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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-229

IN THE MATTER OF

ALAN K. MARCUS,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 16, 1992

Decided: December 28, 1992

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Stephen H. Dunbar appeared on behalf of respondent.

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

This matter is before the Board on a Motion for Final Discipline based upon a criminal conviction filed by the Office of Attorney Ethics ("OAE"). R.1:20-6(c)(2)(i).

Respondent, Alan K. Marcus, was admitted to the bar of New Jersey in 1980. On July 22, 1991, respondent pled guilty to a criminal indictment charging him with wire fraud, in violation of 18 U.S.C.A. § 1342.

On October 23, 1991, respondent was sentenced to a suspended five-year prison term and placed on probation for three years. As a special condition of the probation, he was required to submit to

an electronically monitored home confinement program. Additionally, respondent was ordered to participate in a narcotic addiction and drug or alcohol dependency treatment program, and pay a fine in the amount of $40,000.

The criminal conviction arose from a scheme to defraud a client, Great American Insurance Company, over a seven-month period between November 1985 and June 1986. During that time, respondent was employed by the law firm of Hayden & Milliken, in Miami, and assigned to represent Great American in a number of cases in its Marine Claims Division.

Over the seven-month period, respondent defrauded Great American through a rather simple scheme. Respondent would obtain authorization from Great American to settle a particular claim for a specified figure. Unbeknownst to his law firm and to his client, respondent, in turn, would negotiate an actual settlement for a lesser amount than was authorized, all the while intending to keep the difference for himself. Respondent would then cause Great American to wire the higher settlement amount to a personal bank account over which he had full control. Separate from the firm's own trust account, this account was established solely for respondent's illicit purposes.

The conviction for wire fraud arose from respondent's settlement of the Continental Insurance Co. v Anchorage Marine, Inc. suit. Although respondent actually settled the case with plaintiff's counsel for $39,000, he misrepresented to Great American that the settlement figure was $50,000. On December 24,

1985, the $50,000 sum was wired to Windchasers III, one of respondent's personal accounts previously opened at Ameri First Federal Saving and Loan, in Miami. Once the funds were securely deposited, respondent purchased a cashier's check in the amount of $39,000, payable to the plaintiff. He then retained the settlement difference of $11,000 solely for his own benefit.

In 1986, the firm of Hayden & Milliken terminated respondent's employment, for reasons unrelated to this scheme. Upon discovery of respondent's swindle, Hayden & Milliken reimbursed to Great American all funds fraudulently obtained. In August 1986, after learning of the firm's discovery, respondent returned all the monies to Great American.

Respondent argued that, during the period he was engaged in these fraudulent activities, his addiction to cocaine consumed his life and contributed significantly to what he characterized as aberrational behavior. In December 1986, respondent voluntarily enrolled in a drug rehabilitation program. He claimed that he has remained abstinent from all mood-altering substances since that time.

On October 16, 1991, following respondent's conviction, the New Jersey Supreme Court temporarily suspended him from the practice of law, pursuant to R.1:20-6(a)(1). Said suspension remains in effect to date. The OAE requests that the Board recommend to the Court that respondent be disbarred.

CONCLUSION AND RECOMMENDATION

A criminal conviction is conclusive evidence of respondent's guilt in disciplinary proceedings. In re Goldberg, 105 N.J. 278, 280 (1987); In re Tuso, 104 N.J. 59, 61 (1981); In re Rosen, 88 N.J. 1, 3 (1981). R.1:20-6(c)(1). Therefore, no independent examination of the underlying facts is necessary to ascertain guilt. In re Bricker, 90 N.J. 6, 10 (1982). The only issue to be determined is the quantum of discipline to be imposed. In re Goldberg, supra, at 280.

Respondent's criminal conviction clearly and convincingly demonstrates that he has engaged in activity that reflects adversely on his honesty, trustworthiness and fitness as a lawyer, and that he has engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(b) and (c).

A calculus for discipline, however, even in cases of criminal conviction, must include the nature and severity of the crime, whether the crime was related to the practice of law, and any mitigating factors, such as evidence of the attorney's good reputation and character. In re Kushner, 101 N.J. 397, 400 (1986). In addition, every disciplinary matter is factually different and must be judged on its own merits. There is no rule, therefore, that requires that a certain penalty be imposed for conviction of a certain crime. In re Alosio, 99 N.J. 84, 89 (1985); In re Friedman, 106 N.J. 1, 6 (1987); In re Litwin, 104 N.J. 362, 365 - 66 (1986). However, the Court has held that "certain types of

ethical violations are, by their very nature, so patently offensive to the elementary standards of a lawyer's professional duty that they per se warrant disbarment." In re Conway, 107 N.J. 168, 180 (1987).

Furthermore, the Court has made it clear that, even in those cases where it is unlikely that the attorney will repeat his misconduct, some types of misbehavior mandate disbarment. In re Lunetta, 118 N.J. 443 (1989) (where the Court found that the attorney's behavior in furthering a complex criminal scheme so "impugned the integrity of the legal system that disbarment was the only appropriate means to restore public confidence." Id. at 450).

Convictions of conspiracy to commit a variety of crimes have uniformly led to disbarment. In re Rigolosi, 107 N.J. 192 (1987) (bribery); In re Conway, supra, (bribery); In re Baldino, 105 N.J. 453 (1987) (official misconduct). In re Goldberg, 105 N.J. 278 (1987) (distribution of controlled substance); In re Surgent, 104 N.J. 566 (1986) (theft by deception and other crimes). In Surgent, the Court reiterated that "convictions of New Jersey attorneys on charges of insurance fraud and conspiracy to commit fraud have regularly resulted in the attorney's disbarment." Id. at 570. Moreover, "where, as in this case, an attorney's criminal deeds directly involve his law practice, the misconduct is even more egregious in the disciplinary context." In re Goldberg, supra, at 282.

Respondent's criminal conduct warrants disbarment. He requisitioned from his client funds in excess of the settlement amount solely to retain the difference for his own pecuniary gain. Although he ultimately reimbursed the insurance carrier of all pilfered funds, that is of no significance. Furthermore, his crimes were directly related to the practice of law.

Once an attorney's misconduct requires disbarment, the only question remaining is whether mitigating circumstances call for lesser discipline in particular cases. Respondent proffers his cocaine addiction at the time when the scheme was perpetrated and his subsequent rehabilitation as mitigating factors. However, as the Court remarked in In re Terner, 120 N.J. 706, 718 (1990), drug addiction is neither a defense nor a mitigating factor in attorney discipline. In the Board's view, nothing may save respondent from disbarment. The Board unanimously recommends that respondent be disbarred. Three members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 12/28/1992 By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board