IN RE: MICHAEL D. O'NEIL

NO. BD-95-069

JUDGMENT OF DISBARMENT

This matter came before the Court, Lynch, J., on an Information and Record of Proceedings and the Vote and Recommendation of the Board of Bar Overseers filed by the Board on March 22, 1999.

After hearing and upon consideration thereof, it is ORDERED and ADJUDGED that Michael D. O'Neil is hereby disbarred from the practice of law in the Commonwealth retroactive to September 29, 1995, the date of his temporary suspension, and the lawyer's name is forthwith stricken from the Roll of Attorneys.

By the Court (Lynch, J.),

Entered: April 20, 1999

REPORT OF THE HEARING COMMITTEE

Bar Counsel filed a Petition for Discipline on February 6, 1996, against the respondent, Michael D. O'Neil, charging that the respondent had been convicted on January 9, 1996, in the United States District Court for the District of Massachusetts of one count of conspiracy, twenty counts of unlawful participation by a credit union official, and one count of bank fraud, and that his conviction established that he violated Canon One, DR 1-102(A)(4) (conduct involving dishonesty, deceit or misrepresentation), (5) (conduct prejudicial to the administration of justice), and (6) (conduct adversely reflecting on fitness to practice law).

The respondent filed an answer on February 26, 1996, admitting the conviction and requesting a hearing on mitigation. In September 1996, the respondent requested deferment due to his incarceration, which motion was allowed. In late April 1998, the respondent was released and the matter was scheduled for hearing.

The hearings were held on July 8, 1998 and July 22, 1998. Bar Counsel presented no witnesses and the respondent testified on his own behalf. Seven exhibits were received into evidence.

I. Findings of Fact

1. The respondent was admitted to the Massachusetts bar on November 19, 1968. (Ans. ¶ 2).

2. On September 29, 1995, the respondent waived indictment, admitted to sufficient facts, entered a plea of guilty and was convicted in the United States District Court for the District of Massachusetts of one count of conspiracy in violation of 18 U.S.C. § 371, twenty-one counts of unlawful participation by a credit union official in violation of 18 U.S.C. § 1006, and one count of bank fraud in violation of 18 U.S.C. § 1334 in United States v. O'Neil, No. CR 95-10265-EFH .(Ans. ¶ 3; Ex. 1, 2, 5). The factual background and the facts underlying the conviction are summarized below and are taken primarily from the testimony at the hearing and the information (Ex. 1) to which the respondent pleaded guilty (Ex. 3). The respondent is precluded from disputing material facts of the crimes to which he pleaded guilty. *Matter of Concemi*, 422 Mass. 326, 328-329 (1996).

3. Following his admission to the bar, the respondent returned to his hometown, Hyannis and went into general practice (Ex. 7; Tr. 2:19).

4. The respondent first became involved in real estate projects in 1978, and over the next ten years, he was involved in 30 to 35 real estate projects worth $35,000,000 to $40,000,000 with various partners (Tr. 2:22-23).

5. In the late 1970's or early 1980's, the respondent met Richard Mangone who had established a credit union at Polaroid and later at Digital (Tr. 2:27; Ex. I, ¶ 5). Mangone invited the respondent to become involved in setting up a credit union on Cape Cod, which the respondent saw as a "good opportunity" for his law practice, since real estate was a "large part of everybody's practice" on the Cape, and he had no direct connection with any banking institution at that time (Tr. 2:28-29).

6. On September 13, 1982, the Barnstable Community Federal Credit Union ("BCCU") was established (Ex. 1, ¶ 1). The respondent was a co-founder along with Mangone and James K. Smith, who was a builder and developer (Ex. 1, ¶¶ 3-5). The respondent was a member of the Board of Directors of BCCU throughout its existence, serving as Chair from January 1984 to October 1987, and as Vice-Chair from October 1987 to March 1991 (Ex. 1, ¶ 3; Tr. 2:63). Bruce Harris, a real estate investor and a partner with the respondent in some of the real estate projects which received loans from BCCU and were referenced in the information, became a member of the Board of Directors of BCCU in 1987, and served as Chair of the Board from October 1987 until October 1990 (Ex. 1, ¶ 8).

7. The dollar amount of loans to any one borrower and insider loans were limited by National Credit Union Association ("NCUA") regulations and BCCU internal policies (Ex. 1, ¶¶ 14, 22). In addition, BCCU's policies provided for a usual and customary loan limit of 80% of the lesser of either the appraised value or the purchase price of the property (Ex. 1, ¶ 17).

8. Prior to 1987, the respondent handled closings for BCCU (Tr. 2:36). In 1987, the respondent was informed that new federal regulations limited directors' handling of closings for the credit union (Tr. 2:36). The respondent at first offered to resign as director, so that he could continue to do closings for BCCU (Tr. 2:36). He was then informed by Mangone that legal counsel in Washington and Attorney Robert Cohen, who was legal counsel for the credit union, that which others in his office to continue to do closing work for BCCU (Tr. 2:37, 60). After that time, other attorneys in the respondent's office handled BCCU closings on their own; in addition, Michael Houlihan, an attorney working part-time for the respondent, handled BCCU closings, for which he was paid $50 per closing, with the remainder of the fee paid to the respondent (Tr. 2:36-37, 59-60). This payment arrangement was approved by the BCCU Board of Directors and Attorney Cohen (Tr. 2:60).

9. Between December 1985 and March 1991, the respondent engaged in a criminal conspiracy, 18 U.S.C. § 371, with Mangone, Smith, Harris, Cohen, and others to defraud BCCU, the NCUA and BCCU's auditors, by knowingly receiving profit through loans from BCCU, by knowingly making false entries in books, reports and statements, and by knowingly executing a scheme to defraud and obtain funds owned by BCCU by means of false and fraudulent pretenses (Ex. 1, ¶ 9).

10. The objectives of the conspiracy were to enable the co-conspirators to use their control of BCCU to obtain financing for, dispose of, and refinance their own real estate investments; to fraudulently evade regulations which would have prevented them from obtaining such loans if the true identity of the beneficial owners had been disclosed; to disguise the extent of self-dealing by BCCU insiders to delay NCUA from taking action to limit such loans; and to obtain financial benefits, including cash payments and tax deductions through real estate investments and loans from BCCU (Ex. 1, ¶ 10).

11. The conspiracy was carried out through the use of:

(a). sham board minutes which concealed the extent of BCCU's lending to "insiders" and the concentration of BCCU's lending to a small number of borrowers, by hiding the identities of the beneficial owners of the properties, the identities of the persons receiving loan proceeds and identities of the sellers of the mortgaged properties, as well as omitting the fact that the loans were in excess of the 80% limit on the lesser of the purchase price or appraised value (Ex. 1, ¶¶ 11 - 17). The respondent also signed minutes which purported to reflect strict controls on insider loans, for the purpose of convincing NCUA and the auditors that BCCU observed and enforced strict rules regarding such loans and to conceal from them the true nature of the loans being made (Ex. 1, ¶¶ 14-15); and

(b) dozens of insider loans involving millions of dollars to the co-conspirators and their partners to finance real estate investments for their own personal gain, which were approved by the directors and

which concealed, through the use of nominee trusts, the insiders' interest in the loans (Ex. 1, ¶¶ 19-29). The respondent and his associate Harris presided over Board meetings approving loans to nominee trusts in which one or more of the co-conspirators owned beneficial interests (Ex. 1, ¶ 27) and signed minutes of meetings which concealed the fact that a number of loans to nominee trusts were in fact loans to themselves or their co-conspirators (Ex. 1, ¶ 19).

11. The respondent, between 1986 and 1991, fraudulently obtained twenty-one loans from BCCU through nominee trusts by concealing his ownership interest in the trusts or his interest in the transactions involving those trusts (Ex. 1, ¶¶ 30-31, 122-127, 130-147).

12. The respondent's involvement included not only loans in transactions which he had a personal interest, which total more than eight million dollars (Ex. 1), but also loans to his co-conspirators (Ex. 1).

13. Not only were these loans to insiders, but in most instances they were in excess of the usual and customary limit of 80% of the lesser of the purchase price or the appraised value, and this fact was also concealed from BCCU (see, e.g., Ex. 1, ¶¶ 51-56, 77, 79, 101-103, 110, 132-134, 139-141).

14. In 1990, when NCUA questioned whether the respondent had an interest in certain property for which BCCU had made a second mortgage loan, the respondent prepared a letter for the BCCU file falsely reporting that he had sole his interest in the property prior to the approval of the loan (Ex. 1, ¶¶ 43-47).

15. The respondent personally received a portion of the proceeds of several of the loans (Ex. 1, ¶¶ 49, 60, 96-97, 137, 144).

16. In another case, the respondent obtained a loan for a trust which did not exist (Ex. 1, ¶ 58).

17. The respondent evaded BCCU requirements in other ways. In one instance, the purported purchaser of property from the respondent and Harris and a poor credit history, and the manager of BCCU informed them a co-signer was required (Ex. 1, ¶ 85). The next day after they provided a co-signed mortgage, the respondent and Harris then instructed BCCU's manager to sign a release for the co-signer, which she did (Ex. 1, ¶ 86).

18. In some cases, the respondent (or his firm) were responsible for the receipt and disbursement of proceeds of the loans to himself, as well as to other co-conspirators (Ex. 1, ¶¶ 97, 135-137, 141-144). With respect to the Damelio loans, the respondent and Harris advised Thomas P. Damelio to acquire property in Osterville, assuring him that he could obtain 100% financing from BCCU (Ex. 1, ¶¶ 131-132). On or about November 10, 1989, Damelio purchased the property for $290,000, according to the settlement statement, and BCCU granted a first mortgage loan in the amount of $400,000, advancing the $290,000 for the purchase at that time (Ex. 1, ¶¶ 133-134). That same day, the respondent deposited the loan proceeds of $290,000 in his law office real estate account and wrote disbursement checks from that account to the previous mortgage holders on the property, totaling $225,742.30 (Ex. 1, ¶ 135). From the remainder of the proceeds, the respondent wrote a check to Damelio in the amount of $538.24, and another check payable to Radio Realty Trust in the amount of $52,872, which the respondent then endorsed, on November 14, 1989, as trustee of Radio Realty Trust, and deposited in a BCCU account in the name of the trust (Ex. 1, ¶¶ 136-137). The respondent and Harris on same day, or shortly thereafter, obtained two BCCU Treasurer's Checks, each in the amount of $21,795, one payable to the respondent and the other to Harris (Ex. 1, ¶ 137). Subsequently in the spring of 1990, the respondent and Harris advised Damelio to purchase a second property, which they had learned BCCU had purchased at foreclosure for $60,000, assuring him again, that he could obtain 100% financing from BCCU (Ex. 1, ¶ 139-140). Damelio attended a closing at the respondent's office on or about August 22, 1990, and was informed that the purchase price was $90,000 (Ex. 1, ¶ 141). On that same date, the respondent and Harris, as directors of BCCU, caused BCCU to grant Damelio a construction loan in the amount of $295,000, of which $ 100,000 was advanced on that date (Ex. 1, ¶ 142), which the respondent deposited into his law office real estate account (Ex. 1, ¶ 143). The respondent, on that same date wrote a check for $60,000 to BCCU (the amount BCCU paid for the property at foreclosure) and two checks, each for $15,000, one payable to the respondent and the other to Harris' wife (Ex. 1, ¶ 143-144).

19. With respect to the Blacksmith Shop Realty Trust transactions, the respondent acted as escrow agent for the closing of the transaction (Ex. 1, ¶ 104), and transferred "excess" loan proceeds (the loan was an amount substantially in excess of the purchase price due to the use of a fake purchase and sale agreement (Ex. 1, ¶ 101-103) to Smith , one of the other beneficiaries, who then distributed $20,000 to each of the five beneficiaries, of whom the respondent was one, a total of $100,000 of the excess (Ex. 1, ¶105). Subsequently, the trust sold the property, the loan from BCCU was repaid and profits were paid to each of the partners: the respondent received $50,000 (Ex. 1, ¶ 109).

20. On September 29, 1994, the same day that the respondent pleaded guilty, he voluntarily agreed to a temporary suspension from the practice of law pending the outcome of disciplinary proceedings (Ans. ¶ 2; Tr. 2:47-48).

21. On January 9, 1996, the respondent was sentenced to thirty-seven months imprisonment followed by thirty-six months of supervised probation and a special assessment of $50 per count for a total of $1,150.00 (Ans. ¶ 3; Ex. 4, 5).

22. During his incarceration, the respondent underwent six hundred hours of treatment for alcoholism (Tr. 2:50). As a result of this treatment, the respondent was released approximately six months early (Tr. 2:55). He presently attends AA meetings regularly, once of twice a week (Tr. 2:55).

III. Conclusions of Law

23. Conspiracy under 18 U.S.C. § 371 is defined as "two or more persons conspire either to commit an offense against the United States or to defraud the- United States, or any agency thereof in any manner or for any purpose, and one or more of such, persons do any act to effect the object of the conspiracy..... 18 U.S.C. § 371.

24. Bank fraud under 18 U.S.C. § 1344 is defined as "Whoever knowingly executes, or attempts to execute, a scheme or artifice -- (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises..... 18 U.S.C. § 1344.

25. Unlawful participation by a credit union official under 18 U.S.C. § 1006 is defined as "Whoever, being an officer agent or employee of or connected in any capacity with ...any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution, the accounts of which are insured by the Federal Deposit Insurance Corporation, or by the National Credit Union Administration Board, ... with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bills of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan commission, contract, or any other act of any such corporation, institution, or association..... 18 U.S.C. § 1006.

26. S.J.C. Rule 4:01, § 12(l), as in effect at the time of the respondent's plea, provided that an admission to sufficient facts resulting in a plea of guilty, constituted a conviction for purposes of that rule. Moreover, conviction of a crime conclusively establishes the commission of the elements of the crime for purposes of a disciplinary proceeding. Matter of Concemi 422 Mass. at 328. As each of the crimes for which the which the respondent was convicted require intent, we reject the respondent's claim that his misconduct resulted from inattention or negligence rather than intent.

27. The respondent's conviction of one count of conspiracy in violation of 18 U.S.C. § 371, twenty-one counts of unlawful participation by a credit union official in violation of 18 U.S.C. § 1006, and one count

of bank fraud in violation of 18 U.S.C. § 1334 constitutes conviction of "serious crime[s]" within the meaning of S.J.C. Rule 4:01, § 12, and a violation of Canon One, DR 1-102(A) (4) (conduct involving fraud, dishonesty, deceit or misrepresentation) and (6) (conduct reflecting adversely on the lawyer's fitness to practice law).

IV. Factors in Aggravation or Mitigation

28. The respondent has no disciplinary history, he had an excellent reputation in his community and was very active in civic affairs (Ex. 7; Tr. 2:23-25); however, these findings constitute 'typical" as opposed to "special" mitigation, and have little weight in determining the level of discipline warranted. Matter of Alter 389 Mass. 153, 3 Mass. Att'y Disc. R. 3, 7 (1983); Matter of Norris,

29. The respondent's criminal conduct was motivated by a desire for personal gain. *ABA Standards for Imposing Lawyer Sanctions §* 9.22(b) (as amended, 1990), reprinted in Professional Responsibility Standards, Rules And Statutes (West, *1995) ('Standards").*

30. The fact that the respondent was an experienced attorney is a factor in aggravation. *Standards, §* 9.22(i).

31. The respondent claims mitigation due to his alcohol dependency at the time of the misconduct. Assuming his alcoholism was active at the time of the misconduct, we find that the respondent has not demonstrated the necessary causal connection between his alcoholism and his misconduct. See Matter of Luongo, 9 Mass. Att'y Disc. 199 (1993) (despite evidence of treatment, no mitigation where alcoholism was not a cause of disciplinary violations); Matter of Jutras, 8 Mass. Att'y Disc. R. 119 (1992) (failure to establish either the existence of substance abuse problem or causal relationship misconduct and claimed condition); Matter of Ward, 8 Mass. Att'y Disc. R. 257 (1991) (no evidence of causal connection between alcoholism and misconduct). The respondent testified that he felt inattention and negligent disregard due to alcoholism caused the misconduct. We find this characterization (1) inconsistent with the nature of the misconduct, which involved complex schemes to avoid disclosure of loans to and profit by insiders, which by their nature necessitated planning, detail and attention, and (2) contrary to the elements of the crimes to which the respondent pleaded guilty. See Matter of Concemi, 422 Mass. at 328-329.

32. The acts which formed the basis of the conviction were committed in connection with the respondent's practice of law, a factor to be considered in aggravation. 422 Mass. at 331. We reject the respondent's argument that because his misconduct was not "directly" connected to his practice of law, the sanction should be lessened. The standard for application of the "private-citizen" exception is whether the misconduct is "purely private." Matter of Labovitz, 425 Mass. 1008, n.2 (1997) (rejection of private citizen exception and order of disbarment for conviction of fraud in connection with personal bankruptcy and bankruptcy of various corporations owned or controlled by the respondent). As set forth above, the respondent's misconduct was not purely private, it was intertwined with his law practice. As he testified, the respondent saw his position as a director of the credit union, as an opportunity to further his law practice. Furthermore, his knowledge and experience as an attorney practicing in the area of real estate certainly facilitated his ability to participate in, if not develop, the complex schemes by which BCCU was defrauded. In some instances, these schemes were directly related to his law practice. The checks for the proceeds of some of the loans, such as the Damelio loans, were processed through his law office real estate account. In addition, the respondent conducted a number of closings for the credit union up until 1987, when the regulations changed, and thereafter the closings were conducted by an attorney, with whom the respondent's firm shared space. The attorney who conducted the closings received $50 per closing and the respondent received the remainder. Under these circumstances, the respondent was acting as an attorney for the credit union in loan transactions some of which formed the basis for his conviction for defrauding the credit union. Given these circumstances, we find that the respondent's misconduct was not "purely private," and that the "private-citizen ' exception here, as in Labovitz, must be rejected.

V. Recommendation for Discipline

The parties acknowledge that the "usual sanction" for a felony conviction for acts committed in

connection with the practice of law is disbarment or indefinite suspension. Matter of Concemi, 422 Mass. at 329, 331. They disagree as to which of those two sanctions is warranted here, with Bar Counsel seeking disbarment and the respondent seeking an indefinite suspension.

The recent case of Matter of Kennedy, 428 Mass. 156 (1998) addressed the issue of whether the appropriate sanction for an attorney's felony conviction was disbarment or indefinite suspension and the factors to be considered in choosing between the two. The Court reiterated that "special mitigating circumstance[s]" were required to "justify deviation from the usual and presumptive sanction of disbarment following conviction of a crime," noting that it had previously rejected reputation in the community, remorse, and cooperation with the government as constituting sufficient "special mitigating circumstances" to warrant an indefinite suspension rather than disbarment. 428 Mass. at 158, quoting Concemi, 422 Mass. at 330. The Court distinguished Matter of Nickerson, 422 Mass. 370 (1996), in which the attorney's felony conviction resulted in an indefinite suspension, from the other cases resulting in disbarment, primarily on the ground that Nickerson was a salaried employee, who was "not involved in shaping policy at the firm and did not directly profit from [the] wrongdoing." 428 Mass. at 159. See also Matter of Schwartz, 12 Mass. Att'y Disc. 521 (1996).

Similarly, in this case the respondent has failed to prove any special mitigating circumstances which would warrant the lesser sanction of indefinite suspension. The respondent's misconduct was intentional and knowing, and was motivated by personal gain. Furthermore, his actions were intertwined with his practice of law. Unlike Nickerson, he was involved in shaping policy with respect to his law firm and his personal business interests, and directly profited from his misconduct both through payment of closing fees, excess loan proceeds, and profits from real estate transactions. The fact that he pleaded guilty is not a factor warranting a reduction in the sanction. See Kennedy, 428 Mass. at 158.

Our conclusion is further supported by Matter of Stoller, BD-97-009, a case involving facts similar to this case in which the sanction was disbarment. In that case, the attorney was the President, CEO and a director of a bank, and in his position as loan officer, he caused the bank to make a number of loans to several trusts in which he, and in one case his son, held undisclosed beneficial interests. He was convicted of nine counts of misapplication by a bank officer.

Based on applicable case law, we conclude that there is no basis for recommending the lesser sanction of indefinite suspension, and we therefore recommend that the respondent be disbarred, retroactive to September 29, 1995, the date of the respondent's temporary suspension.

Respectfully submitted,
By the Hearing Committee,

Anthony M. Doniger, Chair

Edward M. Sullivan, Jr., Member

Jessica Block, Member