Supreme Court of New Jersey
Disciplinary Review Board
Docket No. 20-219
District Docket No. XIV-2020-0068E

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| In the Matter of | : |
| Nabil Nadim Kassem | : |
| An Attorney at Law | : |

Decision

Argued: January 21, 2021

Decided: April 28, 2021

Ashley L. Kolata-Guzik appeared on behalf of the Office of Attorney Ethics.

John D. Arseneault 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 Supreme Court of New York, Kings County, to criminal possession of heroin, in violation of New York Penal Law § 220.03, a

seventh-degree class A misdemeanor. The OAE asserted that this offense constitutes a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

For the reasons set forth below, we determine to grant the motion for final discipline and to impose a three-month, suspended suspension, with conditions.

Respondent earned admission to the New Jersey bar in 1994 and to the New York bar in 1995. He maintains a law office in Clifton, New Jersey.

In 2008, the Court censured respondent for violating RPC 8.4(b), following his conviction for possession of cocaine, a controlled dangerous substance (CDS), and his successful completion of a pre-trial intervention program. In re Kassem, 194 N.J. 182 (2008).

We now turn to the facts of this matter.

On February 4, 2020, respondent, through his counsel John D. Arseneault, Esq., reported to the OAE that, in December 2019, he had been arrested in Kings County, New York, and charged with possession of a CDS. At the time of his report, respondent was participating in inpatient substance abuse treatment. He participated in inpatient treatment from February 3, 2020 through March 4, 2020. He asserted that he had been sober for thirteen years,

but had relapsed, after surgery, when he was proscribed Oxycodone for pain.[1] Respondent acknowledged that his conduct violated RPC 8.4(b).

On February 7, 2020, the Honorable Ernest M. Caposela, A.J.S.C., Superior Court of New Jersey, Law Division, Passaic County, appointed David A. Nufrio, Esq., respondent's sole associate at his law firm, as temporary attorney-trustee to administer respondent's law practice for a six-month period.

Respondent was charged in New York with violating New York Penal Law § 220.18 (second-degree criminal possession of CDS, four ounces or more of a narcotic, a class A-II felony); two counts of New York Penal Law § 220.16 (third-degree criminal possession of CDS, a class B felony); two counts of New York Penal Law § 220.09 (fourth-degree criminal possession of CDS, a class C felony); New York Penal Law § 220.06 (fifth-degree criminal possession of CDS, a class D felony); New York Penal Law § 220.03 (seventh-degree criminal possession of CDS, a class A misdemeanor); New York Vehicle and Traffic Law § 1110(a) (failure to obey an official traffic-control device); and New York Vehicle and Traffic Law § 1163(a) (illegal turn signal).

On February 20, 2020, during his inpatient treatment, respondent appeared before the Honorable Christopher Robles, Justice of the Supreme

[1] Respondent provided to the OAE certain confidential treatment records, which the OAE submitted to us under separate cover.

Court of the State of New York, Kings County, waived indictment, and pleaded guilty to a single-count Information charging him with having violated New York Penal Law § 220.03. In exchange, respondent was granted a conditional discharge, with the requirements that he complete inpatient treatment and engage in follow-up, outpatient treatment.[2] During his plea allocution, respondent admitted that, on December 12, 2019, he had possessed heroin.

The OAE requested that we grant the motion for final discipline and impose a suspension of three or six months, with the conditions that respondent provide proof of his continued sobriety and his fitness to practice law. The OAE acknowledged that a three-month suspension is the presumptive measure of discipline for possessory drug crimes but contended that some offenses attributable to addiction may warrant stronger measures. Here, the OAE commented that, in 2008, respondent had "escaped" the presumptive three-month suspension and received a censure, due to our consideration of significant mitigating factors based on respondent's sustained sobriety. According to the OAE, this offense, representing respondent's second arrest

[2] New York Penal Law § 220.03 states that "a person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance . . . . Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor."

for possession of CDS, demonstrated a "long-term struggle to maintain sobriety and avoid criminal behavior and warrants stronger disciplinary measures."

The OAE cited In re Pleva, 106 N.J. 637 (1987), as instructive. In Pleva, the Court imposed a six-month suspension on the attorney, and warned that "any lawyer who knowingly engages in criminally-proscribed conduct, such as possession of narcotics, must be aware of the professional jeopardy to which he is exposed by such activity." Id. at 644.

The OAE remarked that respondent previously had been arrested; had been admitted to pre-trial intervention; had participated in substance abuse treatment; and had received the 2008 censure. Thus, respondent "should have been acutely aware of the discipline he would face after he relapsed on prescription pain medication and later purchased illegal heroin" in New York. The OAE concluded that respondent has "done little to stop his criminal behavior or *meaningfully* treat his addiction" (emphasis in original).

The OAE asserted that respondent's participation in treatment should be considered in mitigation, and that his prior discipline should be considered in aggravation. Conceding that respondent should not be punished for his relapse, the OAE argued that, nonetheless, he should receive enhanced discipline for his criminal conduct.

Respondent, through counsel, submitted a brief and appendix in partial opposition to the OAE's motion for final discipline, arguing that the appropriate discipline should be no more severe than a three-month, suspended suspension. Respondent cited In the Matter of Steven M. Schaffer, DRB 93-453 (July 1, 1994) (slip op. at 7), and In re Schaffer, 140 N.J. 148 (1995), to argue that "an active suspension beyond the now seven months out of practice during which [respondent] has rehabilitated would 'serve no purpose other than to punish.'"

Although respondent conceded his violation of RPC 8.4(b), he submitted additional facts for our consideration. He pointed out that, during the thirteen years prior to this instance, he had remained sober through treatment, introspection, and outreach, and had become a leader for others suffering from addiction. He claimed that his relapse was the result of his doctor having prescribed dangerous and addictive drugs, following respondent's serious ankle and knee injury and major surgery. At the time of his relapse, respondent also was dealing with the departure of his trusted office manager and friend of fifteen years, causing him to "scramble" to manage the firm and his clients, as well as a random OAE audit of his practice. Additionally, his mother was diagnosed with terminal cancer, and respondent became, and remains, her primary caretaker.

Respondent asserted that, despite these events and his struggle, in the wake of his arrest in December 2019, he took swift action, submitting to thirty days of impatient treatment and eight weeks of outpatient treatment. He also has attended more than 100 Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings. Further, when Nufrio was appointed as attorney-trustee for his firm, respondent stepped away from his practice to focus on his well-being. Respondent noted that he continues treatment in an outpatient program.

Respondent also emphasized that, although he had reached out to the OAE to consent to immediate suspension to coincide with his period of rehabilitation, the OAE chose not to file the motion for discipline by consent. He argued that, as a result, he "was never *officially* suspended, even though he has been effectively suspended since he has not practiced since the appointment of Mr. Nufrio as attorney-trustee."

In support of his argument for a suspended, three-month suspension, respondent primarily relied on Schaffer, in which the Court authorized an accelerated suspension procedure, whereby attorneys struggling with addiction could apply for immediate suspension so that their discipline could coincide with their recovery in a rehabilitation program. Id. at 160-61.

Respondent further contended that "the OAE blinds itself to the fact that [respondent] did not receive the accelerated discipline authorized in Schaffer," despite having requested it.

Indeed, in its brief, as well as in reply to respondent's opposition, the OAE did not address respondent's argument regarding accelerated suspension. Instead, the OAE contended that respondent mischaracterized the nature of his addiction and recovery, noting that confidential records demonstrated that his relapse occurred prior to his June 2017 surgery.

Moreover, the OAE asserted that the confidential records further demonstrate that respondent's motivation for recovery was "mixed," that he struggled at times to follow expectations, and that he discharged himself from treatment one day early without prior approval, despite the clinical team's suggestion that he extend his treatment.

In its original brief, the OAE had suggested that respondent's treatment be considered a mitigating factor, but in its reply brief, the OAE took the opposite position, arguing that respondent's confidential treatment records confirm that his "commitment to sobriety is tenuous, at best." The OAE asserted that the following factors should be considered as aggravating factors: respondent's previous censure; his failure to proactively request a non-narcotic prescription post-surgery; his failure to timely seek treatment after his relapse;

his decision to pursue illegal heroin to sustain his addiction; and his "mixed" motivation during his substance abuse treatment.

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 guilty plea and conviction of possession of CDS, contrary to New York Penal Law § 220.03, thus, establishes a violation of RPC 8.4(b). Pursuant to that Rule, it is 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 on respondent for his violation of RPC 8.4(b). 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." Ibid. (citations omitted). 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).

The Court has noted that, although it does not conduct "an independent examination of the underlying facts to ascertain guilt," it will "consider them relevant to the nature and extent of discipline to be imposed." In re Magid, 139 N.J. at 452. In motions for final discipline, it is acceptable to "examine the totality of the circumstances" including the "details of the offense, the background of respondent, and the pre-sentence report" before "reaching a decision as to [the] sanction to be imposed." In re Spina, 121 N.J. 378, 389 (1990). The "appropriate decision" should provide "due consideration to the interests of the attorney involved and to the protection of the public." Ibid.

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse an ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 165, 173 (1997). Offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high standard of conduct required by 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.

Here, respondent pleaded guilty to one count of possession of CDS, in violation of New York Penal Law § 220.03. Although the facts are sparse, respondent admitted that he knowingly possessed heroin.

In sum, we find that he violated RPC 8.4(b). The only remaining issue is the appropriate quantum of discipline to be imposed for respondent's misconduct.

A three-month suspension is generally the appropriate measure of discipline for an attorney's possession of a controlled dangerous substance (CDS). See, e.g., In re Musto, 152 N.J. at 174 (possession of cocaine and heroin); In re Holland, 194 N.J. 165 (2008) (possession of cocaine); In re Sarmiento, 194 N.J. 164 (2008) (possession of ecstasy); and In re McKeon, 185 N.J. 247 (2005) (possession of cocaine).

As the OAE argued, some offenses attributable to drug addiction may warrant stronger disciplinary measures. In re Musto, 152 N.J. at 174. See, e.g., In re Stanton, 110 N.J. 356 (1988) (six-month suspension for possession of cocaine where the attorney had acknowledged ten years of drug abuse); In re Pleva, 106 N.J. 637 (six-month suspension for attorney who pleaded guilty to possession of cocaine, hashish, and marijuana; the attorney was a regular drug

user and had been arrested previously; the Court further imposed a three-month suspension for the attorney's guilty plea to the charge of giving false information about drug use, when he completed a certification required before purchasing a firearm); In re Kaufman, 104 N.J. 509 (1986) (six-month suspension for attorney who pleaded guilty to two separate criminal indictments for possession of cocaine and methaqualone; the attorney had a prior drug-related incident and a long history of drug abuse); In re Rowek, 220 N.J. 348 (2015) (one-year, retroactive suspension for attorney who pleaded guilty to possession of Vicodin, GBL, Percocet, a device used to assist him in fraudulently passing a drug urinalysis, and driving under the influence of GBL; the attorney had a long history of drug abuse and, after being admitted to pre-trial intervention, continued to use drugs and attempted to improperly pass his court-mandated drug test; we emphasized the attorney's lack of respect for the criminal justice system as an aggravating factor warranting enhanced discipline); and In re Salzman, 231 N.J. 2 (2017) (two-year suspension for an attorney who engaged in "blatant drug abuse" and criminal conduct, despite having been placed on supervised probation for a heroin conviction; discipline was enhanced based on egregious aggravation, including the attorney's extensive criminal history, "sheer disdain" for court appearances and court orders, and life-long drug addiction and abuse).

As noted previously, in Schaffer, the Court created the "accelerated suspension," to accommodate an attorney who "conscientiously, promptly and successfully achieved rehabilitation, and has recognized the continuing need to remain drug-free and maintain sobriety." Schaffer, 140 N.J. at 160. The Court recognized that a suspension for a CDS offense remains the proper measure of discipline but, "if possible," should be imposed "immediately following the commission of the offense so that it may coincide with any rehabilitation program and recovery efforts that are undertaken by the attorney following the commission of the underlying offense." The Court remarked that the discipline was created so as not to undermine an attorney's rehabilitation. Ibid.

The mechanics of this accelerated suspension require an attorney to apply to the OAE for a motion for discipline by consent under R. 1:20-10(b) for an immediate suspension pending disposition of the motion. The process also is to be accelerated for our review. Ibid. Because Schaffer could not have availed himself of the new process announced in his own case, the Court refrained from suspending him, and instead imposed a three-month, suspended suspension. Here, although respondent requested an accelerated suspension, the OAE did not approve that disposition, presumably, due to respondent's prior censure for possession of cocaine.

In some cases, however, the Court has refrained from imposing a suspension and, instead, has imposed a censure. See, e.g., In re Ten Broeck, 242 N.J. 152 (2020) (attorney unlawfully possessed and used cocaine; the attorney successfully completed all conditions of the PTI program; participated in the New Jersey Lawyers Assistance Program; attended counseling; and submitted negative urinalysis results; the attorney also established significant rehabilitation and remorse, including regularly donating blood, regularly attending meetings for current and former law enforcement officers and lawyers, and traveling to self-help recovery meetings to speak about his experience and recovery); In re Caratzola, 241 N.J. 490 (2020) (attorney unlawfully possessed and used Oxycodone; mitigation included the attorney's extreme youth and rehabilitative efforts); In re De Sevo, 228 N.J. 461 (2017) (an accusation and an indictment had issued against the attorney for two separate incidents involving his possession of CDS (cocaine); the attorney was admitted into the PTI program for a twelve-month period, which he successfully completed; the attorney had participated in four inpatient drug treatment programs and an intensive out-patient program, followed by a period of time living in a half-way house, and then a sober living house where he served as an active member for almost two years; in addition to attendance at more than 1,000 recovery meetings, the attorney had a sponsor and, in turn,

sponsored two men, and had been clean and sober for forty-one months; professionally, after he had been away from the practice of law for two years, a law firm hired the attorney as the director of litigation where he handled a number of cases that were resolved successfully; because the attorney had made great strides to achieve rehabilitation, had successfully and diligently returned to practice, and had moved on with his personal life, we found that a suspension would be demoralizing and could derail his rehabilitation efforts; prior admonition); In re Simone, 201 N.J. 10 (2009) (attorney was charged in Florida with possession of crack cocaine; the attorney was admitted to the Florida Drug Court Program, which was equivalent to New Jersey's PTI program; we considered that the attorney had successfully completed inpatient treatment; attended twice weekly counseling sessions after his release from inpatient treatment, and then weekly sessions; attended ten to twelve Alcoholics Anonymous meetings per week; successfully completed PTI, resulting in the dismissal of all criminal charges against him; and submitted clean drug screens to the OAE and to us; in addition, the drug court judge believed that the attorney was doing so well with his recovery, he could inspire others, and, thus, invited him to address a drug court graduation, which the attorney accepted); and In re Filomeno, 190 N.J. 579 (2007) (attorney was arrested for possession of cocaine and drug paraphernalia; numerous

mitigating circumstances considered, including the attorney's quick action to achieve rehabilitation; his attendance at 415 meetings in that process; his instrumental role in re-establishing the New Jersey Lawyers Concerned for Lawyers Program meetings in Bergen County, the fact that he acted as a "very distinctive and helpful role model," from which other participants in that program profited; his conclusion of the PTI program three months early because of his commitment and diligence in exceeding its terms; and his expression of deep regret for his conduct).

In this case, on February 4, 2020, respondent reported his arrest to the OAE and sought accelerated discipline. The OAE did not approve respondent's request, and argued that, because respondent had been arrested a second time for drug possession and previously "escaped" the presumptive three-month suspension, his actions warrant stronger disciplinary measures. Respondent does not argue that the presumptive sentence should be imposed; rather, he seeks a suspended sentence, because he requested the Schaffer accelerated discipline and attended treatment.

The OAE's argument that respondent relapsed prior to his ankle surgery is tenuous. On the other hand, the OAE's argument that respondent may not be as dedicated to recovery as he indicates is arguably supported by certain confidential records in this case. He discharged himself a day early, although

the clinical team had suggested that he extend his treatment and continue with outpatient treatment.

Respondent's argument that he has been "effectively suspended for more than seven months," because the court appointed his associate as a temporary attorney-trustee for his firm, on February 7, 2020, during respondent's time in inpatient treatment, does not constitute a mitigating factor. As the OAE argued, the appointment was borne out of necessity due to respondent's status as an inpatient.

In this case, a term of suspension is warranted. As evidenced by certain aspects of the confidential records in this case, respondent has not demonstrated the same dedication to recovery as the attorneys in the cases cited above that deviate from the presumptive three-month suspension. Respondent does appear to be attempting recovery: he has attended outpatient treatment, attends AA and NA meetings, and has taken care to ensure that his clients are protected by the appointment of his associate as attorney-trustee.

Thus, on balance, we determine that a three-month, suspended suspension is the appropriate quantum of discipline necessary to protect the public and preserve confidence in the bar. Respondent should be permitted to continue practicing law. However, because respondent has twice been arrested for possession of CDS and admits his substance abuse problem, we impose the

conditions that the OAE suggested. Specifically, respondent should provide proof of fitness to practice law, as attested to by a mental health professional approved by the OAE. Further, respondent should provide the OAE with quarterly reports documenting his continued psychological and substance abuse counseling, for a period of two years from the date of the Court's Order in this matter. Finally, respondent should be required to notify the OAE of any positive drug test results.

Member Joseph voted to impose a retroactive three-month suspension, with the same conditions. Member Singer voted to impose a censure, with the same conditions.

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: **/s/ Timothy M. Ellis**
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Nabil Nadim Kassem
Docket No. DRB 20-219

Argued: January 21, 2021

Decided: April 28, 2021

Disposition: Three-Month Suspended Suspension

| ***Members*** | Three-Month Suspension, Suspended | Three-Month Suspension, Retroactive | Censure | Recused | Did Not Participate |
|---|---|---|---|---|---|
| Clark | X | | | | |
| Boyer | X | | | | |
| Gallipoli | X | | | | |
| Hoberman | X | | | | |
| Joseph | | X | | | |
| Petrou | X | | | | |
| Rivera | X | | | | |
| Singer | | | X | | |
| Zmirich | X | | | | |
| Total: | 7 | 1 | 1 | 0 | 0 |

**/s/ Timothy M. Ellis**
Timothy M. Ellis
Acting Chief Counsel