SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 97-047 and DRB 97-111

IN THE MATTER OF :
BENJAMIN A. POREDA, :
AN ATTORNEY AT LAW :

Decision

Argued: June 19, 1997

Decided: September 2, 1997

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

Suzanne McSorley appeared on behalf of respondent.

These matters were before the Board based on a motion for final discipline filed by the Office of Attorney Ethics ("OAE") (Docket No. DRB 97-111) and a recommendation for discipline filed by the District IIIB Ethics Committee ("DEC")(Docket No. DRB 97- 047). The matter under Docket No. DRB 97-111 arose out of respondent's criminal conviction for conspiracy to commit official misconduct. Three matters were consolidated under Docket No. DRB 97-047. In the first matter, Konnyu, respondent was charged with a violation of RPC 1.8(c) (conflict of interest: prohibited transactions) and RPC 8.4(a) (violating the Rules of Professional Conduct or knowingly assisting or inducing another to do so). In the Pilla matter, respondent was charged with a violation

of RPC 8.1(a) (false statement of material fact in connection with a bar admission application or a disciplinary matter), RPC 1.2(d) (scope of representation) and RPC 8.4(c) and (d). In the Dreisbach-Fasanella matter, respondent was charged with a violation of RPC 8.4(c), R. 1:20-20(b) (activities after suspension) and R.1:21-6(a)(1) and (2) (recordkeeping).

Respondent was admitted to the New Jersey bar in 1957 and maintained an office for the practice of law in Trenton. On March 21, 1995, respondent was suspended for three months for presenting a forged insurance identification card to a police officer and to a court. In re Poreda, 139 N.J. 435 (1995). Respondent remains under suspension.

I- DOCKET NO. DRB 97-111

The Motion for Final Discipline

On April 11, 1996, an accusation was filed against respondent in Hunterdon County, charging him with third-degree conspiracy to commit official misconduct (N.J.S.A. 2C:30-2), in violation of N.J.S.A. 2C:5-2. On that same day, respondent pleaded guilty to the charge. At sentencing on January 3, 1997, respondent was placed on probation for one year. During that hearing, respondent also pleaded guilty to a motor vehicle summons charging him with driving while his license was suspended, in violation of N.J.S.A. 39:3-40. On that charge, the court imposed a $750 fine and revoked respondent's driving privileges for three months.

The underlying facts are as follows. On November 7, 1994, respondent was stopped for a motor vehicle violation and issued a summons for driving while his New Jersey driver's license was suspended due to non-payment of surcharges. During the next several days respondent conspired

with an employee of the New Jersey Division of Motor Vehicles ("DMV") to backdate two checks in order to make it appear that the surcharges had been timely paid. To that end, respondent prepared and backdated two checks, in the amounts of $216 and $50, made payable to the DMV and the Automobile Insurance Surcharge and Collection Fund. Respondent delivered the checks to the DMV employee, who presented the checks to other DMV employees assigned to perform driver's license restorations. These actions resulted in the alteration of official DMV records and the restoration of respondent's license marked on official records as being effective prior to November 7, 1994, the date of respondent's summons.

* * *

Respondent violated RPC 8.4(b)(c) and (d) (commission of a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer; conduct involving dishonesty, fraud, deceit or misrepresentation; and conduct prejudicial to the administration of justice).

II- DOCKET NO. DRB 97-047

A-The Konnyu Matter (District Docket No. XIV-93-136E)

In 1991 and 1992, respondent represented Katherine Konnyu, an elderly woman, in connection with the preparation of several wills. Respondent prepared a will for Konnyu dated March 22, 1991, naming himself as a one-half residuary beneficiary of Konnyu's estate. Thereafter, respondent assisted in the preparation of another will for Konnyu. Respondent's assistance consisted of visiting Konnyu's house and obtaining the necessary information to prepare the will.

Respondent transmitted that information to an attorney who was renting office space from him. That attorney drafted the will, which Konnyu later executed. This later will, partially dated May 1992, also named respondent as a one-half residuary beneficiary of Konnyu's estate. RPC 1.8(c) does not allow an attorney to prepare a testamentary instrument in which a non-relative gives the attorney or a member of the attorney's family a "substantial gift."

Respondent admitted his actions in this matter. He contended, however, that the bequest was not substantial and that the ultimate amount he would have received was very small. (Respondent renounced his devise at the court's suggestion).

* * *

The DEC found that respondent had violated RPC 1.8, by preparing a will in which a non-relative left him a gift, and RPC 8.4(a), by assisting another attorney to violate the RPCs.

B-The Pilla Matter (District Docket No. XIV-94-256E)

Between October 14, 1993 and October 8, 1994, respondent cashed 146 checks, totaling some $28,875, made payable to him and drawn by Louisa Pilla.[1] The checks were brought to respondent by Louisa Pilla's grandson, Donald Pilla, whom respondent had represented in a number of matters. Respondent testified that Donald Pilla had asked him to cash the checks for him because he, Pilla, did not possess the requisite identification or maintain a bank account. It was respondent's

[1]The checks are drawn on an account of Louisa Pilla and on an account belonging to Louisa and Anna Pilla, her sister-in-law. Louisa Pilla held a power-of-attorney for Anna Pilla. She ultimately returned the money to Anna Pilla's account, apparently having to sell her house to do so.

understanding that Louisa Pilla knew that Donald Pilla was cashing the checks through respondent. Respondent based his belief on two factors: Louisa Pilla had accompanied her grandson on "many occasions" to cash the checks, at which time she had observed the transactions; and, in numerous telephone conversations, Louisa Pilla had acknowledged that her grandson needed the money to pay fines, restitution and loans. Respondent theorized that Louisa Pilla also probably knew that Donald Pilla was assisting his father in some way with the funds. According to respondent, it "didn't cross [his] mind" that Donald Pilla was defrauding his grandmother.

Louisa Pilla testified that Donald Pilla did indeed tell her that he needed the money to pay fines and restitution to avoid going to prison and also to pay his attorney. (Louisa Pilla knew that respondent had represented Donald Pilla). Louisa Pilla testified that she "wanted to believe" what her grandson had told her. Contrary to respondent's testimony, however, Louis Pilla asserted that she had never seen Donald Pilla receive cash from respondent and also had never communicated with respondent about the purpose of the checks.

The grievance in this matter was filed by John Pilla, Louisa Pilla's son and Donald Pilla's uncle. According to respondent, after the grievance was filed, Donald Pilla asked respondent to come with him to John Pilla's house to learn why he had filed the grievance. According to John Pilla, during that meeting respondent asked him to withdraw his grievance. Contrarily, respondent testified that he did not make that request. He claimed that he had merely asked John Pilla if he had filed the grievance because respondent had filed a lawsuit in behalf of respondent's brother against John Pilla and his brother.

The OAE alleged that respondent initially misrepresented to its investigator that he had not received any funds from Donald Pilla in connection with the cashing of the checks. In this context

respondent explained that he thought that the OAE investigator was asking about a large sum of money and not just a check-cashing fee. At a subsequent meeting with the OAE, respondent stated that he had received small sums for cashing the checks. Respondent testified that he had, in fact, received a total of $900 to $1,000 from Donald Pilla in small amounts as "an accommodation."

* * *

The DEC dismissed the alleged violations of RPC 1.2(d) and RPC 8.4(c). The DEC found no evidence of fraud, deceit or misrepresentation or any knowledge on the part of respondent that he was assisting Donald Pilla in illegal, criminal or fraudulent conduct. In the DEC's view, actual knowledge is required to support a finding of a violation of RPC 8.4(c). With regard to the alleged violation of RPC 8.1, the DEC found no direct proof of the statements allegedly made to the OAE and, therefore, dismissed that charge. The DEC did find, however, that respondent violated RPC 8.4(d) by attempting to persuade John Pilla to withdraw the grievance.

C-The Dreisbach-Fasanella Matter (District Docket No. XIV-96-030E)

Respondent represented Patricia Dreisbach-Fasanella in a personal injury claim against two defendants. On December 17, 1994 Dreisbach-Fasanella signed a release of her claim against one of the defendants in exchange for $6,641. On April 7, 1995, in anticipation of his suspension (effective April 17, 1995), respondent signed a substitution of attorney and forwarded the file to another attorney. Prior to sending the file to new counsel, respondent removed the executed release from the file. After his suspension, respondent continued to communicate with counsel for the

defendant about the settlement. Respondent testified that "this matter was settled before I was suspended and there was nothing left to do and I felt that, well, I could then do that, complete the settlement." Respondent did not notify counsel for the defendant that he was suspended or that another attorney was handling the matter. Respondent admitted his misconduct:

> That was the mistake on my part. I should have done that but I didn't. I figured I settled this case, the portion of the case before I was suspended in the latter part of December, so I thought I could conclude the case, which was improper. I shouldn't have done it. I just did it and I didn't tell him about it.
> [T5/22/96 75-76]

Dreisbach-Fasanella testified via telephone before the DEC. According to her testimony, respondent did not tell her that he was transferring her file to another attorney; she learned of the substitution when she was contacted by new counsel. Dreisbach-Fasanella also complained that respondent did not communicate with her about the settlement negotiations after his suspension and did not notify her that he had been suspended.

Respondent admitted that he never told Dreisbach-Fasanella about his suspension, but denied not informing her that he was transferring her file to another attorney.

Counsel for the defendant in Dreisbach-Fasanella's personal injury suit also testified via telephone during the DEC hearing. Several letters and memoranda in the record confirm that respondent continued to act in his client's behalf after his suspension. Counsel for the defendant testified that he never received a substitution of attorney from respondent.

Respondent received the settlement proceeds of $6,641 after his suspension. He did not deposit the settlement check into his trust account. Rather, he cashed the check and made a cash distribution to Dreisbach-Fasanella. Furthermore, respondent did not deposit his fee into his

business account. Respondent explained that, because he was suspended, he was unable to use his attorney trust and business accounts; he, therefore, cashed the check.

In addition to the above misconduct, in a May 17, 1995 certification to the OAE respondent misrepresented that, as of the effective date of his suspension, he had no open client files or pending cases in any court or administrative agency.

* * *

The DEC found that respondent had violated RPC 8.4(c) by continuing to act in behalf of Dreisbach-Fasanella with regard to the settlement after the effective date of his suspension and by failing to advise her that he had been suspended. The DEC did not refer to the other charges. It is assumed that no additional violations were found.

The DEC recommended the imposition of a six-month suspension.

* * *

Upon a de novo review of the record, the Board found numerous violations of the Rules of Professional Conduct. Specifically, respondent clearly violated RPC 1.8 and RPC 8.1(a) in the Konnyu matter, by preparing and assisting in the preparation of a will wherein he received one-half of the residuary estate. Respondent's claim that the ultimate amount he would have received was very small is irrelevant to the ethics infraction. In Pilla, although the events are troubling, the DEC's conclusion that respondent was not guilty of the underlying misconduct was correct. While the

testimony of respondent and Louisa Pilla was somewhat unclear, there is no clear and convincing evidence that respondent knew that Louisa Pilla was unaware that respondent was cashing the numerous checks she gave to Donald Pilla. More simply stated, there is no clear and convincing evidence that respondent knowingly participated in a scheme to defraud Louisa Pilla. Significantly, despite suspicions respondent might have had about Donald Pilla, who is described in the record as "not a Boy Scout," respondent had represented Donald Pilla, had an attorney/client relationship with him and was bound by that relationship not to reveal any suspicions to Louisa Pilla. However, the DEC was also correct in its assessment that respondent violated RPC 8.4(d) by attempting to have John Pilla withdraw the grievance. The DEC, which was in a better position to judge the credibility of the witnesses, found John Pilla's testimony in this regard more credible.

In Dreisbach-Fasanella, respondent's continued representation of Dreisbach-Fasanella after the effective date of his suspension, his failure to advise her of his suspension, his misrepresentation in a May 17, 1995 certification to the OAE that he had no pending matters and his cashing of the settlement check were unethical and would independently warrant a lengthy suspension. Conduct similar to this respondent's conduct occurred in In re Kasdan, 132 N.J. 99 (1993), where an attorney received a three-year suspension after she continued to practice law and made false statements about her status during the period of her suspension. Arguably, Kasdan's overall conduct was worse than respondent's, who concluded a settlement and did not appear before a court. Respondent's misconduct, however, adds substantially to a considerable list of ethics infractions.

As to the motion for final discipline, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R.1:20-13(c)(1). The sole issue to be considered is the extent of discipline to be imposed. In re Infinito, 94 N.J. 50, 56 (1983).

Recently an attorney was disbarred for bribing a court clerk to backdate the filing of two personal injury complaints for which the statute of limitations had expired. In re Fox, 140 N.J. 614 (1995). As the OAE pointed out, the attorney in Fox was disbarred despite a prior unblemished record. Unlike Fox, respondent has a disciplinary history. As noted above, respondent is currently suspended for misconduct strikingly similar to that now before the Board. The essential facts in that earlier matter, as set forth in the Board's Decision, are as follows:

> . . . During the early-morning hours of March 14, 1992, respondent was stopped by a police officer in Morrisville, Pennsylvania, for allegedly failing to stop for a red traffic signal. At that time, respondent did not produce a valid insurance identification card. In fact, at the time he was stopped, respondent was driving a vehicle that he had purchased only two or three days earlier, which replaced his older, insured vehicle. However, at that point, he had not yet notified his agent or insurance carrier of this change and, therefore, had not obtained a corrected or valid identification card.
>
> The police officer issued respondent a summons for driving an uninsured vehicle. Thereafter, on January 11, 1993, respondent appeared at the scheduled hearing on that citation. Prior to his matter being called, respondent approached the officer who had issued him the citation and produced an insurance identification card, ostensibly showing that his vehicle was insured on the date the citation was issued. The police officer, together with respondent, then appeared before the judge for hearing on the matter. At that time, the officer represented to the court that respondent had produced what appeared to be a valid insurance identification card for the date in question. The officer announced his intention to verify the existence of the insurance. Respondent remained silent during the officer's representations to the court. At that point, the charge was apparently dismissed.
>
> The police officer's subsequent investigation revealed that respondent's vehicle had not been insured on March 14, 1992. In addition, he learned that the broker identified on the insurance card had not issued the card. Similarly, Rutgers Casualty Insurance Company advised that it had not issued the card to respondent and, further, that the policy number appearing on the card was not the type of number that would be issued to a legitimate insured.

In the earlier case, the Board determined that respondent had violated RPC 8.4(a),(b),(c) and (d). In imposing only a three-month suspension, the Board noted that ordinarily a lengthy term of suspension would be appropriate for this type of misconduct. However, the Board considered a

number of mitigating factors, including respondent's personal problems, his unblemished lengthy legal career and his service to a community that might not otherwise be served. Finally, the Board noted that

> while he may not have been quick to accept the fact that he continues to suffer from an illness that needs attention, respondent readily admitted the wrongfulness of his conduct and did not seek to avoid its consequences by advancing any claim of diminished capacity because of that illness. There is no reason to believe that respondent's conduct was more than a single instance of aberrant behavior, unlikely to be repeated.

Unfortunately, the Board's prediction has been proven wrong. A comparison of the timing of the within misconduct with the ethics offenses in the prior matter shows that, here, respondent's actions occurred between March 1992 and January 1993. The Board's Decision was dated September 1994 and the Court's Order was issued in March 1995. Respondent's criminal conduct in the within matter took place in November 1994, between those two events. The Board noted that, although the Board's Decision is dated September 27, 1994, that Decision was not transmitted to the Court and to respondent until November 10, 1994, after the date of respondent's summons and likely the same approximate time as the within misconduct. Although the other shoe had not yet fallen, respondent knew that his conduct was under scrutiny and should have conformed his future actions to the standards expected of attorneys. Yet, respondent's misconduct in the three additional matters now before the Board continued through mid-1995.

In its motion for final discipline filed with the Board, the OAE urged the imposition of a three-year suspension for respondent's criminal conduct. However, in a subsequent brief to the Board, the OAE called for respondent's disbarment, relying on the Court's pronouncement in In re Giordano, 123 N.J. 362 (1991): "Let there be no mistake, though; lawyers do not get two chances

to commit an offense like this . . . the offense will ordinarily require disbarment." Id. at 369-370.

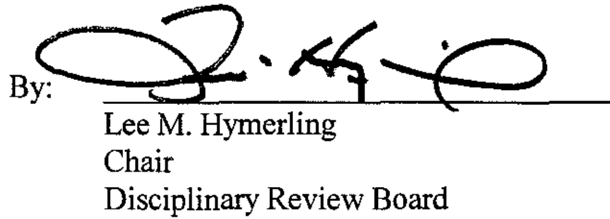
The record and relevant caselaw support the OAE's contention that disbarment is warranted here. The Board imposed only a brief term of suspension in respondent's earlier matter because that misconduct appeared to be an aberration. Obviously it was not. Indeed, as noted above, in respondent's earlier matter before the Board, numerous mitigating factors were taken into account. Here, there are no such factors. This is an attorney who practiced for many years and who should have known better.

When respondent's criminal conviction is coupled with his misconduct in the additional three matters before the Board, the call for disbarment is compelling. The benefit of the doubt afforded respondent in his last appearance before the Board cannot apply here. Respondent is a recidivist who is unable to conform his behavior to the standard expected of members of the bar. The nature and the totality of respondent's misconduct (both the matter before the Board and his prior case) convinced the Board that disbarment is required. See In re Cohen, 120 N.J. 304 (1990) (attorney disbarred after he exhibited a pervasive pattern of neglect and lack of communication with his client and altered the filing date on a complaint in an attempt to cover up the fact that it had been filed after the running of the statute of limitations. The attorney had previously been privately reprimanded and had received a one-year suspension for numerous ethics violations).

In light of the foregoing, the Board unanimously recommends that respondent be disbarred. Two members recused themselves. Two members did not participate.

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

Dated: 9/2/97

By: 
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