SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-105
District Docket No. XIV-00-0002E

IN THE MATTER OF :
:
EARL S. DAVID :
:
AN ATTORNEY AT LAW :

Decision

Argued: June 17, 2004

Decided: July 28, 2004

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), based on respondent's fifteen-month suspension in New York for, among other things, aiding and abetting securities fraud, and money laundering.

Respondent was admitted to the New Jersey and the New York bars in 1988. He has no history of discipline.

In December 1999, a federal district judge in Nevada informed New York disciplinary authorities that respondent had testified as a prosecution witness in a racketeering and securities fraud trial, after receiving immunity from prosecution, during which he conceded his involvement in acts of securities fraud and money laundering. That matter concerned the issuance of millions of shares of stock in Teletek, Inc., a public company engaged in the marketing of international calling services and pre-paid calling cards, the bribery of stockbrokers to sell Teletek's stock to customers, and money laundering.

On October 11, 2002, the New York disciplinary authorities issued a Statement of Charges (formal complaint), charging respondent with engaging in conduct that adversely reflects on his honesty, trustworthiness, or fitness as a lawyer [New York Disciplinary Rule 1-102(a)(3) – comparable to New Jersey RPC 8.4(b)]; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation [New York Disciplinary Rule 1-102(a)(4) – comparable to New Jersey RPC 8.4(c)]; and issuing trust account checks made payable to "cash" [New York Disciplinary Rule 9-102(e) – comparable to New Jersey RPC 1.15(d)].

A hearing was conducted, and the referee issued a report on May 7, 2003, finding respondent guilty of the charges and recommending that he be suspended from the practice of law for a

period of fifteen months. The matter proceeded to a hearing panel, which issued its decision on September 12, 2003, affirming the referee's findings of fact and conclusions of law, but increasing the recommended sanction to an eighteen-month suspension. Upon final review, the Supreme Court of New York, Appellate Division, First Judicial Department, determined that respondent should be suspended for a period of fifteen months, effective March 1, 2004.

The determination of the hearing panel set forth the underlying facts:

> In late 1991, Respondent was introduced to Steve Wertman, a stock promoter, through a childhood friend. Respondent, who had no business experience at that time, was impressed by Wertman's knowledge of securities and his dealings with public companies. In 1992, Wertman asked Respondent to be his escrow agent for various business activities, and Respondent agreed. On February 25, 1992, Respondent opened a trust brokerage account at Union Securities in Vancouver, British Columbia, and falsely listed his grandparents' address in Canada as his own on the account application. On February 28, 1992, Respondent signed an agreement with Wertman to be his escrow agent.
>
> Respondent also signed two agreements, dated February 26, 1992, and March 10, 1992, with Michael Swan, President of Teletek, Inc. ("Teletek"), to provide software programming and consulting services to Teletek, which Respondent admitted were neither provided nor intended to be provided. In return, Teletek agreed to place 2 million shares of Teletek

stock in the Union Securities account in Respondent's name as the escrow agent for Steven Wertman.

After Respondent had entered into the aforementioned agreements with Teletek, Wertman suddenly became hostile towards Respondent and informed Respondent of his involvement with the Russian mafia in the 1980s and his participation in many violent crimes, including murder. Wertman warned Respondent that he must listen to whatever Wertman told him.

Pursuant to Wertman's instructions, Respondent engaged in criminal activity for a period of several months, from March to June or July of 1992. Respondent sold the Teletek stock in the Union Securities account and placed the proceeds in the same account. He then transferred monies from the Union Securities brokerage account into Citibank and Bank of New York escrow accounts that he had opened in New York, New York. On approximately 15 to 20 separate occasions, he withdrew various sums of cash of less than $10,000 from the escrow accounts, and gave the cash to Wertman or sent the cash to various brokers in Florida via Federal Express by placing the cash inside of magazines. By withdrawing less than $10,000 at a time, the banks were not required to file Currency Transaction Reports to the government.

In return for Respondent's participation in his fraudulent scheme, Wertman paid Respondent $10,000, in addition to $2,000 for expenses incurred while traveling to Canada to open the Union Securities account. Respondent had no further relationship with Wertman after the end of 1992.

Over four years later, Bruce Bettigole, of the U.S. Attorney's Office, contacted

> Respondent in September 1996 about Teletek and Wertman. Respondent then contacted Wertman about Bettigole's inquiries, and Wertman insisted that no criminal activity had taken place, that Teletek was a legitimate company, and that Respondent should not mention his name to the government. Wertman also directed Respondent to claim that all Teletek-related documents in Respondent's possession had been destroyed in a basement flood in Respondent's home in 1992 if the government asked for the disclosure of such documents, although no such destruction had actually taken place.
>
> After his conversation with Wertman, Respondent retained counsel, cooperated with the government, and turned over all of the documents related to the fraudulent scheme, which he had preserved. Respondent entered into a cooperation agreement with the government and was granted immunity in exchange for several debriefings with prosecutors and the staff of the Securities and Exchange Commission ("SEC") and for his testimonies in grand jury and trial proceedings. Over the course of four years, Respondent testified before two grand juries and at two criminal trials. Pursuant to the SEC's Order Making Findings and Imposing Remedial Sanctions as to Earl Seth David, Matter of Wertman et al., File No.3-9334, Release No. 43173, dated August 18, 2000, Respondent also paid $10,000 in restitution and $5,000 in penalties to the SEC, and is barred from participating in any offering of penny stock. (Citations omitted).
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> [OAEbEx.B2 to 4.][1]

In determining to impose only a fifteen-month suspension, the Appellate Division noted numerous mitigating factors:

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[1]OAEb refers to the brief submitted by the OAE.

While the seriousness of the criminal conduct to which respondent has admitted demands a penalty more severe than the three-month suspension suggested by his counsel, the presence of substantial mitigating factors persuades us to impose a sanction less severe than the discipline that might otherwise have been imposed. Respondent's wrongdoing occurred during a brief period in 1992, when he was a relatively new attorney and inexperienced in business matters. Respondent, who had no expertise in securities law, was apparently a peripheral figure in the criminal scheme in question. His involvement in the scheme, from which he realized only a modest benefit, appears to have been motivated in part by a threat made against him by the acquaintance who solicited his participation. (Citation omitted). At the time of his wrongdoing, respondent was suffering from depression due to a broken marriage engagement and the serious injury of his father in an automobile accident. Moreover, respondent ultimately cooperated extensively with the government's prosecution of others involved in the scheme. A letter from the lead prosecutor in the criminal cases in which respondent cooperated states that '[his] cooperation proved critical to the overall success of the investigation and prosecution,' which led to the felony convictions of 39 defendants.

Most importantly, we are impressed by respondent's evident rehabilitation in the more than 10 years since the misconduct took place, and by his expressions of remorse for his wrongdoing. During the intervening decade, respondent, whose practice is in the field of immigration law, has maintained an unblemished disciplinary record, and he submits letters from his vulnerable clients that attest to his dedication in representing them. We also take note of respondent's pro bono representation of clients who lack the financial means to pay for counsel, and of

> his other acts of community service. In view of all the circumstances, we conclude that the appropriate sanction is to suspend respondent from the practice of law for a period of 15 months.
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> [OAEbEx.C3 to 5.]

Respondent acknowledged that he committed crimes in connection with Teletek. He conceded that, in concealing cash in magazines, which he sent via Federal Express to stockbrokers, he knew the act to be a crime. Respondent also acknowledged that he aided and abetted securities fraud, that he helped launder money, and that he helped Wertman avoid the filing of currency reports required by withdrawals of $10,000 in cash or more from bank accounts.

Furthermore, respondent conceded that he falsely filed forms with the Securities and Exchange Commission in which he stated that he had received two million shares of Teletek's stock in consideration for providing the firm with consulting services and software programming, for which he was unqualified. Respondent also admitted that he helped Teletek to commit crimes and that he was motivated by the prospect of potential financial opportunities. His conduct violated RPC 8.4(b) and (c) in addition to RPC 1.15(d). For his misconduct, respondent received a fifteen-month suspension in New York.

Upon a _de novo_ review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Reciprocal disciplinary proceedings in New Jersey are governed by _R._ 1:20-14(a)(4), which directs that

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the misconduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E).

As noted above, respondent conceded his repeated criminal acts in connection with Teletek. There need not be a criminal

conviction for a finding of a violation of RPC 8.4(b). See In re McEnroe, 172 N.J. 324 (2002).

The level of discipline imposed in disciplinary matters based on the commission of a crime depends on a number of 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, supra, 118 N.J. at 445-446. Discipline is imposed even though an attorney's offense was not related to the practice of law. In re Kinnear, 105 N.J. 391 (1987).

The OAE cited several cases in support of the proposition that, in New Jersey, misconduct of this nature generally resulted in suspensions of one to three years in duration, depending on the underlying circumstances and the mitigation presented. The OAE argued that the law and facts of this case require the imposition of the same discipline imposed in New York, a fifteen-month suspension.

In re Chung, 147 N.J. 559 (1997), involved an attorney who pleaded guilty to a federal information charging him with receiving more than $10,000 in cash in a transaction and failing to file the report of the transaction required by law. A client retained Chung to represent him in the purchase of a restaurant.

The client delivered more than $100,000 in cash to Chung in connection with this sale. Thereafter, Chung made fifteen cash deposits of less than $10,000 each, into five different escrow accounts at five different banks. The deposit slips used for the transactions did not have any notation as to the source or purpose of the cash. Neither Chung nor his law firm filed any Forms 8300 (Report of Cash Payments over $10,000 Received in a Trade or Business) with the Internal Revenue Service. Furthermore, there were no Currency Transaction Reports filed by any bank, relative to the cash deposits into the bank accounts of Chung's law firm. In recommending the imposition of an eighteen-month suspension, which was adopted by the Court, we took note of Chung's seventeen-year career without any prior incidents, his performance of legal services to the poor and community organizations for little or no compensation, the absence of greed[2], and his son's serious neurological problems.

In In re Khoudary, 167 N.J. 593 (2001), an attorney was convicted of structuring a financial transaction designed to evade federal reporting requirements. Khoudary involved four separate checks negotiated over a three-month period. In addition, Khoudary expected to receive some remuneration for his conduct. He received a two-year suspension.

[2]Chung did, however, expect to receive more work from the client he was assisting.

Also instructive is In re DeSantis, 171 N.J. 142 (2002), where the attorney pleaded guilty to obstruction of justice. DeSantis gave false testimony and engaged in a cover-up to obstruct an SEC investigation of insider trading, in which he was involved. Although DeSantis' criminal activity did not involve his law practice, it extended over a substantial period of time. In addition, he was motivated by self-gain. Although we noted that this type of misconduct ordinarily warrants a lengthy term of suspension, we determined to impose a one-year suspension because of extensive mitigating factors. The Court agreed that a one-year suspension was appropriate.[3]

A three-year suspension was imposed in In re Woodward, 149 N.J. 562 (1997), where the attorney pleaded guilty to conspiracy to commit securities fraud. While employed at a New York City law firm, Woodward divulged confidential information about mergers, takeovers, and tender offers to his brother and to his best friend, who then traded in the stocks of the companies in question and profited over $300,000. Woodward, however, did not realize any financial gain from his misconduct.

See also In re Van Dam, 140 N.J. 78 (1995)(three-year suspension where the attorney pleaded guilty to a two-count information charging him with making a false statement to an

[3] At the time of the Court's order, DeSantis had already been temporarily suspended for almost eighteen months.

institution insured by the Federal Savings and Loan Insurance Corporation, and obstruction of justice; Van Dam made a false statement to federal authorities regarding the activities of his law partner and gave false testimony during a deposition); and In re Solomon, 110 N.J. 56 (1988) (two-year suspension where attorney received confidential information about proposed take-overs, provided the information to others, then traded in the stock and options of the take-over candidates).

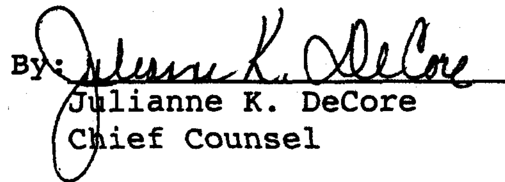
The OAE argued that, although respondent's crimes were serious, the mitigation presented on his behalf was "impressive." In the OAE's view, a fifteen-month suspension, the discipline imposed in New York, should be imposed in New Jersey. The OAE did not suggest that the suspension be made retroactive.

The OAE's assessment of the appropriate quantum of discipline is correct. Respondent's conduct, while serious, did not quite reach the level of "indifference to the essence of the character that [the Court has] deemed essential to the licensure of every member of the Bar," as found in Solomon, supra, 110 N.J. 56, 57. In addition, respondent presented significant mitigating factors. Accordingly, we unanimously determine to impose a fifteen-month suspension. Because respondent was not temporarily suspended, the suspension is to be prospective.

Vice-Chair William J. O'Shaughnessy, Esq., did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

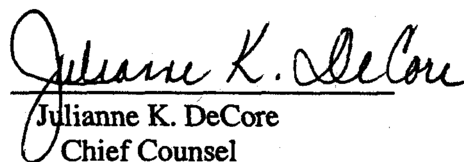
In the Matter of Earl S. David
Docket No. DRB 04-105

Argued: June 17, 2004

Decided: July 28, 2004

Disposition:

Members	*Disbar*	*Fifteen-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy							X
Boylan		X					
Holmes		X					
Lolla		X					
Pashman		X					
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		8					1



Julianne K. DeCore
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