

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 18-364
District Docket No. XIV-2018-0333E

In the Matter of :
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Robert Arthur Plagmann :
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:
An Attorney At Law :
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Decision

Argued: January 17, 2019

Decided: June 24, 2019

Eugene A. Racz appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite proper notice.

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 the United States Department of the Navy's imposition of an indefinite suspension

on respondent for his violation of Navy RPC 8.4a(3), equivalent to New Jersey RPC 8.4(c). That Rule prohibits Navy and United States Marine Corps (USMC)¹ attorneys from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The OAE recommends the imposition of a censure for respondent's misconduct. Respondent does not challenge the recommendation.

For the reasons set forth below, we determine to grant the motion for reciprocal discipline and impose a reprimand on respondent for his violation of New Jersey RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 2006, the District of Columbia bar in 2009, and the Arizona bar in 2017. At the relevant times, he served as a Deputy Station Judge Advocate in the USMC. Respondent has no history of discipline in New Jersey.

In October 2014, respondent was a Major in the USMC, and Deputy Staff Judge Advocate and Senior Defense Counsel at Marine Corps Air Station Miramar (MCAS Miramar) in San Diego, California. Sometime that month, he and Lieutenant Colonel Melanie J. Mann, USMC, agreed that, due to a

¹ Although the Marine Corps is its own branch of the United States military, it is under the Navy's administration.

"tremendous amount of stress" and a heavy case load, he "'needed a break' from his intense defense work."

On November 17, 2014, respondent was reassigned to Deputy Station Judge Advocate. In this position, he provided legal advice to the MCAS Miramar Commander and subordinate commands and staff.

On December 17, 2014, respondent's brother, Staff Sergeant James L. Plagmann, Jr., was placed in the Pre-Trial Confinement Facility (brig) aboard MCAS Iwakuni, Japan, where he remained for six days. During Staff Sergeant Plagmann's confinement, respondent was neither his attorney, nor authorized to form or establish an attorney-client relationship with him.

Under brig procedure, telephone calls to a detainee could not be accepted unless the calls were from a lawyer or the detainee's immediate command, or of a medical nature. All other callers were required to leave a message for the detainee, who would be permitted to return the call via payphone at a designated time. Brig staff then listened to, or, in some instances, recorded, the conversations.

The procedure was different when the caller was the detainee's attorney. In such cases, the attorney would have immediate access to the detainee, and no one was permitted to listen to the conversation.

On December 19, 2014, respondent called the brig and identified himself to Corporal Victor O. Zelaya as Staff Sergeant Plagmann's attorney. By doing so, respondent gained access to his brother that he otherwise would not have had. Respondent confirmed with Zelaya that the telephone line was secure and that their conversation would not be recorded.

When Brig Officer Master Sergeant Raul D. Concepcion learned that the caller had the same last name as Staff Sergeant Plagmann, he took the call. Respondent asked to speak to his brother on the claim that he was his brother's defense counsel. Respondent also claimed that his co-counsel was aware of his call to the brig. At the time, Staff Sergeant Plagmann was not represented by counsel. Because respondent identified himself as legal counsel, he was permitted access to Staff Sergeant Plagmann. Moreover, because the telephone conversation was privileged, brig staff did not monitor or listen to the conversation.

Although respondent was neither Staff Sergeant Plagmann's attorney, nor authorized to form an attorney-client relationship with him, between December 19 and 21, 2014, he spoke to his brother six times by misrepresenting that he was his brother's lawyer.

In September 2016, respondent was subject to a two-day Board of Inquiry (BOI) process,² which included evidence regarding his telephone calls to the brig. On July 17, 2017, Navy Rules Counsel notified respondent that probable cause existed that he had violated the Navy's Rules of Professional Conduct, and, thus, an ethics investigation would be undertaken.

The ethics investigation covered respondent's misrepresentations to members of the brig that he represented his brother in the criminal matter. In the attorney disciplinary proceeding, respondent declined a hearing, choosing instead to "stand[] by his positions outlined at the BOI."

On September 13, 2017, Lieutenant Colonel Andrew D. Beckwith issued a report of his investigation, concluding that the "[c]lear and convincing evidence" established that respondent had violated Rule 8.4a(3) of the Navy Rules of Professional Conduct, by "falsely claiming to be his brother's attorney." Specifically, respondent was not his brother's attorney and, thus, his

² A BOI is an administrative hearing, which may result in a service member's administrative discharge. The proceeding is adversarial, and both the government and the service member may present its case. It appears that, on October 30, 2017, respondent was separated from the Navy for "substandard performance and misconduct with a General (Under Honorable Conditions) characterization of service."

claim to the contrary was false. Further, respondent's claim that he was co-counsel for his brother was false. According to Beckwith,

[I]n using both his rank and his legal title in gaining access to which he was not entitled, Major Plagmann's dishonesty intersected precisely at the heart of his duties and privileges as an attorney.

[Ex.B,p.23,¶20.]

Beckwith recommended that respondent be temporarily barred from practicing law and that his certification to serve as trial counsel or defense counsel, under the Uniform Code of Military Justice, 10 U.S.C. § 827(b), be suspended for four years. In addition, he recommended that respondent continue treatment for his mental health issues.

On March 1, 2018, Judge Advocate General J. W. Crawford, III, upheld Beckwith's findings and suspended respondent's certification indefinitely. In reaching his determination, the Judge Advocate General took into consideration respondent's rank, years of honorable service, medical diagnosis of post-traumatic stress disorder, and his General (Under Honorable Conditions) discharge, but found that these factors were "outweighed by the significance of [his] underlying misconduct."

On March 7, 2018, the Navy reported respondent's indefinite suspension to the OAE, noting that the decision was based on "a 'clear and convincing' evidentiary standard."

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), "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." 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). In the Navy, the standard of proof in attorney disciplinary matters is clear and convincing evidence. 32 C.F.R. 776.86(c)(3) (2015).

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:

(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.

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

In this case, respondent falsely claimed to brig staff that he represented his brother in connection with the criminal charges filed against him. Based on this falsehood, respondent was able to talk to his brother immediately and privately. In addition, because respondent's brother was not represented by any attorney at the time, respondent's claim that he had co-counsel also was false. Thus, respondent violated New Jersey RPC 8.4(c). The minimum measure of discipline for a misrepresentation to a third party is a reprimand. In re Walcott, 217 N.J. 367 (2014).

Of the cases cited by the OAE in support of a censure, In re Jenkins, 151 N.J. 473 (1997), is most similar in respect of motive. It is not directly on point, however. There, Jenkins represented one of the parties in contentious estate litigation. In the Matter of Jesse Jenkins, III, DRB 96-469 (June 3, 1997) (slip op. at 3-4). In January 1994, he submitted to a hospital a medical authorization form that purported to be signed by the decedent, who had died a year earlier. Id. at 4. Although Jenkins had signed the decedent's name on the form, he

placed an "/s/" next to it to avoid committing a fraud. Ibid. In the transmittal letter accompanying the authorization, Jenkins misrepresented that he was the decedent's attorney and requested the hospital to release the decedent's records to him. Id. at 3-4. The hospital took Jenkins "at his word," and released the medical records to him. Id. at 4, 11. Jenkins admitted that his conduct violated RPC 8.4(c). Id. at 9.

Although Jenkins had falsely claimed that he represented the decedent so that he could access the decedent's records, he did not obtain the records based on that representation alone. Rather, Jenkins acquired the records because he had submitted a medical authorization containing the decedent/patient's signature, which the attorney had forged. Moreover, the six-month suspension imposed on Jenkins was for multiple ethics infractions.

In this case, respondent gained access to his brother solely on the claim that he represented him. Although we are not aware of any case in which an individual used his or her position as an attorney to gain access to something to which, or someone to whom, the attorney was not entitled, in In re Musmanno, 197 N.J. 19 (2008), the attorney lied to a police officer about his position for the purpose of avoiding a negative consequence of his behavior.

In Musmanno, a police officer pulled over the attorney after he had made an improper left turn. In the Matter of Christopher L. Musmanno, DRB 08-259

(November 25, 2008) (slip op. at 1). To avoid a ticket, Musmanno produced a Union County Sheriff's Office card and told the police officer that he was employed by the Union County Prosecutor's Office. Ibid. On further questioning, Musmanno admitted to the officer that he did not work for the Prosecutor's Office. Ibid. Musmanno received a ticket for making an improper left turn and was charged with impersonating a law enforcement officer, and obstruction of the administration of law. Id. at 2.

When the OAE asked Musmanno for an explanation, he misrepresented that the charges had been dismissed, and that there had been a "'miscommunication' between him and the arresting officer." Ibid. Later, he admitted to the OAE that he had lied to the police officer to avoid getting a ticket and, further, that he had lied to the OAE in the hope that the ethics matter would be dismissed. Ibid. The attorney received a censure. Id. at 3.

We reasoned that, if Musmanno's conduct had comprised a single misrepresentation to the police officer, he would have received a reprimand because the misrepresentation could have been impulsive, prompted by the fear of prosecution. Ibid. Musmanno's misrepresentation to the OAE was a different story, however. Ibid. In our view, that lie was the "product of reflection," resulting in a "conscious, deliberate decision to mislead the OAE." Ibid. Accordingly, a censure was "more in keeping with the extent of

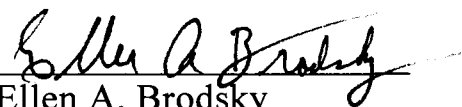
[Musmanno's] offenses." Ibid. Musmanno's twenty-year unblemished disciplinary record was insufficient to reduce the censure to a reprimand, "particularly because he was moved by personal interest." Ibid.

Here, respondent lied to brig personnel to gain access to his brother. Unlike Musmanno, however, he did not lie to disciplinary authorities. We recognize that, in addition to respondent's misrepresentation to brig personnel that he was his brother's attorney, he misrepresented that he had co-counsel. In our view, this additional misrepresentation is insufficient to justify a censure. Rather, it was part and parcel of respondent's attempt to gain access to his brother. Thus, we determine to impose a reprimand on respondent for his violation of New Jersey RPC 8.4(c).

Members Joseph and Gallipoli voted to impose a censure.

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 Robert Arthur Plagmann
Docket No. DRB 18-364

Argued: January 17, 2019

Decided: June 24, 2019

Disposition: Reprimand

<i>Members</i>	Reprimand	Censure	Recused	Did Not Participate
Frost	X			
Clark	X			
Boyer	X			
Gallipoli		X		
Hoberman	X			
Joseph		X		
Rivera	X			
Singer	X			
Zmirich	X			
Total:	7	2	0	0


Ellen A. Brodsky
Chief Counsel