SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-210
District Docket No. XIV-01-123E

IN THE MATTER OF	:
	:
NUSSHY SARAYA	:
	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 20, 2005

Decided: November 29, 2005

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

Respondent 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 final discipline filed by the Office of Attorney Ethics ("OAE") based on respondent's conviction of theft by deception and forgery.

Respondent was admitted to the New Jersey bar in 1978. He was temporarily suspended by Order dated July 31, 2002, following his criminal conviction in this matter. In re Saraya, 173 N.J. 392 (2002). He remains suspended to date.

In January 2001, respondent was the subject of a three-count indictment charging him with one count of third-degree theft by unlawful taking (N.J.S.A. 2C:20-3), one count of third-degree theft by deception (N.J.S.A. 2C:20-4), and one count of third-degree forgery (N.J.S.A. 2C:21-1a(2)).

Respondent was accused of signing the name of client Maria Oliveira to four checks totaling $31,547.57, payable to himself, without her authorization. Respondent contended that Oliveira signed the checks and gave them to him as payment for representing her family in a dispute over the proceeds of her late husband's life insurance policy.

Oliveira testified that respondent, a family friend, volunteered to help her fill out claim forms and write letters to the insurance company. She did not agree to pay respondent a fee, and he had refused an offer of payment. Respondent claimed to the contrary. Specifically, respondent stated that, because of his friendship with the Oliveira family, there was no written fee agreement, but there had been discussion of a twenty-percent contingency fee, plus costs.

Oliveira stated that respondent met with her only a few times, wrote one or two letters to the insurance company, and made a few telephone calls. Respondent contended that he met with the family several times, diligently pursued the probate of

the estate, and handled matters regarding real estate, deeds, and a business that the deceased ran.

The insurance company sent the insurance proceeds to respondent by way of a check for $141,547.57, payable to Oliveira, within three weeks of the first inquiry about the policy. Respondent, in Oliveira's presence, opened a checking account at the Bank of New York under her name and his own, as attorney at law, to handle the probate of the estate. The bank statements and the first package of numbered checks were sent to respondent, at his law office, on behalf of Oliveira, who began to write checks against the account. After several checks were returned for insufficient funds, Oliveira contacted the bank and learned that there was no money left in the account. It was then that she discovered that four checks payable to respondent, totaling $31,547.57, had been drawn on the account.[1]

Respondent claimed that he had received the checks from either Victor Oliveira, the deceased's brother, or Maria Oliveira, and that they represented his contingency fee. Oliveira, in turn, claimed that his services were free, and denied that she had written the checks.

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[1] A review of the brief filed by the State of New Jersey with the Appellate Division reveals that there was a series of communications between respondent and the Oliveiras, when checks began bouncing. Respondent advised the Oliveiras that they should not be concerned.

In June 2000, after a five-day jury trial before the Honorable Elaine L. Davis, J.S.C., respondent was convicted of theft by deception and forgery.

During respondent's sentencing proceeding, the following exchange took place between respondent's counsel and Judge Davis:

> Counsel: I know that Mr. Saraya's position as an attorney is a unique part of what occurred here, but I would indicate to the Court that Mr. Saraya maintained that there was never an attorney/client privilege in this particular instance, that this was basically a friendship type of transaction, that the money did not go through Mr. Saraya's trust account and that it may very well be that while this friendship was originally conditioned upon his representation of the family in other matters, that [sic] they viewed this as a friendship type of a thing, that [sic] there was never to be a fee involved, and I would suggest to the Court that this is not strictly or in the strictest sense an attorney violating a confidence to a client, but was more along the lines of a friend. If the evidence is to be believed and the jury accepted it, that it was more along the lines of a friend defrauding a friend as opposed to a client being defrauded by an attorney.
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> The Court: Well, in all due respect, [counsel] I believe that your client in his version here indicated that she was a client, and indicated what he had done for her with regard to trying to get this insurance money back, and whether she thought of it as an attorney/client or – is really not the issue. It's what he was doing, exhibit certainly under the auspices of being an attorney.
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> [OAEbEx.F9-15 to F10-16.][2]

[2] OAEb refers to the brief filed by the OAE.

Judge Davis went on to state:

> Mr. Saraya, I don't think you have ever really fully understood what was going on in this case. To be honest with you, I think you got convicted in this case because of your own attitude . . . . you still don't get it; and what you don't get, apparently, is that, as an attorney, we have obligations that nobody else has. Just like you're a police officer 24 hours a day, you're a lawyer 24 hours a day if you're privileged enough to be one. And what happened here should never have happened under any circumstances, regardless of whether this was a friend or not a friend, a client or not a client. No lawyer, no lawyer, under our code should have done anything close to what you did here. The minute you put that money into an account that you were controlling, for whatever reason, it was wrong, and then everything is read from there.
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> . . . .
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> Once that insurance money got into your hands, it should have gotten right into her hands and that would have been the end of it because that's what we were all supposed to do. You're entitled to a reasonable fee, certainly for doing what you did, and whatever that fee would have been, if you had decided to have a fee agreement, it would have been subject to your discretion, or even if she thought it was too much money, you know, to fee arbitration. But what you did here was grossly wrong. You know you can't charge somebody an enormous fee like that you claim that you were entitled to for writing a letter. But, more importantly, to lull this woman into a false sense security – of false security, excuse me, over the time period that went on here is atrocious.
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> . . . .
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> As I said before, your attitude stinks, in my opinion, because I think, for whatever reason, you still think that this was not wrong to do, and where you're getting that idea, I have no

> idea . . . . You should know without me having to tell you that what you did here is absolutely wrong . . . .
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> [OAEbEx.F10-17 to F13-5.]

Respondent was sentenced to five years' probation, and ordered to pay restitution of $31,547.57 and court costs. He was also ordered to perform 250 hours of community service. In October 2004, the Appellate Division affirmed respondent's conviction. In March 2005, the Supreme Court denied his petition for certification.

The OAE urged us to recommend respondent's disbarment.

Upon a review of the record, we determine to grant the OAE's motion for final discipline.

Respondent has been convicted of third-degree theft by deception, in violation of N.J.S.A. 2C:20-4, and third-degree forgery, in violation of N.J.S.A. 2C:21-1a(2). Respondent's criminal conviction clearly and convincingly demonstrates that he has committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer, and that he has engaged in conduct involving, dishonesty, fraud, deceit or misrepresentation, a violation of RPC 8.4(b) and (c). In addition, he failed to safeguard funds and failed to promptly turn over funds to which a client or third party was entitled, a violation of RPC 1.15(a) and (b).

The existence of a criminal conviction is conclusive evidence of respondent's guilt. R. 1:20-13(c)(1); In re Gipson, 103 N.J. 75, 77 (1986). Only the quantum of discipline to be imposed remains at issue. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The level of discipline imposed in disciplinary matters based on the commission of a crime depends on a number of factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, supra, 118 N.J. at 445-46. Discipline is imposed even though an attorney's offense was not related to the practice of law. In re Kinnear, 105 N.J. 391 (1987).

The OAE argued that the law and facts of this case require that respondent be disbarred. We agree. Our recommendation for disbarment is grounded not on a finding of knowing misappropriation, but on respondent's conviction of forgery and theft of funds received on behalf of Oliveira.

Conduct analogous to respondent's has resulted in disbarment. See, e.g., In re Scola, 175 N.J. 58 (2002) (attorney disbarred after guilty plea to one count of theft by deception and one count of witness tampering; the attorney was

involved in a check-kiting scheme that victimized a bank); In re Obringer, 152 N.J. 76 (1997) (attorney disbarred for filing fictitious documents with the court to induce court staff to send him funds to which he was not entitled); In re Dade, 134 N.J. 597 (1994) (attorney disbarred after guilty plea to theft by deception; she submitted falsified claim drafts to her employer); and In re Spina, 121 N.J. 378 (1990) (attorney disbarred after criminal conviction; the attorney knowingly misused his employer's funds). There are no circumstances in this case to warrant a departure from the above case law. We, therefore, recommend respondent's disbarment. Members Boylan and Neuwirth did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Nusshy Saraya
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Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley	X					
O'Shaughnessy	X					
Boylan						X
Holmes	X					
Lolla	X					
Neuwirth						X
Pashman	X					
Stanton	X					
Wissinger	X					
Total:	7					2

Julianne K. DeCore
Chief Counsel