

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 03-427

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IN THE MATTER OF  
NICOLE DEVANEY  
AN ATTORNEY AT LAW

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Decision

Argued: February 13, 2004

Decided: April 8, 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 final discipline filed by the Office of Attorney Ethics (“OAE”), based on respondent’s guilty plea to two counts of an accusation filed by the Monmouth County Prosecutor’s Office. The accusation charged respondent with the third degree crime of theft of movable property, a violation of N.J.S.A. 2C:20-3(a) (count one), and the third degree crime of obtaining a controlled dangerous substance (“CDS”) by fraud, a violation of N.J.S.A. 2C:35-13 (count five).

Respondent was admitted to New Jersey bar in 1997. She has no history of discipline.

Respondent admitted taking prescription pads from two doctors, without their authorization, and using the scripts to unlawfully obtain prescription pain medication.

On May 28, 2003, respondent entered a guilty plea to the above charges. The following factual basis was elicited during the plea hearing:

DIRECT EXAMINATION BY MR. ZAGER [RESPONDENT'S COUNSEL]:

Q Nicole, on count one, theft, that alleges that on certain dates between January of 2001 and January of 2002 you took certain items from Dr. Weckstein (phonetic) and Dr. Commentucci, you understand that?

A Yes.

Q And were those items prescription pads?

A Yes.

Q And did you take them without permission?

A Yes.

.....

Q And as a matter of fact, you did have legitimate prescriptions with Dr. Commentucci, is that correct?

A Yes.

Q And Dr. Weckstein, he was a doctor that you saw for a legitimate purpose in Freehold?

A Yes.

Q And you had legitimate prescriptions with him?

A Yes.

Q And while you were in his office, you took prescription pads from him also, correct?

A Yes.

Q How do you plead to the charge of theft of the prescription pads from both Dr. Commentucci and Dr. Weckstein?

A Plead guilty.

Q Guilty. The other charge is count five that alleges that between those same dates, January 6<sup>th</sup>, 2001 and January 13<sup>th</sup>, 2003 (sic), that you used those prescription pads from both Dr. Commentucci and Dr. Weckstein to obtain Percocet, is that correct?

A Yes.

Q And did you go to a few pharmacies in and around Monmouth County?

A Yes.

.....

Q Nicole, continuing on count five, the prescription pads that we talked about, did you then take them and use them to obtain prescriptions for Percocet?

A Yes.

Q And did you do that at various pharmacies in Shrewsbury and Freehold?

A Yes.

Q And did you do it on more than one occasion?

A Yes.

Q As a matter of fact, you did it on about 20 occasions?

A Yes.

Q And did you do that knowing it was illegal?

A Yes.

Q And how do you plead to that charge?

A I plead guilty.

Q Okay. Now before the police came, you had a pain problem starting since you were ten years old, is that correct?

A Yes.

Q And when . . . you were 14, you had an operation for a collapsed lung?

A Yes.

Q And were you prescribed pain medication then?

A Yes.

Q And when you were 18, did you have arthroscopic knee surgery that resulted in complications?

A Yes.

Q Were you then given pain killers for that?

A Yes, sir.

Q And then when you were 20, you were attacked by a dog, and severely injured?

A Yes.

Q And did they also prescribe to you legal prescriptions for Percocet?

A Yes, sir.

Q Now on or about March of 2000, you gave birth prematurely to three triplets, correct?

A Yes.

Q During the course of the pregnancy, you were prescribed Percocet by . . . Dr. Gonzales?

A Yes.

Q Okay. And after the pregnancy, you had birth by way of Caesarean Section, correct?

A Yes.

Q And when they delivered, they cut a nerve in your lungs, is that correct?

A Yes.

Q And as a result, after the birth, you were having significant pain problems with the scaring from the cut nerve and the C-Section, is that right?

A Yes.

Q And is that when Dr. Weckstein prescribed more Percocet to you?

A Yes.

Q Did you then become, or were you then addicted to Percocet?

A Yes.

Q And did you attempt to use some sort of pain management by going to a neuro-spinal pain management group?

A Yes.

Q And did they, again, prescribe Percocet?

A Yes.

Q Did you then become addicted?

A Yes.

Q All these pills that you obtained, they were for your own personal use?

A Yes.

Q And they were necessary so that you could perform your daily and professional duties on a daily basis?

A Yes.

Q You gave no pills to anyone else?

A No.

Q And it was just so you could maintain your motherhood and your livelihood, is that correct?

A Yes.

Q And the only medication you're on today is penicillin, is that right?

A Yeah. I take other anti-nauseous [sic].

Q And that [sic] because you're pregnant, and due in December?

A Yes.

....

CROSS EXAMINATION BY MS. FREYER [ASSISTANT PROSECUTOR]:

Q I just wanted to clarify, I know you saw Dr. Weckstein, and he gave you legitimate prescriptions. But you also did take prescriptions that he did not give you, correct?

A Yes.

Q And the same with Dr. Commentucci? They were left out in the building you work in, and you took them without his permission, correct?

A Yes.

....

REDIRECT EXAMINATION BY [RESPONDENT'S COUNSEL]:

Q Nicole when Det. Stone from Atlantic Highlands approached you regarding the mess that you're in now, did you cooperate with him fully?

A Yes.

Q And when Det. Pagano (phonetic) from Ocean Township contacted Det. Stone, did you then call me?

A Yes.

Q And then did we go and cooperate with both of them, and give them statements, and all the information that they requested?

A Yes, sir.

....

FURTHER EXAMINATION BY THE COURT:

Q Ms. Devaney, are you pleading guilty because, in fact, you are guilty of these offenses?

A Yes.

Q And are you asking me to accept your pleas of guilty?

A Yes.

THE COURT: All right, I'm satisfied that the defendant is guilty of theft, and obtaining CDS by fraud, both in the third degree.

[Exhibit B to the OAE's brief.]

Following the plea, respondent applied for and, on September 2, 2003, was accepted into the pretrial intervention program ("PTI"). As a result, no criminal conviction will ensue from her guilty

plea. However, R.1:20-13(c)(2) permits the filing of a motion for final discipline based on an admission of guilt.

The OAE urged us to impose a reprimand, rather than a suspension, because of mitigating circumstances that include respondent's youth, unblemished disciplinary record, the fact that the prosecutor concurred with respondent's application for PTI, and the unique and substantial mitigating factors relating to her history of injuries. The OAE relied on In re Zem, 142 N.J. 638 (1995), and In re McAuliffe, 171 N.J. 85 (2001), where mitigating factors convinced the Court to impose reprimands, rather than suspensions, on attorneys who illegally possessed CDS.

Following a review of the record, we determine to grant the OAE's motion for final discipline.

Respondent's guilty plea to theft of movable property and obtaining a controlled dangerous substance by fraud constitutes a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer). Only the level of discipline to be imposed remains at issue. R. 1:20-13(c)(20); In re Lunetta, 118 N.J. 443, 445 (1989). The purpose of discipline is to protect the public from attorneys who do not meet the standards of responsibility of their profession. In re Barbour, 107 N.J. 143 (1988). Whenever an attorney commits a crime, he or she violates his or her professional duty to uphold and honor the law. In re Bricker, 70 N.J. 6, 11 (1982). The fact that respondent's offense does not relate directly to the practice of law does not negate the need for discipline.

The discipline imposed on attorneys who have committed crimes to obtain prescription drugs to which they have become addicted has varied depending on various circumstances, including the efforts they have taken to overcome their addiction. In In re Hasbrouck, 140 N.J. 162 (1995), a one-year suspension was imposed on an attorney who had suffered from migraine headaches, and was prescribed painkillers by her father, a physician. She gradually began taking the medication more frequently, until she began taking sheets from her father's prescription pads and forging prescriptions

for the drug. As she became more and more dependant, she had prescriptions filled at more pharmacies and forged prescriptions not only in her name, but also in the name of her husband and sister. Ultimately, she was arrested while attempting to have a prescription filled in her sister's name.

In Hasbrouck, the Court found that violations of the criminal laws governing CDS that involve fraudulent conduct constitute serious ethics transgressions that justify a stern disciplinary response. The Court distinguished Hasbrouck from In re Adubato, 106 N.J. 655 (1987), where a six-month suspension was imposed. In Adubato, the attorney was found guilty of violating N.J.S.A. 24:21-22(a)(3) (attempt to obtain a controlled dangerous substance by fraud). Adubato also suffered from migraine headaches, for which two doctors prescribed dilaudid. He became addicted to the drug. When he no longer had a valid prescription, he resorted to misrepresentation and fraud to obtain the drug. The Court found Adubato's conduct less egregious than Hasbrouck's because, even though he was actually convicted of criminal misconduct, it was confined to only one attempt to obtain dilaudid. Hasbrouck's fraudulent conduct spanned a seven-year period. The Court found that Hasbrouck did not confront her addiction, but rather resorted to continuing unlawful fraudulent measures to maintain her addiction.<sup>1</sup>

In In re Zem, 142 N.J. 638 (1995), the attorney escaped the mandatory suspension for her minimal use of cocaine because of the presence of significant mitigating circumstances. Zem, a young attorney, successfully completed PTI after her arrest for conspiracy to possess CDS, cocaine, in violation of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-10(a). She was charged with purchasing the drug from September 1992 through November 1992. Her drug use was confined to only that period, and resulted from her attempts to cope with the death of her mother from cancer, in June 1989, and the death of her brother from Hodgkin's disease, in January 1990.

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<sup>1</sup> Ultimately, she was disbarred for breaking and entering to obtain prescription pads.

Because of the unique circumstances in the matter — Zem’s tragic reasons for her brief period of drug use, her successful completion of PTI, the lack of need of any rehabilitation, her genuine remorse for her conduct, efforts to put her life back on track, and an inability to avail herself of the accelerated suspension procedure fashioned in In re Schaffer, 140 N.J. 148 (1995), the Court imposed only a reprimand.

Likewise, in In re McAuliffe, 171 N.J. 85 (2001), the Court imposed a reprimand where the attorney was convicted of a third degree conspiracy to possess CDS, Tylenol with codeine, a violation of N.J.S.A. 2C:5-2(a) and N.J.S.A. 2C:35-10(a)(1). In McAuliffe, the attorney had a legitimate prescription for the medication. He arranged with a pharmacist he knew to obtain additional pills “as a matter of convenience,” so he would not have to visit doctors or the pharmacy as often as would otherwise be necessary. The attorney had suffered from gastro-esophageal reflux defect, recurrent episodes of pneumonia, and respiratory distress. He had undergone four surgeries and numerous prolonged hospitalizations. His doctors agreed that he required pain medication for “a real and continuing pain syndrome.” One doctor determined that pain medication was required for him to maintain his daily activities and gainful employment and for his real and significant continuing pain, not for pleasurable manipulation of his affect and mood. The mitigating circumstances present in McAuliffe — the attorney’s legitimate prescriptions for the medication needed for him to perform his daily activities, the fact that the additional pills he obtained were for his personal use, and his previous unblemished thirty-year legal career — led the Court to impose a reprimand.

In this matter, respondent established a history of serious physical ailments for which she was legitimately prescribed painkillers. Ultimately, she became dependent on the pain medication and resorted to illegal means to obtain it. Following a police investigation and her arrest, respondent cooperated fully with the police and with ethics authorities. In March 2003, respondent began individual outpatient counseling with a drug counselor. She remained under the care of a physician

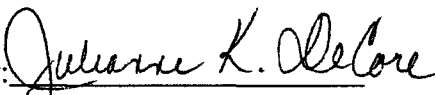
experienced in addiction treatment until at least June 2003. As of September 2003, respondent has tested negative for drug use. In short, respondent was remorseful for her conduct, entered PTI, and seems to have taken appropriate steps to overcome her addiction.

Based on the foregoing factors, we determine that a short-term suspension would serve no purpose at this juncture, other than to punish respondent. Because she does not pose a threat to the public, we unanimously determine that a reprimand is the appropriate discipline for her conduct. Two members did not participate.

We also require respondent to continue drug counseling until she is medically discharged.

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  
Chief Counsel



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**SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

In the Matter of Nicole Devaney  
Docket No. DRB 03-427

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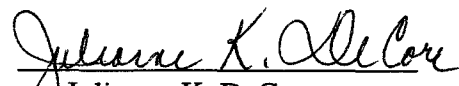
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Argued: February 13, 2004

Decided: April 8, 2004

Disposition: Reprimand

<i>Members</i>	<i>Disbar</i>	<i>Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Maudsley</i>			X				
<i>O'Shaughnessy</i>			X				
<i>Boylan</i>			X				
<i>Holmes</i>			X				
<i>Lolla</i>							X
<i>Pashman</i>							X
<i>Schwartz</i>			X				
<i>Stanton</i>			X				
<i>Wissinger</i>			X				
<b>Total:</b>			7				2

  
Julianne K. DeCore  
Chief Counsel