested that the OAE attorney scan the acknowledgement of service and e-mail it to him. That was done. On the same day that respondent received the acknowledgement of service, he signed it and returned it to the OAE via e-mail. He attached a note announcing his intention not to dispute the basis of the Appellate Division decision. He explained that the conflict was the result of an oversight on his part, an unintentional act; he asked the OAE attorney to advise him if he could be of additional assistance; and he thanked her for her understanding and attention.

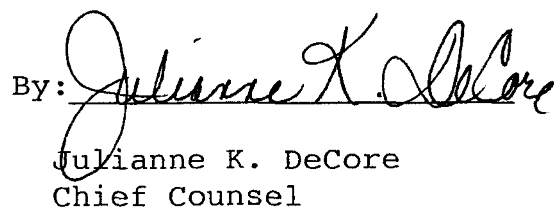
The foregoing does not equate to the typical indifference to the ethics system that is almost always found in default cases. Instead, it reflects respondent's willingness to accept his wrongdoing. That he did not file an answer might have been the

product of a mistaken understanding that he did not have to do so, inasmuch as he was acknowledging the impropriety of his dual representation of criminal defendants with potentially competing interests.

All in all, respondent's conduct in this disciplinary matter does not compare to that of attorneys who defiantly ignore disciplinary authorities' attempts to reach a just resolution of ethics grievances. It certainly does not demonstrate that he "knowingly failed to respond to a lawful demand for information from a[] . . . disciplinary authority [emphasis added]," RPC 8.1(b), as required for a finding of a violation of that rule. Last but not least, even the OAE urged us to impose only an admonition. For all the above reasons, we determine that an admonition is the proper level of discipline in this instance.

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
Chief Counsel

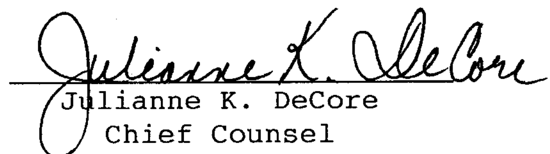
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John William Bjorklund
Docket No. DRB 09-136

Decided: August 12, 2009

Disposition: Admonition

Members	Disbar	Suspension	Admonition	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			



Julianne K. DeCore
Chief Counsel