SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-054
District Docket No. XIV-2014-0351E

IN THE MATTER OF	:
ROBERT NEIL WILKEY	:
AN ATTORNEY AT LAW	:

Decision

Argued: June 16, 2016

Decided: September 28, 2016

Jason D. Saunders appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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(c)(2), following respondent's guilty plea, in the Commonwealth of Pennsylvania Court of Common Pleas, to three counts of identity theft, in violation of 18 Pa.C.S.A. §4120. The OAE seeks the imposition of a suspension "ranging from eighteen months to two-years."

For the reasons set forth below, we determine to grant the OAE's motion and to impose a two-year suspension, retroactive to June 11, 2014, the date respondent reported to the OAE that he had been disciplined by the Supreme Court of Pennsylvania.

Respondent was admitted to the New Jersey bar in 2004. He also belongs to the bars of the Commonwealth of Pennsylvania and the District of Columbia.

Respondent has no disciplinary history in New Jersey. He was suspended in Pennsylvania and the District of Columbia for the conduct giving rise to the disciplinary matter now before us.

On May 24, 2010, a Pennsylvania magistrate judge approved the filing of a criminal complaint in Upper Saucon Township, Lehigh County, against respondent, charging him with the identity theft of Marco Orellana, in February 2009. On August 4, 2010, an information was filed against respondent in the Lehigh County, Pennsylvania Court of Common Pleas, formally charging him with three counts of identity theft, contrary to 18 Pa.C.S.A. §4120(a). Specifically, respondent allegedly had used identifying information of Orellana, without Orellana's consent, to apply for three different credit cards. The information stolen by respondent included Orellana's name, Social Security number, and date of birth. According to the Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d) (Joint Petition), dated June

7, 2013, respondent had obtained Orellana's information "through a lawyer-client relationship."

Respondent applied for three credit cards, but received only one. Although he did not activate or use the credit card, he had intended to do so.

On November 22, 2010, respondent pleaded guilty, in writing, to all three charges. On December 28, 2010, he was sentenced to thirty-six months of probation and required to pay the costs of prosecution and a $1,250 fine. In addition, respondent was required to fulfill a number of conditions, including continued participation in a "gambling program and any treatment as determined by the treatment provider."

The Supreme Court of Pennsylvania temporarily suspended respondent from the practice of law on February 17, 2011. On August 16, 2013, a three-member panel of the Disciplinary Board of the Supreme Court of Pennsylvania recommended the imposition of a thirty-month suspension, retroactive to February 17, 2011.

On November 15, 2013, the Supreme Court accepted the panel's recommendation and imposed a retroactive thirty-month suspension. The Supreme Court reinstated respondent to the practice of law on November 7, 2015.

On November 26, 2014, the District of Columbia Court of Appeals suspended respondent for thirty months, nunc pro tunc, to

September 24, 2014.[1] Respondent, thus, is not yet eligible for reinstatement in the District of Columbia.

Respondent did not report to the OAE that he had been charged with identity theft in Pennsylvania. He did not report his November 22, 2010 conviction. Although he did report the November 13, 2013 suspension imposed on him in Pennsylvania, he did not do so until nearly seven months later, on June 11, 2014. It was at that time that the OAE first learned of the 2010 charge and conviction.

At argument, respondent took responsibility for his failure to report the charge, conviction, and suspension, explaining that, at the time, his life was "in complete shambles." He also had been under the misapprehension that the reciprocity of discipline was automatic. Respondent learned of his specific obligation to report the conviction and the discipline to the OAE from the Pennsylvania disciplinary authorities, during the course of his reinstatement efforts in Pennsylvania.

On the issue of mitigation, according to the Joint Petition, respondent never accessed or used the credit card. Moreover, when he realized that he was under criminal investigation, in

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[1] September 24, 2014 is the date of an order, issued by the District of Columbia Court of Appeals, requiring respondent to show cause why reciprocal discipline should not be imposed.

approximately July 2009, respondent retained an attorney, who then accompanied him to a meeting with the investigating officer, at which time respondent acknowledged responsibility for what he had done.

The Disciplinary Board also noted that, although the law firm where respondent had been employed at the time of his arrest could no longer employ him as an attorney, the firm continued to employ him in a nonlawyer capacity, with the approval of the Disciplinary Board.

Although the Joint Petition mentioned very little of respondent's gambling addiction, the Report and Recommendations of the Disciplinary Board recommending respondent's reinstatement referred to respondent's diagnosis as a "pathologic gambler." Further, prior to the filing of the criminal complaint against him, respondent had been "involved in extensive programs focused on treatment for a gambling addiction, rehabilitation, volunteerism and outreach, all to further and strengthen his recovery."

Following respondent's conviction, he continued treatment for his gambling addiction; he volunteered with Lawyers Concerned for Lawyers and a local chapter of Gamblers Anonymous; and he maintained "the continued support of his family, church associates, close friends and employer." At oral argument before

us, respondent noted that his last bet was made on November 30, 2009, and that he had just celebrated six years of recovery from compulsive gambling.

Finally, respondent cooperated with the Pennsylvania disciplinary authorities throughout the process. No other discipline has been imposed on him in that state.

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

A criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Maqid, 139 N.J. 449, 451 (1995); and 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." Moreover, the facts underlying respondent's conviction also evidence that he was engaged in conduct that involved dishonesty, fraud, deceit or misrepresentation, a violation of RPC 8.4(c). Hence, the sole issue is the extent of discipline to be imposed for respondent's violation of RPC 8.4(b) and RPC 8.4(c). See R. 1:20-13(c)(2); In re Maqid, supra, 139 N.J. at 451-52; and 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." Ibid. (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). Yet, even if the misconduct is not related to the practice of law, it must be kept in mind that an attorney "is bound even in the absence of the attorney-client relation to a more rigid standard of conduct than required of laymen." In re Gavel, 22 N.J. 248, 265 (1956). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." Ibid.

Over the years, we have considered a number of cases involving attorneys who have been convicted of identity theft in New Jersey. Each of them received a three-year suspension. See In re Kopp, 206 N.J. 106 (2011) (attorney pleaded guilty to identity theft, credit card theft, and theft by deception, third degree crimes; attorney had used her sister's identity to obtain several credit cards in the sister's name and then used them over a four-

month period; she was sentenced to five years' probation and ordered to pay $750 in fines and more than $5,400 in restitution; before sentencing on the theft charges, she was arrested for and charged with two counts of third degree burglary, to which she also pleaded guilty and received four years' probation; mitigating factors included her receipt of extensive treatment for "very serious" prescription drug and alcohol addiction; a three-year period of sobriety; letters from her sister, addiction counselor, sponsor, and former employer; and her involvement in the New Jersey Lawyers Assistance Program, which concluded that she had attained "sustained full remission"); In re Bevacqua, 185 N.J. 161 (2005) (attorney arrested for attempting to purchase items at a K-Mart store totaling $519.15, using a fraudulent credit card bearing another person's name; the attorney had attempted to make a large purchase at that K-mart two days earlier, but that transaction had been declined; when the store's security personnel requested identification from the attorney on this second occasion, he offered a wallet-full of identification in the other person's name; the attorney was charged with identity fraud, credit card fraud, and theft; he was admitted into PTI and stipulated that his conduct violated RPC 8.4(b); prior reprimand and six-month suspension); In re Meaden, 165 N.J. 22 (2000) (during a California vacation, attorney stole a credit card number

while in a camera store and then attempted to commit theft by using the number to purchase $5,800 worth of golf clubs, which he arranged to have delivered to a New Jersey address; the attorney also made multiple misrepresentations on fire-arms purchase identification cards and handgun permit applications by failing to disclose his psychiatric condition and his involuntary psychiatric commitment, as required by law; the attorney's conduct took place over several weeks; the attorney had a prior reprimand for making direct, personal contact with victims of the Edison New Jersey Pipeline Explosion Mass Disaster); and In re Marinangeli, 142 N.J. 487 (1995) (over a two-month period, attorney removed approximately four credit cards and two checks from mailboxes in the building where his mother lived, which he used to fund his alcohol and crack cocaine addictions; he was sentenced to three years' probation and was required to undergo urinalysis testing, to receive treatment for his narcotics addiction, if necessary, and to make restitution ($21,734.21) of money obtained from his illegal use of the various credit cards and checks; suspension was retroactive to date of temporary suspension).

Respondent's conduct, like that of the attorneys in Kopp and Marinangeli, was driven by addiction. Here, however, the similarities end. Unlike the attorneys in all four cases, respondent's criminal conduct took place on a single day and

resulted in no financial loss to his victim. Thus, under the circumstances of this case, a three-year suspension would be excessive. A two-year suspension would be appropriate, however.

Certainly, the mitigation in respondent's favor is as compelling as it was in Kopp, given his extensive treatment for his gambling addiction and efforts to maintain his recovery. Further, unlike the attorneys in Bevacqua and Meaden, respondent does not have an ethics history.

In addition, when respondent learned that he was under criminal investigation, in approximately July 2009, he retained an attorney, met with the investigating officer, and acknowledged responsibility for his conduct.

In aggravation, respondent did not report the criminal charge to the OAE. Under R. 1:20-13(a)(1), "[a]n attorney who has been charged with an indictable offense in this state or with an equivalent offense in any other state" must promptly inform the OAE of the charge, in writing. Further, the attorney must promptly report the disposition of the matter. Ibid.

Here, although respondent was charged with a misdemeanor in Pennsylvania, the penalty (up to five years in prison) rendered it equivalent to a second- or third-degree crime in New Jersey. See N.J.S.A. 2C:43-6(2) (second-degree crime, between five and ten years) and N.J.S.A. 2C:43-6(3) (third-degree crime, between three

and five years). Thus, under R. 1:20-13(a)(1), respondent was required to report the charge to the OAE, in August 2010. Moreover, he was required to report the conviction, in November of that year. Yet, the OAE learned of the charge and the conviction only when respondent reported the October 2013 Pennsylvania suspension, in June 2014. That was more than six months after the suspension was imposed and nearly four years after he had been charged with and convicted of identity theft. Further, respondent appears not to have reported the suspension imposed on him by the District of Columbia Court of Appeals. Though not justifiable, we note that respondent's failure was related more to his illness than any intent to hide his conduct from the OAE.

In our view, when weighed, the mitigating factors and aggravating factors do not warrant deviation from what should be a two-year suspension. We determine, however, that the suspension should be retroactive to June 11, 2014, the date on which respondent reported to the OAE that discipline had been imposed on him in Pennsylvania.

Vice-Chair Baugh and Members Gallipoli and Zmirich voted to impose a two-year prospective suspension. Members Hoberman and Rivera 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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert N. Wilkey
Docket No. DRB 16-054

Argued: June 16, 2016

Decided: September 28, 2016

Disposition: Two-year retroactive

Members	Two-year Retroactive Suspension	Two-year Prospective Suspension	Disqualified	Did not participate
Frost	X			
Baugh		X		
Boyer	X			
Clark	X			
Gallipoli		X		
Hoberman				X
Rivera				X
Singer	X			
Zmirich		X		
Total:	4	3		2

Ellen A. Brodsky
Chief Counsel