SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 00-205

IN THE MATTER OF

ALLEN C. MARRA

AN ATTORNEY AT LAW

Decision

Argued: September 21, 2000

Decided: January 29, 2001

John McGill, III appeared on behalf of the Office of Attorney Ethics.

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 VC Ethics Committee ("DEC"). The first count of the two-count complaint charged respondent with a violation of RPC 5.5(a) (unauthorized practice of law) and RPC 8.4(d) (conduct prejudicial to the administration of justice), stemming from his practicing law while suspended. Count two charged respondent with a violation of RPC 1.15(d) and R.1:21-6(b) (recordkeeping).

Respondent was admitted to the New Jersey bar in 1967. He is engaged in the

practice of law in Montclair, Essex County.

Respondent was privately reprimanded on June 19, 1992 for lack of diligence and failure to communicate in a civil matter. He received a public reprimand on December 7, 1993 for failing to communicate with the client, having an employee "notarize" false signatures, failing to deposit settlement proceeds into his trust account and failing to cooperate with disciplinary authorities. In re Marra, 134 N.J. 521 (1993). More recently, on July 28, 1997, respondent was suspended for three months for gross neglect, failure to abide by a client's decisions, lack of diligence, failure to communicate, failure to cooperate with disciplinary authorities and conduct involving dishonesty, fraud, deceit or misrepresentation. In re Marra, 149 N.J. 650 (1997). He was restored to practice on October 6, 1998.

* * *

Count One (Practicing Law While Suspended)

On January 22, 1998, while respondent was serving a three-month suspension, he appeared in municipal court in Clifton, Passaic County, on behalf of Gary C. Del Monte, regarding the dismissal of simple assault charges and the execution of Del Monte's guilty plea to possession of marijuana. Respondent received $700 for his representation of Del Monte.

Thereafter, on or about July 20, 1998 respondent was again retained by Del Monte, this time in connection with a "pit bull case" in Clifton municipal court. On July 21, 1998 respondent sent a letter to the court stating that he had been recently retained and requested

an adjournment of Del Monte's scheduled appearance. Respondent's letterhead identified him as an attorney and listed a New Jersey address.[1] Three or four days later, respondent "had a consciousness of guilt," informed Del Monte of his suspension and suggested that he retain another attorney. Respondent also returned a $250 retainer that Del Monte had paid him.

Respondent conceded that he was guilty of misconduct, but contended that no additional suspension should be imposed.[2] He argued that the charges stemming from his representation of Del Monte during his suspension had already been "disposed of" by the New Jersey Supreme Court when it considered his petition for reinstatement. Respondent raised, but did not brief, the defenses of collateral estoppel, double jeopardy, denial of due process and excessive punishment.

To understand respondent's contentions, a review of his reinstatement proceedings is necessary. In June 1998, with no objection from the Office of Attorney Ethics ("OAE"), we recommended that respondent be reinstated. Before the Court issued a final order, the OAE learned of respondent's representation of Del Monte and filed an objection to the reinstatement. After hearing oral argument from both respondent and the OAE, the Court reinstated respondent.

Respondent's argument on this issue is as follows:

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[1]A newspaper article about the case identified respondent as Del Monte's attorney.

[2]Respondent called the July 21, 1998 representation "a technical violation."

[T]he Supreme Court heard me in 1998, there were no - it's like arguing for a judge, what I did I did and this court heard it, there's nothing more that's said in the year 2000 of March 28 that was said in September of 1998. Technically speaking, there may be a different rule and different application, but they heard it all. Instead of three people sitting like yourself, it was the entire body of the Supreme Court that heard it all and I feel that if I got my punishment for it and they felt that okay, we're not going to give him any more time, so to speak, we're going to give him the time that he spent since he did more than he really should have, anyway, he got a three month suspension and wound up doing 15 months. I believe that Supreme Court and their infinite wisdom felt that he should not get any more and I'm asking that this Panel, if a suspension is warranted would be that time that I already served would serve toward this and only because there's nothing new here today. The charges that are here today were the same charges that the Supreme Court heard, so I guess that's it.

[T3/28/00 at 45]

Later, in reply to questions from a panel member, respondent testified as follows:

> Q. With respect to Count One, is it fair to say that all of what you have to say is really in support of mitigation throughout the day?
>
> A. Yes.
>
> Q. As a defense to the allegations of violations?
>
> A. Yes.
>
> Q. So this argument of Res Judicata, you characterized it at different times as double jeopardy, in fact, is a mitigation argument?
>
> A. Yes.
>
> Q. You are conceding at this point that there were violations?
>
> A. Yes. Absolutely.
>
> Q. And if we're to consider the issues of what was before the Supreme Court we should consider it now more in terms of mitigation of

sanction?

A. Correct.

[T3/28/00 at 55-56]

Before us, respondent reiterated his argument that it appeared that he was "put before the guillotine once again for something that, in [his] opinion, was already heard."

Contrarily, the OAE argued before the DEC that the reinstatement proceeding did not, as a matter of law, dispose of the issue of whether respondent's representation of Del Monte constituted unethical conduct. Rather, the OAE argued, the Court took into account the mitigating circumstances related to respondent's health (see discussion below) and the financial hardship that continuing the suspension would cause him and determined that he should be reinstated. The OAE argued that the fact that respondent was reinstated is not "necessarily" a mitigating factor and that the earlier Supreme Court action was not a final adjudication of the matter.

* * *

The complaint charged respondent with a violation of RPC 5.5(a) and RPC 8.4(d).

Count Two (Recordkeeping violations)

Respondent was the subject of a March 26, 1990 random audit, which revealed several recordkeeping deficiencies, including (1) failure to maintain trust and business account receipts journals; (2) failure to maintain trust and business account disbursement journals;

(3) failure to perform quarterly trust account reconciliations; (4) failure to remove inactive trust ledger balances; and (5) ledger cards with negative client balances.

Following the audit, the OAE instructed respondent to correct the deficiencies. By letter dated July 25, 1990 respondent represented to the OAE that he had made the necessary corrections.

Thereafter, on October 31, 1997, respondent was the subject of a demand audit. The focus of the audit was the disposition of settlement proceeds that respondent received in behalf of a client. The demand audit revealed a number of deficiencies, including five that respondent certified as remedied, following the 1990 audit. The deficiencies included (1) failure to maintain trust and business account receipts journals; (2) failure to maintain trust and business account disbursement journals; (3) failure to perform quarterly trust account reconciliations; (4) failure to remove inactive trust ledger balances; (5) ledger cards with negative client balances; and (6) commingling of personal funds and trust funds.

The OAE argued that, because respondent had been put on notice of his recordkeeping deficiencies at the 1990 audit, his subsequent failure to comply with the recordkeeping requirements was wilful.

Respondent admitted "not keeping the best records," but insisted that his conduct was negligent, rather than wilful, as charged in the complaint. Respondent contended that he was unable to keep up with his recordkeeping responsibilities because of a number of factors, including a serious medical condition. Along that line, respondent offered into evidence a

number of medical records and reports. Respondent suffered a heart attack in 1985 and, according to his testimony before us, has since undergone seven catheterizations and five angioplasties. In December 1998 respondent underwent a quadruple bypass. Respondent stated that his medical condition was causally related to the ethics charges against him and should serve as a mitigating factor.

The complaint charged respondent with a violation of RPC 1.15(d) and R1:21-6(b).

* * *

The DEC found that respondent violated RPC 5.5(a) and RPC 8.4(d) by representing Del Monte on January 22, 1998 and July 21, 1998, while he was suspended from practice. The DEC also found that respondent failed to comply with recordkeeping requirements, in violation of RPC 1.15(d) and R.1:21-6(b).

In recommending only a reprimand, the DEC was swayed by the mitigating circumstances presented by respondent, including

> . . . factors of his poor health . . . and financial hardship which would result from an additional period of suspension from the practice of law. The panel is also persuaded by the fact that, in 1998, the New Jersey Supreme Court considered the same evidence regarding the DelMonte [sic] matters, as set forth in Count One of the complaint, and mitigation. Thereafter, after considering this evidence, on October 6th, 1998, the New Jersey Supreme Court reinstated Respondent to the practice of law.

* * *

Upon a de novo review of the record, we are satisfied that the conclusion of the DEC that respondent's conduct was unethical is fully supported by clear and convincing evidence. We also find that this matter is properly before us for review and for the imposition of discipline.

Respondent contended that the two instances of his practicing law while suspended have already been reviewed by the Court and, therefore, should not be the subject of further discipline. Respondent's argument is without merit. Reinstatement petitions are reviewed on the record. Even if, for whatever reason, the Court grants oral argument in such matters, it is not a plenary hearing, with briefs or testimony under oath. It cannot be said, thus, that, under such circumstances and with a limited record, the Court fully reviewed and resolved respondent's further ethics improprieties. In fact, the Court granted the reinstatement presumably because it was aware that the new charges would be fully reviewed by the OAE and the Board. Most likely, the Court, as the OAE contended, recognized the financial hardship on respondent, determined that he was not an immediate threat to the public and reinstated him. The charges of respondent's practicing law while suspended are, therefore, properly before us.

The level of discipline for practicing law while suspended has generally ranged from a long-term suspension to disbarment, depending on a number of factors, including the attorney's level of cooperation with the disciplinary proceedings, the presence of other

misconduct and the attorney's prior disciplinary history. In In re Lisa, 158 N.J. 5 (1999), a one-year suspension was imposed where the Board took into consideration that a childhood incidence of sexual abuse by a neighbor caused the attorney to be highly anxious about offending other people or refusing their requests. Out of fear of offending a close friend, the attorney, while serving a suspension, agreed to assist as "second chair" in a New York criminal proceeding involving the friend. No venality or personal gain motivated the attorney's actions. In fact, he did not charge his friend for the representation. Finally, the attorney cooperated with the ethics system by entering into a disciplinary stipulation. In In re Grabler, 127 N.J. 38 (1992), the attorney was suspended for two years for practicing law while suspended, exhibiting gross neglect and making misrepresentations to client; the attorney had had two prior suspensions. In In re Beltre, 130 N.J. 437 (1992), the attorney was suspended for three years for appearing in court after he was suspended, misrepresenting his status to the judge, failing to carry out his responsibilities as an escrow agent, lying to the Board about maintaining a bona fide office and failing to cooperate with an ethics investigation. In In re Kasdan, 132 N.J. 99 (1993), the attorney was suspended for three years for continuing to practice law while suspended after the Court's express denial of her request for a stay of her suspension. The attorney also failed to disclose her suspension to her clients, her adversary or the courts, to keep complete trust records and to advise her adversary of the whereabouts and amount of escrow funds. In addition, the attorney displayed conduct involving dishonesty, fraud, deceit or misrepresentation. In In re Wheeler,

163 N.J. 64 (2000), the attorney received a three-year suspension for representing clients in three matters, while he was suspended. The attorney had a significant disciplinary history, including an earlier suspension for practicing law while suspended. In In re Goldstein, 97 N.J. 545 (1984), the attorney was disbarred for misconduct in eleven different matters and for practicing law while temporarily suspended by the Court and in violation of an agreement with the Board that he would limit his practice to criminal matters.

At the DEC hearing, the OAE suggested a three-month suspension as "a starting point," adding that, if mitigating factors are considered, a lesser sanction might be appropriate. At oral argument before us, however, the OAE asserted that a suspension of one year is appropriate, likening this matter to In re Lisa, supra, 5, 158 N.J. (1999). Although we agree with the OAE's assessment of the seriousness of this matter, we are unable to agree with the recommended level of discipline.

The transcript of respondent's January 22, 1998 appearance in Del Monte's behalf, exhibit C-2, shows that it was a simple matter and that respondent's appearance was extremely brief. As to the July 1998 incident, respondent took on the representation, sent a letter to the court asking for an adjournment and then determined that he could not handle the case because of his suspension. Shortly thereafter, respondent disclosed his suspension to the client and withdrew from the representation. Because we deemed the July 1998 incident a momentary lapse in judgment, which respondent quickly corrected, we found no violation of the disciplinary rules.

Respondent advanced no reason for his blatant disregard of the Court's order suspending him from the practice of law. Although we are sympathetic toward respondent and his plethora of cardiac problems, they do not explain or excuse his conduct. We, therefore, found that his January 22, 1998 court appearance violated RPC 5.5(a) and RPC 8.4(d).

As to the recordkeeping violations, respondent blamed them on his health problems and the pressures of his solo practice. Respondent, however, was the subject of a previous random audit, received an earlier warning from the OAE and knew that he had to comply with the recordkeeping rules. If he was unable to keep up with his recordkeeping responsibilities, he should have sought the help of an accountant. We, therefore, found a violation of RPC 1.15(d) and R1:21-6(b). Nevertheless, respondent's recordkeeping deficiencies do not elevate the level of discipline above that required for his more serious misconduct, practicing law during his suspension.

We are mindful of precedent for practicing law while suspended. It is a serious violation that is met with extensive discipline. Exceptionally, however, compelling circumstances justify a lesser sanction than that ordinarily required. We are persuaded that this case calls for discipline short of suspension. Indeed, since disciplinary cases are necessarily fact-sensitive, the appropriate measure of discipline in each case calls for a weighing of the nature of the ethics offense, mitigating circumstances and other considerations, such as the purpose served by a suspension and the need to protect the public

from the errant attorney. Here, we gave great consideration to respondent's voluntary withdrawal of the July 1998 representation, which we saw as a recognition that his conduct was wrong and that the wrong should not be perpetuated. We also took into account respondent's serious cardiac problems, which, in our view, had an effect on his judgment. Moreover, we noted that respondent served a fifteen-month suspension, rather than the three-month suspension imposed in July 1997. Finally, we saw no purpose in suspending respondent again, believing that our — and respondent's — acknowledgment of the seriousness of the offense sufficiently addresses the goals of the disciplinary system and the need for the public to maintain confidence in the legal profession. Accordingly, we unanimously determined that a reprimand is sufficient discipline for this respondent. We reiterate, however, that practicing law while suspended will continue to require severe discipline — in the form of a long suspension or even disbarment — absent the special circumstances we found in this case.

Two members did not participate.

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

Dated: 1/29/01

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Allen C. Marra
Docket No. DRB 00-205

Argued: September 21, 2000

Decided: January 29, 2001

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson							X
Boylan			X				
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy			X				
Schwartz							X
Wissinger			X				
Total:			7				2

Robyn M. Hill
Chief Counsel