SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-282
District Docket No. XIV-05-492E

IN THE MATTER OF	
JOHN F. RHODY	
AN ATTORNEY AT LAW	

Decision

Argued: January 18, 2007

Decided: April 5, 2007

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

Respondent waived appearance for oral argument.

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 the fourth-degree offense of tampering with records. The OAE recommends a censure. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1971. He has no history of discipline. The New Jersey Lawyers' Fund for

Client Protection reports that respondent has been retired since 2001.

In September 2005, a five-count indictment charged respondent with one count of second-degree theft by deception, two counts of fourth-degree tampering with records, and two counts of fourth-degree contempt. In December 2005, respondent pleaded guilty to one count of fourth-degree tampering with records, in violation of N.J.S.A. 2C:21-4a.[1] The court elicited the factual basis for respondent's plea:

> A. Well, at the time I filled out an insurance application, I was asked if I had any hobbies. And I've had a hobby of postcards, collecting and buying and selling for 30-35 years. And I didn't indicate that.
>
> Q. And did that have some significance in regard to, -- is it disability insurance?
>
> A. Yes, sir.
>
> Q. Did it have some significance in regard to whether or not you were paid disability?
>
> A. Yes.

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[1] N.J.S.A. 2C:21-4(a) states:

> Except as provided in subsection b. of this section, a person commits a crime of the fourth degree if he falsifies, destroys, removes, conceals any writing or record, or utters any writing or record knowing that it contains a false statement or information, with purpose to deceive or injure anyone or to conceal any wrongdoing.

> Q. Were you aware that you had an obligation to fill out that part of the application?
>
> A. Yes.
>
> THE COURT: [DAG], anything else you want me to ask him?
>
> [DAG]: Specifically, Judge, the purpose of him omitting, indicating that he was involved in a hobby [sic] that extent.
>
> Was it partly to deceive the insurance company into providing you with long-term disability benefits?
>
> [Respondent]: That was part of it. The other reasons [sic] is I just didn't want to disturb that and be able to keep doing it.
>
> [OAEbEx.B7-7 to 8-6.][2]

In May 2006, the court sentenced respondent to three years' probation. The court noted, in aggravation, the need to deter respondent and others from violating the law. In mitigation, the court noted that "there were substantial grounds tending to excuse or justify [respondent's] conduct though failing to establish a defense." Specifically, the court noted that respondent suffered some medical problems, had no history of prior delinquency or criminal activity, and was particularly likely to respond affirmatively to probationary treatment.

[2] OAEb refers to the OAE's brief.

As explained in the OAE's brief, the indictment alleged that respondent misrepresented facts and falsified records to obtain long-term disability benefits from the Standard Insurance Company ("Standard"), and knowingly violated two court orders. Respondent's disability policy provided benefits for the first twenty-four months of disability, upon proof of disability from one's "own occupation" and, thereafter, to age sixty-five, upon proof of disability from "any occupation." The policy also provided that, during the "own occupation" period, the recipient could work in a different occupation and collect benefits, although the entitlement would be offset by the amount earned.

In June 1999, respondent applied for benefits, claiming inability to work as an attorney due to a mental condition caused by Lyme's Disease. As part of the claims verification process during the "own occupation" period, respondent denied having any other form of employment, significant daily activities or involvement with any social clubs or organizations, and denied use of his home computer for anything other than word processing.

In January 2002, respondent's estranged wife advised Standard that respondent had "a substantial source of income" from the purchase and sale of classic postcards on eBay and at trade shows and flea markets. Standard's investigation into the

allegations confirmed respondent's sales of postcards on eBay and at fairs. Further investigation revealed that he was Treasurer of the "Jersey Shore Post Card Club." Standard ceased paying benefits to respondent, and demanded restitution for the portion of benefits overpaid during the "own occupation" period, and all sums paid during the "any occupation" period. Respondent refused to repay any money.

Standard referred the matter to the Office of the Insurance Fraud Prosecutor (OIFP). OIFP's investigation included witness interviews and the review of data from many sources. The state's investigation and review of OIFP's records "allow[ed] for the conclusion" that respondent's disclosures to Standard contained knowing misrepresentations and omissions of material fact regarding his activities, thereby inducing Standard to pay benefits to which he was not entitled.

During the course of the state's investigation, a matrimonial court entered two orders in connection with respondent's divorce proceedings, barring the parties from disposing of any marital assets or other assets subject to equitable distribution. The second of the two orders specifically referred to respondent's postcard collection. In June 2003, the court found that respondent had violated the

orders by selling postcards. The court referred the matter to the OIFP for further investigation.

The state's investigation revealed that, during the time in question, respondent sold postcards at several trade shows and completed over 1,400 transactions on eBay. He also made misrepresentations to the court, in a March 2002 certification, in which he claimed that he had given his accountants information about his postcard activities, that he could not maintain accurate records due to his disability, and that he could not obtain the information. Respondent's accountants, however, denied under oath any knowledge of his postcard activities. Furthermore, as the DAG pointed out, eBay records were available on the Internet for review.

In addition, respondent provided documents to Standard and to the matrimonial court, including an "Activities of Daily Living" questionnaire, in which he denied membership in clubs, denied having any hobbies and indicated that his only daily activity was walking. His representations were inconsistent with his assertion, during his divorce proceeding, that his postcard activity was a hobby. It was further inconsistent with his travels to trade shows, where he would buy and sell postcards.

In August 2006, respondent's counsel provided additional information to the OAE about respondent's postcard collecting hobby. According to counsel, although respondent's estranged wife represented to the court that the collection was worth over $1,000,000, when the collection was liquidated, the proceeds were under $75,000. In addition, respondent retained a forensic accountant, who established that not only did respondent not make a profit from his hobby, but, when his expenses were considered, he actually had suffered financial losses.

According to counsel, following the indictment, in light of all that respondent had been through in connection with his matrimonial proceedings and the legal fees incurred, respondent decided to plead guilty to "put an end to this nightmare."

According to the OAE, respondent's conduct violated RPC 8.4(b) (commission of a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

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

Respondent pleaded guilty to fourth-degree tampering with records, a violation of RPC 8.4(b) and RPC 8.4(c). The existence of a criminal conviction is conclusive evidence of

respondent's guilt. R. 1:20-13(c)(1); In re Gipson, 103 N.J. 75, 77 (1986). The sole remaining issue is the appropriate discipline. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The level of discipline imposed in disciplinary matters based on the commission of a crime depends on a number of 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, supra, 118 N.J. at 445-46. Discipline is imposed even though an attorney's offense is not related to the practice of law. In re Kinnear, 105 N.J. 391, 395 (1987).

Discipline imposed for misconduct similar to respondent's has ranged from a reprimand to a brief suspension. See, e.g., In re Gjurich, 177 N.J. 44 (2003) (reprimand imposed on attorney guilty of theft by deception for collecting unemployment benefits from the State of New Jersey while employed as an attorney in a Pennsylvania law firm, a third-degree offense, in violation of N.J.S.A. 2C:20-4 and N.J.S.A. 2C:28-3; the attorney was admitted to a pre-trial intervention program ("PTI") for three years, ordered to pay $11,000 in restitution, a $7,500 fine, and to perform fifty hours of community service);

In re Ford, 152 N.J. 465 (1998) (reprimand where the attorney, on at least ten occasions, certified to the Division of Unemployment and Disability Insurance ("the Division") that he was entitled to unemployment benefits; the attorney failed to disclose the existence of his newly established law practice to the Division, although the practice grew to be successful);[3] and In re Jaffe, 170 N.J. 187 (2001) (three-month suspension for attorney who, prior to entering PTI, pled guilty to one count of third-degree theft by deception, in violation of N.J.S.A. 2C:20-4; the crime involved the theft of $13,000 from Blue Cross/Blue Shield through the submission of false health insurance claims for specially prescribed baby formula for the attorney's child; in mitigation, we considered that the conduct took place during a very emotional and difficult time in the attorney's life).

In recommending a censure, the OAE distinguished Jaffe (three-month suspension) from the instant matter. Although the OAE noted that, unlike Jaffe, who entered PTI, respondent was convicted of a crime, it pointed out that Jaffe committed a third-degree crime, as opposed to respondent's fourth-degree crime. The OAE also pointed to the existence of mitigating factors, in particular, respondent's health problems. In the

[3] Ford did not face criminal charges.

OAE's view, this matter was not as serious as Jaffe and, thus, does not require the imposition of a suspension.

The OAE distinguished this case from Ford, noting that Ford was not the subject of a criminal prosecution and that, "[i]n order to strike an appropriate balance between and among the cases," a censure is appropriate here. We disagree. In Gjurich, the attorney was also the subject of a criminal prosecution and, nevertheless, received a reprimand. Furthermore, here, we gave weight to the mitigating factors noted by the sentencing court, and have also considered respondent's health problems. Finally, it is the underlying conduct, and not the existence of a criminal conviction, that should determine the measure of discipline in this case.

In the instant matter, not only did respondent make misrepresentations to Standard, but he also made misrepresentations to the court. Where attorneys have made misrepresentations to a tribunal, the discipline has ranged from an admonition to a suspension. See, e.g., In the Matter of Robin Kay Lord, DRB 01-250 (September 24, 2001) (admonition for attorney who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias, thus resulting in a lower sentence because the court was not aware of the client's significant history of motor vehicle

infractions; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); In re Mazeau, 122 N.J. 244 (1991) (attorney reprimanded for failing to disclose to a court his representation of a client in a prior lawsuit, where that representation would have been a factor in the court's ruling on the attorney's motion to file a late notice of tort claim); In re Whitmore, 117 N.J. 472 (1990) (reprimand for municipal prosecutor who failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a drunk-driving case intentionally left the courtroom before the case was called, resulting in the dismissal of the charge); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension for attorney who made a series of misrepresentations to a municipal court judge to explain his repeated tardiness and failure to appear at hearings; we noted that, if not for mitigating factors, the discipline would have been much harsher); In re Mark, 132 N.J. 268 (1993) (three-month suspension for attorney who misrepresented to the court that his adversary had been supplied with an expert's report and then created another report when he could not find the original; in mitigation, the Court considered that the attorney was not aware that his statement was untrue and that he was under considerable stress from assuming the caseload

of three attorneys who had recently left the firm); In re Kernan, 118 N.J. 361 (1990) (three-month suspension for attorney's failure to inform the court, in his own matrimonial matter, that he had transferred property to his mother for no consideration, and for failure to amend his certification listing his assets; the attorney had a prior private reprimand); In re Forrest, 158 N.J. 429 (1999) (six-month suspension for attorney who, in order to obtain a personal injury settlement, did not disclose to his adversary, an arbitrator, and the court that his client had died); In re Telson, 138 N.J. 47 (1994) (attorney suspended for six months after he concealed a judge's docket entry dismissing his client's divorce complaint, obtained a divorce judgment from another judge without disclosing that the first judge had denied the request, and denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was scared); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in

reserve); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney who had been involved in an automobile accident and then misrepresented to the police, her lawyer, and a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse another of her own wrongdoing; two members of the Court voted for disbarment).

Respondent's misrepresentation to the court more closely resembles that of attorney Kernan, who received a three-month suspension. In both instances, the attorneys hid the existence of an asset. Kernan's conduct, however, was more serious, in that he actually transferred the property to conceal his ownership. In addition, Kernan had a disciplinary history (a private reprimand), unlike respondent who, prior to this incident, practiced law for twenty-eight years without a blemish on his professional record.

Furthermore, respondent's misconduct was no more serious than that of Gjurich and Ford, who received reprimands. Indeed, Ford hid the existence of a profitable law practice. Respondent hid the existence of a hobby that generated no income for him. We, therefore, determine to impose a reprimand in the instant matter.

Members Lolla and Baugh 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
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John F. Rhody
Docket No. DRB 06-282

Argued: January 18, 2007

Decided: April 5, 2007

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy			X			
Pashman			X			
Baugh						X
Boylan			X			
Frost			X			
Lolla						X
Neuwirth			X			
Stanton			X			
Wissinger			X			
Total:			7			2

Julianne K. DeCore
Chief Counsel