SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-335
District Docket No. XIV-2011-0059E

IN THE MATTER OF	
MARC D. MANOFF	
AN ATTORNEY AT LAW	

Decision

Argued: February 20, 2014

Decided: March 31, 2014

Missy A. Urban 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 final discipline, filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-13, following respondent's guilty plea to one count of conspiracy to commit securities fraud and two counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 17 C.F.R. pt. § 240.10b-5.

The OAE seeks a three-year suspension. Respondent consents to a three-year suspension, but requested that it be imposed retroactively to the date of his temporary suspension, February 16, 2011. We determine to impose a three-year retroactive suspension.

Respondent was admitted to the New Jersey bar in 1990 and to the bar of the Commonwealth of Pennsylvania in 1988. He has no final disciplinary history in New Jersey, although, as a result of his guilty plea, he was temporarily suspended in New Jersey, effective February 16, 2011. In the Matter of Marc D. Manoff, 205 N.J. 74 (2011).

On October 28, 2010, respondent pleaded guilty, before the Honorable Joel H. Slomsky, U.S.D.J., in the United States District Court, Eastern District of Pennsylvania, to one count of conspiracy to commit securities fraud and two counts of securities fraud. On June 12, 2012, respondent was sentenced to five years' probation.

The conduct that gave rise to respondent's guilty plea was as follows:

Respondent was a partner in Marck Capital Partners, LLC ("Marck Capital"), along with one of his co-defendants, Mark Johnson ("Johnson"). According to the government, Marck Capital

described itself as a consulting firm that helped raise money for both private and public companies and assisted in taking companies public through "reverse mergers." In this instance, however, respondent and Johnson participated with others in a scheme "to manipulate share prices of thinly traded over-the-counter pink sheet stocks in exchange for stock and cash."

Two other co-defendants, Kyle and Leonard Gotshalk (collectively, "the Gotshalks"), were the owners of two companies, Exit Only and CX2 Technologies ("Exit Only" and "CX2" respectively), whose stocks the co-conspirators attempted to manipulate as part of the scheme. Exit Only was a Nevada corporation based in California. CX2 was a Nevada corporation based in Florida. Both companies were publicly traded on the OTC market.[1]

On January 23, 2008, respondent met with an undercover informant ("the informant") working with the government. The purpose of the meeting, which took place in Wayne, Pennsylvania,

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[1] OTC, or Over-The-Counter Market, is a stock exchange through which securities transactions are made via telephone and computer, rather than on the floor of an exchange. It is typically direct, bilateral trading, that lacks the supervision of an exchange.

was to discuss manipulating publicly traded stocks. This meeting and subsequent conversations were secretly recorded.

During this meeting, the informant agreed to help respondent and Johnson by introducing them to another person, an undercover FBI agent ("the agent"). The agent was solicited to help them manipulate stocks by paying secret bribes to brokers in exchange for purchasing stocks in their clients' accounts. The agent would convince others to purchase and hold the shares of Exit Only and CX2.

By generating these fraudulent purchases, the co-conspirators would increase the demand for the stock. As a result, the price would rise artificially, thereby defrauding those who purchased the stock based on the false appearance of an active market in the stock. Trading volume from the Gotshalks, as well as their family and friends, would be included in the increased demand.

On February 25, 2008, respondent and Johnson met with the informant and the agent, in Philadelphia, to discuss the manipulation of the target stocks. Respondent and his co-defendants agreed to pay a fifteen percent kickback in order to bribe brokers to purchase and hold the target stocks at their direction.

On March 3, 2008, Johnson told the informant that he was re-writing news releases for the target stocks and that he would provide them to the agent with confidential shareholder lists. On March 7, 2008, Kyle Gotshalk emailed Johnson a spreadsheet that identified where almost all of the outstanding shares of Exit Only were being held.

On that same day, during a telephone conversation with the agent, Johnson indicated to the agent that he would provide him with future press releases and shareholder lists before [the agent] and his brokers made the purchases of the target stock. Johnson instructed the agent to purchase $5,000 to $10,000 of Exit Only stock every day, or every other day, for twelve to fifteen days. After this twelve to fifteen-day period, Johnson said that he would likely use a "phone room" or mail campaign to generate interest in Exit Only stock based upon the artificial trading generated during the buying program. Additionally, Johnson told the agent that respondent and his co-defendants would pay kickbacks to brokers for purchasing and holding the target stocks.

On March 10, 2008, Johnson emailed the agent the confidential shareholder lists for Exit Only that he had received from Kyle Gotshalk. Johnson also emailed the agent

eight non-public press releases related to Exit Only. One of those press releases was made public the following day. Additionally, Johnson emailed the agent a CX2 shareholder list and two non-public press releases. One of the press releases was scheduled to go public on March 20, 2008, which was ten days later.

On March 17, 2008, Johnson agreed to pay the agent a fifteen percent kickback, based on the number of shares in Exit Only's stock that were fraudulently purchased and held. Further, the agent could use that money to bribe brokers to purchase and hold the target stock in their clients' accounts. Johnson explained to the agent that he would buy the Exit Only stock directly from Kyle Gotshalk and that Johnson would be in a position to issue press releases in connection with the agent's purchases of the target stock. Johnson issued the press releases for Exit Only on March 19, 2008.

On March 20, 2008, the agent, on Johnson's direction, purported to make retail purchases of 200,000 shares of Exit Only stock at about five cents per share, for a total of

$10,000. These trades were settled with undercover FBI funds. The indictment claimed that the trade was a matched trade with co-defendant Leonard Gotshalk as the seller of the shares.[2]

On March 24, 2008, Leonard Gotshalk caused $1,500 to be wired in interstate commerce from outside Pennsylvania to an undercover financial institution account maintained by the FBI in Philadelphia, as the kickback for the purchase of the $10,000 Exit Only stock by the agent.

On the same day, respondent spoke with the agent and explained to him that the Gotshalks were their partners in the deal and that they were responsible for paying the kickbacks to the agent, since the agent was buying the stock from them. Also on the same day, Johnson again directed the agent to purchase shares. This time the agent purported to buy approximately

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[2] According to the government, "[a] match trade is a prohibited transaction under federal securities laws, and is an order to buy or sell securities that is entered into with knowledge that a matching order on the opposite side of the transaction has been or will be entered for the purpose of either creating a false or misleading appearance of active trading in a security registered on a national securities exchange or to create a false or misleading appearance with respect to the market for any security."

217,021 retail shares of Exit Only stock at about 4.6 cents a share, totaling approximately $10,000. These trades were also settled with undercover FBI funds.

On March 26, 2008, Johnson and the Gotshalks discussed with the agent how they could manipulate target stocks and the potential for "bigger" deals in the future. They discussed getting the Exit Only stock up to ten cents per share, so that the Gotshalks could sell their shares at a significant profit.

On March 27, 2008, Johnson called the agent to obtain further wiring instructions for the kickback payment. Later that same day, Leonard Gotshalk caused an interstate wire of $1,500 to be transferred to an undercover account, as kickback for the purchase of 217,021 shares of Exit Only stock. The next day, Johnson spoke to the agent about manipulating the price of the CX2 stock. Johnson stated that "he would artificially lower the price of the stock to thirteen cents so that [the agent] could get a better price." Johnson and the Gotshalks then purportedly purchased another 104,000 shares of Exit Only stock at about 4.8 cents per share.

Also on March 28, 2008, Johnson and the Gotshalks agreed to allow the agent to make a retail purchase of 39,000 shares of CX2 stock at about thirteen cents per share, for a total of

approximately $5,070. Again, these trades were settled using undercover FBI funds. This trade was also a match trade with Leonard Gotshalk as the seller of the shares.

The government claimed that the defendants planned to artificially manipulate the share price of both CX2 and Exit Only stock by seven to fourteen cents. The government used a low-end calculation of eight cents per share and calculated the defendants' gain by taking the share price and multiplying it by the number of shares held, controlled, or expected to be given as compensation. Respondent and Johnson owned a combined 500,000 shares of CX2 stock. Further, they were promised about five million shares of Exit Only stock, because of their illegal efforts to increase the price of the stock. It was calculated that there was a total potential loss of $440,000. In reality, however, there was no actual loss and no gain on the part of respondent.

After pleading guilty to the above acts, respondent was sentenced, on June 12, 2012, to five-years probation and twelve-months' house arrest. He was ordered to perform 150 hours of community service and to pay a $10,000 fine and a $300 special assessment. The sentencing court considered the protection of the public, the need for deterrence, and the promotion of

respect for the law. In mitigation, the court noted that respondent presented sixteen letters attesting to his good character, that he accepted responsibility for his actions, and that he cooperated with the investigators.

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

Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of RPC 8.4(b). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Hence, the sole issue is the extent of discipline to be imposed on a respondent for his or her violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, the interests of the public, the bar, and the respondent must be considered. "The primary purpose of discipline is not to punish

the attorney but to preserve the confidence of the public in the bar." In re Principato, supra, 139 N.J. at 460 (citations omitted). Many factors must be taken into consideration, 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, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect the attorney's clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956). Thus, offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, will, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995).

Attorneys who are convicted of offenses similar to respondent's have received discipline ranging from lengthy suspensions to disbarment. See, e.g., In re David, 181 N.J. 326 (2004) (fifteen-month prospective suspension for attorney who was suspended for the same period in a disciplinary proceeding in the State of New York, arising from the attorney's testimony as a prosecution witness in a racketeering and securities fraud trial after receiving immunity from prosecution, in which the attorney admitted his involvement in acts of security fraud and money laundering; the attorney had not been temporarily suspended); In re Woodward, 149 N.J. 562 (1997) (three-year retroactive suspension for attorney who pleaded guilty to conspiracy to commit securities fraud; the attorney breached his fiduciary duty to his firm and his firm's clients by providing inside information to his brother and friend in a scheme to make large sums of money); In re Kundrat, 195 N.J. 4 (2008) (three-year retroactive suspension for attorney who pleaded guilty to a one-count information charging him with conspiracy to commit securities fraud, mail fraud, and wire fraud stemming from his participation in a scheme under which he, the main conspirator, and others illegally obtained shares in the initial stock offering of a new bank); In re

Lurie, 163 N.J. 83 (2000) (attorney disbarred after eight-count conviction of scheme to commit fraud, nine counts of intentional real estate securities fraud, six counts of grand larceny, and one count of offering a false statement for filing); In re Sprecher, 142 N.J. 432 (1995) (attorney disbarred based on his conviction for conspiracy to commit securities fraud, conspiracy to defraud the United States, perjury and obstruction of justice); and In re Messinger, 133 N.J. 173 (1993) (attorney disbarred following conviction of conspiracy to defraud the United States by engaging in fraudulent securities transactions for the purpose of generating tax losses, seven counts of aiding in the filing of false tax returns for various partnerships, and one count of filing a false personal income tax return).

Here, respondent's conduct was very serious, but it was not so pervasive or protracted as to warrant disbarment, such as in Lurie, Sprecher, and Messinger, where the attorneys committed multiple other crimes, in addition to being guilty of securities fraud. We find that respondent's behavior is more akin to that of the attorneys in Kundrat and Woodward.

In Kundrat, the attorney and his co-conspirators schemed to secure shares in a bank's initial stock offering illegally. They achieved this goal by having bank depositors at a former

bank use their special eligibility to obtain pre-offering shares, with funds supplied by the co-conspirators, and then transferring the shares to the attorney and other depositors. The initial purchasers would lie and say the stock was purchased with their own funds and with no intent to transfer the stocks. The attorney was motivated by personal financial gain. In deciding the proper sanction for Kundrat, we noted that his behavior, although serious, was not as "pervasive" as in other cases involving multiple crimes. In the Matter of George J. Kundrat, Jr., DRB 07-396 (April 16, 2008) (slip. op. at 9).

In Woodward, the attorney divulged confidential, material, and nonpublic information regarding mergers, takeovers, and tender offers to his brother and to his best friend, from 1990 through 1995. The brother and the friend then traded in the stocks of the companies on which the attorney gave such information, making a profit of about $305,500. The attorney, however, did not realize any financial gain from his wrongdoing. Weighing the attorney's actions, as well as the mitigating factors, specifically, the attorney's cooperation with disciplinary authorities and the absence of personal gain on the attorney's part, we determined to impose a three-year retroactive suspension on him. In the Matter of Richard W.

Woodward, DRB 96-314 (March 25, 1997) (slip op. at 4). The Court agreed.

In mitigation, we considered that this respondent has no disciplinary history and that he cooperated with the government, by acknowledging his guilt and accepting responsibility for his actions.

On the other hand, the record reflects that the government calculated (projected) losses to investors, or the market, to be $440,000. Those losses were projected because, in reality, the transactions never occurred. If not for the fact that the co-conspirators were working with an undercover agent, these losses would have been real and would have caused economic harm to the investors. We find this to be a significant aggravating factor.

Additionally, respondent was clearly motivated by self-gain, although he did not actually profit from the scheme, and was a lead contributor behind the illegal activities. Therefore, we find that a three-year suspension, rather than the two-year suspension imposed in Kundrat, is the suitable discipline for respondent's offenses. In our view, nothing goes against making the suspension retroactive to the date of respondent's temporary suspension (February 16, 2011), as in Kundrat and Woodward.

Member Yamner voted for a three-year retroactive suspension, but noted that, but for established precedent, he would have voted to disbar respondent. Members Doremus and Hoberman voted for a three-year prospective suspension. Member Gallipoli, in a separate dissenting decision, recommended respondent's disbarment.

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 Marc D. Manoff
Docket No. DRB 13-335

Argued: February 20, 2014

Decided: March 31, 2014

Disposition: Three-year retroactive suspension

Members	Disbar	Three-year Retroactive Suspension	Three-year Prospective Suspension	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	6	2			

Isabel Frank
Acting Chief Counsel