SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 98-299, 98-300 and 98-301

IN THE MATTER OF	:
ANGEL PENA,	:
GLENN M. ROCCA	:
AND	:
MICHAEL S. AHL	:
ATTORNEYS AT LAW	:

Decision

Argued: September 17, 1998 and December 17, 1998

Decided: May 24, 1999

John E. Molinari appeared on behalf of the District VI Ethics Committee.

Bernard Freamon appeared on behalf of respondents on September 17, 1998.

Anthony P. Ambrosia appeared on behalf of respondent Angel Pena on December 17, 1998.

Libero D. Marotta appeared on behalf of respondent Glenn M. Rocca on December 17, 1998.

Joseph P. Castiglia appeared on behalf of respondent Michael S. Ahl on December 17, 1998.

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

These matters are before the Board based on a recommendation for discipline filed by special master Gage Andretta. The complaint alleged that respondents violated RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The matters were initially before the Board on September 17, 1998. One attorney represented all respondents. Because it became clear at the hearing that there might be different levels of culpability, the Board concluded that each respondent should be represented by separate counsel. Therefore, the Board afforded respondents time to retain new counsel and the matter was heard on December 17, 1998.

Respondent Pena was admitted to the New Jersey bar in 1984 and respondents Rocca and Ahl were admitted in 1983. The three respondents are partners in a law practice and maintain offices in Fort Lee (Bergen County) and Union City (Hudson County), New Jersey.

In March 1993, Pena was privately reprimanded for allowing the statute of limitations to expire on an uninsured motorist claim and failing to release the client's file to her new attorney. On November 2, 1998, the Board determined that Pena should be suspended for eighteen months for violations of RPC 1.7(b), RPC 8.1(b) and RPC 8.4(c). As of the date of this decision, the Court had not yet issued an order in the matter.

Rocca received a private reprimand in May 1993 for entering into a business relationship with a client without complying with the requirements of RPC 1.8(a) and RPC

1.7(b)(2).

Ahl has no prior disciplinary history.

* * *

The alleged misconduct involving respondents arose from their involvement in a bar business in Hoboken, New Jersey. The complaint alleged that respondents perpetrated a fraud on the New Jersey Division of Alcoholic Beverage Control ("state ABC"), the Municipal Board of Alcoholic Beverage Control of Hoboken ("Hoboken ABC") and the state police by concealing the fact that they had two additional partners, Gus Santorella and Courtney Krause, in that venture. According to the complaint, respondents concealed the interests of Santorella and Krause because the state ABC had prohibited Santorella's and Krause's involvement in the business. In the ethics proceedings, respondents denied that Santorella and Krause were their partners. They maintained that they had purchased the business and liquor license from Krause in an arms-length transaction.

Only two witnesses testified at the ethics hearing. The presenter called one witness, Diane Bisogni. Pena also testified, but Rocca and Ahl chose not to testify. There had been a lengthy non-jury civil trial before the Honorable Arthur N. D'Italia, during which respondents, Santorella and Krause testified concerning the same issues involved in the ethics matter. Pena represented himself and his partners at the civil trial, except when he

testified, at which time Rocca became defense counsel and questioned Pena. The presenter and respondents, through their counsel, stipulated that the transcripts of the civil trial and some of the trial exhibits would be admitted into evidence at the ethics hearing.

The central issue in both the civil trial and this matter was whether respondents purchased the bar business from Krause in an arms-length transaction or whether they lied to the state ABC, the state police and the Hoboken ABC that Santorella and Krause were not their partners.

* * *

In 1976, following a federal criminal conviction, Santorella was disqualified from any involvement in a business that held a liquor license. Despite this disqualification, in 1986, Santorella acquired the assets of a bar business known as the Good N' Plenti bar, located at 99 Washington Street, Hoboken, using his son, Charles Santorella, as the licensee of the liquor license. Because of disputes with Charles, in 1989 Santorella arranged for Krause, with whom he lived, to take over the business with a new license in the name of 99 Washington Street, Inc.

Because of Santorella's continued involvement in the Good N' Plenti, the director of the state ABC suspended Krause's license in 1992, pending a transfer of the license to a bona fide purchaser.

It is undisputed that, in 1993, respondents purchased an interest in the Good N' Plenti and its liquor license. However, there is substantial variance between respondents' version of the purchase and operation of the Good N' Plenti and that of Santorella and Krause.

According to respondents, they were looking into potential business investments in 1993 because they had received substantial legal fees from a $1,000,000 settlement on behalf of a client. On April 18, 1993, Pena, Rocca and Krause agreed that Krause would sell the liquor license and business to respondents for $110,000. They also agreed that respondents would sign a lease with Krause for the commercial space in which the bar was located.

Although an agreement was reached in April 1993, the parties did not sign the contract and lease until August 1993. Nevertheless, in April 1993, respondents filed with the Secretary of State a certificate of incorporation for Hoboken Fun Place, Inc. Respondents were the officers and shareholders of the corporation, which was established to purchase the Good N' Plenti. On May 11, 1993, a checking account was opened in the name of Hoboken Fun Place, Inc. at Pamrapo Savings & Loan Association ("Pamrapo"). The signatories on the Pamrapo corporate account card were Pena and Rocca. According to respondents, Krause had obtained the signature card from Pamrapo and Rocca had returned the card to the bank and opened the account. Rocca obtained a stamp with his signature from an office supply store.

In June 1993, the Appellate Division affirmed the state ABC director's order suspending Krause's liquor license, pending its sale to a bona fide purchaser. On June 17,

1993, respondents petitioned the state ABC director to recognize them as prospective bona fide transferees of the license and to lift the suspension. Respondents also filed an application with the Hoboken ABC for a transfer of the liquor license.

In July 1993, all three respondents submitted to extensive interviews by representatives of the state police, ABC enforcement unit, concerning their purchase of the license. They represented to the investigators that they intended to purchase the license in a bona fide, arms-length transaction from Krause, with "complete divestiture" by Krause, whose only future involvement would be the management of the business for one year.

Following respondents' interview with the state police, respondents sent a signed contract to the investigators. As noted earlier, although the contract was dated April 1993, it was not actually signed until August 1993. There was no formal closing on the sale of the business.

Although the contract provided for respondents to pay $35,000 at the closing and $75,000 in thirty-six monthly installments secured by a promissory note, no promissory note was executed. Instead, respondents paid $110,000 on October 13, 1993: $36,300 to the state ABC for fines and the remainder to Krause. Instead of writing the checks directly to the state ABC and Krause, respondents passed the payments through the trust account of an attorney from an adjoining law office. That attorney did not represent any of the parties.

In October 1993, respondents appeared at a hearing of the Hoboken ABC in support of their application for a transfer of the liquor license. On October 12, 1993, the Hoboken

ABC transferred the license to Hoboken Fun Place, Inc. The state ABC lifted its suspension of the license on October 13, 1993. The bar was reopened for business on October 14, 1993 with the same name, Good N' Plenti, and with the same methods of operation.

There was a dispute among the parties as to whether the actual price for respondents' interest was $110,000, as stated in the contract, or $150,000, as claimed by Santorella and Krause. Rocca conceded that he paid $33,500 to Krause in January 1994, in addition to the $110,000 paid in October 1993. The January payment was comprised of two bank checks payable to Rocca, which all parties agreed were endorsed over to Krause, and a check in the amount of $19,500 from respondents' investment account, payable to Krause. Respondents disputed, however, that those checks constituted additional payments on the purchase price. They maintained that the purpose of the checks was to partially reimburse Santorella for $40,000 advanced to Diane and Dominick Bisogni in connection with respondents' purchase of an interest in the Osprey, a bar owned by the Bisognis. Santorella had advanced $40,000 on respondents' behalf because the Bisognis needed $40,000 immediately to pay overdue rent to the owner of the building where the bar was located.

At the ethics hearing, Diane Bisogni's testimony contradicted respondents' contentions in this regard. She testified that she never received any money from Santorella, Krause or respondents for overdue rent.

When the Good N' Plenti bar reopened on October 14, 1993, Krause acted as its general manager. She oversaw the operations of the bar, maintained the business records,

made deposits into the Pamrapo account and made out the business checks using the stamp with Rocca's signature. One or more of the respondents were usually present at the bar when it was open and participated in its operation. According to respondents, Santorella was not involved in the business.

Beginning in or about May 1994, certain disagreements among respondents and Krause erupted. Eventually these disagreements escalated. However, Krause continued to manage the business until August 13, 1994, when there was a falling-out among respondents and Krause.

The record shows that, thereafter, each side embarked on a vendetta against the other side. Santorella and Krause filed a civil action against respondents, which culminated in the trial before Judge D'Italia and the filing of an ethics grievance by Santorella and Krause.[1]

One of the claims in the civil suit concerned the amount of profits generated from the business between October 1993 and August 1994. According to Santorella and Krause, there were net profits of more than $200,000 for the forty-four week period, with half of the profits paid to respondents in cash. Respondents denied that they made $100,000, contending that the bar generated relatively little profit. Rocca testified that he did not know how much the business yielded during the relevant time period, but estimated that respondents netted approximately $24,000, collectively.

Respondents claimed that they did not have any business or bank records for the

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[1] Judge D'Italia, too, referred the matter to the District VI Ethics Committee ("DEC").

relevant time period. However, they never produced records for any time period to support their position as to their profits. At the civil trial, all of the parties denied that they were in possession of the relevant business records. As set forth below, respondents' testimony on this issue adversely affected their credibility.

At the trial, the accountant for the business, Matthew Calabrese, produced copies of some of the records that respondents claimed were missing. Calabrese testified that he had been given the records by an employee of respondents, Jeff Chenard, in late September or early October 1994, after Calabrese had told either Rocca or Chenard that he needed certain documents to complete the third quarter-sales tax return.

* * *

In contrast to respondents' version of the events, Santorella and Krause testified as follows:

According to Santorella, he, not Krause, had met with Pena and Rocca in April 1993. They agreed that respondents would purchase a fifty percent interest in the business for $150,000 and that Santorella and Krause would retain a hidden fifty percent ownership interest. They agreed to sign a sham contract of sale showing that Hoboken Fun Place, Inc. had purchased the entire business for $110,000. The purpose of this scheme was to conceal from the state ABC Santorella's continuing interest in the business. In August 1993, Krause

signed the contract. This formality had been required by the state police as proof of the parties' ostensible bona fide transaction.

As proof of their continued involvement in the venture, a contention denied by respondents, Santorella and Krause pointed to their active participation in some of the initial functions required toward the running of the business. They testified that, for example, they had personally taken care of opening a checking account for Hoboken Fun Place, Inc. at Pamrapo. Santorella claimed that he and Krause had obtained the signature card from Pamrapo, returned it to the bank with Pena's and Rocca's signatures and opened the account. Santorella also contended that he and Krause had obtained a signature stamp by having Rocca sign a blank piece of paper and returning it to the bank for the stamp to be made.

The branch manager for Pamrapo corroborated Santorella's statements about the opening of the account and the signature stamp.[2] She also testified that Santorella would make deposits into the account every Monday.

As noted earlier, Santorella maintained that respondents had paid him $150,000 for their interest in the business, rather than the $110,000 paid in October 1993. He testified that the $33,500 given to Krause in January 1994 had been an additional payment on the purchase price and that the remainder of the purchase price had been paid in cash. Santorella

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[2] At the ethics hearing, Pena attempted to reconcile the discrepancy between respondents' testimony regarding the signature stamp and that of the bank manager. Pena testified that there were two signature stamps. However, at the civil trial neither Rocca nor Pena made any mention of a second stamp.

denied that those payments were reimbursements to him for an advance to the Bisognis, adding that neither he nor Krause had advanced any funds to the Bisognis on respondents' behalf.

Santorella claimed that, in addition to the Good N' Plenti, he and Krause were to be respondents' partners in the Osprey transaction. Santorella produced documentation of communications between him and respondents that supported his contention that he was to be a partner in the Osprey. The communications also supported his position that he was respondents' partner in the Good N' Plenti.

According to Santorella, he was an active participant in the management and operation of the Good N' Plenti, even though he never actually went into the bar. Santorella maintained that there were net profits of more than $200,000 from October 1993 through August 1994 and that he gave one-half of the profits to respondents in cash. Santorella testified that Krause would bring the week's cash receipts home with her early Sunday morning after the bar closed. Santorella and Krause would total the receipts, allocate the funds and prepare a weekly report, which would be "faxed" to respondents on Sunday or Monday. Santorella would then deposit the funds needed for operating expenses into the Pamrapo account on Monday morning.

Unlike respondents, Santorella produced documentation of his claim that respondents made more than $100,000 in profits from the Good N' Plenti between October 1993 and August 1994. Santorella produced the weekly reports prepared by him and Krause for the

forty-four week period from October 1993 to August 1994. The reports contained, among other things, the gross sales, net sales, deposits into the Pamrapo bank account and respondents' share of the profits. The Pamrapo bank records showed that the deposits reflected on the weekly reports coincided with deposits into the Pamrapo account from October 1993 through May 1994.[3] Santorella also produced "fax" and telephone records showing that the weekly reports had been "faxed" to respondents almost every week.

Respondents contended that Santorella had fabricated these reports and that the "fax" and telephone records reflected "faxes" of employee schedules from Krause.

* * *

Pena was the only respondent to testify at the ethics hearing. The special master remarked that he had observed Pena's demeanor during his testimony and had found Pena's testimony to be "lacking in credibility." Furthermore, the special master found it "telling" that Rocca and Ahl chose not to testify at the hearing.

The special master concluded that the "overwhelming documentary evidence" established by clear and convincing evidence that respondents "deliberately engaged in fraud, dishonesty and misrepresentations," in violation of RPC 8.4(c).

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[3] There were no bank records for June to August 1994, apparently because Santorella's attorney had not subpoenaed them. However, respondents did not dispute that the deposits shown on the weekly reports coincided with deposits into the checking account.

The special master recommended that all three respondents be suspended for two years for their misconduct. He noted that Rocca and Pena dominated the underlying fraudulent transaction, while Ahl played a lesser role. However, the special master could not justify distinguishing Ahl's conduct from that of his partners because Ahl was a knowing participant in the original fraud and in the ensuing cover-up.

* * *

Upon a de novo review of the full record, the Board was satisfied that the special master's finding that respondents were guilty of unethical conduct is fully supported by clear and convincing evidence. Although respondents maintained throughout the civil trial and the ethics hearing that Santorella and Krause were not their partners, the overwhelming weight of the evidence, including documentary evidence, showed otherwise.

From the outset of the transaction, the parties' actions evidenced something other than an arms-length purchase of a business. Respondents admitted that they performed no due diligence prior to their purchase; they did not even look at the business's books and records. Although an agreement was reached in April 1993, the contract was not signed until August 1993, and then only after the state police required that respondents provide them with a signed contract. The contract and lease that were used had been drawn up by the attorney for a prior prospective purchaser. Krause gave those documents to respondents, who simply

had the prior documents retyped, with the few specific details, such as the name of the other party, replaced with the new information.[4]

There was no formal closing on the purchase of the business. Krause was not represented by an attorney. Although respondents contended that Krause had been represented by Harold Ruvoldt for some period of time in the transaction and that they had correspondence from him that reflected that representation, they never produced the correspondence. Ruvoldt did not testify.

Respondents signed a fifteen-year lease with Krause for the business premises, which required a security deposit of $6,000 and monthly lease payments of $3,000 for the first year. In addition, respondents were to obtain a general liability policy for the benefit of the landlord. Respondents did not obtain the liability policy until December 1993. Yet, Krause did not complain about this failure to comply with the lease agreement until the parties had a falling-out and Santorella and Krause sued respondents.

With respect to the security deposit, respondents stated that it had been paid in February 1994 by a $6,000 bank check made out to Rocca. Respondents claimed that Rocca had endorsed the bank check over to Krause; however, they did not have any documentary evidence of Krause's receipt of the deposit. There was no explanation as to why this method of payment was utilized, rather than making a check payable directly to Krause. Krause

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[4] Krause maintained that respondents merely "whited out" the few specific details in the prior contract and lease, filled in those spaces with the new information and then recopied the documents.

denied receipt of the security deposit.

Respondents' dealings with Krause were marked by circuitous payments. When respondents purchased their interest in the business, they did not write checks directly to the state ABC and Krause. Instead, respondents passed the payments through the trust account of an attorney from an adjoining office. That attorney did not represent any of the parties. When Rocca paid an additional $35,000 to Krause in 1994, the payment was comprised of two bank checks payable to Rocca, which he endorsed over to Krause, and a check in the amount of $19,500 from respondents' investment account, payable to Krause. In one of his communications to Santorella, Rocca asked if he should "launder" a payment through a third party, rather than giving the funds directly to Krause. It is obvious that respondents were careful about creating written records of their payments to Krause.

Additional evidence establishing Santorella's participation in the venture consists of the weekly reports prepared by Santorella and Krause and sent to respondents on a weekly basis. In an attempt to discredit Santorella, respondents maintained that the weekly reports had been fabricated by Santorella for the civil trial. Santorella's position, however, was corroborated by numerous telephone and "fax" records. Furthermore, some of the "faxes" contained additional contemporaneous communications to which respondents had replied. Three of Santorella's notes to respondents were written on the weekly reports and Rocca's reply to one of the communications was written on the same report.

Rocca, in turn, admitted that he wrote the notes, but contended that Santorella had "cut

and pasted" unrelated communications onto "fabricated" weekly reports. The record does not support this contention. It is obvious from the evidence that Rocca's communications were in reply to Santorella's notes. These communications corroborated Santorella's position that he and Krause were respondents' partners in the Good N' Plenti and would have been their partners in the Osprey as well.[5] For example, on the report for the week ending January 14, 1994, Santorella wrote: "Meeting Wednesday - at Port Liberte Bring Money."[6] According to Santorella, the money notation referred to the remainder of the $150,000 respondents owed on their purchase of a one-half interest in the bar. Indeed, on Tuesday, January 18, 1994, Rocca gave Krause three checks totaling $33,500. Furthermore, Rocca admitted that, on January 18, 1994, he had "faxed" a handwritten note to Santorella asking if he should give the money to Krause or "launder" it through Diane Bisogni.

Also relevant is the report for the week ending February 19, 1994. On it Santorella wrote that he had exhausted his contacts for obtaining a mortgage for the Osprey. Santorella's note then continued as follows: "D & D are not interested in partners unless we can purchase the property, I hope your recycling guy can pull us out of this problem."[7]

Rocca admitted that he sent a "fax" to Santorella denying any intention of "boxing" Santorella and Krause out of the Osprey deal "since we agreed to be partners." The "fax"

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5 The Osprey deal was never consummated.

6 Santorella and Krause resided at Port Liberte, a community in Jersey City.

7 All parties agreed that "D & D" referred to Diane and Dominick Bisogni.

stated as follows:

> I do not know why you and I have a problem. We seemed to be working together smoothly. We should continue to work together as we planned before my two partners screw up our future successes.

There was another note from Santorella in the report for the week ending May 1, 1994; Rocca's handwritten response was made on the same report. In his note, Santorella referred to the "original [Good N' Plenti] agreement" that Krause would run the operation. He then stated that, if respondents had a problem with the original agreement, they should "call me, meet me, or buy me out." Santorella concluded the note with a vulgar post-script. Exhibit J34.

In evidence is the same weekly report with a handwritten response at the bottom, admittedly made by Rocca. That report, "faxed" from respondents' office on May 2, 1994, stated the following:

> If you want out just let us know. Give me price for building also!!! We have an investment to look after. If we see things going wrong we will change them. If you want to call it a pissing match, fine. We just want to make money.
>
> As far as your P.S. - whatever turns you on.
>
> [Exhibit J34]

Again, Rocca's explanation of the "fax" was that his note was written to Krause and that Santorella had "cut and pasted" an unrelated memo to the weekly report. Rocca had no explanation for the fact that his note replied to Santorella's "fax," including its postscript.

There were additional notes evidencing Santorella's and Krause's partnership in the venture. For example, on June 7, 1994, Pena sent a "fax" regarding the employee schedule to "Doug."[8] According to Santorella, respondents referred to him as Doug to conceal his participation in the business. Respondents, in turn, maintained that they referred to Krause as Doug.

Krause replied to Pena's "fax" and disagreed with the schedule. Krause stated that, if respondents wanted four doormen, they would have to pay for the fourth out of their own pocket. She also stated that respondents should call or meet with her and Santorella if they wanted to discuss the schedule. Rocca replied to Krause by "fax" that same day stating, "[m]eet us tonight at 9:30 outside GNP. Both you and Doug." [Original emphasis].

Despite the fact that Rocca had written to Krause that she and "Doug" should meet respondents, respondents continued to maintain that they referred to Krause, not Santorella, as "Doug." Respondents could not explain why Krause would have told them that they would have to pay for a fourth doorman out of their own pocket if respondents were the sole owners of the bar.

Further evidence of the legitimacy of the weekly reports was the fact that the deposits shown in the reports coincided with deposits made into the business checking account. The bank records and the contemporaneous communications compel the conclusion

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[8] The June 7, 1994 "faxes" were the only communications that pertained to employee schedules, although respondents testified that the weekly "faxes" were schedules from Krause, not business reports from Santorella.

that Santorella's reports were authentic, that they had been sent to respondents and that their purpose was to inform respondents of the profitability of the business on a weekly basis.

For their part, respondents maintained that the reports could not have been legitimate because they were inaccurate and grossly overstated the actual profits. However, respondents failed to produce any documents to support their position. They contended that they did not have the records for the relevant time period and never produced documents from any time period to support their position that their profits were minimal.

According to respondents, the reason they had no records for the relevant period was that Krause had removed them from the bar sometime during the weekend of August 12-13, 1994. However, everyone agreed that Krause was not "fired" by Pena until the evening of August 13, 1994 and no one saw her take the records. In addition, she was escorted by Pena and a policeman from the premises and respondents had the locks changed that same evening. Furthermore, respondent's employee gave certain of the "missing" records to the accountant, Calabrese, after August 1994.

Pena's testimony that he had seen Santorella give the records to Calabrese shortly before Calabrese testified lacked credibility for several reasons. First, Pena did not confront Calabrese on cross-examination at the civil trial. Second, Pena did not reveal what he had observed even after Santorella's attorney renewed his motion for sanctions against respondents for failure to provide discovery. The motion was renewed based upon Calabrese's testimony that he had obtained the "missing" documents from respondents'

employee. Third, in response to the motion, Pena stated: "I don't have them [the business records]. I have not seen them, and this is a total surprise to me when [Calabrese] took them out." Fourth, Pena stated that he had to speak with Chenard to find out how Chenard had obtained the records. Fifth, even after Judge D'Italia questioned Pena's candor concerning the business records and noted that Pena's credibility was "not good," Pena never asserted that he had seen Santorella give the documents to Calabrese. Finally, when Santorella's attorney asked Pena about why he had not questioned Calabrese about the receipt of the documents from Santorella, Pena replied that, although he had attempted to do so, there had been an objection, which was sustained by Judge D'Italia. In fact, that did not occur.

Similarly, respondents' version of the $33,500 payment to Krause does not ring true. It does not comport with the contemporaneous communications between the parties, as set forth above, or with the chronology of events. There was no dispute that, in December 1993, respondents and the Bisognis began negotiating for respondents' purchase of an interest in the Osprey. Respondents did dispute, however, that Santorella was to be their partner in the deal. According to respondents, the Bisognis needed $40,000 immediately to pay overdue rent to the owner of the building where the bar was located. Because respondents did not have sufficient funds, Santorella offered to advance them to the Bisognis, interest-free. Respondents claimed that there had been no documentation of the $40,000 loan or of its repayment. Although respondents were uncertain of the date when Santorella advanced the $40,000 to the Bisognis, they agreed that it was prior to January 18, 1994, when Rocca paid

$33,500 to Krause. Yet, the court date for the landlord/tenant action was January 28, 1994, after respondents had already repaid Santorella. Furthermore, on January 21, 1994, respondents gave a $100,000 deposit to the Bisognis for their purchase of an interest in the Osprey. Therefore, respondents' testimony that, sometime prior to January 18, 1994, the Bisognis needed the money to pay rent and that respondents did not have the money to give to the Bisognis is contradicted by the chronology of the payments and the court date for the landlord/tenant action.

Furthermore, Diane Bisogni's testimony refuted respondents' contentions concerning the payment. She testified that she and her husband owed $23,000 to $24,000, not $40,000, in rental payments and that she never received any money from Santorella, Krause or respondents for the rent. Finally, although Ahl had represented the Bisognis in the landlord-tenant action, respondents did not produce any documentation of their version of the $33,500 payment or the amount of the rent owed by the Bisognis.

In light of respondents' inability to produce any evidence corroborating their testimony -- which the special master found unworthy of belief -- and their inability to overcome the logical inferences raised from the testimony and from the documentary evidence, no weight can be given to their bare assertions. The contemporaneous documents, including several handwritten notes by Rocca, provide clear and convincing proof that respondents entered into a partnership with Santorella and Krause. There is no doubt that all three respondents lied to the state ABC, the Hoboken ABC, the state police and Judge

D'Italia. They lied repeatedly, even when under oath.

The initial lies concerning their status as bona fide purchasers of the liquor license were made for financial gain. They had entered into what they perceived to be a lucrative deal with Santorella and lied to the licensing authorities in furtherance of the deal. After Santorella sued them, respondents lied to Judge D'Italia to cover up their prior misconduct.

The only violation alleged in the complaint was a violation of RPC 8.4(c). The complaint alleged that respondents' purpose in concealing Santorella and Krause's interests was to thwart N.J.S.A. 33:1-25, evade the divestiture order of the state ABC and perpetrate a fraud on the state ABC, the Hoboken ABC and the State of New Jersey. Despite these allegations, the complaint did not charge respondents with violations of RPC 8.4(d) (conduct prejudicial to the administration of justice). The record reflects that respondents filed a petition with the state ABC in which they misrepresented that they were bona fide purchasers. Respondents also misrepresented to the ABC enforcement unit of the state police that they were purchasing the license in an arms-length transaction and that Krause would be completely divested of any interest in the license.

It is clear, thus, that respondents violated RPC 8.4(d) by their misrepresentations to the licensing authorities. Although respondents were not specifically charged with a violation of that rule, the facts in the complaint gave them sufficient notice of the alleged improper conduct and of the potential violation of the rule. Furthermore, the record contains clear and convincing evidence of a violation of RPC 8.4(d) and respondents stipulated to the

admission of such evidence. In light of the foregoing, the Board deems the complaint amended to conform to the proofs. In re Logan, 70 N.J. 222, 232 (1976).

Similarly, the complaint did not charge respondents with lying to Judge D'Italia, even though there was clear and convincing evidence that respondents lied repeatedly during the trial, even when under oath. Furthermore, as noted by the special master, Pena suborned perjury when he conducted the direct examination of Rocca and Ahl, and Rocca suborned perjury when he conducted the direct examination of Pena during the trial. However, the complaint did not charge such violations and there were no statements made at the ethics hearing that would have put respondents on notice that they had to defend against such charges. Based on the foregoing, the complaint cannot be deemed amended to include violations for respondents' false testimony before Judge D'Italia. However, that misconduct may be considered as an aggravating factor.

Only Pena offered any evidence at the ethics hearing in mitigation of his misconduct. He testified that he had served as a municipal prosecutor, a township attorney and as a member of the Board of Directors of a drug and alcohol rehabilitation center. He also stated that he did pro-bono work for an AIDS clinic and was involved in coaching little league baseball.

Rocca submitted a certification to the Board regarding his pro bono work as a municipal prosecutor and his volunteer service in community associations.

Ahl submitted a certification and documentary evidence to the Board regarding his

volunteer service on a fee arbitration committee and on early settlement panels, along with letters attesting to his good character. Ahl also argued that he should receive a lesser penalty than his partners because of his lesser involvement in the running of the business.

With regard to the appropriate sanction, the recent case of In re Kornreich, 149 N.J. 346 (1997), is instructive. There, too, the attorney was found guilty of obstruction of justice. After being involved in a minor motor vehicle accident, Kornreich denied having been at the scene, lied to the police and the prosecutor and implicated her babysitter as the driver of her automobile. She also attempted to dissuade her babysitter from returning to New Jersey after charges were filed against the sitter. The prosecutor's office filed three criminal charges against Kornreich, including obstruction of the administration of law. The charges were resolved by a plea agreement that permitted Kornreich to enter into a pretrial-intervention program. Throughout the ethics proceedings, Kornreich refused to admit that she was the driver of the automobile. The Court suspended Kornreich for three years. Two members of the Court would have disbarred her. The Court noted that the gravity of the offense was heightened because Kornreich attempted to avoid prosecution by first framing an innocent person and then trying to convince the innocent person not to return to the state to contest her guilt. Here, there were no innocent victims that respondents attempted to blame. On the other hand, there were numerous mitigating factors in Kornreich that are not present in this matter. Unlike Kornreich, respondents cannot claim youth and inexperience as mitigating

factors. In 1993, Rocca and Ahl had been practicing law for ten years and Pena for nine. Moreover, both Pena and Rocca received private reprimands in early 1993, within the same time frame as their initial agreement with Santorella. Obviously, their involvement with the ethics system did not deter them from further misconduct. Furthermore, respondents' actions were motivated by financial gain and the status that they perceived would be attained by ownership of a bar. Their misconduct was not the result of a moment of panic; rather, it involved a carefully orchestrated plan to circumvent the liquor-licensing laws. See also, In re Lunn, 118 N.J. 163 (1990) (three-year suspension for submitting a false written statement allegedly signed by attorney's wife in support of attorney's own claim and lying about it under oath in a civil action) and In re Kushner, 101 N.J. 397 (1986) (three-year suspension for attorney's false certification to the court in a civil action that his signatures on promissory notes were forgeries).

Based on the foregoing, the Board determined that severe discipline is warranted. For Rocca's misconduct, the Board unanimously voted to impose a three-year suspension.

With respect to Ahl, the Board was not persuaded that his conduct was less serious than Rocca's because of his lesser involvement in the business. Ahl was a knowing participant in both the original fraud and the cover-up. He was a full partner in the business and was the secretary of Hoboken Fun Place, Inc. He attended the meeting with the state police and the hearing before the Hoboken ABC, when respondents sought approvals of the

transfer of the liquor license. According to Ahl, he assisted Rocca in the management of the business. Finally, Ahl testified falsely before Judge D'Italia.

However, after balancing Ahl's unethical activities with his volunteer service to the fee arbitration system and early settlement panels, the letters attesting to his good character and the absence of any disciplinary history, the Board unanimously determined that a two-year suspension sufficiently addresses the serious nature of his conduct and the disciplinary system's goal of protecting the public.

With respect to Pena, his serious disciplinary history and particularly his primary role, as trial counsel, in respondents' lies to Judge D'Italia make his conduct even more egregious than that of his partners. In 1993, Pena received a private reprimand for allowing the statute of limitations to expire on a claim and for failing to release the client's file to her new attorney. More significantly, the Board recently determined to suspend him for eighteen months for violations of RPC 1.7(b) (conflict of interest), RPC 8.1(b) (false statement of material fact in connection with a disciplinary matter) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). There, Pena displayed the same lack of probity and capacity for deception that he exhibited in this matter. He purchased a client's house in flagrant violation of the conflict of interest rule; created two phony real estate transactions to conceal the fact that he was the purchaser; made numerous misrepresentations to the District Ethics Committee, the Office of Attorney Ethics and the special master to

conceal his misconduct and lied under oath during the ethics hearing.

In imposing only an eighteen-month suspension in that matter, the Board took into consideration that the initial "purchase" had taken place when Pena was a young and inexperienced attorney and that most of his actions had occurred nine to eleven years prior to the Board's decision. Here, there are no such mitigating factors. Moreover, Pena's misconduct in this matter occurred after he had received a private reprimand and while he was the subject of the ethics investigation of the second disciplinary matter.

Pena is a recidivist who is unable to conform his behavior to the standard expected of members of the bar. He has demonstrated in this case and in his prior case that he has no compunction about lying to a court, to licensing agencies or to ethics authorities, even when testifying under oath. He also showed that he has no misgivings about suborning perjury. Such misconduct "poisons the well of justice" and constitutes "grave misconduct that goes to the heart of the administration of justice." In re Verdiramo, 96 N.J. 183, 185 (1984). See In re Conway, 107 N.J. 168, 180 (1987) (corrupting judicial process by suborning perjury or tampering with witnesses merits disbarment). "In the totality of the circumstances [Pena] has demonstrated that his ethical deficiencies are intractable and irremediable." In re Templeton, 99 N.J. 365, 376 (1985). The nature and the totality of Pena's prior and present misconduct convinced the Board that disbarment is required. Accordingly, the Board unanimously

determined to recommend that he be disbarred from the practice of law. One member did not participate.

The Board also directed that respondents reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: May 24, 1999

By: Michael R. Cole

Michael R. Cole
Vice Chair
Disciplinary Review Board