

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-205
District Docket No. XIV-08-
013E

IN THE MATTER OF
RICHARD A. MARCUS
AN ATTORNEY AT LAW

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Decision

Argued: September 18, 2008

Decided: October 29, 2008

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter came before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-14(a). It arose out of respondent's suspension in California for violations of rules comparable New Jersey RPC 3.3(a)(5) (knowingly failing to disclose tribunal a material fact with knowledge that the tribunal

tend to be misled by such failure), RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice). Although the Supreme Court of California suspended respondent for three years, it suspended the suspension and placed respondent on probation for three years, on condition that he serve a nine-month suspension.

The OAE requests the imposition of a nine month-suspension and no reinstatement in New Jersey before respondent is reinstated in California. The OAE has no objection to the suspension's being retroactive to December 30, 2007, the effective date of the California suspension.

Respondent, in turn, requests either a private reprimand or a suspended suspension. He also asks that he be exempt from complying with R. 1:20-20, governing the activities of suspended or disbarred attorneys, that the OAE's brief and the California decision be sealed, and that administrative costs be waived.

We determine to impose a nine-month retroactive suspension and to deny respondent's incidental requests.

Respondent was admitted to the New Jersey bar in 1992 and to the California bar in 1996. He has no prior discipline in either state.

Respondent advised the OAE that he has been an "inactive"

member of the New Jersey bar and that he has never practiced in this state. The New Jersey Lawyers' Fund for Client Protection reports him as eligible.

According to the opinion of the Review Department of the State Bar Court, respondent helped plan and arrange a sham marriage to emancipate a sixteen-year old girl, in order to circumvent a valid custody order. The facts that gave rise to the California disciplinary matter were culled from the Opinion on Review of the Review Department of the State Bar Court.

Following the death of their mother in 1997, Melissa, then eleven years old, and Courtney, then ten years old, became the subject of a custody battle between their father, Terry, and their maternal grandparents, Fran and Arthur Weiss. In 1999, the grandparents were appointed temporary guardians. When Courtney elected to live with her father, the grandparents' guardianship was terminated as to her. It remained in place as to Melissa until through trial on the petition for guardianship. The grandparents were represented by Melodye Hannes. In April 2001, respondent became co-counsel of record.

At the conclusion of a three-day trial on the guardianship matter, the court ordered Melissa returned to her father, but granted a thirty-day stay of the order to allow Melissa to finish school and her grandparents to file an appeal.

After the trial, respondent and Hannes began exploring

available options to avoid returning Melissa to her father. They agreed that Melissa, then sixteen years of age, had three options: (1) to ask her father if he would allow her to stay with her grandparents; (2) to wait until the Court of Appeal ruled on the grandparents' writ of supersedeas; and (3) to become emancipated through marriage to her boyfriend, Austin Holzer. Respondent and Hannes considered the emancipation option as a "back-up" position. They anticipated proceeding with the appeal even if Melissa got married. If the appeal was successful, the marriage was to be annulled. Otherwise, Melissa could use her marriage to avoid complying with the court's judgment.

Although Hannes thought that the emancipation option was not advisable, respondent believed that they had an ethical obligation to present it to Melissa. He called the State Bar Ethics Hotline for guidance on this issue. After his conversation with the ethics hotline, he felt that he was required to present the option to Melissa, lest he risk a malpractice suit. There is no evidence that the ethics hotline provided legal advice to respondent or told him that he would be subject to malpractice or discipline if he did not disclose the marriage option to Melissa.

After conducting some research on whether the grandparents, as temporary guardians, could consent to a minor's marriage in

the Bahamas, Hannes concluded that the laws did not differentiate between the powers of a permanent and a temporary guardian. Respondent believed that they had a "non-frivolous" legal argument that the grandparents' temporary guardianship remained in place because of the judge's thirty-day stay of the order.

On June 12, 2001, the court entered a written judgment on its prior decision. Thereafter, Hannes and respondent met with the grandparents to discuss the three options. On June 25, 2001, Melissa told Hannes that she had decided to marry Holzer in the Bahamas. Melissa asked Hannes to accompany her. Hannes then prepared consent forms that had to be signed by the grandparents and presented to Bahamian officials. The consent forms represented that the grandparents were Melissa's legal guardian, making no reference to the court's order. On June 29, 2001, Hannes left for the Bahamas with Melissa.

Respondent knew that Melissa had made a decision to marry Holzer in the Bahamas. He discussed with Hannes that the Bahamian officials had to be shown that consent to the marriage had been given. He agreed that Hannes should accompany Melissa to make sure that all procedures had been observed.

In the interim, on June 26, 2001, respondent filed a motion seeking an extension of the stay of the court's order. The next day, he filed a notice of appeal. On June 29, 2001, he filed a

petition for writ of supersedeas in the Court of Appeal, asking for a stay of the trial court's order. According to respondent, he did some legal research and concluded that Melissa's emancipation by marriage would moot the appeal.

On July 2, 2001, Melissa and Holzer were married in the Bahamas. Hannes, who was present, had facilitated the necessary paperwork with the Bahamian officials.

On July 5, 2001, respondent had a phone conversation with the father's attorney, Freda Pechner. Pechner, who had heard rumors that Melissa was in the Bahamas, asked him if that was true. Respondent replied that she was not, as Melissa had already returned. Respondent did not disclose the marriage to Pechner.

Respondent claimed that he had become Melissa's attorney after her marriage and that her marriage was confidential information that she had asked him not to disclose.

On July 7, 2001, Melissa returned to her father's custody. On July 19, 2001, respondent filed a request in the Court of Appeal for an immediate stay of the judgment, pending the appeal. He attached a declaration stating that there were "two new events" of which the Court of Appeal should be made aware. The marriage was not one of those events. On July 25, 2001, the Court of Appeal summarily denied the petition for writ of supersedeas and request for a stay.

On July 30, 2001, the father learned about the marriage when he found a note in his mailbox, signed "Melissa Holzer." The note stated that she was leaving to start a new life with her husband.

On the same day, the father filed a Domestic Violence Prevention action, seeking Melissa's return. He also filed an action to annul the marriage. Later, on September 25, 2001, he filed a motion for the dismissal of the grandparents' appeal, on the grounds that the marriage had rendered the appeal moot.

On January 9, 2002, the Court of Appeal issued an order to show cause ("OTSC") as to why the appeal had not been rendered moot by the marriage, why the appellants should not be estopped from denying the validity of the marriage, and why sanctions should not be imposed on appellants' counsel for pursuing a frivolous appeal by failing to inform the court of the changed circumstances. Respondent filed a response on January 18, 2002.

The Court of Appeal held that (1) the grandparents could not have obtained review of the judgment and, at the same time, be in violation of the judgment from which they were appealing; (2) the conduct of counsel and the grandparents' in arranging Melissa's emancipation had rendered the issue of guardianship moot; (3) by undermining the trial court's judgment, counsel and the grandparents had forfeited their right to prosecute the appeal; (4) the grandparents lacked authority to consent to the

marriage; (5) counsel and the grandparents had arranged the marriage to emancipate Melissa for the purpose of negating the effect of the trial court's judgment; and (6) their obstructive tactics warranted a dismissal of the appeal.

Respondent and Hannes were sanctioned \$13,000 for pursuing a frivolous appeal.¹ Melissa's marriage was annulled on the ground that the consent from the grandparents was invalid as a matter of law.

In the disciplinary proceeding that ensued, respondent was found guilty of (1) an act of moral turpitude, for arranging a sham marriage to circumvent the court's order and for simultaneously prosecuting an appeal to overturn the same order and (2) an act of moral turpitude, by concealing Melissa's marriage from the Superior Court and the Court of Appeal and by continuing to prosecute the appeal, despite knowing of Melissa's intent to marry and of her subsequent marriage. The State Bar Court noted that respondent's conduct wasted judicial resources.

Respondent was suspended for three years, with the execution of the suspension stayed and an actual nine-month suspension served. He was placed on probation for three years and ordered to take and pass the Multistate Professional Responsibility Examination.

¹ Hannes, too, faced disciplinary actions for her actions. In 2006, she was disbarred for unrelated conduct.

The OAE compared the violated California rules to New Jersey RPC 3.3(a)(1) (lack of candor to a tribunal), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore, adopt the findings of the California State Bar Court.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that fall within the scope of subparagraphs (A) through (E).

In New Jersey, lack of candor to a tribunal has resulted in discipline ranging from an admonition to a long-term suspension. See, e.g., In the Matter of Robin K. Lord, DRB 01-250 (September 24, 2001) (admonition for attorney who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias; unaware of the client's significant history of motor vehicle infractions, the court imposed a lesser sentence; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); In re Whitmore, 117 N.J. 472 (1990) (reprimand imposed on a municipal prosecutor who failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a DWI charge had intentionally left the courtroom before the case was called, resulting in the dismissal of the charge); In re Mazeau, 122 N.J. 244 (1991) (attorney reprimanded for failure to disclose to a court his representation of a client in a prior lawsuit, when that representation would have been a factor in the court's ruling on the attorney's motion to file a late notice of tort claim); In re Shafir, 92 N.J. 138 (1983) (reprimand for an assistant prosecutor who forged his supervisor's name on internal plea disposition forms and misrepresented information to another assistant prosecutor to

consummate a plea agreement); In re Stuart, 192 N.J. 441 (2007) (three-month suspension for assistant district attorney in New York who, during the prosecution of a homicide case, misrepresented to the court that he did not know the whereabouts of a witness; in fact, the attorney had made contact with the witness four days earlier; compelling mitigation justified only a three-month suspension); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension for attorney who made multiple misrepresentations to a judge about his tardiness for court appearances or failure to appear); In re Chasan, 154 N.J. 8 (1998) (three-month suspension for attorney who distributed a fee to himself after representing that he would maintain the fee in his trust account pending a dispute with another attorney over the division of the fee, and then led the court to believe that he was retaining the fee in his trust account; the attorney also misled his adversary, failed to retain fees in a separate account, and violated recordkeeping requirements); In re Norton and Kress, 128 N.J. 520 (1992) (both the prosecutor and defense counsel were suspended for three months for permitting the dismissal of a DWI charge; although the attorneys participated in a representation to the court that the arresting officer did not wish to proceed with the case, they did not disclose that the reason therefor was the officer's desire to give a "break" to someone who supported law enforcement); In re Forrest, 158 N.J. 428 (1999) (attorney who failed to disclose the

death of his client to the court, to his adversary, and to an arbitrator was suspended for six months; the attorney's motive was to obtain a personal injury settlement); In re Telson, 138 N.J. 47 (1994) (after an attorney concealed a judge's docket entry dismissing his client's divorce complaint, he obtained a divorce judgment from another judge without disclosing that the first judge had denied the request; the attorney then denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was scared; the attorney was suspended for six months); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least \$500,000 of the escrow funds remain in reserve); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney who had been in an automobile accident and then misrepresented to the police, her lawyer, and a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing).

Respondent's conduct, if not in nature, at least in

seriousness, was comparable to that of the attorney in Forrest. There, the attorney, knowing that his client had died, served unsigned answers to interrogatories on defense counsel, appeared at a mandatory arbitration with the client's wife, and advised her not to voluntarily disclose the death of her husband. In the Matter of Robert J. Forrest, DRB 97-359 (June 29, 1998) (slip op. at 2-3). The arbitrator entered an award in favor of the wife and the husband. Defense counsel was unsuccessful in getting a voluntary medical examination of the husband. After he obtained a court order, Forrest disclosed to him that the client had died. Id. at 3.

Forrest, thus, concealed from the court, from the arbitrator, and from the adversary that his client had died. Like this respondent, he wasted judicial resources. He received a six-month suspension.

In another similar case, In re Santiago, 175 N.J. 499 (2003), the attorney was suspended for three months for concocting a "misidentification" plan in representing a DWI client. Santiago arranged for another individual to appear in court in place of the client, hoping that the other individual would not be identified as the driver of the car and that the case would be dismissed. Santiago hoped that the arresting police officer would become confused and, therefore, unable to identify the driver of the vehicle. In the Matter of Emilio Santiago, DRB 02-168 (December 4, 2002) (slip op. at 3). Santiago proposed to the municipal

court prosecutor that the charges against his client be dismissed, alleging that someone had stolen this client's driver's license and had used it when arrested. That was untrue. He presented the individual as his client, stating to the prosecutor that he was not the individual who had been arrested. Id. at 4. Santiago then repeated to the court that his client's license had been stolen and that someone else must have been using it. Id. at 5. Our decision noted that, if not for compelling mitigating factors, Santiago would have been suspended for six months, instead of three. Id. at 15.

Like Santiago, respondent devised a stratagem to bypass the orderly administration of the judicial process. Unlike in Santiago, the California State Bar Court found no mitigating factors. Therefore, we find no compelling reason to deviate from the nine-month suspension ordered in California. We agree with the OAE's suggestion that the suspension be retroactive to December 30, 2007, the date of the California suspension, given that respondent never practiced in New Jersey.

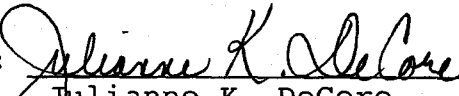
As to the OAE's recommendation that respondent not be reinstated in New Jersey before he is reinstated in California, respondent explained in his brief that he will not be required to apply for reinstatement in California because, in that jurisdiction, reinstatement proceedings apply only to disbarment or resignation situations. Nevertheless, we determine to

condition respondent's reinstatement in New Jersey on proof of his reinstatement in California.

As to respondent's incidental requests, he is hereby informed that a private reprimand is no longer a form of discipline in New Jersey; that records of disciplinary proceedings in New Jersey are public unless they are the subject of a protective order; that he would have to pay administrative costs even if he were to receive a suspended suspension; that, even if he has never practiced in New Jersey, he still must file an affidavit in compliance with R. 1:20-20, indicating as non-applicable any appropriate paragraphs; and that, if he is financially unable to pay the administrative costs in a lump sum, he may apply for an installment payment plan, as permitted by R. 1:20-17(d).

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

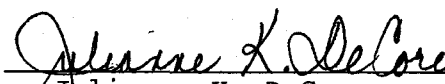
In the Matter of Richard A. Marcus
Docket No. DRB 08-205

Argued: September 18, 2008

Decided: October 29, 2008

Disposition: Nine-month suspension

Members	Disbar	Nine-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Boylan		X				
Clark		X				
Doremus		X				
Lolla		X				
Stanton		X				
Wissinger		X				
Total:		9				


Julianne K. DeCore
Chief Counsel