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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-355

IN THE MATTER OF	
RICHARD L. BERNSTEIN,	
AN ATTORNEY AT LAW	

Decision of the
Disciplinary Review Board

Argued: November 15, 1995

Decided: April 17, 1996

Rafael J. Betancourt appeared on behalf of the District XII Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter was before the Board based on a recommendation for discipline filed by the District XII Ethics Committee (DEC). The complaint alleged that respondent violated RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 8.4(a) and (c) (violation of the Rules of Professional Conduct and conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.1(b) (failure to cooperate with the DEC) in connection with a mortgage refinancing.

Respondent did not reply to the DEC investigator's request for information, file an answer to the complaint or appear at the DEC hearing, despite proper notice.[1]

Respondent was admitted to the New Jersey bar in 1974. He is engaged in private practice in Westfield, Union County.

Respondent was privately reprimanded by letter dated September 22, 1992, for a violation of RPC 1.3, RPC 1.4(a), RPC 8.1 and RPC 8.4(c). Specifically, respondent failed to inform a client of a court order, resulting in a default judgment against the client. Thereafter, respondent did not inform the client of the entry of the default and, in fact, misled the client when questioned about the status of the matter. Respondent also failed to cooperate with the DEC investigator in the initial phase of the disciplinary proceeding.

In the matter now before the Board, Linda S. Moss retained respondent on January 21, 1994 in connection with a mortgage refinancing. Ms. Moss had, on that date, obtained a mortgage commitment from Bank Plus Mortgage ("BPM"). The commitment and "lock-in" on the 7.5% interest rate would expire in sixty days.

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[1] By letter dated January 19, 1995, the panel chair notified respondent of the scheduling of the DEC hearing and asked him to contact the chair about proposed hearing dates. The letter was sent via regular mail to respondent's post office box and certified mail to his office. The regular mail was not returned to the chair and the green card was returned, signed by "R. Bernstein." Respondent did not reply to the chair's letter.

By letter dated January 31, 1995, the chair informed respondent of the hearing date, time and location. The letter was sent by regular mail to respondent's post office box and certified mail to his office. The regular mail was not returned to the chair. The green card was returned, signed "Alexandra Carnell." (The record does not reveal her identity). Respondent did not reply to the letter.

Ms. Moss' closing, therefore, had to be held within that period. Ms. Moss conveyed that information to respondent, who assured her that they could close within sixty days. Ms. Moss did not sign a retainer agreement and she and respondent did not discuss the fee arrangement. There were, however, no allegations of misconduct arising out of the absence of a retainer agreement.

At Ms. Moss' request, BPM "faxed" a copy of the mortgage commitment letter to respondent. Ms. Moss thereafter provided respondent with copies of the additional documents he would need for the closing.

In February 1994, Ms. Moss contacted respondent on one or two occasions to ask about the status of the matter. Respondent stated that he was ordering the necessary title work, that he had received the information Ms. Moss had sent to him and that he did not need any additional documentation from her. Respondent assured Ms. Moss that the matter was proceeding apace and that he would contact her about a closing date.

During the first week of March 1994, Ms. Moss became concerned because she had not heard from respondent and the commitment from BPM would expire later that month. Ms. Moss contacted respondent, who again stated that he was ordering the necessary documents and that the matter was progressing. Respondent promised that he would contact her the following week with a closing date. He did not, however.

On March 9, 1994, Ms. Moss contacted BPM. A representative of BPM advised her that they had not received any documents from

respondent and, if the necessary documents were not filed on a timely basis, BPM would be unable to conclude the transaction within the sixty-day commitment period. The representative from BPM suggested that Ms. Moss use a particular title insurance company, as it would be able to quickly prepare a title search to close title within the sixty-day period.

Ms. Moss called respondent on March 9, 1994. She repeated her conversation with BPM about using another title company. Respondent assured her that he was ordering the necessary paperwork, that the refinancing was a simple process and that she should not be concerned about closing within the sixty-day period. During this conversation, respondent asked Ms. Moss for her mortgage number and the name of her then current mortgage company, NatWest, so that he could obtain the mortgage payoff figure. Ms. Moss gave him the requested information. Respondent told Ms. Moss at that time that the closing would be held on March 18, 1994 and that he would call her with the specific time. Respondent, however, did not contact Ms. Moss.

The following week, on March 15, 16 and 17, 1994, although Ms. Moss left five or six messages on respondent's answering machine, respondent did not return her calls. Ms. Moss contacted BPM and NatWest. Respondent had neither contacted nor forwarded any documents to either company. A representative of BPM told Ms. Moss that they would no longer be able to hold the closing before the commitment expired.

On March 18, 1994, Ms. Moss went to respondent's office to retrieve her file. The file contained only the original commitment letter. Respondent had not taken any action in her behalf. When Ms. Moss asked for a reason for his neglect, respondent admitted that "he had no logical explanation." T3/22/95 18.

On March 18, 1994, a representative of BPM contacted Ms. Moss to inform her that, on March 17 or 18, 1994, respondent had contacted BPM "frantically trying to get an extension on the refinancing commitment." T3/22/95 19. BPM, however, would not extend the commitment unless Ms. Moss paid three points, approximately $2,100. Ms. Moss was not willing to pay that amount and the commitment lapsed.

Ms. Moss retained new counsel and, in early April 1994, obtained a mortgage at an interest rate of 8.125%. The difference in the mortgage rate translated into an additional $30 per month for the life of the thirty-year mortgage.

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By letter dated April 14, 1994, Rafael J. Betancourt, Esq., the DEC investigator, asked respondent to reply to Ms. Moss' allegations. Respondent failed to do so. Thereafter, Mr. Betancourt left messages on respondent's answering machine on June 3, 9, 15, 20 and 21, 1994, seeking a reply to his letter. Respondent never contacted Mr. Betancourt. The formal complaint was filed on November 28, 1994. As noted above, respondent did not file an answer to the complaint. (There is no evidence in the record concerning respondent's receipt of the complaint).

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The DEC determined that respondent had violated each of the charged RPCs: RPC 1.3, RPC 1.4(a), RPC 8.1(b) and RPC 8.4(a) and (c).

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Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The testimony of the grievant, Ms. Moss, was clear and credible. Her allegations remain uncontroverted by respondent, who neither filed an answer to the complaint nor appeared at the DEC or Board hearings. Respondent offered no evidence in his behalf as to the underlying facts or any mitigating factors. The record clearly and convincingly supports the allegations of the complaint that respondent was guilty of violations of RPC 1.3, RPC 1.4(a), RPC 8.1(b) and RPC 8.4(a) and (c).

Respondent was not charged with a violation of RPC 1.1(a) (gross neglect). There is no doubt, given respondent's complete inaction in Ms. Moss' behalf, that the charge would have been appropriate and that the record supports a finding of such violation. Generally, when this Board has deemed a complaint amended to conform with the proofs adduced at the DEC hearing, the respondent has been present at the hearing and, thus, has knowledge of the evidence presented and notice of potential additional charges. Here, respondent was given an opportunity to be heard and

to defend himself on the charges. See In re Logan, 70 N.J. 222 (1976). Respondent chose not to take the opportunity offered to him. In addition, the finding of gross neglect flows logically from the evidence presented on the charged violations – lack of diligence and failure to communicate. A finding of gross neglect is, thus, appropriate and clearly warranted.

If respondent's only misconduct in the underlying matter was gross neglect, lack of diligence and failure to communicate, an admonition might be appropriate discipline. For a period of nearly two months, however, respondent told Ms. Moss that he was preparing the necessary documents for her refinancing. In fact, he did nothing. His deliberate and continuing misrepresentations mandate the imposition of more stern discipline. See In re Kasdan, 115 N.J. 472 (1989) (public reprimand for intentionally misrepresenting to a client the status of a lawsuit). Here, although respondent's misconduct occurred in the context of a closing, instead of a lawsuit, it was equally serious and caused financial harm to Ms. Moss.

Ordinarily, misconduct of this type – gross neglect, lack of diligence, failure to communicate and misrepresentation – would result in a reprimand. See, e.g., In re Weber, 138 N.J. 35 (1994) (reprimand imposed where the attorney allowed a client's appeal to be dismissed without communicating with the client and then deceived the client for over a year in an attempt to mislead the client into believing that the case had been decided on the merits). The distinguishing factor in this case, however, is

respondent's continuing failure to cooperate with the disciplinary system. Respondent failed to reply to the grievance or to file an answer to the complaint. In addition, despite proper notice, he failed to appear for the DEC hearing or to inform the DEC that he would not be attending the hearing. "Disrespect to an ethics committee agent constitutes disrespect to this Court, as such a committee is an arm of the Court." In re Grinchis, 75 N.J. 495, 496 (1978). Such lack of respect warrants increased discipline. Similarly, although an attorney is free to waive appearance for oral argument, his failure to appear at the Board hearing, viewed in conjunction with his failure to file an answer and to participate in the ethics hearing below, can only be taken as further indifference towards the disciplinary system as a whole.

Furthermore, the Board is concerned about the public perception of these proceedings when the attorney fails to appear and answer the charges against him. As noted by the presenter during the Board hearing,

> -- the grievant has -- has maintained contact and it -- she's puzzled by the procedure -- by this whole process whereby he doesn't appear, he doesn't appear, he doesn't appear. And I think that -- that's very frustrating for her to think that he's getting away with this.
> [BT11/15/95 5][2]

Respondent has presented no evidence of mitigation in this matter. Although, respondent's 1992 letter of private reprimand states that respondent "sought psychiatric help," there is no evidence of a psychological disability or of any other factor that

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[2] BT represents the transcript of the hearing before the Board on November 15, 1995.

might serve to explain his behavior. The Board also considered, in aggravation, that respondent was privately reprimanded for very similar misconduct one and one-half years before the within infractions. Obviously, respondent's earlier discipline made no impression on him.

Respondent's ethics infractions in the underlying matter, combined with his contemptuous attitude toward the disciplinary system and his previous discipline, warrant a suspension. The Board unanimously determined to impose a three-month suspension. See In re Kates, 137 N.J. 102 (1994) (three-month suspension for lack of diligence, failure to communicate and failure to cooperate with disciplinary authorities). One member recused himself.

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

Dated: 4/17/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board