SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-144
District Docket No. XIV-2008-0613E

IN THE MATTER OF	:	
MICHAEL A. ROWEK	:	
AN ATTORNEY AT LAW	:	Decision

Argued: July 17, 2014

Decided: November 24, 2014

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

David H. Dugan, III appeared on behalf of respondent.

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

This matter was before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13, following respondent's guilty plea to one count of third-degree unlawful possession of a prescription legend drug, in violation of N.J.S.A. 2C:35-10a(3) (Vicodin); third-degree unlawful possession of a controlled dangerous substance (CDS) (gamma-Butyrolactone (GBL)), in violation of N.J.S.A. 2C:35-10a(1); third-degree unlawful possession of a CDS (Percocet,

schedule II), in violation of N.J.S.A. 2C:35-10a(1); fourth-degree possession of a device to defraud the administration of a drug test, in violation of N.J.S.A. 2C:36-10e; and driving while under the influence of GBL, in violation of N.J.S.A. 39:4-50.

The OAE recommended a one-year suspension and the requirement that, prior to reinstatement, respondent provide proof of drug counseling and medical and psychological fitness to practice law. In his brief to us, respondent admitted the facts, as recited in the OAE's brief, and agreed that the OAE's recommended discipline is appropriate in this matter, but requested that it be retroactive to the date of his temporary suspension, September 24, 2013.

For the reasons stated below, we agree that a one-year retroactive suspension is appropriate.

Respondent was admitted to the New Jersey bar in 1987. He has no history of final discipline. Effective September 24, 2013, however, he was temporarily suspended in New Jersey, following his guilty plea to the within criminal offenses. In re Rowek, 215 N.J. 518 (2013).

By way of background -- and according to the OAE -- on January 14, 2009, respondent was admitted into the Pretrial Intervention Program (PTI) for the commission of the following offenses: third-degree possession of heroin and crystal

methamphetamine and fourth-degree possession of a large quantity of syringes, with the intent to distribute.

On January 22, 2009, a mere eight days after being admitted to PTI, respondent attempted to defraud the administration of a drug test, while at Probation. Also on that date, he admitted to using heroin, crystal methamphetamine, and Percocet, and signed an "Admission to Drug Use" form. As a result, on January 27, 2010, he was indicted for fourth-degree defrauding the administration of a drug test for possessing "an instrument, product, tool, device or substance adapted, designed or commonly used to defraud the administration of a drug test".

Subsequently, on February 10, 2009, respondent provided urine samples to Probation that reflected conflicting results. The collection of the first sample may not have been properly witnessed. The laboratory confirmed that it was "adulterated," having "creatine levels and specific gravity" that were inconsistent with a "normal sample." A second sample collected later the same day tested positive for benzodiazepines.

On April 22, 2009, respondent's probation officer recommended that PTI be terminated. On August 3, 2010, the court did so. The underlying charges then reverted back to the active trial calendar.

Thereafter, between October 6, 2010 and April 18, 2013, the Morris County prosecutor filed multiple indictments against

respondent, charging him with third-degree possession with intent to distribute Vicodin, third-degree conspiracy to possess GBL, two counts of third-degree conspiracy to possess gamma-hydroxybutyric acid ("GHB"), third-degree possession of GBL, third-degree possession of methamphetamine, third-degree possession of Percocet, third-degree possession of oxycodone, and fourth-degree defrauding the administration of a drug test for possessing "an instrument, product, tool, device or substance adapted, designed or commonly used to defraud the administration of a drug test". Also, during that same period, respondent received a summons for driving while under the influence of GBL and for several other moving violations.

On May 1, 2013, respondent entered a guilty plea to the charges that are the subject of this motion for final discipline, or one count of third-degree unlawful possession of a prescription legend drug, two counts of third-degree unlawful possession of a CDS, fourth-degree possession of a device to defraud the administration of a drug test, and driving while intoxicated. The state agreed to dismiss all remaining counts of the several indictments, including the original charges underlying respondent's admission to PTI.

In providing a factual basis for his plea, respondent admitted that, between August 19, 2010 and April 9, 2013, he illegally possessed seventeen Vicodin pills (August 19, 2010),

GBL (April 11, 2012), eight Percocet pills (October 6, 2012), and a device that could be used to assist him in passing a drug test that he could not otherwise pass (April 9, 2013). He also admitted to driving under the influence of GBL (October 6, 2012).

On August 2, 2013, respondent was sentenced to a five-year term of drug court probation. His driver's license was suspended for two years, effective January 29, 2013. In addition, he was ordered to perform thirty days of community service, was required to spend forty-eight hours in the intoxicated driver resource center, and was assessed fines and penalties.

Before sentencing respondent, the court found that aggravating factor three (risk of recidivism), nine (general and specific deterrence), and ten (crime involving fraudulent and deceptive practices committed against a department or division of the State Government), as well as mitigating factor ten (likely to respond positively to probationary treatment) applied.

At sentencing, defense counsel explained to the court that respondent, a fifty-two-year-old lawyer, had been the victim of a serious 1985 accident that resulted in severe injury and necessitated the use of prescription drugs. Respondent recovered and continued working. Then, in 2000, he had another

severe accident and had to take prescription drugs again. This time, he became addicted to prescription drugs and his downward spiral began.

Defense counsel requested that the court take note of respondent's ADD diagnosis, as a factor contributing to his problems. Counsel argued for the imposition of a term of drug court probation, instead of a state prison sentence, in light of respondent's history of drug addiction and the steps that he had begun to take to overcome it. Counsel explained to the court that respondent had just completed eighty-one days of rehabilitation at Discovery House and was involved in a twelve-step outpatient process.

Following a de novo review of the record, we determine to grant the OAE's motion.

Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(C)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of RPC 8.4(b). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Hence, the sole issue before us is the extent of discipline to be imposed

for the attorney's violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, supra, 139 N.J. at 460 (citations omitted). Rather, many factors must be taken into consideration, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect the attorney's clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956). Thus,

offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, will, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995).

A three-month suspension is generally the appropriate measure of discipline for possession of CDS. In re Musto, supra, 152 N.J. at 173. See, e.g., In re Holland, 194 N.J. 165 (2008) (three-month suspension for possession of cocaine); In re Sarmiento, 194 N.J. 164 (three-month suspension for possession of ecstasy, a CDS); In re McKeon, 185 N.J. 247 (2005) (three-month suspension for possession of cocaine); In re Avrigian, 175 N.J. 452 (2003) (three-month suspension for possession of cocaine); In re Kervick, 174 N.J. 377 (2002) (three-month suspension for possession of cocaine, use of a CDS, and possession of drug paraphernalia); In re Ahrens, 167 N.J. 601 (2001) (three-month suspension for possession of cocaine, marijuana, and narcotics paraphernalia); In re Foushee, 156 N.J. 553 (1999) (three-month suspension for possession of cocaine; the attorney had a prior three-year suspension); In re Lisa, 152 N.J. 455 (1998) (three-month suspension for attorney who admitted being under the influence of cocaine, having unlawful, constructive possession of cocaine, and possessing drug paraphernalia; the attorney had a previous admonition for recordkeeping violations); and In re Schaffer, supra, 140 N.J. 148 (three-month suspended suspension for attorney guilty of possession

of cocaine, being under the influence of cocaine, and possession of drug-related paraphernalia; the attorney had achieved rehabilitation prior to the consideration of his ethics transgression; the Court imposed a suspended suspension only because of the attorney's obvious inability to anticipate the possibility of applying for the early-suspension mechanism announced in his case).

Some offenses attributable to drug addiction may warrant stronger disciplinary measures. In re Musto, supra, 152 N.J. at 17. See, e.g., In re Stanton, 110 N.J. 356 (1988) (six-month suspension for possession of cocaine where attorney had acknowledged ten years of drug abuse); In re Pleva, 106 N.J. 637 (1987) (six-month suspension for attorney who pleaded guilty to possession of nine and one-half grams of cocaine, eleven grams of hashish, and fifty-two grams of marijuana; the attorney was a regular drug user and had been arrested previously; three-month sentence warranted for guilty plea to charge of giving false information about drug use, when completing certification required before purchasing firearm); and In re Kaufman, 104 N.J. 509 (1986) (six-month suspension for attorney who pleaded guilty to two separate criminal indictments for possession of cocaine and methaqualude; the attorney had a prior drug-related incident and a long history of drug abuse).

In this case, respondent pleaded guilty to illegal possession of seventeen Vicodin pills, GBL, eight Percocet

pills, and a device that could be used to assist him in the passing of a drug test. He also pleaded guilty to driving under the influence of GBL. The baseline discipline for respondent's behavior is a three-month suspension. However, much like the attorney in Stanton, who admitted to a decade-long addiction, respondent has suffered with addiction since his 2000 accident, or the better part of fourteen years. That factor, along with the possession of a device to assist him in defrauding the system and driving under the influence of GBL, justifies an escalation of the discipline to a six-month suspension.

But there is more to be considered -- respondent's troubling behavior after being admitted to PTI. Unquestionably, he did not take his criminal offenses seriously and failed to recognize the opportunity that PTI offered him. Within days of his admission to the program, he was taking drugs and attempting to defraud the system. His reprehensible behavior justifies enhancing the six-month suspension to a one-year suspension.

In short, respondent's extensive interaction with law enforcement really did little or nothing to mitigate his addiction until he came face-to-face with the real prospect of a prison sentence. Further, as previously discussed, he has shown an immense lack of respect for the system by entering into PTI and immediately violating its terms.

In view of the foregoing, we agree with the OAE's recommendation for a one-year suspension, retroactive to September 24, 2013, the date of respondent's temporary suspension. Prior to reinstatement, respondent should be required to provide proof that he has overcome his drug addiction and that he is otherwise fit to practice law. Upon reinstatement, he should be required to submit to random drug-testing, monitored by the OAE, until further order of the Court.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael A. Rowek
Docket No. DRB 14-144

Argued: July 17, 2014

Decided: November 24, 2014

Disposition: One-year retroactive suspension

Members	Disbar	One-year Retroactive Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Gallipoli		X				
Hoberman		X				
Rivera		X				
Singer		X				
Yamner		X				
Zmirich		X				
Total:		9				

Ellen A. Brodsky
Chief Counsel