PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

ORIGINAL

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No. 01-C-01358
	)	
MALCOLM B. WITTENBERG,	)	OPINION ON REVIEW
	)	
A Member of the State Bar.	)	
	)	

On his plea of guilty, in 2001 in United States District Court, respondent Malcolm B. Wittenberg was convicted of insider trading. (15 U.S.C. §§ 78j, 78ff; and 17 C.F.R §240.10b-5 (2000).) Following precedent of other attorneys' convictions of violating insider trading laws, we determined that respondent's conviction may or may not involve moral turpitude or other misconduct warranting discipline. However, because respondent's crimes were felonies, we imposed an interim suspension, effective November 2001. (Bus. & Prof. Code, § 6102, subd. (a).)[1]

After respondent's convictions had become final, the State Bar's Office of Chief Trial Counsel requested that we recommend respondent's summary disbarment to the Supreme Court. We declined to do so and instead referred the matter to our Hearing Department for an

[1]Unless noted otherwise, all later statutory references are to the provisions of the Business and Professions Code.

evidentiary hearing on whether moral turpitude or other misconduct warranting discipline was involved in the facts and circumstances; and, if so, for a recommendation of discipline. After a five-day trial, the hearing judge found that the facts and circumstances did involve moral turpitude and recommended that respondent be suspended for five years, stayed on a five-year probation with actual suspension for the first three years with credit toward his interim suspension.[2]

On review the State Bar contends that this case is eligible for a recommendation of summary disbarment; and, in any event, that we should recommend disbarment based on the seriousness of the crimes and associated ethical violations. Respondent does not dispute the suspension recommendation but does take issue with some of the moral turpitude findings. While we agree that the criminal violations were inexcusable for any attorney, particularly one in respondent's position of experience and knowledge, we see no reason to change our previous decision that this crime is ineligible for summary disbarment. On our independent review of the record, we have determined that the hearing judge concluded correctly that moral turpitude was involved in the facts and circumstances and balanced appropriately mitigating and aggravating circumstances to reach a proper recommendation of discipline and we shall recommend it to the Supreme Court.

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[2]In addition to complying with specific conditions, respondent's probation would require that before his actual suspension is terminated, he make the showing required by standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct as to rehabilitation, fitness to practice and legal learning.

I. Facts and Findings.

The essential facts are neither complex nor disputed. Many are contained in a stipulation reached before the State Bar Court trial. Others are found in respondent's criminal court plea agreement. We set forth those key facts succinctly.

Respondent was admitted to practice law in 1977 and has no record of prior discipline.

As a patent-trademark partner with Crosby, Heafey, Roach & May ("Crosby, Heafey"), respondent represented Forte Software, Inc. ("Forte"), in patent matters in 1995. Forte "went public" at that time. The Crosby, Heafey associate who worked primarily on the Forte patent matters told respondent that Forte's software was good. Respondent apparently failed to get Forte shares at the initial public offering (pre-market) price; and, although respondent put in an order to buy soon after Forte went public, the market price was higher than respondent's order price and he missed out on the stock, which continued to climb. In the late 1990s, the stock had gone down in price quite a bit and respondent said that he started watching it as a potential purchase. By August 1999, Forte's stock price had climbed because of speculation that it might be a takeover target.

On July 14, 1999, respondent had surgery for a torn shoulder rotator cuff. He was in some degree of pain for some weeks following surgery and was also taking prescribed medicine for pain-relief and to sleep. According to respondent, the effect of the surgery and medicines distracted his concentration during August 1999 when his crimes happened.

On August 13, 1999, Sayed Darwish, Forte's general counsel, left a voice mail message on respondent's phone to call him about "an urgent patent matter." On the morning of August 16, respondent returned the call and he and Darwish spoke. Darwish made it clear to

respondent that Sun Mircrosystems, ("Sun") a large, publicly traded company, was planning to acquire Forte and that Darwish was coordinating Sun's requests in its due diligence efforts as to Forte's legal issues. Darwish wanted respondent to share patent files in Crosby, Heafey's office with Sun's counsel so that Sun could complete its due diligence review of Forte.

About midday on August 16, respondent placed a brokerage "market order" to buy 1,000 shares of Forte. He paid $13.50 per share.

The next day, a Sun attorney phoned respondent and they discussed the due diligence review and the proposed merger and, in light of that, Sun's need to review the Forte patent files at Crosby, Heafey. On August 19, the Sun attorney came to Crosby to review the files.

On August 20 respondent placed a second brokerage "market order" to buy another 1,000 shares of Forte. He paid $14.75 per share.

The merger of Forte into Sun was publicly announced before the market's opening on August 23. When the merger was consummated, shares of Forte stock were exchanged at a certain ratio for shares in Sun. In October 1999, respondent sold his Sun shares for a $14,000 profit; which he ultimately had to disgorge.

Respondent pled guilty to insider trading as to the second 1,000 share purchase on August 20, 1999.[3] However, in his written plea agreement, he admitted that before he placed his first order on August 16 he received a call from "a Forte attorney . . . about the merger." At the State Bar Court hearing, respondent conceded his August 20 purchase followed the receipt of inside

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[3]Respondent and the United States attorney admitted as follows in his written plea agreement the elements of the insider trading offenses surrounding respondent's plea: Respondent "was a corporate insider," he possessed "material non-public information" about the corporation, he "used the information" to buy stock, and "acted with reckless, deliberate indifference."

information but disagreed that he was aware of the merger before the August 16 purchase and claimed his admission in the plea agreement that he did have that knowledge on the morning of August 16 was inaccurate. The hearing judge did not credit this claim. Her decision was also based on the strength of the State Bar Court testimony of Forte's counsel, Darwish, who recalled with clarity and detail, his August 16 morning conversation with respondent about the planned Sun merger.

The hearing judge concluded that the facts and circumstances surrounding respondent's two insider trades involved moral turpitude. She noted that respondent had a fiduciary duty to Forte which he breached and that his conduct was also a manipulation of the financial markets as stock was sold by shareholders who were unaware of the material non-public information that respondent had learned as Forte's long-time patent counsel. Further, the hearing judge found moral turpitude involved in his untruthful statement to a Securities and Exchange Commission (SEC) attorney in an extended interview that he was unaware of the Sun-Forte merger when he purchased the August 16th lot of Forte stock.[4]

In mitigation, the hearing judge credited respondent's lengthy practice without prior discipline, the impressive testimony of eight character witnesses, that respondent had engaged in pro bono activities and that his conduct was aberrational.

In aggravation, the hearing judge found that respondent's testimony was not candid as to his August 16 purchase of Forte stock and that his misconduct harmed the public significantly

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[4]The hearing judge did not find moral turpitude to be involved in respondent's act that might have led to tipping others to buy Forte stock nor in the incorrect statement respondent gave as to failing to tell the SEC about conversations with others. We agree with the hearing judge's conclusions here.

and harmed public confidence in the legal profession. Also, multiple acts of misconduct were found.

II. Discussion.

A. Eligibility of this case for summary disbarment.

We discuss at the outset the State Bar's claim that this case is eligible for summary disbarment. If we agree with it we need not reach other issues in this review.

The State Bar advances two key reasons for contending that we should recommend respondent's summary disbarment. First the State Bar argues that respondent's insider trading crime involves moral turpitude per se. Second, the State Bar contends that the summary disbarment statute applies to crimes in which later State Bar proceedings find the surrounding facts and circumstances to involve moral turpitude.

As to the State Bar's first argument, applicable law, section 6102, subdivision (c), would warrant our recommendation of summary disbarment were we to conclude that the elements of respondent's crime, which occurred after the 1996 amendments to section 6102, involved moral turpitude per se. (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) However, we so declined to classify respondent's conviction earlier and we reaffirm our decision. As we pointed out in our recent decision in *In the Matter of Oheb* (Review Dept., Jul. 16, 2004) 4 Cal. State Bar Ct. Rptr. ___ (hereafter *Oheb*), when we classify a crime for moral turpitude purposes, we must do so according to its least adjudicated elements. Only if those elements involve moral turpitude as a matter of law, may we classify the attorney's conviction of crime as one that involves moral turpitude. (*Id.* at p. 9.)

The State Bar relies on *Chadwick v. State Bar* (1989) 49 Cal.3d 103, for its argument that respondent's offense of insider trading involved moral turpitude as a matter of law. Although there is language in that opinion indicating the Supreme Court's view that might support a moral turpitude classification, it is clear that *Chadwick* was an original disciplinary proceeding and not one, as is the one before us, that arose based on the conviction of a crime. (*Id.* at p. 108, fn. 3.) Accordingly, it was only necessary for the court to conclude in that original proceeding that the findings or facts showed Chadwick's acts of moral turpitude and that is the limit of the case's essential holding. Moreover, our research of unpublished decisions involving attorney convictions prior to and subsequent to *Chadwick* showed that the Supreme Court and, after 1991, this court, classified insider trading convictions, not involving other securities offenses, as crimes which may or may not involve moral turpitude or misconduct warranting discipline. Finally, in the case before us, the agreed-upon elements of respondent's crime involved reckless or deliberate indifference. There is neither intentional dishonesty for personal gain nor any other element that would bring the conviction into the class of those involving moral turpitude per se. (In this regard see *In re Silicon Graphics Inc. Securities Litigation* (9th Cir. 1999) 183 F.3d 970, 976-977.) Although the State Bar points out that the Ninth Circuit in *In re Silicon Graphics Inc. Securites Litigation*, *supra*, treats the element of recklessness for insider trading as a form of intentional conduct, we deem that treatment to fall short of elements that warrant our classifying the crime as one involving moral turpitude as a matter of law.

In *Oheb*, in the case of another attorney convicted of a crime, which we also classified as not involving moral turpitude as a matter of law, we decided against the State Bar's argument

that section 6102, subdivision (c) allows for a recommendation of summary disbarment.[5] Although we need not repeat here our analysis in *Oheb*, in that opinion we considered the history of automatic or summary disbarment provisions, the language of section 6102, subdivision (c), and discussed the State Bar's legislative history evidence. We concluded in *Oheb* that section 6102, subdivision (c) should be interpreted to apply only to California attorneys' convictions of crimes which involved moral turpitude as a matter of law. (*Id.* at pp. 4-9.) For the reasons we concluded in *Oheb*, we conclude here that section 6102, subdivision (c) does not authorize a recommendation of summary disbarment even if we uphold the hearing judge's conclusions that the facts and circumstances surrounding respondent's crime involved moral turpitude.

B. Analysis of the facts and circumstances surrounding respondent's crime.

Although not concluding that respondent's crime involved moral turpitude per se, our independent review of the record (Cal. Rules of Court, rule 951.5, Rules Proc. of State Bar, rule 305(a), *In re Morse* (1995) 11 Cal.4th 184, 207), abundantly warrants the conclusion that the facts and circumstances surrounding respondent's conviction of insider trading involved moral turpitude. Moral turpitude for an attorney has been judicially defined over many years in a number of ways. In *Chadwick v. State Bar, supra*, 49 Cal.3d at page 110, the court discussed moral turpitude as follows in ways apt to the case before us: "As we have noted on numerous occasions, the concept of moral turpitude escapes precise definition. [Citation.] Moral turpitude has been described as an 'act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and

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[5]Prior to hearing oral argument in the present matter, we provided counsel with a copy of our *Oheb* decision.

customary rule of right and duty between man and man.' [Citation.] It has been described as any crime or misconduct without excuse [citation] or any dishonest or immoral act. The meaning and test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all. [Citation.]"

What is clear about respondent's conduct is that, as an experienced partner of an established law firm, and for personal profit, he intentionally took advantage of information that was not only not public, but came to him in the very process of his representation of his long-standing client, Forte. Under the foregoing definitions of moral turpitude, respondent's intentional breach of fiduciary duty to his client to seek personal profit for himself in these circumstances must be viewed as involving moral turpitude. Moreover, the record discloses clear and convincing evidence that respondent traded twice, over a period of four days, and not just once, in the shares of his client, based on this non-public information. When we review respondent's own criminal court plea agreement admissions and his stipulation in these disciplinary proceedings, we are unable to understand how respondent could claim that only his August 20, 1999, Forte trade was based on insider information, or why he would advance such a position before this court. Respondent's lack of candor in these proceedings that he traded only once on insider information would itself warrant our conclusion of moral turpitude.

Respondent's untruthful statement to an SEC attorney looking into trading in Forte stock before the Forte-Sun merger became public, also involved moral turpitude, without question.

C. Appropriate degree of discipline.

Noting that both mitigating and aggravating circumstances surrounded respondent's offenses, the hearing judge was guided significantly by *Chadwick v. State Bar*, *supra*, 49 Cal.3d

103. As we noted *ante*, *Chadwick* was an original proceeding which nevertheless arose from a federal court misdemeanor conviction of insider trading laws. Chadwick learned of non-public information that the Whittaker Corporation was about to make a tender offer for the assets of the Brunswick Corporation. Chadwick used the information to purchase Brunswick options. He then shared the information with a co-worker and suggested they purchase options together. Both agreed to and did lie to the SEC; but after this deception, Chadwick disclosed to the SEC their insider trading and deceit and convinced his co-worker to be candid as well. (*Id.* at pp. 106-107.) The Supreme Court imposed a five-year suspension, stayed on conditions including a one-year actual suspension.

Although the hearing judge noted similarities between this case and *Chadwick*, she also noted three important differences and we agree not only with the differences observed by the hearing judge but that they warrant the increased discipline she recommended. First, the hearing judge noted that, unlike *Chadwick*, this case arose out of an attorney-client relationship which respondent breached by seeking to profit personally by trading on the non-public information that came to him as Forte's counsel. Second, unlike Chadwick who, early on, ceased his deception and maintained candor thereafter with the government authorities and the State Bar, respondent's acceptance of responsibility was much more limited and he persisted in his version that only his second, August 20, 1999, Forte trade was on insider information. Third, and a related point to the second difference, respondent's lack of candor during State Bar Court proceedings and his failure to accept responsibility for what the clear evidence warrants, demonstrates that respondent has not shown remorse or recognition of wrongdoing as Chadwick had shown.

Ultimately, the appropriate degree of discipline to recommend is based on a balanced consideration of all relevant factors. (E.g., *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Although we acknowledge significant mitigating circumstances found by the hearing judge -- particularly respondent's length of practice without prior discipline and his very positive achievements in his practice and community, which were attested to by eight witnesses -- we are most concerned over respondent's abuse of his position as a practicing attorney to seek personal profit. Moreover, this record compels us to agree with the hearing judge that respondent's limited acknowledgment of his misconduct and his persistent attempts, as late as at oral argument before us, to refute the record evidence, including his own earlier admissions, that he traded twice on insider information is a significant aggravating circumstance and a difference from *Chadwick* which imposed lesser discipline. Accordingly, we determine that the hearing judge's recommendation is an appropriate balance of all relevant factors and we shall adopt it as our recommendation to the Supreme Court.

III. Formal Recommendation.

For the foregoing reasons, we recommend that respondent, Malcolm B. Wittenberg, be suspended from the practice of law in California for a period of five (5) years, and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, that execution of that suspension be stayed and that respondent be placed on probation for a period of five (5) years on the conditions recommended by the hearing judge in her decision filed June 19, 2003, including that respondent be actually suspended from the practice of law for the first three (3) years of the period of

probation, and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. We recommend that respondent receive credit toward his actual suspension for the period of his interim suspension.

We modify the hearing judge's conditions of probation: (1) to add that respondent must declare under penalty of perjury, in conjunction with his quarterly reports, that he has complied with all conditions of probation imposed in the underlying criminal matter and (2) to change the references to the Probation Unit to references to the Office of Probation.

We further recommend adoption of the hearing judge's recommendation that respondent be required to pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners and to provide proof of passage of that examination to the State Bar's Office of Probation within the period of respondent's actual suspension or one year from the effective date of the Supreme Court's order, whichever period is longer.

We further recommend that costs be awarded to the State Bar pursuant to section 6086.10 and that such costs be made payable in accordance with section 6140.7.

Since respondent was required to comply with the provisions of rule 955, California Rules of Court incident to our order of interim suspension and he has been suspended continuously since 2001, we do not recommend that he be required to again comply with rule 955.

STOVITZ, P. J.

We concur:

WATAI, J.
TALCOTT, J.*

* Hon. Robert M. Talcott, Hearing Judge, sitting by designation pursuant to rule 305(e), Rules of Procedure of the State Bar.

Case No. 01-C-01358

In the Matter of Malcolm B. Wittenberg

Hearing Judge

Hon. Patrice E. McElroy

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CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on November 10, 2004, I deposited a true copy of the following document(s):

OPINION ON REVIEW FILED NOVEMBER 10, 2004

in a sealed envelope for collection and mailing on that date as follows:

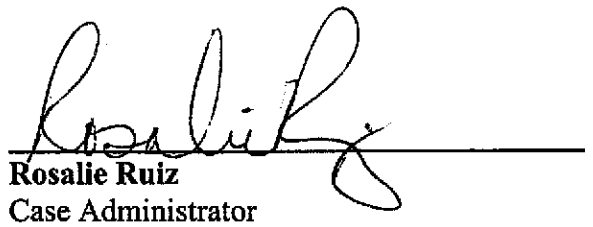
[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

DORON WEINBERG
523 OCTAVIA ST
SAN FRANCISCO, CA 94102

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

DONALD R STEEDMAN, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **November 10, 2004**.



Rosalie Ruiz
Case Administrator
State Bar Court