SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-229
District Docket No. XIV-04-0178E

IN THE MATTER OF

DAVID E. WOLFSON

AN ATTORNEY AT LAW

Decision

Argued: September 23, 2004

Decided: November 5, 2004

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

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 on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE")

following respondent's affidavit of resignation and subsequent disbarment in New York.[1]

Respondent was admitted to the New Jersey and New York bars in 1992. He has no disciplinary history in New Jersey.

On March 1, 2004, the Supreme Court of New York, Appellate Division, Second Judicial Department, entered an order of disbarment based on respondent's September 19, 2003 resignation from the practice of law. In the resignation, respondent acknowledged that he could not successfully defend against charges of neglect of more than a dozen collection cases, failure to account for funds entrusted to him as a fiduciary, and failure to promptly return funds to a client. The facts were gleaned from an April 2003 memorandum submitted by deputy counsel for the Grievance Committee for the Ninth Judicial District of New York to that committee.

Respondent was retained by DBF Collection Corporation ("DBF") to collect funds due in approximately 200 cases. Respondent admitted that he neglected, or failed to diligently pursue, fourteen of those matters for DBF. In addition, he did

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[1]Pursuant to 22 N.Y.C.R.R. 691.9, upon receipt of an affidavit of resignation from the New York bar, the Supreme Court, Appellate Division may enter an order disbarring the attorney.

not refute allegations that he was guilty of neglect or lack of diligence in twenty-three other cases and that he misrepresented the status of five cases to clients. He also admitted that he received $4,790 from DBF in twenty-five cases to be used for court costs, and that he neither expended the funds nor returned them to his client. Respondent used the funds for his own purpose and was unable to return them to DBF. He claimed that those funds, once advanced to him, no longer belonged to the client and were not required to be deposited into an escrow account.

Although deputy counsel in New York alleged other ethics violations, those charges were neither admitted nor proven. We, therefore, did not consider them in assessing the level of discipline. For the sake of completeness, however, we provide the background of those allegations.

Specifically, respondent failed to return files that DBF had requested. During the investigation by New York ethics authorities, respondent failed to cooperate with requests of the investigator. The report of the deputy counsel characterized respondent's recordkeeping as "horrible." As an example, she noted that respondent failed to separately list client matters on his deposit slips.

Another charge that was neither admitted nor proven related to client John Pascale. Pascale alleged that in April 2001, he paid respondent $3,500 to defend a lawsuit that had been filed against him. Although respondent stated that he would provide Pascale with a copy of his answer to the complaint and a copy of the counterclaim, Pascale never received these documents. Respondent represented to Pascale that he had "faxed" the documents to him, but stated that he would do so again. Still, Pascale never received them.

According to Pascale, respondent failed to return his telephone calls or those of another attorney he ultimately retained. Pascale obtained a $3,500 judgment against respondent in small claims court, part of which respondent paid. Because respondent failed to file an answer to the ethics complaint, New York disciplinary authorities served him with a subpoena, requiring him to testify about the matter. Although respondent testified that he had submitted an answer to the ethics complaint, the Grievance Committee never received it. Despite respondent's representation that he would furnish the Committee with another copy, the Committee still did not receive it. Respondent produced a copy of the answer that he allegedly filed on Pascale's behalf, but, despite his testimony that he had

"faxed" it to Pascale several times, he had no proof of those transmissions. He also testified that he had returned Pascale's telephone calls, and that it was Pascale who had failed to return his telephone calls.

According to the OAE, deputy counsel in New York recommended that respondent be charged with violations comparable to New Jersey RPC 1.1(a) and (b) (gross neglect and pattern of neglect); RPC 1.3 (lack of diligence); RPC 1.15(a) (misappropriation of client funds and commingling)[2]; RPC 1.15(b) (failure to promptly deliver a client's funds or property); RPC 1.15(d) and Rule 1:21-6 (recordkeeping violations); RPC 1.16(d) (failure to promptly return an unearned fee); RPC 3.2 (failure to expedite litigation); RPC 8.1(b) (failure to cooperate with disciplinary authorities); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

As mentioned above, when tendering his resignation, respondent admitted only that his conduct amounted to gross neglect, lack of diligence, failure to account for funds entrusted to him as a fiduciary, and failure to promptly return

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[2] The record is silent on whether the recommended charge was for knowing or negligent misappropriation.

client funds. Therefore, those are the only violations that we considered when determining the quantum of discipline.

In addition, respondent did not notify the OAE of his disbarment in New York, as required by Rule 1:20-14(a)(1).

The OAE recommended that respondent receive an indeterminate suspension and that he not be permitted to apply for reinstatement in New Jersey until he is reinstated in New York.

Reciprocal discipline proceedings in New Jersey are governed by Rule 1:20-14(a)(4), which provides as follows:

> 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:
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> (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;
> (E) the misconduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). With respect to subparagraph (E), although respondent was disbarred in New York, a disbarred New York attorney may seek reinstatement seven years after the effective date of disbarment, pursuant to 22 N.Y.C.R.R. 603.14. In effect, thus, disbarment in New York is equivalent to a seven-year suspension.

Although the allegations of the New York complaint raise the specter of knowing misappropriation, the OAE concluded that the New York record does not contain clear and convincing evidence of that violation. We agree. Knowing misappropriation was not one of the charges on which respondent's resignation from the New York bar was premised. Although respondent's poor recordkeeping presumably led to instances of negligent misappropriation, that allegation was not admitted or proven. As such, it was not part of the violations for which the New York court accepted respondent's resignation.

On the record presented to us, thus, the only appropriate findings are gross neglect, lack of diligence, failure to account for client funds, and failure to promptly return client funds.

Similar violations in New Jersey have resulted in the imposition of a suspension. See, e.g., In re Rodgers, 177 N.J. 501 (2003) (three-month suspension imposed on attorney who grossly neglected the administration of a decedent's estate, failed to communicate with the beneficiaries, and failed to safeguard and deliver property or funds to a third party); In re Lesser, 139 N.J. 233 (1995) (attorney suspended for three months after he agreed to represent a corporation in collection matters and then refused to comply with his client's reasonable and repeated requests for information, commingled client and personal funds, and failed to comply with recordkeeping rules; the attorney held his client's funds "hostage" based on an unfounded belief that the client had withheld legal fees from the attorney); In re LaVergne, 168 N.J. 410 (2001) (attorney received a six-month suspension for mishandling eight matters; he exhibited a lack of diligence in six matters, displayed gross neglect in four matters, was guilty of a pattern of neglect, failed to disburse escrow funds in one matter, failed to communicate with clients in five matters, failed to turn over the file upon termination for the representation in three matters, failed to maintain proper records, and engaged in conduct prejudicial to the administration of justice in one

matter); In re Levande, 172 N.J. 72 (2002) (one-year suspension imposed on an attorney who had been suspended for one year and one day in Pennsylvania for gross neglect, lack of diligence, failure to communicate with clients, failure to maintain proper records, improper termination of representation, and conduct prejudicial to the administration of justice; attorney had two prior informal admonitions in Pennsylvania); In re McEnroe, 156 N.J. 433 (1998) (one-year suspension imposed on an attorney who had been suspended for three years in New York for misconduct in fourteen matters, including gross neglect, failure to maintain contact with clients, and failure to promptly refund unearned advance fees upon withdrawing from employment).

In addition to the level of discipline to be imposed, we must determine whether to impose the condition requested by the OAE, that is, to deny respondent the opportunity to seek reinstatement in New Jersey until he has been reinstated in New York. Because respondent may not apply for reinstatement in New York for at least seven years, the OAE's request amounts to a minimum seven-year suspension, a term not ordinarily imposed in New Jersey.

Whether to condition an attorney's reinstatement in New Jersey on that attorney's readmission in another jurisdiction

requires a fact-sensitive analysis. At times, the OAE requests reinstatement in the original jurisdiction because that jurisdiction typically will conduct a hearing on the reinstatement issue, while such applications are routinely granted in New Jersey without substantial inquiry. In addition, the OAE often requests reinstatement when conditions have been imposed on the attorney's return to practice, such as proof of fitness or payment of restitution. In those cases, the original jurisdiction is in a better position to assess whether the attorney has been rehabilitated or has complied with the required conditions.

Although, in many cases, requiring reinstatement is appropriate, a blanket rule fails to consider those cases in which the discipline imposed in the foreign jurisdiction is radically different from the discipline imposed in New Jersey. For example, although, in New York, attorneys who fail to cooperate with disciplinary authorities are disbarred, in New Jersey, that violation, standing alone, is usually met with an admonition or a reprimand. In New Jersey, the matter proceeds by way of default, in which case, the level of discipline is almost always enhanced.

At times, attorneys resign from their bar membership because they no longer wish to practice in another state. For example, in In re Skripek, 156 N.J. 399 (1998), the attorney submitted his resignation from the New York bar during an ethics investigation following a judicial ruling of civil contempt for failure to obey a court order. Although the OAE requested that the attorney receive an indefinite suspension and that he be prohibited from applying for reinstatement in New Jersey until he was reinstated in New York, we – and the Court – determined that only a reprimand was warranted. The attorney submitted to us a certification attached to his brief, indicating that the New York disciplinary counsel never notified him that, upon his resignation and subsequent disbarment in New York, reciprocal proceedings could be filed in New Jersey. He stated that, had he known that discipline would be imposed on him in New Jersey, he would not have submitted his resignation in New York.

Requiring attorneys to suffer multi-year suspensions under these circumstances does not comport with Rule 1:20-14(a)(4)(E), the reciprocal discipline rule, which provides that

> [t]he 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:

. . . .

(E) the misconduct established warrants substantially different discipline.

In our view, the better procedure is to determine, on a case-by-case basis, whether reinstatement in the original jurisdiction as a condition of reinstatement in New Jersey is warranted. We believe that, in this case, it is not. Respondent's conduct, while serious, does not present the type of egregious circumstances justifying an indeterminate suspension, one step shy of disbarment. Furthermore, respondent's disbarment in New York resulted from his affidavit of resignation, not a determination from a sister disciplinary agency that disbarment was warranted. Requiring that he be reinstated in New York — a state in which he resigned from his bar membership — before applying for reinstatement in New Jersey is unduly burdensome to respondent. A shorter term of suspension adheres to the level of discipline imposed in prior New Jersey cases and recognizes the exception contemplated by Rule 1:20-14(a)(4)(E), that is, the imposition of substantially different discipline whenever warranted by the nature of the misconduct.

Based on the number of matters involved (at least twelve), respondent's misconduct is more akin to that of the attorney in

McEnroe, who received a one-year suspension, not conditioned on reinstatement in New York, where he had been suspended for three years. Moreover, respondent has no disciplinary history in New Jersey; although the record does not contain a complete ethics history from New York, it refers to only a prior admonition.

We, therefore, determine that a one-year suspension, without the condition of reinstatement in New York, is the appropriate level of discipline in this matter. In addition, upon reinstatement, and for a period of two years, respondent must practice law under the supervision of a proctor approved by the OAE.

Members Barbara F. Schwartz and Spencer V. Wissinger, III did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David E. Wolfson
Docket No. DRB 04-229

Argued: September 23, 2004

Decided: November 5, 2004

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley		X				
O'Shaughnessy		X				
Boylan		X				
Holmes		X				
Lolla		X				
Pashman		X				
Schwartz						X
Stanton		X				
Wissinger						X
Total:		7				2

By Isabel Frank 11/1/04
Julianne K. DeCore
Chief Counsel