SUPREME COURT OF NEW JERSEY
District Docket No. XIV-2011-0285E
Disciplinary Review Board
Docket No. DRB 13-324

IN THE MATTER OF	:
ERIK W. MUELLER	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 16, 2014

Decided: February 12, 2014

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Matthew S. Marrone appeared on behalf of respondent.

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

This matter was before us on a motion for final discipline, filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-13(c)(2). The OAE recommended a three-year suspension, retroactive to the date of respondent's temporary suspension, for his guilty plea to an information charging him with one count of conspiracy to commit wire fraud, in

violation of U.S.C.A. §1349. For the reasons expressed below, we agree with the OAE's recommendation.

Respondent was admitted to the New Jersey bar in 2000 and the New York bar in 2001. At the relevant times, he practiced law in Ocean Township, New Jersey. Although he has no history of discipline, he was temporarily suspended, effective June 24, 2011, after his guilty plea to the above criminal offense. In re Muller, 206 N.J. 553 (2011).

As indicated previously, on June 10, 2011, respondent entered a guilty plea to an information charging him with conspiracy (U.S.C.A. §1349) to commit wire fraud, in violation of U.S.C.A. §1343. (Ex.A;Ex.B). The guilty plea was in accordance with a plea agreement with the United States Attorney's Office.

According to the information, respondent knowingly and intentionally conspired and agreed with Allen Weiss, a commercial and residential real estate developer, and other co-conspirators

> to execute a scheme and artifice to defraud investors and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and, for the purpose of executing this scheme and artifice to defraud, to transmit and cause to be transmitted by means of wire communications in interstate and foreign commerce, certain signs, signals, and

> sounds, contrary to Title 18, United States Code, Section 1343.
>
> [OAEb.Ex.B5¶5.][1]

More specifically, respondent served as legal counsel for a real estate development project. Respondent, Weiss, and other co-conspirators formed several limited liability corporations to acquire, develop, finance, and convert existing properties into medical offices in various towns in New Jersey and to sell those offices to physicians.

In the summer of 2008, Weiss and other co-conspirators determined to solicit investors to finance the purchase and development of the properties for the project. Between approximately February 2009 and January 2010, Weiss and a co-conspirator represented to investors that their investment funds would be used to advance the goals of the real estate development project. They induced prospective investors by making false promises of the receipt of large returns on their investments (twenty or thirty percent) and by delivering false guarantees to the investors. They received approximately $1,000,000 from investors, which respondent held in his trust account.

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[1] OAEb refers to the OAE's brief, dated September 24, 2013.

Between approximately February 2009 and January 2010, at Weiss' and another co-conspirator's request, respondent wire-transferred varying amounts of the investment funds to their bank accounts. Weiss and the co-conspirator depleted the funds for their personal expenses and other expenses that were not related to the real estate development project.

Certain investors, who had already contributed funds, developed concerns about the project's solvency. As part of the conspiracy, respondent, Weiss, and other co-conspirators made material misrepresentations to either "lull" the investors to believe that their investments remained secure in respondent's trust account or to induce other prospective investors, who were uncertain about contributing funds, to invest in the project.

Respondent admitted that he knew that one of the investors was worried about the safety of his investment. That investor knew that the profits that Weiss and the co-conspirator had promised had not materialized. Therefore, Weiss had respondent perform certain acts and create certain false documents to deliver to certain investors. Specifically to induce one potential investor, Weiss created a false lien and note with names of guarantors who had not signed their names to the note or authorized their signature. Weiss

presented to respondent a copy of the false lien, purportedly signed by "R.S." Respondent then notarized the document, even though he had not witnessed its execution. Weiss delivered the documents to "M.D." to secure "M.D.'s" investment of approximately $150,000.

Respondent also prepared an August 31, 2009 letter that falsely stated that he had $834,000 of other investors' funds in his trust account for the real estate development project, when he held only $164. Respondent delivered the letter to an "A.D.," who subsequently invested $75,000. Respondent admitted that he misrepresented the balance in his trust account in that letter.

In October 2009, Weiss directed another co-conspirator to create a false statement of respondent's trust account to submit to one of the investors, as evidence that the investor's funds were secure. From his office, respondent faxed the false trust account statement to the investor. The statement showed a September 2009 balance in respondent's trust account of $612,461, when, as a result of transfers to Weiss and another co-conspirator, the actual balance was approximately $8,973.

During a January 10, 2010 meeting, Weiss informed some investors that "virtually all of the approximately $1,000,000

that had been invested in the Real Estate Development Project was gone." Weiss offered to recoup the money if the investors contributed additional funds, but the investors refused to do so.

None of the developments, at any of the proposed sites associated with the development project, was ever completed.

The parties to the plea agreement stipulated that the loss attributable to respondent was between $30,000 and $70,000.

At respondent's sentencing, his counsel noted that he was a "small-time" solo practitioner and that Weiss and his co-conspirator were experienced developers. It had always been respondent's "dream to move into the real estate development field." Counsel claimed that, in the beginning, the developers convinced respondent that their development project was legitimate. In August 2009, when all of the investment funds had been depleted, Weiss and his co-conspirator persuaded respondent to join in their illegal activities.

Counsel added that respondent was hard-working and did not earn a lot of money as a "small-time" practitioner. His income was modest; he lived "a simple life." Respondent did not receive any of the "windfall" from the scheme, only his $20,000 fee.

As mitigation offered to the sentencing judge, counsel remarked that respondent charged clients only what they could afford, sometimes little or nothing. Counsel pointed out the number of character letters submitted on respondent's behalf (not a part of this record) and the "gallery of folks" who attended the sentencing proceeding to support respondent. Counsel noted that respondent's support was "broad-based:" family, lawyers and friends.

At the sentencing proceeding, respondent apologized to the victims; admitted that he acted "stupidly" and that he should have known that what he was doing was wrong; explained that he had acted out of character; acknowledged that he had caused "a great amount of harm;" expressed sincere contrition; and apologized to his family, friends, and all who attended the hearing to support him.

The U.S. Attorney underscored that twice respondent had the opportunity to do the right thing but, instead, chose the wrong path. First, he authored the August 2009 letter misrepresenting that he held more than $800,000 in his trust account to induce investors to contribute more funds, when the funds had been depleted by Weiss and his co-conspirator for their own "private" purposes. Second, he faxed a falsified bank account statement to another investor to keep that

investor "happy, keep him calm, keep him away from the police, keep him away from anyone who might start poking around about where this money had gone." The U.S. Attorney emphasized that respondent engaged in an affirmative act: "[Respondent] said, 'I will do this thing. I will make these misrepresentations. I will tell these lies'." The U.S. Attorney highlighted that, as an attorney, respondent should be held to a higher standard. The U.S. Attorney asked for a term of imprisonment near the top of the sentencing range.

In imposing sentence, the judge considered that respondent would probably not repeat the conduct, but that general deterrence was a factor and that the fraudulent conduct was committed by a lawyer. The judge balanced respondent's abuse of trust against his kindness to others, his admirable work, and the love and devotion of his family. The judge sentenced respondent to a five-month term of imprisonment and two years of supervised release, ordered restitution in the amount of $25,500, and imposed a special prohibition against "incurring any new credit charges, opening additional lines of credit, or incurring any new monetary loans, or obligations without the approval of the Probation Office."

By letter dated June 10, 2011, respondent's counsel notified the OAE of respondent's guilty plea. Respondent was released from prison on September 28, 2012. He is currently suspended in New York.

The OAE noted that attorneys who are found guilty of fraud typically receive lengthy suspensions, citing In re Abrams, 186 N.J. 588 (2006) (three-year suspension for guilty plea to two counts of wire fraud; attorney overstated the value of accounts receivables of a company of which he was part owner and whose assets were bought by another company; the attorney fraudulently paid debts of the sold company with assets of the buyer company, resulting in a loss of $200,000); In re Chianese, 157 N.J. 527 (1999) (three-year suspension for attorney convicted of perjury, theft by deception, and forgery by submitting a forged document in a civil proceeding that the attorney had instituted to collect a $42,000 brokerage fee); In re Takacs, 147 N.J. 277 (1997) (three-year suspension following guilty plea to two counts of mail fraud for filing false insurance claims in two separate matters, including his own personal injury case); and In re DeSantis, 147 N.J. 589 (1997) (two-year suspension for guilty plea to one count of mail fraud for submitting fraudulent medical reports for his own injuries).

The OAE also cited a disbarment case, In re Lesser, 200 N.J. 222 (2009) (attorney disbarred for his conviction for wire fraud, money laundering, aiding and abetting; the attorney also engaged in a conflict of interest, devised and executed a fraudulent transaction, made false statements to clients and to a financial institution, engaged in the unauthorized practice of law, and practiced while suspended; the attorney had an extensive disciplinary history).

Following a review of the full record, we determine to grant the OAE's motion for final discipline.

The existence of a criminal conviction is conclusive evidence of respondent's guilt. R. 1:20-13(c); In re Gipson, 103 N.J. 75, 77 (1986).

Respondent's guilty plea to a violation of U.S.C.A. §1349 constitutes a violation of RPC 8.4(b). 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 sanction 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 . . . prior

trustworthy conduct, and general good conduct." In re Lunetta, supra, 118 N.J. at 445-46.

The proper measure of discipline in this case turns on the conduct that formed the basis for respondent's guilty plea. Respondent made affirmative misrepresentations to aid Weiss and his co-conspirators to obtain funds from investors. Respondent wire-transferred the funds from his trust account to the co-conspirators. The funds were depleted, almost entirely. The purpose for which the funds were purportedly earmarked was not fulfilled. The co-conspirators depleted the funds for personal and other expenses unrelated to the development project.

Respondent also engaged in lies to lull the investors. First, he authored a letter misrepresenting that he was holding $834,000 in his trust account. Next, he faxed a false trust account statement to an investor that misrepresented a balance of $612,461 in his trust account. He also notarized a document for which he did not witness the execution.

Moreover, although respondent's counsel asserted that, initially, respondent believed that the development project was legitimate, he later clearly learned otherwise and lent his name and his position of trust to help defraud investors.

As the OAE noted, this case is somewhat similar to In re Abrams, supra, 186 N.J. 588 where the attorney received a three-year retroactive suspension. There, the attorney entered a guilty plea to two counts of wire fraud for his participation in a scheme to defraud Thermadyne Holdings Corporation in connection with its purchase of Woodland Cryogenics, Inc., in which he was part owner, vice-president, secretary and, at times, general counsel. The attorney instructed his accounts receivable administrator to fraudulently overstate Woodland's accounts receivables.

After the sale, the attorney continued to work for Thermadyne and used Thermadyne's funds for, among other things, the satisfaction of Woodland's old debt to the IRS and other Woodland liabilities that were not assumed by Thermadyne under the purchase agreement.

The attorney committed wire fraud, when he faxed a document from Philadelphia to Thermadyne, in Missouri. The facsimile grossly overstated the "collectibility" of Woodland's other accounts receivable to Thermadyne in the final stages of the negotiations. The information caused Thermadyne to pay $1.508 million to purchase Woodland's assets, which funds were wire-transferred from New York to Philadelphia.

In Abrams, we considered, in aggravation, that the attorney was a prime participant in the scheme to defraud Thermadyne out of $200,000 and that his motivation was self-gain. In mitigation, the attorney had no disciplinary history in New Jersey, cooperated fully with the federal government, and repaid Thermadyne.

In In re Noce, 179 N.J. 531 (2004), too, the attorney received a three-year retroactive suspension for pleading guilty to conspiracy to commit mail fraud. The attorney and others participated in a scheme to defraud the Department of Housing and Urban Development (HUD) by assisting in the procurement of home mortgage loans for unqualified buyers, from which HUD suffered losses of over $2.4 million. The attorney was the settlement agent and closing attorney for unqualified buyers in fifty closings. He knowingly certified HUD-1 statements and gift transfer certifications that contained misrepresentations. The attorney was paid only his regular fee and cooperated fully with the government.

A three-year suspension was also imposed in In re Panarella, 177 N.J. 565 (2003). There, the attorney pleaded guilty to being an accessory-after-the-fact in a wire-fraud scheme, albeit in a different context from the one at hand. The scheme was to deprive the public of honest services of an elected official. Through

another, the attorney paid a state senator $330,000, over a four-year period, to conceal their financial relationship. The senator was on the Board of Directors of the attorney's company, which contracted with local governments to collect taxes from non-residential businesses under Pennsylvania Law. The senator drafted an amendment to legislation favoring the attorney's business and helped the attorney obtain collection work. The attorney assisted the senator in filing false disclosure statements. The sentencing court imposed a six-month prison term and one-year of supervised release, and ordered the attorney to pay a $20,000 fine.

We have considered the mitigating circumstances present here. Respondent was not the instigator of the fraudulent scheme and did not benefit from it, other than to collect a $20,000 fee; he has no disciplinary history; he cooperated with the federal government, by pleading guilty to an accusation; he expressed his sincere remorse for his conduct; and he submitted evidence of his good personal traits. Nevertheless we find that, because of respondent's role in depleting almost $1,000,000 of investors' funds, a three-year suspension is warranted. We also determine that the suspension should be retroactive to respondent's temporary suspension, June 24, 2011.

Although Member Yamner voted with the majority, he noted that, were it not for established precedent, he would have recommended respondent's disbarment.

Member Gallipoli filed a separate dissent, recommending respondent's disbarment. Member Doremus 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
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Erik Mueller
Docket No. DRB 13-324

Argued: January 16, 2014

Decided: February 12, 2014

Disposition: Three-year retroactive suspension

Members	Disbar	Three-year Retroactive Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Doremus						X
Gallipoli	X					
Hoberman		X				
Singer		X				
Yamner		X				
Zmirich		x				
Total:	1	7				1

Isabel Frank
Acting Chief Counsel