SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-314

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

Decision

Argued: October 17, 2002

Decided: January 24, 2003

Suzanne M. Kourlesis 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 IIIB Ethics Committee ("DEC"). The complaint charged respondent with a violation of RPC 4.4 (respect for rights of third persons) and RPC 8.4(d) (conduct prejudicial to the administration of justice), arising from a letter he sent to the victim in a criminal matter.

Respondent was admitted to the New Jersey bar in 1980. He has a law office in Marmora, Cape May County. In 1985, he was suspended for six months for unethical

conduct at criminal pretrial negotiations and for conduct involving deceit and misrepresentation, in his attempt to obtain information to assist a client. In re Militia, 99 N.J. 336 (1985).

Respondent represented the defendant in a matter captioned State v. Luis F. Hernandez, charging Hernandez with kidnapping, eluding police and simple assault. The victim was Regina L. Parsons, Hernandez' former paramour and the mother of his son. Pursuant to a plea agreement, on July 20, 2000 Hernandez entered a guilty plea to criminal restraint, with a sentence recommendation of three and one-half years, to run concurrently with a three-year sentence for a probation violation imposed by another judge. Sentencing was scheduled for August 25, 2000. Prior to sentencing, on or about July 25, 2000, respondent sent a letter to Parsons, the complaining witness in the criminal matter. That letter stated in relevant part as follows:

> Quite obviously, you have achieved one of your original goals, namely, to gain revenge upon my client who apparently had the 'unmitigated gall' to exercise his constitutional right to associate with another, more-educated, personable and less vindictive woman. At the same time, however, you have likely forfeited your chances of ever realizing your other goal of bringing Mr. Hernandez back together with you. In less technical terms, you have attempted to spite your face by cutting off your nose. Not only have you hurt yourself and your son, you have grievously harmed my client who has sat in jail for more than three months, and will now continue to sit, upon charges that are likely a fabrication of your fertile imagination but which appeared to the assistant county prosecutor handling the matter to be supported and substantiated by the dubious lacerations and other injuries you reported to the emergency room personnel.
>
> As Mr. Hernandez' defense attorney, my perspective and objectivity are obviously affected by my obligations and loyalty to my client. Although I personally and professionally believe that the charges are spurious, I am persuaded as was Mrs. Litke that a grand jury, and even possibly a trial jury, hearing the evidence might be convinced beyond a

> reasonable doubt of one or more of the original charges no matter the actual truth as to what occurred. Given the arbitrariness and lack of precision of the criminal justice system, Mr. Hernandez' decision is clearly an intelligent, but unfortunate, one under all the circumstances. As the complaining witness, you, of course, are entitled to be present at the sentencing hearing and to provide a victim impact statement. Should you find it within yourself to attempt to right the wrong you have perpetrated upon my client, you might even wish to contact the county prosecutor's office to provide a true statement of what actually occurred.
>
> [Exhibit P-2]

Parsons brought the letter to the prosecutor's office. Thereafter, Assistant Atlantic County Prosecutor Dana B. Litke filed a motion seeking a protective order, pursuant to N.J.S. 2C:28-5.1, restraining respondent from having any further contact with Parsons.[1] Respondent filed an objection to the motion, which was heard on August 25, 2000 by the Honorable Albert J. Garofolo, P.J.C.D., Superior Court, the complainant herein. Judge Garofolo issued the protective order. Also on August 25, 2000, Judge Garofolo sentenced Hernandez, pursuant to the plea agreement. There was no change to the plea agreement or sentence as a result of respondent's letter to Parsons.

[1] Respondent's letter to Parsons was the first contact he had with her. After respondent spoke with Litke and before she filed the motion, he agreed to have no further contact with Parsons.

At the DEC hearing, Parsons testified that respondent's letter had upset her. During respondent's questioning of Parsons, the following exchange took place:

> Q. When you received the letter, did you – or spoke to the prosecutor, did you yourself have any idea of what my purpose was in sending the letter?
> A. I don't know what your purpose was, but it didn't make me feel good.
> • • •
> Q. My question, not knowing me or not knowing my motives, you have no idea what my intended purpose was; is that correct?
> A. No.
> Q. You just know its consequences which you communicated to the prosecutor, and of course, today through the presenter to the committee; isn't that true?
> A. Yes.
> Q. In writing the letter, are you aware, though, that I was represented [sic] or at least attempting or at least allegedly representing the interest of Mr. Hernandez, whether they're motivated on his part for good reasons or bad reasons?
> A. I don't know what your purpose was.
> Q. As you read this letter, did you believe it was telling you to lie to the court in favor of Luis?
> A. Yes.
> • • •
> Q. When it asks you to provide a truthful statement, how did that ask you to lie?
> A. Because I already told the truth when it happened.
> [T4/4/02 137-139]

Respondent testified that he had no intention of causing distress to Parsons. Rather, he claimed, he knew that Parsons had visited Hernandez in prison and had written to him. In light of the totality of the circumstances, respondent claimed, he believed that Hernandez was innocent of the more serious charges filed against him. According to respondent, his letter was intended to express his client's sense of outrage and to let his client know that he sympathized with him.

In his reply to the grievance, exhibit P-3, respondent stated that he wanted to "goad [Parsons] into coming forward with what [he] legitimately perceived to be the truth...." According to respondent, although courts accept most plea agreements, his additional motivation for the letter was his concern that the judge, seeing the seriousness of the original charges, might reject the plea agreement.

As to the allegations that his conduct was prejudicial to the administration of justice, respondent pointed out that, as noted above, there was no change to the plea agreement or the sentence as a result of his conduct and, thus, no actual prejudice.

Litke testified that domestic violence victims have a difficult time prosecuting offenders. She added that, in this case, Parsons was particularly vulnerable because her young son was going through over a dozen surgical procedures to correct a vision problem. As to Parsons' contacts with Hernandez in prison, Litke testified that it is not uncommon for domestic violence victims to have contact with the offender after the incident.

Judge Garofolo testified before the DEC and was asked by the presenter to explain his basis for contacting the ethics authorities:

> Sure. Well, I was outraged, frankly, at the letter Mr. Milita sent to Miss Parsons, and I viewed it as an attempt to effect [sic] what was going to happen at time of sentencing, because there were a number of things that could occur at the time of sentencing, that, notwithstanding the guilty plea, could have resulted in anywhere from dismissal of the charges to the court's accepting the plea agreement or to the court's rejecting the plea agreement, and I viewed it as an inappropriate, to say the least, attempt to accomplish that act, or that result in the tone, content of the letter. I found, I thought the letter was snide, sarcastic, demeaning. . . .
>
> [T4/4/02 66]

As to the reasonableness of respondent's contentions about his motives, the following exchange between the presenter and Judge Garofolo is relevant:

> Q. Now, I don't know if you were present initially for the opening, but Mr. Milita indicated that he, this, and in his grievance, indicates that this was a zealous attempt to represent his client.
>
> My question is, at this point in time, after the plea agreement is entered into, what does a defense attorney, what is the job of a defense attorney to continue to zealously represent his client? Would you be able to answer that?
>
> A Yes. Well, I think so. When I saw this, it was an effort to get the best of both worlds in the sense that to avoid, to avoid the worse [sic] of what could happen through the criminal process by engaging in the agreement with Ms. Litke, and then seeking to get, do even better, do even better by perhaps having the victim come forward and saying it really didn't happen that way and, so what he did was he, he established an upward perimeter or parameter of what could occur and then could only do better whereas to take it to trial or to have insisted to the prosecutor that a case would have to run the normal course with grand jury or perhaps having the kidnapping indictment to face as opposed to the agreement that was ultimately entered into, was able to really, really avoid and minimize liability and then really try to just get down one more notch.
>
> • • •
>
> Q. Would it be unlawful for Mr. Milita to contact the victim and ask for a, for her to testify on behalf of a more lenient sentence?
>
> A. Having heard what I heard sitting as an observer to Ms. Litke's testimony and now knowing things that I, I did not know before concerning efforts on her part, apparently, I certainly think it would have been appropriate to say, Ms. Parsons, this is what happened in the case, you know, notwithstanding what happened, obviously you still have feelings for my client and, you know, I appreciate [sic] you came to court and told the judge this, that and the other, and to the extent the court may do something more lenient, you know, please do that. Certainly that would have been appropriate to do.
>
> Q. But it's not appropriate to provide a letter indicating, 'Should you find it within yourself to right the wrong you have perpetrated...'
>
> A. I found that letter to be extremely offensive.
>
> [T4/4/02 71-76]

* * *

The DEC found credible Parson's testimony about the effect that respondent's letter had on her. The DEC found the letter "snide, sarcastic and demeaning," with "no legitimate purpose" other than "to embarrass and humiliate her." The DEC found that respondent was using the letter to chastise Parsons and to vent his own and his client's frustration at what "he perceived to be perhaps untruthful testimony." As noted above, respondent testified that one of the purposes of the letter was to "cement the plea agreement" by having Parsons come forward and state that the events in question were not as serious as they might appear from the police report; in this fashion, the court would be more inclined to accept the plea agreement. As to this contention, the DEC pointed out that respondent, a very experienced criminal trial attorney, acknowledged that it is extremely rare for a negotiated plea agreement to be rejected. The DEC found no indication of a possibility that the plea might be rejected. The DEC concluded that respondent's letter was intended to accuse Parsons of dishonesty, to harass her and to personally attack a vulnerable victim, all in violation of RPC 4.4.

Similarly, the DEC found that respondent's letter to Parsons violated RPC 8.4(d). It rejected respondent's contention that he was seeking to "cement the plea agreement." According to the DEC, respondent "was instead trying to get Ms. Parsons to recant her previous statements so that defendant Hernandez' sentence would be lesser than the contemplated amount pursuant to the plea agreement. It was basically an attempt to strong arm a witness into changing her story so that the sentence could be dropped a notch or two."

The DEC recommended that respondent receive a three-month suspension.

* * *

Upon a de novo review of the record, we are satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

Respondent contended that he did not violate RPC 8.4(d) because there was no actual prejudice to the administration of justice as a result of his letter to Parsons. Although respondent was correct that the plea and sentencing proceeded as agreed, there was an actual prejudice by the wasting of judicial resources expended because of his actions. Litke prepared and filed a motion to keep respondent away from Parsons, which had to be reviewed and decided by the court. In that regard, respondent violated RPC 8.4(d).

As to the allegations of a violation of RPC 4.4, that rule states as follows:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Although RPC 4.4 is more commonly applied in connection with improper conduct in gathering evidence, in our view, respondent's conduct also falls within the ambit of that rule. At the hearing below, respondent argued that his intent was not to embarrass Parsons. The rule does not, however, require actual embarrassment on the part of the third person. It is sufficient that the lawyer's purpose be to embarrass the third person. We are of the opinion that respondent chose his language, at least in part, to embarrass Parsons. In principle, thus, the rule is applicable to the circumstances of this

case.

Furthermore, in the final draft of the Model Rules of Professional Conduct by the American Bar Association Commission on Evaluation of Professional Standards, the commission compared RPC 4.4 to DR 7-102(A)(1), formerly applicable, which provided that a lawyer shall not "take . . . action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[2] The record makes it clear that, at a minimum, the letter was intended to attack Parsons' credibility and, therefore, her character.

As noted above, respondent contended that he wanted Parsons to corroborate the factual basis for the plea to criminal restraint, in case Judge Garofolo was inclined to reinstate the more serious charges. We agree, however, with the conclusion of the DEC for two reasons. First, in issues of credibility we generally defer to the DEC, which found respondent's explanation for his actions not credible. Second, the language of the letter itself goes far beyond respondent's stated intent. There is nothing in it that clearly expresses respondent's supposed concerns about the court's rejecting the plea. Rather, respondent's focus was on repeatedly insulting Parsons.

In support of its findings, the DEC pointed to In re Vincenti, 114 N.J. 275 (1989), (three-month suspension where attorney challenged opposing counsel and witness to fight, used loud abusive and profane language against adversary and opposing witness and used racial innuendo; previous discipline was an aggravating factor). The DEC

[2] The New Jersey version of the disciplinary rule stated "In his representation of a client, a lawyer shall not: . . . take other action on behalf of his client when he believes that such action would serve merely to harass or maliciously injure another."

recommended that, like Vincenti, respondent receive a three-month suspension. The comparison is readily apparent. Respondent already has received a six-month suspension for misconduct in criminal pretrial negotiations and in obtaining information to assist a client. Seemingly, he has an inclination for overstepping the bounds of zealous advocacy.[3]

One more point warrants mention. In her motion before Judge Garofolo, Litke stated that respondent's conduct was "approaching witness tampering." At the DEC hearing, however, Litke conceded that, in fact, without a protective order, respondent had the right to speak with all witnesses that would testify for the state.[4]

A majority of our members determined that, in light of respondent's prior discipline and his inability to recognize the boundaries of zealous representation, a three-month suspension is appropriate. See In re Adelle, 174 N.J. 348 (2002) (three-month suspension imposed in a default matter; in representing the client, attorney used means that have no substantial purpose other than to embarrass, delay or burden a third person; attorney also failed to cooperate with disciplinary authorities and engaged in conduct involving deceit or misrepresentation; prior reprimand in a default matter). Three members voted for a reprimand. One member recused herself.

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[3] There is a pending matter against respondent involving allegations of communication with represented parties in a criminal proceeding. A DEC hearing is scheduled for early 2003.

[4] There was a restraining order in place preventing Hernandez from contacting Parsons. To the extent that respondent testified that, in his letter, he was expressing his client's feelings, it could be said that he was assisting his client in violating the restraining order against him. Because, however, respondent was not charged with misconduct in this respect and the issue was not litigated below, we made no findings in this regard.

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

Rocky L. Peterson
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Vincent J. Milita, II
Docket No. DRB 02-314

Argued: October 17, 2002

Decided: January 24, 2003

Disposition: Three-month suspension

Members	*Disbar*	*Three-month 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:		5	3				1

Robyn M. Hill 2/3/03
Robyn M. Hill
Chief Counsel