SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-039
District Docket No. VA-05-17E

IN THE MATTER OF

THOMAS P. MONAHAN

AN ATTORNEY AT LAW

Decision

Argued: June 18, 2009

Decided: September 15, 2009

George P. Barbatsuly appeared on behalf of the District VA Ethics Committee.

Edward W. Cillick appeared on behalf of respondent.

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

This matter came before us on a recommendation for a reprimand filed by the District VA Ethics Committee ("DEC"), based on respondent's misrepresentations in two certifications submitted to a federal district court and his practicing law

while ineligible to do so. For the reasons stated below, we determine to impose a three-month suspension for respondent's misconduct.

Respondent was admitted to the New Jersey bar in 1985. At the relevant times, he was a "contract partner" with the Roseland law firm of Carella, Byrne, Bain, Gilfillan, Cecchi, Steward & Olstein ("the Carella firm").

Respondent has no disciplinary history. However, from September 27, 2004 to January 31, 2005, and from September 26, 2005 to March 20, 2006, he was on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF").

The formal ethics complaint charged respondent with having violated RPC 3.3(a)(1) (knowingly making a false statement of material fact or law to a tribunal), RPC 3.3(a)(5) (knowingly failing to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal), and RPC 5.5(a)(1) (practicing while ineligible). The RPC 3.3 violations were based on the contents of two certifications that respondent submitted to a federal district court, in support of a motion to extend the time within which to file an appeal. In short, respondent misrepresented that, when the appeal was due

to be filed, he was seriously ill and confined to his home on bed rest and, therefore, either unable to work or unable to prepare and file the appeal. The RPC 5.5 violation stems from respondent's practicing law between September 27, 2004 and January 31, 2005, and September 26, 2005 to March 20, 2006, when he was on the Supreme Court's ineligible list.

The parties entered into a pre-hearing stipulation of facts that asserted the following. Between October 4, 2004 and March 21, 2005, respondent was employed by the Carella firm as a contract partner. Prior to and during his employment with the Carella firm, he represented National Utility Services, Inc. ("NUS") in various matters, including an action captioned National Utility Service, Inc. v. Cambridge Lee Industries, Inc., Civil Action No. 02-3294, which was filed in the United States District Court for the District of New Jersey ("the NUS matter").

On June 4, 2004, after a four-day bench trial in the NUS matter, the Honorable Faith S. Hochberg, U.S.D.J., rendered a decision, finding, in part, for NUS. On September 9, 2004, the court entered an order awarding NUS $182,514.18 in damages. The court denied NUS recovery for certain other damages.

On September 20, 2004, NUS moved for reconsideration of the September 9, 2004 order, which was denied on December 9, 2004. Under Rule 4(a) of the Federal Rules of Appellate Procedure, NUS was required to file a notice of cross-appeal no later than January 10, 2005.[1]

Respondent did not file a notice of appeal by the January 10, 2005 deadline. Instead, on January 20, 2005, he filed a motion to extend the time to file an appeal on his client's behalf. In support of the motion, respondent filed a certification, which stated:

> Commencing immediately after Christmas of 2004 I was experiencing the symptoms of a serious chest cold. Immediately before New Years [sic], due to the severe breathing problems caused by what I thought was a simple chest cold, I sought the treatment of a doctor, to treat the cold. I was being treated by Dr. Deborah Petrowsky, M.D., of Chatham, New Jersey. After some brief antibiotics and a very high sustained fever, on January 3, 2005, Dr. Petrowsky, after testing, diagnosed me with severe pneumonia. Due to my debilitated and potentially contagious condition, I was required to stay home with bed rest for a period of a week

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[1] For ease of reference, this decision will refer to the cross-appeal as an appeal.

> and one-half. I returned to work on January 14, 2005.
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> [S¶7.] [2]

Respondent further certified that, prior to January 2, 2005, he had prepared for filing a notice of appeal in the NUS matter. He continued:

> However, as I was not present in the office and under rather heavy medication, although it was my understanding that it had been forwarded, it had not been forwarded. I was not aware of this until late in the afternoon of January 14, 2004 [sic] at which time the time for appeal had passed . . . .
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> [S¶7.]

Respondent's certification concluded with the standard language required by R. 1:4-4(b), in which the certifier acknowledges that he or she is subject to punishment if the statements made in the certification are willfully false.

Contrary to respondent's certification, he actually performed substantial work on, and billed substantial time to, various client matters (including the NUS case) between January 4 and January 13, 2005. According to these time

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[2] "S" refers to the February 2008 pre-hearing stipulation.

records, respondent performed a total of 87.35 hours of billable and non-billable work between January 3 and 14, 2005.[3] The billing records reflected eight-to-nine hours a day of billable time, although respondent testified that this was less than the usual eleven-to-twelve hours that he billed. The records showed that, during the period of his illness, respondent made four court appearances, attended four client meetings out of the office, and participated in two meetings at the Carella firm's office. In fact, on the date that the notice of appeal was due to be filed, January 10, 2005, respondent billed almost one hour to the NUS matter for finalizing the notice of appeal and forwarding it to the court.

As stated previously, respondent filed the motion to extend the time within which to file the notice of appeal on January 20, 2005. On January 31, 2005, Cambridge-Lee Industries, Inc. ("Cambridge-Lee"), the defendant in the NUS matter, filed opposition to NUS's motion. Cambridge-Lee did not dispute respondent's representation that he had been ill and

[3] The time records are subject to a protective order issued by the DEC on March 31, 2008, presumably to protect information pertaining to other clients, contained in those records.

unable to work. Instead, Cambridge-Lee argued that NUS had not demonstrated excusable neglect or good cause, warranting leave to file the untimely appeal.

On February 7, 2005, respondent filed a reply certification and brief in further support of the motion for leave to submit a late-filed appeal. In the reply certification, respondent stated:

> This health condition during the January 4-13, 2005 time period "was exacerbated by the cough I had at the time of my pneumonia"; "this required me to take pain killers as I was in extreme pain"; "[t]his and the contagious nature of the pneumonia required that I remain home"; "this was not an issue that was under my control"; "I was required to leave the office abruptly for my emergent appointment with the doctor" on January 3, 2005; "through no fault of my own I became ill"; "[t]his was unexpected and became quite serious very abruptly"; "I quite simply did not know that I would be so affected during the period of time I had set aside to address this matter"; and "I request the Court to understand that my condition was very severe."
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> [S¶15.]

The certification made no reference to the eighty-seven billable hours that respondent had recorded between January 4 and 13, 2005. The certification also made no reference to his various court appearances and client meetings during this time.

In particular, the certification did not mention that respondent had billed time for finalizing the notice of appeal on the date that it was due to be filed.

As with his initial certification, respondent signed the reply certification under a statement made pursuant to R. 1:4-4(b).

In the accompanying brief, respondent again stated that "his health condition 'required that he remain home';" "his 'health condition was a very real one which had a very serious affect [sic] upon his life';" "through no fault of his own he became ill;" "and that his illness 'was unexpected and became quite serious very abruptly.'"

On February 15, 2005, NUS's motion for leave to file a late appeal was denied. In denying the motion, the court did not dispute respondent's claim that he was ill. Rather, the court reasoned that this did not establish either good cause or excusable neglect, which would justify the extension of the deadline.

At some point, two Carella firm partners confronted respondent about the information in his certifications, which they believed was inaccurate with regard to his absence from the office.

Respondent also stipulated that he practiced law during the following periods of ineligibility: September 27, 2004 to January 31, 2005, and September 26, 2005 to March 20, 2006.

The parties stipulated to the following facts in mitigation of respondent's misconduct. First, for twenty-three years he had an unblemished disciplinary history; he did suffer from pneumonia between January 4 and 13, 2005, although during "certain portions of this time period" he also worked from home; when he drafted the certifications at issue, he had been "prescribed medication for anxiety and stress," and he was taking pain killers "and a strong antibiotic;" he cooperated with the investigator at all times during the DEC investigation, timely replying to requests for information and providing all the information requested by the investigator; he was contrite and remorseful; he "now concedes that his use of the expressions 'remained home' and 'out of the office' could have been interpreted [to mean] 'remained home at all times' and 'out of the office at all times;'" in filing the motion and false certifications, he did not act for personal pecuniary gain, but for the benefit of his client, NUS; the court did not deny the motion based on the misrepresentations in the certifications; as a result, the motion and the certifications "did not cause

any party any harm, other than the cost that the adverse party in the [NUS] matter had to incur in responding to the Respondent's motion, and the time and cost expended by the United States District Court in responding to the motion; and, last, his conduct in the NUS matter was an isolated incident and "do[es] not appear to be part of a pattern of dishonest conduct on the part of the respondent."

As to respondent's periods of ineligibility, the parties stipulated that they were due to "inadvertent failures on his part to timely submit his attorney registration statements and dues because he twice changed law firms around these time periods." He "has represented that once aware of these inadvertent failures, [he] took immediate action to rectify these failures, in fact traveling to Trenton, New Jersey to pay the appropriate fees the same day." He "has since rectified these failures and is current in his attorney registration."

In conclusion, the parties stipulated that a suspension from the practice of law "would impose a hardship upon the respondent and his family."

The DEC hearing panel heard testimony from respondent and his wife Cynthia, on March 31, 2008. Respondent testified that the failure to pay the CPF fee on both occasions occurred during

the course of his practice relocation. Each time, he believed that the fee had been paid. Upon learning of the ineligibility, he immediately paid the fee.

Respondent also testified that when he became ill around Christmas 2004, his sister-in-law, Dr. Petrowsky, prescribed an antibiotic and pain killers. The pain killers were necessary because the coughing from the pneumonia irritated a herniated disc in his neck. As a result of the painkillers, he "honestly [didn't] believe [he] was practicing the way [he] normally would practice."

Respondent claimed that his practice was to go to the office every day, which he did even after he had herniated a disc in his neck. When he became ill with pneumonia, he was tired and lethargic and stayed at home "as much as possible." Respondent also believed that the medication was affecting him "in terms of [his] being cognizant at all times of how [he] was."

With respect to the NUS motion to extend the deadline for filing the appeal, respondent testified that he had prepared the notice of appeal prior to its due date and mistakenly believed that the notice had been filed. When he learned that the appeal had not been filed, he attributed it to his health problems,

which had kept him out of the office. Thus, the application to extend the time for filing the notice of appeal stated that it was his fault that the notice had not been timely filed and that his fault was due to his health condition.

According to respondent, in drafting the certification, his intention was to inform the court that he had been ill, not that he had been "out of the office every minute of every day." He described the certifications as "sloppy." He explained:

> I believe that the time period I was concerned about, I was moving quicker, much quicker than I normally would or would now at the present time or have since that time. I moved too quickly. It was sloppy. It was my fault, I made a mistake. I should have taken more care.
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> [T33-16 to 22.][4]

Respondent claimed that, when he submitted the reply certification to the court, he did not understand that he had misrepresented anything in his initial certification. Accordingly, he did not fail to advise the court of the

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[4] "T" refers to the transcript of the DEC hearing on March 31, 2008.

misrepresentations contained in that first certification. His intention was "to let the Court know that I had been ill."

Respondent added that, at the time of his illness, he was carrying a heavy caseload at the Carella firm. He was working late into the night, which was causing problems in his marriage. He was suffering from depression and he and his wife were in marriage counseling.

According to respondent, although the deadline for filing the appeal had been calendared, Cambridge-Lee had filed an appeal before the court's decision had been reduced to judgment. Motions for reconsideration also were filed. These events confused the dates for filing cross-appeals. Nevertheless, respondent stated, he knew that he had recorded the deadline for filing the appeal. He also prepared the notice of appeal, which was a one-page document that he believed was due to be filed no later than January 10, 2005. The date was marked on his personal calendar. His usual practice, however, was to give a note to his secretary, informing her of the deadline.

Respondent testified that he had left the notice of appeal on his desk and "thought . . . it was going to be put in the outgoing mail." When he returned to the office, on January 14, 2005, he "realized it hadn't been mailed out and then [he]

addressed the issue." While he was out of the office, his secretary had informed the firm that she would be leaving "the Friday before." Thereafter, he had no contact with her.

In the motion for leave to extend the deadline, respondent based the excusable neglect argument on his illness. He conceded that the certification did not state that he had worked while he was ill. Rather, his "objective was to indicate to the Court that [he] was ill." Nevertheless, respondent testified, between January 3 and 14, 2005, he did stop into the office on occasion. When asked if he believed that the judge would not have found excusable neglect if he had simply stated in the certification that he did not get around to filing the appeal on time, respondent stated:

> I guess the description I have to do is this, I was obviously under a lot of stress at that point in time. I was concerned about what was going on. I moved too quickly in doing the certification. It was never intentional to state that to the Court. Twenty/twenty hindsight is perfect. I wish to a certain extent that I had laid out each and every element of that. But it is not in that certtifcattion [sic].
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> I've got to admit that the best way — it was never intentional. At best it was — it was sloppy. There are no two ways about it. . . .
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> [T72-8 to 21.]

With respect to the time entry, on January 10, 2005, stating that he had prepared the notice of appeal and "[f]orwarded same to court," respondent stated that the entry could have been an error because the notice of appeal did not get to the court until four days later. Although respondent stated that, typically, he entered his time contemporaneously with the service rendered, this entry "may have been done a couple of days later." He agreed that he had worked on the NUS matter while he was home with pneumonia.

As to the paragraph in the certification stating that he was under heavy medication and did not know until late in the afternoon of January 14, 2005, that the notice had not been filed, respondent testified that the information was true, but that the certification was "incomplete to the extent that there is additional information . . . that may have born upon the Court's decision."

With respect to the paragraph stating that he was not in the office, respondent explained:

> I'm not trying to mix words or couch them in a different way. My understanding was, usually I would be in the office every day, okay. It says I was not present in the office. If that is interpreted as did you ever go to the office? The answer is that's incorrect, okay. If it is interpreted as

> were you in the office every day as you usually would be or if you had to appear ? [sic]. The answer would be that that's right. I'm not trying to play with the words. I'm saying in order to make this a clear and accurate certification, it shouldn't say I was not present in the office. It should have said I was not present in the office on every day as I usually would be. That's where the sloppiness is.
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> [T94-8 to 24.]

Respondent emphasized that his point was to convey to the court that he "was not in the office the way [he] usually would be." He conceded, however, that the certification did not say so. Nevertheless, he claimed that he "was not trying to trick the Court in any way." He added that the fact is that he "was not present in the office every day." He conceded, however, that the certification did not so state.

According to respondent, the reference to taking medication was to indicate that his performance was affected by the medicine, which, in turn, goes to excusable neglect. He believed that excusable neglect meant that it was not the client's fault but, rather, the fault of the client's attorney. He explained that the excusable neglect was the result of the illness and medication, which caused him not to be himself and to practice law not in the way that he usually did.

With respect to the second certification, respondent testified that he had attached Dr. Petrowsky's letter to it and that the statement that he "returned to work on January 14, 2005" meant that he had returned to work on a full-time basis. Because of what was going on in his life, however, the certification was written "haphazardly."

Respondent's wife, Cynthia, testified that, while respondent was sick, he stayed home in bed and rested "some days." She also stated, however, that, during his illness, respondent worked at home "a lot."

As to his practicing while ineligible, respondent contended that, when he had talked to his partner about the CPF notices, the partner had assured him that "it's already been taken care of; when he was told that it had not been paid, he paid it in person, immediately.

With respect to the previous ineligibility periods, respondent was not certain that he had ever received notification from the CPF because his partner dealt with that aspect of the business. He testified that, when he would change firms or office locations, the CPF was notified of the new address.

The DEC found that, in his certification, respondent had "affirmatively represented and suggested to the Court he was out of the office, incapacitated and/or bed ridden." He also "omitted all references to the legal services he provided to his clients during the subject timeframe," and he "acknowledged that his time entries and timesheets cited above were accurate and reflect the actual work he performed during the subject time period." Yet, respondent "was not home on bed rest, was not incapacitated and, in fact, worked and billed various clients during this time frame from his home and otherwise." The DEC noted that "[w]hile respondent may have been ill, he continued to practice and represented his clients in a full-time capacity and any statements or suggestions to the contrary were false]."

The DEC concluded that respondent had violated RPC 3.3(a)(1) and RPC 3.3(a)(5), as well as RPC 5.5(a)(1). Although the DEC observed that respondent's conduct was "a serious matter" and that a suspension might be warranted, it chose instead to recommend a reprimand for his misconduct. The DEC offered the following reasons in support of the lower form of discipline: (1) respondent was sincerely remorseful for his actions and mindful of their seriousness; (2) he was cooperative in the investigation; (3) he was dismissed from his job, causing

him "to learn a professional and life's lesson;" (4) he had an unblemished disciplinary record; and (5) the DEC believed that he would not repeat the misconduct "and therefore the interest of the public will be protected by the recommended sanction."

With respect to the practicing-while-ineligible charge, the DEC accepted respondent's testimony that he had been unaware of the two "administrative suspensions."

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

The applicable provisions of RPC 3.3 provides, in pertinent part:

> (a) A lawyer shall not knowingly:
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> (1) make a false statement of material fact or law to a tribunal; or
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> . . . .
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> (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

The DEC was correct in its determination that respondent violated RPC 3.3(a)(1) when he represented, in the

certifications, that he was unable to work during the time that the notice of appeal was due to be filed. In both certifications to the federal court, respondent affirmatively misrepresented that he did not file the notice of appeal on time because he was too sick to be at work and "under rather heavy medication." Yet, his time records show that, between January 3 and 14, 2005, he billed between eight and nine hours a day. Moreover, he did prepare the notice of appeal, but failed to see to it that the notice was filed with the court. Thus, respondent made a false statement of material fact to the court, when he claimed that his illness was the reason why the notice of appeal had not been filed by the deadline.

Also, as stipulated, between Christmas 2004 and January 19, 2005, respondent practiced law while he was on the CPF ineligible list.

We find, however, that RPC 3.3(a)(5) is inapplicable to the facts of this case. Respondent's dereliction did not stem from his failure to disclose a fact. Rather, it stemmed from an affirmative false statement of material fact.

There remains the quantum of discipline to be imposed on respondent for his misrepresentations to the court and his practicing law while ineligible. Practicing law while

ineligible, without more, is generally met with an admonition, if the attorney is unaware of the ineligibility or advances compelling mitigating factors. See, e.g., In the Matter of Matthew George Connolly, DRB 08-419 (March 31, 2009) (attorney ineligible to practice law rendered legal services; the attorney's conduct was unintentional); In the Matter of William C. Brummel, DRB 06-031 (March 21, 2006) (attorney practiced law during a four-month period of ineligibility; the attorney was unaware of his ineligible status); and In the Matter of Richard J. Cohen, DRB 04-209 (July 16, 2004) (attorney practiced law during a nineteen-month period of ineligibility; the attorney did not know he was ineligible).

In this case, respondent was not aware of his ineligibility on either occasion. His partner was responsible for the filing of the forms and the payment of the fees. He assured respondent that the fees had been paid. When respondent eventually learned that this was not accurate, he immediately made the payment to the CPF. Thus, an admonition would be in order for the RPC 5.5(a)(1) violation.

The majority of cases involving an attorney's misrepresentation to a court, made under oath, while testifying or in an affidavit or a certification filed with the court, have

resulted in the imposition of a three-month suspension. See, e.g., In re Perez, 193 N.J. 483 (2008) (motion for final discipline; attorney, then Jersey City Chief Municipal Prosecutor, lied under oath at a domestic violence hearing that he had not asked that the municipal prosecutor request a bail increase for the person charged with assaulting him); In re Chasar, 182 N.J. 459 (2005) (attorney misrepresented in a certification in her own divorce matter that she had paid her staff "on the books," when, in fact, she had paid her staff in cash); In re Coffee, 174 N.J. 292 (2002) (motion for reciprocal discipline following attorney's one-month suspension in Arizona; the attorney submitted a false affidavit of financial information in his own divorce case, followed by his misrepresentation at a hearing under oath that he had no assets other than those identified in the affidavit); In re Lyle, 172 N.J. 563 (2002) (attorney misrepresented in his divorce complaint that he and his wife had been separated for eighteen months, when they had been separated for only one month); In re Brown, 144 N.J. 580 (1996) (during a trial in the plaintiff-hospital's collection suit against the attorney for recovery of expenses incurred in the treatment of attorney's drug and alcohol dependency, he testified untruthfully that he had never

used cocaine, that he had never been treated for cocaine dependency, that his treatment at the hospital was limited to alcoholism, and that the treatment had occurred in fewer than the number of days billed; we noted that the attorney's misrepresentations at trial were made nearly five years after his alleged successful completion of a rehabilitation program); and In re Kernan, 118 N.J. 361 (1990) (one day before the hearing in his divorce matter, the attorney transferred to his mother one of his assets, an unimproved 11.5 acre lot, for no consideration; and then filed a case information statement excluding that asset; the attorney's intent was to exclude the lot from marital property subject to equitable distribution; the attorney did not disclose the conveyance at the settlement conference held immediately prior to the court hearing and did so only when directly questioned by the court; the attorney also failed to amend the certification of his assets to disclose the transfer of the lot ownership; prior private reprimand).

In four instances, discipline less severe than a three-month suspension was imposed. See, e.g., In the Matter of Richard S. Diamond, DRB 07-230 (November 15, 2007) (in a matrimonial matter, attorney filed with the court certifications making numerous references to "attached" psychological and

medical records, whereas the attachments were merely billing records from the client's insurance provider); In re McLaughlin, 179 N.J. 314 (2004) (attorney, who had been required by the New Jersey Board of Bar Examiners to submit quarterly certifications attesting to his abstinence from alcohol, falsely reported that he had been alcohol-free during a period within which he had been convicted of driving while intoxicated); In re Manns, 171 N.J. 145 (2002) (reprimand for misleading the court in a certification in support of a motion to reinstate a complaint as to the date the attorney learned that the complaint had been dismissed, as well as lack of diligence, failure to expedite litigation, and failure to communicate with the client); and In re Clayman, 186 N.J. 73 (2006) (attorney knowingly misrepresented the financial condition of a bankruptcy client in filings with the United States Bankruptcy Court in order to conceal information detrimental to his client's Chapter 13 bankruptcy petition).

In the cases that led to a three-month suspension, either no mitigating factors were brought to our attention, or we rejected the mitigating factors that were proffered by the attorney. See, e.g., In re Perez, supra, 193 N.J. 483 (no mitigating factors identified in decision); In re Chasar, supra,

182 N.J. at 459 (rejecting the attorney's claims that the litigation was contentious, that she was using steroids, painkillers, and sleeping pills as the result of a neck injury, and that her former husband had wrongfully denied her visitation with their children for a three-month period); In re Coffee, supra, 174 N.J. 292 (no mitigating factors identified in decision); In re Lyle, supra, 172 N.J. 563 (rejecting as a mitigating factor the attorney's purported treatment for depression at the time of misconduct); In re Brown, supra, 144 N.J. 580 (rejecting the attorney's claim that his untruthful denial of drug use was the result of the shock, fear, and shame he experienced as a result of the court's questioning of him about his drug use; we noted that the questioning should not have surprised the attorney inasmuch as the trial involved the bill for his treatment in a drug rehabilitation program; we noted further that, if the attorney had been surprised by the questions, he could have corrected his statement or asked for a sidebar conference with the judge to discuss his addiction, rather than sacrificing his obligation to tell the truth, "allegedly for the sake of modesty and embarrassment"); and In re Kernan, supra, 118 N.J. 361, 367-68 (attorney's claimed

history of psychiatric difficulties insufficient to demonstrate "a lack of volition or moral awareness").

In most of the cases where less than a three-month suspension was imposed, we noted the presence of mitigating factors. See, e.g., In re Clayman, supra, 186 N.J. 73 (although the attorney had made a number of misrepresentations in the bankruptcy petition, we observed that he was one of the first attorneys to be reported for his misconduct by a new Chapter 13 trustee who had elected to enforce the strict requirements of the bankruptcy rules, rather than to permit what had been the "common practice" of bankruptcy attorneys under the previous trustee; we also noted that the attorney had an unblemished disciplinary history, was not motivated by personal gain, and had not acted out of venality); In the Matter of Richard S. Diamond, supra, DRB 07-230 (attorney's first encounter with disciplinary system in twenty-year career); In re McLaughlin, supra, 179 N.J. 314 (noting that, after the false certification was submitted, respondent sought the advice of counsel, came forward, and admitted his transgressions); In re Manns, supra, 171 N.J. 145 (attorney had received a prior reprimand, but we noted that the conduct in both matters had occurred during the

same time frame and that the misconduct in the second matter may have resulted from the attorney's poor office procedures).

In this case, respondent filed two certifications in which he falsely represented that, on the deadline for the filing of the notice of appeal in the NUS matter, he was at home on bed rest and, therefore, unable to work. A certification submitted pursuant to R. 1:4-4(b) is in lieu of the oath taken by an affiant. Nevertheless, one who signs a certification is subject to prosecution for perjury or false swearing, just as is one who signs an affidavit. Pressler, Current N.J. Court Rules, R. 1:4-4(b) at 52-53 (2009). In our view, respondent's misrepresentations to the court, which were made in two certifications, require the imposition of a three-month suspension.

Although the parties stipulated to a number of mitigating factors, we do not agree that all are, in fact, mitigation. That respondent was actually sick, as stated in the certifications, is not a mitigating factor. Respondent used his illness as a reason to excuse the late filing of the notice of appeal when, in fact, he had been working on a full-time basis during that time period, which included court appearances and meetings with clients at their offices.

Similarly, that respondent was taking unidentified medications for anxiety and pain, in addition to a strong antibiotic, has no bearing on his misconduct, in the absence of identification of those medications and a medical explanation of how they affected his cognition and judgment at the time. See, e.g., In re Chasar, supra, 182 N.J. 459 (rejecting as mitigation the ingestion of steroids, pain killers, and sleeping pills, in the absence of disclosure of the specific drugs prescribed).

Although respondent claims that he acted for the benefit of his client in filing the false certifications, rather than for personal pecuniary gain, we note that he stood to benefit if the motion had been granted; his failure to file the notice of appeal within the time permitted subjected him to liability for malpractice.

Also, it is not a mitigating factor that the federal court denied the motion based on reasons other than the misrepresentations in the certifications. Cf. In the Matter of Richard S. Diamond, supra, DRB 07-230 (attorney violated RPC 3.3(a)(1) even though the matrimonial court was not misled by his certification's mischaracterization of the documents attached to it). Neither is it a mitigating factor that no party was harmed as a result of respondent's misconduct. As the

stipulation points out, the United States District Court spent time and incurred costs in entertaining and deciding the motion. This was a clear waste of judicial resources.

In addition, although the parties stipulated that respondent's misconduct in the NUS matter was an isolated incident, we note that he filed two false certifications. Moreover, not only did respondent make the misrepresentations twice, but he had the opportunity to reflect about what he was saying. In other words, his conduct was not the product of the exigencies of the moment, when it may be explained, although not excused.

On the other hand, we accept, as mitigation, that respondent has practiced law without incident for more than twenty years, although we note that an unblemished disciplinary history is not always considered mitigation in cases involving similar misconduct. Compare (cases in which unblemished disciplinary history was not identified as a mitigating factor) In re Perez, supra, 193 N.J. 483 (eighteen-year career); In re Chasar, supra, 182 N.J. 459 (three-year career); In re Lyle, supra, 172 N.J. 563 (twenty-five-year career); In re Coffee, supra, 174 N.J. 292 (twenty-eight-year career); and In re Brown, supra, 144 N.J. 580 (eight-year career) with (cases in which

unblemished disciplinary history was identified as a mitigating factor) In re Clayman, supra, 186 N.J. 73 (thirteen-year career) and Matter of Richard S. Diamond, supra, DRB 07-230 (twenty-year career).

Also, we are not convinced, in this case, that respondent's cooperation with the investigation of this disciplinary matter should be considered a mitigating factor. While, in some situations, the Supreme Court has recognized as a mitigating factor an attorney's cooperation with ethics authorities, In re Yacavino, 100 N.J. 50, 54 (1985), and In re Mirabelli, 79 N.J. 597, 602 (1979), R. 1:20-3(g)(3) requires every attorney to cooperate in a disciplinary investigation. Even if respondent's cooperation could be considered in mitigation, we do not view his cooperation as sufficient to downgrade the short-term suspension called for by established precedent. Similarly, we find that, although respondent's contrition and remorse are mitigating factors, they, too, are insufficient to downgrade the suspension.

Finally, although the mitigating factors do not serve to decrease the ordinary measure of discipline for lying under oath (three-month suspension), at the same time we do not believe

that respondent's practicing while ineligible should serve to increase it to a longer term of suspension.

For these reasons, we determine to impose a three-month suspension on respondent for his violations of RPC 3.3(a)(1) and RPC 5.5(a)(1).

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 Thomas P. Monahan
Docket No. DRB 09-039

Argued: June 18, 2009

Decided: September 15, 2009

Disposition: Three-month suspension

Members	Disbar	Three-month 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:		9				

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel