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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-148

IN THE MATTER OF	:
JAMES V. GASSARO,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 25, 1990

Decided: March 28, 1991

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

Warren W. Wilentz and Frederick J. Dennehy appeared on behalf of respondent, who was also present.

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). Pursuant to R.1:20-6(a)(1), the Court temporarily suspended respondent from the practice of law on December 14, 1989. The suspension remains in effect as of this date.

Respondent, James V. Gassaro, was admitted to the bar of New Jersey in 1981. From 1980 until 1988, respondent served full-time as Police Director for the City of New Brunswick. Following a jury trial, he was convicted, on January 29, 1990, of conspiracy to defraud the Internal Revenue Service, in violation of 18 U.S.C.A.

§371, and two counts of making false statements to the Internal Revenue Service, in violation of 18 U.S.C.A. §1001, §1002. Respondent was sentenced to pay $5,000, ordered to perform 200 hours of community service, and placed on probation for three years.

All three counts of the indictment stem from the same underlying transaction. Respondent's co-defendant in this criminal matter was his father-in-law, J.P. In 1981, J.P. possessed a sum of money which he had received from his Exxon pension account. When respondent learned of a business opportunity with a building contractor named P.H., he suggested to his father-in-law that he invest his money with P.H. Respondent lent $35,000 of J.P.'s money to P.H. with the understanding that a total of $45,000 would be returned in six months.

When P.H. failed to pay the $45,000 after the six-month period, J.P. claimed a bad debt deduction for the $45,000 on his 1982 personal tax return. Under IRS tax rules, J.P. was allowed to deduct $3,000 in 1982 from his taxable income, and was allowed to carry forward to future tax years the balance of the bad debt and deduct $3,000 each year, until the entire amount was deducted.

In 1982, respondent, acting as an attorney for his father-in-law, obtained a judgment against P.H. and tried to collect on the judgment, without success. In November 1982, another debtor of P.H. recovered some funds and transferred $10,000 of those funds to J.P. via respondent's attorney trust account. Under IRS tax rules,

J.P. was required to reduce the debt by the amount recovered. He failed to do so on both his 1983 and 1984 tax returns.

In 1984, the IRS audited J.P.'s 1982 tax return. J.P.'s accountant asked respondent to write to the IRS in his role as the attorney who had tried to collect the judgment funds from P.H. Respondent wrote the first letter on December 17, 1984, using his professional stationery:

> Please be advised that the following legal action has been taken in an effort to collect a sum of $45,000.00 which is owed to my client, [J.P.] .
>
> . . .
>
> As of this letter, the liquor license has not yet been sold, (see enclosed court order), and my client has not yet received any funds to satisfy his claim against [P.H.]..
>
> [Exhibit A to Certification of Gassaro]

The second letter was written on February 27, 1985.

> Please be advised that I represent [J.P.] with regard to the collection of the sum of $45,000.00 which has been due and owed to him since the year 1981. . . . I advised [J.P.] that at this particular time he should consider his debt to be worthless.
>
> [Exhibit B to Certification of Gassaro]

The IRS allowed J.P. the short-term capital loss based on the information provided by his attorney, respondent. Respondent was convicted of two counts of making false statements to the IRS based upon these two letters, in addition to the conspiracy conviction.

In mitigation, respondent stated his father-in-law assisted him financially through law school and built his home for him. In return, respondent had wanted to reciprocate the favor by recommending the investment with P.H. as a good business opportunity for his father-in-law. Respondent argued that his

letters to the IRS were not sent in the course of ongoing representation, and that his representation of his father-in-law ended after his collection efforts in 1982. He wrote the letters to the IRS without compensation. He stated he had nothing to do with the preparation of his father-in-law's tax returns, and that he gave his father-in-law no tax advice. In addition, he believed that his long history of public service should be considered in mitigation.

At the time of his criminal sentencing respondent stated the following:

> Your Honor, it's difficult for me to stand here before the court.
>
> I have been part of the system my entire life. I fought for my country because I believe in it. I still believe in it. I served 23 years of my life in the police department. I believe in our system. I believe I let my system down. It hurts me very much.
>
> I made some foolish mistakes. My family suffers tremendously because of my mistakes. My in-laws sit here today in court because of my actions. My actions brought me here. Nobody else is at fault. Only me.
>
> I think my attorney has said it better than I can say it. Came from the gutter, not really the gutter. We were pretty poor. Didn't have very much. I worked very hard. Before I knew it I was sitting with executives from J. and J. and Presidents from Rutgers University asking for my advice how to make New Brunswick a better city. People were coming to me everyday asking for me, for my input, for what I could do to help them. And I finally looked at myself and my family and said it's time for me to help myself and do something for myself and my family. Pay back perhaps my father-in-law for everything he did for me over the years.
> [Sentencing Report, Exhibit C to OAE's brief at 14-15]

The OAE argued that it is appropriate to consider the details of the offense, the background of respondent and any other relevant material that shows both mitigating and aggravating circumstances in imposing discipline. The OAE contended that several aggravating factors must be considered, such as that respondent's crimes directly involved the practice of law, and were motivated by personal gain. The OAE further maintained that respondent still does not admit his actions were criminal but contends they were merely a mistake, that he had a prior conviction which was overturned on a legal issue, but the facts of that case indicated intangible fraud[1] and, finally, that respondent asked for lenience in the criminal sentencing based on his legal career being finished.

The OAE pointed out that, at the criminal sentencing which is the basis for this Motion for Final Discipline, the sentencing judge believed that respondent would be disbarred:

> "Look at rule seven, the rules of this Court. This is a serious crime, serious crime as defined under rule seven. It means you will become involved in disciplinary proceedings and lose your license, license to be a lawyer.

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[1] The OAE's basis for this statement is United States District Judge Barry's opinion of August 3, 1987, in which she stated: "Malouf and Gassaro consciously sought to deceive the City of New Brunswick as to the fact that Gassaro was a silent partner in the transaction which resulted in the City's payment of $305,000 for a piece of property which Malouf had purchased two months earlier for $260,000. . . . On any view of the objective facts, Nelson's conduct was reprehensible but, in my view, neither his conduct nor that of Gassaro constituted extortion under color of official right." United States v. Nelson, Gassaro, Perrone and Shamey, No. 87-41, slip op. at 7, (District of N.J. Aug. 3, 1987).

> Sad, sad commentary. Sad ending to what was a good beginning.
>
> Now, recognizing all of that, what is a fair disposition by this court?
>
> Is jail the answer?
>
> Is another form of punishment an answer?
>
> I have struggled with this. It is not an easy sentence to pronounce because even though you have done what you have done, you did at one time serve this country well and did perform service to the community and in New Brunswick.
>
> There is a clean record.
>
> I'm satisfied that incarceration is not the answer, I won't incarcerate you. Nothing can be gained by sending you to jail because jail doesn't do anything more to you than I think what has already happened to you.
>
> I'm going to take you [sic] at what you have told me here in this courtroom.
>
> You won't be a lawyer any more. That's the worse punishment. That's the worst punishment. What you fought for for so long you won't have.
>
> But you have to give that ticket back to society because you don't deserve it. You may have earned it at one time, but you know [sic] longer deserve it. You bring shame to all fellow members of that profession by your actions.
>
> [Sentencing Report, supra, at 23-24.]

The OAE argued that the seriousness of the crime, combined with these aggravating factors, make disbarment the appropriate discipline.

DECISION AND RECOMMENDATION

Upon a review of the full record, the Board recommends that the Office of Attorney Ethics' Motion for Final Discipline be granted.

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. RPC 8.4(b) and (c); DR 1-102(A)(3) and (4).

A criminal conviction is conclusive evidence of respondent's guilt in disciplinary proceedings. R.1:20-6(c)(1); Matter of Goldberg, 105 N.J. 278, 280 (1987). An independent examination of the underlying facts is, therefore, unnecessary to ascertain guilt. In re Bricker, 90 N.J. 6, 10 (1982). The sole issue to be determined is the quantum of discipline to be imposed. In re Infinito, 94 N.J. 50, 56 (1983).

A calculus for discipline, 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. Matter of Kushner, 101 N.J. 397, 400 (1986).

In this case, respondent conspired to defraud the Internal Revenue Service by writing two letters concerning the same event. He misrepresented to the IRS that his father-in-law had not

collected any money on a bad debt, when in fact he had collected $10,000. Under no circumstances does the Board condone respondent's actions. Any violation of the tax laws committed by a member of the bar is viewed as a serious breach of ethics. As stated by the Court, "A lawyer's word must be his bond." In re Weston, 118 N.J. 477 (1990). Respondent violated this covenant when he used his word as an attorney to help his father-in-law evade his tax obligation. The Board, however, does not agree with the OAE that this conviction and the surrounding circumstances make disbarment the appropriate discipline.

At the Board hearing, the OAE argued that respondent's actions were even more egregious than the actions reported in the recent case of Matter of Lunetta, 118 N.J. 443 (1989). In Lunetta, the attorney pleaded guilty to a federal information charging him with knowingly and willfully conspiring to receive and dispose of $200,000 worth of stolen bearer bonds. In that case, the attorney used his trust account to distribute the proceeds of sale of the stolen securities to himself and his accomplices. The conspiracy realized $170,000, of which respondent received $20,000 to $25,000 for his role in the scheme. This conduct is materially different from respondent's behavior, which consisted of twice misrepresenting the reduction of a bad debt to the IRS. Respondent did not receive any pecuniary gain from submitting the two letters to the IRS, beyond the non-monetary benefit associated with assisting his father-in-law. Respondent's actions, although

inexcusable and ill-advised, were motivated by his desire to assist his father-in-law. See also, In re Giordano ___ N.J. ___ (March 1991) where the attorney tampered with public records, but was saved from disbarment because of his misguided motivation.

In addition, the Board disagrees with the OAE that there is a pattern of conduct between 1981 and 1987, or that any prior record can be considered to justify disbarment. The transgression of which respondent was convicted consists of writing two letters concerning the same event to the IRS. There is no clear and convincing evidence in this record that respondent's misconduct extended any further than the event for which he was convicted.

It is the Board's understanding that the Office of Attorney Ethics has exercised its discretion not to pursue other serious allegations, as described in the earlier opinion of Judge Barry or the letter of the prosecutor in this case, U.S. Attorney Paul Brickfield (OAE's Letter Memorandum, Exhibit B). Pursuant to R. 1:20-6 (6)(2), the Director of the Office of Attorney Ethics is accorded exclusive jurisdiction to investigate and prosecute all matters where an attorney is a defendant in a criminal proceeding. He may file a Motion for Final Discipline Based Upon Criminal Conviction, or he may elect to file an ethics complaint in the ordinary course, if he chooses to develop a record beyond what is contained in the criminal conviction. Matter of Friedman, 106 N.J. 1, 10-11 (1987). Given the OAE's decision to file a Motion for Final Discipline, the Board's review cannot and will not include

consideration of unproven allegations.[2]

Nonetheless, the Board does agree that respondent's criminal conduct directly involved the practice of law. The IRS allowed the full $45,000 deduction based on the information contained in the two letters written on respondent's letterhead and provided by respondent in his role as J.P.'s attorney. His convictions for conspiracy and making false statements clearly result from his actions as an attorney.

The only remaining question is the quantum of discipline. Before the Court orders disbarment for dishonesty, it must be proven by clear and convincing evidence that the attorney's conduct "reveals a flaw running so deep that he can never again be permitted to practice law." Matter of Rigolosi, 107 N.J. 192, 210 (1987). The totality of the circumstances must demonstrate that "the ethical deficiencies are intractable and irremediable . . . Disbarment is reserved for the case in which the misconduct of an attorney is so immoral, venal, corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession." Matter of Templeton, 99 N.J. 365, 376 (1985). Respondent's grave misconduct was inexcusable and clearly diminished the confidence vested in him by the public, particularly in light of his public

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[2] The Board has reviewed the pre-sentence memorandum prepared by probation and follows the decision in In re Spina, 121 N.J. 378 (1990). However, this case is distingushible from Spina, in that this respondent did not acknowledge that references in the presentence report to earlier behavior were accurate, and the judge, in imposing his sentence, clearly stated he did not consider that background information in deciding his discipline.

status as Police Director of New Brunswick. The Board, however, is not persuaded that respondent should be disbarred.

In Matter of Solomon, 110 N.J. 56 (1988), an attorney was convicted of insider securities trading violations. The Court took into account that he was not acting as an attorney, did not trade for his own benefit, and had no prior record. He received a two-year retroactive suspension.

The Board does see a clear distinction between this case and Matter of Mallon, 118 N.J. 663 (1990), where the attorney was convicted of conspiracy to defraud the United States, and aiding and abetting the submission of false tax returns. That attorney directly participated in the laundering of funds in order to fabricate two transactions reported on the tax returns of his clients. Those transactions concerned capital gains totalling $541,000. Mallon did not appear before the Board or the Court. The Court in that case found a pattern of multiple offenses over a period of several years, with no mitigating factors, and ordered the attorney's disbarment. Clearly this case is more akin to Solomon, given the lack of pecuniary gain to respondent and the other mitigating factors noted, than Mallon.

In arriving at its recommendation, the Board has considered a number of mitigating factors: (1) respondent's prior good reputation, as evidenced by the thirty or so letters of support from friends, attorneys, fellow police officers, and clergy, contained in the record; (2) his prior public service, as demonstrated by his service in the Marine Corps, followed by his

twenty-three years with the New Brunswick Police; and (3) his expressed candor, contrition, and regret for his actions as detailed in his statement to the sentencing judge.

After a careful balancing of the nature of the crime with the mitigating factors enumerated above, the Board unanimously recommends that respondent be suspended for a period of two years. One member did not participate.

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

DATED: 3/28/1991

BY: _____
Raymond R. Trombadore, Esq.
Chair
Disciplinary Review Board