SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-192
District Docket No. XIV-05-065E

IN THE MATTER OF :
:
SCOTT MICHAEL BERGER :
:
AN ATTORNEY AT LAW :

Decision

Argued: July 21, 2005

Decided: September 15, 2005

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 on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE") based on respondent's three-year suspension in New York for filing misleading retainer statements and using a runner.

Respondent was admitted to the practice of law in New Jersey in 1990. He was admitted to the New York bar in 1991.

He has no history of discipline. He has, however, been ineligible to practice law in New Jersey since 1999, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

In November 1999, the Grievance Committee for the Second and Eleventh Judicial Districts filed a petition in the Supreme Court of New York, Appellate Division, Second Judicial Department, charging respondent with two counts of misconduct. Specifically, respondent was charged with conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Disciplinary Rule 1-102(a)(4) of the Lawyer's Code of Professional Responsibility [22 NYCRR 1200.3] and §691.20(a)(1)(2) of the Rules of the Appellate Division, Second Judicial Department [22 NYCRR 691.20(a)(1)(2)], for his filing inaccurate, incomplete and/or misleading retainer statements with the Office of Court Administration ("OCA")[1]. The petition also charged that respondent engaged in the practice of paying third persons for the purpose of soliciting retainers authorizing respondent to perform legal services, in violation

[1] The corresponding New Jersey rule is RPC 8.4(c). The OAE's brief also cited RPC 8.4(d) (conduct prejudicial to the administration of justice), which is applicable as well.

of Judiciary Law §482 and Disciplinary Rule 2-103 of the Lawyer's Code of Professional Responsibility, [22 NYCRR 1200.8].[2]

A disciplinary hearing was conducted on April 6, 2000 and May 2, 2000. The special referee sustained both charges. In connection with the second charge, the special referee stated:

> Respondent admitted Mr. Magliore and Larry Harvard referred client matters to his office . . . . The details of such referrals were absent from the retainer statement filed by Respondent.[3]
>
> [OAEbEx.B.][4]

In June 2000, the Grievance Committee filed a motion to confirm the report of the special referee. The Grievance Committee stated, with regard to the second charge:

> On respondent's behalf, Mr. Magloire goes to see 'prospective clients', including ones who are hospitalized . . . . He obtains information about their 'condition' and the

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[2] The applicable New Jersey rules are RPC 7.2(c) and RPC 7.3(d). RPC 7.2(c) states "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services (exceptions omitted)."

RPC 7.3(d) states "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client (exceptions omitted)."

[3] It is unclear if the correct spelling of the individual's name is Magloire or Magliore. It appears both ways in the record. In the transcript of his testimony in the underlying proceeding in New York, it is spelled Magloire.

[4] OAEb refers to the OAE's brief.

> 'manner in which the . . . accident occurred', and leaves behind one of respondent's business cards, which Mr. Magloire keeps in his wallet and on which he writes his name.
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> [OAEbEx.C.]

The Supreme Court of New York, Appellate Division, Second Judicial Department, in a per curiam decision, granted the motion. The Court set forth the underlying facts supporting its decision. As to the first charge, the Court stated:

> Between January 1995 and August 1996, the respondent filed approximately 350 retainer statements with the OCA. In response to question 7 on those statements, which concerned information about the person referring the client, the respondent provided inaccurate, incomplete, and/or misleading information.[5]
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> [OAEbEx.D.]

With regard to the second charge, the Court stated:

> Between January 1995 and December 1996, the respondent made payments of at least $41,570 to Ivan Magloire and of at least $700 to Larry Harvard. Both Magloire and Harvard received payment from the respondent for the purpose of soliciting retainers authorizing the respondent to perform legal services.
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> [OAEbEx.D.]

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[5] At the disciplinary proceeding in New York, respondent testified that to expedite the filing of the retainers he and his secretary used a standard response such as "a friend" or "N/A" (not applicable) on the forms.

Respondent was suspended in New York for three years, effective June 29, 2001. The OAE urged us to impose a one-year suspension.

Upon a de novo review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Respondent received a three-year suspension in New York for filing inaccurate retainer agreements with the OCA, and for using runners.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), 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 on 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 unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). As to subparagraph (E), a review of the case law would indicate that different discipline from that imposed in New York is appropriate here.

In its motion for reciprocal discipline, the OAE stated that respondent's conduct violated RPC 8.4(c), RPC 8.4(d), RPC 7.2(c), and RPC 7.3(d). The OAE charged RPC 8.4(c) because that rule contains the same language as the New York Code provision under which respondent was disciplined. In New Jersey, however, lack of candor to a tribunal violates not only RPC 8.4(c), but also a more specific rule, RPC 3.3(a)(1) (false statement of material fact or law to a tribunal). In fact, one of the cases cited in the OAE's motion, In re Forrest, 158 N.J. 428 (1999), involved a violation of RPC 8.4(c), as well as RPC 3.3(a)(5), thereby putting respondent on notice that RPC 3.3 was implicated by his conduct.

Where attorneys are guilty of lack of candor to a tribunal, although suspensions are the most frequent sanctions, the range of discipline is wide. See, e.g., In the Matter of Robin K. Lord, DRB 01-250 (2001) (admonition where the attorney failed to reveal her client's real name to a municipal court judge when

her client appeared in court using an alias, thus resulting in a lower sentence because the court was not aware of the client's significant history of motor vehicle infractions; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); In re Whitmore, 117 N.J. 472 (1990) (reprimand where a municipal prosecutor failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a charge of driving while intoxicated intentionally left the courtroom before the case was called, resulting in the dismissal of the charge; attorney did not have an improper motive and "may not have clearly seen the distinct line that must be drawn between his obligations to the court and his commitment to the State, on the one hand, and, on the other, his feelings of loyalty and respect for the police officers with whom he deals on a regular basis." Id. at 480); In re Mazeau, 122 N.J. 244 (1991) (attorney reprimanded for failing to disclose to a court his 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 Chasan, 154 N.J. 8 (1998) (three-month suspension for attorney who distributed a fee to himself after representing that he would maintain the fee in his trust

account pending a dispute with another attorney over the division of the fee and then misled the court into believing that he retained the fee in his trust account; attorney misled his adversary also, failed to retain fees in a separate account, and violated recordkeeping requirements); In re Norton and Kress, 128 N.J. 520 (1992) (both the prosecutor and defense counsel were suspended for three months for permitting the dismissal of a charge of driving while intoxicated; although the attorneys represented to the municipal court that the arresting officer did not wish to proceed with the case, they failed to disclose that the reason for the dismissal was the officer's desire to give a "break" to someone who supported law enforcement); In re Kernan, 118 N.J. 361 (1990) (attorney received a three-month suspension for failure to inform the court, in his own matrimonial matter, that he had transferred property to his mother for no consideration, and failure to amend his certification listing his assets; attorney had a prior private reprimand); In re Forrest, supra, 158 N.J. 429 (attorney suspended for six months for failure to disclose the death of his client to the court, to his adversary, and to an arbitrator; the attorney's motive was to obtain a personal injury settlement); In re Eskin, 158 N.J. 259 (1999) (six-month suspension on a motion for reciprocal discipline, where an

attorney forged and falsely notarized his client's signature to a notice of claim served after the statute of limitations had expired, and served a second notice of claim containing a material misrepresentation); In re Telson, 138 N.J. 47 (1994) (attorney suspended for six months after he concealed a judge's docket entry dismissing his client's divorce complaint, obtained a divorce judgment from another judge without disclosing that the first judge had denied the request, and denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was scared); In re Cillo, 155 N.J. 599 (1998) (one-year suspension where, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, the attorney obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension where attorney, who had been in an automobile accident, misrepresented to the police, her lawyer, and a municipal court judge that her babysitter had been operating her vehicle and presented false evidence in an attempt

to falsely accuse another of her own wrongdoing; two members of the Court voted for disbarment).

As to the second charge against respondent, stemming from his use of s runner, the policy served by the prohibition against fee sharing with a nonlawyer is clear:

> To ensure that any recommendation made by a non-attorney to a potential client to seek the services of a particular lawyer is made in the *client's* interest, and not to serve the business impulses of either the lawyer or the person making the referral; it also eliminates any monetary incentive for transfer of control over the handling of legal matters from the attorney to the lay person who is responsible for referring in the client.
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> [In re Weinroth, 100 N.J. 343, 350 (1985).]

Fee sharing with nonlawyers has resulted in discipline ranging from a suspension to disbarment. In In re Frankel, supra, 20 N.J. 588 (1956), the attorney paid a runner twenty-five percent of his net fee to solicit personal injury clients. He was charged with violating the Canons of Professional Ethics that prohibited soliciting clients (Canon 28) and dividing fees with a non-attorney (Canon 34). Frankel contended that the fees paid to the runner were in the nature of compensation for investigatory services. Frankel paid the runner $6,303.53 in 1953. The fees constituted the runner's primary source of income. In imposing discipline, the Court noted that, while Canon 28 itself provides that the offender may be disbarred,

Frankel was the first attorney prosecuted for this type of violation. The Court also cited Frankel's previously unblemished professional reputation. A five-member majority of the Court ordered Frankel suspended for two years, cautioning the bar that "[f]or such infractions in the future more drastic measures may be expected." Id. at 599.

In that case, Justice Brennan authored a dissent, joined by Chief Justice Vanderbilt, advocating Frankel's disbarment. Justice Brennan predicted that similar misconduct in the future would result in disbarment: "The 'gravity of the offense' is conceded, and presumably will be deemed to warrant disbarment in the case of any lawyer hereafter guilty of similar misconduct, since it is said, 'For such infractions in the future more drastic measures may be expected.'" Id. at 605.

Two years later, in In re Introcaso, supra, 26 N.J. 353, the Court addressed the issue of the use of a runner to solicit criminal cases. There, three clients testified that a runner solicited them to retain Introcaso. The Court found overwhelming evidence that Introcaso employed a runner to solicit clients in all three matters, improperly divided legal fees, and lacked candor in his testimony. Noting that its "immediate impulse here is to strike respondent's name from the roll of members of the bar," the Court nevertheless imposed a

three-year suspension. Id. at 361. The Court took into account that Introcaso's behavior had occurred prior to its decision in Frankel. Because Frankel decided an issue of first impression and Introcaso had an unblemished reputation, the Court refrained from imposing disbarment.

Next, in In re Bregg, supra, 61 N.J. 476, the Court imposed a three-month suspension on an attorney who paid part of his fees to a runner from whom he accepted referrals. The Court commented that the attorney in Bregg lacked the "studied and hardened disregard for ethical standards, accompanied by a total lack of candor" present in both Frankel and Introcaso.

In In re Shaw, 88 N.J. 433 (1982), the attorney represented a passenger in a lawsuit against the driver of the same automobile and represented both the passenger and driver in litigation filed against another driver. The attorney also used a runner to solicit a client in a personal injury matter. The attorney then "purchased" the client's cause of action for $30,000 and subsequently settled the claim for $97,500. Instead of depositing the settlement check in his trust account, he gave it to the runner, who forged the client's name on the settlement check and deposited it into his own bank account. The attorney was disbarred.

More recently, the Court disbarred an attorney who, for a period of almost four years, used a runner to solicit personal injury clients. In re Pajerowski, supra, 156 N.J. 509. In Pajerowski, the attorney stipulated to numerous ethics violations. The attorney used a runner to solicit clients, split fees with the runner, and compensated him for referrals in eight matters involving eleven clients. While claiming that the runner was his "office manager," in 1994 the attorney compensated the runner at the rate of $3,500 per week ($182,000 a year) for the referrals. The prospective clients had been involved in motor vehicle accidents. In each case, the runner visited them either at their homes or in hospitals on the day of the accident or very shortly thereafter. The runner brought retainer agreements with him and tried to persuade the individuals to retain the attorney to represent them in connection with claims arising out of the accident. In some cases, the runner instructed the prospective clients to obtain treatment from specific medical providers, despite the clients' protestations that they had not been injured. The Court found that the attorney knew about and condoned the runner's conduct in assisting his clients' filing of false medical claims.

By splitting fees with the runner, Pajerowski assisted in the unauthorized practice of law. He also advanced sums of

money to clients in ten instances and engaged in a conflict of interest situation. In ordering the attorney's disbarment, the Court noted that

> [a]lthough the public needs to be protected from the solicitation of legal business by runners, we do not find that disbarment is called for in every 'runner' case. In determining the appropriate discipline to be imposed in prior 'runner' cases . . . we have considered the circumstances surrounding each case. We intend to adhere to that approach in such cases.
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> [Id. at 521-22.]

Finding that Pajerowski acted out of economic greed, took advantage of vulnerable individuals, condoned his runner's conduct in assisting clients to file false medical claims, and committed other less serious acts of misconduct, the Court imposed disbarment.

In In re Pease, supra, 167 N.J. 597, a three-month suspension was imposed where the attorney paid a runner for referring fifteen prospective clients to him and for loaning funds to one of those clients. The attorney's misconduct was limited to a four-month period, more than ten years prior to the ethics proceeding, when he was a relatively young, inexperienced attorney. Also, he had not been previously disciplined and had performed a significant amount of community service.

Here, the record tells us that, in approximately 350 cases, respondent filed inaccurate, incomplete and/or misleading retainer statements. A careful scouring of the record -- including the petition, the special referee's report, and the Supreme Court of New York, Appellate Division opinion -- does not clearly reveal in how many of those 350 cases respondent used misleading information to cover up his use of the runner. Similarly, the same careful, detailed review does not reveal what portion of the moneys paid to the runners was for referral fees. Magloire and respondent testified that Magloire provided investigative services for respondent. As noted above, the Appellate Division stated that "respondent made payments of at least $41,750 to Ivan Magloire and of at least $700 to Larry Harvard. Both Magloire and Harvard received payment from the respondent for the purpose of soliciting retainers authorizing the respondent to perform legal services." Those statements do not clearly establish that the entire payments were intended to cover referral fees. There is, therefore, no way of knowing, on this record, the exact extent of respondent's unethical practices. What is known is that respondent engaged in a pattern of paying referral fees, and that all of the retainer

statements were, at a minimum, incomplete.[6] We cannot know on how many occasions, respondent formed the mens rea to misrepresent to the court the source of his clients' referrals.

It is unquestionable, however, that respondent used runners to obtain clients. As noted above, in In re Pajerowski, supra, 156 N.J. 509, the Court stated that the circumstances in each case would be considered in determining the appropriate measure of discipline. Disbarment is not necessarily appropriate in every instance where a runner has been employed. We find that, in this case, disbarment is not mandated. That leaves the question, however, of the appropriate measure of discipline for respondent's serious acts of misconduct. Taking In re Pease, supra, 167 N.J. 597, as a starting point, discipline more severe than a three-month suspension is appropriate here. Pease received a three-month suspension for paying a runner for fifteen client referrals over a four-month period. Pease also loaned funds to a client. In addition, Pease's misconduct occurred more than ten years before the ethics proceeding.

Respondent's conduct was more serious than Pease's. It continued far longer and involved the serious additional element of his misrepresentations to the New York OCA. As to that infraction, we recall In re Solvibile, 156 N.J. 321 (1998).

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[6] Magloire testified that he referred more than ten clients to respondent.

There, the attorney was suspended for six months for misrepresenting that her application for admission to the Pennsylvania bar exam was mailed prior to the closing deadline, when she knew it was not; the attorney prepared and submitted a misleading letter to the Pennsylvania Board of Bar Examiners, signed by a post office worker, stating that her application and money order payment were timely. Here, the attorney, in some cases to conceal his misconduct in using a runner, and, arguably in others, merely for his own convenience in expediting the filing of retainer statements, made misrepresentations to the New York courts in 350 instances. As in Solvibile, respondent acted only for his own advantage, and showed no regard for the fact that these were official documents filed with a court.

We note that there has been a considerable delay in the filing of this motion for reciprocal discipline in New Jersey. As noted above, respondent's three-year suspension was effective in New York in June 2001. He did not report his New York discipline to New Jersey ethics authorities, as required by R. 1:20-13(a)(1). According to a letter to the OAE from respondent's counsel in New York and respondent's affidavit to us, it was not until respondent applied for reinstatement in New York and sought a required certificate of good standing in New Jersey that he learned of the reporting requirement. Respondent

did not know that, despite being on "inactive status" and never having practiced law in New Jersey, he still had to report his New York discipline to New Jersey disciplinary authorities. Respondent's prior counsel in the New York disciplinary proceeding had not advised him of the requirement. In his affidavit, respondent asked that any suspension imposed be nunc pro tunc and that he be allowed to apply for reinstatement to practice in New Jersey immediately.[7] The OAE stated that, since respondent has not "recently practiced" in New Jersey, it would not object to a suspension retroactive to June 29, 2001, the effective date of respondent's suspension in New York.

The within misconduct took place nine years ago. Although the delay in prosecuting this matter is due, at least in part, to respondent's failure to report his New York discipline to New Jersey authorities, he apparently relied on his counsel, who did not advise him of the reporting requirement.

We, therefore, determine that a one-year suspension for the totality of respondent's misconduct is appropriate. The suspension is to be retroactive to the date of respondent's suspension in New York, June 29, 2001. He has already been suspended in New York for four years. In our view, any additional time would be unnecessarily harsh.

[7] In his affidavit, respondent referred to his "consent to the discipline requested herein" (one-year suspension).

Members Robert Holmes, Esq., Louis Pashman, Esq., and Reginald Stanton, Esq. 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Scott Michael Berger
Docket No. DRB 05-192

Argued: July 21, 2005

Decided: September 15, 2005

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley		X				
O'Shaughnessy		X				
Boylan		X				
Holmes						X
Lolla		X				
Neuwirth		X				
Pashman						X
Stanton						X
Wissinger		X				
Total:		6				3

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel