

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-346

IN THE MATTER OF :
 :
JUDE J. FONZOLA :
 :
AN ATTORNEY AT LAW :
 :

Supplemental
Decision

Argued: March 18, 1999

Decided: May 10, 1999

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

William R. Connelly appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based on a remand order from the Court dated July 21, 1997. On November 18, 1996, the Board had issued a decision recommending respondent's disbarment for the knowing misappropriation of client funds and the forgery of the signatures of three judges. That matter had come to the Board as a Motion for Final Discipline, following respondent's guilty plea to one count of forgery and one count of theft

by unlawful taking. Respondent had forged the signatures of judges to convince a client that he had obtained expungement orders, when he had not, and had also misappropriated approximately \$27,000 from a client who had given him power-of-attorney in a real estate transaction. Respondent had converted the funds to his own use, spending the majority of the funds to make capital contributions to a law partnership he had recently formed.

In a concurring decision, two Board members stated that respondent's manic-depressive (bipolar) disease should be allowed to mitigate the disbarment sanction. Those members would have voted for a prospective three-year suspension, with certain conditions.

* * *

On July 21, 1997, the Court remanded the case to the Board to supplement the record with a psychiatric report. The matter was delayed, primarily by two events: (1) respondent underwent surgery for the removal of a tumor from his spinal cord. His lengthy recuperation period postponed his examination by Daniel P. Greenfield, M.D., the psychiatrist retained by the Office of Attorney Ethics ("OAE"); and (2) Dr. Greenfield issued his report more than four months after his examination of respondent.

On February 19 and March 3, 1999, respectively, respondent and the OAE filed motions to supplement the record. The Board granted both motions. Respondent requested that the Board consider (1) a supplemental report from his expert and treating psychiatrist,

Howard Gross, M.D., (2) a supplemental letter-memorandum and (3) respondent's certification and exhibits. In turn, the OAE requested that the Board consider (1) Dr. Gross' records regarding respondent, (2) a status memorandum from respondent to his employer, (3) a time line prepared by the OAE, (4) forged orders purporting to be signed by Judges Codey and Beglin and (5) a forged letter purporting to be signed by Judge Simon.

* * *

After the Court remanded this matter, the OAE's expert, Dr. Greenfield, submitted a November 25, 1998 report. Although Dr. Greenfield agreed with Dr. Gross' diagnosis of manic depression, he strongly disagreed with the conclusion that the disease so impaired respondent's cognitive abilities so as to excuse his misconduct:

With regard to the issue of Mr. Tonzola's mental states and psychiatric conditions in connection with the several incidents in question, while I accept and agree that an underlying Bipolar Disorder when not effectively treated can result in acute impulsive behaviors, also driven by very poor social and professional judgement and grandiosity, and while I also accept and agree with Dr. Gross' formulation that Mr. Tonzola was actively symptomatic with regard to his Bipolar Disorder at the time, it is nevertheless my psychiatric opinion - held with a degree of reasonable medical probability - that even if this situation were the case with Mr. Tonzola during the several specific periods of time in question in relation to the several specifically unacceptable acts and behaviors in which he engaged as an attorney (i.e., the three forgeries and misappropriation of approximately \$27,000), it did not determine his mental state, ability to plan in purposeful, sequential, and goal-directed behaviors, or otherwise to

impair his ability to have engaged in the complex behaviors in which he did, to the point that he was unable to do so.

Put more simply, Mr. Tonzola was motivated in all of the instances of his forgeries to have engaged in complex, goal-directed, knowing, and purposeful behaviors in effecting these forgeries in order to accomplish the goal which he felt these forgeries would do at the time. His professional and social judgement were clearly wrong, and were influenced -- as described above -- by his grandiosity as a symptom of his Bipolar Disorder.

Nevertheless, he engaged in these behaviors knowing that they were wrong, but hoping that they would accomplish the goals of placating his clients

Taking this analysis beyond the four incidents at issue, however, I also note that Mr. Tonzola was involved in the practice of law in other ways, and involving other cases, during the periods of time in question of these four incidents. To my knowledge, he was able to manage these other cases effectively and in some cases very well (referring, again to his 'A-plus' notion, described above).

* * *

Using this analysis, these four situations stand out as unusual and out of context with the background of his otherwise competent and acceptable work as an attorney. Such an analysis does not permit symptomatology attributable to Bipolar Disorder -- which, presumably, was ongoing and constant during the period of time in question -- to selectively affect some parts of Mr. Tonzola's work as an attorney, but not all.

Put more simply and concisely, if Mr. Tonzola's Bipolar Disorder symptomatology were so overbearing and uncontrollable during the period of time in question, it should not have affected only four out of many cases on which he was working at the time.

* * *

In summary. . . it is my psychiatric opinion – held with a degree of reasonable medical probability – that even though Mr. Tonzola’s judgement was unquestionable [sic] impaired in doing what he did in connection with those incidents, and even though this impairment was a symptom of his underlying Bipolar Disorder, his basic psychiatric conditions, mental states, and abilities to engage in high-level complex and cognitively driven and determined behaviors was [sic] not.

Presumably in response to Dr. Greenfield’s report, respondent filed the aforementioned motion to supplement the record with, among other things, Dr. Gross’ February 5, 1999 supplemental report. In that report, Dr. Gross disputed Dr. Greenfield’s assertion that, with the exception of the four criminal acts, respondent functioned normally and acceptably. Dr. Gross asserted that respondent’s illness detrimentally affected almost his entire professional and personal life. Dr. Gross vigorously reiterated his position that, contrary to Dr. Greenfield’s opinion, respondent’s "manic depressive illness so totally destroyed his will and volition that I would have been surprised if he acted in any manner other than the way that he did." Dr. Gross added that

[M]r. Tonzola’s cognitive abilities and thought processes during the times in question were acutely infiltrated by delusions, paranoia and grandiosity. Under those circumstances, if the measure of a person’s sanity is the rudimentary ability to appreciate the nature of his or her actions and to be able to differentiate whether those actions are right or wrong, then Mr. Tonzola was not ‘insane’ during the relevant times in question. Conversely, if the measure of a person’s sanity is the totality and juxtaposition of his or her thoughts and the actions taken relative to those thoughts, then Mr. Tonzola was ‘insane’ during the relevant times in question.

Finally, Dr. Gross reported that, after the submission of his January 13, 1996 report, he conducted further medical research that supported his prior conclusion that respondent's spinal cord tumor significantly contributed to his manic depressive illness.

In response to Dr. Gross' supplemental report, the OAE argued that either Dr. Gross misrepresented respondent's status to respondent's law partners or respondent lied to Dr. Gross and subsequently to the OAE. By way of explanation, the OAE submitted a time line of the events after respondent began treating with Dr. Gross. That time line showed that Dr. Gross treated respondent on four occasions between April 18 and April 28, 1994. According to a statement that respondent's law partners submitted to the OAE, Dr. Gross informed them on April 28, 1994 that, although respondent was suffering from depression with an obsessive-compulsive lying component, (1) he had no indication that respondent had ever lied to a client, (2) the condition was treatable and (3) respondent could continue to practice law with supervision. Moreover, at a June 3, 1998 interview with the OAE respondent twice represented that he had been candid with Dr. Gross from the beginning of his treatment.

In addition, the OAE observed that, in his April 30, 1994 report, Dr. Gross remarked that, as of the end of April, respondent no longer exhibited manic behavior or consumed alcohol. The OAE further pointed out that, notwithstanding Dr. Gross'

April 28, 1994 report to respondent's law partners, on May 2, 1994 respondent forged Judge Simon's signature on a letter and gave the letter to a client to mislead the client into believing that Judge Simon had signed it. Furthermore, the OAE stated, respondent failed to disclose his misconduct to his law partners, to the law enforcement authorities and to the disciplinary authorities. The OAE, thus, contended that, given Dr. Gross' April 28, 1994 report to respondent's law partners that respondent had not lied to a client and could continue to practice law and given respondent's statement that he had been completely truthful with Dr. Gross since the beginning of his treatment on April 18, 1994, "[e]ither Dr. Gross made serious misrepresentations to [respondent's law partners] in his initial diagnosis of respondent on April 28, 1994 or respondent lied to him in his three office visits prior to that date and lied to the OAE in his June 3, 1998 tape-recorded statement." The OAE asserted that, if respondent lied to Dr. Gross from the beginning, then his claim for mitigation must fail because the factual background supporting Dr. Gross' conclusions is primarily based on information gathered from respondent.

The OAE further argued that, if Dr. Gross was not able to properly diagnose respondent during his treatment, then Dr. Gross' conclusions about respondent's mental state before treatment must necessarily be viewed with suspicion. The OAE pointed out that, despite Dr. Gross' April 28, 1994 report that respondent was fit to practice law with supervision, on May 2, 1994 respondent forged Judge Simon's

signature; on May 7, 1994, after consuming five drinks containing vodka, respondent contemplated buying a gun while in an acute manic state; and on May 9, 1994 he relayed a false message to a client. The OAE, thus, contended that, if Dr. Gross so "misjudged" respondent's behavior during his active treatment, then no significance could be attributed to Dr. Gross' explanations for respondent's prior behaviors.

* * *

Following a *de novo* review of the record, the Board was convinced that its initial decision should stand. Despite the additional report that Dr. Gross submitted in respondent's behalf after this matter was remanded, respondent has not presented evidence that his misconduct should be excused because it satisfies the standard contained in *In re Jacob*, 95 N.J. 132 (1984). In that case, the Court ruled that for an attorney to escape mandatory disbarment for knowing misappropriation the attorney must show

by competent medical proofs that [he or she] suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful.

[*Id.* at 137]

The Court recently affirmed the continued viability of the *Jacob* standard in *In re Greenberg*, 155 N.J. 138 (1998). Although the attorney in *Greenberg* admitted

that he had knowingly misappropriated funds from his law firm, he claimed that his depressive disorder both excused and mitigated his misconduct, thereby sparing him from disbarment. The Court, however, determined that Greenberg had not met the *Jacob* standard:

In making the determination whether an attorney lacked competency, comprehension or will, we have considered whether he or she was 'out of touch with reality or unable to appreciate the ethical quality of his [or her] acts.' *In re Bock*, 128 N.J. 270, 273, 602 A.2d 1307 (1992). Respondent relies on the testimony of two experts to support his claim that he was 'out of touch with reality' and had no conscious awareness of his actions when he misappropriated firm funds. . . . Neither expert goes so far as to claim that respondent was out of touch with reality or, alternatively, that he did not know what he was doing when he committed multiple acts of misappropriation Neither of respondent's experts testified that during the time he was stealing money from his law firm he was unable to appreciate the difference between right and wrong or the nature and quality of his acts.

[*In re Jacob*, *supra*, 95 N.J. at 156-157]

The Court also remarked that Greenberg implemented and executed a carefully constructed scheme that constituted a pattern of activity - including the forgery of signatures - to accomplish the misappropriation of funds. The Court ruled that such activity suggested that Greenberg had not suffered such a loss of competency, comprehension or will that he was unable to distinguish between right and wrong.

Here, although Dr. Gross, in his February 5, 1999 supplemental report, emphatically attempted to characterize respondent as "insane," he opined that respondent was able to appreciate the nature of his actions and was able to

differentiate whether those actions were right or wrong. Moreover, despite Dr. Gross' opinion that respondent had difficulty functioning throughout his personal and professional life, Dr. Greenfield observed that, with the exception of the forgeries and misappropriation, respondent managed to practice law and engage in complex behaviors. Dr. Greenfield asserted that, if respondent's bipolar disorder had so deprived him of his cognitive abilities, then respondent should not have been able to function in other aspects of his professional and personal life. Yet, Dr. Greenfield stated that respondent characterized as "A-plus" his own legal work during this period. Dr. Greenfield opined that bipolar disorder does not permit such selective influence. Indeed, in *Greenberg* the Court observed that

[n]o reasonable explanation has been provided for respondent's ability generally to function as a normal person in everyday life and yet suffer from a mental illness causing him to devise a complicated system of misappropriation unavailable to his consciousness. Dr. Sadoff testified, 'I just don't know of any mental illness that would deprive him of his cognitive functions in this particular area and not globally, not across the board. There's just no such illness.'

[*Id.* at 157]

In Dr. Greenfield's opinion, respondent's actions in forging judges' signatures and misappropriating his client's money were complex, goal-directed, knowing and purposeful. The doctor noted that these actions accomplished the goals that respondent sought, that is, they placated his client and his law partners; by forging two judges' signatures, respondent misled a client to believe that he had obtained an

expungement of his criminal record; by misappropriating his client's money, respondent obtained funds needed to provide his share of the initial capital investment in his law firm. Parenthetically, it should be noted that the client whose funds were stolen was respondent's former high school teacher and friend and that the client's son was being treated for cancer at the time of the theft. Dr. Greenfield, thus, concluded that respondent understood the nature of his actions, understood right from wrong and was able to control those actions.

Undoubtedly, respondent's plight generates a considerable measure of sympathy. He obviously suffered from a substantial mental illness. His criminal actions have taken a toll on his family. Indeed, the record suggests that at one point respondent's family was receiving public assistance. A number of attorneys, however, have presented sad circumstances. Attorneys have stolen or borrowed funds out of desperation, illness or necessity, such as payment of medical bills for a severely ill spouse and child [*In re Warhaftig*, 106 N.J. 529 (1987)]; or for the attorney's own medical treatment [*In re Manning*, 134 N.J. 523 (1993)]; alcoholism [*In re Hahm*, 120 N.J. 691 (1990)]; cocaine addiction [*In re Steinhoff*, 114 N.J. 268 (1989)] and compulsive gambling [*In re Nitti*, 110 N.J. 321 (1988)]. Yet, each of these attorneys has been disbarred.

Finally, it must be remembered that this matter arose by way of a motion for final discipline, following respondent's guilty plea to forgery of a judge's signature and theft of client funds by unlawful taking. By virtue of the guilty plea, respondent admitted that his conduct was knowing and purposeful. To permit him now to argue that he lacked the requisite cognitive ability to commit those crimes would not only violate *R. 1:20-13 (c)*¹, but would also cause the public to question the integrity of the attorney disciplinary system and its goal of protecting the public. Rightfully, the public would be unable to reconcile one court's acceptance of respondent's guilty plea and the factual basis for it, with a subsequent finding in a disciplinary context by a separate court system that he lacked the requisite cognitive abilities to be held responsible for his actions and would, therefore, not be disbarred.

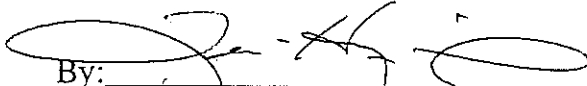
Based on the foregoing, the Board unanimously recommended respondent's disbarment. Two members adhered to the views expressed in their concurrence to the original Board decision in this matter, noting that, despite the uncertainty of the *Jacob* standard, the Board was required to follow the *Greenberg* holding. Those two members concluded that, although there were disputed factual issues in this matter,

¹ That rule provides that "[t]he Board and Court may consider any relevant evidence in mitigation **that is not inconsistent with the essential elements of the criminal matter** for which the attorney was convicted or has admitted guilt as determined by the statute defining the criminal matter." [Emphasis supplied].

respondent conceded that he knew the difference between right and wrong and, consequently, respondent must be held responsible for his misconduct. Three members did not participate.

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

Dated: 5/10/98

By: 

Lee M. Hymerling
Chair
Disciplinary Review Board