Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 18-399
District Docket No. XIV-2018-0299E

In the Matter of	
Daniel J. McCarthy	
An Attorney at Law	

Decision

Argued: February 21, 2019

Decided: August 6, 2019

Amanda Figland appeared on behalf of the Office of Attorney Ethics.

Respondent's counsel 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), following respondent's disbarment in Delaware, for his violation of the Delaware equivalents of New Jersey RPC 3.3(a)(2) (failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in an illegal, criminal or fraudulent act); RPC 3.3(a)(4) (offering evidence that the lawyer knows to be false and failing to take

reasonable remedial measures if the lawyer learns that the evidence is false); RPC 3.4(a) (unlawfully obstructing another party's access to evidence or concealing a document having potential evidentiary value); RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); RPC 4.1(a)(2) and RPC 4.1(b) (failing to disclose a material fact to a third person to avoid a criminal or fraudulent act by a client); RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

For the reasons set forth below, we determine to impose a two-year suspension.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1984, and to the New York bar in 2000. He has no history of discipline in New Jersey. On March 27, 2017, respondent retired from the practice of law in New Jersey. On June 1, 2018, the Pennsylvania Supreme Court suspended respondent from the practice of law for three years, based on his discipline in Delaware. He is also listed as retired in Pennsylvania.

Respondent represented Dr. Phyllis James, a primary care physician who operated a medical practice known as New Castle County Family Care. Dr. James, and her physician's assistant, Michelle Montague, treated a newborn baby on Friday, July 21, 2006. The infant presented symptoms of jaundice, but the doctor determined that the condition was not serious, and the baby was sent

home with his mother. Two days later, he was taken to the hospital and found to have brain damage, caused by the jaundice.

Dr. James' insurance carrier, Preferred Professional Insurance Company, appointed Daniel P. Bennett, Esq., to represent the doctor in a Delaware malpractice action filed by the infant's parents. Respondent was admitted pro hac vice and served as lead counsel for Dr. James. Respondent received interrogatories and a request for production of documents from the plaintiff's attorney. Respondent drafted discovery answers for Dr. James, which Bennett signed and dated November 12, 2007. Respondent also produced treatment records from Dr. James' office and from Christiana Care Hospital.

Several months after respondent served answers to discovery, Montague was added as a defendant in the case. Mason Turner, Esq., represented Montague through her insurance carrier. On May 20, 2008, Turner filed an answer on behalf of Montague.

On September 2, 2008, Turner met with respondent to discuss the case. Turner gave respondent copies of the patient notes for the plaintiff, dated July 21, 2006, that he had received from Montague. These notes, however, differed from the notes respondent had produced in discovery for Dr. James. The July 21, 2006 note authored by Montague, which respondent had produced in discovery, referred to the plaintiff's skin as "yellow tint face/sternum." Turner's copy of the note written by Montague, also dated July 21, 2006, referred to the

baby's skin as "yellow tint face/abdomen." Additionally, the version of Dr. James' note ended with a sentence stating, "Patient's mom stressed on importance to call since older sibling during neonatal period required Bili blanket." Turner's copy of the patient note was shorter and did not include this final sentence.

During a September 2, 2008 meeting, respondent showed Dr. James the records from Montague. Dr. James acknowledged the authenticity of Montague's patient notes, and explained that Montague's note stating that the yellow tint went down to the baby's abdomen was "a first draft" and that, the revised Montague note stating that the yellow tint extended only to the sternum was more accurate. Dr. James also told respondent that she had changed her own patient note to add that she stressed to the mother the importance to call and added the reference to the older sibling, because "those were the instructions she gave the mom." Dr. James admitted to respondent that she should have dated the additional entry to her patient note.

At her September 4, 2008 deposition in the medical malpractice action, Dr. James misrepresented which documents she had reviewed to prepare for her deposition, claiming only to have reviewed the infant's patient chart; failed to disclose that other versions or drafts of her "office records" existed, which were in Montague's possession and had not been produced in discovery; and was intentionally vague regarding the document that she had produced as

Montague's "original note," despite the fact that she clearly knew that Montague had prepared an earlier draft of her patient note. Further, when Dr. James was asked why her portion of the "note of the examination" was titled "Office Visit Addendum" she answered that she was trying to explain that Montague had seen the patient and that she was the supervisor; therefore, it was an addendum to Montague's note. Respondent took no action at the deposition to correct Dr. James' testimony, and he failed to notify plaintiff's counsel, or the court, of that false testimony.

On November 10, 2008, respondent attended Montague's deposition. Montague testified falsely that she had reviewed only office and hospital records to prepare for her deposition; failed to acknowledge the existence of her patient notes; and failed to disclose that there was an earlier version of her patient note from her examination of the baby. Respondent failed to correct the record in this regard as well.

Although respondent knew that he was required to supplement his discovery responses pursuant to Delaware Superior Court Civil Rule 26, he failed to produce copies of the patient notes, which he had received from Turner on September 2, 2008. Further, respondent later stipulated in pretrial submissions that the medical records he had produced in discovery were the "office records of New Castle Family Care," which was not an accurate characterization, since this exhibit did not include the patient notes.

At the March 22, 2010 medical malpractice trial, Dr. James testified that "the yellowing was not in the face and had not progressed to the sternum" and that she "had given the mother instructions to call her if the condition worsened due to the family history of jaundice." During his closing argument, respondent "highlighted the mother's failure to follow Dr. James' instructions." The jury returned a verdict for the plaintiff for $6,250,000, which far exceeded Dr. James' insurance policy limits.

Subsequently, Dr. James filed a lawsuit in the Delaware Superior Court, New Castle County, against her insurance carrier and respondent's law firm. Dr. James retained Kenneth Roseman, Esq., who had been the plaintiff's counsel in the medical malpractice matter, to represent her. Dr. James claimed that her insurance company acted in bad faith by failing to settle the matter, and that respondent's law firm failed to follow her direction to do so.[1] In discovery, respondent produced his entire file, including both the original patient notes for the plaintiff, which Montague had produced, and the patient notes that respondent had received from Dr. James and produced in discovery. Following production of these records, an ethics investigation commenced in Delaware.

The Delaware Office of Disciplinary Counsel (DODC) charged that respondent had allowed his client to testify falsely, had concealed information,

[1] Although respondent's retention of Roseman in this regard raises concerns regarding a conflict of interest, that issue is not before us.

and had failed to take subsequent remedial measures in violation of Delaware Lawyers' Rule of Professional Conduct (Rule) 3.3(b); obstructing another party's access to and/or concealing materials having possible evidentiary value, in violation of Rule 3.4(a); knowingly disobeying the Delaware court rules requiring supplementation of discovery answers, in violation of Rule 3.4(c); failing to disclose a material fact to avoid assisting a criminal or fraudulent act by a client, in violation of Rule 4.1(b); engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(c); and engaging in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d).

On December 21, 2016, after deciding that respondent had violated all the charged RPCs, a panel of the Board on Professional Responsibility of the Supreme Court of Delaware (Delaware Board) conducted a sanctions hearing. At that hearing, respondent denied that he had violated any ethics rules, or that the patient notes he received from Montague should have been produced in the medical malpractice litigation. Initially, respondent testified that the records, "weren't germane to the treatment that was rendered to this child." He later contradicted himself and admitted that "the extent of the jaundice on the baby" was an issue in the case. Respondent further admitted that the medical care that Dr. James and her staff provided to the baby on July 21, 2006 was "the central

issue in the case." Respondent also admitted that he had not produced the altered records because their production would have hurt his client's credibility.

Respondent eventually conceded that Delaware Superior Court Civil Rule 26 required him to supplement his discovery responses during the litigation, but insisted that he was not required to produce the Montague patient notes. Yet, he also testified that, in hindsight, it was a "mistake" to withhold the records and "he now would have produced" them.

On June 5, 2017, the Delaware Board recommended respondent's disbarment to the Supreme Court of Delaware. The Delaware Board stated that "it is disingenuous to suggest that a medical record altered by a physician and her staff concerning her treatment of the patient would not be relevant in a medical malpractice action alleging that the physician's treatment of the patient was negligent and violated the standard of care." It further found that respondent "failed to admit the wrongfulness of his conduct and instead attempted to make technical arguments about why disclosure was not required under discovery rules and why the evidence likely would not have impacted the amount recovered by plaintiff at trial . . . Respondent's actions in this matter were at best dishonest and at worst criminal which resulted in actual and potential harm to the litigants, the judicial process and the public."

On October 23, 2017, the Supreme Court of Delaware issued an order disbarring respondent.[2] Based on the facts of the Delaware disciplinary matter, respondent entered a joint petition by consent in Pennsylvania, and on June 1, 2018, the Supreme Court of Pennsylvania suspended him for three years.

In its motion, the OAE argues that respondent's unethical conduct and ethics violations in Delaware equate to violations of the following New Jersey Rules of Professional Conduct: RPC 3.3(a)(2), RPC 3.3(a)(4), RPC 3.4(a), RPC 3.4(c), RPC 4.1(a)(2), RPC 4.1(b), RPC 8.4(c), and RPC 8.4(d).

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 Delaware, the standard of proof in attorney disciplinary matters is clear and convincing evidence.

[2] In Delaware, disbarment is not permanent. A disbarred attorney may not apply for reinstatement, however, "until the expiration of at least five years from the effective date of the disbarment." Rule 22(c) of the Delaware Lawyer's Rules of Disciplinary Procedure.

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.

The OAE asserts that, typically, in New Jersey, persistent concealment of material evidence by an attorney in a complex litigation matter, involving violations of RPC 3.3, RPC 3.4, RPC 4.1, RPC 8.4(c) and RPC 8.4(d), results in a one-year suspension.

Further, the OAE contends, in aggravation, that respondent's misconduct caused substantial harm to the parties to the underlying matter. His deception may have prevented a higher verdict for an infant who requires life-long care. Respondent's misconduct also resulted in the filing of two subsequent lawsuits in Delaware against respondent and other parties. Indeed, the Delaware Board found that respondent's misconduct "caused actual and potential injury to the litigants, the public and the judicial process." In further aggravation, respondent is an experienced attorney who should have recognized the evidentiary value of the altered medical records.

Moreover, the OAE emphasized the Delaware Board's finding that, during his disciplinary proceeding, respondent expressed no remorse, failed to acknowledge his misconduct, and was dishonest in his proffered defenses. Additionally, respondent failed to report his Delaware discipline to New Jersey ethics authorities.

The OAE acknowledged, in mitigation, that respondent has no history of discipline in New Jersey, he cooperated with the OAE during the New Jersey ethics proceedings, and he notified the OAE through counsel that he had consented to discipline in Pennsylvania. Accordingly, the OAE recommends a two-year suspension.

In a December 20, 2018 letter, respondent's counsel stated that respondent does not oppose the OAE's recommendation.

In our view, after respondent received patient notes from Turner that conflicted with his own client's patient notes, and after respondent confronted Dr. James with them, respondent should have been aware of the ethics minefield he was about to enter. Nonetheless, he allowed his client to testify falsely at her deposition and at trial. He allowed Montague to testify falsely at her deposition. He failed to provide Montague's notes to the plaintiff's counsel in discovery. He took no action during the depositions to correct or remediate the false testimony. At a minimum, he should have notified the court and moved to withdraw as counsel. He did neither. Instead, he allowed Dr. James to testify dishonestly and then, in his closing, highlighted the mother's failure to follow instructions, doubling down on the misleading testimony. Respondent's misconduct in this regard was egregious.

By assisting Dr. James in the commission of fraud, withholding evidence of the fraud, and obstructing justice, respondent violated RPC 3.3(a)(2), RPC 3.3(a)(4), RPC 3.4(a), RPC 3.4(c), RPC 4.1(a)(2), RPC 8.4(c), and RPC 8.4(d).[3]

Cases involving egregious instances of lack of candor to a tribunal, even where the attorney has a non-serious ethics history, have resulted in the imposition of terms of suspension. See, e.g., In re Stuart, 192 N.J. 441 (2007)

[3] Although the OAE charged respondent with having violated RPC 4.1(b), that Rule is merely an advisory addendum to RPC 4.1, and is otherwise subsumed by our finding that respondent violated RPC 4.1(a)(2).

(three-month suspension for assistant district attorney in New York who had been in contact with a witness in the prosecution of a homicide case, but misrepresented to the court that he did not know the whereabouts of this witness; no prior discipline); In re Forrest, 158 N.J. 428 (1999) (attorney who failed to disclose the death of his client to the court, his adversary, and the arbitrator was suspended for six months; the attorney's motive was to obtain a personal injury settlement; prior private reprimand); In re Marshall, 165 N.J. 27 (2000) (one-year suspension for attorney who deceived his adversary and the court by failing to reveal a material fact during litigation, serving false answers to interrogatories, and permitting his client to produce misleading documents to his adversary, all the while maintaining his silence; the attorney backdated a stock transfer document and falsely dated his notarization of the transfer agreement, knowing that the timing of the transfer could have a material effect on the case; no prior discipline); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the 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; two prior private reprimands); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney

who was involved in an automobile accident and then misrepresented to the police, her lawyer, and a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing; no prior discipline).

This matter is most like that of Marshall. There, the attorney received a one-year suspension for, like respondent, deceiving his adversary and the court by failing to reveal a material fact during litigation, serving false answers to interrogatories, and permitting his client to produce misleading documents to his adversary, all the while maintaining his silence. Specifically, Marshall backdated a stock transfer agreement and stock certificate. He also notarized his client's signatures on the agreement showing a false date. Marshall maintained that he was only attempting to memorialize, in 1995, a transaction that had occurred in 1991. In the Matter of Ira B. Marshall, DRB 99-328 (February 22, 2000) (slip op. at 11). He then allowed his client to provide false testimony regarding the transfer agreement and did nothing to correct the false statements. Id. at 12. The stock transfer agreement represented an attempt to shield the stock from a substantial creditor in an involuntary corporate bankruptcy action. Id. at 2-3.

Here, respondent's misconduct is more serious than Marshall's but not as serious as the attorney's in In re Kornreich. Where Marshall remained silent, respondent, ultimately, did not. He remained silent during the discovery period

and during his client's false testimony. When he finally spoke up, instead of correcting the misrepresentations, he highlighted the false testimony to strengthen his case to the jury and, thus, became a much more active participant in the lie. His action and inaction caused potential harm to the plaintiff by way of a reduced jury award. Kornreich made misrepresentations and falsified evidence to accuse another person, her employee, for the crimes Kornreich had committed. That is a significant factor not present here. Therefore, respondent's misconduct falls between the one-year suspension in Marshall and the three-year suspension in Kornreich.

Additionally, respondent expressed no remorse, failed to acknowledge his misconduct, and was dishonest in his proffered defenses. Further, although respondent has no history of discipline in New Jersey, he is an experienced attorney who should have recognized the evidentiary value of the altered medical records. Moreover, although respondent's counsel notified the OAE that he had consented to discipline in Pennsylvania, there is no evidence that he reported his Delaware disbarment to the OAE. Rather, he retired from the practice of law in New Jersey, on March 27, 2017, during the pendency of the Delaware proceedings.

In mitigation, respondent cooperated with the OAE during the ethics proceedings.

The aggravating factors far exceed those in mitigation and, thus, we determine to impose a two-year suspension.

Members Gallipoli and Joseph 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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daniel J. McCarthy
Docket No. DRB 18-399

Argued: February 21, 2019

Decided: August 6, 2019

Disposition: Two-Year Suspension

Members	Two-Year Suspension	Recused	Did Not Participate
Frost	X		
Clark	X		
Boyer	X		
Gallipoli			X
Hoberman	X		
Joseph			X
Rivera	X		
Singer	X		
Zmirich	X		
Total:	7	0	2

Ellen A. Brodsky
Chief Counsel