SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-385
District Docket No. XIV-2014-0359E

IN THE MATTER OF	:
CHARLES B. KAPALIN	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 21, 2016

Decided: August 12, 2016

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

Robert J. DeGroot 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 on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13(c)(2), following respondent's guilty plea, in the United States District Court for the District of New Jersey, to conspiracy to smuggle contraband into a correctional facility, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1791(a).

We determine to grant the OAE's motion and impose a three-year suspension, retroactive to December 12, 2014, the date of respondent's temporary suspension.

Respondent was admitted to the New Jersey bar in 1982. At the relevant time, he maintained a law office in Maplewood, New Jersey.

On December 12, 2014, respondent was temporarily suspended from the practice of law, as a result of his guilty plea to the charges that are the subject of this motion for final discipline. In re Kapalin, 220 N.J. 112 (2014). He remains suspended to date.

From 1970 to 1983, respondent was employed as a probation officer for Essex County. After obtaining his law degree, respondent served as an assistant prosecutor at the Essex County Prosecutor's Office, from 1983 to 2001. During his tenure as a prosecutor, respondent supervised the arson and homicide units. Following his retirement from the prosecutor's office, until his temporary suspension in 2014, respondent maintained a law office in his Maplewood residence, focusing primarily on criminal defense work in New Jersey state courts. On May 28, 2014, respondent was arrested in connection with the federal criminal charges underlying this matter.

On December 3, 2014, after respondent had formally waived prosecution by indictment on his federal charges, an information

was filed with the United States District Court for the District of New Jersey, charging respondent with conspiracy to smuggle contraband, including marijuana and tobacco, to federal inmates housed in the Essex County Correctional Facility (ECCF).

Also on December 3, 2014, before the Honorable Mary L. Cooper, U.S.D.J., respondent entered a guilty plea to the information. During his allocution, respondent admitted that, between August 2013 and May 2014, he had engaged in a scheme to smuggle marijuana and tobacco to federal inmates in the ECCF. Respondent's role was planned and coordinated as part of a conspiracy with his codefendants, V.S. and M.S. Respondent would meet with V.S., who was not incarcerated, to obtain the packages of contraband, which he would then smuggle into the ECCF. M.S., V.S.'s brother, a federal inmate, was detained at the ECCF during the relevant time frame of the conspiracy. Respondent admitted that he used his status as an attorney to secure meetings with the inmates who were part of the scheme, that he delivered the marijuana and tobacco to the inmates inside of an attorney conference room, and that he was paid approximately $500 in cash for each instance of smuggling. He admitted that he had smuggled contraband into the ECCF on eight occasions, in return for cash payments totaling $5,000 to $6,000.

On March 18, 2015, Judge Cooper sentenced respondent to one month in custody and five months of home confinement, with a three-year period of supervised release, a fine of $5,000, and a $100 special assessment. Judge Cooper declined to impose a non-custodial sentence, noting that to do so would not adequately address the gravity of respondent's offense and "the way that Mr. Kapalin . . . involved himself in [the conduct] in his role as an attorney with special access to the jail."[1]

Upon 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 this 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); In re Principato, 139 N.J. 456, 460 (1995). Respondent's guilty plea and conviction establish a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer). Thus, the sole

---

[1] During the sentencing proceeding, the Assistant United States Attorney observed that, because meetings between attorneys and their clients are not recorded, respondent's use of his status as an attorney gave him increased access to inmates and unhampered opportunity to deliver the contraband.

question before us in this matter is the quantum of discipline to be imposed. 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 fashioning the proper quantum of discipline in this case, the interests of the public, the bar, and 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 consider 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). The obligation of an attorney to maintain the high standard of conduct required of a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956).

Respondent urges us to impose a one-year suspension, retroactive to his temporary suspension on December 12, 2014, citing several mitigating factors. The OAE recommends the

imposition of a three-year suspension, taking no position as to whether it should be prospective or retroactive.

In urging a one-year suspension, respondent points to several factors in mitigation, which, he contends, provide a background for his otherwise aberrational conduct. Specifically, respondent's wife had been diagnosed with breast cancer in 1994. Although she initially went into remission, she suffered relapses on numerous occasions and received treatment for approximately twenty years, until her death in December 2013. In the period leading up to her death, her cancer had spread to her bones, making movement about their house difficult. Respondent, therefore, made costly renovations to his home to accommodate his wife's needs and limitations.

During the same period, respondent's son developed an addiction to cocaine and began to steal from the family. He also opened credit cards in respondent's name, thereafter incurring debt in the amount of tens of thousands of dollars. Because respondent did not want to burden his wife with their son's problems, he kept them from her and "tried to take care of everything himself."

Dr. Kenneth McNeil performed a psychological examination of respondent in anticipation of his sentencing. He determined that respondent suffered from "clinical depression and feelings

of self-deprecation, distrust, social alienation and withdrawal." Dr. McNeil further noted that "[w]hen the opportunity presented itself to smuggle contraband into jail for cash [respondent] agreed, despite his professional values and despite the risks of serious personal harm." Dr. McNeil characterized respondent's decision to engage in criminal conduct as a "symbolic act of 'professional suicide,' motivated by overwhelming feelings of desperation and loss associated with his wife's death, bitterness over his [personal and financial] situation, and not caring what happened anymore due to clinical depression."

Thus, although respondent accepts responsibility for his actions, he maintains that his conduct was aberrational and the product of his compelling life circumstances, resulting in significant depression.

We now turn to the specific discipline to be imposed for respondent's conduct.

Generally, attorneys convicted of distribution of controlled dangerous substances have been disbarred, if the distribution is for gain or profit. In re Kinnear, 105 N.J. 391, 396 (1987). See In re Valentin, 147 N.J. 499 (1997) (attorney disbarred in New Jersey, following disbarment in New York, for selling more than a pound of cocaine to a police informant for

$11,500); In re McCann, 110 N.J. 496 (1988) (attorney disbarred for a large scale and prolonged criminal narcotics conspiracy, as well as tax evasion); and In re Goldberg, 105 N.J. 278 (1987) (attorney disbarred for playing a significant role in a three-year criminal conspiracy to distribute, and to possess with intent to distribute, large quantities of phenylacetone (P-2P), a Schedule II controlled substance, contrary to 21 U.S.C.A. § 846; the defendants purchased nine tons of P-2P, enough for $200,000,000 worth of "speed", at a profit of at least $3.5 million).

The Court, however, reached a different result in In re Musto, 152 N.J. 165 (1997). In that case, the attorney had been convicted, in both state and federal court, of conspiracy to distribute cocaine, possession of methyl ecgonine, conspiracy to possess heroin and cocaine, and possession of heroin and cocaine. Id. at 168. We recommended the attorney's disbarment, but the Court disagreed. Id. at 167. The Court recognized that "[i]n most cases an attorney convicted of distribution of controlled dangerous substances would be disbarred" and that "[d]isbarment would certainly be appropriate if the distribution were done for gain or profit." Id. at 176 (citing Kinnear, supra, 105 N.J. at 396). On balance, however, the Court determined that a three-year suspension, rather than disbarment, was appropriate, emphasizing that the attorney's distribution of cocaine was limited to providing it to a friend for her personal use; he "was primarily a

drug user;" the $200 profit realized from the cocaine distribution was used "to fund his heroin addiction;" his misconduct did not harm his clients; he met professional obligations while "spiral[ing] down the path of drug addiction;" his crime did not relate to his practice of law; he did not "use his professional status or skills as an attorney to assist in his criminal acts;" and he was not actively practicing law at the time of his criminal conduct. Id. at 178-79. The Court concluded that, "given [Musto's] efforts to rehabilitate himself, we are left short of the conclusion that respondent's ethical violations reflect a defect in professional character so grave as to require disbarment." Id. at 181.

Both the OAE and respondent cited In re Farr, 115 N.J. 231 (1989), in support of their request for the imposition of a suspension, instead of disbarment. In that case, a young assistant county prosecutor, described by supervisors as "hard-working" but "naïve, immature, and susceptible to manipulation by others," became involved in an inappropriate relationship with a couple who were acting as police informants. Id. at 233. The attorney became "infatuated" with the young female informant, and committed "gross improprieties" to "ingratiate himself with her." Ibid. Specifically, he misappropriated marijuana and PCP from the evidence room of the prosecutor's office for his personal use and to share with the couple, and

manipulated the justice system through search warrants, bail motions, and appellate arguments, in an attempt to further his relationship with the female. Id. at 234. The Court found that "while [he] thought he was manipulating the informants, they were also manipulating him," noting that the male had an extensive criminal history. Ibid. He was suspended for six months for his misconduct. Id. at 238.

In crafting the appropriate discipline, the Court concluded that the attorney had "lost his ethical compass and went astray," but that his conduct "was aberrational and not likely to occur again," adding that he had "found his bearings" through rehabilitation by effective psychiatric counseling. Id. at 236-37. The Court concluded that:

> As offensive as was [Farr's] conduct, we are persuaded that 'the root of his transgressions is not intractable dishonesty, venality, immorality, or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or mental condition that is not obvious and, if present, could be corrected through treatment.' By receiving needed psychotherapy and performing various good works, respondent has rehabilitated himself.
>
> [Id. at 237.]

As set forth above, under Kinnear and its progeny, the typical measure of discipline for attorneys convicted of

distribution of controlled dangerous substances, where the distribution is for gain and profit, is disbarment. Here, respondent admitted that he engaged in a scheme to smuggle marijuana and tobacco to inmates being held on federal charges in the ECCF. Respondent also admitted that he used his status as an attorney to secure meetings with the inmates who were part of the scheme, that he would deliver the marijuana and tobacco to the inmates inside of an attorney conference room, and that he was paid approximately $500 in cash for each instance of smuggling.

Respondent, however, has presented significant mitigation that, in our view, warrants discipline short of disbarment. Specifically, he offers his lengthy dedication to public service and forbearance from pursuing a "lucrative job" upon retiring as an assistant prosecutor, instead becoming a criminal defense attorney to "under-represented communities;" a "perfect storm of clinical depression and financial stress," as described in a psychological evaluation performed by Dr. Kenneth McNeil; the loss of his wife after her prolonged battle with cancer; his son's battle with cocaine addiction and his theft from respondent and his wife; and respondent's cooperation with federal law enforcement, without requiring that a downward departure motion be filed as a pre-condition.

Although the facts here are distinguishable from the facts in Farr, respondent's conduct, like that of the attorney in Farr, was aberrational. Respondent's conduct was reprehensible, but the root of his transgressions is not intractable dishonesty, venality, immorality, or incompetence. Rather, as determined by Dr. McNeil, respondent committed "professional suicide," motivated by "overwhelming feelings of desperation" and depression. As a result, we determine that a three-year suspension, retroactive to December 12, 2014, the date of respondent's temporary suspension, is the appropriate sanction for respondent's conduct.

Chair Frost, Vice-Chair Baugh, and Member Zmirich voted for disbarment.

Member Gallipoli did not participate. Member Rivera was recused.

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
Bruce Clark, Esquire

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Charles B. Kapalin
Docket No. DRB 15-385

Argued: April 21, 2016

Decided: August 12, 2016

Disposition: Three-year retroactive suspension

Members	Disbar	Three-year Retroactive Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost	X					
Baugh	X					
Boyer		X				
Clark		X				
Gallipoli						X
Hoberman		X				
Rivera					X	
Singer		X				
Zmirich	X					
Total:	3	4			1	1

Ellen A. Brodsky
Chief Counsel