SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 00-347

IN THE MATTER OF

SHMUEL KLEIN

AN ATTORNEY AT LAW

Decision

Argued: December 21, 2000

Decided:

Richard J. Engelhardt 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 on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-14, following respondent's June 30, 1997 five-year suspension in New York.[1]

[1] The OAE moved to impose reciprocal discipline in 1997 but withdrew its motion pending respondent's appeal of the bankruptcy court order that led to one of the New York grievances.

Respondent was admitted to the New Jersey bar in 1987. He has no disciplinary history.

Respondent's five-year suspension in New York resulted from his actions in three matters. However, the OAE's motion for reciprocal discipline encompassed only the first two matters. The OAE did not include the third matter in its motion because the documents in that matter support respondent's contention that his letter to the New York grievance committee did not contain any misrepresentations.

The Stein Bankruptcy Matter

The first matter arose out of respondent's 1994 representation of Moses Klein in a Chapter 13 bankruptcy case. The bankruptcy court sanctioned respondent for, among other things, giving false testimony during a hearing, filing a second bankruptcy petition after the first petition had been dismissed and falsely certifying on the second petition that the debtor had not previously filed a petition.

In determining that respondent's conduct violated DR 1-102(A)(4) [RPC 8.4(c)] (conduct involving dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(8) [RPC 8.4(b)] (conduct that adversely reflects on the attorney's fitness to practice law) and DR 1-102(A)(5) [RPC 8.4(d)] (conduct prejudicial to the administration of justice), the Supreme Court of New York, Appellate Division ("Appellate Division") made the following factual findings:

1. In an 'Extract of Bench Ruling Dismissing Chapter 13

Case and Imposing Sanctions on the Debtor's Attorney' (hereinafter bench ruling) dated June 9, 1994, the Honorable Stuart M. Bernstein, United States Bankruptcy Judge, found that the respondent, the debtor's attorney, engaged in improper conduct.

2. In the bench ruling, the court found that the respondent attempted to present an ex parte order to show cause to the court on or about March 28, 1994, which the court declined to entertain. The object of the order to show cause was to reimpose an automatic stay on the foreclosure sale of the debtor's home.

3. The court further found that, when the respondent again presented the order to show cause in the presence of the bank's attorney on or about March 30, 1994, he initially contended that a foreclosure sale of the debtor's home was imminent, which was not the case since no sale had been scheduled.

4. The respondent then represented that the debtor's confirmation hearing was scheduled for April 7, 1994, and that it was necessary to resolve the stay issue before then. Based on the respondent's representation, the court scheduled the hearing on the debtor's motion for April 6, 1994.

5. The court found that the respondent gave false testimony at the hearing on April 6, 1994, and that the respondent lied to cover his office's mistake in sending three checks for past due mortgage payments to the bank's attorneys rather than to the bank.

6. At the hearing on April 6, 1994, the court sanctioned the respondent for the aforementioned conduct, ordering him to pay $500 to the bank. When the bench ruling was reduced to writing, some nine weeks later, the respondent still had not paid the sanction.

7. The court further found that, throughout the many proceedings in the Stein bankruptcy matter, the respondent failed to disclose that the Chapter 13 trustee had moved before

another United States Bankruptcy Court Judge, Judge Jeffrey Gallet, to dismiss or convert the matter pursuant to 11 USC § 1307(c)(1), (e)(4) due to the debtor's failure to appear at a 'section 341' hearing and to deposit necessary funds with the trustee.

8. In the bench ruling, the court noted that the trustee's motion was returnable on April 7, 1994, the date that the respondent represented to the court as the date of the debtor's confirmation hearing. On that date, however, neither the debtor nor the respondent appeared in response to the trustee's motion or at the confirmation hearing. By an order dated April 7, 1994, Judge Gallet granted the trustee's motion and dismissed the case.

9. The court also noted that the foreclosure sale was rescheduled for the end of April 1994. On April 26, 1994, on the heels of the previous dismissal and on the eve of the sale, the respondent, on behalf of the debtor, filed a second bankruptcy petition.

10. The court found that the second bankruptcy petition constituted an 'abusive' Chapter 13 filing that was not done in good faith, but to frustrate the legitimate rights of the bank. The court further found that the second petition flouted a prior order of the court granting conditional relief from the stay, caused the bank unnecessary expenses, and abused the bankruptcy process.

11. The court also found that the respondent falsely certified, in response to a question on the second bankruptcy petition, that the debtor had not filed a bankruptcy petition during the previous six years. The court found that the respondent knew, based on his personal knowledge, that the debtor was ineligible to file the second bankruptcy petition since he had filed a petition on the debtor's behalf in November 1993, which was dismissed on April 7, 1994. Thus, the court found that the second petition was interposed to delay the foreclosure.

12. Based on the aforementioned violations, the court

> directed the respondent to pay, within 30 days, sanctions in the sum of $3,500: $2,500 to the Clerk of the United States Bankruptcy Court and $1,000 to the bank as compensation for its expenses, including attorney's fees.

The Appellate Division issued its opinion and order on June 30, 1997. In the meantime, however, respondent had appealed that part of the bankruptcy court's order that required him to pay $2,500 to the Clerk of the Court. The district court affirmed the decision of the bankruptcy court. However, on October 20, 1997, the United States Court of Appeals for the Second Circuit vacated the district court's order because respondent had neither been provided notice of nor an opportunity to be heard on the sanction imposed by the bankruptcy court. The matter was remanded to the bankruptcy court and respondent filed opposition to the sanction. On May 11, 1998, the bankruptcy court reiterated its prior findings, but reduced the sanction from $2,500 to $500 because respondent had been suspended from the practice of law.

Although respondent was suspended from practice in the state courts of New York, he continued to practice in the bankruptcy court. By letter dated December 5, 1997, the grievance committee for the United States District Court for the Southern District of New York ("Southern District") advised respondent that it had determined not to take any action against him.

The Goldstock Malpractice Action

In 1995, respondent represented himself in a legal malpractice action filed by Eliezer

Goldstock and the American Jewish Society for Distinguished Children, Inc. in the New York Supreme Court. The plaintiffs were represented by David Bushman.

By order dated October 6, 1994, the trial court warned respondent and Bushman to cease their "abusive" pleadings, correspondence and conduct and ordered that no further motions could be filed without prior court approval. Despite the October 1994 order, both counsel continued the behavior and the motion practice. On March 21, 1995, the trial court again warned both counsel to stop their "abusive" conduct. However, both attorneys continued the inappropriate conduct.

In determining that respondent's conduct violated DR 1-102(A)(8) and DR 1-102(A)(5), the Appellate Division made the following factual findings:

> 1. In a decision and order of the Supreme Court, Rockland County, dated October 6, 1994, the Honorable Anthony A. Scarpino, Jr., *inter alia,* dismissed 10 of the respondent's affirmative defenses in the above-entitled action, finding that either they were not defenses to the alleged claim or they were wholly without merit. The court noted that, despite the plaintiff's challenge, the respondent failed to making [sic] any showing of merit to the dismissed defenses.
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> 2. In the aforementioned decision and order, the court warned the respondent and opposing counsel 'that the abusive nature of the pleadings, correspondence, and conduct in this action must stop here. The hyperbole, harassment, and histrionics will no longer be tolerated. Failure to heed this warning will result in sanctions and referral by the Court to the Grievance Committee.' The court also stated that no further motions could be made without prior court approval.
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> 3. Upon information and belief, Justice Scarpino was reassigned on or about January 1, 1995, and the matter was

transferred to the Honorable Kenneth W. Rudolph.

4. On or about March 16, 1995, Justice Rudolph sent the respondent and opposing counsel a letter in which he stated that the 'stern warning' issued by Justice Scarpino, Jr., in his decision and order dated October 6, 1994, had 'been ignored and had gone unheeded'. [sic]

5. Justice Rudolph's letter also stated that, despite Justice Scarpino's order that no further motions be made without prior court approval, counsel continued the behavior described by Justice Scarpino as if the prior order never existed.

6. Justice Rudolph's letter advised counsel that a hearing would be held on March 21, 1995, to determine whether sanctions would be imposed against them for dilatory and oppressive conduct in violation of prior orders of the court.

7. In a decision and order dated March 29, 1995, Justice Rudolph, *inter alia,* found that, '[i]n complete contravention of the prior order of this Court and in violation of the preliminary conference order to serve his answer to the amended complaint the [respondent] has made an Omnibus Motion to compel arbitration, to renew previous motions to strike, to dismiss plaintiffs' complaint and to dismiss the action as to the individual plaintiff, Eliezer M. Goldstock'. [sic]

8. In the March 29, 1995 order the court also found that the omnibus motion included the respondent's third motion to compel arbitration, the two prior applications having been denied by the same court. Moreover, the respondent admitted to the court that he had no legal basis for making such application and that his request for arbitration was based on religious laws.

9. The court further found that, when opposing counsel agreed to a discontinuance of the action on behalf of the individual plaintiff pursuant to the respondent's motion (see subparagraph 7 above), the respondent said, 'I changed my mind, I want him in the action,' and the respondent did not want that portion of the relief requested. The court stated, '[T]his

contemptuous response clearly demonstrates [the respondent's] intent to harass his adversary and grind this litigation to a halt in a sea of frivolous motions.'

10. The court further stated that the respondent's attempt to revisit the previous decisions of the court was equally egregious. Despite the court's admonitions, the respondent displayed what appeared to be a complete lack of understanding of the serious nature of the proceedings by submitting a further affirmation in support of his omnibus motion on March 24, 1995, three days after a hearing on sanctions was completed by the court.

11. Based on the aforesaid conduct, the court imposed sanctions of $1,000 against the respondent, ordering him to pay that sum to the Lawyers' Fund for Client Protection of the State of New York within 20 days and to file proof of payment with the Clerk of the Supreme Court, Rockland County, within 10 days thereafter.

12. On or about May 4, 1995, Justice Rudolph sent the respondent a letter in which he stated that opposing counsel had been given permission to file a motion for summary judgment in response to which the respondent interposed affirmative defenses previously dismissed by a prior order of the court. The letter further stated that the respondent's correspondence indicated the respondent's awareness that he was not to revisit the previously dismissed defenses.

* * *

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 adopted the findings of the Supreme Court of New York,

Appellate Division.

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:
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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;
> >
> > (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.

We agree with the OAE that subsection (E) is applicable here; namely, that respondent's misconduct warrants substantially different discipline in New Jersey. The OAE urges a six-month suspension, citing In re Telson, 138 N.J. 47 (1994) (six-month suspension where the attorney altered a document to conceal the fact that a divorce complaint had been dismissed, thereafter submitted the uncontested divorce to another judge, who granted the divorce, then denied to a third judge that he had altered the

document) and In re Fink, 141 N.J. 231 (1995) (six-month suspension where the attorney failed to disclose secondary financing in closing documents for five mortgage closings and initially lied to the prosecutor's office as to why he had omitted the secondary financing information; in one of the transactions, the attorney executed a jurat on a power-of-attorney without having witnessed its signing by the grantor).

Respondent's failure to obey the trial court's orders to cease filing motions without prior leave of court would warrant a reprimand. See In re Frankfurt, 164 N.J. 596 (2000) (reprimand for failure to appear at pre-trial conferences, rude conduct toward the trial judge and her staff, failure to expedite litigation and lack of diligence); In re Hartmann, 142 N.J. 587 (1995) (reprimand where the attorney intentionally and repeatedly ignored court orders to pay opposing counsel a fee, resulting in a warrant for the attorney's arrest, and, in a separate case, engaged in discourteous and abusive conduct toward a judge in an attempt to intimidate her into hearing his client's matter that day); In re Lekas, 136 N.J. 515 (1994) (reprimand where the attorney disrupted a municipal court trial and ignored the judge's repeated orders for her to sit down or leave the courtroom).

Here, respondent not only failed to obey a court's orders, but he also made misrepresentations to a bankruptcy judge and filed a bankruptcy petition that contained a false statement. An attorney's misrepresentations to a court has resulted in discipline ranging from a reprimand to a lengthy suspension, depending on the circumstances. See In re Marlowe, 121 N.J. 236 (1990) (attorney reprimanded for falsely representing to the court

that all counsel consented to an adjournment of a matter); In re Chasan, 154 N.J. 8 (1998) (three-month suspension where the attorney distributed a fee to himself after representing that he would maintain the fee in his trust account, pending the resolution of a dispute with another attorney over division of the fee, and then misled the court into believing that he retained the fee in his trust account; attorney also misled his adversary, failed to retain fees in a separate account and violated recordkeeping requirements); In re Chulak, 152 N.J. 553 (1998) (three-month suspension where the attorney allowed a non-attorney to prepare and sign pleadings in the attorney's name and permitted a non-attorney to be designated as "Esq." on his attorney business account and then misrepresented to the court his knowledge of these facts; attorney also assisted in the unauthorized practice of law); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension for multiple misrepresentations to a judge for attorney's tardiness or failure to appear for court appearances); In Lunn, 118 N.J. 163 (1990) (three-year suspension where the attorney submitted a false written statement allegedly signed by the attorney's deceased wife in support of the attorney's own claim and lied about it under oath in a civil action); In re Kushner, 101 N.J. 397 (1986) (three-year suspension for attorney's false certification to the court that his signatures on promissory notes were forgeries).

In determining the appropriate sanction, we considered that respondent's conduct took place in 1994 and 1995, that he continued to practice in the bankruptcy courts of New York and New Jersey without further problems and that the Southern District determined

not to take any disciplinary action against him. Furthermore, the district court, while affirming the bankruptcy court's sanction order, stated that respondent "actively practices in this district and is well and favorably known to the court. He is an attorney of diligence and good reputation and highly regarded." The district court also remarked that, while respondent's conduct in the bankruptcy court was "a sanctionable event, I don't think that the level of misconduct is quite so serious as you yourself [respondent] seem to feel that it's being perceived."[2] As to the statement in the second bankruptcy petition that Stein had not filed a petition during the previous six years, the district court accepted respondent's explanation that the statement was not deleted from the second petition because of a clerical error.

One final point requires clarification. In its brief, the OAE indicated that the statements contained in paragraph nine of the Appellate Division's findings in the Goldstock matter are not supported by the transcript of the March 21, 1995 hearing. Although it is not entirely clear from the Appellate Division's decision that the statements were purportedly made during the March 21, 1995 hearing, we share the concern of the OAE as to the findings made by the Appellate Division in that paragraph. In any event, however, those findings would not affect the discipline we have imposed on respondent.

Based upon the foregoing, we unanimously determined to suspend respondent for

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[2] The district court's remarks predate the Appellate Division's decision to suspend respondent for five years.

three months. Two members did not participate.

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

Dated: 2/6/2001

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Shmuel Klein
Docket No. DRB 00-347

Decided: **February 6, 2001**

Disposition: **three-month suspension**

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

By Isabel Frank 6/8/01
Robyn M. Hill
Chief Counsel