Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-268

IN THE MATTER OF

MICHAEL R. IMBRIANI,

AN ATTORNEY AT LAW

Decision

Argued: September 18, 1996

Decided: December 4, 1996

Richard J. Engelhardt 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 the Board on a Motion for Final Discipline filed by the Office of Attorney Ethics (OAE), following respondent's guilty plea to a charge involving theft. R. 1:20-13(c)(2). Respondent committed the criminal conduct underlying the conviction while he was a judge of the Superior Court of New Jersey in Somerset County.

On December 28, 1994, the Advisory Committee on Judicial Conduct issued a presentment, finding that respondent violated the New Jersey Constitution and five canons of the Code of Judicial Conduct. Based on the presentment, the Supreme Court filed a

complaint on its own motion, pursuant to R. 2:14-1, to remove respondent from his judicial office. Respondent, who had retired on May 1, 1994, consented to such removal. On February 14, 1995, the Court issued its opinion and order removing respondent from his judicial office and barring him from holding any future judicial position. In re Imbriani, 139 N.J. 262 (1995).

The basis for the removal proceedings and for the instant disciplinary action is the same: on June 16, 1994, respondent pleaded guilty to a one-count accusation charging him with theft by failure to make required disposition of funds received, in violation of N.J.S.A. 2C:20-9. By Order dated June 30, 1994, the Court temporarily suspended respondent from the practice of law. In re Imbriani, 137 N.J. 100 (1994). That suspension continues to date.

The facts are not in dispute. In 1963, respondent formed a corporation named Community Medical Arts Building, Inc. (CMAB) of which he held twelve and one-half percent of the stock. In 1970, he transferred the stock to his wife, who by 1982 owned forty percent of the shares. As its name suggests, the main asset of the corporation was an office building. Respondent participated actively in the management of the corporation's affairs, including receiving rent checks, assisting with bookkeeping and filing of tax returns and performing building maintenance.

In 1989, respondent began to deposit rent checks made payable to the corporation into his personal bank accounts, without the knowledge or consent of his business associates. In this fashion,

he converted corporate funds of approximately $98,000 to his own use. From 1987 to 1992, respondent also withdrew approximately $29,000 from CMAB's bank account for his benefit. In addition, he wrote checks drawn on CMAB's account for his personal use in three ways: he issued checks for his own expenses; he issued checks to himself, cashed them, and used the cash for his own expenses; and he issued checks to payees, endorsed the checks by signing the names of the payees, and used the cash for his own expenses. Finally, respondent took between $15,000 and $35,000 from an investment account maintained by the corporation. Thus, beginning in the 1980s, respondent devised various schemes by which he converted corporate funds to his own use.

As mentioned earlier, respondent waived indictment and entered into a plea agreement with the Attorney General that required him to make restitution to CMAB's shareholders in the amount of $173,002.93, pay $5,314 in taxes on the converted funds, perform 300 hours of community service and serve probation for five years. Respondent had already paid $85,000 to the shareholders. The terms of the plea agreement permitted him to repay the remaining $88,000 at the rate of $250 per month for twelve months and $500 per month thereafter. The agreement also provided that respondent would apply for entry to the pretrial intervention program (PTI).

By way of explanation for his crime, respondent stated that he used the converted funds to meet living expenses and to pay the college and post-graduate education expenses of his five children, all of whom attended private institutions.

In accordance with the plea agreement, respondent applied to the PTI program. However, the program director denied his application and the denial was affirmed by Judge Samuel D. Lenox, Jr. State v. Imbriani, 280 N.J. 304 (Law Div. 1994). On appeal, the denial was affirmed by the Appellate Division. State v. Imbriani, 291 N.J. Super. 171 (App. Div. 1996).

The OAE urged the Board to recommend disbarment.

* * *

Respondent's conviction clearly and convincingly demonstrates that he has committed "a criminal act that reflects adversely on (his) honesty, trustworthiness or fitness as a lawyer in other respects." RPC 8.4(b). He has also violated RPC 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

A criminal conviction is conclusive evidence of a respondent's guilt. R. 1:20-13(c)(1); In re Gipson, 103 N.J. 75,77 (1986). The only issue to be determined is the quantum of discipline to be imposed. R. 1:20-13(c)(2); In re Goldberg, 105 N.J. 278, 280 (1987). Similarly, the findings and determinations made by the Supreme Court in the judicial removal proceedings are conclusive in attorney disciplinary proceedings. R. 1:20-14(c); In re Yaccarino, 117 N.J. 175 (1989). In discussing the effect of judicial removal proceedings on subsequent disciplinary action, the Court stated:

> Preliminarily, we must advert to the conclusive effect, if any, on these proceedings of our determinations in the judicial-removal case. . . . We are similarly of the view that the determinations made in judicial-removal proceedings are conclusive and binding in subsequent attorney-disciplinary proceedings. [Citation omitted]. This is particularly so, as in this case, where the charges are identical and the burden and standard of proof in the antecedent proceedings were at least as protective of the interests of the respondent as they are in the current proceedings. We, therefore, rule that the findings that undergird a determination of judicial misconduct are conclusive in subsequent attorney-disciplinary proceedings.
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> [Id. at 183.]

Respondent, as prosecutor and judge, was placed in positions of public trust and confidence. Attorneys in positions of public trust are held to higher ethical standards. In re Pepe, 140 N.J. 561, 568 (1995). The public has every right to expect that the high standards applicable to public officials will be met. For the vast majority of his public career, respondent not only met but exceeded those standards. Over the years, he compiled an impressive reputation as a talented judge, one to whom the Supreme Court could assign difficult cases with confidence that respondent would preside over them competently and capably. However, he abused the trust that was reposed in him. Respondent took advantage of CMAB shareholders, to whom he owed a fiduciary duty. In doing so, he also betrayed the public he swore to serve and protect.

Respondent's conduct in converting corporate funds to his own use is not unlike that of attorneys who misappropriate funds belonging to their clients or law partners. It is well-established that misappropriation of client funds will result in disbarment.

In re Wilson, 81 N.J. 451 (1979). In addition, attorneys who misappropriate partnership funds similarly face disbarment. In re Siegel, 133 N.J. 162 (1993). See also In re Spina, 121 N.J. 378 (1990).

In his brief filed with the Board, respondent cited In re Hoerst, 135 N.J. 98 (1994), in support of his position that the suspension that he has been serving since June 30, 1994 is sufficient discipline for his criminal conduct. In Hoerst, a county prosecutor attended a conference in San Francisco that was sponsored by the National College of District Attorneys. The attorney was accompanied by a woman (whom he subsequently married), an assistant prosecutor, and the assistant prosecutor's wife. The group went to Monterey for three days prior to the conference, which lasted two to three days. The attorney used forfeiture funds to pay for the trip. He pleaded guilty to the same offense with which respondent is charged, N.J.S.A. 2C:20-9, theft by failure to make required disposition of property received. The attorney was admitted into the PTI program, resigned as prosecutor and was ordered to pay restitution of $7,500. The attorney received a six-month suspension.

Respondent points out that he misappropriated private funds, while the attorney in Hoerst misappropriated public property. In Hoerst, the attorney committed a single act of misconduct, the amount of money involved was not substantial and, because the Attorney General had not yet issued guidelines on the implementation of the forfeiture statute, there was no clear and

convincing proof that the attorney had knowledge of the wrongful nature of his actions. However, here, respondent misappropriated substantial sums of money ($173,000) by engaging in a series of thefts over a five-year period using various mechanisms. Knowing that his actions were wrongful, respondent chose to steal from his business partners.

This is a case of first impression in that funds were misappropriated from associates in a business venture, rather than client funds, as in Wilson, supra, or law firm funds as in Siegel, supra. While it is up to the Supreme Court, not the Board, to decide if disbarment will necessarily follow every time an attorney steals from a business associate, the Board is convinced that, in this case, this respondent must be disbarred. Respondent's misconduct was extensive and extended. He stole from his business partners over a five-year period. The amount taken was substantial - in excess of $173,000. Respondent used various deceptive practices to accomplish the conversion of the funds. Moreover, he stole repeatedly, not just on one or two occasions. Significantly, respondent was a judge at the time he committed these acts. "The Court has consistently subjected attorneys who commit acts of serious misconduct while serving in public office to stringent discipline, normally disbarment." In re Yaccarino, 117 N.J. 175, 197 (1989).

In mitigation, respondent pointed out that he has practiced law since 1956 without a blemish on his record, including long terms as both a prosecutor and a judge. Respondent also advanced

that the funds were not used to support a lavish lifestyle, but instead to educate his five children at private institutions at a cost that exceeded his financial means. However, those factors are insufficient to warrant imposing a sanction other than disbarment. In In re Siegel, supra, the attorney called attention to his distinguished record of service in an unsuccessful attempt to dissuade the Court from imposing disbarment. While observing that the attorney's record was outstanding, the Court stated that the importance of good reputation, prior trustworthy professional conduct and general good character as mitigating factors are diminished when misappropriation is involved. Id. at 171.

In light of the foregoing, the Board unanimously determined to recommend respondent's disbarment. Were we allowed to consider mitigating circumstances in knowing misappropriation cases, we would have taken into account respondent's long and distinguished public career and the absence of other blemishes on his record. However, under existing law, we are not permitted to consider those factors. In In re Noonan, 102 N.J. 157, 159-160 (1986), the Court stated:

> The misappropriation that will trigger automatic disbarment under In re Wilson, 81 N.J. 451 (1979), disbarment that is "almost invariable," id. at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act,

> measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. To the extent that the language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality" - all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be "almost invariable," the fact is that since Wilson, it has been invariable.
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> [footnote omitted]

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

Dated: 12/4/96

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board