SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 02-301

IN THE MATTER OF

STEVEN W. SMOGER

AN ATTORNEY AT LAW

Decision

Argued: October 17, 2002

Decided: December 17, 2002

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Carl D. Poplar 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 reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), pursuant to R.1:20-14, following the Court's July 2, 2002 order accepting respondent's resignation, with prejudice, as the judge of the municipal courts of Margate, Port Republic and Ventor and barring him from holding judicial office.

Respondent was admitted to the New Jersey bar in 1969. He has no disciplinary history.

In March 2001, the Advisory Committee on Judicial Conduct ("ACJC") filed a three-count complaint against respondent. In November 2001, the ACJC filed a seven-count amended complaint. Respondent filed answers to the complaints.[1]

The complaint alleged that respondent violated the following Canons of the Code of Judicial conduct: Canon 1 (requiring judges to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved), Canon 2A (requiring judges to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), Canon 2B (requiring that judges not lend the prestige of their office to advance the private interests of others), Canon 3A(1) (requiring judges to be faithful to the law and to maintain professional competence in it) and R. 2:15-8(a)(6) (requiring judges to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute).

Following a January 2002 hearing, the ACJC found that respondent was guilty of all but one count of the complaint. The ACJC recommended that the Court institute proceedings under R. 2:14-1 to remove respondent permanently from judicial office. Shortly thereafter, respondent resigned from his municipal court positions, waived his right to a hearing before the Court and stated that he would not file an objection to the ACJC's presentment.

On July 2, 2002, the Court adopted the ACJC's findings and ordered that respondent's

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[1] The first three counts of the amended complaint are identical to the first three counts of the original complaint. For ease of reference, we refer to the amended complaint as the complaint and to respondent's two answers as the answer.

resignations from the municipal courts of Margate, Port Republic and Ventnor be accepted with prejudice, "an action that is tantamount to respondent's removal," and permanently barred him from "holding judicial office in this State."

Count I

Contrary to the Court's dictate in In re Bozarth, 127 N.J. 271 (1992), on ten occasions between February and October 1997, respondent ordered that bench warrants be issued for the arrest of municipal court defendants who were late for court sessions. In Bozarth, a municipal court judge was publicly reprimanded for (1) ordering that a bench warrant be issued for a defendant who was no more than twenty minutes late for court, which resulted in the defendant's being handcuffed to a bench in the police station for several hours; (2) dealing inappropriately with another defendant who was talking in the courtroom; and (3) trivializing a third defendant's right to counsel.

Respondent denied having intentionally violated the law and stated that as soon as he was told of the impropriety of issuing bench warrants for defendants who were merely late, he discontinued that practice.

The ACJC found that respondent's ignorance of the law and his cessation of the improper practice did not excuse or mitigate his misconduct, since it was respondent's responsibility to know the law as it related to his duties as a municipal court judge.

The ACJC concluded that respondent violated Canons 1, 2A and 3A(1) of the Code of Judicial Conduct, as well as R. 2:15-8(a)(6).

Count II

Respondent was first appointed to a municipal court in 1992. In 1993, he was appointed counsel to the Atlantic City Board of Alcoholic Beverage Control ("ABC") and continued in that position through 2001. As counsel, his duties included prosecuting matters before the ABC. The complaint alleged that respondent's position as ABC counsel violated R. 1:15-1(b), which prohibits municipal court judges from practicing in "any criminal, quasi-criminal or penal matter, whether judicial or administrative in nature."

According to respondent, he had believed that ABC matters were not criminal, quasi-criminal or penal. Rather, he had believed that acting as counsel to the ABC was no different from acting as an attorney for a school, planning or zoning board. He denied that he intentionally violated R. 1:15-1(b) and stated that he would no longer serve as counsel to the ABC.

The ACJC rejected respondent's explanation as either a defense to or mitigation for the charge. The ACJC found that respondent violated Canons 1, 2A and 3A(1) of the Code of Judicial Conduct, as well as R. 2:15-8(a)(6).

Count III

Respondent was a licensed professional boxing referee before becoming a municipal court judge. By letter dated July 29, 1992, Robert D. Lipscher, Administrative Director of the Courts, informed respondent that the Supreme Court had decided that, as a municipal

court judge, respondent "should not referee fights professionally. As you know, the Court is particularly sensitive to the possibility of an appearance of impropriety arising from an association of the Judiciary with the casino industry."

In March 1993, Director Lipscher asked respondent about the accuracy of a report that he was still refereeing fights in Atlantic City. Respondent replied that the "telecast of me refereeing a professional boxing match in Atlantic City must have been a re-broadcast of a professional boxing match that I officiated before receipt of [Director Lipscher's July 1992 letter]."

In his answer to the allegation in the complaint that, after the Court's direction, respondent continued to referee boxing matches, respondent stated that it was his understanding that the prohibition only applied to fights in Atlantic City casinos and that he had been

> fastidious about compliance with this determination, and he has not engaged in any refereeing activity in any Atlantic City casino hotel since the issuance of the Supreme Court directive. He has in fact pursued this activity in other states and, on rare occasions, elsewhere in New Jersey.

In fact, according to the records of the Athletic Control Board, respondent officiated at thirty-one fights after July 1992; sixteen of the matches were in Atlantic City, nine of which took place in casinos.

Respondent testified that he continued to referee fights because of his strong attachment to boxing and because of the income derived from this activity. He admitted knowing that his conduct violated the Court's directive. He hoped, however, that his actions would remain undetected. As to refereeing in Atlantic City only three months after receiving

the Court's directive, respondent stated that "I thought I could slip through."

The ACJC found that respondent violated Canons 1 and 2A of the Code of Judicial Conduct, as well as R. 2:15-8(a)(6), and that the violation was "compounded by his false responses to inquiries from the Administrative Director of the Courts and the false statement in his Answer."

Count IV

In June 2001, respondent officiated at the wedding of Martin Kratz, a Margate resident, in the Margate municipal court. Prior to the wedding, Kratz had asked respondent if there would be a charge for respondent's services. Respondent replied that there would be no charge, but that it would be appreciated if Kratz could make a donation to a local charity. In reply to Kratz's request that respondent recommend a particular charity, respondent named the Hiltner Foundation. When Kratz asked what amount he should donate, respondent replied "whatever you can afford."

After the wedding ceremony, Kratz asked respondent to repeat the name of the charity. One of respondent's court staff stated "Oh, it's the Hiltner Foundation." When Kratz asked if he could donate cash, the staff person replied that the donation had to be by check. Kratz made out a check for $100 and gave it to the staff person.

Respondent testified that it was his practice, when asked about a fee for officiating at a wedding, to reply that he was "not permitted to touch anything" and to suggest a few charities, including the Hiltner Foundation.

Municipal court judges are prohibited from accepting emoluments beyond their salaries for the performance of their duties. N.J.S.A. 2B:12-7. See In re Del Mauro, 57 N.J. 317 (1971) (municipal court judge suspended for one year for taking fees for performing wedding ceremonies).

The ACJC determined that respondent's statements to wedding participants about donating to charity was "tantamount to obtaining such payments...for a private personal use...The character of such payments as 'compensation' is not altered by the fact that moneys went to other recipients." The ACJC further found that the donations "served Respondent's purposes" because he had a "personal attachment or interest" in the suggested charities. In fact, the Hiltner Foundation was not an officially recognized charity; rather, "individuals organized and constituted to pay for the education of their relatives, the children of a deceased brother of the city administrator and of the secretary to the mayor [of Margate]."

The ACJC found that respondent violated Canons 1 and 2A of the Code of Judicial Conduct, as well as R. 2:15-8(a)(6), by recommending that Kratz and others make charitable donations for his officiating at their weddings and by involving his court staff in the receipt and delivery of the donations. The ACJC also found that respondent violated Canons 2B and 5C(2) of the Code of Judicial Conduct, as well as R. 2:15-8(a)(6), by specifying the charities to receive such donations. The complaint did not allege a violation of Canon 5C(2) (prohibiting judges from soliciting for educational, religious, charitable, fraternal or civic organizations).

Count V

On June 5, 2001, the day after his wedding, Kratz appeared before respondent in the Ventnor municipal court on a charge of driving with a suspended license. Kratz entered into a plea agreement with the municipal prosecutor, which included a $200 fine. Respondent accepted the plea and imposed a $200 fine. Respondent then told the prosecutor that "this gentleman was married in the Margate City Court yesterday in a very fine ceremony that the Court officiated...Any objection to a suspension of a portion of the fine as a wedding present for the gentleman?" The prosecutor replied that he had made his recommendation, but that, as the judge, respondent had discretion when imposing sentence. Respondent then suspended $100 of the $200 fine.

Respondent testified that he suspended a portion of the fine because Kratz's plea saved the court the time that a trial would have taken.

The ACJC rejected respondent's explanation, finding that Kratz had already received the benefit of his plea when the charge was downgraded. The ACJC determined that respondent's "actual motivation" was to return to Kratz the amount of his donation to the Hiltner Foundation.

The ACJC found that respondent violated Canons 1 and 2A of the Code of Judicial Conduct, as well as R. 2:15-8(a)(6).

Count VI

The complaint alleged that, as the Margate municipal judge, respondent became aware

that the Margate police department was investigating Maria Hiltner, wife of the Margate administrator, for possible possession and use of a controlled dangerous substance and that he had told Dorothy Hiltner, secretary to Margate's mayor and sister of the city administrator, of the investigation.

Respondent denied the allegation.

The ACJC dismissed the charge for lack of clear and convincing evidence.

Count VII

Count VII alleged that the conduct set forth in the complaint demonstrated respondent's "disregard for his judicial obligations sufficient to call into question his fitness to continue to serve as a judge."

The ACJC found that the evidence, including respondent's testimony, "demonstrates an egregious and persistent pattern of total disregard for judicial ethical obligations" and a "disregard for the truth." The ACJC concluded that the evidence "clearly and convincingly shows that Respondent is unfit for judicial office."

* * *

The OAE urged us to reprimand respondent for the misconduct in Count III. As to Counts I and II, the OAE stated that the conduct related solely to respondent's "judicial functions and it does not appear that these counts would call for discipline as an attorney." With respect to counts IV and V, the OAE stated that respondent's conduct did "not appear to

rise to such an egregious level," as found in In re Del Mauro, supra, 57 N.J. 317 (1971), where the judge made a practice of charging a fee for officiating at weddings. Finally, the OAE described Count VII as "cumulative."

* * *

Upon a de novo review of the full record, we determined to grant the OAE=s motion for reciprocal discipline. Where a motion for reciprocal discipline is based on "a final determination of judicial misconduct" by the Court, "that determination shall conclusively establish the facts on which it rests for purposes of an attorney disciplinary proceeding...The sole issue to be determined...shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3); In re Yaccarino, 117 N.J. 175, 183 (1989) ("[T]he determinations made in judicial-removal proceedings are conclusive and binding in subsequent attorney-disciplinary proceedings.")

We agree with the OAE that not all of respondent's judicial improprieties rise to the level of attorney misconduct. We also agree with the OAE that respondent's refusal to comply with the Court directive and his misrepresentations in his letter to Director Lipscher and in his answer to the ACJC's complaint were the most serious of respondent's infractions. Respondent admitted that he knew that his refereeing violated the Court's directive, but hoped that his conduct would remain undiscovered. His misconduct began only three months after receiving the July 1992 directive and continued for almost nine years, until March 31,

2001.[2] During that time, respondent officiated at thirty-one fights. Respondent's refusal to comply with the Court's directive violated RPC 8.4(d) (conduct prejudicial to the administration of justice). Also, respondent's false statements in his letter to Director Lipscher and in his answer to the ACJC complaint violated RPC 3.3(a)(1) (candor toward a tribunal) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Attorneys who have engaged in misrepresentations to tribunals and in conduct prejudicial to the administration of justice have generally received long-term suspensions or disbarment. See, e.g., In re Cillo, 155 N.J. 599 (1998) (one-year suspension where the attorney falsely advised the judge that a case had been settled and that no one was appearing for a conference, when he knew that at least one other attorney involved in the litigation was to appear and that the terms of the order he presented to the court violated other relevant agreements between the parties); In re Kornreich, 149 N.J. 346 (1997) (three-year suspension where the attorney falsely accused her babysitter of being involved in an automobile accident that actually involved the attorney, then attempted to dissuade the babysitter from attending her trial and continued to insist to the court that the babysitter drove the car); In re Edson, 108 N.J. 464 (1987) (disbarment where the attorney advised his client and an expert witness to lie about evidence in two different matters before municipal courts).

In less egregious cases, the Court has found a reprimand or a short suspension to be sufficient. See, e.g., In re Kantor, 165 N.J. 572 (2000) (attorney reprimanded for

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[2] The ACJC complaint was filed on March 9, 2001.

misrepresenting to a municipal court judge that he had insurance coverage on his automobile on the day of an accident); In re Marlowe, 126 N.J. 378 (1991) (attorney reprimanded for misrepresenting to the court that his adversary consented to the adjournment of a domestic violence matter in which the attorney was a party); In re Kernan, 118 N.J. 361 (1990) (three-month suspension where the attorney lied in a certification to the court and fraudulently conveyed property to his mother in order to avoid child support obligations).

In determining the appropriate discipline, we took into consideration respondent's previously unblemished thirty-year legal career and his many years of public service. We also considered the letters from members of the community attesting to his reputation for honesty and professionalism.

In light of the foregoing, for the misconduct described in Counts III, IV and V, we unanimously determined to reprimand respondent. Two members recused themselves.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Steven W. Smoger
Docket No. DRB 02-301

Argued: October 17, 2002

Decided: December 17, 2002

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson			X				
Maudsley						X	
Boylan			X				
Brody			X				
Lolla			X				
O'Shaughnessy						X	
Pashman			X				
Schwartz			X				
Wissinger			X				
Total:			7			2	

Robyn M. Hill 12/19/02
Robyn M. Hill
Chief Counsel