SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 16-274
District Docket No. XIV-2015-0055E

IN THE MATTER OF	
TODD DAVIS VAN SICLEN	
AN ATTORNEY AT LAW	

Decision

Argued: January 19, 2017

Decided: May 2, 2017

Reid Adler appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.[1]

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

This matter was before us on a motion for reciprocal discipline, pursuant to R. 1:20-14, filed by the Office of Attorney Ethics (OAE), following the imposition of a two-year suspension on respondent by the Third Judicial Department of the Appellate Division of the Supreme Court of New York

[1] We received respondent's oral argument form waiving his appearance on the date of hearing, but after argument had taken place.

(Department), based on his conduct in representing the owner of a private company in a reverse merger and his participation in a federal securities fraud scheme. The OAE seeks the imposition of a two-year suspension from the practice of law.

For the reasons set forth below, we determined to grant the motion for reciprocal discipline and, like New York, to impose a two-year prospective suspension.

Respondent was admitted to the New Jersey bar in 2000 and to the New York bar in 2001. At the relevant times, he was employed as an associate attorney with the Otto Law Group, PLLC (Otto Law), a Washington State law firm. It is not clear from the record whether respondent presently practices law. Respondent has no history of discipline in New Jersey.

We take the facts from the petition and the answer filed in the New York ethics proceeding.

Pak Peter Cheung was the president and chief executive officer of HerbalPharm, Inc. (HerbalPharm), a privately-held company. HerbalPharm was in the business of selling anti-aging products.

In 2004, Cheung retained attorney David M. Otto and Otto Law to incorporate HerbalPharm and raise funds for the entity. Otto recommended a reverse merger, which would allow HerbalPharm to bypass the ordinary disclosure and registration requirements

of going public. To effect the merger, respondent was given the task of locating a public shell company, that is, a company with minimal or no operations.

In 2006, respondent located Eurosoft Corporation (Eurosoft), through broker and former Otto Law client, Beverly Kammerling. At the time, Kammerling owed at least $50,000 in legal fees to Otto Law.

Kammerling offered to sell a controlling interest in Eurosoft (25,000,000 of 49,000,000 shares of stock) for $275,000. She would not accept HerbalPharm's $225,000 counter offer unless Otto Law agreed to reduce her bill by $50,000. Accordingly, a deal was structured so that the outstanding balance owed by Kammerling to the firm was reduced by $50,000 – not by Otto's waiver of that amount but, rather, by HerbalPharm's payment of the original $275,000 asking price for the Eurosoft stock.

HerbalPharm did not purchase the controlling interest in Eurosoft directly. Rather, Otto Venture Purchasers (OVP), a company affiliated with Otto, purchased the 25,000,000 shares of Eurosoft stock for $225,000. OVP resold that interest to HerbalPharm for $275,000. At Otto's direction, respondent informed Cheung that $275,000 was the market price for the stock, concealed Otto's and Otto Law's interests in the transaction, and never obtained a waiver from Cheung. OVP's

$50,000 "profit" was applied to the outstanding fees owed by Kammerling to Otto Law.

In 2007, HerbalPharm's name was changed to MitoPharm, Inc. (MitoPharm), which remained in the business of selling anti-aging products. Thereafter, Otto and respondent engaged in a "pump and dump" securities trading scheme. Specifically, they knowingly drafted letters containing false statements, designed to facilitate the purchase of MitoPharm's freely-tradeable stock,[2] by individuals and entities under Otto's control and influence, "at sufficient volume and pricing to attract private investors." Otto and respondent did not disclose to Cheung that the entities were owned and controlled by Otto.

After the unnamed individuals and entities had purchased the freely-tradeable stock, Otto had "complete, undisclosed control of MitoPharm's 'float,'" that is, the freely-tradeable shares of stock. At this point, and upon respondent's recommendation, Cheung hired stock promoter Charles Bingham to conduct an "aggressive" public relations campaign to promote MitoPharm's stock "by misleading potential investors about its non-existent anti-aging product."

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[2] The freely-tradeable stock comprised the remaining 24,000,000 shares of the original 49,000,000 shares of the Eurosoft/HerbalPharm/MitoPharm stock.

Bingham's campaign caused MitoPharm's stock price to rise more than 400 percent through the summer of 2007. Otto and Bingham then sold their shares of stock, resulting in a gain of more than $1 million for Otto and $300,000 for Bingham.

On April 6, 2011, respondent consented to the entry of final judgment in a United States Securities and Exchange Commission (SEC) civil suit, instituted against him as the result of the above transactions. The final judgment, which was entered five days later, permanently restrained and enjoined respondent from violating Section 5 of the Securities Act, 15 U.S.C. § 77e(a), barred him from participating in an offering of penny stock for a period of three years, and ordered him to pay a $10,000 civil penalty. On April 22, 2011, the SEC entered an order instituting public administrative proceedings against respondent, pursuant to Rule 102(e) of the SEC's Rules of Practice, and imposing a one-year suspension on him.

On June 26, 2014, New York disciplinary authorities, specifically, the Department's Committee on Professional Standards (Committee) filed a petition of charges and specifications against respondent. On December 4, 2014, the Department entered an order finding respondent guilty of having violated New York Disciplinary Rule (DR) 5-101(A) (prohibiting a lawyer from accepting or continuing employment if the lawyer's

exercise of professional judgment on behalf of the client will, or reasonably may, be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure); DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(5) (conduct prejudicial to the administration of justice); and DR 1-102(A)(7) (other conduct adversely reflecting on the lawyer's fitness as a lawyer). The determination was based on the allegations set forth in the Committee's petition and respondent's verified answer, as the pleadings raised no factual issues. As stated previously, respondent received a two-year suspension in New York.

In its brief, the OAE recommended a one-year suspension. Although the Department noted in its decision that respondent had "offered no submissions in mitigation," the OAE cited the following mitigating factors: (1) respondent cooperated with the SEC investigation, (2) he had been practicing law for only seven years at the time of his misconduct, (3) he has no disciplinary history, and (4) "he did not receive a direct financial benefit and he played a less active role and was not the architect of

the deceit." In aggravation, respondent did not report the two-year suspension to the OAE.

At oral argument, deputy ethics counsel informed us that the OAE was now seeking a two-year suspension.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E).

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state

. . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

With the exception of DR 1-102(A)(7),[3] the New York DRs violated by respondent are equivalent to New Jersey RPC 1.7(a)(2) (prohibiting a lawyer from representing a client if there is "a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer");[4] RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice). Here, respondent violated RPC 1.7(a)(2) and RPC 8.4(c). The record, however, does not support a violation of RPC 8.4(d).

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[3] New Jersey's RPCs do not have an equivalent to DR 1-102(A)(7) (other conduct adversely reflecting on the lawyer's fitness as a lawyer). Although RPC 8.4(b) refers to conduct reflecting adversely on a lawyer's fitness, that Rule applies exclusively to criminal acts. Here, the SEC matter was a civil action.

[4] The OAE incorrectly states that RPC 1.8(a) is the RPC equivalent to DR 5-101(A). RPC 1.8(a) applies to business transactions with clients.

"One of the most basic responsibilities incumbent on a lawyer is the duty of loyalty to his or her clients." Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 111 (2008) (quoting In re Opinion No. 653 of the Advisory Comm. on Prof'l Ethics, 132 N.J. 124 (1993)). When an attorney becomes involved in a conflict of interest, that duty of loyalty may be compromised, as it was in this case.

As stated above, RPC 1.7(a)(2) prohibits a lawyer from representing a client if there is "a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." Although respondent merely carried out the directives of Otto, who was the mastermind and beneficiary of the plan to defraud HerbalPharm of $50,000, he violated RPC 1.7(a)(2) nevertheless by participating in the transaction. There was not simply a "significant risk" that respondent's representation of Cheung and HerbalPharm would be materially limited. Rather, the representation, in fact, was materially limited.

Under RPC 1.7(a)(2), respondent's representation of Cheung and HerbalPharm in the reverse merger with Eurosoft was certainly "materially limited" by respondent's responsibility to "a third person," that is, Otto, his boss, as well as by respondent's

"personal interest," that is, in maintaining employment with Otto Law. Specifically, respondent represented Cheung and HerbalPharm in a transaction, knowing that it would operate in favor of Otto and Kammerling to the detriment of his clients, who were duped into paying $50,000 in legal fees to Otto Law on behalf of Kammerling.

Although respondent may have violated the same Rule by his participation in the "pump and dump" scheme, the record lacks clear and convincing evidence to support that conclusion. The scheme manipulated the value of the freely-tradeable stock and positioned Otto to be in control of those shares; however, it appears that Cheung knowingly may have participated in the scam, thus undercutting a finding of a conflict.

In respect of the "pump and dump" scheme, respondent's misconduct is more suitably captured by RPC 8.4(c), which prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Respondent did not violate RPC 8.4(d), however. As the plain language of the Rule makes clear, it applies to conduct that compromises the administration of justice. Violations of RPC 8.4(d) typically involve an attorney's non-compliance with court orders and other efforts to thwart justice, such as failing to appear for hearings, failing to disclose relationships with judges overseeing the attorney's cases, and

hiding assets from creditors to avoid collection. See, e.g., In re Ezor, 222 N.J. 8 (2015) (attorney maintained personal funds in the law firm's trust account to conceal those monies from his judgment creditors, who, as a result, were denied the ability to seize the asset); In re Cerza, 220 N.J. 215 (2015) (attorney failed to comply with an order requiring him to produce subpoenaed documents in a bankruptcy matter); In re D'Arienzo, 207 N.J. 31 (2011) (attorney failed to appear in municipal court for a scheduled criminal trial, and thereafter failed to appear for two orders to show cause stemming from his failure to appear at the trial); In re DeClemente, 201 N.J. 4 (2010) (attorney arranged three loans to a judge in connection with his own business and failed to either disclose to opposing counsel his financial relationship with the judge or ask the judge to recuse himself); and In re Orlow, 197 N.J. 507 (2009) (attorney assisted his client in fraudulently conveying and hiding assets before and after a creditor had obtained a judgment against him, knowing that his client's actions were taken for the purpose of hiding assets from the creditor).

As noted, New York imposed a two-year suspension on respondent. We find no reason, in fact or law, to deviate from that determination.

Although the OAE cites cases we previously have decided on motions for reciprocal discipline from New York, both involving acts of securities fraud, those matters stemmed from criminal conduct. See In re Spiegel, 172 N.J. 74 (2002) (New York disciplinary authorities found that the attorney had violated RPC 8.4(c) and (d) by virtue of his felony conviction under §352(c) of New York's Martin Act, by trading in the securities of several companies after having received insider information from his girlfriend; attorney was automatically disbarred in New York because the crime was a felony; the Court imposed a three-year suspension), and In re David, 181 N.J. 326 (2004) (fifteen-month prospective suspension was imposed on an attorney who was suspended for the same period in a disciplinary proceeding in the State of New York, arising from his 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 criminal acts of security fraud and money laundering; violations of RPC 1.15(d), RPC 8.4(b), and RPC 8.4(c)).

Here, respondent was not prosecuted for, and did not admit to, criminal conduct. Therefore, Spiegel and David (and the cases cited in those decisions) are not applicable to this case.

The cases cited by the OAE in support of its recent recommendation for the imposition of a two-year suspension are not

controlling in respect of the outcome of this matter for two reasons. First, like Spiegel and David, the attorneys in these cases were convicted of securities fraud. Second, the discipline imposed on those attorneys exceeded a two-year suspension. See In re Bultmeyer, 224 N.J. 145 (2016) (disbarment imposed on attorney who pleaded guilty to one count of conspiracy to commit wire fraud, which, over a four-and-a-half-year period, resulted in losses of more than $7 million but less than $20 million to victims numbering between 50 and 250; the attorney was sentenced to sixty months' imprisonment, followed by three years of supervised release, and ordered to pay more than $8.5 million to 179 victims); In re Marino, 217 N.J. 351 (2014) (disbarment imposed on attorney who pleaded guilty to one count of misprision of a felony in which 392 investors lost more than $309 million, while he was paid nearly $600,000; although the attorney's role was limited, during the seven-month period that he was aware of the fraud but did not report it, choosing instead to assist in concealing it, $60 million was invested and lost; the attorney was sentenced to twenty-one months' imprisonment, followed by one year of supervised release, and ordered to pay $60 million in restitution, jointly and severally with his co-defendants); In re Manoff, 219 N.J. 182 (2014) (three-year retroactive suspension imposed on attorney who pleaded guilty, in federal court, to one count of

conspiracy to commit securities fraud and two counts of securities fraud); and In re Woodward, 149 N.J. 562 (1997) (three-year retroactive suspension based on attorney's guilty plea to a federal securities fraud crime).

We recognize that the attorney in David, supra, 181 N.J. at 326, received only a fifteen-month suspension. Because David was convicted of a crime, whereas respondent was not even indicted, we examine our decision in that matter more closely.

David received a fifteen-month suspension because, although his conduct was criminal, in our view, "the mitigation presented on his behalf was 'impressive.'" In the Matter of Earl S. David, DRB 04-105 (July 28, 2004) (slip op. at 12). In particular, David's misconduct took place during a brief period, when he was "a relatively new attorney," who was "inexperienced in business matters" and had no securities law expertise. Id. at 5. Further, he was "a peripheral figure in the criminal scheme," who became involved after he was threatened by the individual who had solicited his participation," which resulted in "only a modest benefit" to him. Ibid. Moreover, at the time of his misconduct, David was suffering from depression due to a broken marriage engagement and his father's serious medical condition. Ibid.

In addition, David cooperated with the government's prosecution of the others involved in the scheme. Ibid. His

cooperation "proved critical to the overall success of the investigation and prosecution," resulting in the conviction of thirty-nine individuals. Ibid.

Finally, David expressed remorse. Ibid. He was committed to providing pro bono legal representation to vulnerable clients who lacked the financial means to pay for that representation, and he was involved in other acts of community service. Id. at 6-7.

Here, the mitigation weighing in respondent's favor is minimal and, thus, pales in comparison to that which was present in David. Indeed, most of the factors identified by the OAE are insufficient, at best. Clearly, the absence of a disciplinary history weighs in respondent's favor, as does the lack of personal gain. Yet, that is where the mitigation ends.

We do not accept the OAE's assertion that respondent's alleged cooperation with the SEC in its investigation, the number of years he had been practicing law at the time of the misconduct, and his "less active role" in the deceit, of which he was not the architect, amount to mitigation. First, the nature of his cooperation is not identified. Second, respondent had been practicing law for seven years and, thus, cannot be said to be inexperienced. Third, and significantly, his role was not "less active." Though he may have been following orders, respondent was the principal actor in the deceit underlying the reverse merger.

In short, the mitigating factors offered by the OAE are insufficient to reduce conduct that we believe warrants a two-year suspension. Moreover, in aggravation, respondent failed to report the suspension to the OAE, as required by R. 1:20-14(a)(1).

To conclude, we determined to grant the motion for reciprocal discipline and impose a two-year prospective suspension on respondent for his violations of RPC 1.7(a)(2) and RPC 8.4(c).

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: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Todd Davis Van Siclen
Docket No. DRB 16-274

Argued: January 19, 2017

Decided: May 2, 2017

Disposition: Two-year Suspension

Members	Two-year Suspension	Recused	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9		

Ellen A. Brodsky
Chief Counsel