

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 03-287

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IN THE MATTER OF  
VINCENT J. MILITA, II  
AN ATTORNEY AT LAW

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Decision

Argued: November 20, 2003

Decided: February 11, 2004

Martin Pappaterra appeared on behalf of the District IIIB Ethics Committee.

Respondent appeared *pro se*.

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

This matter was before us based on a recommendation for discipline filed by the District III Ethics Committee (“DEC”). The complaint charged respondent with a violation of *RPC 4.2* (a lawyer shall not communicate with a person represented by another lawyer).

Respondent was admitted to the New Jersey bar in 1980. He was suspended for six months in 1985 for his misconduct in two matters. In the first matter, respondent asked an assistant prosecutor whether a more favorable plea bargain would result for his client if a contribution were made to the assistant prosecutor’s favorite charity. Although the Court found that respondent had not intended to offer a bribe, it found that respondent’s conduct was prejudicial to the administration of justice and adversely reflected on his fitness to practice law. In the second matter, respondent visited an adverse witness under police custody in a hospital. When the guard mistakenly led the witness to believe that respondent was the attorney for the witness, respondent did not correct the misapprehension. Within a day, respondent notified the public defender’s office of his actions. The Court noted that, although the public defender’s office was not representing the witness at the time of the interview, he was a potential suspect and was represented by the public defender’s office in other matters. The Court found that respondent engaged in conduct involving deceit and misrepresentation and that he knew it was improper to appear to counsel someone represented by another attorney. In 2003, respondent was reprimanded for failure to treat with courtesy and consideration all persons involved in the legal process. In that matter, respondent sent an insulting and sarcastic letter to the victim of his client’s criminal conduct.

The facts in this matter are not in dispute. Respondent admitted that he had contacted his client's codefendant, although he knew that the codefendant was represented by another attorney. Respondent claimed, however, that because he had had a prior discussion with the codefendant in the presence of her attorney, he believed that he had received the attorney's consent to contact her.

Specifically, in late June 2001, Darryl K. Murphy retained respondent to represent him in a criminal matter in which he was charged with various drug and weapons offenses. Scott Sherwood represented Murphy's paramour and codefendant, Tyrema J. Sims. On July 5, 2001, the parties were in court for a status conference, during which plea discussions took place. Sims told Sherwood that she was concerned about Murphy's position because, although she had received a plea offer of probation, Murphy was probably going to receive a custodial sentence. Sims asked Sherwood if she could ask respondent a question. Although Sherwood told Sims that she should ask Sherwood the question, Sims insisted that she wanted to talk to respondent. Sherwood told respondent that Sims had a question that she wanted to direct toward him. At the ethics hearing, Sherwood testified about that conversation:

I went up to [respondent] and I said my client has a question that [she] wants to direct to you. . . . I don't know what it is, but I'll listen to what she's going to ask you. And she then asked him. I don't even remember exactly what the question was. It was something like is [Murphy] going to take the plea bargain or what was the offer to [Murphy] or do you, you know, they are offering me probation, do you think that that's a good deal for me or, you know, I can understand the logical inclination to wanting to get a second opinion or something on your plea bargain, even though, you know, she really technically couldn't get legal advice from him. And we had this brief conversation and then we went our separate ways.

[T7]<sup>1</sup>

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<sup>1</sup> T refers to the March 3, 2003 hearing before the DEC.

In addition, on cross-examination by respondent at the ethics hearing, Sherwood testified that Sims' request to ask respondent a question was unusual, adding:

[Y]ou agreed to listen to what she had to say and I think I made it clear that I was going to listen to what the question was and if I thought she was asking you something that you shouldn't be discussing with her, then I was going to pull her aside, but she was not – she was not the easiest person to get along with and so it didn't surprise me what she wanted to ask you, but I insisted on being there and hearing the question. If she asked something, like I said, that I didn't think she should be discussing, I would have pulled her aside and discussed that with her before I let her ask you.

[T23]

Upon Sherwood's return from a vacation in early August 2001, Anne Crater, the assistant prosecutor in charge of the case, asked him if he had seen a letter dated July 31, 2001, to her from respondent in which respondent made a proffer of Sims' testimony. Because Crater wondered how respondent had acquired this information, she brought the matter to Sherwood's attention. Upon contacting Sims, Sherwood learned that on July 17, 2001, respondent had telephoned her at home and that he had discussed the case with her. Sherwood then contacted respondent, who admitted that he had telephoned Sims.

Sherwood noticed that some of the facts purporting to represent Sims' version of events contained in respondent's letter to Crater were inaccurate. He became concerned that the information that Sims had provided to respondent could affect the plea bargain under which Sims would receive probation. According to Sherwood, if the case went to trial and Sims were convicted, she would most likely receive a substantial custodial sentence. Sherwood then filed a motion to disqualify respondent from representing Murphy, to sever the codefendants' trials, and

to exclude from trial Sims' statement that respondent had provided to the assistant prosecutor.

On August 24, 2001, respondent filed a reply to the motion, in part, as follows:

While the contents of the supporting certification filed by Mr. Sherwood are accurate for the most part, they conveniently fail to include the circumstances under which I felt privileged to speak with his client, co-defendant Sims.

During an earlier status conference conducted on this matter on the 5<sup>th</sup> day of July, 2001, shortly after my entry into the case as substituted counsel of record for defendant Murphy, I was called aside by Mr. Sherwood who advised me that his client, the paramour of my own client, wished to speak to me concerning the case and her proposed plea agreement.

At that time, Mr. Sherwood allowed Ms. Sims to speak at length with me concerning both the facts and circumstances leading up to her arrest on the 10<sup>th</sup> day of January, 2001, in Atlantic City by members of the Atlantic City Police Department, together with various factors entering into the plea bargaining process.

At no time did Mr. Sherwood or his client seek to limit the duration or extent of the permission earlier given to me, especially since Ms. Sims and her aunt and other family members continued to speak to me about the case later that date while outside the presence of Mr. Sherwood. . . .

My purpose in doing so was to obtain as exact and complete information to include in my reciprocal discovery letter to Anne Crater, Esquire, Assistant Atlantic County Prosecutor, dated the 31<sup>st</sup> day of July, 2001.

To the extent that the aforesaid certification [by Sherwood] fails to even admit or acknowledge the circumstances under which I reasonably believed that I had continuing permission to speak to co-defendant Sims, the certification is at once both incomplete and misleading in violation of RPC 3.3(5).

At the ethics hearing, Sherwood denied that he had given respondent ongoing permission to talk to Sims outside of his presence.

After the Honorable Michael R. Connor, J.S.C. conducted a hearing on Sherwood's motion, he ordered respondent disqualified from representing Murphy and barred Murphy's

subsequent attorney from receiving information about Sims' statement.<sup>2</sup> Both Sims and Murphy later entered guilty pleas and Sims received a probationary sentence.

For his part, respondent admitted that he had telephoned Sims without Sherwood's knowledge or consent. He also admitted that, on July 5, 2001, after his conversation with respondent and Sims ended, Sims and her relatives, who had accompanied her to the courthouse, approached him twice and he discussed the case with them outside of Sherwood's presence. Respondent contended that, because Sherwood had permitted him to talk to Sims in Sherwood's presence, he reasonably believed that he had Sherwood's continuing permission to talk to Sims about the case in Sherwood's absence. He testified that, in hindsight, he should not have contacted Sims and that he had "perhaps usurped the authority given by Mr. Sherwood without realizing it until after the problem arose." (T40). At the ethics hearing, respondent stated

I've never had the experience before. I've never been charged with or been alleged to have communicated with someone else's client without permission. . . . As I said, in hindsight, had I ever dealt with this kind of situation before, I'm sure I would have handled this differently. . . . I've never had this situation come up. I know the rule and, you know, what it's purpose is and it's definitely – it's been violated to some extent. The question is the motivation.

[T43-43]

Respondent offered as mitigating factors "the lack of any prior situations involving anything close to this," and the lack of prejudice to Sims, who received the same plea bargain that had previously been offered by the state.

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<sup>2</sup> No written order was included in the record. Omitted from Exhibit P-1, the transcript of the motion hearing, are the pages containing the judge's ruling.

The presenter urged us to impose a three-month suspension, while respondent contended that a reprimand should be imposed.

The DEC found that respondent violated *RPC* 4.2 by contacting Sims, finding that “no reasonable attorney under the facts of this matter could conclude that there was an ongoing and essentially unlimited permission from Mr. Sherwood to discuss the pending criminal matter with Mr. Sherwood’s client, flowing from the court house discussion on July 5, 2001.” The DEC recommended a three-month suspension, noting that, if not for respondent’s disciplinary history, a reprimand may have been warranted.

Following a *de novo* review of the record, we are satisfied that the DEC’s finding that respondent’s conduct was unethical is supported by clear and convincing evidence. Indeed, respondent admitted that his conduct had been unethical. Respondent admitted that he contacted Sims, the client of Sherwood, and discussed the facts and circumstances of the case. He admitted that he knew, when he contacted Sims, that she was represented by Sherwood. He admitted that he disclosed to the assistant prosecutor the statement that Sims had provided to him. He admitted that, in hindsight, he should not have contacted Sims and that he had “perhaps usurped the authority given by Mr. Sherwood.”

Respondent’s explanation for contacting Sims was that, because Sherwood had permitted Sims to engage in a discussion with him at the courthouse, in Sherwood’s presence, he reasonably believed that he had Sherwood’s continuing permission to contact Sims without Sherwood’s presence. We were unable to accept this explanation. Under no circumstances could respondent have reasonably believed that Sherwood had authorized him to contact Sims.

Moreover, the implausibility of respondent's explanation becomes even clearer in light of the care with which Sherwood limited Sims' discussion with respondent. According to Sherwood's un rebutted testimony, when he and Sims approached respondent, Sherwood explicitly cautioned respondent that he would permit Sims to ask respondent a question and, depending on the nature of the question, he either would allow respondent to answer or would remove Sims from respondent's presence. Sherwood, thus, clearly set limits on respondent's contact with Sims, even in Sherwood's presence. Respondent could not have reasonably believed that Sherwood consented to respondent's subsequent contact with Sims, either at the courthouse later that day or by telephone twelve days later. Respondent violated *RPC* 4.2.

In addition, respondent violated *RPC* 8.4(d) (conduct prejudicial to the administration of justice). After Sherwood became aware of respondent's disclosure of Sims' statement to the assistant prosecutor, Sherwood filed a motion to disqualify respondent, to sever the trials, and to exclude Sims' statement from trial. Judge Connor conducted a hearing on the motion, which was granted. As a result, Murphy was required to obtain substitute counsel. Judicial resources were expended unnecessarily. Although respondent was not specifically charged with a violation of *RPC* 8.4(d), the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that *RPC*. Furthermore, the record developed below contains clear and convincing evidence of that violation. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deemed the complaint amended to conform to the proofs. *Rule 4:9-2; In re Logan*, 70 N.J. 222, 232 (1976).



We were concerned about several of respondent's statements in this matter. In his reply certification to Sherwood's motion for disqualification and other relief, respondent stated, "At no time did Mr. Sherwood or his client seek to limit the duration or extent of the permission earlier given to me . . ." Not only had Sherwood expressly limited the extent of the discussion between Sims and respondent, Sherwood had never given respondent permission to contact Sims independently. In addition, in respondent's certification filed with Judge Connor, he accused Sherwood of violating *RPC 3.3(5)* (candor to a tribunal) by failing to acknowledge in his moving papers the circumstances under which respondent believed he had continuing permission to contact Sims. Thus, while respondent was guilty of unethical conduct, his accusation of unethical conduct by his adversary was without merit.

Moreover, respondent testified at the ethics hearing that he "had never been charged with or been alleged to have communicated with someone else's client without permission" and cited as a mitigating factor "the lack of any prior situations involving anything close to this." Yet, as noted in respondent's disciplinary history, he was suspended for six months, in part for using deceit in communicating with an adverse witness. Respondent either was not truthful to the DEC or still does not understand the nature of his prior misconduct. In addition, he was reprimanded earlier this year for sending an insulting letter to his client's victim. Respondent apparently has failed to learn from his prior mistakes involving improper contact with those in the legal process.

As to the quantum of discipline, in *In re Alcantara*, 144 N.J. 257 (1995), the attorney advised his client's codefendants not to testify at his client's impending criminal trial. The

attorney had not sought permission of the codefendants' attorneys before approaching them.

After imposing a reprimand for the attorney's conduct, the Court stated:

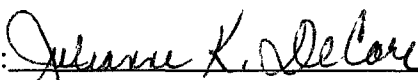
But for the fact that this is our first interpretation and application of *RPC 4.2*, respondent's discipline would be greater than the public reprimand recommended by the Office of Attorney Ethics and now imposed by the Court. "We caution members of the bar, however, that the Court in the future will ordinarily suspend an attorney" for the type of violation of *RPC 4.2* that occurred in this case. *In re Magid*, 139 N.J. 449, 445, 665 A.2d 916 (1995); *In re Principato*, 139 N.J. 456, 463, 655 A.2d 920 (1995).

[*In re Alcantara, supra*, 144 N.J. at 268.]

In this matter, respondent communicated with a person represented by another lawyer, in violation of *RPC 4.2* and *RPC 8.4(d)*. Pursuant to *Alcantara*, attorneys who engage in this type of misconduct ordinarily will be suspended. Respondent's disciplinary record includes a six-month suspension for similar misconduct and a reprimand. He obviously has not received the message that he is not permitted to contact certain people involved in the legal process. Based on the foregoing, we unanimously voted to impose a three-month suspension. One member recused herself. Three members did not participate.

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

Disciplinary Review Board  
Mary J. Maudsley, Chair

By:   
Julianne K. DeCore  
Chief Counsel

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**SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

In the Matter of Vincent J. Milita, II  
Docket No. DRB 03-287

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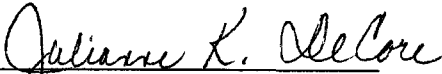
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Argued: November 20, 2003

Decided: February 11, 2004

Disposition: Three-month suspension

<i>Members</i>	<i>Disbar</i>	<i>Three-month Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Maudsley</i>						X	
<i>O'Shaughnessy</i>							X
<i>Boylan</i>		X					
<i>Holmes</i>							X
<i>Lolla</i>		X					
<i>Pashman</i>		X					
<i>Schwartz</i>							X
<i>Stanton</i>		X					
<i>Wissinger</i>		X					
<i>Total:</i>		5				1	3

  
Julianne K. DeCore  
Chief Counsel