SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-135
District Docket No. XIV-2008-0467E

IN THE MATTER OF

MATTHEW A. MARINO

AN ATTORNEY AT LAW

Decision

Argued: October 17, 2013

Decided: December 10, 2013

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

Paul B. Brickfield 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), based on respondent's guilty plea to misprision of a felony, in violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as

a lawyer) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The OAE urged the imposition of an eighteen-month suspension. We determine that a two-year prospective suspension is the more appropriate level of discipline.

Respondent was admitted to the New Jersey bar in 1988.[1] On October 2, 2008, he was temporarily suspended in New Jersey as a result of his guilty plea to misprision of a felony. In re Marino, 196 N.J. 523 (2008). He remains suspended to date.

The facts that gave rise to this matter are as follows:

In September 2008, respondent pleaded guilty to a one-count information, charging him with misprision of a felony, in violation of 18 U.S.C. §4.[2] Respondent's criminal conviction

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[1] According to respondent's memorandum in aid of sentencing, at one time, he was admitted to practice in six jurisdictions: New Jersey, New York, Connecticut, North Carolina, Florida, and the District of Columbia. During oral argument before us, respondent's counsel stated that respondent has resigned from the bars of Connecticut, the District of Columbia, Florida, and New York.

[2] 18 U.S.C. §4 provides as follows:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

arose from his business relationship with his brother, Daniel Marino, and with Bayou Fund, LLC (Bayou). Because the background and history of Bayou are necessary for a full understanding of respondent's misconduct, this decision sets out events that occurred a number of years before respondent's involvement with Bayou.

In 1996, Samuel Israel, III and James G. Marquez formed Bayou, a hedge fund that opened with a little over $1,000,000 and an office in the basement of Israel's home, in Harrison, New York. Israel and Marquez were solely responsible for Bayou's investment strategy and recruitment of investors, each of whom were required to contribute $100,000. Israel and Marquez hired respondent's brother, Daniel Marino, a certified public accountant who had worked for Marquez, to maintain their books and reconcile the trading records.

In mid-1998, Bayou moved its offices to Stamford, Connecticut. Israel, through Bayou, traded securities from his New York residence and from the Stamford office.

By the end of 1998, Bayou had accumulated substantial losses. In December 1998, Israel and Marquez met with Daniel Marino to discuss the losses, which could not be revealed to Bayou investors. They decided to cover up the losses by

terminating Bayou's accounting firm's services and having Daniel Marino prepare a sham audit of Bayou.

During the first half of 1999, Daniel Marino created the fictional accounting firm of Richmond-Fairfield Associates (RFA), which purported to have offices in Manhattan. In furtherance of their scheme, Israel, Marquez, and Daniel Marino mailed quarterly reports to the investors, showing fictitious positive rates of return. Monthly reports sent to the investors also showed inflated accumulated profits accrued by the investors. In addition, Marquez, Israel, and Daniel Marino mailed annual financial statements to the investors, containing, among other representations, inflated rates of return on trading, inflated net asset values, and certifications that Bayou had been audited by RFA, a supposedly independent accounting firm.

Israel and Marquez were not successful enough at trading to make up for the false amounts reported. They argued increasingly about who was to blame.

In January 2001, Marquez moved to a separate office, across the street from Bayou, and ultimately ended his relationship with Bayou. Daniel Marino then took over as chief financial

officer of Bayou. From that time on, he and Israel became Bayou's sole principals.

Bayou kept growing, as Israel and Marino used the false financial history they had created to persuade potential investors that the fund had a profitable track record. They were so successful at deceiving then-current and potential investors that they obtained contributions of over $500 million. They closed the original Bayou Fund and opened four domestic hedge funds, as well as two different sets of offshore funds, in the Cayman Islands. Investors in every fund were provided with the same fraudulent information.

Israel and Daniel Marino also hired numerous employees, including traders, accounting personnel, and other administrative staff. By lying to employees and by keeping the trading and accounting records separated and the trading and accounting staff apart, Israel and Daniel Marino prevented employees from learning the true financial status of the funds. Daniel Marino, through RFA, continued to manage the accounting portion of the fraud. He issued false annual financial statements and fielded questions from investors, using false information. Israel was responsible for Bayou's investment/trading activities, including recruiting investors.

In 2002, Daniel Marino hired respondent, who lived in North Carolina, to develop a North Carolina office for Bayou. Respondent was paid a salary of $5,000 a month. By the fall of 2002, respondent was making periodic visits to Bayou's Connecticut office. He was also performing personal errands for his brother, including picking up his dry cleaning and washing his car.

In January 2003, respondent's salary was increased to $10,000 a month. He began visiting the Connecticut office more frequently. By this time, Daniel Marino had respondent assisting with private-placement investments that were, for the most part, legitimate, but very risky.[3] Israel and Daniel Marino invested approximately forty million dollars in these private investments, in order to make a personal profit and to offset Bayou's losses. These investments were neither disclosed to nor authorized by Bayou investors. Many of these transactions were made through partnerships set up by Daniel Marino and Israel.

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[3] Private-placement securities are investment instruments issued by a corporation to investors outside the public markets. They usually do not need to be registered with the Securities and Exchange Commission.

Apparently, respondent was unaware that the use of Bayou investors' money in these transactions was unauthorized.

In 2003, Daniel Marino decided to rent a new office space for RFA. He directed respondent to find a location in Manhattan.[4] During the spring of 2003, two temporary employees worked at RFA, one for a few days and the other for three or four weeks. No one else worked at RFA. After the temporary employees left, respondent began to perform RFA's administrative tasks, including going to its office, picking up mail and delivering it to Daniel Marino, checking voice mail messages from Bayou investors, discussing the messages with Daniel Marino, reviewing correspondence from Bayou investors, paying RFA's bills out of RFA's checkbook, and picking up fake audited financial statements from the printer and copying them, after they were signed on behalf of RFA.[5] In addition, respondent sent two faxes to Daniel Marino, containing lists of Bayou investors and indicating "whether they had confirmed their investments."

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[4] Respondent was aware of RFA. In fact, in 1999, when RFA was created as a professional limited liability company, he filed the appropriate paperwork, at his brother's request.

[5] It is unclear from the record if respondent or Daniel Marino signed the statements.

The sender of the faxes was "M. Richmond" of RFA, a fictional name.

In the spring and summer of 2004, Israel and Daniel Marino began an effort to earn money quickly by attempting to invest over 100 million dollars of Bayou investors' funds in allegedly secret trading programs that purported to yield exorbitant rates of return. In reality, the trading programs were "prime bank" frauds. Israel was primarily involved in this effort. For the next year, he traveled extensively, in an attempt to invest Bayou funds in these programs.

During Israel's travels, no trading occurred at Bayou. According to the government's sentencing memorandum, Daniel Marino was "putting off employees and browbeating them into not asking questions about why Israel (and, therefore, Bayou) was not doing any trading" and working to keep Bayou "afloat." In March 2005, when Daniel Marino found a figure that had to be changed, in the 2004 RFA "audit" of Bayou's financials to be sent out to Bayou investors, he asked respondent to change the number in the report, which respondent did.

By January 2005, respondent was aware that a fraud was being perpetrated on the Bayou investors and assisted Daniel Marino in hiding the fraud. Around that time, Israel and his

wife were in litigation over their divorce. Mrs. Israel's lawyers served subpoenas on Bayou and RFA, seeking financial records. Bayou could not produce the sought documents, because there were no records supporting the numbers that were being provided to the investors. As a result, there was a risk that Mrs. Israel's counsel could discover the fraud. In addition, Bayou had to maintain the appearance that RFA was a legitimate and independent accounting firm.

According to the government's sentencing memorandum, respondent "helped Daniel Marino stonewall and otherwise prevent Mrs. Israel's lawyers from obtaining Bayou's financial records and from finding out that RFA was not an independent accounting firm."

In May 2005, the Arizona Attorney General seized from a New Jersey bank account funds that Israel had been trying to invest in the private-placement transactions. Over 100 million dollars of the investors' money was frozen, causing Bayou to near financial ruin.

Daniel Marino continued to try to put off investors, who by then were beginning to make inquiries. In mid-July 2005, one investor, who had conducted independent research, requested documentation to demonstrate that RFA was an independent firm

not connected to Daniel Marino. At Daniel Marino's request, respondent drafted versions of a phony purchase and sale agreement, purporting to show that Daniel Marino had sold RFA to "Matt Richmond," in September 1999. The agreement, however, was never forwarded to the inquiring investor.

Soon thereafter, another investor began to ask questions and sought to redeem the investment in Bayou. In August 2005, after being unable to answer the investors' questions, Daniel Marino issued a check for approximately fifty-three million dollars to the investor. Bayou, however, did not have sufficient funds to cover the check. A few days later, the investor went to Bayou's Connecticut office to meet with Daniel Marino and found a "suicide/confession note" written by Daniel Marino. The investor then contacted the police, who located Daniel Marino and notified federal authorities.

According to the United States Attorney's Office analysis of Bayou's financial records and information from the victims of the scam, approximately 392 Bayou investors contributed over

$500 million to the funds. 288 Bayou investors lost over $309 million.[6] $110 million plus interest was eventually recovered.

During the time that respondent worked for Daniel Marino, he was paid almost $600,000. According to the OAE, respondent's "salary" came from "the Bayou fraud." Respondent's compensation also included a $250,000 payment from Daniel Marino and another $75,000 payment relating to one of the purported private-placement transactions. Both of these payments were issued from "Bayou fraud proceeds."[7]

As noted previously, respondent pleaded guilty to one count of misprision of a felony, in violation of 18 U.S.C. §4. At his plea hearing, respondent admitted that he participated in the administration of the fraudulent accounting firm, concealed Bayou's true financial information from Israel's wife, and revised a fraudulent document drafted by Daniel Marino. At

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[6] There was extensive discussion in the record about the losses for which respondent was responsible. The issue was a key component to the sentencing guidelines for his crime. The sentencing judge stated that, for sentencing purposes, respondent was not responsible for all of the losses because they were not foreseeable to him.

[7] The OAE's brief also mentioned $331,000 in loans that respondent and his wife obtained from Daniel Marino, between December 2002 and March 2004, which have not been paid back. It is not clear if those funds came from Bayou.

sentencing, respondent accepted responsibility and expressed remorse for his criminal offense.

In respondent's memorandum in aid of sentencing, respondent's counsel noted that respondent had graduated from New York University (NYU) magna cum laude and, subsequently, from NYU School of Law; that his accomplishments included certain activities and awards; that he was subsequently employed at "prestigious" law firms; and that he performed community service. Counsel's memorandum also addressed respondent's substantial hearing loss, as the result of an illness, at age two. The record contains a report from a psychologist who examined respondent, stating that respondent's "personality liabilities, his deafness, trusting nature, inability to 'read' people, and his limited communication skills made him very vulnerable to being taken advantage of" by his brother and Israel. Counsel presented a number of character letters, generally stating that respondent is dedicated to his family and has demonstrated good moral character. The letters also spoke to his "abusive" relationship with his brother, Daniel Marino.

The sentencing judge found that respondent knew that a fraud was being committed and that he helped to conceal it, by failing to report it to authorities. The judge remarked that

some of the losses could have been either avoided or significantly limited, if respondent had reported the fraudulent activity to law enforcement authorities. The judge noted that, while he did not doubt that Daniel Marino was "either evil, domineering, a person subject to violent mood swings and psychological imbalance," respondent was willing to participate in the fraudulent activities even after they became clear.

The sentencing judge rejected respondent's argument that respondent's hearing loss, "inability to read people well," and "inability to pick up on subtleties" prevented him from knowing "what was going on." The judge noted that respondent understood that there was an ongoing fraud, failed to report it, and participated in a fake accounting firm. Furthermore, citing respondent's communication to Daniel Marino under the name of M. Richmond, the judge concluded that respondent utilized the fake identity to support the fraudulent scheme and to make it look real. The judge also pointed out that respondent's actions left individuals, some "in the twilight of their life, suddenly destitute."

Respondent was sentenced to twenty-one months' imprisonment and one year of supervised release. He was also ordered to make restitution of $60 million, jointly and severally with the other

defendants involved in the fraud, and to pay a special assessment of $100.[8]

In its brief, the OAE urged us to impose an eighteen-month suspension, citing In re Felmeister, 186 N.J. 1 (2006).[9] There, an eighteen-month suspension was imposed, following the attorney's guilty plea to misprision of a felony. The attorney represented the purchasers of a business and assisted in their scheme to defraud the Small Business Administration and the lender by preparing and submitting a HUD-1 form that misrepresented that his clients had made the required $700 million capital contribution, when he knew that to be untrue. Our decision noted that the attorney knew that the loan was guaranteed by the SBA, a branch of the federal government, knew that substantial public funds were at risk, voluntarily participated in the fraud, and failed to disclose it to the proper authorities. The OAE also cited In re Fishman, 177 N.J. 600 (2003), where an eighteen-month suspension was imposed,

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[8] $60 million dollars was the amount that the investors had been induced to contribute to Bayou, during the period that respondent admitted knowing of the fraud, not reporting it, and assisting in its concealment, or January 1, 2005 through August 2005.

[9] The OAE did not suggest that the suspension be made retroactive to respondent's temporary suspension.

after the attorney's guilty plea to misprision of a felony. The attorney helped certain individuals set up charitable trusts in an offshore jurisdiction, later learning that these trusts contained proceeds of securities fraud. The attorney failed to report the criminal activity and acted to conceal the facts surrounding it. Finally, the OAE cited In re Primavera, 157 N.J. 459 (1999), where the attorney received an eighteen-month suspension, following his guilty plea to misprision of a felony. In that case, the attorney failed to take any action, when he learned that the buyer of real estate and the buyer's attorney intended to submit a false RESPA to a mortgage company. The attorney proceeded with the transaction and concealed the HUD-1 form from the real estate brokers at the closing, in an attempt to reduce the likelihood that the fraud would be reported to the lender.

The OAE distinguished respondent's misconduct from that of the attorney in In re Van Dam, 140 N.J. 78 (1995), where a three-year suspension was imposed on an attorney who pleaded guilty to making a false statement to a financial institution and to obstructing justice. The attorney sent a letter to a bank, falsely identifying himself and two others as the only shareholders in a company, in order to influence the bank's

decision about administering a loan. Later, the attorney made false statements, during the investigation of the matter. The OAE noted that, unlike in Van Dam, there was no evidence that respondent continued to perpetrate the fraud, after becoming aware of its investigation.

The OAE remarked that, like Felmeister, Fishman, and Primavera, respondent "knew about and/or participated in an ongoing fraud, but failed to report it to the proper authorities" and like those three attorneys, was a "passive participant" in the scheme.

In mitigation, the OAE noted that respondent accepted responsibility and was remorseful for his actions, cooperated with the OAE, and has no history of discipline. In light of the similarities to the cases where eighteen-month suspensions were imposed, however, the OAE urged us not to deviate from precedent and to impose the same measure of discipline in this matter.

The existence of a criminal conviction is conclusive evidence of respondent's guilt. R. 1:20-13(c)(1); In re Gipson, 103 N.J. 75, 77 (1986). Respondent's guilty plea to misprision of a felony constituted a violation of RPC 8.4(b) and (c). Only the quantum of discipline to be imposed remains at issue. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The level of discipline imposed in disciplinary matters involving the commission of a crime depends on numerous 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 445-46. Discipline is imposed even when the attorney's offense is not related to the practice of law. In re Kinnear, 105 N.J. 391 (1987).

We find that the cases that the OAE cited to support its recommended discipline, Felmeister, Fishman and Primavera, are on point. We are unable to agree, however, with the OAE's view that the attorneys in those cases were passive participants in their respective schemes. Both Felmeister and Primavera actively assisted the fraud. Felmeister prepared and submitted to the lender a false HUD-1 and failed to report his clients' misconduct to any authority. Primavera proceeded with a closing, knowing that the HUD-1 was false and did not show the HUD-1 to real estate brokers, at the closing, to decrease the likelihood that the fraud would be discovered. Fishman learned of the fraud after the fact, but actively helped to perpetuate it by not reporting it to any authority or court.

Here, too, respondent was not simply a "passive participant" in the Bayou scheme. Rather, like Felmeister, Fishman, and Primavera, he actively and affirmatively aided his brother and Israel in committing the fraud. He assisted them in the creation of RFA, a non-existent accounting firm; he handled administrative tasks for RFA; he altered a document; and he sent two faxes from a fictional individual, indicating that the investors had confirmed their investments. $60 million in investor funds was lost, due to respondent's participation in the scheme.

It would seem, thus, that an eighteen-month suspension, the discipline meted out in Felmeister, Fishman, and Primavera, would be the right form of discipline in this case. One significant factor, however, convinces us that a more severe sanction is warranted for this respondent. Unlike those three attorneys, respondent derived a huge financial benefit from the fraud. Felmeister received only his legal fee. Primavera's motive was not greed, but a desire to assist a client in selling his house. Only Fishman had a financial interest, of an unknown amount. We, therefore, determine that a two-year prospective suspension is required in this case. We do not make it retroactive to the date of respondent's temporary suspension

because of the egregious role that respondent performed in a fraud that caused a $309 million loss to the investors, $60 million of which were lost after he became aware of the scam.

Vice-Chair Baugh and Member Gallipoli would disbar respondent. Member Zmirich did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: ______________________
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

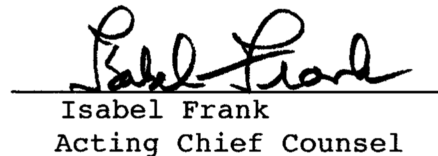
In the Matter of Matthew A. Marino
Docket No. DRB 13-135

Argued: October 17, 2013

Decided: December 9, 2013

Disposition: Two-year prospective suspension

Members	Disbar	Two-year Prospective Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh	X					
Clark		X				
Doremus		X				
Gallipoli	X					
Yamner		X				
Zmirich						X
Total:	2	4				1



Isabel Frank
Acting Chief Counsel