SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-104
District Docket No. XIV-04-081E

IN THE MATTER OF	:
DAVID C. ANTON	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 20, 2004

Decided: June 23, 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 based on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE") pursuant to R.1:20-14(a), following respondent's suspensions from the practice of law in California.

Respondent was admitted to the New Jersey bar in 1981 and the California bar in 1980. He has no history of discipline in New Jersey.

On May 12, 2000, the Supreme Court of California entered an order imposing a one-year suspension on respondent. The suspension, however, was stayed, and respondent was placed on probation for two years, conditioned upon his serving a forty-five day suspension. The discipline resulted from a stipulation entered into on January 12, 2000, between respondent and the State Bar of California, in which respondent admitted violating California disciplinary rules that correspond to New Jersey's RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice). The stipulation established that

> [r]espondent represented plaintiff Nancy C. Lavelle in a wrongful termination action filed on July 20, 1995 in the United States District Court for the Northern District of California entitled Lavelle v. Bank America Corporation et al, case number C 95-2637 SBA. Defendants in that action filed a motion for summary adjudication on November 5, 1996. On January 7, 1997, Respondent filed an opposition to the defendants' motion, which relied, in part, upon his declaration and evidence attached thereto. Respondent's declaration referenced a "note" allegedly executed by plaintiff in February 1995. Defendants [sic] reply brief suggested that the note was fabricated and presented convincing evidence to support their contention. In response, Respondent submitted a letter to the Court, indicating

> that the date on the note was "incorrect and a mistake," and requested that the note be withdrawn.
>
> On March 18, 1997, the Court denied defendants' motion. It also found that Respondent's response to defendants' allegations did not sufficiently address the issue of the note's authenticity. Therefore, the Court ordered Respondent to file a Certificate of Counsel addressing defendants' allegations regarding the fabrication of evidence. On March 31, 1997, Respondent filed his Certificate of Counsel in which he admitted he had "created" the note. He took full responsibility for the fabrication and explicitly stated that no one else participated in the preparation and submission of the note. He attributed the fabrication to emotional and mental difficulties and stated that as a result of his conduct, he had sought counseling, intended to take a sabbatical from his law practice effective August 1, 1997, and he had submitted a copy of his Certificate of Counsel to the State Bar. Based upon Respondent's representations, the Court referred the matter to the State Bar for investigation by order dated April 23, 1997.
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> [OAEbEx.B][1]

Respondent served his forty-five day suspension and was reinstated to the practice of law in California on July 26, 2000.

Three years later, on October 16, 2003, the Supreme Court of California suspended respondent for a two-year period. Again, the suspension was stayed, and respondent was placed on

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[1] OAEb denotes the Office of Attorney Ethics' brief dated March 24, 2004.

probation for two years, subject to certain conditions, which included that he serve a ninety-day suspension. This suspension was also based on a stipulation, filed June 11, 2003, between respondent and the State Bar of California. Respondent admitted that he engaged in a conflict of interest, in violation of California disciplinary rules. According to the stipulation:

> [p]rior to 1992, Rhonda Witharm was employed as a police officer for the city of Milpitas. In or about 1992, Rhonda Witharm employed respondent to represent her in a discrimination lawsuit against Milpitas. On or about December 23, 1996, fellow police officers Shawn Saulsbury and Ruth Revallier also employed respondent to represent them in a discrimination lawsuit against Milpitas. On or about December 23, 1996, Witharm, Saulsbury and Revallier executed a fee agreement. The fee agreement provided that respondent would receive one third of any settlement recovery.
>
> At the time that respondent agreed to represent all three, he contends that he discussed with his three clients the possibility that Milpitas might present them with a joint settlement offer. However, respondent contends that his clients stated that they had no objection to considering a joint offer and agreed to split any joint offer equally.
>
> The three clients' interests potentially conflicted since they each might want to maximize her recovery, rather than agreeing to split it evenly. At the time respondent agreed to represent all three clients, he realized that his clients' interests potentially conflicted.
>
> Respondent included a provision in the fee agreement which stated that in the event of

a settlement the three women would equally split any settlement. Respondent never disclosed in writing to his clients that their interests potentially conflicted. Respondent never informed his clients in writing that their interests potentially conflicted or [sic] the relevant circumstances and the reasonably foreseeable adverse consequences if respondent represented all three clients.

. . . .

On or about May 5, 1998, respondent's three clients agreed to settle their claim against Milipitas [sic] for a lump sum payment of $250,000 plus a disability package and executed a written settlement agreement with Milpitas. Prior to May 5, 1998, respondent's clients' interests actually conflicted since they received a lump sum offer and it was in the best interests of each of respondent's clients to maximize their recovery.

At the time respondent received Milipitas'[sic] settlement offer, he knew his clients' interests actually conflicted. Respondent did not disclose in writing to any of his clients the relevant circumstances of the actual and reasonably foreseeable adverse consequences to them and did not obtain their written consent to respondent's continued representation of each of the clients.

. . . .

Respondent represented all three clients when they entered into an aggregate settlement. Respondent did not disclose in writing to any of his clients the relevant circumstances of the actual and reasonably foreseeable adverse consequences to them and did not obtain their written consent to the aggregate settlement.

[OAEbEx.D]

After serving a ninety-day suspension, on February 13, 2004, respondent was reinstated to the practice of law in California.

Respondent did not advise the OAE of either California suspension, as required by R. 1:20-14(a) (requiring attorneys admitted to practice in this state to promptly inform the OAE of any discipline imposed in another jurisdiction).

On February 6, 1989, respondent received a private reproval (equivalent to New Jersey's private reprimand, a former form of discipline) in California, for minor recordkeeping violations. The record does not reveal whether respondent reported this violation to the OAE.

The OAE pointed out that the New Jersey Supreme Court does not customarily impose long-term suspensions and then stay the suspension conditioned on the service of a shorter term of suspension. Based on precedent, therefore, the OAE recommended that respondent receive a three-month suspension.

Following a de novo 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 the Board rests for purposes of disciplinary proceedings), we adopt the findings of the Supreme Court of California.

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:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (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 misconduct established warrants substantially different discipline.

As to respondent's misconduct in the Lavelle matter, we agree with the OAE, that a review of the record does not reveal any conditions that would fall within the scope of subparagraphs (A) through (D). As to subparagraph (E), however, respondent's conduct in New Jersey would not be met with a one-year suspension, as in California.

Respondent fabricated evidence and submitted it in connection with papers he filed in opposition to a motion for summary adjudication. Generally, in matters involving misrepresentations to a tribunal, the discipline imposed in New

Jersey ranges from an admonition to a term of suspension. See In re Lewis, 138 N.J. 33 (1994) (admonition for attempting to deceive a court by introducing into evidence a document falsely showing that a heating problem in an apartment of which the attorney was the owner/landlord had been corrected prior to the issuance of a summons); In re Mazeau, 122 N.J. 244 (1991) (reprimand for failure to disclose to a court representation of a client in a prior lawsuit where 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 Paul, 167 N.J. 6 (2001) (three-month suspension for attorney who made oral misrepresentations to his adversary, and written misrepresentations in, among other things, a deposition and several certifications to a court, in violation of RPC 3.3(a), RPC 8.4(c) and RPC 8.4(d)); In re D'Arienzo, 157 N.J. 32 (1999) (attorney suspended for three months for multiple misrepresentations to a judge concerning his tardiness for court appearances or failure to appear); In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension where the attorney did not diligently pursue a matter, made misrepresentations to the client about the status of the matter and submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the matter); In re Mark, 132 N.J. 268 (1993) (attorney suspended for three months for misrepresenting

to the court that his adversary had been supplied with an expert's report and then creating another report when the attorney could not find the original; in mitigation, it was considered that the attorney was not aware that his statement was untrue and that he was under considerable stress from assuming the caseloads of three attorneys who had recently left the firm); and In re Telson, 138 N.J. 47 (1994) (six-month suspension where attorney altered a court document to conceal the fact that a divorce complaint had been dismissed; thereafter, he submitted the uncontested divorce to another judge, who granted the divorce; the attorney then denied to a third judge that he had altered the document).

When respondent's conduct in Lavelle is compared with those of the above attorneys, we are persuaded that the appropriate level of discipline is a three-month suspension.

We are unable to conclude, however, that respondent's conduct in the Witharm matter violated the New Jersey conflict of interest rules. The California Supreme Court found that respondent violated rules 3-310(C)(1) and 3-310(D), which provide:

> (C) A member [of the bar] shall not, without the informed written consent of each client:
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict.
>
> . . . .

> (D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of one or more clients without the informed written consent of each client.
>
> [Emphasis added.]

The New Jersey conflict of interest rule at the time of respondent's conduct, however, did not require the client's written consent to the multiple representation. To avoid running afoul of the rule, all the attorney was required to have was a reasonable belief that the representation would not be adversely affected by the relationship with the other client, to make full (oral) disclosure of the circumstances to the client, and to obtain the client's (oral) consent to the simultaneous representation. RPC 1.7(a) and (b). Effective January 1, 2004, the rule requires that each client give informed consent, confirmed in writing, after full disclosure and consultation.

Nothing in the record indicates that respondent made or did not make full (oral) disclosure of the circumstances to each client and obtained or did not obtain their (oral) consent to the representation. The stipulation states merely that

> [a]t the time that respondent agreed to represent all three [clients], he contends that he discussed with his three clients the possibility that Milpitas might present them with a joint settlement offer. Respondent claims that he stated his preference to avoid a joint settlement offer. However, respondent contends that his clients stated that they had no objection to considering a

joint offer and agreed to split any joint offer equally.

[OAEaEx.D.][2]

The problem with the above statement is twofold: it does not contain stipulated facts, but only respondent's contentions, and it does not address whether respondent orally and fully disclosed to his clients the circumstances of the joint representation and obtained their oral consent thereto. There is no clear and convincing evidence that respondent violated the RPC in effect at the time. The only violations were, thus, RPC 8.4(c) and (d) in the Lavelle matter.

Based on the foregoing, we determine that a three-month suspension is the appropriate discipline for respondent's misconduct. One member did not participate.

We further determine to 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

[2] "OAEa" refers to the appendix to the OAE's brief.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David C. Anton
Docket No. DRB 04-104

Argued: May 20, 2004

Decided: June 23, 2004

Disposition: Three-month suspension

Members	***Disbar***	***Three-month Suspension***	***Reprimand***	***Admonition***	***Dismiss***	***Disqualified***	***Did not participate***
Maudsley		X					
O'Shaughnessy		X					
Boylan							1
Holmes		X					
Lolla		X					
Pashman		X					
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		8					1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel