SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-258
District Docket No. XIV-2011-0170E

IN THE MATTER OF	:
KIRILL PERCY	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 15, 2015

Decided: May 9, 2016

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear for the hearing, despite proper notice.

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), pursuant to R. 1:20-13. Respondent pleaded guilty in the United States District Court, Southern District of New York (S.D.N.Y.), to conspiracy to defraud the United States Government, contrary to 18 U.S.C §371.1.

Subsequently, respondent pleaded guilty in the United States District Court, Eastern District of New York (E.D.N.Y.) to felony health care fraud, contrary to 18 U.S.C. §1347. The OAE recommends disbarment. For the reasons stated below, we, too, recommend respondent's disbarment.

Respondent was admitted to the bars of New Jersey and New York in 1986. He was disbarred in New York on December 16, 2004, after the court granted the Departmental Disciplinary Committee of New York City's motion for an Order accepting respondent's resignation from the practice of law. In re Percy, 785 N.Y.S. 2d 911 (N.Y. App. Div. 2004). He has been temporarily suspended in New Jersey since April 10, 2013. Respondent has no other history of discipline in New Jersey.

In its brief in support of final discipline, the OAE set forth the following procedural history and factual recitation: on November 18, 2003, respondent pleaded guilty in the S.D.N.Y. to a one-count information charging him with conspiracy to defraud the United States Government, contrary to 18 U.S.C. §371.1. Respondent admitted that, between April 2003 and June 2003, in Manhattan and elsewhere, he conspired to commit health care fraud and to submit false documents in connection with medical claims for patients

treated at North Miami Pain and Rehabilitation Center and the Broward Pain Rehabilitation Group. Respondent and his co-conspirators submitted false documents in connection with medical claims in order to maximize insurance billing.

On July 7, 2005, the Honorable Loretta A. Preska, U.S.D.J., sentenced respondent to imprisonment for one year and one day, supervised release for two years, and a $30,000 fine.

On November 9, 2005, respondent pleaded guilty in the E.D.N.Y. to felony health care fraud, contrary to 18 U.S.C. §1347. He admitted that between August 21, 1996 and March 2003, in Kings County, New York and elsewhere, he conspired to defraud health care benefit programs.

Specifically, respondent admitted that he employed "runners" to solicit automobile accident victims and to direct them to medical offices in which respondent was a full or partial owner for treatment that was not medically necessary. Insurance companies would pay respondent's medical offices for the unnecessary medical treatments.

On January 28, 2011, the Honorable Dora Irizarry, U.S.D.J., sentenced respondent to serve a five-year term of probation with six months home confinement and electronic monitoring, to complete

200 hours of community service, and to pay restitution of $192,536. The judge permitted respondent to have his probation supervised in Florida.

The OAE acknowledged that respondent had provided effective cooperation with a larger criminal investigation and that he had participated in eighteen consensual tapings, and ultimately assisted the government in identifying 264 other "wrongdoers." Further, the OAE noted, respondent's cooperation resulted in the arrest of five other actors. Judge Irizarry, however, was concerned that respondent was not entirely forthcoming about his finances. She noted that some of his interactions with the court showed a "disturbing lack of candor."

Although the OAE did not know the number of times that respondent paid an individual to refer clients to him, it noted that respondent admitted that he had used runners for a period of seven years. Additionally, he admitted that, for three months in 2003, he conspired with others to commit health care fraud by submitting false documents for medical claims for treatment at two clinics in which he had an ownership interest.

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

Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(C)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of RPC 8.4(b). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Hence, the sole issue before the Board is the extent of discipline to be imposed for the attorney's violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, supra, 139 N.J. at 460 (citations omitted). Rather, many factors must be taken into consideration, 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, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect the attorney's clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956). Thus, offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, will, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995).

Attorneys in New Jersey who have been found guilty of insurance fraud have received a wide range of suspensions, as well as disbarment. In companion cases, three attorneys pleaded guilty to mail fraud arising from a scheme to defraud insurance companies. In re Sloane, 147 N.J. 279 (1997), In re Takacs, 147 N.J. 277 (1997), and In re Kerrigan, 146 N.J. 557 (1996). There, the attorneys

submitted false claims to insurance companies, alleging that either they or their clients had sustained personal injury. Sloane pleaded guilty to one count of mail fraud and received a two-year suspension; Takacs was suspended for three years, after pleading guilty to two counts of mail fraud; and Kerrigan was suspended for eighteen months because, at the time of his misconduct, he was not yet an attorney and because he promptly notified and cooperated with disciplinary authorities. See, also, In re Wiss, 181 N.J. 298 (2004) (in a motion for reciprocal discipline, an attorney who pleaded guilty to the fifth-degree crime of insurance fraud received a six-month suspension; the attorney had directed a member of his staff to falsely notarize a client's signature on forms that were then submitted to an insurance company, made misrepresentations on a court form about the source of the client referral, and failed to supervise his staff, resulting in misrepresentations designed to improperly obtain insurance payments); In re Eskin, 158 N.J. 259 (1999) (in another motion for reciprocal discipline, an attorney received a six-month suspension for forgery and falsely notarizing his client's signature on a notice of claim that was served after the deadline had expired and for serving a second notice of claim misrepresenting the date of the injury to give the appearance that the

notice had been timely filed); In re Fisher, 185 N.J. 238 (2005) (one-year suspension in a reciprocal discipline matter from Pennsylvania, where the attorney submitted a phony receipt to an insurance company for the purpose of obtaining insurance proceeds for his girlfriend, whose computer had been stolen, and then filed a complaint against the insurance company, based on the same claim; the attorney was convicted of insurance fraud, forgery, and conspiracy; prior three-month suspension considered in aggravation; passage of time, attorney's inexperience at time of violation, and lack of financial motivation considered in mitigation); In re Berger, 151 N.J. 476 (1997) (two-year suspension imposed on an attorney who submitted false information to his insurance agent, including an improper jurat, with the intent to defraud the law firm's insurance carrier in connection with a fire loss); In re DeSantis, 147 N.J. 589 (1997) (two-year suspension for an attorney who pleaded guilty to one count of mail fraud, relating to the submission of a false medical report of injuries sustained in an automobile accident); and In re Seligsohn, 200 N.J. 441 (2009) (disbarment for an attorney who participated in a scheme that involved staging and reporting fraudulent motor vehicle accidents for the purpose of pursuing false insurance claims; compensated three individuals for

referring clients to him and to his law firm; and filed false tax returns, improperly deducting those payments as business expenses on the firm's corporation business tax returns).

Here, respondent also admitted to employing "runners" over the course of seven years as part of his fraudulent scheme. Generally, the appropriate measure of discipline in a runner case is determined on a case-by-case basis, In re Pajerowski, 156 N.J. 509 (1998), and ranges from a three-month suspension to disbarment. See, e.g., In re Pease, 167 N.J. 597 (2001) (three-month suspension for attorney who paid a tow truck driver, calling him an "investigator," over a four-month period, to refer personal injury cases to the firm); In re Berger, 185 N.J. 269 (2005) (one-year suspension for attorney who paid more than $40,000 to two individuals in exchange for one year of client referrals); In re Chilewich, 192 N.J. 221 (2007) (one-year suspension for attorney who pleaded guilty to one count of offering a false instrument for filing and admitted accepting illegal referrals from runners in approximately twenty matters); In re Sorkin, 192 N.J. 76 (2007) (one-year suspension following a guilty plea to one count of offering a false instrument for filing; the attorney also admitted using a runner on approximately fifty matters); In re Shaw, 88 N.J. 433 (1982) (disbarment for

attorney who used a runner to solicit a personal injury client, "purchased" the client's cause of action for $30,000, settled the claim for $97,500, and permitted the runner to deposit the settlement check into the runner's personal bank account after forging the client's signature; and In re Pajerowski, supra, 156 N.J. 509 (1998) (disbarment for attorney who used a runner for nearly four years to solicit personal injury clients, split fees with the runner, and compensated him for referrals in eight to eleven matters; in one year, 1994, while claiming that the runner was his "office manager," the attorney paid the runner $182,000 for the referrals; many of the clients referred had not actually been injured in accidents).

Here, respondent admitted to both conspiring to commit, and the commission of, healthcare fraud through medical clinics that he owned, or was part owner of, in Miami, Florida. Those clinics received payments based on false documents and claims submitted in connection with fraud. Equally egregious is respondent's admission that he employed "runners" to solicit accident victims to obtain unnecessary medical treatment through the clinics he owned.

This case is unique in that it involves healthcare fraud and the use of runners to solicit business for medical clinics but not

for legal services. Nonetheless, similarities can be drawn between this matter and the Pajerowski case.

Pajerowski admitted to soliciting clients through a runner over the course of three years. On the same day the accident occurred, the runner, Pajerowski's office manager/investigator, would contact the victim at their home or the hospital. In many of the cases, the runner also directed the victims to a particular medical provider for treatment. He did so regardless of whether they had complained about injury. Pajerowski, supra, 156 N.J. at 515.

The Court in Pajerowski held that:

> when an attorney pays a runner to solicit clients, numerous problems arise that adversely affect the public, the bar and the judicial system. Soliciting accident victims so soon after their injuries presents an opportunity for fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct.
>
> [Id. at 520.]

The Court then noted that the runner fabricated medical claims, as authorized by Pajerowski, id., thus highlighting the gravity of the misconduct in that case.

In considering the appropriate quantum of discipline for Pajerowski, the Court stated that disbarment is not called for in

every "runner" case and that each matter should be determined on a case-by-case approach. Id. at 522. Pajerowski knew of, and condoned, the conduct of his runner in assisting his clients to file false medical claims. The Court found that such misconduct "poisons the well of justice," and "constitutes misconduct that goes to the heart of the administration of justice." Id. Pajerowski's actions "harmed the public and cast the profession in a negative light." Id. Based on the numerous acts of misconduct committed involving the use of a runner along with his other unethical conduct, the Court determined to disbar Pajerowski. Id.

Much like Pajerowski, respondent condoned the solicitation of clients, albeit not legal clients, through a runner and then, through his clinics, filed false medical claims. As the owner, or part owner of these clinics, respondent's position is no different from that of the attorney whose law practice benefits from these crimes. Whether acting in the capacity of an attorney, or otherwise, respondent is still obligated to conduct himself in accordance with the Rules of Professional Conduct. Instead, respondent used a runner to manipulate accident victims to direct them to a business from which he derived income. In many instances, the medical treatment the victims received at the

facility respondent owned were unnecessary or the expenses inflated. No material difference exists between respondent's behavior and that of Pajerowski, other than the fact that respondent committed his violations over the course of seven years, four more years than did Pajerowski.

In mitigation, as the OAE noted, respondent cooperated extensively with the government in its prosecution of the matter, resulting in even more arrests of other wrongdoers. In addition, respondent has an otherwise unblemished ethics history since his admission to the bar.

Notwithstanding that cooperation and respondent's otherwise unblemished twenty-nine years at the bar, his conduct is egregious, shows a complete lack of moral character, and proves that he is untrustworthy and, thus, unworthy, to continue in this profession. We, therefore, recommend that respondent be disbarred.

Vice-Chair Baugh and Members Hoberman and Singer 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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kirill Percy
Docket No. DRB 15-258

Argued: October 15, 2015

Decided: May 9, 2016

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost	X					
Baugh						X
Clark	X					
Gallipoli	X					
Hoberman						X
Rivera	X					
Singer						X
Zmirich	X					
Total:	5					3

Ellen A. Brodsky
Chief Counsel