In the Matter of NORMAN F. RUSSAKOFF, an Attorney, Appellant. GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS, Respondent.

Argued April 1, 1992; decided May 5, 1992

SUMMARY

APPEAL, by permission of the Court of Appeals, from an unpublished order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 31, 1991, which granted a motion by petitioner Grievance Committee for the Second and Eleventh Judicial Districts to suspend respondent attorney from the practice of law pending the outcome of a disciplinary proceeding, suspended respondent until further order of the court, authorized petitioner to institute and prosecute a disciplinary proceeding against respondent, referred the matter to a Special Referee and directed service of the petition within 90 days.

HEADNOTES

Attorney and Client — Disciplinary Proceedings — Interim Suspension — Controverting Misconduct Charges — Failure of Appellate Division to Articulate Reasons for Interim Suspension

1. So much of an Appellate Division order as suspended respondent attorney from the practice of law pending the outcome of disciplinary proceedings concerning charges that he mishandled clients' funds in violation of DR 9-102 and DR 1-102 (A) (1), (4) and (7) is vacated, and the matter is remitted to the Appellate Division for further proceedings. The Appellate Division has the power to suspend attorneys charged with misconduct pending final disposition of the charges where the misconduct in question poses an immediate threat to the public interest and is clearly established either by the attorney's own admissions or by other uncontroverted evidence. When the Appellate Division decides to issue an interim suspension order, it should articulate the reasons for its decision. Here, respondent attorney made no admissions, and affirmatively denied any "intentional or wilful" misconduct. While that denial may not have been sufficient to controvert charges that he had violated DR 9-102, which concerns attorneys' fiduciary and record-keeping responsibilities, it did give rise to a question as to whether respondent violated DR 1-102 (A) (4), which has been held to require a showing of intent to defraud, deceive or misrepresent. Thus, it cannot be said that the misconduct charges were completely uncontroverted. Further, because the Appellate Division did not state the reason for its interim suspension order, there is no way of knowing whether its decision was predicated on the uncontroverted allegations that DR 9-102 had been violated or was instead premised on the claimed violation of DR 1-102 (A) (4), as to which there was considerable dispute.

Attorney and Client — Disciplinary Proceedings — Interim Suspension — Prompt Postsuspension Hearing

2. Inasmuch as neither the Appellate Division rules governing interim

suspensions of attorneys pending final disposition of misconduct charges (22 NYCRR 603.4 [e]; 691.4 *[l]*; 806.4 [f]; 1022.19 [f]), nor the specific interim suspension order of the Appellate Division, Second Department, in this disciplinary proceeding against respondent attorney, provide for a prompt postsuspension hearing, some action to correct this omission seems warranted.

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AM JUR 2d, Attorneys at Law, §§ 28, 30, 48, 51, 91.

CLS, Judiciary Law, Appx, Code of Professional Responsibility DR 1-102 (A) (1), (4), (7); DR 9-102; Vol 45, § 603.4 (e); § 691.4 *(l)*; § 806.4 (f); § 1022.19 (f).

NY JUR 2d, Attorneys at Law, §§ 19, 22, 24-27, 32.

ANNOTATION REFERENCE

Validity and construction of procedure to temporarily suspend attorney from practice, or place attorney on inactive status, pending investigation of, and action upon, disciplinary charges. 80 ALR4th 136.

POINTS OF COUNSEL

Nicholas C. Cooper for appellant. I. Section 691.4 *(l)* (1) of the Appellate Division, Second Department (22 NYCRR), permits the immediate suspension of an attorney only upon a finding of guilt of misconduct "immediately threatening the public interest" based upon either "a substantial admission under oath * * * or * * * other uncontroverted evidence". *(Matter of Padilla,* 67 NY2d 440; *Matter of Nuey,* 61 NY2d 513.) II. Petitioner's alleged evidence of conversion of clients' funds was clearly controverted by respondent's denial that he is guilty thereof and by petitioner's failure to prove a necessary element of conversion, namely venal intent. *(Matter of Altomerianos,* 160 AD2d 96; *Matter of Goodman,* 146 AD2d 78.) III. The Appellate Division, Second Department's "immediate" suspension rule (22 NYCRR 691.4 *[l])*, is unconstitutional since it fails to provide for a sufficiently prompt hearing after imposition of an interim suspension. *(Barry v Barchi,* 443 US 55.) IV. Since the standard of proof applied by the Appellate Division, Second Department, is far less stringent than the "venal" intent standard applied by the Appellate Division, First Department, in "conversion" cases, respondent is denied

his constitutional guarantee of equal protection of the law. V. Imposition by the Appellate Division of a suspension rendered effective "immediately" and without prior notice to respondent violates due process of law. VI. Respondent may not be disciplined for invoking his privilege against self-incrimination. (*Spevack v Klein*, 385 US 511.)

Robert H. Straus for respondent. I. The Appellate Division, Second Department, properly exercised its authority, pursuant to 22 NYCRR 691.4 *(l)*, in suspending appellant from the practice of law, pending the outcome of a disciplinary proceeding. (*Matter of Padilla*, 67 NY2d 440; *Matter of Iversen*, 51 AD2d 422; *Matter of Detsky*, 16 AD2d 595; *Matter of Rogers*, 94 AD2d 121; *Matter of Pinello*, 100 AD2d 64; *Matter of Frankel*, 123 AD2d 468; *Matter of Harris*, 124 AD2d 126; *Matter of Kirwin*, 127 AD2d 264; *Matter of Swyer*, 143 AD2d 462; *Matter of Randel*, 158 NY 216.) II. Having failed to assert constitutional challenges in the court below, appellant may not raise them for the first time on this appeal. (*Di Bella v Di Bella*, 47 NY2d 828; *Cibro Petroleum Prods. v Chu*, 67 NY2d 806.) III. Appellant has not been deprived of his due process rights in that he has been afforded the opportunity for a prompt postsuspension hearing. (*Arnett v Kennedy*, 416 US 134; *Barry v Barchi*, 443 US 55; *Gershenfeld v Justices of Supreme Ct. of Pa.*, 641 F Supp 1419; *Cleveland Bd. of Educ. v Loudermill*, 470 US 532.)

Hal R. Lieberman and *Barbara S. Gillers* for the Departmental Disciplinary Committee for the First Judicial Department, *amicus curiae*. The temporary suspension rule does not violate due process. (*In re Ruffalo*, 390 US 544; *Matter of Mitchell*, 40 NY2d 153; *Morrissey v Brewer*, 408 US 471; *Mathews v Eldridge*, 424 US 319; *Federal Deposit Ins. Corp. v Mallen*, 486 US 230; *Mitchell v Grant Co.*, 416 US 600; *Matter of Anonymous Attorneys*, 41 NY2d 506; *Matter of Rochlin*, 100 AD2d 263; *Matter of Glassman*, 19 AD2d 146.)

OPINION OF THE COURT

Per Curiam.

Respondent attorney was suspended from the practice of law pending final disposition of charges that he had mishandled clients' funds. The issue in this appeal is whether the Appellate Division order of suspension complied with the requirements of *Matter of Padilla* (67 NY2d 440).

In the fall of 1989, in response to a client complaint, the Grievance Committee for the Second and Eleventh Judicial Districts initiated an inquiry into respondent's handling of his client bank accounts. The inquiry, which included an inspection of certain bank records furnished by respondent, revealed a number of unexplained withdrawals from several escrow accounts containing client and estate funds. This discovery prompted the Committee to direct respondent to appear and to give testimony regarding his "apparent conversion" of clients' funds.

After learning that the Committee intended to use any admissions he might make against him, respondent declined to appear in person and elected instead to submit an affirmation in which he "categorically denied" that he had engaged in conduct "involving 'fraud, deceit or misrepresentation.' " With regard to any specific questions about his handling of client funds, respondent affirmed that he had "no alternative but to exercise [his] constitutional right against self-incrimination."

Following the submission of this affirmation, the Committee moved by order to show cause for authorization to commence formal disciplinary proceedings against respondent. The Committee also sought an order suspending respondent during the pendency of the proceedings on the grounds that there was "uncontroverted evidence of his professional misconduct" and that respondent was "guilty of professional misconduct immediately threatening the public interest." Submitted in support of this request for relief were the bank statements the Committee had inspected, as well as other documentary evidence demonstrating respondent's unexplained use of client funds. Also submitted was a copy of the Committee's proposed petition, which alleged that respondent had violated Code of Professional Responsibility DR 9-102 and DR 1-102 (A) (1), (4) and (7). Once again, respondent's only reply was that he had not engaged in "any intentional or wilful misconduct."

By order dated October 31, 1991, the Appellate Division granted the Committee's motion and ordered respondent temporarily suspended immediately. The court also authorized the initiation of formal disciplinary proceedings, referring the matter to a Special Referee and directing service of the Committee's petition within 90 days. The order, however, did not include any other provisions regarding the timing of either the hearing or the final disposition of the charges

against respondent. Significantly, the court did not set forth the reasons for its decision to suspend respondent. On respondent's subsequent application, this Court granted him leave to appeal to the Court of Appeals. We now conclude that the Appellate Division order of temporary suspension cannot stand.

In *Matter of Padilla (supra,* at 448-449), we held that in certain narrow circumstances the Appellate Division has the power to suspend attorneys charged with misconduct even though the disciplinary proceedings against them remain pending. Specifically, we held that interim suspensions are permissible where the misconduct in question poses an immediate threat to the public interest and is clearly established either by the attorney's own admissions or by other uncontroverted evidence *(id.).* We further stated in *Padilla* that when the Appellate Division decides to issue an interim suspension order, it should articulate the reasons for its decision. While the failure to articulate the basis of an interim suspension decision may not be fatal in all cases, it is a defect that cannot be overlooked where the papers on which the decision was based leave room for doubt or ambiguity *(see, id.).*

[1] Here, respondent had made no admissions. In fact, he affirmatively denied any "intentional or wilful" misconduct. While that denial may not have been sufficient to controvert charges that he had violated DR 9-102, which concerns attorneys' fiduciary and record-keeping responsibilities *(see, Matter of Harris,* 124 AD2d 126; *Matter of Iversen,* 51 AD2d 422), it did give rise to a question as to whether respondent violated DR 1-102 (A) (4), which was cited by the Committee and has been held to require a showing of intent to defraud, deceive or misrepresent *(Matter of Altomerianos,* 160 AD2d 96). Accordingly, it cannot be said that the Committee's charges of misconduct were completely "uncontroverted."

Further, because the Appellate Division did not state the reason for its interim suspension order, there is no way of knowing whether its decision was predicated on the uncontroverted allegations that DR 9-102 had been violated or was instead premised on the claimed violation of DR 1-102 (A) (4), as to which there was considerable dispute. Thus, we cannot now determine whether the suspension order was issued in compliance with *Matter of Padilla (supra).*

[2] Because it is impossible to determine whether the Appellate Division acted within the guidelines set forth in *Padilla,*

we conclude that the court's temporary suspension order must be reversed and the matter remitted to that court for further proceedings consistent with this opinion. In view of this disposition, we do not reach respondent's alternative argument that the Appellate Division's interim suspension order was improper because no provision was made for a reasonably prompt postsuspension hearing. However, inasmuch as the matter is to be remitted, it is worthwhile to note that neither the Appellate Division rules governing interim suspensions (22 NYCRR 603.4 [e]; 691.4 *[l];* 806.4 [f]; 1022.19 [f]) nor the specific order issued in this case provide for a prompt postsuspension hearing. Some action to correct this omission seems warranted *(see, Barry v Barchi,* 443 US 55, 66-68; *Gershenfeld v Justices of Supreme Ct.,* 641 F Supp 1419).

Accordingly, the order of the Appellate Division should be modified, without costs, by vacating so much of the order as suspended respondent from the practice of law pending the outcome of disciplinary proceedings, and the matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein.

Chief Judge WACHTLER and Judges KAYE, TITONE, HANCOCK, JR., BELLACOSA and YESAWICH, JR.,* concur in Per Curiam opinion; Judge SIMONS taking no part.

Order modified, without costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein.

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* Designated pursuant to NY Constitution, article VI, § 2.