# State of New York
# Court of Appeals

OPINION



No. 74
In the Matter of Larry Hallock,
&c.,
Appellant;
Grievance Committee for the Tenth
Judicial District,
Respondent.
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No. 75
In the Matter of Mary Sheila
Malerba, &c.,
Appellant;
Grievance Committee for the Tenth
Judicial District,
Respondent.

Deborah A. Scalise, for appellants.
Rona I. Kugler, for respondent.

PER CURIAM:

The Appellate Division imposed reciprocal discipline on appellants Larry Hallock and Mary Malerba for misconduct committed before a federal district court judge, suspending Hallock for one year and Malerba for six months. We hold that the record from

the foreign jurisdiction did not support the Appellate Division's finding that appellants acted dishonestly and, accordingly, we reverse and remit in both cases.

I.

Hallock & Malerba, P.C., appellants' law firm, along with associate Oleg Smolyar, represented plaintiff Sheri Luscier in a personal injury case before Judge P. Kevin Castel in the Southern District of New York. In opposition to defendants' summary judgment motion, the firm submitted an affidavit purportedly signed by Luscier and notarized by Smolyar (the Luscier Affidavit). During her trial testimony, however, Luscier disavowed any knowledge of the Luscier Affidavit.

Judge Castel subsequently ordered the firm to explain how the Luscier Affidavit was drafted and executed. In his unsworn "Attorney's Affidavit," Smolyar took responsibility for drafting the Luscier Affidavit and claimed Luscier was involved in its preparation but admitted that he signed her name and falsely attested to the administration of the oath. After Judge Castel issued an order to show cause why all three attorneys and the law firm should not be sanctioned under the Federal Rules of Civil Procedure rules 56 and 11 for the false signature and attestation, Smolyar admitted that indeed most of the Attorney's Affidavit was false and that he never contacted Luscier about the affidavit, but instead unilaterally drafted and signed the Luscier Affidavit. He maintained that this was an "isolated incident."

Hallock and Malerba denied involvement in drafting the Luscier Affidavit and argued they had no reason to know of Smolyar's dishonesty. They also disclosed the discovery of an unrelated client affidavit that Smolyar falsely signed less than three weeks

after the Luscier Affidavit. Although Hallock and Smolyar agreed that Hallock drafted the Attorney's Affidavit, they disagreed about whether Hallock spoke to Smolyar before drafting it and whether he sought Smolyar's input before submission.

Judge Castel sanctioned Smolyar individually for the Luscier Affidavit under Federal Rules of Civil Procedure rules 51 (h) (the submission of affidavit or declaration in bad faith) and 11 (b) (sanctions for bad faith submission to the court requiring actual knowledge of lack of evidentiary support). Judge Castel found that Smolyar, as an associate at the firm, signed and submitted the Attorney's Affidavit with knowledge of its falsity (*Luscier v Risinger Bros. Transfer*, 2015 WL 5638063, *10-11 [SD NY Sep. 17, 2015]). By contrast, Judge Castel imposed sanctions under Federal Rules of Civil Procedure rule 11 (c) on the law firm not "because of [the firm's] misfortune of having employed a lone wolf, bad actor" but rather because Hallock "was a direct participant in the preparation and filing" of the Attorney's Affidavit (*id.* at *12, *34-35). Judge Castel reasoned that Hallock "had serious reason to doubt" Smolyar's account of the drafting of the Luscier Affidavit and should have sought to verify Smolyar's account with the client before filing the Attorney's Affidavit (*id.* at *12, *35-36). Moreover, the discovery of Smolyar's unrelated misconduct demonstrated "[t]he ease with which . . . Smolyar's lie could have been exposed" (*id.* at *13, *37). Nevertheless, Judge Castel concluded that the record did not support a finding that Hallock knew that the Attorney's Affidavit was false (*id.* at *12, *37). As a result, the law firm was jointly and severally liable for the submission of the Attorney's Affidavit but neither Hallock nor Malerba was sanctioned under Federal Rules of Civil Procedure rule 11 (b).

The Grievance Committee for the Southern District of New York (SD NY Committee) charged Hallock and Malerba with violations of various New York Rules of Professional Conduct (*see* SD NY Local Civil Rule 1.5 [b] [5]). Both attorneys consented to censure and admitted they failed to supervise Smolyar in violation of Rules of Professional Conduct (22 NYCRR 1200.00) rules 5.1 (b) (1) (requiring lawyers in a firm with managerial responsibility to make "reasonable efforts" to ensure supervised attorneys follow the rules); 5.1 (b) (2) (same for lawyers with direct supervisory authority); 5.1 (d) (2) (ii) (rendering law firm partner vicariously responsible for a violation of the rules by an employee where the partner should have known of the employee's misconduct); and 8.4 (h) (prohibiting a lawyer from engaging in "conduct that adversely reflects on the lawyer's fitness as a lawyer"). The SD NY Committee made no additional factual findings and censured appellants.

Pursuant to 22 NYCRR 1240.13, the Appellate Division ordered Hallock and Malerba to show cause why reciprocal discipline should not be imposed "based on the misconduct underlying the discipline imposed" by the SD NY Committee. Before the Appellate Division, both attorneys admitted the same disciplinary rule violations with respect to their failure to supervise Smolyar, offered mitigation, and requested a sanction no more severe than censure. Neither gave any indication in their response that they knew beforehand about Smolyar's misconduct or that they personally engaged in any dishonest conduct.

The Appellate Division suspended Hallock for one year (*Matter of Hallock*, 181 AD3d 125 [2d Dept 2020]). The court determined that Hallock's "misconduct extended

beyond a mere failure to supervise" because Judge Castel found that he was a direct participant in the preparation of the Attorney's Affidavit (*id.* at 129-30). The court noted that "[f]ailure by attorneys to adhere to basic standards of honesty in their representations to the courts seriously compromises the ability of the courts to render the appropriate disposition in matters brought before them" (*id.* at 130). Malerba was suspended for six months (*Matter of Malerba*, 182 AD3d 91 [2d Dept 2020]). Even though she was "less culpable" than Hallock, the court found that Malerba's "dishonest conduct merits a suspension from the practice of law" (*id.* at 95). Hallock and Malerba appealed to this Court as of right pursuant to CPLR 5601 (b) (1).

II.

An attorney disciplinary proceeding is an "adversary proceeding[] of a quasi-criminal nature" and the lawyer charged with misconduct is "entitled to procedural due process, which includes fair notice of the charge" and an opportunity to be heard (*In re Ruffalo*, 390 US 544, 550-51 [1968]; *see also Matter of Dondi*, 63 NY2d 331, 339-40 [1984]). Sanctions imposed in disciplinary proceedings "may have serious consequences resulting in impairment of repute, loss of clientele, or, in the case of disbarment, loss of license to practice a profession which is their very source of livelihood" (*see Anonymous Attorneys v Bar Assn of Erie County*, 41 NY2d 506, 508 [1977]). In a reciprocal disciplinary proceeding, "[a]fter the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction," the court may impose discipline for the underlying misconduct committed in the foreign jurisdiction (22 NYCRR 1240.13 [c]). In reviewing

the disciplinary determination of the Appellate Division, this Court "possesses no power to rule upon the facts, in the absence of an abuse of discretion as a matter of law, or to determine the severity of the punishment" (*Matter of Del Bello*, 19 NY2d 466, 472 [1967]).

Hallock and Malerba claim that the Appellate Division improperly relied on evidence from Smolyar's reciprocal disciplinary proceeding.[1] We disagree. The court did not explicitly rely on evidence from Smolyar's proceeding in either opinion. While there are cross references to the *Matter of Smolyar* order in each decision, the references were intended only to incorporate the court's prior summary of Judge Castel's findings (*see Hallock*, 181 AD3d at 126; *Malerba*, 182 AD3d at 92) or to identify specific facts within that summary (see *Hallock*, 181 AD3d at 127).

We do, however, hold that the Appellate Division's findings that Hallock and Malerba acted dishonestly in their dealings with the federal court were not supported by the record and, therefore, constituted an abuse of discretion (*see Matter of Brandes*, 28 NY3d 1041, 1043 [2016]). As an initial matter, the only record at issue here was "the record of the proceeding in [the foreign] jurisdiction" (22 NYCRR 1240.13 [c]). And in that proceeding, Judge Castel explicitly noted, "the record before this Court is not sufficient to support a finding of actual knowledge on the part of Mr. Hallock of the falsity of the 'Attorney's Affidavit'" (*Luscier*, 2015 WL 5638063, *12, 2015 US Dist LEXIS 129640,

[1] The Appellate Division, after holding a mitigation hearing, suspended Smolyar for one year, finding that he was "not entirely to blame for the false statements" because both offending documents were "prepared while under the supervision of his employer" (*Matter of Smolyar*, 165 AD3d 74, 83 [2d Dept 2018]). Smolyar's reciprocal disciplinary proceeding was concluded prior to the commencement of the proceedings at issue here.

*37). Judge Castel did not mention any participation by Malerba in the filing of either Affidavit or any personal dishonesty by either Hallock or Malerba. Nevertheless, in the "Findings and Conclusion" section of each opinion, the Appellate Division noted that each attorney engaged in "dishonest" conduct (*see Hallock,* 181 AD3d at 130*; Malerba*, 182 AD3d at 95). A finding of personal dishonesty—such as knowingly filing a false affirmation—goes beyond a failure to supervise or to prevent dishonest conduct by an employee, and such a finding with respect to Hallock or Malerba is not supported by the record of the federal court proceedings.[2]

It is crucial, given the stakes involved, that the Appellate Division makes clear that whatever sanction is imposed is grounded in the record of the federal court proceedings. We take no position on the appropriate penalty for that misconduct. Nor do we minimize the serious violations of the disciplinary rules that admittedly occurred here. Accordingly, on each appeal, the order of the Appellate Division should be reversed, with costs, and matter remitted to that court for further proceedings in accordance with this opinion.

[2] In light of our holding, we do not address appellants' due process claims with respect to the Appellate Division's findings of dishonesty.

No. 74: Order reversed, with costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion Per Curiam. Judges Fahey, Garcia, Wilson, Singas and Cannataro concur. Chief Judge DiFiore and Judge Rivera took no part.

No. 75: Order reversed, with costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion Per Curiam. Judges Fahey, Garcia, Wilson, Singas and Cannataro concur. Chief Judge DiFiore and Judge Rivera took no part.

Decided December 14, 2021