SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-273

IN THE MATTER OF :
LEONARD A. MESSINGER, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 23, 1991

Decided: December 9, 1991

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

Ronald G. Russo appeared on behalf of respondent.[1]

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"), based on respondent's conviction on one count of conspiracy to defraud the United States, by engaging in fraudulent securities transactions for the purpose of generating tax losses (18 U.S.C.A. 371), seven counts of aiding in the filing of false tax returns for various partnerships (26 U.S.C.A. 7206 (2)) and one count of filing a false personal income tax return for the calendar year 1981 (26 U.S.C.A. 7206 (1)).

[1] Mr. Russo is a New York attorney, not admitted to practice in New Jersey. At the hearing, the Board granted his motion for admission pro hac vice.

Respondent was admitted to the New Jersey bar in 1974. He was admitted to the practice of law in New York in 1964. In December 1987, a federal grand jury in New York returned a sixteen-count indictment against respondent and his former law partner, Michael P. Oshatz. Respondent was named in nine counts of the indictment (Exhibit A to the OAE brief). On February 6, 1989, after a twelve-week trial, respondent was found guilty of all nine counts. On May 6, 1989, he was sentenced to an aggregate term of imprisonment for twenty-eight months, to be followed by probation for a period of three years (Exhibits B and C to the OAE brief). Respondent's conviction was affirmed by the United States Court of Appeals for the Second Circuit on August 23, 1990, United States v. Oshatz, et al., 912 F.2d 534 (2nd Cir. 1990) (Exhibit D to the OAE brief).

Following the Second Circuit's decision, respondent's partner filed a petition for re-hearing en banc, which was joined by respondent. The petition was denied on October 10, 1990 (Exhibit E to the OAE brief). On November 20, 1990, respondent began serving his custodial sentence at a federal prison in Allenwood, Pennsylvania.

The design of the fraudulent tax shelter scheme is set forth in the Second Circuit's decision:

> Between 1979 and 1983, Oshatz, a tax attorney, assisted in the formation of a number of affiliated partnerships known as the 'Monetary Group.' The offering memoranda for the Monetary Group reported that the partnerships would invest in various financial instruments to secure economic gain, that these investments would involve substantial market risk, and that any losses generated by these transactions would be available as tax deductions. Oshatz and Messinger, his law partner, also formed a number of other partnerships,

in which they held an interest, for the purpose of purchasing tax shelter investments from the Monetary Group.

The Monetary Group partnerships engaged primarily in two types of securities transactions on behalf of their limited partner investors. Initially, the partnerships entered into 'straddle' transactions in which 'short' and 'long' positions are simultaneously established in a commodity or a security. At the end of the year, the side of the transaction with a loss is closed out, generating a tax deduction. At the beginning of the next year, the other 'leg' of the transaction is closed out, generating a taxable gain. After Congress passed legislation curtailing the use of straddle transactions, (citation omitted), the partnerships entered into repurchase ['repo'] agreements as investment vehicles. This type of arrangement involves the purchase of a security with borrowed money, with the security serving as collateral for the loan. In 'open' repurchase agreements, the interest charge on the loan fluctuates with the prevailing market rate, entitling the investor to an interest expense deduction since a profit or loss may be realized on the transaction. Open repurchase agreements function much like straddle transactions since the interest on the loan may be deducted immediately, while the gain from the underlying security, generally a Treasury bill, is not realized until the next taxable year.

The Government offered convincing proof that the tax losses reported by the partnerships from these transactions were not the product of legitimate trading. Edward Markowitz, the head trader for the Monetary Group, testified that he falsified trade documents to reflect straddle transactions that never occurred. The partnerships also removed the risks associated with repurchase agreements by fixing the interest rate of the loan to coincide with the interest rate of the securities that collateralized the loan. Though this type of arrangement, known as a 'repo to maturity' repurchase agreement, is legal, it provides no basis for claiming an interest expense deduction since no profit or loss can be realized in connection with the interest charges. To generate the desired tax losses, the partnerships financed repurchase agreements by using fixed 'repo to maturity' rates but fraudulently documented the transactions as 'open' repurchase agreements. (citation omitted).
[United States v. Oshatz, et al., supra, 912 F.2d at 536]

The conspiracy involved $1.6 billion in fictitious transactions that were utilized to generate approximately $225 million in false tax deductions. Respondent himself was among the individuals who personally benefitted from these false tax deductions. The Government claimed that respondent enjoyed a $45,000 personal tax savings as a result of his fraud, while respondent claimed that his savings actually approximated $23,000 (Exhibit C to the OAE brief).

By Court order dated March 22, 1989, respondent was temporarily suspended from the practice of law in New Jersey. The suspension remains in effect as of this date.

The OAE is requesting 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 re Goldberg, 105 N.J. 278, 280 (1987); In re Tuso, 104 N.J. 59, 61 (1986); In re Rosen, 88 N.J. 1, 3 (1981). R. 1:20-6(c)(1). Accordingly, there is no need to make an independent examination of the underlying facts to ascertain guilt. In re Conway, 107 N.J. 168, 169 (1987). The Board's review is limited to the extent of final discipline to be imposed. In re Goldberg, supra, 105 N.J. at 280. Respondent's conviction clearly and convincingly shows that he has committed a criminal act that reflects adversely on his honesty and fitness as a lawyer, in violation of RPC 8.4(b). In addition, respondent's criminal

conduct involved dishonesty, fraud, deceit and misrepresentation, in violation of RPC 8.4(c).

In determining the appropriate discipline, several factors must be considered. These 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 addition, "each disciplinary proceeding is fact-sensitive and must be judged on its merits." In re Lunetta, 118 N.J. 443, 448 (1989). The Court has not imposed a hard and fast rule that requires a certain penalty for a conviction of a particular crime. In re Aloisio, 99 N.J. 84, 89 (1985).

Respondent's participation in a fraudulent scheme to generate fictitious tax losses was a serious crime against the government. Moreover, his cooperation in this complex criminal conspiracy produced a personal financial gain of $23,000 in tax savings. Respondent's misconduct was inexcusable and diminished the confidence vested in him by the members of the public. Nevertheless, the Board is not convinced that respondent's name should be removed from the roll of practicing attorneys in New Jersey.

Indeed, before the Court orders disbarment, the misconduct of the attorney must be "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." In re Templeton, 99 N.J. 365, 376 (1985). The attorney's conduct must "mirror [] an unsalvageable professional

character. . . [and demonstrate] that [his] good character and fitness have been permanently or irretrievably lost." In re Templeton, supra, 99 N.J. at 376-77. In the face of the record before it, the Board is not persuaded that respondent's character is so deficient as to preclude him from ever practicing law again. This conviction is grounded on the Board's careful review of the hearing panel report by the New York disciplinary authorities and of the transcript of the sentencing proceedings.

The New York hearing panel unanimously recommended that respondent be spared from disbarment. It recommended that, instead, respondent be suspended from the practice of law for a period of five years, retroactive to the date of his temporary suspension in New York, July 27, 1989, or for the combined period of his incarceration and probation, whichever was longer.[2] The panel's recommendation was based on the sentencing judge's implicit belief that respondent's conduct did not warrant disbarment. The panel recognized that the judge's comments should be considered much the same as the testimony of a character witness, given the judge's opportunity to hear and evaluate all of the evidence of respondent's wrongdoing, which evidence included 150 character letters, during a lengthy criminal trial.

The Board agrees with the New York panel's position and, like the panel, acknowledges that deference should be paid to the trial

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[2] By letter dated September 9, 1991, respondent's counsel forwarded the New York hearing panel report to the OAE. In that letter, counsel advised the OAE that the presenter in the New York matter would not be opposing counsel's application to confirm the report.

judge with respect to those intangible aspects of the case not transmitted by the written record. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). The Board also gave considerable weight to the New York panel's independent conclusions, drawn from the testimony presented to it, that numerous compelling circumstances militate against a recommendation for disbarment.

Specifically, the sentencing judge and the New York panel considered the following mitigating factors: (1) respondent's strong sense of commitment to his family, his religious congregation, his community, and his friend, associates and clients; (2) his acknowledgement of his wrongs; (3) his deep and sincere remorse for his illegal conduct; (4) respondent was not the mastermind of the fraudulent tax shelter scheme but, rather, the follower of his senior partners' lead, despite his own qualms about the propriety of that conduct; (5) respondent's motivation for joining the illegal scheme apparently was not to increase his own personal wealth but, instead, to fulfill the legal assignments given to him by his senior partners; (6) his wrongdoing was not the result of venality or greed but, rather, of his reluctance to do battle with his law partners and, perhaps, to forfeit his job; (7) respondent and his family have already endured considerable suffering and punishment for his misdeeds; (8) respondent has been left virtually destitute as a result of the loss of his law practice and the costs of his criminal defense; (9) the confidence still reposed in him by his clients, associates and employers; and (10) the conviction that respondent will never err again.

Like the New York panel, the Board believes that, although the charges of which respondent was convicted are most serious, under the circumstances of this case disbarment is not mandated. The Board's view is that a lengthy suspension will adequately achieve the goal of protecting the reputation and integrity of the bar and the confidence reposed on the profession by the members of the public.

Accordingly, the Board unanimously recommends that respondent's suspension in New Jersey be equal to that imposed in New York and that respondent not be reinstated in this state until and unless he is restored to the practice of law in New York. One member did not participate.

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

Dated: 12/9/1991

By: Raymond R. Trombadore
Chair
Disciplinary Review Board