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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-014

IN THE MATTER OF
KENNETH E. FINK
AN ATTORNEY AT LAW

Decision

Argued: April 15, 2004

Decided: May 18, 2004

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

Teri S. Lodge 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 based on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE") following the imposition of discipline on respondent in Delaware.

Respondent was admitted to the New Jersey bar in 1987 and to the Delaware bar in 1985. On July 18, 2002, he was temporarily suspended in New Jersey based on multiple convictions of child pornography, as detailed below. In re Fink, 173 N.J. 322 (2002). He has no other disciplinary history in New Jersey. On June 3, 2003, he was disbarred in Delaware, pursuant to a stipulation of disbarment by consent dated May 13, 2003, entered into by respondent and the Delaware Office of Disciplinary Counsel ("ODC").

The following facts were gleaned primarily from the stipulation of disbarment. On March 7, 2000, the Supreme Court of Delaware temporarily suspended respondent after a hearing in which the Court found that respondent had diverted client funds to his personal use from the Estate of Patricia A. Zimmerman. The ODC had alleged that respondent had diverted \$57,272.03 from the estate, in violation of the Delaware equivalents to New Jersey RPC 1.15(a) and RPC 8.4(c). According to a petition for discipline filed by the ODC, after respondent failed to provide an accounting of the estate, the ODC arranged for an auditor from the Delaware Lawyers' Fund for Client Protection to review respondent's financial records. The auditor found that respondent had issued four checks totaling \$57,272.03 to himself

or to a corporation that he controlled. Respondent admitted in the stipulation that he had borrowed estate funds to buy an airplane for his corporation. Although at the time of the final audit report respondent had repaid some of the funds, \$13,306.46 remained outstanding. After the entry of the temporary suspension order of March 7, 2000, the Court of Chancery appointed a receiver for respondent's practice and the matter was reported to the Delaware Department of Justice.

On March 2, 2000, the ODC filed a complaint charging respondent with twenty-four RPC violations, based on his misconduct in the Zimmerman estate, as well as other matters. On March 27, 2000, respondent was indicted by a grand jury and charged with four counts of felony theft in connection with the Zimmerman estate. The disciplinary proceedings were then stayed.

On March 21, 2000, the Delaware Department of Justice executed a search warrant at respondent's home, seeking certain financial and client records. Upon review of respondent's home computer, an additional search warrant was obtained, seeking items depicting children engaged in prohibited sexual acts or the simulation of such acts. The subsequent search yielded 194 visual depictions of prepubescent children engaged in prohibited sexual acts.

On May 11, 2000, respondent was arrested and arraigned on fifteen counts of felony possession of child pornography, in violation of 11 Del. C. §1111¹ and fifteen counts of unlawful dealing in material depicting a child engaging in a prohibited sexual act, in violation of 11 Del. C. §1109(4).²

In March 2002, respondent was convicted of all thirty felony counts and in May 2002, he was sentenced to eight years of incarceration to be followed by thirty-five years of probation. On February 21, 2003, the Supreme Court of Delaware affirmed the convictions and sentence. On February 20, 2004, respondent's motion for a reduction of sentence was granted and an order was entered decreasing the period of incarceration from eight years to six years. According to respondent's brief, he expects to be released from incarceration in March 2007.

¹ 11 Del. C. §1111 provides, "A person is guilty of possession of child pornography when (1) the person knowingly possesses any visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act . . . Possession of child pornography is a class F felony."

² 11 Del. C. §1109(4) provides, "A person is guilty of dealing in child pornography when: (4) The person, by means of a computer, intentionally compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act. . . . Unlawfully dealing in child pornography is a class D felony."

In July 2002, respondent's criminal trial in connection with the alleged theft from the Zimmerman estate resulted in a mistrial after the jury was unable to reach a unanimous verdict. The judge granted respondent's motion for an acquittal based on the expiration of the statute of limitations.

In addition, on March 17, 2000, the court-appointed receiver notified the Office of Attorney General that respondent may have knowingly misappropriated funds from another estate. The co-executor of the estate of Jeanette Connell informed the receiver that, upon learning of respondent's suspension, she contacted the bank where the estate account was located. Although respondent should have been holding \$46,783.35 in trust, pending a real estate transfer in the Connell estate, the bank reported that the funds had been withdrawn and the account closed. The receiver determined that respondent had transferred the funds to his operating account and then to a money market account and that respondent's law office contained no records of the Connell estate.

At the time of the stipulation of disbarment by consent, thus, respondent had been convicted of child pornography crimes and had been acquitted of the theft charges. According to the stipulation, respondent may apply for reinstatement only if a

federal court reverses or vacates all thirty of his felony convictions, and if all avenues of appeal available to the State of Delaware to reinstate those convictions have been exhausted. The stipulation provides that the files in the Zimmerman and Connell estates, as well as the other disciplinary matters, would be closed without prejudice, and that if respondent files a petition for reinstatement, the ODC may reopen those matters for further proceedings.

The OAE urges us to recommend that an indefinite suspension be imposed on respondent and that he be prohibited from applying for reinstatement in New Jersey until he is reinstated to the practice of law in Delaware. Respondent contends that he should receive either a definite term of suspension, or an indefinite suspension to terminate upon his release from prison.

Reciprocal discipline proceedings in New Jersey are governed by R.1:20-14(a)(4), which provides as follows:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

- (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
- (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

- (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
- (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
- (E) the misconduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). With respect to subparagraph (E), although respondent consented to disbarment in Delaware, a disbarred Delaware attorney may seek reinstatement five years after the effective date of disbarment, pursuant to Rule 22(c) of the Delaware Lawyers' Rule of Disciplinary Procedure. In effect, thus, disbarment in Delaware is equivalent to a five-year suspension. In New Jersey, disbarment is permanent. Accordingly, substantially different discipline from that imposed in Delaware is warranted in New Jersey.

In New Jersey, attorneys who have pleaded to or been found guilty of child pornography offenses have been suspended for periods ranging from six months to two years. In In re McBroom, 158 N.J. 258 (1999), the attorney pleaded guilty to a violation of 18 U.S.C.A. 2252(a)(4), a federal statute prohibiting possession of child pornography obtained through interstate

commerce. McBroom downloaded from the internet images of minors engaged in sexually explicit conduct. He was suspended for two years, retroactively to the date of his temporary suspension.

Last year, the Court imposed discipline on three attorneys involved in child pornography. In In re Rosanelli, 176 N.J. 275 (2003), the attorney acknowledged possessing twenty-three pictures of children engaged in various sexual acts and pleaded guilty to an accusation charging him with fourth degree endangering the welfare of a child. He was admitted into the pre-trial intervention program. Rosanelli was suspended for six months. In In re Peck, 177 N.J. 249 (2003), the attorney was sentenced to a fifteen-month prison term after he pleaded guilty to one count of possession of child pornography, in violation of 18 U.S.C.A. 2252(1)(4)(B). Peck admitted possession of at least three magazines depicting minors engaged in sexually explicit conduct. He received a "time served" suspension of twenty-one months. Finally, in In re Kennedy, 177 N.J. 517 (2003), the attorney pleaded guilty to fourth degree endangering the welfare of a child and admitted that he had downloaded from the internet several hundred images depicting children engaged in sexual acts. Kennedy was placed on probation for three years. He received a six-month suspension.

Here, respondent's misconduct was serious. He was convicted of thirty counts of child pornography and was sentenced to incarceration for six years, to be followed by a thirty-five year term of probation. 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). Respondent's conviction of possession of and dealing in child pornography constituted a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer).

We determine that a two-year suspension is the appropriate discipline in this matter. We further determine that respondent may not apply for reinstatement in New Jersey until he has been released from incarceration. In addition, if respondent is reinstated in New Jersey, we will recommend that financial conditions be imposed, such as that he be required to practice with a law firm, or that a trustee be appointed to oversee his bank accounts and trust account funds. On March 7, 2000, the Supreme Court of Delaware temporarily suspended respondent, based on allegations of knowing misappropriation. That order expresses concern for protecting the public. Because we, too,

are concerned about protecting the public, we determine that the above financial constraints may be required.

One member voted, in addition to the two-year suspension, to prohibit respondent from applying for reinstatement in New Jersey until he is reinstated in Delaware. One member voted to recommend respondent's disbarment. Three members did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

In the Matter of Kenneth E. Fink
Docket No. DRB 04-014

Argued: April 15, 2004

Decided: May 19, 2004

Disposition: Two-year suspension

<i>Members</i>	<i>Disbar</i>	<i>Two-year Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Maudsley</i>		X					
<i>O'Shaughnessy</i>							X
<i>Boylan</i>							X
<i>Holmes</i>		X					
<i>Lolla</i>	X						
<i>Pashman</i>		X					
<i>Schwartz</i>							X
<i>Stanton</i>		X					
<i>Wissinger</i>		X					
Total:	1	5					3

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel