SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-027

IN THE MATTER OF :
:
CARMINE DESANTIS :
:
AN ATTORNEY AT LAW :

Decision

Argued: March 15, 2001

Decided: August 6, 2001

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

Respondent appeared pro se.

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 criminal conviction for obstruction of justice, in violation of 18 U.S.C.A. § 1505.

Respondent was admitted to the New Jersey bar in 1988. He was admitted to the bar of the State of New York in 1989. On October 16, 2000 he was temporarily suspended based on his criminal conviction, pursuant to R.1:20-13(b)(1). In re DeSantis, 165 N.J. 508 (2000). His suspension remains in effect. Respondent was disbarred in New York on June 5, 2000

as a result of his criminal conviction.[1]

On October 28, 1998 respondent pleaded guilty to a one-count information filed in the United States District Court for the Southern District of New York charging him with obstruction of justice. A detailed recitation of the underlying facts was set forth in the March 28, 1999 letter of the Assistant United States Attorney to the sentencing court:

> During the first half of 1995, International Business Machines Corporation ('IBM') evaluated the possibility of acquiring Lotus in a stock acquisition. IBM's consideration of this transaction was not disclosed to the public, and was carried out by IBM employees and outside advisors who were under a duty to maintain its confidentiality.
>
> On June 5, 1995, IBM publicly announced a tender offer for the purchase of all of Lotus' outstanding common stock. Pursuant to the terms of the tender offer, IBM offered to buy from shareholders any and all Lotus common stock at a price of $60 per share. The $60-per-share price offered by IBM on June 5, 1995 was almost twice the market price of $32.50 per share at the close of trading on June 2, 1995, the previous day on which Lotus common stock traded over the National Association of Securities Dealers' Automated Quotation System. Following IBM's announcement, the market price of Lotus common stock rose on June 5, 1995 to approximately $61.44 per share. On or about June 12, 1995, IBM increased its offer from $60 per share to $64 per share, and Lotus' management agreed to IBM's acquisition of Lotus at that price.
>
> On or before June 1, 1995, an acquaintance of Mr. DeSantis named Peter Mazzone learned of IBM's plan to launch a tender offer for Lotus' common stock from a cousin who was acquainted with an IBM employee. On June 1, 1995, Mazzone recommended that Mr. DeSantis purchase call options for Lotus common stock and specifically advised him to purchase 'June 30' call option contracts. (Each 'June 30' call option contract gave the purchaser the right to acquire 100 shares of common stock on or before June 16, 1995 at a price of $30 dollars per share.) Mazzone did not relate to Mr. DeSantis the basis for Mazzone's recommendation, but advised him that a purchase of 'June 30' call options was likely to be profitable. On Friday, June 2, 1995, acting

[1]In New York disbarment is the equivalent of a seven-year suspension.

upon Mazzone's recommendation, Mr. DeSantis purchased six 'June 30' call option contracts for a total purchase price of approximately $1,822. On Monday, June 5, 1995, after IBM publicly announced its plan to acquire Lotus, Mr. DeSantis sold the contracts that he had purchased three days before, making a net profit of approximately $16,101.

On the day that Mr. DeSantis sold his options, Mazzone informed Mr. DeSantis that Mazzone himself and a common acquaintance of DeSantis and Mazzone named Dr. Gary Spierer had each made a profit of approximately $80,000 to $90,000 by purchasing 'June 30' call options in advance of IBM's announced tender offer.

In June 1995, the SEC's Boston District Office commenced an investigation to determine whether any persons had bought Lotus securities on the basis of material nonpublic information with respect to IBM's plan to acquire Lotus in violation of, inter alia, Title 15, United States Code, Sections 78j(b) and 78n(e), and Title 17, Code of Federal Regulations, Sections, 240. 10b-5 and 240.14e-3.

From newspaper articles and conversations with his securities broker, Mr. DeSantis learned of the SEC's investigation a few days after selling his Lotus call option contracts. After learning of the investigation, Mr. DeSantis questioned Mazzone about the source of his tip to purchase Lotus securities and learned that Mazzone had acquired advance knowledge of IBM's plan to acquire from a cousin who was acquainted with an IBM employee involved in IBM's proposed acquisition.

In November 1996, Mr. DeSantis received a telephone call from an SEC attorney. In the telephone conversation that followed, the SEC attorney inquired whether Mr. DeSantis was acquainted with Peter Mazzone or Gary Spierer and Mr. DeSantis falsely denied knowing either person. Later that month, Mr. DeSantis received a subpoena calling for his testimony before the SEC. After receiving the subpoena, Mr. DeSantis met with Mazzone, who advised DeSantis that Mazzone, Mazzone's cousin, and Spierer had agreed to provide the SEC with false explanations for their purchases of Lotus securities and urged DeSantis to do the same.

On December 3, 1996, Mr. DeSantis appeared before the Northeast Regional Office of the SEC in New York and falsely testified, among other things, that he had not received a recommendation to purchase Lotus securities and that he purchased Lotus call options on June 2, 1995 based on articles that he read in the newspaper that related public information about the company's management and business plans. Mazzone, Spierer, and various tippees [sic] of each of those individuals subsequently gave similar, false accounts of their

purchases of Lotus securities to the SEC. After Mazzone testified before the SEC, Mazzone and DeSantis had a conversation in which each informed the other that he had carried through on the plan to provide false information to the SEC in the hope of derailing the SEC's investigation.

In January 1998, Mr. DeSantis learned from a newspaper article of the arrest of Robert Cassano, the ultimate source of the inside information upon which Mazzone's recommendation was based. Later that month, Mazzone arranged to meet with DeSantis and informed him that Mazzone's cousin also had been arrested and that his cousin was 'finished' because of a tape recorded conversation that the cousin had with Cassano. Mazzone urged DeSantis not to disclose the truth if questioned by criminal authorities, telling him that he was 'screwed' because of his past perjury before the SEC. Mazzone similarly urged Dr. Spierer to 'stick' with the false account that he had provided in testimony before the SEC.

In the early Summer of 1996, Mazzone, Spierer, and DeSantis were informed through counsel that they were targets of the Government's criminal investigation of possible obstruction of the SEC investigation. In response, through counsel, both Mazzone and Spierer falsely denied any participation in such obstruction and asserted that their SEC testimony had been truthful. Of these three individuals, only Mr. DeSantis at that time admitted the truth. He advised the Government through counsel that he had in fact testified falsely before the SEC and admitted receiving a recommendation to purchase Lotus securities from Mazzone and falsely testifying before the SEC in order to protect Mazzone and avoid disclosure of the inside information upon which he eventually learned that Mazzone's recommendation was based.

Thereafter, Mr. DeSantis attended several debriefing sessions with representatives of the U.S. Attorney's Office and Federal Bureau of Investigation. In those sessions, Mr. DeSantis truthfully disclosed, to the best of this Office's knowledge, his own criminal conduct, including details of which the Government had no prior knowledge. In addition, Mr. DeSantis provided the Government with evidence concerning Mazzone's participation in insider trading and efforts to obstruct the SEC's investigation and Dr. Spierer's participation in those same efforts. In July 1998, Mr. DeSantis entered into a cooperation agreement with the Government.

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In sum, Mr. DeSantis rendered substantial assistance to the Government that contributed significantly to the convictions of Gary Spierer and Peter Mazzone and helped the Government to avoid trials that seemed likely before DeSantis's cooperation. Accordingly, the Government requests that all of the

foregoing be taken into account in determining an appropriate sentence for Mr. DeSantis.

[Exhibit C to the OAE's motion at 2-5]

On April 6, 1999 respondent was placed on probation for one year and ordered to pay a fine of $5,000.

In his brief and at oral argument before us, respondent advanced the reasons for his misconduct and mitigating factors. Respondent explained that he had acted to protect a friend, Mazzone, whose wife was a close friend of respondent's wife. In mitigation, respondent urged us to consider his extensive involvement in community and charitable organizations.

The OAE urged us to impose a three-year suspension, retroactive to the date of respondent's temporary suspension in New Jersey, October 16, 2000.

* * *

Upon a de novo review of the record, we determined 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)(1); In re Gipson, 103 N.J. 75, 77 (1986). Respondent's conviction of obstruction of justice is clear and convincing evidence that he violated RPC 8.4(b) (commission of a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Only the quantum of discipline to be imposed remains at issue.

R.1:20-13(c)(2)(ii); In re Goldberg, 105 N.J. 278, 280 (1987).

Respondent gave false testimony and engaged in a cover-up to obstruct an SEC investigation. The OAE noted that, although respondent's criminal activity did not involve his law practice, it did extend over a substantial period of time. Specifically, respondent purchased the Lotus stock option on June 2, 1995, his false testimony to the SEC was offered on December 3, 1996 and he did not enter into a cooperation agreement with the government until July 1998. In addition, respondent was motivated by self-gain.

The OAE correctly pointed out that this type of misconduct generally warrants a lengthy term of suspension. A three-year suspension was imposed in In re Woodward, 149 N.J. 562 (1997), where the attorney pleaded guilty to conspiracy to commit securities fraud. While employed at a New York City law firm, the attorney divulged confidential information about mergers, take-overs and tender offers to his brother and to his best friend, who then traded in the stocks of the companies in question and profited over $300,000. The attorney, however, did not realize any financial gain from his misconduct. Similarly, a three-year suspension was imposed in In re Van Dam, 140 N.J. 78 (1995) where an attorney pleaded guilty to a two-count information charging him with making a false statement to an institution insured by the Federal Savings and Loan Insurance Corporation and obstruction of justice. Also, in In re Solomon, 110 N.J. 56 (1988), a two-year suspension was imposed where a young attorney, while employed as a research analyst at a risk arbitrage firm, received confidential information about proposed take-overs. During a four-month period,

the attorney provided this information to his immediate supervisors, then traded in the stock and options of the take-over candidates, realizing substantial gains. The Court found that "such conduct manifests an indifference to the essence of the character that we have deemed essential to the licensure of every member of the Bar" and cautioned that, in the future, such conduct will be followed by a lengthy suspension or disbarment.

As noted above, respondent was disbarred in New York, which is the equivalent of a seven-year suspension. In the OAE's view, the above cases demonstrate that a three-year suspension is the appropriate discipline for this respondent.

We agree with the OAE that respondent's conduct was serious. He intentionally obstructed an SEC investigation by lying to investigators. Ordinarily, misconduct of this type would merit the discipline that the OAE suggested.

We considered, however, the extensive mitigating factors in this matter. Specifically, at the time of respondent's initial acts of misconduct - his purchase of the Lotus stock options - he was unaware that he was relying on insider information. Indeed, he was not charged with any impropriety in that regard. Respondent's misconduct occurred when he chose to protect a friend by lying to the SEC. As noted by the author of one of respondent's character letters, "[i]n this situation, entered into innocently, complicated by the dishonesty and lack of forthrightness of a 'presumed friend,' influenced by the human responsibilities of a man toward his family (the so called 'friend') he acted on an emotional not a rational level and was wrong in so doing." Furthermore, the record contains a number of additional

character letters attesting to respondent's extraordinary community and charitable service. We were also persuaded by the letter from respondent's former client who, during the course of her personal injury suit, aware of the charges against respondent, still voiced her confidence in him as her attorney.

Unquestionably, the seriousness of respondent's conduct - obstruction of the SEC's investigation - cannot be overlooked. We recognize, however, that he used poor judgment in a misguided attempt to protect a friend. Indeed, once respondent wove his web of deceit, it became difficult to extricate himself from the situation. Although we are aware of the gravity of respondent's misconduct and the precedent cited by the OAE, we are not convinced that the circumstances of this matter require more than a one-year suspension. Hence, a seven-member majority determined that a one-year suspension is sufficient discipline for respondent's ethics offences. Two members would have imposed a two-year suspension.

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

Dated: 8/06/01

By: _____
Rocky L. Peterson
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Carmine DeSantis
Docket No. DRB 01-027

Argued: March 15, 2001

Decided: August 6, 2001

Disposition: (discipline)

Members	Disbar	One-year Suspension	Reprimand	Two-year Suspension	Dismiss	Disqualified	Did not Participate
Hymerling				X			
Peterson				X			
Boylan		X					
Brody		X					
Lolla		X					
Maudsley		X					
O'Shaughnessy		X					
Schwartz		X					
Wissinger		X					
Total:		7		2			

Robyn M. Hill 9/26/01
Robyn M. Hill
Chief Counsel