SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-379
District Docket No. XIV-2014-0362E

| | |
|---|---|
| IN THE MATTER OF | : |
| DAVID A. WALKER | : |
| AN ATTORNEY AT LAW | : |

Decision

Argued: February 15, 2018

Decided: April 17, 2018

Hillary K. Horton 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(c), following respondent's guilty plea in the Superior Court of New Jersey, Mercer County, to one count of third-degree conspiracy with the purpose of promoting or facilitating the commission of the crime of using a runner, in violation of N.J.S.A. 2C:21-22 and N.J.S.A. 2C:5-2.

We determine to impose a one-year suspension, retroactive to respondent's temporary suspension, on July 7, 2017.

Respondent did not report his criminal conviction to the OAE, as R. 1:20-13(a)(1) requires.

Respondent was admitted to the New Jersey bar in 1983, to the Washington D.C. bar in 1989, and to the New York bar in 1990. He has no prior final discipline in New Jersey.

Effective July 7, 2017, the Supreme Court temporarily suspended respondent after he pleaded guilty to the conduct underlying this matter. In re Walker, 229 N.J. 515 (2017).

Respondent was declared ineligible to practice law by Court Order, effective September 12, 2016, for failure to pay the New Jersey Lawyers' Fund for Client Protection annual attorney assessment for 2016. He remains ineligible to date.

On May 1, 2014, the New Jersey State Grand Jury returned an indictment charging respondent with second-degree racketeering (N.J.S.A. 2C:41-2c and N.J.S.A. 2C:41-2d) (count one); third degree conspiracy to use a runner (N.J.S.A. 2C:21-22.1 and N.J.S.A. 2C:5-2) (count thirty-nine); and third-degree criminal use of runners (N.J.S.A. 2C:21-22.1 and N.J.S.A. 2C:2-6) (count forty).

On March 13, 2017, respondent pleaded guilty before the Honorable Thomas M. Brown, J.S.C., in the Superior Court, Mercer County, to one count of third-degree conspiracy to use a runner, in contravention of N.J.S.A. 2C:21-22.1 and N.J.S.A. 2C:5-2. In exchange, the New Jersey State Office of the Attorney General (the State) agreed to dismiss the remaining counts (one and forty) against respondent, and to recommend a 364-day term of incarceration in the county jail, followed by probation. Under the plea agreement, the State agreed not to oppose respondent's application to the Sheriff's Labor Assistance Program (SLAP),[1] but precluded respondent from applying for admission into the Pretrial Intervention Program.

Respondent admitted that, for the four-and-one-half years from June 1, 2009 to January 1, 2014, he conspired with brothers Anhuar and Karim Bandy, owners of KEKK Marketing, Inc., purportedly a managing or marketing company. According to the indictment, the scheme involved the Bandy brothers' use of runners to recruit automobile accident victims as patients for

[1] The SLAP program offers an alternative to incarceration, and requires offenders to perform moderate levels of manual labor. See N.J.S.A. 28:19-5.

treatment at certain chiropractic facilities named in the indictment.

Respondent's involvement was limited to his agreement with the Bandy brothers to accept the referral of chiropractic patients, through KEKK, for their potential legal claims. In exchange, respondent would pay the Bandys a referral fee for each potential client.

In at least fifty instances, respondent accepted chiropractic referrals, and paid the Bandys referral fees in return. The transcript of the plea hearing is silent about the amount of those referral fees and the amount that respondent realized from the arrangement.

On May 5, 2017, at respondent's sentencing hearing, Judge Brown specifically asked defense counsel about the amount of gain that respondent had realized as a result of the Bandy conspiracy. Counsel replied:

> [T]here's a companion civil suit that he was swept up in and that matter is still ongoing. It's very difficult to quantify it because there was a ledger book that was the centerpiece of the State's case where his secretary, paralegal who ran the office, would enter -- would cut checks, essentially, to the Bandys, who was this front company. It was KLK or K&K, and they were paid out of settlements.
>
> What that dollar amount was was unclear. Some thoughts were it was $7,000, some

> thoughts were it was $70,000 but it was never really quantified. So in that regard that's where we find ourselves.
>
> [OAEbEx.E,10.] [2]

Judge Brown sentenced respondent to two years' probation and forty hours of community service for his crimes, with no jail time, noting that the sentence deviated from the parties' negotiated recommendation of 364 days of incarceration. The judge conditioned the sentence on respondent's compliance with the terms of his probation. The judge found as the sole aggravating factor "the need for deterrence."

Respondent sought the court's consideration of certain mitigation, namely that, in recent years, he had suffered a deterioration of his cognitive abilities, for which he now receives Social Security disability benefits. At sentencing, respondent explained the genesis of that medical issue:

> THE COURT: You're receiving a disability benefit currently. What are you receiving the disability benefit for?
>
> [RESPONDENT]: The doctors call it cognitive disability. When I was a child —
>
> THE COURT: You had a brain injury.
>
> [RESPONDENT]: I had a brain tumor removed from my brain. And back in those days when they treated people, they didn't do what they do today with stereotactic radiation.

[2] OAEb refers to the OAE brief in support of the motion for final discipline, dated October 5, 2017.

> They basically stuck me in a room and radiated my whole brain with cobalt radiation which is gamma rays, basically. And then back in the 60's when I went through this, they didn't have protocols for post exposure treatment and all that sort of thing. So, basically, I was untreated all that time. And the only reason I even -- I knew that there were issues with the back of my head and that area, but I did not know until roughly November of a couple years ago when I had a fall off a chair and I went to the emergency room because I was -- my reaction to that fall off the chair and hitting the back of my head was far worse that [sic] you'd expect from a concussion. I felt like the room was spinning and everything else. They did a CAT scan and they found that there's dead brain tissue throughout my brain.
>
> I went to neurologists and my records will show you that even though the neurologists find two different ideas, each one has his own idea where it's from or how, they both agree it's cognitive disability.
>
> And as I think you'll note from the messages you're going to read from my family who has all my life to observe me, they weren't aware of these difficulties I had but I was able as a younger person to persevere overall all [sic] of them. As I got older, my ability to persevere over these difficulties got less and less. And that's how come I think things got away from me in handling my office.
>
> [OAEbEx.E,13-14.]

With respect to the cognitive disability, the following colloquy took place:

> [THE COURT]: I've also had the opportunity to review a number of letters that were given to me about one o'clock today. They

> are letters from a Lauren Walker, who is Mr. Walker's daughter, his Aunt Linda Thaler (phonetic), his cousin, I guess, Marcie Thaler (phonetic). His brother-in-law, I guess, or uncle by marriage, I'm sorry, Michael Thaler (phonetic) and then Julie Richman (phonetic), who is Mr. Walker's --
>
> [RESPONDENT]: Sister.
>
> THE COURT: -- sister. Now, all those letters suggest that Mr. Walker at one point in time was a, I'd say a vibrant individual, but that over time his, I guess, cognitive deficits have, let's say, come to the forefront and have impacted on his overall cognitive ability. Now, whether that, you know, had a significant impact on the situation with the conspiracy, it appears that it may have, although I'm not an expert in neurology, to be able to make that opinion. But based upon what I've seen in these letters, it suggests that a part of the problem that occurred with the Bandys may have had some -- that his cognitive issues may have had some impact on why he had other people, let's say, refer clients to him which I really think is what happened in the underlying conspiracy as I understand it.
>
> [OAEbEx.E,14-13 to 15-12.]

Judge Brown applied mitigating factors as follows: (1) "the cognitive deficit that is now being compensated by virtue of his disability benefit," although not a defense, constituted substantial grounds that tended to excuse or justify respondent's conduct;[3] (2) respondent's character and attitude

[3] Judge Brown also considered that respondent suffers from sleep apnea, depression, seizures, and gout.

were such that he was unlikely to commit another offense; (3) respondent was "particularly likely" to benefit from probationary treatment; and (4) any term of imprisonment would have presented an undue hardship on respondent, given his medical and financial history.

The OAE recommended a one-year suspension, citing a number of cases involving attorneys' use of runners, including In re Sorkin, 192 N.J. 76 (2007), discussed below.

* * *

Following a review of the record, we determined to grant the OAE's motion. Respondent's criminal conviction clearly and convincingly establishes that he has committed a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer, in violation of RPC 8.4(b). Moreover, the facts underlying his conviction evidence that he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of RPC 8.4(c).

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); and In re Principato, 139 N.J. 456, 460 (1995). Respondent's conviction of third-degree conspiracy with the purpose of promoting or facilitating the commission of the crime of using a runner, establishes a violation of RPC 8.4(b).

Pursuant to that Rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Hence, the sole issue is the extent of discipline to be imposed. R. 1:20-13(c)(2); In re Magid, 139 N.J. at 451-52; In re Principato, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the 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." Principato, 139 N.J. at 460. Fashioning the appropriate penalty involves a consideration of 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).

Here, respondent admitted having conspired to use a "runner," for four-and-one-half years, in the Bandy brothers' illicit scheme to refer at least fifty chiropractic patients in exchange for referral fees. The appropriate measure of discipline in a runner case is determined on a case-by-case basis, and ranges from a

three-month suspension to disbarment. See e.g., In re Howard A. Gross, 186 N.J. 157 (2006) (three-month suspended suspension imposed for the attorney's use of a paid runner; the attorney stipulated that he paid $300 to the runner on at least fifty occasions between 1998 and 2000; in mitigation, the attorney inherited a system that his father had established); In re Pease, 167 N.J. 597 (2001) (three-month suspension imposed on attorney who paid a runner for referring fifteen prospective clients to him and for loaning funds to one of those clients; in mitigation, the attorney had not been disciplined previously, he had performed a significant amount of community service, and the misconduct was limited to a four-month period, which took place more than ten years prior to the ethics proceeding, when the attorney was relatively young and inexperienced); In re Bregg, 61 N.J. 476 (1972) (attorney suspended for three months for paying part of his fees to a runner from whom he had accepted referrals in thirty cases; mitigating factors included the attorney's candor and contrition); In re Alvin Gross, 190 N.J. 194 (2007) (attorney received a four-month suspended suspension, conceding that he participated in his son's running scheme by issuing payments to a runner); In re Chilewich, 192 N.J. 221 (2007) and In re Sorkin, 192 N.J. 76 (2007) (companion motions for final discipline; one-

year suspensions imposed on two personal injury attorneys who, along with a husband-and-wife runner team, were charged in a ninety-three-count indictment; the runners bribed New York hospital employees to divulge confidential patient information to them in exchange for a referral fee; over a five-year period, Chilewich accepted twenty referrals, while Sorkin accepted fifty such cases; the attorneys then filed false retainer reports with New York's Office of Court Administration in order to conceal their deeds, for which they pleaded guilty to one count each of offering a false instrument for filing, a first degree, Class E felony, in violation of §175.35 of the Penal Law of the State of New York); In re Berglas, 190 N.J. 357 (2007) (on a motion for reciprocal discipline, the attorney received a one-year suspension for sharing legal fees with a nonlawyer and improperly paying third parties for referring legal cases to him; the conduct took place over three years and involved two hundred immigration and personal injury matters); In re Birman, 185 N.J. 342 (2005) (attorney received a one-year suspension by way of reciprocal discipline; he had agreed to compensate an existing employee for bringing new cases into the office, after she offered to solicit clients for him); In re Frankel, 20 N.J. 588 (1956) (two-year suspension imposed on attorney who paid a runner twenty-five

percent of his net legal fee to solicit personal injury clients); In re Introcaso, 26 N.J. 353 (1958) (three-year suspension for attorney who used a runner to solicit clients in three criminal cases, improperly divided legal fees, and lacked candor in his testimony); In re Pajerowski, 156 N.J. 509 (1998) (disbarment for attorney who, for almost four years, used a runner to solicit personal injury clients, split fees with the runner, and compensated him for referrals in eight matters involving eleven clients; although the attorney claimed that the runner was his "office manager," in 1994, the attorney had compensated him at the rate of $3,500 per week ($182,000 a year) for the referrals); and In re Shaw, 88 N.J. 433 (1982), (disbarment for attorney who used a runner to solicit a client in a personal injury matter, "purchased" the client's cause of action for $30,000, and then settled the claim for $97,500; the runner forged the client's endorsement on the settlement check, depositing it in his own bank account, rather than the attorney's trust account; the attorney also represented a passenger in a lawsuit against the driver of the same automobile and represented both the passenger and the driver in litigation filed against another driver).

Here, respondent's actions, which resulted in a criminal conviction, are akin to the one-year suspension cases, Chilewich

and Sorkin, wherein the attorneys were each convicted of a crime after using runners over a five-year period, roughly the same period as had respondent. In fact, like respondent, Sorkin's misconduct occurred in fifty matters.

In mitigation, respondent has no prior final discipline in thirty-five years at the bar. In addition, as Judge Brown found when reducing the previously negotiated sentence in respondent's criminal matter, respondent may have become more susceptible to accepting the Bandy brothers' business proposal as the result of his deteriorating cognitive abilities. Family members had provided the court with letters to the effect that respondent had been better able to handle his legal practice and other affairs until the cumulative, long-term effects of childhood radiation treatments to his brain finally began to take hold.

In aggravation, respondent failed to inform the OAE of his criminal conviction, as required by R. 1:20-13(a)(1).

In light of the similarities to Chilewich and, in particular, Sorkin, we determine that a one-year suspension is appropriate, retroactive to July 7, 2017, the date of respondent's temporary suspension. We also require respondent to provide proof of fitness to practice, by a mental health professional approved by the OAE, prior to reinstatement.

Member Singer voted for a retroactive six-month suspension. Vice-Chair Baugh and Member Gallipoli 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
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David A. Walker
Docket No. DRB 17-379

Argued: February 15, 2018

Decided: April 17, 2018

Disposition: One-Year Retroactive Suspension

| **Members** | One-year Retroactive Suspension | Six-month Retroactive Suspension | Did not participate |
|---|---|---|---|
| Frost | X | | |
| Baugh | | | X |
| Boyer | X | | |
| Clark | X | | |
| Gallipoli | | | X |
| Hoberman | X | | |
| Rivera | X | | |
| Singer | | X | |
| Zmirich | X | | |
| Total: | 6 | 1 | 2 |

Ellen A. Brodsky
Chief Counsel