SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-272

IN THE MATTER OF

JAMES A. BRESLIN, JR.

AN ATTORNEY AT LAW

Dissent

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

I must part company from my colleagues in this difficult case. I do so because I do not believe the evidence clearly and convincingly establishes either that respondent knowingly participated in a bribe effort or that he had a duty as a lawyer, as distinguished from a judge, to report such bribe effort. I therefore do not believe that a violation of either RPC 8.4(c) or (d) has been made out. I do believe, however, that the OAE's charge of a violation of RPC 1.2(c) -- requiring a lawyer to advise his or her client on the limitations on his or her conduct -- has been shown, and that this calls for a reprimand.

The Judicial Panel ["the Panel"], as I read its report, made two essential findings.

First, that respondent had a duty -- as a municipal judge -- promptly to report Ciardella's bribe plan to law enforcement officials (p. 13). Second, that respondent's posing of a hypothetical question to Haggerty created a circumstance "whereby a reasonably objective member of the public could conclude that respondent became an accomplice in Ciardella's plan" (p. 14).

The second issue transcends the first because, quite frankly, one's view of respondent's intentions during his first discussion with Haggerty on October 21 or 22, 1996 shapes one's attitude towards the entire case. If, in fact, it was in furtherance of Ciardella's plan, then I would agree that a lengthy suspension or possibly even disbarment might be necessary. If, on the other hand, he was merely attempting to report the plan, or was just feeling his way as to what he should do in this situation, one has a quite different reaction.

Significantly, the Panel did not make a finding on this key factual issue, presumably because it did not have to. All it had to decide, for its purposes, was whether respondent's conduct created an "appearance of impropriety" within the purview of Canon 2 of the Code of Judicial Conduct. It found that it did. But a finding that "the public could conclude" respondent had participated in a crime does not equate with a finding that he did participate in a crime. Thus, there is no "finding" on this issue binding on us under the authority of In re Yaccarino, 117 N.J. 175, 183 (1989). We therefore are not only entitled, but required, to evaluate on our own the evidence on the issue of whether respondent did or did not knowingly participate in a bribe effort.

In doing so, the questions abound. E.g., why did respondent choose to speak with Haggerty -- the apparent intended recipient of this bribe -- as opposed to someone else? Was it because respondent was *in fact* trying to "test the waters" as to Haggerty's receptivity to a bribe? Or was it because respondent was uncertain as to what to do and that Haggerty, who was not only Police Commissioner, but also a close personal friend, might give him some guidance? In this respect, note the Panel's description of how respondent put the hypothetical to Haggerty: that he did so "to get [his] reaction to what he would do if a client of Breslin offered Haggerty money to do a favor?" (p. 9). Was the intent to find out what Haggerty would do if offered the money? Or was it to learn what Haggerty would do were he in respondent's shoes -- report the matter or just quietly return Ciardella's envelope to him? And isn't the hypothetical approach more consistent with a "looking for guidance" scenario? That by withholding Ciardella's name he (respondent) was preserving his options as to whether or not to report?[1] Also, given respondent's long-standing friendship with Haggerty, would he not have had a pretty good handle on his receptivity or lack thereof to a bribe? Assuming he did not so grossly misread his friend, does that not argue for a benign rather than pernicious reading of the La Cibeles encounter?

Respondent gave his recollection of this conversation on three separate occasions (on December 26, 1996 before Sergeant Randazzise, on May 6, 1998 before an investigator for

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[1] The majority assumes that respondent had a duty to report. That may have been true in his capacity as a judge. For reasons given below, I do not believe that duty carried over to his capacity as a lawyer.

the Advisory Committee, and on October 1, 1999 before the Hearing Panel). Haggerty gave his at least twice (on January 2, 1997, before Sergeant Randazzise, and on September 30, 1999, before the Hearing Panel). The testimony is hardly conclusive as to any of these questions, one way or the other. Indeed, some of such testimony is conflicting (e.g., Haggerty did not even recall a hypothetical. Transcript of 9/30/99 testimony, p. 83). What we do know is that the conversation was aborted, and one cannot reliably say how it would have proceeded had it continued. We also know that within the days or weeks following this conversation, respondent in fact gave Haggerty all the details, and that he ultimately agreed Haggerty should report the matter to Acting Commissioner Tobin. In my view, there are simply too many questions for us to find that the evidence "clearly and convincingly" establishes that respondent engaged in conduct "involving dishonesty, fraud, deceit or misrepresentation" within the ambit of RPC 8.4(c), or that he engaged in conduct "prejudicial to the administration of justice" under RPC 8.4(d).[2]

As to the analytically distinct "duty to report," the Panel has already found that respondent *in his capacity us a municipal judge* had a duty under the Code of Judicial Conduct promptly to report the bribe plan, that such duty was not delegable to Haggerty, and that he failed promptly to discharge it (p. 13). These findings, of course, are binding on us. Judges are held to higher standards than the private practitioner, however, and therefore

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[2] The Panel's rejection of respondent's credibility on why he did not report the "details of the plan to Haggerty that night" (p.9) relates, in my view, to the charge of failure to report, not to the alleged complicity in the underlying crime.

judicial misconduct does not necessarily translate into professional misconduct. Thus, the question for us is whether, independent of his judicial duties, respondent had a duty to report either as lawyer or as private citizen.

Insofar as he was acting as a *lawyer*, I do not believe respondent had a duty under the RPCs to report at all. In this respect, the Panel's clipped reference to RPC 1.6 (p. 13, n.1) omits to note the crucial distinction between situations of mandatory disclosure under subsection "(b)" and permissive disclosure under subsection "(c)". I believe it quite clear this was not a mandatory disclosure situation. Disclosure was not necessary to prevent likely "death or substantial bodily harm" or "substantial injury to the financial interest or property of another" ((b)(1)). Nor was it necessary to prevent likely "perpetuation of a fraud on a tribunal" ((b)(2)). Nor, so far as I am aware, does a private citizen have a duty to report an attempted crime. Were it a crime simply to look the other way, the web of criminal conspiracy would be wider than it already is. In short, I do not believe respondent had or violated a duty to report.

Since I do not believe respondent had a duty to report under RPC 1.6 (b), this moots the question of whether his delay in reporting the bribe scheme, which the panel found to have violated the Judicial Code, also constituted a violation of the RPCs. If there is no duty to act in the first place, a delay in acting should not be sanctionable. In any event, respondent did in fact give Haggerty "Ciardella's name and the other details" at some time within three weeks following their initial discussion (p. 10). He also agreed that Haggerty would report

the matter to Acting Police Commissioner Tobin, which Haggerty did on November 26.

This said, I believe discipline must follow from another finding of the panel: namely, that when Ciardella visited respondent on that Thursday in October, he was "'at least generally aware, at that time of the bribery and its goal" (p 7) -- a factual determination which, under In re Yaccarino, is binding on us.

In this respect, the OAE argues that to the extent a lawyer-client relationship did exist here, other RPCs are implicated; namely, RPC 1.2(d) and (c) and RPC 4.1(a)(2).

RPC 1.2(d) prohibits a lawyer from "'counseling or assisting" a client in illegal conduct. Since I do not see clear and convincing evidence of any complicity by respondent in the attempted bribe, I do not see a violation of this Rule. Nor do I see a violation of RPC 4.1. That Rule prohibits a lawyer from failing to disclose a material fact to a third person "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." Respondent maintained possession of the envelope and it was going nowhere until he decided what to do with it. In fact, on December 26, 1996, respondent turned over to the Prosecutor's office "the manila envelope and its entire contents." (p. 12).

Finally, the OAE argues that to the extent respondent was acting as a lawyer he had a duty under RPC 1.2(c) to advise Ciardella of "the relevant limitations on the lawyer's conduct." While the question of whether a lawyer-client relationship existed here is not free from doubt, I believe the better argument is that it did not. As the Panel also found "Ciardella sought no legal representative assistance from respondent" (p. 5) and therefore Ciardella was

probably still in the category of a former client rather than a current client.

Nonetheless, it seems to me that in assessing lawyer conduct we should not cut things too fine. Whether acting in a counseling role or not, a lawyer confronted by a situation such as this -- "knowing" of a bribery attempt and its goal (Panel Op., p. 7) -- should make it clear, immediately and emphatically, that he or she will have nothing to do with it. It is clear respondent did no such thing.

I therefore believe a violation of RPC 1.2(c) has been established here. The situation, in my view, calls for a reprimand, no more, no less.

Dated: May 8, 2001

By: William J. O'Shaughnessy
WILLIAM J. O'SHAUGHNESSY
Member
Disciplinary Review Board