IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2326 Disciplinary Docket No. 3
	:	
Petitioner	:	No. 187 DB 2016
	:	
v.	:	Attorney Registration No. 23699
	:	
JOSEPH JAMES O'NEILL,	:	(Philadelphia)
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 1st day of October, 2019, upon consideration of the Report and Recommendations of the Disciplinary Board, Joseph James O'Neill is suspended from the Bar of this Commonwealth for a period of five years, retroactive to December 7, 2016, and he shall comply with all the provisions of Pa.R.D.E. 217. Respondent shall pay costs to the Disciplinary Board. *See* Pa.R.D.E. 208(g).

Justice Dougherty did not participate in the consideration or decision of this matter.

A True Copy Patricia Nicola
As Of 10/01/2019

Attest: _____
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 187 DB 2016
v.	:	Attorney Registration No. 23699
JOSEPH JAMES O'NEILL Respondent	:	(Philadelphia)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

On October 20, 2017, Petitioner, Office of Disciplinary Counsel, filed a Petition for Discipline against Respondent, Joseph James O'Neill, charging him with violations of Rule of Professional Conduct 8.4(b) and Rule of Disciplinary Enforcement 203(b)(1) arising out of his criminal conviction of two counts of False Statements, in violation of 18 U.S.C. §1001. The parties stipulated to a one-time twenty-day extension to file a response, and Respondent filed an Answer to Petition for Discipline on December 7, 2017.

The Board referred the Petition to a District I Hearing Committee ("Committee") on January 10, 2018. On January 31, 2018, Committee Chair David S. Senoff, Esquire conducted a prehearing conference. A disciplinary hearing was held on March 28, 2018 before Chair Senoff and Members Katherine Missimer, Esquire and Michele Hangley, Esquire. Petitioner introduced Exhibits ODC-1 to ODC-43. Respondent, represented by counsel, testified on his own behalf and presented eleven character witnesses.

On May 29, 2018, Petitioner filed a Brief to the Committee and recommended that Respondent be disbarred.

On July 27, 2018, Respondent filed a Brief to the Committee and recommended that he be suspended for a lengthy term, as opposed to disbarment.

The Committee filed a Report on November 2, 2018, in which it concluded that Respondent violated the rules as charged in the Petition for Discipline and recommended that he be disbarred from the practice of law.

On November 21, 2018, Respondent filed a Brief on Exceptions to the Committee's Report and recommendation and requested oral argument before the Board. Respondent contends that disbarment is not warranted, that the Committee did not consider all of the mitigating factors, and requests that the Board recommend to the Court that Respondent be suspended for a lengthy term.

Petitioner filed a Brief Opposing Exceptions on December 10, 2018 and contends that the Committee did not err in its findings and conclusions and requests that the Board recommend to the Court that Respondent be disbarred.

A three-member panel of the Board held oral argument on January 4, 2019.

The Board adjudicated this matter at the meeting on January 10, 2019.

By Order dated July 3, 2019, the Court remanded this matter for the Board to consider the issue of retroactivity of discipline.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is located at the Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, P.O. Box 62485, Harrisburg, Pennsylvania 17106-2485, is invested pursuant to Pa.R.D.E. 207, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings.

2. Respondent is Joseph James O'Neill, born in 1950 and admitted to practice law in the Commonwealth of Pennsylvania in 1976. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. On January 3, 2008, Respondent was sworn-in as a judge of the Municipal Court of Philadelphia and voluntarily assumed inactive attorney status. Petition for Discipline ¶3, Respondent's Answer ¶3.

4. By Order dated December 7, 2016, following the filing by the parties of a Joint Petition to Temporarily Suspend an Attorney, the Supreme Court of Pennsylvania placed Respondent on temporary suspension from the practice of law. Petition for Discipline ¶4, Respondent's Answer ¶4.

Houdini Lock and Safe Co. v. Donegal Investment Property Management Services

5. On August 9, 2011, Houdini Lock and Safe Co. ("Houdini") filed a small claims lawsuit in the Municipal Court of Philadelphia County against Donegal

Investment Property Management Services ("Donegal"), alleging that Donegal failed to pay for services it had received from Houdini. ODC-2, ¶9.

6. Donegal was owned and managed by Samuel Kuttab, a politically active businessman, who had a relationship with Municipal Court Judge Joseph C. Waters, Jr. ODC-2, ¶5.

7. The FBI obtained court orders permitting it to monitor Waters' telephone conversations as part of its investigation into Waters' improper use of his judicial position. ODC-2, ¶11.

8. On November 16, 2011, Waters called Respondent on the telephone and had an *ex parte* conversation about ***Houdini v. Donegal*** during which Waters stated to Respondent: "Uh, you got a case this afternoon, ***Houdini v. Donegal Investments.***" ODC-2, ¶16.

9. Respondent replied, "You got me? Do I?" to which Waters stated, "[Yeah] Donegal is Sam Kuttab. He's a friend of mine, so if you can take a hard look at it..." After Waters confirmed that the defendant was his "guy," Respondent responded, "No problem." ODC-2, ¶16.

10. Respondent failed to report Waters' *ex parte* communication about ***Houdini v. Donegal*** to the Judicial Conduct Board. N.T. 58, 93, 96.

11. Respondent failed to recuse himself from hearing the case of ***Houdini v. Donegal***. N.T. 96.

12. On November 16, 2011, Respondent presided over the ***Houdini*** matter, ruled in favor of Donegal, and dismissed Houdini's claim for damages, thereby making Houdini unable to collect its fee for services rendered to Donegal. ODC-2, ¶17.

13. Waters subsequently facilitated a settlement between Houdini and Kuttab to avoid an appeal of Respondent's decision. ODC-2, ¶¶18-19.

FBI Interviews of Respondent

14. On September 19, 2012, the FBI interviewed Respondent regarding his handling of ***Houdini v. Donegal***, and specifically asked Respondent whether anyone had contacted him in advance of the hearing and asked for a favor. ODC-2, ¶23.

15. Respondent denied that anyone had contacted him and claimed he would have remembered if anyone had done so. ODC-2, ¶23; ODC-4, p. 53.

16. Respondent called the FBI on two separate occasions, September 19 and 20, 2012, requesting a call back from the FBI. ODC-2, ¶25; ODC-4, p. 53.

17. On September 20, 2012, Respondent met again with the FBI and advised them he had reviewed the ***Houdini v. Donegal*** file. ODC-4, p. 54.

18. In response to the FBI's inquiry if anyone had contacted him before he heard the case of ***Donegal*** and told him the defendant involved in the case was a friend, Respondent said that "did not happen." ODC-2 ¶26.

Federal Criminal Case

19. On March 1, 2016, Respondent was indicted in the United States District Court for the Eastern District of Pennsylvania on two counts of the criminal offense of False Statements, in violation of 18 U.S.C. §1001. ODC-1.

20. On May 26, 2016, Respondent attended a Change of Plea Hearing before the Honorable Juan R. Sanchez, (ODC-4), during which time:

a. Judge Sanchez advised Respondent that his guilty plea "could have an impact on any professional licenses that you may have and you have a law license…";

b. Respondent admitted that he "absolutely" understood that his felony conviction would have an impact;

c. Judge Sanchez asked Respondent, "Did you lie to the FBI agents on September 19, 2012 and September 20, 2012?"

d. Respondent admitted that he had lied to the FBI; and

e. Respondent entered a guilty plea to two counts of false statements.

21. On August 31, 2016, Respondent filed a Sentencing Memorandum and stated: (1) he was in counseling for anxiety, depression and alcohol abuse; (2) admitted he lied because he was afraid to admit a colleague contacted him and improperly influenced him; and (3) contended he would likely never practice law again. ODC-6.

22. On September 7, 2016, Respondent was sentenced to: (1) four years of probation on each count to run concurrently, with the first six (6) months on home confinement; (2) a $5,000 fine; (3) 200 hours of community service; and (4) a special assessment of $200. ODC-1.

23. Respondent paid his fine and special assessment, and completed 200 hours of community service. He remains on probation. N.T. 70.

Judicial Conduct Board Proceeding

24. On December 5, 2014, the Judicial Conduct Board ("JCB") served Respondent with a request for written response and on December 18, 2014, Respondent filed his written response. ODC-9; ODC-10.

25. On January 9, 2015, the JCB deposed Respondent regarding his interview with the FBI. ODC-11, p. 43.

26. On March 11, 2015, the JCB filed formal charges against Respondent and by Order dated February 2, 2016, the Court of Judicial Discipline suspended Respondent without pay. ODC-12; ODC-20.

27. On May 26, 2016, Respondent resigned from his position as a Municipal Court judge. N.T. 120.

28. On September 30, 2016, the JCB filed charges against Respondent based on his May 26, 2016 guilty plea. ODC-21.

29. On October 27, 2016, the Court of Judicial Discipline ordered Respondent removed from office and declared him ineligible to hold judicial office in the future. ODC-24.

Disciplinary Hearing

30. Respondent was a sitting judge when his criminal conduct occurred.

31. Respondent testified that he entered his guilty plea in order to avoid a lengthy trial that he could not physically and/or emotionally handle and to cooperate with the Government. N.T. 70.

32. Respondent cooperated with the United States' Attorney's Office, the Judicial Conduct Board and Office of Disciplinary Counsel.

33. Respondent credibly testified that he is remorseful for his criminal misconduct. He admitted his misconduct and owned up to his actions on multiple occasions during his testimony. N.T. 89, 99, 105, 123, 249. Respondent testified that he "absolutely" accepts responsibility for his conduct. N.T. 74, 254.

34. Respondent agreed that his removal from the bench was an appropriate sanction by the Court of Judicial Discipline for his conduct. N.T. 120.

35. Respondent presented the credible testimony of eleven character witnesses: Honorable Jerome Zaleski; Honorable Robert Blasi; Honorable Eugene Mayor; Honorable Felice Stack; Honorable Maurino Rossanese, Jr.; John Morris, Esquire, former member of the Disciplinary Board and former President Judge of the Court of Judicial Discipline; John Leonard, Esquire; Roger Harrington, Esquire; Brian McMonagle, Esquire; Alan Feldman, Esquire; and Mary McGovern, the former director of the complex litigation center of the Philadelphia Court of Common Pleas. All of the witnesses have known Respondent for decades, some as far back as forty years ago. N.T. 126-238.

36. All of the witnesses offered credible testimony that Respondent's actions were not in character with the person they knew to be a solid lawyer and a good judge, well-respected by the legal community and other judges, and a conscientious, honest and caring person.

37. While all witnesses were aware of Respondent's conviction, some witnesses were unaware of the specific details of that conduct. However, this did not change their overall opinion of Respondent's good character. N.T. 166, 168, 236-37.

38. Respondent has no history of attorney discipline or judicial discipline prior to the matters at issue.

39. Petitioner presented evidence that there was publicity coverage of Respondent's criminal matter. ODC-25 through ODC-32.

III. CONCLUSIONS OF LAW

By his conduct as set forth above, Respondent violated the following Rule of Professional Conduct and Pennsylvania Rule of Disciplinary Enforcement:

1. RPC 8.4(b) – It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

2. Pa.R.D.E. 203(b)(1) – Conviction of a crime shall be grounds for discipline.

IV. DISCUSSION

Respondent's guilty plea to two counts of false statements is conclusive evidence of the commission of a crime, and incontrovertible evidence of his professional misconduct. ***Office of Disciplinary Counsel v. Harold E. Casety, Jr.***, 512 A.2d 607, 609 (Pa. 1986). The Board's task is to determine the appropriate level of discipline for an attorney who, while serving as a judge of the Philadelphia Municipal Court, tarnished his unblemished disciplinary record by engaging in criminal conduct. Pa.R.D.E. 214(f)(1) and 203(b)(1). The Board's recommended discipline must reflect facts and circumstances unique to the case, including circumstances that are aggravating or mitigating. ***Office of Disciplinary Counsel v. Joshua Eilberg***, 441 A.2d 1193, 1195 (Pa. 1982). In order to properly assess a recommendation of discipline, the Board must "examine the underlying facts involved in the criminal charge to weigh the impact of the conviction upon the

measure of discipline." ***Office of Disciplinary Counsel v. Frank Troback***, 383 A.2d 952, 953 (Pa. 1978). A determination of the appropriate discipline must be done on a case-by-case basis with appropriate weight being given to both aggravating and mitigating factors. ***Office of Disciplinary Counsel v. Brian Preski***, 134 A.3d 1027, 1031 (Pa. 2016). Nevertheless, despite the fact-intensive nature of the endeavor, consistency is required so that similar misconduct "is not punished in radically different ways." ***Office of Disciplinary Counsel v. Robert S. Lucarini***, 472 A.2d 186, 190 (Pa. 1983).

The facts adduced at the disciplinary hearing on March 28, 2018, indicate that on November 16, 2011, Respondent, a Philadelphia Municipal Court judge, received a telephone call from Joseph Waters, who was also a Municipal Court judge. Waters informed Respondent that Respondent had the case of ***Houdini v. Donegal*** on his court list. Waters told Respondent that "Donegal is Sam Kuttab," and Kuttab was "a friend" of Waters. Waters then requested that Respondent "take a hard look at it." Respondent inquired "[w]ho was your guy? The defendant?" After Waters confirmed that "the defendant" Donegal was his "guy," Respondent replied, "No problem." ODC-2 ¶16. Respondent failed to report Waters' contact or recuse himself from handling the case of ***Houdini v. Donegal***. Later that day, Respondent presided over the case of ***Houdini v. Donegal***, and found in favor of Donegal.

Ten months later, on September 19, 2012, the FBI interviewed Respondent concerning his handling of ***Houdini v. Donegal***, at which time he denied that anyone had contacted him in advance of the case and asked for a favor. Respondent stated that he would have remembered had anyone done so. After his FBI interview, Respondent reviewed his file on the ***Houdini*** matter, called the FBI and left two messages requesting a call back. On September 20, 2012, the FBI interviewed Respondent again, at which

time in response to the FBI's inquiry if anyone had contacted him before he heard the case of Donegal and told him the defendant involved in the case was a friend, Respondent said that it did not happen.

Subsequently, Respondent was indicted and entered a plea of guilty to two counts of false statements in connection with lying to the FBI. He cooperated fully with the United States Government throughout his criminal matter and was sentenced to four years of probation on each count, with the first six months served on home confinement. Respondent fulfilled requirements of his sentence by paying a fine and special assessment and fulfilling 200 hours of community service. He remains on probation. Respondent cooperated with the Judicial Conduct Board, and by Opinion and Order dated October 27, 2016, the Court of Judicial Discipline removed Respondent from his position as a judge, and held him ineligible to serve as a judge in the future. Respondent cooperated with Petitioner by agreeing to file a joint petition for temporary suspension with the Supreme Court.

At the disciplinary hearing, Respondent testified at length and admitted that he engaged in misconduct. On multiple occasions during his testimony, Respondent admitted that he "owned" his misconduct and accepted responsibility for his actions, as demonstrated by his guilty plea. Respondent has been admitted to practice law in the Commonwealth since 1976 and has no prior history of attorney discipline, nor did he have any prior discipline as a judge before the matter at issue. Respondent demonstrated through the credible and compelling testimony of his many character witnesses, almost all of whom are former judges or experienced lawyers in the Philadelphia community, that prior to his conviction he had a very good reputation in the community as a solid lawyer, a good judge, and a conscientious, honest and caring person. These witnesses, all of

whom have known Respondent for decades, viewed Respondent's misconduct as an aberration in an otherwise unblemished career as a lawyer who had always conducted himself with integrity.

After considering these facts, the Hearing Committee recommended disbarment. Respondent filed a Brief on Exceptions and his central claim is that disbarment is not the appropriate sanction for his misconduct, in light of the relevant and applicable mitigating factors. Petitioner filed a Brief Opposing Exceptions and posits that public officials who engaged in criminal activity that breached the public trust are routinely disbarred, and directs our attention in particular to cases involving criminal conviction of members of the judiciary who were serving in that capacity at the time the offenses occurred.

For the following reasons, we conclude that a suspension of five years is appropriate. In reaching our conclusion that Respondent be suspended, we reviewed multiple prior matters involving criminal convictions of judges who were serving on the bench at the time of their misconduct.

Some years ago, in the matter of ***Office of Disciplinary Counsel v. Julius C. Melograne***, 888 A.2d 753 (Pa. 2005), the Court addressed the high standard that a judge must be held to. Melograne was a magisterial district judge who conspired with employees of the trial court to bring about unfavorable rulings for two individuals in their statutory appeals, in exchange for bribes. As a result of Melograne's actions, one individual was found guilty of driving while under suspension and another was found guilty of violating a township driveway ordinance. Melograne was convicted of conspiracy to violate civil rights and was sentenced to twenty-seven months of incarceration followed by two years of probation. Disbarment was the result in Melograne's disciplinary matter,

despite Melograne's mitigating factors of good character, lack of prior discipline, and community activities. The Court concluded that "by conspiring with court employees to affect the outcome of statutory appeals, Melograne struck at the very core of the judicial system." 888 A.2d at 757. Further, the Court observed that while there is no *per se* rule that judges who commit crimes must be disbarred, Melograne's "unique posture as a judicial official" made his criminal activity even more serious than that of an attorney for purposes of discipline. ***Id.*** The Court made Melograne's disbarment retroactive to the date of the temporary suspension.

More recently, the Court disbarred an attorney who engaged in criminal conduct while serving as a judge. In the matter of ***Office of Disciplinary Counsel v. Paul Michael Pozonsky***, 177 A.3d 830 (Pa. 2018), Pozonsky, a judge of the Court of Common Pleas of Washington County, presided over criminal trials and directed the rehabilitative disposition of drug offenders in that county's Drug Court, which he founded. Using his position as a jurist, Pozonsky directed police officers and court personnel to bring cocaine, which was evidence in the cases over which he was presiding, to an evidence locker in his courtroom. Pozonsky stole quantities of the cocaine from the locker and used it for his personal consumption, while contemporaneously presiding over criminal proceedings. Pozonsky pleaded guilty to theft by unlawful taking, obstructing administration of law, and misapplication of entrusted property and property of a government institution. He was sentenced to 1 to 23 ½ months incarceration, followed by two years of probation. The Court undertook a similar analysis to that in ***Melograne*** of Pozonsky's conduct in light of his judicial posture, examining the facts and circumstances of the criminal activity and any aggravating and mitigating factors, including lack of prior disciplinary history, expressions of remorse, numerous character letters, community service, and efforts to

address addiction health issues. After careful evaluation, the Court disbarred Pozonsky, finding that his conduct corroded fundamental adjudicatory processes and rendered him unfit to practice law.

Disbarment was imposed in ***Office of Disciplinary Counsel v. Francis Peter Eagen, III***, No. 102 DB 2003 (D. Bd. Rpt. 11/1/2004) (S. Ct. Order 2/1/2005). Eagen, a judge of the Lackawanna County Court of Common Pleas, was convicted of one count of obstructing administration of law or other governmental function after a jury trial. The circumstances of the criminal activity involved the FBI's investigation into irregularities in the appointment and administration of guardianship estates under Eagen's judicial supervision. The jury found that Eagen lied to the FBI and failed to give the FBI requested information, in his attempt to hinder the investigation. Eagen also instructed his co-conspirator not to cooperate with the state and federal investigations. Eagen was sentenced to two years of probation. The Board found two aggravating factors: Eagen's judicial capacity at the time of his misconduct violated the public trust and brought embarrassment to the bar and the courts; and, Eagen failed to appear at his disciplinary hearing. The Board recommended disbarment to the Court, which adopted the recommendation.

An appellate court judge was disbarred retroactive to the date of his temporary suspension, following his conviction for making false statements to motor vehicle insurance companies in a personal matter to obtain a monetary benefit. ***Office of Disciplinary Counsel v. Michael T. Joyce***, No. 47 DB 2009 (D. Bd. Rpt. 2/10/2012) (S. Ct. Order 6/14/2012). Joyce was convicted of mail fraud and engaging in monetary transactions in property derived from specified unlawful activity, and personally benefitted in the amount of $400,000.00. He was sentenced to 46 months of imprisonment. At the

time of his crimes, Joyce was a judge of the Superior Court of Pennsylvania. The Board considered mitigating evidence of Joyce's military service, his prior unblemished disciplinary record, and credible character evidence from three witnesses. However, the Board concluded that Joyce did not demonstrate remorse or acceptance of responsibility, which weighed against a lesser discipline than disbarment.

In the matter of ***Office of Disciplinary Counsel v. Rolf R. Larsen***, No. 19 DB 2003 (D. Bd. Rpt. 10/14/2005) (S. Ct. Order 11/30/2006), former Supreme Court Justice Larsen was convicted for criminal conspiracy to violate the Controlled Substance, Drug, Device and Cosmetic Act, after he conspired with his doctor and court employees to obtain prescription drugs in the name of other persons, in Larsen's effort to protect his privacy. Larsen was sentenced to two years of probation. Larsen put forth character evidence through the testimony of five witnesses, but the Board found the evidence unpersuasive, as several witnesses were unaware of Larsen's reputation for being truthful and law-abiding. The Board found Larsen's position as a Supreme Court Justice an aggravating factor, as well as Larsen's lack of remorse. However, the Board found that the underlying crime was not as egregious as other drug conviction matters involving attorneys, and recommended a three year period of suspension. The Court rejected this recommendation and disbarred Larsen, retroactive to the date of his temporary suspension.

In the matter of ***Office of Disciplinary Counsel v. David J. Murphy***, 188 DB 2010 (D. Bd. Rpt. 3/24/2011) (S. Ct. Order 1/30/2013), Murphy was a magisterial district judge who pleaded guilty to 64 counts of forgery, 64 counts of identity theft, one count of criminal conspiracy to commit identity theft, two counts of perjury, and 64 counts of false signature and statements in nominating petitions and papers for his re-election.

He was sentenced to four years of probation. At his disciplinary hearing, Murphy expressed remorse and presented two character witnesses, and presented evidence that his wife suffered from a debilitating neurological disease that impacted him and his children. The Board recommended a five year period of suspension, but the Court imposed disbarment retroactive to the date of Murphy's temporary suspension.

The Court disbarred a Philadelphia Municipal Court judge for his conduct in making misrepresentations and material omissions to the judicial evaluation and ratings commission as to his qualifications to be a judge. ***Office of Disciplinary Counsel v. Thomas M. Nocella***, No. 152 DB 2013 (D. Bd. Rpt. 6/5/2015) (S. Ct. Order 10/20/2015). Nocella was not charged with or convicted of a crime, but in support of its recommendation for disbarment, the Board found his conduct was extremely serious and aggravated by his position as a judge. The Board was not persuaded by Nocella's tepid expressions of remorse and recognition of wrongdoing, and found that Nocella's mitigating factors of cooperation with Petitioner and character evidence from three witnesses were not sufficiently weighty to compel a lesser sanction than disbarment.

Our review of prior cases revealed that not every criminal conviction by a judge resulted in disbarment. Two recent matters involved the same magisterial district judge. In the matter of ***Office of Disciplinary Counsel v. Kelly S. Ballentine***, No. 142 DB 2013 (S. Ct. Order 6/16/2014), Ballentine consented to a one year period of suspension, which the Court imposed. While Ballentine was serving as a magisterial district judge, she was convicted of three counts of tampering with public records after she dismissed her own summary traffic citations on two occasions. She was sentenced to pay a $500 fine on each count. In mitigation, Ballentine cooperated with Petitioner, showed remorse and acceptance of responsibility, had no prior discipline as an attorney

or judge, and demonstrated well-documented serious health issues.

In a subsequent matter, ***Office of Disciplinary Counsel v. Kelly S. Ballentine***, No. 202 DB 2016 (D. Bd. Rpt. 6/7/2018) (S. Ct. Order 8/6/2018), Ballentine was convicted of offering taxable goods for sale without possession of a valid sales tax license. She was sentenced to pay fines and costs. In addition, Ballentine failed to timely file her federal and state individual tax returns, although there were no criminal charges connected with this conduct. The Board determined that standing alone, Ballentine's criminal activity would not merit a lengthy suspension, but her disciplinary matter was aggravated by her status as a judicial officer at the time of her misconduct, her violation of judicial probation related to her prior conviction, and her prior disciplinary record of a one year suspension in the 2014 matter. The Board pointed out that at the same time Ballentine violated her own tax obligations, she presided over multiple cases in her judicial capacity in which the defendant was charged with doing business without a license or failing to pay tax on the sale of taxable goods. Her judicial status at the time of her criminal conduct undermined the public's confidence in the judicial system. In mitigation, Ballentine was repentant and accepted full responsibility for her actions. Furthermore, the Board found that Ballentine's good reputation in her community had not been diminished by her actions, in part because of her long-standing history of community service. Based on the totality of the record, the Board recommended a two year period of suspension, which the Court imposed.

Although Petitioner's arguments seem to suggest it is a foregone conclusion that a judge must be disbarred for criminal conduct, we reject such a conclusion, being mindful of our responsibility to review each case on the totality of the facts presented, both aggravating and mitigating. ***Preski***, 134 A.3d at 1031. It is without question an

aggravating factor that at the time of his criminal conduct, Respondent held a position of public trust as an elected Philadelphia Municipal Court judge, but this aggravating factor is not dispositive as to the question of appropriate discipline. We cannot *per se* disbar all judges for criminal convictions, as such would be contrary to established precedent. ***Lucarini***,

In determining the proper measure of discipline, which is not intended to be punitive in nature, the Board considers whether the discipline imposed will fulfill the principal purpose of the disciplinary system, which is the protection of the public, the preservation of the integrity of the courts, and the deterrence of unethical conduct. ***Office of Disciplinary Counsel v Akim Czmus***, 889 A.2d 1197, 1203 (Pa. 2005).

Bearing in mind the case law, the Board considered disbarment as an appropriate disciplinary sanction, ***Melograne***, 888 A.2d at 757, but we conclude that it is not warranted in this matter. When compared to the cited disbarment cases, we find that Respondent's actions are less egregious than other judges who have been disbarred. In the ***Eagen*** matter, Eagen lied to the FBI and failed to turn over requested information, in addition to urging his co-conspirator not to cooperate with authorities. Eagen's criminal acts were meant to hinder the FBI's investigation of irregularities of guardianship estates under his judicial supervision. Eagen's failure to appear at his own disciplinary hearing aggravated the serious underlying acts and warranted disbarment. Herein, Respondent cooperated with Petitioner, appeared before the Committee, testified and demonstrated remorse and good character. This is wholly different than Eagen.

Respondent's criminal activity is less serious than what occurred in the ***Pozonsky*** matter, wherein the Court concluded that Pozonsky used his judicial capacity in running the drug court in his county to steal cocaine and use it for personal

consumption. Pozonsky was able to effectuate his crime because of his power as a judge, without which he would not have been able to direct police where to store the cocaine, nor would he have had access to it. Likewise, Respondent did not conspire with court employees to fix outcomes of cases in exchange for bribes, as in ***Melograne***, or conspire with court employees and others to obtain prescription medications, as in ***Larsen***.

Respondent did not engage in mail fraud through a fake insurance claim that benefitted him in excess of $400,000, as in ***Joyce***, did not engage in identity theft, perjury and criminal conspiracy by forging signatures on his nominating petition for re-election, as occurred in ***Murphy***, and Respondent did not make misrepresentations and material omissions concerning his qualifications to the judicial evaluation and ratings commission, as in ***Nocella***.

Respondent's criminal conduct related to his false statements on two occasions to the FBI; he was not charged with crimes related to case fixing or conspiracy. There is no evidence that Respondent profited or obtained personal benefit for his acts, as did many of the judges in the above-cited matters. In combination with significant competent mitigating evidence, comprised of compelling character testimony from former judges and respected members of the bar, who have known Respondent for many years; expressions of remorse; lack of prior discipline during a legal career that commenced in 1976; and cooperation with Petitioner in filing a joint petition for temporary suspension, which demonstrated Respondent's understanding of the seriousness of the matter, as well as his earlier cooperation with the Government and the Judicial Conduct Board, we conclude that in this particular matter, a suspension of five years is warranted. Respondent engaged in serious and regrettable criminal conduct, and acknowledged that his actions warrant at least a lengthy suspension. Respondent is sixty-eight years of age.

A five year period of suspension is not a trivial sanction, and will serve to preserve the integrity of the profession.

We further recommend that the suspension be made retroactive to the date of Respondent's temporary suspension. Upon review, this recommendation is consistent with prior matters cited above, considering that Respondent timely reported his conviction to Petitioner and cooperated by entering into a joint petition for temporary suspension. We recognize that Respondent has been removed from the practice of law for nearly three years; as such, a prospective suspension of five years would be unfairly harsh and akin to disbarment.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that Respondent, Joseph James O'Neill, be Suspended for a period of five years from the practice of law in this Commonwealth, retroactive to December 7, 2016, the date of Respondent's temporary suspension.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

By: _____
Stefanie B. Porges, MD, Member

Date: 8/5/2019