SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-133

IN THE MATTER OF

ARNOLD I. KALMAN

AN ATTORNEY AT LAW

Decision

Argued: June 19, 2003

Decided: August 12, 2003

John A. Jones appeared on behalf of the District IV Ethics Committee.

Respondent appeared *pro se*.

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

This matter was before us based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"). The complaint charged respondent with violations of *RPC* 1.7(a) (representation of clients with adverse interests), *RPC* 1.7(b) (representation that is materially limited by a lawyer's responsibilities to another client), *RPC* 3.3(a)(1) (false statement of material fact or law to a tribunal), *RPC* 3.3(a)(2) (failure to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client), *RPC* 3.3(a)(4) (offer of evidence that the lawyer knows to be false), *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and *RPC* 8.4(d) (conduct prejudicial to the administration of justice). At the ethics hearing, the DEC permitted the presenter to amend the complaint to include a charge of a violation of *RPC* 3.3(a)(5) (failure to disclose to a tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure).

Respondent is not a member of the New Jersey bar, but was admitted here *pro hac vice*. The ethics complaint stems from litigation that he handled in New Jersey and from a related case heard in federal court in Pennsylvania. Respondent was admitted to the Pennsylvania bar in 1973.

Respondent represented Robert A. Katz in a business dispute in Pennsylvania and represented Gail J. Sabatura in related litigation in New Jersey. Both courts found that

respondent withheld certain documents from his adversary and the court. In addition, the New Jersey court ruled that respondent's failure to correct Katz's false pleadings was improper. Both courts sanctioned respondent. Respondent contended that, because the documents were not relevant, he was not required to reveal them.

Respondent challenged the DEC's jurisdiction over the portion of the grievance arising from the Pennsylvania litigation, asserting that Pennsylvania disciplinary authorities have jurisdiction over conduct that occurred in that state.[1] *RPC* 8.5 provides that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere."[2] Respondent's conduct in Pennsylvania is, thus, subject to review by New Jersey disciplinary authorities.

On February 8, 1999 respondent filed a complaint captioned *Robert A. Katz v. Food Sciences Corporation and Robert S. Schwartz* in United States District Court for the Eastern District of Pennsylvania. Katz, a Pennsylvania resident, had been associated with Food Sciences Corporation ("FSC"), a New Jersey corporation that develops, manufactures, markets and sells weight-loss and nutritional products and provides related

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1 According to respondent, although the Pennsylvania disciplinary authorities had initially determined to issue a letter of admonition, they have reopened their investigation because of this matter.

2 The same applies to lawyers admitted *pro hac vice* in New Jersey. *R.*1:21-2. *See, e.g., In re Lockard*, 174 *N.J.* 373 (2002); *In re Haberman*, 170 *N.J.* 197 (2001).

services. Robert Schwartz is the sole stockholder of FSC. Contending that the association was a joint venture, Katz sought damages for corporate profits that he claimed had not been distributed to him.

Eleven days later, on February 19, 1999, FSC filed a complaint in Burlington County, New Jersey, seeking to enforce a restrictive covenant against Gail J. Sabatura, an employee FSC had fired on January 29, 1999. Respondent, admitted *pro hac vice*, represented Sabatura in the New Jersey litigation. He, thus, represented Katz as the plaintiff in the Pennsylvania lawsuit and Sabatura as the defendant in the New Jersey lawsuit. Katz paid respondent's fee for representing Sabatura in New Jersey. In a March 6, 1999 letter to Sabatura, respondent stated that, although he did not foresee a potential conflict in his simultaneous representation of her and Katz's interests, he would withdraw from representing her if a conflict ever arose.

In the Pennsylvania litigation, FSC filed an answer and a counterclaim naming Katz, Nutritional Sciences Corporation ("NSC") — an entity formed by Katz — and Sabatura as defendants.

In November 1983, when Sabatura began her employment with FSC, she had signed a covenant not to compete with FSC for a period of two years, following a termination of her employment. FSC required employees to sign such restrictive covenants to protect its trade secrets and other proprietary information. Upon firing

Sabatura, FSC gave her a copy of the restrictive covenant, reminding her of its provisions. In the New Jersey litigation, FSC, alleging that Sabatura intended to work in a competing venture for Katz or for his corporation, NSC, sought to enforce the restrictive covenant. Specifically, FSC sought an order enjoining Sabatura from engaging in competition in any form and from disclosing confidential or business information. FSC also requested compensatory damages. Katz contended, in the Pennsylvania lawsuit, that he and FSC were joint venturers, while in its New Jersey complaint against Sabatura, FSC alleged that Katz was a former employee in charge of marketing and customer development. Katz and FSC terminated their association on or about January 19, 1999, about two weeks before Katz filed the Pennsylvania lawsuit.

The New Jersey complaint further stated that, in 1998, pursuant to Katz's request, Sabatura became his assistant and worked closely with him in connection with a customer known as Jenny Craig, Inc. ("Jenny Craig"). Jenny Craig and LA Weight Loss Centers ("LA Weight Loss") bought nutritional or weight management products from FSC, or its competitors, for distribution to consumers. In addition, FSC bought food bars from vendors, such as Increda-Meal, Inc. ("Increda-Meal") for sale to customers, such as Jenny Craig and LA Weight Loss.

In the Pennsylvania lawsuit, in addition to his request for compensatory damages, Katz sought a judgment declaring that his intended hiring of Sabatura would not violate

the restrictive covenant that she had signed.[3] The Pennsylvania and New Jersey lawsuits, thus, overlapped with regard to the interpretation of the restrictive covenant. The attorneys for the respective parties (the same attorney represented FSC in both the New Jersey and Pennsylvania lawsuits) agreed that all evidence produced through discovery could be used in both matters.

On March 1, 1999, respondent moved for summary adjudication in Pennsylvania of that portion of the complaint seeking a judicial declaration that Katz's employment of Sabatura would not violate the restrictive covenant. In support of the motion, respondent prepared and submitted a March 1, 1999 certification signed by Katz, stating that Katz intended to hire Sabatura and that the new "venture is not competitive with the business of Food Sciences Corporation . . . Food Sciences Corporation will not lose business or customers because of my venture." As seen below, that was not true. Respondent also prepared and submitted a March 1, 1999, certification signed by Sabatura, containing a similar statement. On March 23, 1999, the court denied the motion for summary adjudication.

On April 26, 1999, FSC counsel sent respondent a notice to take Katz's deposition on May 3, 1999, and enclosed a schedule of documents to be produced at that time. On May 3, 1999, respondent objected to the short time for the production of documents,

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[3] According to respondent's brief to us, Katz hired Sabatura on August 6, 1999.

citing the federal rule of civil procedure permitting a party thirty days to respond to a document request. FSC counsel agreed to proceed with Katz's deposition without the documents.

At the May 3, 1999, deposition, FSC counsel and respondent agreed that portions of Katz's testimony were confidential and would be kept separately from the remainder of the deposition. At the deposition, FSC counsel asked Katz numerous questions about his contacts with Jenny Craig:

Q. How many contacts have you had irrespective of who initiated the contact with Jenny Craig since you terminated your relationship with the joint venture Food Sciences, Robard, what have you?

A. Perhaps a dozen.

Q. How many times have you gone out to California to visit Jenny Craig people?

A. Once.

Q. The other communications have been oral?

A. Yes.

Q. Any in writing?

A. None.

* * *

Q. Has there been any discussion between you and Jenny Craig personnel about your doing business with or for Jenny Craig?

A. Peripherally.

Q. Do you contemplate and expect to do business with Jenny Craig with your new corporation?

A. At some time I would hope to.

Q. Do you expect to?

A. I would hope to.

Q. That's not an answer to my question, sir. If you have no expectation, say so.

A. I would hope to do business with them.

Q. Have you been led to believe that you would do business with them?

A. No.

Q. Has anybody ever said anything to you to encourage your belief that you would do business with them?

A. No.

Q. While you were in the joint venture or associated with Food Sciences or Robard, did you have any –

[Respondent]: Are you finished with your confidential questioning?

Counsel: Yes, thank you.

Also on May 3, 1999, in the New Jersey lawsuit, respondent submitted two affidavits, one signed by Sabatura and the other by Katz, opposing FSC's request to enforce the restrictive covenant. The affidavits, dated April 23, 1999, are almost identical

to the certifications filed in the Pennsylvania litigation and repeat the contention that Katz's venture would not be competitive with FSC's business.

On May 14, 1999, the New Jersey court conducted a hearing on FSC's request for an injunction. The court found that Katz's new venture was not competitive with FSC and denied FSC's request to prevent Sabatura from working for Katz. The court, however, restrained Sabatura from using or disclosing FSC's product formulations. On June 8, 1999, the court entered a written order formalizing its decision.

On June 3, 1999, in the Pennsylvania case, FSC served Katz with a request for the production of documents, including the following:

> 4. All documents reflecting, referring, relating to and/or evidencing communications of any kind or nature which Katz has had with any persons(s) or company(ies) in the food service or weight loss business including, without limitation, person(s) or company(ies) with whom FSC did business or was doing business during the time that Katz was employed by or provided services to FSC.
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> 8. All documents reflecting, referring to, relating to and/or evidencing communications of any kind or nature between Robert Katz and (a) any representatives of Jenny Craig and/or LA Weight Loss and/or any other customer of FSC and (b) any representatives of any supplier and/or vendor of FSC.

As noted above, these documents had also been requested on April 26, 1999, to be produced at Katz's May 3, 1999 deposition. Respondent had objected to the short notice of the request. On July 16, 1999, respondent produced 1,769 documents pursuant to

FSC's request. He objected to producing any documents that contained trade secrets and confidential information on product and pricing.

On August 31, 1999, FSC served respondent with a second request for the production of documents, directed to Katz, and a first request for the production of documents, directed to Sabatura and Katz's corporation, NSC. Four days earlier, August 27, 1999, FSC had sent a subpoena to Increda-Meal, the manufacturer of weight-reduction food bars sold to FSC. In response to the subpoena, Increda-Meal produced documents indicating that Katz had been negotiating a contract for Increda-Meal to manufacture food bars for sale to LA Weight Loss, including a May 19, 1999 document titled "Agreement for receipt and exchange of confidential information." Respondent had neither produced these documents to FSC nor corrected Katz's written statements or deposition testimony that failed to disclose them. Respondent denied that Katz had shared these documents with him, conceding that, at the end of May 1999, Katz had shown him drafts of the agreements.

In September 1999, FSC issued a subpoena to Jenny Craig, which responded by producing an agreement, stamped "confidential," reached with Katz. The letter-agreement, dated December 28, 1998, was signed by Jenny Craig on December 31, 1998 and by Katz on January 4, 1999, while Katz was still associated with FSC. The agreement provided as follows:

> If Jenny Craig Products, Inc. or any related entity of Jenny Craig, purchases any or all of the 15 products identified in Appendix 1 or like product, from a vendor(s) other than Food Science Corporation, you will receive the compensation described. Jenny Craig will pay you a five percent (5%) commission on each such purchase(s) valued directly from the vendor/supplier invoice(s). Payment of the commission will be made no later than thirty (30) days from receipt of invoice(s). This agreement will commence on December 18, 1998.
>
> Both parties acknowledge that this agreement may be modified from time to time to incorporate the payment of additional compensation for the services that may be rendered by you for Jenny Craig in the future for the development of other programs and products. Such modification shall be in writing signed by both parties.

Jenny Craig also produced copies of two checks issued to Katz pursuant to the agreement, in the amounts of $21,881.24 and $36,673.05, dated January 19, 1999, and March 4, 1999, respectively. Copies of check requisition forms supplied by Jenny Craig indicated that the purpose of the checks was sales commission on purchases of food products.

Respondent had neither produced the Jenny Craig agreement in discovery nor corrected Katz's written statements or deposition testimony that failed to disclose it. Respondent did not dispute that he knew of the agreement in late January or early February 1999, three months before Katz's deposition and more than six months before FSC served him with the second request for the production of documents. He also did not dispute Sabatura's testimony that he had never disclosed the agreement to her and that she was not aware of it until after Jenny Craig supplied it to FSC. The disclosure to

Sabatura was important because she may have unwittingly supplied untrue information to the court. Sabatura signed affidavits prepared by respondent that stated that Katz was not competing with FSC. Sabatura also testified in the litigation to the same effect. She did so without knowledge of the agreement between Katz and Jenny Craig, which arguably showed that Katz was competing with FSC.

According to a local federal rule of procedure in the Pennsylvania case, the parties were required to make initial disclosures of certain information, without the necessity of discovery requests. The parties were further required to supplement or correct those disclosures upon learning that the information supplied was incomplete, incorrect or no longer true. The rule provides that an attorney's signature on the disclosure certifies that it is complete. During the Pennsylvania litigation, respondent served an initial disclosure and supplemented it on eight occasions. He never disclosed the Jenny Craig agreement or Increda-Meal documents to FSC.

While the subpoena to Jenny Craig was outstanding, respondent filed a motion for partial summary judgment in the Pennsylvania litigation on FSC's counterclaim for damages, attaching, in support of the motion, the transcript of the New Jersey May 14, 1999, hearing that led to the denial of FSC's application for injunctive relief against Sabatura. In reply to FSC's cross-motion for partial summary judgment, respondent filed an October 29, 1999, declaration signed by Katz. Although Katz's declaration contained

a discussion of events that took place around the same timeframe of the Jenny Craig agreement, Katz did not disclose the agreement or his negotiations with Increda-Meal or LA Weight Loss. In addition, respondent knew that he had withheld documents from FSC and, at the same time, criticized FSC's failure to prove that Katz's affidavit was not truthful. In his memorandum of law opposing FSC's motion for summary judgment, respondent argued:

> Food Sciences and Schwartz have failed to demonstrate that a reasonable jury could not find in favor of Katz on any of his claims. They have not offered any evidence of why his declaration testimony and the testimony of other persons he has offered in opposition to their motion should not be believed.
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> Both motions for summary judgment were denied on November 17, 1999.

After FSC learned of the Jenny Craig agreement and the evidence of Katz's negotiations with Increda-Meal and LA Weight Loss, it filed a motion in the Pennsylvania proceedings to sanction Katz and respondent. On January 12, 2000, the court entered an order granting the motion:

> Plaintiff provided misleading and inaccurate answers to deposition questions relating to his contacts with Jenny Craig. See May 3, 1999 Katz Dep. At pp. 16-19. In addition, without a proper basis, documents related to plaintiff's contacts with Jenny Craig were not produced although requested in paragraphs 4 and 8 of Defendants' First Request for Production of Documents directed to plaintiff Robert A. Katz. . . .
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> The responses and objections were signed by plaintiff's attorney Arnold I. Kalman, Esquire. Despite the response to Request #4, plaintiff and his attorney knowingly withheld the documents related to plaintiff's contacts

> with Jenny Craig. In addition, the objection in response to Request #8 was totally meritless, evasive, and designed to mislead defendants. Defendants have been put to the unnecessary expense of having to file the November 12, 1999 motion for sanctions and will necessarily incur extra expenses in redeposing plaintiff Robert A. Katz and Gail Sabatura. . . . Under the totality of the circumstances, the court imposes sanctions jointly against plaintiff Robert A. Katz and Arnold I. Kalman, Esquire for defendants' reasonable attorney's fees and costs related to the preparation and filing of the defendants' November 12, 1999 motion for sanctions and for reasonable attorney's fees and costs in redeposing plaintiff Robert A. Katz and Gail Sabatura.

In addition, the court permitted FSC to take additional discovery. According to respondent, he paid a sanction of $4,200 in the Pennsylvania litigation.

On March 14, 2000, after the Pennsylvania case proceeded to trial, a jury dismissed Katz's claim, finding that Katz was an FSC employee, not a joint venturer, and awarded FSC compensatory damages of $58,554.49, the amount of the commissions that Jenny Craig had paid Katz, plus punitive damages of $100,000 for breach of fiduciary duties. The matter was settled after Katz filed an appeal.

After FSC's discovery of the Jenny Craig agreement, FSC demanded that respondent withdraw Katz's April 23, 1999, affidavit opposing FSC's request for an injunction in the New Jersey lawsuit. Respondent did not reply to FSC's demand. On December 21, 1999, FSC moved to strike the affidavit, impose restrictions against Sabatura, impose sanctions against respondent, and reopen discovery. In his January 6, 2000, opposition to the motion, Katz stated that "[n]either Mrs. Sabatura nor

[respondent's co-counsel in New Jersey] had knowledge that Mr. Katz had received a commission from Jenny Craig when Mr. Katz submitted his affidavit in this action."

On January 14, 2000, the court granted FSC's motion, struck Katz's affidavit, vacated its June 8, 1999, order denying an injunction and instructed FSC to file a motion for the withdrawal of respondent's *pro hac vice* admission and for sanctions. Although the court initially ordered Sabatura to terminate her employment with Katz, it subsequently permitted her to remain employed, subject to certain restrictions. At the hearing, respondent voluntarily withdrew as Sabatura's attorney, obviating the need for a motion to withdraw his admission. The court imposed a sanction of $7,239 against respondent.

At that hearing, the court made the following remarks to respondent:

The Court: You and I have a problem. And the problem is you choose to let me know what you want to let me know. You don't choose to present everything to me and explain it to me and let me determine the context and what worthwhileness I'm going to give to it --

[Respondent]: Sir--

The Court: -- right? You now are giving me explanations –

[Respondent]: -- that was no –

The Court: -- as to why this particular paragraph ought not to be construed that way. Shouldn't you have presented that paragraph, that document, along with the explanations to me so that I could see,

I could make my own judgment that, indeed, Mr. Katz was not to be competitive?

* * *

The Court: You say I should not have drawn an inference from this to the extent that Katz was competitive. I say I should have at least known of it that I could make my own decision. . . . No lawyer has the right to spoon-feed me a little bit and hope thereby I come to a particular favorable decision. . . . Right now I am only deciding that it was improper not to reveal this information to me. . . . [T]here was a want of candor, a failure to disclose relevant information which had the capability of not permitting me, being ignorant of that information, to arrive at my own best judgment on a meaningful issue.

* * *

The Court: I'm saying is Sabatura, one, working for Katz too? Yes. Two, is Katz a competitor? Yes. And three, is what Sabatura is doing in working for Katz something which is meaningful in furthering the ability of Katz to compete? That simple. . . Is that not furthering the ability of --

[Respondent]: Katz to compete.

The Court: -- Katz to compete with Food Sciences?

[Respondent]: Does it further the ability, yes, it does.

The Court: Pardon?

[Respondent]: It does. It furthers his ability. But unfairly, no.

The Court: It doesn't have to be unfair.

After finding that Katz was competing with FSC and that Sabatura's employment assisted Katz in that endeavor, the court ruled that Sabatura violated the restrictive covenant. The court then stated:

> I would note that by reason of what was earlier produced to me, which was less than candor on behalf of Ms. Sabatura, and I understand she may not, and I am not making this judgment, may not have known herself of some of the events, her attorney did. And it colors or infects her in that regard.

On April 10, 2001, in an unpublished opinion, the Appellate Division affirmed the order for sanctions against respondent, finding that he had violated *RPC* 3.3(a)(5). The Appellate Division rejected respondent's argument that the Jenny Craig agreement was limited to compensation for past services and was not in effect at the time that Katz's affidavit was submitted. The Appellate Division noted that the agreement did not contain a dissolution date and that it permitted the parties to modify the agreement to provide additional compensation to Katz for future services. The Appellate Division further stated:

> When Katz's affidavit is compared on its face with the agreement, Katz's affidavit appears to be false. The agreement on its face revealed that at least one of Food Sciences' customers, Jenny Craig, would pay Katz a commission whenever Jenny Craig purchased certain products from companies other than Food Services [sic]. Thus, the agreement appears to provide an incentive for Katz to obtain product for Jenny Craig from manufacturers other than Food Sciences. Minimally, there is at least a serious question as to whether Food Sciences and Katz had become competitors by the time Kalman submitted Katz's affidavit claiming the contrary. . . . [W]e conclude that sanctions were legitimately imposed because the agreement was relevant and appeared on its face to conflict

> with the affidavit. Because of that appearance alone, the agreement should have been disclosed. . . . [I]t had to be disclosed if Kalman was to be candid with the court, as the canons of ethics so require. . . . In order to be faithful to the dictates of R. 1:4-8[4], and R.P.C. 3.3, Kalman had an obligation to disclose the Jenny Craig document along with the affidavit, together with any explanation of the circumstances so as to fulfill his obligation under the rule.

The Appellate Division concluded that "[l]itigation is not a game requiring guile and deception, and no lawyer may attempt with impunity to mislead a court."

For his part, respondent claimed that Katz had instructed him not to produce the Jenny Craig agreement and other documents because they contained confidential information and FSC counsel had previously violated the agreement not to disclose to FSC Katz's confidential deposition testimony. As noted above, the court in the Pennsylvania litigation ruled that respondent's objection was "totally meritless, evasive and designed to mislead defendants," and that respondent had knowingly withheld the Jenny Craig agreement from FSC.

Respondent contended that, in November and December 1998, while Katz was associated with FSC, Jenny Craig had expressed concerns that FSC would be unable to fill its pending orders. Apparently, FSC had informed Jenny Craig that delivery of its

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[4] *R.*1:4-8 provides that by signing, filing or advocating a pleading or other paper, an attorney "certifies that to the best of his or her knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . the factual allegations have evidentiary support."

orders would be at least forty days late. According to respondent, after Katz determined that Jenny Craig's concerns were well-founded, Katz obtained products for Jenny Craig from other companies. Respondent argued that Jenny Craig stated that it had compensated Katz for his services because it was "the right thing to do," and that, although the agreement did not have a termination date, it did not contemplate an ongoing relationship. He contended that the agreement itself provided that any future agreement for additional compensation to Katz was to be in writing and signed by both parties. Respondent claimed that, because the agreement represented a "one-shot deal" for past services, it was not relevant to FSC's request for information about future business between Katz and Jenny Craig. Moreover, respondent asserted that all of the deposition questions posed to Katz had been limited to the timeframe after Katz's association with FSC had terminated, or, after the formation of NSC, which took place in April 1999. Therefore, respondent argued, Katz's deposition testimony and replies to discovery requests had been accurate.

Respondent also argued that FSC counsel had "bamboozled" the OAE by filing a grievance filled with inaccuracies, which the OAE repeated verbatim in the ethics complaint. He also contended that, although FSC counsel attached exhibits to the grievance, key documents were intentionally omitted to mislead the OAE.

Lastly, respondent pointed out that, although courts sanctioned him for failure to disclose documents, they applied the preponderance of the evidence standard, while the ethics presenter was required to prove ethics violations by a clear and convincing standard. Respondent, thus, contended that the courts' findings were not binding on the DEC. After oral argument, respondent submitted a letter in support of his position that the courts' determination does not have a preclusive affect on us.

* * *

The DEC found that respondent violated *RPC* 1.7(a) and (b) by representing both Katz and Sabatura and failing to disclose to Sabatura that Katz had a "secret agreement" with Jenny Craig. The DEC also found that respondent violated *RPC* 3.3(a)(2), *RPC* 8.4(c) and *RPC* 8.4(d) by failing to disclose to the court and FSC counsel the documents concerning the agreement with Jenny Craig and the documents concerning his negotiations with Increda-Meal and LA Weight Loss Centers. The DEC did not address the charges that respondent violated *RPC* 3.3(a)(1), (4) and (5). Because the DEC made its own independent findings, we need not address respondent's argument that the courts' findings were not binding on the DEC.

The DEC recommended a six-month suspension, presumably a restriction on respondent's *pro hac vice* appearance in New Jersey for six months.

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Following a *de novo* review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is supported by clear and convincing evidence.

Respondent failed to disclose documents that had been requested several times in discovery and failed to correct Katz's testimony and affidavits that he knew were inaccurate. In addition, by failing to reveal material information to Sabatura, while representing her and Katz at the same time, respondent engaged in a conflict of interest, as detailed below.

Specifically, in the Pennsylvania litigation, FSC counsel made at least three requests for the production of documents. Among other items, FSC counsel asked for documents in connection with any communications that Katz might have had with (1) anyone in the food service or weight loss business and (2) representatives of Jenny Craig, LA Weight Loss, any other FSC customer and any supplier or vendor of FSC during Katz's employment with FSC and after his departure. Although respondent objected to the short notice of the first request, FSC counsel later served him with two identical

requests. Respondent claimed that he had not produced the documents under instructions from his client because FSC counsel had violated a confidentiality agreement reached during Katz's deposition. Respondent did not make that argument to either court. Moreover, contrary to his assertions, the documents did not contain any trade secrets or confidential pricing or product information, a circumstance that might have supported his objection. Although respondent produced 1,769 documents and supplemented his initial discovery disclosure eight times, he never produced the Jenny Craig or Increda-Meal documents.

Respondent also claimed that the Jenny Craig agreement was not relevant because it did not contemplate that Katz and Jenny Craig would be doing business in the future, but related only to Katz's services in obtaining substitute products in December 1998, following FSC's inability to fill Jenny Craig's orders. Nevertheless, even if respondent's claim were accepted, it is undeniable that the documents were still relevant to the discovery requests. They represented Katz's communications with individuals in the food or weight loss industry in general and with Jenny Craig, Increda-Meal, and LA Weight Loss in particular, information that FSC had specifically requested be produced.

We could not accept respondent's explanation for failing to correct Katz's inaccurate testimony. He claimed that he understood the deposition questioning to be limited to the timeframe following Katz's departure from FSC. Although several

questions asked by FSC counsel addressed that time period, others did not. For example, when FSC counsel asked Katz if he had been led to believe that he would be doing business with Jenny Craig, Katz replied "no." This testimony was obviously untrue. Even if respondent viewed the Jenny Craig agreement as merely compensation for Katz's past services, the agreement itself contemplated possible future business transactions between Katz and Jenny Craig.

Furthermore, we may draw the inference that respondent intentionally interrupted FSC counsel's deposition questioning of Katz to prevent counsel from asking questions about Katz's contacts with Jenny Craig before his association with FSC ended. As noted above, the following exchange took place during Katz's May 3, 1999 deposition:

Q. While you were in the joint venture or associated with Food Sciences or Robard, did you have any –

[Respondent]: Are you finished with your confidential questioning?

Counsel: Yes, thank you.

The record does not contain any indication that FSC counsel completed the interrupted question, which seemingly intended to address whether Katz had had any contact with Jenny Craig during his association with FSC.

Not only did respondent withhold discovery and fail to correct his client's misrepresentations, but he also flaunted FSC's failure to challenge those false statements. In a brief submitted in opposition to FSC's motion for summary judgment, he pointed to

FSC's lack of evidence contradicting Katz's affidavit. In the brief, respondent argued that FSC had "not offered any evidence of why [Katz's] declaration testimony and the testimony of other persons he has offered in opposition to their motion should not be believed." Respondent first withheld documents from his adversary and then exploited the adversary's lack of evidence to challenge the validity of Katz's position. All of the foregoing conduct violated *RPC* 8.4(c), *RPC* 8.4(d) and *RPC* 3.4(d) (failure to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party). Although respondent was not specifically charged with a violation of *RPC* 3.4(d), the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential finding of a violation of that *RPC*. Furthermore, the record developed below contains clear and convincing evidence of a violation of *RPC* 3.4(d). Respondent did not object to the admission of such evidence in the record. In light of the foregoing, a finding of a violation of that *RPC* will not violate due process.

Moreover, respondent lacked candor to a tribunal, as found by both courts. His failure to produce documents and to correct his client's intentionally inaccurate statements violated *RPC* 3.3(a)(5) and *RPC* 8.4(c). Respondent knew that the New Jersey court would consider the Jenny Craig agreement when deciding whether to grant FSC's request for an injunction. As the court stated, respondent chose to "spoonfeed" the court information that he thought would help his client and to conceal documents that were

detrimental to his client's position. As a result of respondent's failure to disclose relevant documents, the court denied FSC's request for restraints against Sabatura. Upon FSC's discovery of the Jenny Craig agreement, the court was required to conduct another hearing, at which it determined that respondent had shown a lack of candor during the earlier hearing. This unnecessary expenditure of judicial resources prejudiced the administration of justice and, therefore, violated *RPC* 8.4(d). Respondent violated the same rules when he duplicated his misconduct in the Pennsylvania litigation.

Because, however, respondent did not make a false statement to a tribunal, assist a client in an illegal, criminal or fraudulent act or offer false evidence, we dismissed the charges that he violated *RPC* 3.3(a)(1), *RPC* 3.3(a)(2) and *RPC* 3.3(a)(4).

Respondent also engaged in an impermissible conflict of interest. At first blush, it appears that Katz's and Sabatura's interests were common, as they both sought judicial approval for Sabatura to work for Katz, notwithstanding that Sabatura was bound by the covenant not to compete with FSC. Respondent, however, failed to disclose to Sabatura the existence of Katz's agreement with Jenny Craig and his contacts with FSC's customers and suppliers, such as LA Weight Loss and Increda-Meal. By intentionally withholding this information from Sabatura, respondent permitted her to file inaccurate affidavits with the court, declaring that Katz did not compete with FSC. Furthermore, respondent permitted Sabatura to potentially violate the covenant not to compete with

FSC. Respondent's concealment of material information from Sabatura precluded her from making an informed decision on whether her employment with Katz would violate the restrictive covenant with FSC. Moreover, as found by the New Jersey court, respondent "infected" Sabatura's cause. Indeed, the court determined that Sabatura's employment furthered Katz's ability to compete with FSC. By placing Katz's interests above Sabatura, respondent violated *RPC* 1.7(a) and (b).

Respondent also violated *RPC* 1.8(f) (a lawyer shall not accept compensation for representing a client from one other than the client, unless the client consents after consultation, there is no interference with the lawyer's independence of professional judgment, and client information is protected, as required by *RPC* 1.6). Here, respondent accepted fees from Katz for representing Sabatura. Although the rule provides for exceptions, respondent did not comply with those safeguards. He allowed his representation of Katz to interfere with his representation of Sabatura. Moreover, in his March 6, 1999 letter to Sabatura, he advised her that, although he did not perceive a potential for a conflict, if one developed, he would withdraw from representing her. In the event of a conflict, however, respondent would be required to withdraw from representing either party. He clearly, thus, favored Katz, the person who was paying all of his fees. Although respondent was not charged with a violation of *RPC* 1.8(f), we deemed the complaint amended to conform to the proofs. *In re Logan*, 70 *N.J.* 222, 232 (1976).

In sum, respondent violated *RPC* 1.7(a) and (b), *RPC* 1.8(f), *RPC* 3.3(a)(5), *RPC* 3.4(d), and *RPC* 8.4(c) and (d). In this matter, respondent's misconduct went well beyond the bounds of zealous advocacy. Respondent acted with deliberation and deceit to conceal from the court and his adversary material information detrimental to his client.

In cases involving lack of candor to a tribunal, although suspensions are the most frequent sanctions, the range of discipline is wide. *See, e.g., In the Matter of Robin K. Lord* DRB 01-250 (2001) (admonition where attorney failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias, thus resulting in a lower sentence because the court was not aware of the client's significant history of motor vehicle infractions; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); *In re Whitmore*, 117 *N.J.* 472 (1990) (reprimand where a municipal prosecutor failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a charge of driving while intoxicated intentionally left the courtroom before the case was called, resulting in the dismissal of the charge; attorney did not have an improper motive and "may not have clearly seen the distinct line that must be drawn between his obligations to the court and his commitment to the State, on the one hand, and, on the other, his feelings of loyalty and respect for the police officers with whom he deals on a regular basis." *Id.* at 480); *In re Norton and Kress*, 128 *N.J.* 520 (1992) (both

the prosecutor and defense counsel were suspended for three months for permitting the dismissal of a charge of driving while intoxicated; although the attorneys represented to the municipal court that the arresting officer did not wish to proceed with the case, they failed to disclose that the reason for the dismissal was the officer's desire to give a "break" to someone who supported law enforcement); *In re Kernan*, 118 *N.J.* 361 (1990) (attorney received a three-month suspension for failure to inform the court, in his own matrimonial matter, that he had transferred property to his mother for no consideration, and failure to amend his certification listing his assets; attorney had a prior private reprimand); *In re Forrest*, 158 *N.J.* 429 (1999) (attorney suspended for six months for failure to disclose the death of his client to the court, to his adversary and to an arbitrator; the attorney's motive was to obtain a personal injury settlement); *In re Telson*, 138 *N.J.* 47 (1994) (attorney suspended for six months after he concealed a judge's docket entry dismissing his client's divorce complaint, obtained a divorce judgment from another judge without disclosing that the first judge had denied the request, and denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was scared); *In re Cillo*, 155 *N.J.* 599 (1998) (one-year suspension where, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, attorney obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; attorney knew that at

least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve); *In re Kornreich*, 149 *N.J.* 346 (1997) (three-year suspension where attorney, who had been in an automobile accident, misrepresented to the police, her lawyer and a municipal court judge that her babysitter had been operating her vehicle and presented false evidence in an attempt to falsely accuse another of her own wrongdoing; two members of the Court voted for disbarment). On the other hand, an attorney received a private reprimand (now an admonition) in 1991 when he misrepresented to a judge that he had his law firm's authority to settle a legal malpractice action and then moved to vacate the settlement because he lacked the law firm's authority to settle the case; in mitigation, we considered that the attorney acted out of fear because he had appeared in court expecting to settle the case and then learned that he would be selecting a jury and that his adversary had almost forty years of experience; that the attorney had recently experienced numerous personal problems; and that he faced unforeseen financial responsibilities after he entered into the settlement agreement).

Here, the Appellate Division, in affirming the sanctions imposed on respondent by the New Jersey court, stated:

> 'Read together, the Rules of Professional Conduct and the New Jersey Court Rules require what common courtesy and candor suggest, that pleadings and answers to interrogatories should not contain half-truths intended to mislead both adversaries and the court.' *Kernan v. One Washington Park*, 154 *N.J.* 437, 464-65 (1998) (J.

Pollock, concurring). . . . Litigation is not a game requiring guile and deception, and no lawyer may attempt with impunity to mislead a court.

Here, respondent not only misled two different courts, but also withheld material documents and information from his adversary, engaged in a conflict of interest and accepted fees from someone other than his client. In addition, at the ethics hearing, rather than acknowledge his wrongdoing and show remorse, respondent persisted that he had engaged in no wrongdoing. Ironically, after failing to disclose important documents to the court and his adversary, respondent argued that FSC counsel omitted key documents and "bamboozled" the OAE. Respondent obviously lacks insight into the impropriety of his own misconduct.

Based on the foregoing and comparing respondent's conduct to that of the attorneys in the above cited cases, we unanimously voted that respondent's privilege to apply for *pro hac vice* admission in New Jersey should be revoked for one year.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Arnold I. Kalman
Docket No. DRB 03-133

Argued: June 19, 2003

Decided: August 12, 2003

Disposition: One-year suspension of pro hac vice privileges

Members	*Disbar*	*One-year Suspension of pro hac vice privileges*	*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:		9					

Julianne K. DeCore
Julianne K. DeCore
Acting Chief Counsel