

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-002

IN THE MATTER OF
THOMAS A. PENN
AN ATTORNEY AT LAW

Decision

Decided: October 1, 2001

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

This matter was before us based on a certification of default filed by the District VB Ethics Committee ("DEC"), pursuant to *R. 1:20-4(f)(1)*.

Respondent was admitted to the New Jersey bar in 1977. In 1996 he admitted violating *RPC 5.5(a)* and *RPC 8.4(c)*, by practicing law while ineligible due to his failure to

pay the New Jersey Lawyers' Fund for Client Protection annual assessment. The matter was diverted pursuant to R.1:20-3(1)(2)(B)(i).

On September 28, 2000 the DEC sent a complaint by regular and certified mail to respondent's last known office address, 1139 East Jersey Street, Elizabeth, New Jersey 07201, and to his last known home address, 120 Washington Street #13, East Orange, New Jersey 07017. The certified mail sent to the office address was returned stamped "[m]oved left no address." The regular mail sent to the office address was not returned. The certified and regular mail sent to the home address were returned stamped "[f]orwarding order expired." On October 16, 2000 the DEC published notice of the complaint in both the *New Jersey Law Journal* and the *Star-Ledger*, a newspaper of general circulation.

Respondent did not file an answer to the complaint. The DEC certified the record directly to us for the imposition of discipline, pursuant to R. 1:20-4(f)(1).

* * *

During the summer of 1999 Milton Dyer retained respondent to represent him and his minor son, Carl, in connection with a mortgage foreclosure action filed in Superior Court, Union County, by Cenlar Federal Savings Bank ("Cenlar"). Dyer was sued both individually and as administrator of the estate of his wife, Myrna Dyer. Because neither Dyer nor Carl had

executed the mortgage note, they bore no personal liability for it. Respondent knew that Dyer did not seek any equity interest in the property, wanting only to avoid liability for himself, his son and his wife's estate. With respect to the fee arrangement, respondent told Dyer that, because an hourly fee would be too costly, Dyer could pay him modest amounts of money periodically. Dyer paid respondent periodic sums totaling about \$1,000.

At some point, respondent offered to deliver a deed in lieu of foreclosure to Cenlar's attorney, Joel Cohen, the grievant in this matter. Cohen replied that, although he was required to proceed with the foreclosure to clear any potential claim that Dyer and Carl had on the property, they had no personal liability because they had not signed the mortgage note.

Respondent did not file or serve an answer to the foreclosure complaint. A default was entered on October 26, 1999.

Respondent did not inform Dyer of the actual status of the litigation. Instead, he periodically informed him that everything was "just fine." In October 1999 respondent told Dyer that the case had been successfully concluded. When Dyer asked for evidence, respondent prepared and sent to him an October 29, 1999 order dismissing the complaint with prejudice. The order purported to be signed by the Honorable Anthony J. Parrillo, J.S.C. As it turned out, respondent had fabricated the order and signed Judge Parrillo's name. In a June 16, 2000 letter to the DEC investigator, Judge Parrillo denied signing the order, pointing

out that the signature was not his and that both the typed name and the signature bore an incorrect spelling of his surname.

On November 2, 1999 Cohen sent Dyer a notice of default. In response, Dyer sent Cohen a copy of the October 29, 1999 dismissal order. Cohen demanded that respondent vacate the fraudulent order and provide a written explanation of his conduct. On December 17, 1999 respondent sent Cohen a letter and a certification, in which he denied preparing the order. The papers stated as follows:

I then met with Mr. Milton Dyer and his oldest son regarding the document. I discovered that the document had been created by the son's friend, a paralegal at a Newark law firm. Same was done in the son's efforts to eliminate the stress he claimed that Milton Dyer was experiencing because of his fear that the Plaintiff will sue them if there is a deficiency after the foreclosure sale. The son opined that his father's anxiety would cease if the father thought that the case had been dismissed.

I advised the young man that he could get into very serious trouble as a result of his actions. I told him that he had perpetrated a fraud on counsel and the court; he had engaged in the unlawful and fraudulent practice of law; and he may have violated the law. The son broke down in tears and he expressed his heartfelt remorse. He also apologized to his father for bring [sic] shame upon the family name.

The ethics complaint charged that the representations made in respondent's certification were false. The DEC investigator interviewed Dyer, Carl and respondent's oldest son, Devon.¹ All three disputed respondent's version of the events. According to the

¹ Although respondent claimed to have met with Devon, in his certification he never mentioned him by name, instead, referring to him as "the son" or "the young man."

complaint, respondent created the order to prove to Dyer that he had successfully concluded the case and to justify the fees that Dyer had paid him.

The complaint also alleged that respondent practiced law while ineligible. On September 20, 1999 the Court entered an order declaring him ineligible to practice law for failure to pay the annual registration fee required by R.1:28-2. He was reinstated about four months later, on January 26, 2000. Although respondent was ineligible to practice law on October 15, 1999, on that date he appeared before the Honorable Carmen H. Alvarez, J.S.C., at the Cape May County courthouse, indicating that his client's matter was ready for trial. On January 26, 2000 respondent assured Judge Alvarez that he anticipated being reinstated by the January 31, 2000 trial date. From September 20, 1999 to January 26, 2000, respondent performed services in the *Dyer* matter, although he was ineligible at the time.

The complaint charged that respondent violated *RPC* 1.4(a) (failure to communicate with a client), *RPC* 1.4(b) (failure to explain a matter so as to permit the client to make informed decisions regarding representation), *RPC* 3.3(a)(1) (false statement of material fact or law to tribunal) *RPC* 5.5(a) (practicing law while ineligible) *RPC* 8.4(a) (violation of the *Rules of Professional Conduct*), *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and *RPC* 8.4(d) (conduct prejudicial to the administration of justice).

* * *

Service of process was proper in this matter. The copy of the complaint sent to respondent's office by regular mail was not returned and he was further served by publication. Therefore, the matter may proceed as a default.

The complaint contains sufficient facts to support findings of misconduct. Respondent represented Milton and Carl Dyer in a mortgage foreclosure action. Because the Dyers had not signed the mortgage note, they would not have been exposed to liability for any deficiency after the foreclosure sale. Respondent, thus, should have explained the matter to Dyer to allow him the choice to decline any further representation. Instead, although respondent charged Dyer about \$1,000, he did not file or serve an answer, resulting in the entry of a default against Dyer and his son. He also failed to keep Dyer informed about the status of the matter. Respondent, thus, violated *RPC* 1.4(a) and (b).

More seriously, respondent misrepresented the status of the matter, falsely telling Dyer that the case had been successfully concluded, in violation of *RPC* 8.4(c). Respondent compounded this misrepresentation by fabricating an order of dismissal and signing Judge Parrillo's name, in violation of *RPC* 8.4(c) and (d). Respondent again violated *RPC* 8.4(c), when he alleged, in a letter and certification to Cohen, that Dyer's eldest son had prepared the phony order with help from a paralegal. Respondent repeated that falsehood to the ethics

investigator, in violation of *RPC* 8.1(a) (false statement of material fact to a disciplinary authority)².

Respondent also practiced law while ineligible, appearing before Judge Alvarez for a trial call. Because he assured Judge Alvarez that he would be reinstated before the January 31, 2000 trial date, he must have been aware of his ineligibility. Therefore, his appearance before Judge Alvarez and his representation of the Dyers during his period of ineligibility violated *RPC* 5.5(a).

In sum, respondent manufactured and signed a court order, made misrepresentations (including in a certification) to his client, his adversary and to the ethics investigator, failed to communicate with his client, failed to explain the matter to permit the client to make informed decisions regarding the representation and practiced law while ineligible.

Similar misconduct has resulted in the imposition of a three-year suspension. *See, e.g., In re Yacavino*, 100 *N.J.* 50 (1985) (three-year suspension where attorney prepared and presented to his clients two fictitious orders of adoption to conceal his neglect in failing to advance an uncomplicated adoption matter for nineteen months, and misrepresented the status of the matter to his clients on several occasions; in mitigation, the Court considered

² The complaint charged respondent with a violation of *RPC* 3.3(a)(1). *RPC* 8.1(a) is more applicable, however, because it addresses misrepresentations made to disciplinary authorities, while *RPC* 3.3(a)(1) applies to misrepresentations to a tribunal. Although respondent was not specifically charged with a violation of *RPC* 8.1(a), the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that *RPC*.

the absence of any purpose of self-enrichment, the aberrational character of the attorney's behavior and his prompt and full cooperation with law enforcement and disciplinary matters); *In re Meyers*, 126 N.J. 409 (1991) (three-year suspension where attorney prepared and presented to his client a fictitious divorce judgment to conceal his failure to advance an uncomplicated divorce matter for approximately two years; the attorney then asked his client to misrepresent to the court that the divorce judgment had merely been a draft and misrepresented to a court intake officer that the fabricated divorce judgment had been a mere draft and that his client had misunderstood its significance; the attorney also made other misrepresentations to his client and failed to inform her that her husband had filed a divorce complaint).

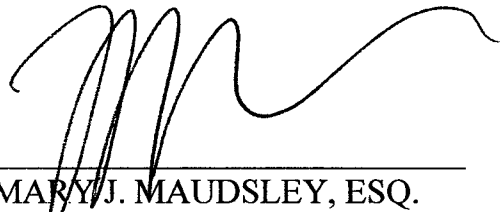
Here, respondent's misconduct of fabricating a court order and forging a judge's name was similar to that of Yacavino and Meyers. In addition, respondent failed to communicate with his client, failed to explain a matter to permit the client to make informed decisions regarding the representation, practiced law while ineligible and made misrepresentations to his client and to the ethics investigator. Because this matter proceeded by way of default, no mitigating factors were presented. In fact, respondent's failure to cooperate with the disciplinary system is a significant aggravating factor.

Based on the foregoing, we unanimously voted to impose a three-year suspension. In addition, as a condition of reinstatement, respondent must demonstrate that he completed

twelve hours of continuing legal education courses in ethics. Two members recused themselves. One member did not participate.

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

Dated: 10/1/01

By: 

MARY J. MAUDSLEY, ESQ.
Vice-Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Thomas A. Penn
Docket No. DRB 01-002**

Decided: October 1, 2001

Disposition: Three-year suspension

Members	Disbar	Three-year suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not participate
Peterson						X	
Maudsley		X					
Boylan							X
Brody		X					
Lolla		X					
O'Shaughnessy						X	
Pashman		X					
Schwartz		X					
Wissinger		X					
Total:		6					3

Robyn M. Hill 11/19/01
Robyn M. Hill
Chief Counsel