SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-169
District Docket No. XIV-2014-0354E

IN THE MATTER OF	:
MARIO J. PERSIANO, III	:
AN ATTORNEY AT LAW	:

Corrected Decision

Argued: July 20, 2017

Decided: November 9, 2017

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

Robert E. Ramsey 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 final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13(c), following respondent's guilty plea to the disorderly persons offense of obstructing the administration of law or other governmental function (N.J.S.A. 2C:29-1),[1] violations of

[1] This section provides in relevant part:

> A person commits an offense if he purposely obstructs, impairs or perverts the

(Footnote cont'd on next page)

RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The OAE recommended the imposition of either a censure or a three-month suspension. Respondent agreed with discipline within that range, but urged the imposition of only a censure. For the reasons expressed below, we determine to impose a three-month suspension for respondent's misconduct.

Respondent was admitted to the New Jersey bar in 2005. At the relevant time, he was a public defender with the Pennsauken Township Municipal Court. He has no history of discipline.

In February 2015, a Camden County Grand Jury returned a thirty-four count Superseding Indictment, against respondent and Ana Baisden,[2] charging them with thirty-two second-degree crimes

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(Footnote cont'd)

> administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.

[2] An online Courier Post newspaper article identified Baisden as a Spanish-speaking court translator who worked in concert with respondent to prey on a victim who had difficulty speaking English and lacked knowledge about the court system.

that involved eight victims, for conduct that occurred between June 2010 and October 2013. More specifically, respondent was charged with eight counts each of the following: (1) official misconduct, N.J.S.A. 2C:30-2(a); (2) acceptance or receipt of unlawful benefit by public servant for official behavior, N.J.S.A. 2C:27-10a/b; (3) bribery in official and political matters, N.J.S.A. 2C:27-2d; and (4) theft by extortion N.J.S.A. 2C:20-5d. Respondent was also charged with one count of conspiracy/official misconduct, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:30-2(a); and one count of pattern of official misconduct, N.J.S.A. 2C:30-7a.

Each of these charges related to respondent's offer of "better representation" to indigent clients for cash payments of additional fees.

On September 12, 2016, respondent appeared before the Honorable Richard F. Wells, J.S.C., Superior Court of New Jersey, Camden County. In return for the dismissal of the superseding indictment, he entered a guilty plea to the disorderly persons offense of obstructing the administration of law or other governmental function.

The plea transcript provides little insight into respondent's conduct. The OAE's brief, therefore, cited a local newspaper article to shed some light on respondent's actions. According to that article, respondent, as the Pennsauken Public Defender, and Ana Baisden, the court translator, conspired to commit theft by

extortion by obtaining a $400 cash payment from one of the victims, whom the court had appointed respondent to represent. The article added that this specific victim had difficulty speaking English and likely was not familiar with the court system. The victim reported the ruse to the prosecutor's office, prompting that office to launch an investigation to determine whether others had been victimized by respondent and the court translator.

Respondent's counsel filed a letter-memorandum, which did not take issue with the OAE's recitation of these facts.

During respondent's allocution, he admitted that, at the relevant time, he served as the Pennsauken Township Public Defender and obtained clients who were both "public defender clients" and private clients. He admitted knowing that it was his responsibility, as the public defender, to ensure that the individuals "understood their right to a public defender, and in lieu of that, obtaining private counsel." He also admitted using another person, his co-defendant, to converse with "individuals and to obtain their representation." Even though respondent knew it was his responsibility to explain to the clients their rights, he failed to do so in order to represent the individuals as "private clients."

Judge Wells weighed the (unspecified) aggravating and mitigating factors, and found that the mitigating factors "preponderate[d]" and warranted a period of probation. He sentenced

respondent to a one-year period of probation, to terminate upon respondent's payment of restitution, fines, and penalties, and required respondent to forfeit current and future public office. Respondent was prepared to pay restitution at the time of the sentencing.

In making a recommendation for discipline, the OAE cited two obstruction of justice cases: In re Gonzalez, 142 N.J. 482 (1995) (reprimand for attorney who lied to a police officer during a traffic stop, then recanted); and In re Lekas, 136 N.J. 514 (1994) (reprimand for attorney whose unruly behavior during a trial led to her being escorted from the courtroom by a police officer).

The OAE also cited cases where the serious abuse of the legal process resulted in disbarment or lengthy suspensions. See, e.g., In re Baldino, 105 N.J. 453 (1987) (attorney disbarred for conspiracy to commit official misconduct for interfering with a grand jury indictment); In re Seaman, 60 N.J. 136 (1972) (attorney disbarred for misconduct in office, extortion, and conspiracy for conspiring with another to fix the grades of students who failed the certified public accountant's exam by taking money from them); and various ticket-fixing cases that resulted in discipline ranging from a reprimand to disbarment, depending on the severity of the attorneys' conduct.

Finally, the OAE cited In re Muckelroy, 118 N.J. 451 (1990) (reprimand for an attorney who unsuccessfully attempted to collect

a fee from a client in his role as a municipal court public defender) and In re Del Tufo, 216 N.J. 332 (2013) (three-month suspension for attorney, who, while acting as the public defender, accepted fees from two clients).

The OAE argued that here, respondent must receive discipline that reflects the seriousness of his conduct for conspiring with the court translator to try to convince assigned clients that they would receive more effective representation if they hired him privately. The OAE argued that respondent abused his official position by "shaking down" his clients for increased fees, and that, although he may have been candid when he told the clients that he would represent them "better" if they gave him more money, he had a duty to inform them that they were eligible for representation by a public defender. His failure to do so was deceptive and misleading to the indigent clients.

The OAE stressed that respondent's conduct, which involved more than a single act, was "reprehensible and sustained" - a "continuing course of dishonesty," and that he abused his status as a public officer. As to mitigation, the OAE noted respondent's lack of a disciplinary record and his agreement to forfeit his employment with the Township of Pennsauken and any future employment with the State. The OAE, thus, recommended either a censure or a three-month suspension.

As noted previously, respondent's counsel filed a letter-memorandum in which he conceded that respondent's guilty plea constituted conclusive evidence of respondent's violations of RPC 8.4(b) and RPC 8.4(c). Counsel agreed with the OAE's legal analysis and recommendation for discipline of either a censure or a three-month suspension, but urging, during oral argument, that we impose only a censure. He pointed out that, in Muckelroy, the attorney had no disciplinary history, no municipal court experience, and, as a corporate attorney, had never before handled an assigned indigent client. Counsel, thus, conceded that respondent's conduct was more serious than Muckelroy's.

Conversely, counsel pointed out that in Del Tufo, the attorney's circumstances were more serious than respondent's because Del Tufo had a significant ethics history, which demonstrated his "penchant for disregarding his legal obligations."

Counsel further distinguished respondent's conduct from Del Tufo's, noting that: respondent made full restitution and has been barred from public employment; only one client matter was involved; there was no evidence that his misconduct caused any delay or prejudice to the court or his client, as found in Del Tufo; he has no disciplinary history in his twelve years of practicing law, unlike Del Tufo; and, finally, that respondent admitted his misconduct, accepted responsibility for it, and cooperated through counsel in the disciplinary process.

* * *

Following a review of the record, we determine to grant the OAE's motion for final discipline. Final disciplinary proceedings in New Jersey are governed by R. 1:20-13(c). A criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Respondent's guilty plea establishes violations of both RPC 8.4(b) and RPC 8.4(c). Pursuant to RPC 8.4(b), it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." RPC 8.4(c), prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Hence, the sole issue is the extent of discipline to be imposed. R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and respondent must be considered. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." Ibid. (citations omitted). Fashioning the appropriate penalty involves a consideration of many factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation,

his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

In his brief, respondent's counsel argued that only one client matter was involved in this matter. Although the newspaper article referenced only one individual, during respondent's allocution, he admitted to conduct involving more than one client and agreed to reimburse four victims. Thus, we conclude that respondent's conduct extended to at least four indigent clients, at least one of whom was unfamiliar with the English language and/or the court system. He did so by improperly obtaining fees to which he was not entitled. Clearly, respondent's conduct violated RPC 8.4(b) and RPC 8.4(c).[3]

Although the OAE cited a variety of cases dealing with the obstruction of justice and abuse of the legal process, in our view, respondent's misconduct most closely resembles that of the attorneys in Muckelroy and Del Tufo. In Muckelroy, a municipal court judge assigned Muckelroy to represent an indigent client. The last sentence of the court's order specifically provided that no counsel fees were to be paid. In the Matter of William L. Muckelroy, DRB 87-093 (November 7, 1989) (slip op. at 6). Notwithstanding that provision, the attorney sent the client a

[3] The record does not disclose whether the victims also paid public defender fees to the court.

letter with a promissory note for a $1,500 legal fee "so that in the event you do not become indigent [sic] in the future, you will be able to pay your obligation for my professional services." The client refused to sign the note. Nevertheless, a year later, the client received a letter from a collection agency stating that it would take steps to enforce collection of the $1,500 legal fee owed to Muckelroy.

Muckelroy asserted that he was not aware of the Court Rule prohibiting him from seeking payment from a court-appointed indigent client, and had a good faith belief of his entitlement to a fee should the indigent client become able to make payments. We found that Muckelroy's attempt to collect a legal fee from a court-assigned indigent client was unethical and a violation of RPC 8.4(c) and RPC 8.4(d) (conduct prejudicial to the administration of justice). Although Muckelroy asserted that the promissory note would take effect only if the client received funds at a later date, the promissory note had no such provision – rather, the note became due in thirty-one days. We found that the letter to the client was misleading, deceptive, and in direct conflict with the court order prohibiting the attorney from charging legal fees.

In mitigation, we considered that the attorney was a corporate patent attorney, who at the time he was assigned the case, had never before handled an indigent assignment or a criminal case. We, thus, voted to impose a reprimand.

We viewed the case of In re Del Tufo, supra, 216 N.J. 332 to be more serious and voted to impose a three-month suspension. Del Tufo had been named the municipal public defender for the Township of Roxbury and, thereafter, was appointed to serve as the public defender for two defendants. In the Matter of Douglas Joseph Del Tufo, DRB 13-063 (August 26, 2013) (slip op. at 3). Notwithstanding the appointment and the clients' payments of public defender fees, Del Tufo took additional fees from both clients to serve as their private attorney in their respective cases.

In one of the cases, the judge directed Del Tufo to provide him with a letter explaining how he had achieved the status of private attorney, while acting as the township's public defender. Del Tufo failed to comply with the directive. Moreover, he neither refunded the client's retainer and expert fees, nor provided the client with an itemized bill, despite the client's requests for same.

Del Tufo also failed to provide the other client with a written communication of the basis or rate of his fee and charged unreasonable fees in both matters. In sum, he violated RPC 1.5(a) and (b) and RPC 8.4(c) and (d).

Del Tufo previously had been admonished for failure to communicate and failure to cooperate with the ethics committee's investigation and reprimanded for commingling personal and business funds, paying personal and business expenses from the trust account

and other recordkeeping violations, and for failing to cooperate with disciplinary authorities.

We considered Del Tufo's conduct to be more serious than Muckelroy's for several reasons: (1) he collected fees from two clients, while Muckelroy unsuccessfully attempted to collect a fee from only one client; (2) unlike Muckelroy, Del Tufo, as the municipal public defender, was experienced in the field of criminal law and had represented indigent clients; and (3) Del Tufo had an ethics history. We, thus, determined that a three-month suspension was warranted.

Here, respondent was involved in a course of conduct with the court translator that targeted indigent and perhaps unsophisticated clients. Based on respondent's specific admissions and his agreement, during his allocution, to reimburse four clients, we find that he is guilty of soliciting improper fees from four clients, two more than Del Tufo. Unlike Muckelroy, but like Del Tufo, respondent was a public defender, was familiar with criminal laws and dealing with indigent clients, and, therefore, knew that his conduct was improper. Because respondent has no disciplinary history, we do not view him as having a propensity to violate the ethics rules, as we found in Del Tufo.

On the other hand, we do not consider, as mitigation, the fact that respondent agreed to forfeit his public defender position and future State employment because N.J.S.A. 2C:51-2 requires a person

holding any public employment, elective or appointive, who is convicted of an offense involving dishonesty, to forfeit such position.

Thus, under the totality of the circumstances, we determine that a three-month suspension is warranted for respondent's violations of RPC 8.4(b) and RPC 8.4(c).

Member Gallipoli voted to recommend disbarment, finding despicable, the preying on such vulnerable clients. Member Zmirich voted to impose a one-year suspension. Member Rivera voted to impose a six-month suspension. Member Hoberman 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 Mario J. Persiano, III
Docket No. DRB 17-169

Argued: July 20, 2017

Decided: November 9, 2017

Disposition: Three-month suspension

Members	Three-month Suspension	Six-month Suspension	One-year Suspension	Disbar	Did Not Participate
Frost	X				
Baugh	X				
Clark	X				
Boyer	X				
Gallipoli				X	
Hoberman					X
Rivera		X			
Singer	X				
Zmirich			X		
Total:	5	1	1	1	1

By: Paula Dow Panuzzo
Ellen A. Brodsky
Chief Counsel