SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-160
District Docket No. XIV-2013-0244E

IN THE MATTER OF	:
DANIEL JAMES FOX	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 18, 2014

Decided: December 5, 2014

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

Ronald C. Hunt waived appearance on behalf of respondent.

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

In April 2013, 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 making a false, fictitious, and fraudulent

statement to the Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. §§ 1001 and 2 (Fox I). The OAE sought a three-year suspension.

Respondent's guilty plea rested on a single transaction. However, when we questioned the presenter, at oral argument in Fox I, about the total number of fraudulent transactions that he had carried out, she asserted that, although respondent had been involved in as many as 200 transactions, she could not state how many of those had been fraudulent. Thus, we denied the motion and remanded the matter to the OAE for an investigation into (1) the number of real estate transactions in which respondent had prepared fraudulent HUD-1 forms, (2) the period within which those transactions had taken place, and (3) whether each transaction resulted in an obligation to make restitution for damages suffered by any party, as a result of respondent's misconduct. The letter of remand directed the OAE to proceed to a disciplinary hearing or, in the alternative, to a disciplinary stipulation, where these issues were to be addressed clearly and definitively.

Despite the letter of remand, the OAE refiled the motion for final discipline, seeking the same quantum of discipline,

based on information set forth in the pre-sentence investigation report, which, we note, is a confidential document.[1]

For the reasons set forth below, we reluctantly determine to grant the motion for final discipline and impose a one-year retroactive suspension on respondent, rather than the three-year suspension recommended by the OAE.[2]

Respondent was admitted to the New Jersey bar in 1986. At the relevant times, he maintained a law office in Orange.

On February 1, 2010, after respondent pleaded guilty to the federal offense that gave rise to this matter, he was temporarily suspended, pending the final resolution of the ethics proceedings that followed his guilty plea. In re Fox, 201 N.J. 158 (2010).

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[1] In Fox I, at Office of Board Counsel's request, the OAE obtained the pre-sentence investigation report from the Honorable Joseph A. Greenaway, currently a judge of the Third Circuit Court of Appeals who, as a judge of the United States District Court for the District of New Jersey, received respondent's guilty plea and sentenced him.

[2] In its brief in support of the motion for discipline by consent, the OAE indicated that it had no objection to the suspension being imposed retroactively to the date of respondent's temporary suspension.

On June 7, 2012, respondent was censured, in a default matter, for failure to cooperate with disciplinary authorities and conduct prejudicial to the administration of justice, In re Fox, 210 N.J. 255 (2012), by failing to file a R. 1:20-20 affidavit, after his 2010 temporary suspension.

On June 22, 2009, before Judge Greenaway, respondent pleaded guilty to one count of

> knowingly and willfully making and causing to be made materially false, fictitious, and fraudulent statements and representations, namely, statements regarding the disbursement of $45,062.85 to seller A.H. contained in a HUD-1 Settlement Statement filed with HUD, which had been prepared in connection with the sale of a property located in Plainfield, New Jersey, and financed with a Federal Housing Administration MLIP loan, when in fact seller A.H. received no such monies and the proceeds were diverted for the benefit of defendant DANIEL J. FOX and others.
>
> [Ex.A¶2.]

On January 27, 2010, Judge Greenaway entered a judgment of conviction of one count of 18 U.S.C. §§ 1001 and 2, based on respondent's guilty plea.

18 U.S.C. § 1001 provides, in relevant part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the

> Government of the United States, knowingly and willfully
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

18 U.S.C. § 1002 provides:

> Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined under this title or imprisoned not more than five years, or both.

At the plea hearing, respondent testified that, in February and March 2001, he had conducted real estate closings on behalf of individuals who had obtained mortgages through First National

Funding Corporation (First National). Specifically, on February 16, 2001, respondent was required to fully and accurately complete a HUD-1 with respect to the purchase of a Plainfield property from seller "A.H.," which was funded by a mortgage insured by the Federal Housing Administration (FHA), a division of HUD.

Respondent prepared two versions of the HUD-1. One showed that the purchaser had received a gift of equity in the amount of $28,445.70, to be used toward the purchase of the property. The other showed that A.H. had received $45,065.82 in proceeds from the sale. In fact, A.H. had received no monies from the sale.

Respondent returned to First National the HUD-1 showing that $45,065.82 had been disbursed to A.H., knowing that the representation was false and knowing that the HUD-1 would be turned over to the FHA, which would rely on it, in insuring the loan. The $45,065.82 was never fully accounted for in the HUD-1. Respondent acknowledged that he "and others received funds that were the product of the fraudulent Plainfield property closing, including the false settlement statement." It appears, however, that respondent received only his customary fee of between $800 and $1000 at each closing.

On January 25, 2010, respondent was sentenced to six months in prison, followed by two years of supervised release, and ordered to make restitution in the amount of $603,074.40. Prior to imposing the sentence, Judge Greenaway granted the government's motion for a downward departure from the sentencing guidelines, making note of "the significance and usefulness of the defendant's assistance," which had resulted in "a number of individuals" having been brought to justice.

As stated previously, rather than comply with our directive to develop a record that reflected the actual number of fraudulent transactions, the period within which they took place, and whether each transaction resulted in the obligation to make restitution, the OAE referred to information in the pre-sentence investigation report and, based on that information, asserted, in its brief, that "it seems reasonable to conclude" that a specific number of transactions (which we cannot disclose in this decision due to the confidential nature of the report) "conducted by respondent during the relevant time period were fraudulent and that the aggrieved party (HUD) was or will be compensated through the $603,074.40 restitution order."

Following a review of the full record, we determine to grant the OAE's motion for final discipline.

Final disciplinary 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); and 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 on respondent for his 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. Thus, we must take into consideration many factors, 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).

Although there are two cases directly on point – In re Serrano, 193 N.J. 24 (2007), and In re Noce, 179 N.J. 531 (2004) – the OAE has relied on several other cases, in support of the requested three-year suspension. Two of those cases arose out of the same federal statute as the one in this case, but involved misrepresentations made on forms submitted to the Immigration and Naturalization Service (INS). In re Vargas, 170 N.J. 255 (2002) (three-year suspension imposed on attorney who pleaded guilty to violating 18 U.S.C. §1001, based on his falsification of INS documents) and In re Silverblatt, 142 N.J. 635 (1995) (three-year suspension imposed on attorney who pleaded guilty to one of ten counts of willfully and knowingly presenting false documents to the INS, a violation of 18 U.S.C. §1001, based on false statements in INS forms). In addition, the OAE cited In re Olewuenyi, 216 N.J. 576 (2014) (two-year suspension imposed on attorney who pleaded guilty to one count of conspiracy to defraud the United States, a violation of 18 U.S.C. § 371, and to one count of conspiracy to promote or facilitate the commission of the crime of identity theft, a violation of N.J.S.A. 2C:5-2).

Given that Serrano and Noce are so similar to this matter, we rely on those cases for the assessment of the proper quantum of discipline. In Serrano, an eighteen-month retroactive suspension was imposed on an attorney who, like respondent, had pleaded guilty to making a false statement to a federal agency, in violation of 18 U.S.C. §1001 and 2. Specifically, Serrano had knowingly prepared materially false HUD-1s, in order to qualify unqualified borrowers for HUD-insured mortgages. In the Matter of Linda Serrano, DRB 07-061 (June 29, 2007) (slip op. at 2-4). The HUD-1s falsely represented that the borrowers had provided Serrano with money at settlement, such as closing costs. Id. at 5-7.

Serrano received between $20,000 and $40,000 from her illegal conduct in approximately twenty-five closings. Id. at 7, 9. Her lawyer claimed that these monies represented her legal fees for all of the transactions. Id. at 9.

In Serrano, the court granted the government's motion for a downward departure from the sentencing guidelines, based on the substantial assistance that Serrano had provided to the government. Id. at 8-9. She was sentenced to a one-year term of probation, fined $5000, and ordered to pay a $100 special assessment. Id. at 9. In addition, the court stated that, if

Serrano paid the fine, it would "entertain a motion within six months" for an early discharge of probation. Ibid.

Our imposition of an eighteen-month retroactive suspension on Serrano was based on a comparison of her conduct to that of the attorney in Noce, who had received a three-year retroactive suspension for fraud, conduct prejudicial to the administration of justice, and conflict of interest. Specifically, in one matter, Noce had notarized a document, without witnessing its execution. In the Matter of Philip S. Noce, DRB 03-225 and 03-169 (December 16, 2003) (slip op. at 3). Additionally, he had engaged in a conflict of interest when, as the co-owner of a title company, he had performed title work and then acted as the settlement agent and closing attorney for the unqualified buyers. Id. at 9-10.

The bulk of Noce's misconduct, however, involved his participation in a conspiracy to defraud HUD, through the fraudulent procurement of home mortgage loans insured by the FHA. Id. at 4-5. Noce played what was described as a minor role in the scheme, which took place from April 1995 to January 1998, and involved the submission of fraudulent certifications to HUD, claiming that the purchasers had received "gift checks" that enabled them to contribute to the purchase price and to qualify for the FHA-insured mortgages. Id. at 5. The "gift checks,"

however, were "bogus." Ibid. Thus, the buyers had purchased homes with FHA mortgage loans, without providing down payments, as required by HUD. Id. at 6.

Fifty of the eighty transactions in which Noce had participated involved illegitimate gift transfer certifications. Id. at 7. He performed the title work and acted as the settlement agent and closing attorney for the unqualified buyers. Id. at 5. He knowingly certified HUD-1 settlement statements and gift transfer certifications falsely indicating that the buyers' gift check funds were paid to the sellers. Id. at 6. He executed those false documents, knowing that HUD would rely on them and that they were necessary for the procurement of the FHA-insured mortgages for the unqualified buyers. Id. at 5. There was no evidence that Noce had been paid more than his regular real estate transaction fee in connection with the fraudulent real estate closings. Ibid. HUD suffered a loss of more than $2.4 million. Id. at 7. Noce pleaded guilty to one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. Id. at 4.

Like Serrano, Noce's substantial cooperation with the government had prompted the government to request a downward departure at sentencing. Id. at 5. Noce was placed on probation for five years, confined to his residence for a period of nine

months, fined $5000, and ordered to make restitution to HUD in the amount of $2,408,614. Id. at 7.

In comparing Serrano's conduct to Noce's, we observed that she had been involved in approximately half the number of transactions as Noce and that the transactions had occurred over a shorter period of time. Moreover, from the standpoint of sentencing, Noce's conduct had been treated much more harshly: a five-year probationary period together with nine months home confinement, as opposed to a one-year probationary period. Although both attorneys had been fined $5000, Noce had been required to reimburse HUD more than $2 million, whereas Serrano had not been required to make any reimbursements. Thus, in our view, Serrano's criminal conduct had not been as serious as Noce's.

Given these distinctions, we determined that the three-year suspension imposed in Noce was too severe for Serrano. Also, Serrano's full cooperation with the government's investigation, including her willingness to testify against her co-conspirators, persuaded us that an eighteen-month suspension, retroactive to the date of her temporary suspension in New Jersey, April 6, 2006, was appropriate discipline for her offenses.

In this matter, we are deeply troubled by the OAE's failure to comply with the instructions set forth in our April 22, 2013 remand letter. Equally troubling is the OAE's claim that "it seems reasonable to conclude that somewhere between . . . of the 200 real estate closing[s] were fraudulent."[3] The terms "seems," "reasonable," and "somewhere" hardly satisfy the clear and convincing evidence standard. Speculation is not a basis upon which we may make such a determination.

Given the OAE's failure to comply with the letter of remand, we are now faced with the same record as before. At this point, then, in the interest of avoiding the waste of judicial resources, we determine to decide this matter based on the present record.

Based on the information set forth in the confidential pre-sentence investigation report, the extent of respondent's misconduct pales in comparison to that of Serrano and Noce. Serrano and Noce were involved in twenty-five and fifty transactions, respectively, during a three-year period.

[3] Because the number of transactions involved was contained in the pre-sentence investigation report, we do not reveal that information in this decision.

The terms of the federal courts' punishment imposed on all three attorneys for their misconduct appear to be inconsistent. Neither Serrano nor Noce were imprisoned,[4] despite their long-term participation in the wrongdoing. Yet, respondent, whose involvement lasted a mere thirty days, was incarcerated for six months. Nevertheless, we note that Serrano's and Noce's periods of probation (one and five years, respectively) exceeded the term of respondent's six-month imprisonment.

The financial ramification of all three attorneys' misconduct is likewise difficult to compare. Serrano and Noce were each fined $5000. No fine was imposed on respondent. Noce was required to pay $2 million in restitution; Serrano was not required to pay anything; and respondent must pay more than $600,000.

Because the sentences among Serrano, Noce, and respondent varied so greatly, rendering impossible a meaningful comparison on that basis, we consider only the scheme itself in fashioning the appropriate discipline. Respondent's involvement in the

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[4] Noce was subject to a nine-month period of home confinement.

number of transactions contained in the pre-sentence report does not warrant the imposition of an eighteen-month suspension, which was imposed on Serrano. It certainly does not warrant a three-year suspension, as was imposed on Noce. Nevertheless, a long-term suspension is warranted, given the egregiousness of respondent's misconduct. Accordingly, we determine to suspend him for one year, retroactive to February 1, 2010, the date of his temporary suspension. We cannot agree with the three-year suspension recommended by the OAE because the record, as presented to us again, does not contain sufficient facts to support a suspension of that length.

Finally, we note that the additional cases cited by the OAE in its brief do not involve conduct that is subject to close comparison to that of respondent. In Vargas, supra, 170 N.J. at 255, the attorney not only falsified INS notices of approval for prior clients by changing the names on the documents to current clients and submitted the false documents to the INS to illegally obtain residency status for his current clients, he also lied to investigators, claiming that a paralegal had falsified the documents. In Silverblatt, supra, 142 N.J. at 635, the attorney submitted to the INS United States Employment Form 1-94, which changed the status of his alien clients,

thereby permitting them to legally remain and work in the United States. He also listed political reasons on the forms, knowing that there were no political reasons or need for political asylum for these individuals, who were not entitled to a change in their alien immigration status. In these cases, there was no quantifiable financial harm to the federal government.

In Olewuenyi, supra, 216 N.J. at 576, although the attorney had prepared and submitted to a bank false statements in connection with the procurement of loans, unlike respondent, he also committed identity theft, a very serious crime.

Members Rivera and Yamner did not participate.

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. Bradsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daniel J. Fox
Docket No. DRB 14-160

Argued: September 18, 2014

Decided: December 5, 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:		7				2

Ellen A. Brodsky
Chief Counsel