SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-295
District Docket No. XIV-2016-0398E

IN THE MATTER OF	:
FELIX NIHAMIN	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 19, 2017

Decided: February 8, 2018

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Kim D. Ringler appeared on behalf of respondent.

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 voluntary resignation from the New York bar, which he submitted after the New York disciplinary authorities uncovered evidence that he had continued to practice law after he was suspended in that State. The OAE seeks a one-year suspension. Although respondent sought

either a three-month or six-month suspension or a retroactive suspension in his brief, counsel asserted, at oral argument, that a censure would be appropriate. We agree with the OAE and, thus, determined to grant the motion for reciprocal discipline and impose a one-year suspension on respondent.

Respondent was admitted to the New Jersey bar in 1995 and the New York bar in 1996. He maintained a law office in New York City that operated under the name Felix Nihamin & Associates, P.C.

In 2010, we imposed an admonition on respondent for deficient recordkeeping practices, negligent misappropriation of escrow funds, failure to safeguard funds held on behalf of a third person, and commingling personal and client funds in his trust account, violations of RPC 1.15(a) and RPC 1.15(d). In the Matter of Felix Nihamin, DRB 10-073 (June 14, 2010).

On July 17, 2014, the Court suspended respondent for three months, following his June 29, 2012 conviction of third-degree misapplication of entrusted property, in violation of N.J.S.A. 2C:21-15. In re Nihamin, 217 N.J. 616 (2014). Specifically, over the course of a few years, in five or six New Jersey "sale-leaseback" transactions, respondent listed inaccurate deposit amounts on the HUD-1 settlement statements and, instead of disbursing the funds as required by the lenders' written

instructions, disbursed the monies on the instruction of the entities that structured the transactions. In the Matter of Felix Nihamin, DRB 13-245 (December 18, 2013) (slip op. at 3-5). Respondent was reinstated on January 23, 2015. In re Nihamin, 220 N.J. 344 (2015).

On May 10, 2013, the Supreme Court of New York, Appellate Division, First Judicial Department (New York Court) entered an unpublished order deeming the New Jersey offense a "serious crime," and directing the Departmental Disciplinary Committee for the First Judicial Department of the Supreme Court of the State of New York (Committee) to designate a hearing panel to "conduct a hearing why a final order of censure, suspension or disbarment should not be made."

The hearing took place on July 30, 2013. On September 27, 2013, the hearing panel recommended that respondent receive a three-month suspension. More than a year later, on October 21, 2014, the New York Court accepted the hearing panel's recommendation and suspended respondent for three months, effective November 20, 2014.

On February 24, 2015, respondent applied for reinstatement in New York. On March 17, 2015, Orlando Reyes, staff counsel to the Committee, examined respondent, under oath, in connection with his motion for reinstatement.

During the examination, respondent stated that he had not closed his law practice after he was suspended, because he did not believe that he was required to do so. Rather, he permitted his firm's only other attorney, Natalia Sishodia, to manage its day-to-day affairs, including handling the firm's caseload.

Respondent told Reyes that, after his suspension, his involvement in the firm's operations was very limited, as were his visits to the office. Respondent represented that, on those limited occasions, he was not involved in pending client-related matters, but only "maybe something having to do with the business account," such as "a payment or what have you." He claimed that he had discussions with Sishodia every seven to ten days, limited to the topic of firm expenses incurred and the payment of bills. He denied that they had discussed individual client matters.

Respondent denied that, after he was suspended, he received remuneration for legal services provided by the firm; that he instructed Sishodia or anyone else at the firm about the handling of specific client matters; that he requested information about any client matters; and that Sishodia asked him for advice concerning client matters.

Respondent further denied having received or having sent correspondence regarding client matters, including e-mails. When

shown separate e-mails from him to three clients, which were sent on the effective date of his suspension (November 20, 2014), however, respondent stated that that date was a mistake, and that he believed November 20 was the last day he was eligible to practice law.

Respondent also admitted that, during his period of suspension, he received e-mails from another client. He stated that those e-mails had been automatically forwarded to him. Although respondent was certain that he had seen the e-mails, he denied that he had taken "any action" after having received them, including instructing Sishodia how to reply, or replying on her behalf.

On July 21, 2015, the New York Court directed that a panel conduct a hearing to determine whether respondent had fully complied with the order of suspension and possessed the requisite character and general fitness to resume the practice of law. Prior to the start of the reinstatement hearing, the Committee informed respondent that it had obtained records of communications, including e-mails and text messages that respondent had exchanged with the firm's staff and others, during his period of suspension, in addition to records of payments for respondent's personal benefit from the firm's operating bank account.

On March 7, 2016, respondent submitted an affidavit of resignation from the New York bar, acknowledging that he had testified, under oath, that, during his suspension, he "was not personally or directly involved in the firm's practice of law in the State of New York." He also acknowledged that, if the Committee had initiated disciplinary proceedings against him, he "could not successfully defend [him]self on the merits against such allegations." Accordingly, respondent requested that the New York Court accept his resignation from the bar, effective immediately.

In an opinion, dated April 15, 2016, the New York Court identified the allegations that respondent conceded as the "continued practice of law" during his suspension, "communicat[ions] with members of his law firm and others," and the receipt of "payments for his personal benefit from his firm's operating bank account." On June 21, 2016, the New York Court accepted respondent's resignation and struck his name from the roll of attorneys, nunc pro tunc to March 9, 2016. On June 30, 2016, New York counsel for respondent notified the OAE of the resignation.

* * *

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

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The 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:
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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;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (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.

Subsection (E) applies in this matter because the unethical conduct warrants substantially different discipline.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal

discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

The New York Court accepted respondent's resignation from the bar, which was premised on the Committee's possession of evidence establishing that he had practiced law during his three-month suspension. Under 22 N.Y.C.R.R. § 605.10(a)(1) of the former Rules and Procedures of the Departmental Disciplinary Committee and 22 N.Y.C.R.R. § 1240.10(a)(1) of the current Rules for Attorney Disciplinary Matters, an attorney who is subject to a disciplinary investigation may be permitted to resign from the New York bar.[1]

Under the former and current Rules, upon the New York Court's acceptance of an attorney's voluntary resignation while under disciplinary investigation, he or she is disbarred. 22 N.Y.C.R.R. § 605.10(b); 22 N.Y.C.R.R. § 1240.10(a)(1). See also, In re Hesterberg, 50 N.Y.S.3d 165 (2017), and In re Frazer, 290 A.D.2d 68, 69, 735 N.Y.S.2d 603, 604 (N.Y. App. Div. 2001).[2]

In New York, attorneys who resign while under disciplinary investigation and who are, thus, disbarred, are permitted to seek

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[1] The former Rules were rescinded, and the current Rules became effective October 1, 2016.

[2] As a general rule, New York attorneys who practice law while suspended are disbarred. See, e.g., In re Hyde, 148 A.D.3d 9, 44 N.Y.S.3d 410 (N.Y. App. Div. 2017), and In re Rosabianca, 131 A.D.3d 215, 15 N.Y.S.3d 309 (N.Y. App. Div. 2015).

reinstatement seven years after the effective date. 22 N.Y.C.R.R. § 605.10(b); 22 N.Y.C.R.R. § 691.11(a); and 22 N.Y.C.R.R. § 1240.16(c)(1).

Here, respondent's admitted conduct involved practicing law while suspended (RPC 5.5(a)). Although respondent did not, in his affidavit of resignation, specifically admit making misrepresentations to disciplinary authorities when he denied that he had practiced while suspended (RPC 8.1(a)) or engaging in conduct prejudicial to the administration of justice (RPC 8.4(d)), under oath, in his deposition, he did just that.

In New Jersey, the level of discipline for practicing law while suspended ranges from a lengthy suspension to disbarment, depending on the presence of other misconduct, the attorney's disciplinary history, and aggravating or mitigating factors. See, e.g., In re Brady, 220 N.J. 212 (2015) (one-year retroactive suspension imposed on attorney who, after a Superior Court judge had restrained him from practicing law, represented two clients in municipal court and appeared in a municipal court matter on behalf of a third client, after the Supreme Court had temporarily suspended him; the attorney also failed to file a R. 1:20-20 affidavit after his suspension; significant mitigating factors considered, including the attorney's diagnosis of a catastrophic illness and other circumstances that led to the

dissolution of his marriage, the loss of his business, and the ultimate collapse of his personal life, including becoming homeless, and, in at least one of the instances of his practicing while suspended, his desperate need to provide some financial support for himself; prior three-month suspension); In re Macchiaverna, 218 N.J. 164 (2014) (default; one-year suspension imposed on attorney who knowingly practiced law during the one-month period following his temporary suspension for failure to pay accrued administrative costs from a 2010 reprimand; specifically, he requested adjournments in two matters, wrote to two judges in one matter, paid an expert in one matter, and sought appointment as a private prosecutor in a municipal court matter; although the attorney defaulted, we determined not to enhance the discipline, due to his medical issues and his father's death, among other things); In re Bowman, 187 N.J. 84 (2006) (one-year suspension for attorney who, during a period of suspension, maintained a law office where he met with clients, represented clients in court, and served as planning board solicitor for two municipalities; prior three-month suspension; extremely compelling circumstances considered in mitigation); In re Marra, 170 N.J. 411 (2002) (Marra I) (one-year suspension for practicing law while suspended in two cases and substantial recordkeeping violations,

despite having previously been the subject of a random audit; on the same day that the attorney received the one-year suspension, he received a six-month suspension and a three-month suspension for separate violations, having previously received a private reprimand, a reprimand, and a three-month suspension); In re Saint-Cyr, 210 N.J. 615 (2012) (default; two-year suspension imposed on attorney who, in addition to practicing law while suspended, exhibited gross neglect and lack of diligence and failed to communicate with the client in one matter, failed to communicate with the client in a second matter, and failed to file a written reply to the grievance in both matters; prior censure in a default case); In re Wheeler, 140 N.J. 321 (1995) (Wheeler I) (two-year suspension imposed on attorney who briefly represented a single client, albeit without compensation, while serving a temporary suspension for failure to refund a fee to a client; the attorney also made multiple and repeated misrepresentations to several clients; exhibited gross neglect of client matters in at least three instances, culminating in a pattern of neglect; failed to diligently pursue his clients' matters and to respond to their repeated requests for information; failed to maintain required attorney accounts in New Jersey; negligently misappropriated escrow funds; represented a client in a matter in which he had a clear

conflict of interest; issued a check knowing that he had insufficient funds to cover it; and failed to cooperate with disciplinary authorities);[3] In re Marra, 183 N.J. 260 (2005) (Marra II) (three-year suspension for attorney found guilty of practicing law in three matters while suspended; the attorney also filed a false affidavit with the Court stating that he had refrained from practicing law during a prior suspension; the attorney had received a private reprimand, two three-month suspensions, a six-month suspension, and a one-year suspension also for practicing law while suspended); In re Cubberley, 178 N.J. 101 (2003) (three-year suspension for attorney who solicited and continued to accept fees from a client after he had been suspended, misrepresented to the client that his disciplinary problems would be resolved within one month, failed to notify the client or the courts of his suspension, failed to file the affidavit of compliance required by Rule 1:20-20(a), and failed to reply to the OAE's requests for information; the attorney had an egregious disciplinary history: an admonition, two reprimands, a three-month suspension, and two six-month

[3] In that same order, the Court imposed a retroactive one-year suspension on the attorney, on a motion for reciprocal discipline, for his retention of unearned retainers, lack of diligence, failure to communicate with clients, and misrepresentations.

suspensions); In re Beltre, 130 N.J. 437 (1992) (three-year suspension for attorney who appeared in court after having been suspended, misrepresented his status to the judge, failed to carry out his responsibilities as an escrow agent, lied to us about maintaining a bona fide office, and failed to cooperate with an ethics investigation; prior three-month suspension); In re Walsh, Jr., 202 N.J. 134 (2010) (attorney disbarred in a default case for practicing law while suspended by attending a case conference and negotiating a consent order on behalf of five clients and making a court appearance on behalf of seven clients; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities during the investigation and processing of these grievances; the attorney failed to appear on an order to show cause before the Court; extensive disciplinary history: reprimanded in 2006, censured in 2007, and suspended twice in 2008); In re Olitsky, 174 N.J. 352 (2002) (disbarment for attorney who agreed to represent clients in bankruptcy cases after he was suspended, did not advise them that he was suspended from practice, charged clients for the prohibited representations, signed another attorney's name on the petitions without that attorney's consent and then filed the petitions with the bankruptcy court; in another matter, the

attorney agreed to represent a client in a mortgage foreclosure after he was suspended, accepted a fee, and took no action on the client's behalf; the attorney also made misrepresentations to the court, and was convicted of stalking a woman with whom he had had a romantic relationship and engaging in the unauthorized practice of law; prior private reprimand, admonition, two three-month suspensions, and two six-month suspensions); and In re Costanzo, 128 N.J. 108 (1992) (attorney disbarred for practicing law while serving a temporary suspension for failure to pay administrative costs incurred in a prior disciplinary matter and for misconduct involving numerous matters, including gross neglect, lack of diligence, failure to keep clients reasonably informed and to explain matters in order to permit them to make informed decisions about cases, pattern of neglect, and failure to designate hourly rate or basis for fee in writing; prior private reprimand and reprimand).

Here, in seeking a one-year suspension, the OAE argues that respondent's conduct was similar to that of the attorneys in Macchiaverna, supra, and Marra I, supra. Like Macchiaverna and Marra, the OAE asserts, respondent's practice while suspended involved "relatively few cases," he "presented no significant mitigating factors," and he has a disciplinary history that is not "extensive."

In seeking a three- to six-month suspension, respondent's counsel argues that his conduct was "more circumscribed than the actual practice of law undertaken" by the attorneys in Marra I, supra, Macchiaverna, supra, and Bowman, supra (one-year suspensions) and in Beltre, supra (three-year suspension). Moreover, counsel notes, respondent's ethics history is more limited than that of the other attorneys who received more substantial discipline.

Further, in counsel's brief, she took issue with what the OAE characterizes as respondent's "implicit" and "tacit" admission that he made misrepresentations to the New York disciplinary authorities. Although she acknowledged her client's lack of candor, which she characterized as "minimiz[ing] his communications," counsel emphasized that he "did acknowledge that he interacted with his law firm."[4]

In addition, counsel argued, there was no allegation that respondent had direct contact with clients or tribunals. Similarly, although respondent received funds from his firm, the monies were not expressly identified as having been earned during the period of his suspension. She noted that a lawyer may

[4] We note that, although the OAE did provide some detail regarding respondent's implicit admissions and his "continuing course of dishonesty and deceit," it did not seek enhanced discipline on that ground.

be compensated for services rendered prior to the effective date of the suspension. Moreover, counsel contended, by accepting that he could not successfully defend against the New York disciplinary allegations that he had practiced law through his firm personnel while suspended and received funds from the law firm, respondent acknowledged that his actions constituted professional misconduct and, thus, fully accepted responsibility for his misconduct in New York.

In our view, a one-year suspension is appropriate. A sanction as severe as disbarment or a longer term suspension is unwarranted because, in cases imposing such discipline, the attorneys represented several clients while suspended and, further, committed a number of other unethical acts. See, e.g., Walsh, supra (default; twelve clients; gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities; extensive disciplinary history); Olitsky supra (eight clients; gross neglect in three matters; signed another attorney's name on four bankruptcy petitions; made misrepresentations to a court; and was convicted of stalking a woman with whom he had been romantically involved; extensive disciplinary history); and Costanzo, supra (numerous client matters, gross neglect, pattern of neglect, lack of diligence,

failure to communicate, and failure to reduce to writing the rate or basis of the fee; prior private reprimand and reprimand).

Although respondent's disciplinary history (admonition and three-month suspension) is hardly benign, it is not as egregious as that of the attorneys in some of the three-year suspension cases (Marra II and Cubberley).

There is, however, the misrepresentation issue. In the three-year suspension cases, all of the attorneys lied about their suspensions, albeit either to clients (Cubberley and Wheeler) or to the courts (Marra II, Kasdan, and Beltre). In the case of Marra II, the attorney filed a false affidavit with the Court stating that he had refrained from practicing law during a prior suspension.

Here, respondent did not lie about his suspension to any client or court. He was, however, less than candid with the Committee, when he stated, under oath, that he was not personally or directly involved in the firm's practice of law in New York and when he denied having engaged in conversations with Sishodia about the handling of client matters. As his counsel points out, when confronted with communications establishing discussions with firm personnel about client matters, respondent admitted his wrongdoing and voluntarily submitted to disbarment, by resigning from the New York bar. As counsel also points out, there is no evidence that

respondent actively engaged in the practice of law, as did the attorneys in the above-cited cases.

It is true, as counsel remarks, that in those cases in which a one-year suspension was imposed, the attorneys actively engaged in the practice of law. Substantial mitigating factors were present, however, absent which lengthier suspensions might have been imposed. See, e.g., Brady, supra; Macchiaverna, supra; and Bowman, supra.

In our view, the limited nature of respondent's activities cannot serve to justify a deviation from the minimum measure of discipline for practicing law while suspended. This is especially so in light of his disciplinary history and his less than candid testimony before the disciplinary Committee.

For these reasons, we determined to grant the motion for reciprocal discipline and impose a one-year suspension on respondent.

Members Clark and Singer voted to impose a three-month suspension. Vice-Chair Baugh and Member Boyer did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Felix Nihamin
Docket No. DRB 17-295

Argued: October 19, 2017

Decided: February 8, 2018

Disposition: One-year Suspension

Members	One-year Suspension	Three-month Suspension	Did not participate
Frost	X		
Baugh			X
Boyer			X
Clark		X	
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer		X	
Zmirich	X		
Total:	5	2	2

Ellen A. Brodsky
Chief Counsel