

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 00-055

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IN THE MATTER OF  
DENNIS D. S. MCALEVY  
AN ATTORNEY AT LAW

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Decision

Argued: April 13, 2000

Decided: December 20, 2000

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

Respondent waived 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"), pursuant to R.1:20-14, following the imposition of a public reprimand by the United States District Court of New Jersey on August 31, 1999.

Respondent was admitted to the New Jersey bar in 1965. He received a public reprimand in February 1976 for lack of civility, good manners and common courtesy before

the court and officers of the court. In re McAlevy, 69 N.J. 349 (1976). In 1983, respondent was suspended for a three-month period for conduct prejudicial to the administration of justice, undignified or discourteous conduct degrading to a tribunal and the intentional violation of established rule of procedure. In re McAlevy, 94 N.J. 201 (1983).

Respondent agreed to the imposition of discipline by the federal court. In his affidavit of consent dated July 9, 1999, respondent admitted violating RPC 1.2(a) (failure to abide by a client's decision as to whether client should testify) and RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

This matter was reported to the ("OAE") by the United States Attorney's Office on January 6, 1999. Respondent had represented the defendant In the Matter of United States v. Lore. In the decision in that matter, the judge referred respondent's conduct to the Chief Judge of the United States District Court to institute federal disciplinary proceedings.

The record sets forth the following facts:

Respondent initially represented Joseph Lore in the early 1990s, in a New Jersey state criminal matter that was resolved to Lore's satisfaction. Thereafter, respondent defended Lore in connection with a federal indictment returned in the United District Court, District of New Jersey, in June 1996.

The federal indictment charged Lore with loan sharking activities from 1987 through 1991. The case was tried over a four-week period before the Honorable Joseph H.

Rodriguez, U.S.D.J. Lore did not testify in his own behalf. He was ultimately convicted, sentenced to a prison term of fifty-one months and ordered to pay restitution of \$20,000.

Following the conviction, Lore retained new counsel, who filed a motion to vacate or set aside the conviction. The motion was based on a claim of ineffective assistance of counsel. More specifically, Lore claimed that respondent prohibited him from testifying at trial, despite Lore's repeated pleas to respondent to be permitted to testify. Lore further claimed that he was unaware of his right to overrule respondent's decision.

On June 8, 1998, Judge Rodriguez conducted a full evidentiary hearing in connection with a motion for a new trial. Respondent submitted an affidavit in support of Lore's motion for a new trial and testified at the evidentiary hearing. Respondent's affidavit and testimony bolstered Lore's ineffective assistance claim. Respondent's affidavit stated that Lore maintained his innocence throughout the trial and was anxious to testify in his own behalf. According to respondent, Lore raised the issue of testifying on a number of occasions leading up to and during the trial. At first, respondent told Lore a decision regarding his testimony was premature. Towards the end of the defense case, respondent admitted that he told Lore that he would not permit him to testify. Respondent also admitted that he never informed Lore that he had a right to testify in his own defense and that ultimately the decision was his. Respondent's affidavit stated the following:

7. Lore insisted that he wanted to testify, but I disregarded his request. Lore was a client who had no experience with the legal system. I felt that Lore was unqualified to make the decision as to whether he should testify and that he must follow my instructions.

8. I am an attorney with over 30 years of trial experience. The government's case against Lore was weak, and I believed that Lore had a good chance of acquittal. I felt that I, not Lore, had the right to decide whether he would take the stand. Therefore, I ignored his stated desire to testify and refused to call him as a witness during the presentation of his defense case, although I called several other witnesses.

9. I never explained to Lore that he had a constitutional right to testify in his own defense, that he could overrule my judgment, or that the decision to testify was his to make.

[Emphasis supplied]

At the hearing before Judge Rodriguez, respondent ratified the statements made in his affidavit and even admitted that he coerced Lore not to testify:

QUESTION: In your estimation, would you characterize or did you, would you say that you actually coerced Mr. Lore into not testifying?

RESPONDENT: I told him that he was not testifying.

QUESTION: In your view, would you say you coerced him?

\* \* \*

RESPONDENT: There's no question about the fact that he [Lore] wanted to testify and I didn't want him to, so in that context there's no question I coerced him.

Lore also testified at the hearing, corroborating respondent's testimony. According to Lore, respondent never advised him that he was empowered to overrule respondent's decision that he should not testify.

In an opinion dated October 30, 1998, Judge Rodriguez granted Lore's motion for a new trial. The judge declined to pass judgment on the propriety of respondent's conduct in the case, but indicated in his opinion that he would refer the matter to the United States District Court, in accordance with Local Civil Rule 104.1(e).

The OAE recognized that respondent's prior discipline might be considered an aggravating factor, but noted that the conduct in the earlier cases was unrelated to the conduct in this matter. The OAE also noted that a considerable length of time had elapsed since respondent's earlier misconduct. The OAE, thus, did not urge the Board to give great weight to respondent's prior disciplinary matter, in determining the level of discipline in this case. The OAE recommended the imposition of a reprimand.

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Upon a de novo review of the full record, we determined 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 a disciplinary proceeding), we adopt the findings of the United States District Court of New Jersey.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a), which directs 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 upon which the discipline in another jurisdiction was predicated that it clearly appears that:

- (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; or
- (E) the misconduct established warrants substantially different discipline.

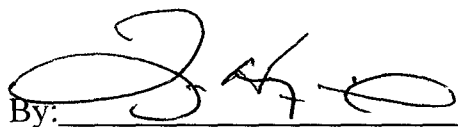
A review of the record does not reveal any conditions that would require the imposition of different discipline. In New Jersey, matters involving similar misconduct have resulted in reprimands. See In re Sunberg, 156 N.J. 396 (1998) (reprimand where attorney failed to consult with client before permitting two matters to be dismissed, created a fictitious arbitration award to mislead his partner and lied to the OAE about the matter during the disciplinary investigation, in violation of RPC 1.2(a), RPC 8.1(a) (making false statement of material fact in connection with a disciplinary matter and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation)); In re Resnick, 154 N.J. 6 (1998) (reprimand where attorney failed to abide by client's decision to reject a settlement offer in a litigated matter, but accepted the settlement, deposited the proceeds in his trust account and disbursed his fee to himself, in violation of RPC 1.2(a) and RPC 1.15(c) (failure to safeguard property) and In re Weber, 138 N.J. 35 (1994) (reprimand where attorney failed

to provide sufficient information to allow client to make informed decisions and misled the client into believing that the case had been decided on the merits, in violation of RPC 1.4(b) and RPC 8.4(c)).

Respondent admitted his violations in this matter. The OAE properly determined that respondent's prior ethics transgressions should not significantly affect the discipline imposed here. Based on the foregoing factors, we unanimously determined to reprimand respondent. One member did not participate.

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

Dated: 12/20/00

By:  \_\_\_\_\_

LEE M. HYMERLING  
Chair  
Disciplinary Review Board

*SUPREME COURT OF NEW JERSEY*

*DISCIPLINARY REVIEW BOARD  
VOTING RECORD*

**In the Matter of Dennis D.S. McAlevy  
Docket No. DRB 00-055**

**Argued: April 13, 2000**

**Decided: December 20, 2000**

**Disposition: Reprimand**

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling			X				
Peterson			X				
Boylan							X
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy			X				
Schwartz			X				
Wissinger			X				
<b>Total:</b>			8				1

*Robyn M. Hill* 1/17/01  
Robyn M. Hill  
Chief Counsel