Supreme Court of New Jersey
Disciplinary Review Board
Docket No. 19-009
District Docket Nos. XIV-2015-0160E and
XIV-2017-0294E

In the Matter of	:
Mark Gertner	:
An Attorney at Law	:

Decision

Argued: May 23, 2019

Decided: August 1, 2019

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

Respondent appeared pro se.

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 conviction, in the Superior Court of New Jersey, Essex County,

on two counts of third-degree criminal use of runners, in violation of N.J.S.A. 2C:21-22.1(b).[1] These offenses constitute 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) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to grant the motion for final discipline and to impose a one-year suspension.

Respondent earned admission to the New Jersey bar in 1982. He is engaged in the practice of law in South Orange, New Jersey. In 2011, he received a reprimand for conflict of interest, prohibited business transaction with a client, and failure to safeguard client funds. In re Gertner, 205 N.J. 468 (2011).

On January 27, 2016, before the Honorable Peter V. Ryan, J.S.C., respondent entered a guilty plea, via an accusation, to third-degree criminal use of runners, in violation of N.J.S.A. 2C:21-22.1(b). During his plea allocution before the court, respondent admitted that, from 2010 to 2015,

[1] That statute provides that "[a] person is guilty of a crime of the third degree if that person knowingly acts as a runner or uses, solicits, directs, hires or employs another to act as a runner." The statute defines a "runner" as "a person who, for pecuniary benefit, procures or attempts to procure a client, patient or customer at the direction of, request of or in cooperation with a provider whose purpose is to seek or obtain benefits."

Philip Potacco, a doctor and former client, referred cases to him through the illegal use of runners. Respondent would pay the runners, many of whom had been sourced by Potacco, fees ranging from $100 to $800, in return for clients from South Orange Trauma and Rehab, LLC. Potacco identified the amount of the fee respondent was to pay each runner and provided him with the medical reports for each patient referred. Those medical reports usually were written by a doctor other than Potacco, and respondent did not know whether the reports were genuine or fraudulent. Respondent paid the runners a fee only if he obtained a monetary recovery in their associated case.

In connection with respondent's first guilty plea, the prosecutor explained to the court that respondent's plea was solely in respect of the South Orange Trauma and Rehab, LLC case, and that an additional investigation was pending against respondent, known as the "Park Avenue Chiropractic" case. The court agreed that any sentence for the second case would run concurrently with the sentence imposed in the first case.

On January 13, 2017, almost one year after his first guilty plea, and once again before Judge Ryan, respondent entered a second guilty plea, via an accusation, to third-degree criminal use of runners, in respect of the Park Avenue Chiropractic case. During his plea allocution before the court, respondent admitted that, between 2010 and 2015, he paid Park Avenue

Chiropractic to refer cases to him, through the use of approximately thirty runners. Respondent would pay the runners a fee of $300 to bring him clients from Park Avenue Chiropractic and had paid approximately $9,000 for the referrals. Respondent further admitted that his criminal conduct in respect of Park Avenue Chiropractic occurred contemporaneously with his illegal use of runners for South Orange Trauma and Rehab, LLC cases.

On June 22, 2018, Judge Ryan denied respondent's appeal for admission into the Pre-Trial Intervention program and sentenced him to two-year terms of probation, in respect of each guilty plea, to run concurrently. The court declined to impose a fine or community service, citing respondent's substantial cooperation with law enforcement. In aggravation, the government argued that respondent, as an attorney, knew that his conduct constituted criminal insurance fraud, yet he chose to engage in a $3.9 million scheme of organized, white-collar crime.

Following a review of the record, we determine to grant the OAE's motion for final discipline. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that 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 convictions on two counts of third-degree criminal use of

runners, in violation of N.J.S.A. 2C:21-22.1(b), thus, establishes two violations 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." The facts underlying respondent's convictions also establish violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). 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; and In re Principato, 139 N.J. at 460.

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and the respondent. "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).

In sum, respondent committed violations of RPC 8.4(b) and RPC 8.4(c). The OAE recommends an eighteen-month suspension. In support of its position, the OAE cites a number of cases involving attorneys' unlawful use of

runners, including In re Walker, 234 N.J. 164 (2018), and In re Sorkin, 192 N.J. 76 (2007), discussed below. Respondent requests discipline short of suspension.

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, between 1998 and 2000, he paid $300 to the runner on at least fifty occasions; 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 was 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 Walker, 234 N.J. 164 (one-year suspension imposed on an attorney who participated in a four-and-a-half-year fraudulent scheme and accepted at least fifty cases from runners; no prior discipline); In re Chilewich, 192 N.J. 221 (2007) and In re Sorkin, 192 N.J. 76 (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; neither attorney had prior discipline); In re Berglas, 190 N.J. 357 (2007) (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)

(motion for reciprocal discipline; attorney received a one-year suspension; 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).

In summary, the OAE contends that here, given respondent's misconduct, an eighteen-month suspension is the appropriate sanction. The OAE compares respondent's behavior to that of the attorneys in Walker and Sorkin, and notes in mitigation, that respondent fully cooperated with law enforcement. Citing respondent's disciplinary history, however, the OAE asserts that a one-year suspension, the discipline imposed on the attorneys in Walker and Sorkin, is insufficient.

In turn, in his submission, respondent requests that we impose a quantum of discipline less than a term of suspension. He cites no authority in support of his request that we deviate from precedent, but, rather, argues that a term of suspension "could end [his] career."

Respondent admitted having conspired to use runners in connection with two chiropractic treatment facilities, over the course of a five-year period, as part of an illicit scheme to refer dozens of chiropractic patients in exchange for referral fees. Respondent's conviction for the knowing use of runners, third-degree crimes, establishes violations of RPC 8.4(b) and RPC 8.4(c). R. 1:20-13(c)(1).

A review of the applicable precedent leads us to conclude that a term of suspension is the proper quantum of discipline in this matter. The imposition of discipline less than a suspension for such egregious misconduct would undermine public confidence in the bar. Like the attorneys in Walker and Sorkin, respondent engaged in fraudulent schemes, using dozens of runners, for a period exceeding five years.

In crafting the appropriate term of suspension, however, we must also consider aggravating and mitigating factors. In aggravation, and unlike the attorneys in Walker and Sorkin, respondent has prior discipline, a 2011 reprimand. In mitigation, respondent provided full and meaningful cooperation to law enforcement, compelling mitigation absent from the Walker and Sorkin matters. On balance, we determine that the aggravating and mitigating factors are of equal weight, and therefore, a one-year suspension is sufficient to protect the public and to preserve confidence in the bar.

Members Petrou, Rivera, and Singer 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
Bruce W. Clark, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Mark Gertner
Docket No. DRB 19-009

Argued: May 23, 2019

Decided: August 1, 2019

Disposition: One-Year Suspension

Members	One-Year Suspension	Recused	Did Not Participate
Clark	X		
Boyer	X		
Gallipoli	X		
Hoberman	X		
Joseph	X		
Petrou			X
Rivera			X
Singer			X
Zmirich	X		
Total:	6	0	3

Ellen A. Brodsky
Chief Counsel