SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-264
District Docket No. XIV-2012-0317E

IN THE MATTER OF	:
JOSEPH C. LANE	:
AN ATTORNEY AT LAW	:

Decision

Decided: February 7, 2014

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

This matter is before us on a certification of default, filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f).

The complaint charged respondent with having violated RPC 1.15(a) (failure to safeguard funds), RPC 1.15(b) (failure to promptly deliver funds to a client or third person), and RPC 1.7(a)(2) (concurrent conflict of interest).

On December 4, 2013, respondent filed a motion to vacate the default, based on the premise of excusable neglect. For the reasons expressed below, we determine to deny respondent's

motion and to impose a three-month suspension for his ethics violations.

Respondent was admitted to the New Jersey bar in 1992. He maintains a law office in Manasquan, New Jersey.

On November 21, 2007, respondent received an admonition for his misconduct in an estate matter. Specifically, he lacked diligence by failing to timely address a 2006 letter from a State of New Jersey Division of Taxation auditor, failed to ensure that the auditor timely received required information, failed to promptly turn over the estate's file and funds to the estate's new attorney, and failed to communicate with the client. In the Matter of Joseph C. Lane, DRB 07-245 (November 21, 2007).

On October 21, 2009, respondent received a second admonition. There, he lacked diligence and grossly neglected two real estate matters by failing to promptly record the deeds in both matters. As a result of his inaction, in one of the matters, the IRS placed a lien on the property for debts of the prior property owner. In the Matter of Joseph C. Lane, DRB 09-196 (October 21, 2009).

In 2012, on a motion for discipline by consent, respondent was reprimanded for engaging in gross neglect and lack of diligence. As the settlement agent in a real estate transaction,

he failed to record the deed and mortgage for approximately one and one-half years, after a June 2008 closing, and then did so only after having been contacted by the seller's attorney. In re Lane, 210 N.J. 220 (2012).

Service of process was proper in this matter, as seen from respondent's motion to vacate the default and attached answer, in which he admitted most of the allegations of the complaint.

On June 5, 2013, the OAE sent copies of the complaint, by regular and certified mail, to respondent's office address, 2600 Highway 35, Manasquan, New Jersey 08736. The certified mail was received on June 7, 2012. The receipt was signed by an individual named "Mazzio." The regular mail was not returned.

Respondent did not file an answer to the complaint.

On July 10, 2013, the OAE sent a letter to the same address, by regular and certified mail. The letter notified respondent that, if he did not file an answer within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to include a willful violation of RPC 8.1(b).

The certified mail was delivered on July 15, 2013 and the receipt was again signed by "Mazzio." The regular mail was not

returned. On July 31, 2013, the OAE certified the record to us, pursuant to R. 1:20-4(f).

In his certification, attached to his motion to vacate the default, respondent stated that, at the time that the ethics complaint was served on him, he was preparing for a trial and had to respond to numerous motions in the case. He was on trial, between August 19, 2013 and September 9, 2013. After the trial concluded, he filed post-judgment motions and an appeal. He asserted that his failure to file an answer within the prescribed time was the result of "excusable neglect."

Respondent claimed further that he had a meritorious defense to the complaint and should be permitted to file an answer. He attached an unsigned, unverified answer to his certification.

To succeed on a motion to vacate a default, a respondent must satisfy a two-pronged test: (1) offer a reasonable explanation for the failure to file an answer and (2) assert meritorious defenses to the ethics charges.

As to the first prong, respondent's explanation for failing to file an answer was not reasonable. While he may have been busy with a trial, he made no effort to seek an extension from the OAE to file an answer or to advise the OAE of his time constraints. Respondent's meritorious defense was contained in

an unsigned, unverified answer to the ethics complaint and, thus, does not meet the second prong of the test. R. 1:20-4(e) requires that the answer be verified. We, therefore, deny respondent's motion to vacate the default.

According to the ethics complaint, in October 2005, Nicholle Gary (a/k/a Nikki Lacourte,[1] previously known as Frances Mascuchi/Mascuci) retained respondent to prepare a joint venture agreement between herself and her father-in-law, grievant Angelo Gerrizzo. Gary was married to Gerrizzo's stepson, Mark Lacourte. Respondent had not previously represented Gerrizzo, nor had he met or spoken to him. Gerrizzo, a senior citizen, was retired and living on a modest, fixed income.

Because Gary could not qualify for a mortgage, due to her poor credit, she intended to transfer her Toms River house to Gerrizzo, who would then obtain a mortgage on the property. Gary told Gerrizzo that, after he obtained the mortgage, the two would improve the property, sell it, and split the profits. Based on Gary's representations, respondent understood that Gary and Gerrizzo had discussed and agreed to this plan.

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[1] The exhibits spell the last name "LaCourt." In March 2002, while living in Florida, Frances had legally changed her name to Nicholle Gary, because her sister had used her identity to accumulate massive debts.

On October 21, 2005, respondent wrote to Gerrizzo, setting forth the parties' basic understanding of their agreement and informing him that he represented "Maschuchi." The letter stated that "[t]he entire proceeds from the equity loan will be given to Ms. Mascuchi, once her existing loan and any and all liens have been paid in full." At Gerrizzo's deposition in a civil suit against him, respondent, Gary, and her husband, Gerrizzo stated that he had no recollection of having seen the letter from respondent. However, during the OAE's investigation, he admitted that he had received respondent's letter, read it, and understood the "import of that sentence, in particular," that is, the sentence stating that the mortgage loan proceeds would be turned over to Gary/Mascuchi, after the existing mortgage and other liens had been paid off.

Respondent prepared the Joint Venture Agreement between Gary and Gerrizzo, dated November 8, 2005. The agreement identified Gary as the owner of the property, even though at that time title to the property was in the name of Frances Mascuchi. The parties executed the agreement in early November 2005. Respondent knew nothing about Gerrizzo's execution of the agreement, as he was not present at the time.

According to the agreement, the property, which Gary had owned since February 8, 1999, was encumbered by a mortgage, as

well as tax and homeowners' association liens. Gary could not qualify for a new mortgage on the property. The agreement provided that Gary and Gerrizzo intended to renovate the property for rental or resale; that Gerrizzo could qualify for a mortgage, if the property was transferred into his name; that Gary would transfer the property to Gerrizzo; that, once the new deed was recorded, Gerrizzo would apply for a home equity loan to pay off the exiting liens and to provide the necessary capital to complete the renovation of the property; that Gerrizzo would execute a deed back to Gary; and that respondent would hold the deed in escrow and would record it only if Gerrizzo died before Gary qualified for a mortgage in her name, at which time Gary would obtain a mortgage on the property and the property would be transferred to her name.

The agreement further provided that respondent would handle the closing on the equity loan; that the loan proceeds would be used to first pay off all of the liens on the property; that Gerrizzo would be paid $2,500; and that respondent would hold the balance of the proceeds, in trust, to be used to pay for all renovation expenses to the property.

The agreement also provided that, during the time that Gerrizzo owned the property, Gary would pay all of the property's monthly bills, including principal and interest on

the mortgage, the homeowners' association dues, and all real estate taxes and utility bills. Gary had twelve months from the completion of the renovations to obtain a mortgage in her own name; was entitled to rent the property and keep the rental income; if she did not obtain a mortgage within twelve months from the date the renovations were completed, Gerrizzo could sell the property and use the proceeds to pay off the mortgage and realty transfer fee; and any balance would be paid to Gary.

Respondent also prepared a deed, dated November 7, 2005, conveying the property from "Frances Mascuchi, grantor, to Angelo Gerrizzo, grantee." Respondent witnessed the grantor's signature and took the jurat.

Neither the joint venture agreement nor the deed identified Nicholle Gary and Frances Mascuchi as the same person. Gerrizzo knew, however, that they were one and the same person, that Gary owned the property, and that she would execute a deed transferring title to him.

After the execution of the agreement, Gerrizzo, Gary and her husband, Lacourte, went to Wachovia Bank to apply for a mortgage loan to Gerrizzo. There is no evidence that respondent was involved with the mortgage application process. Gerrizzo claimed that his monthly income was "substantially inadequate" to pay the mortgage monthly, but did not so inform respondent.

On December 29, 2005, Wachovia forwarded the mortgage loan proceeds to respondent, in the amount of $167,500. On the following day, December 30, 2005, respondent deposited the funds into his Wachovia trust account. Respondent then issued three checks against the deposit: on January 5, 2006, a check for $93,222.99 to Gary and a $300 check to himself (legal fee) and, on January 7, 2006, a check for $73,977.01 to PNC Bank to pay off the existing mortgage. Respondent disbursed a total of $167,500, the entire balance of the mortgage loan. He did not disburse $2,500 to Gerrizzo, as required by the agreement.

On January 5, 2006, respondent disbursed the funds to Gary, after she executed an indemnification agreement that respondent prepared. The indemnification agreement stated that Gary had discussed the matter with Gerrizzo and that they had agreed that, after the existing mortgage and respondent's attorney's fees were paid, the balance would be paid to Gary, who would "pay the tax and homeowner association liens on the premises, the money to Gerrizzo and for the renovation expenses on the home." Gary further agreed to hold harmless and indemnify Gerrizzo and respondent, "in the event that she shall fail to pay said items." The indemnification agreement was not witnessed or notarized.

According to the complaint, respondent did not attempt to contact Gerrizzo, prior to Gary's execution of the indemnification agreement. In fact, according to Gerrizzo's statement to two detectives from the Monmouth County Prosecuter's Office (Exhibit 12 to the formal ethics complaint), Gerrizzo never saw the indemnification agreement. During respondent's interview by detectives from that same office, respondent admitted that he had not discussed the indemnification agreement with Gerrizzo and that his failure to do so was a mistake.

Respondent's disbursement of funds to Gary was not consistent with Wachovia Bank's settlement statement, which called for the funds to be disbursed to Gerrizzo.

Instead of using the funds disbursed to Gary for home renovations, she "took the money and absconded." Because Gerrizzo was unable to make the mortgage payments, he filed a civil lawsuit against respondent, Gary (under her various names), and her husband, Mark Lacourt. The civil complaint alleged that respondent conspired to commit fraud and/or legal malpractice. That lawsuit was "resolved" in or around March

2010. Respondent's malpractice insurer "paid a substantial sum" to settle the malpractice claim.[2]

A related criminal investigation resulted in Gary's and Lacourte's successful prosecution. Respondent was not charged with any criminal offense. Likewise, the OAE's investigation did not uncover that respondent profited from Gary's criminal conduct or that he knew that Gary intended to breach the joint venture agreement and misuse the $93,000 that she received.

Respondent's October 21, 2005 letter and the joint venture agreement described, in conflicting terms, his obligations regarding the retention or payment of funds. The ethics complaint charged that, by drafting inconsistent statements regarding his responsibilities with respect to the mortgage loan proceeds, respondent acted in a manner "inimical to his own interests," as well as Gerrizzo's interests, given that Gerrizzo had a reasonable and "lawful" expectation that respondent would hold the mortgage proceeds in trust, consistent with the joint venture agreement.

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[2] Gerrizzo's first-amended third party complaint stated that he was not represented by counsel for the purchase of the property and that he did not attend the title closing. Gerrizzo also alleged that respondent did not advise him to obtain counsel or advise both parties of the potential "inherent conflict of interest."

The complaint charged that respondent did not properly safeguard the funds he received (RPC 1.15(a)) and that, upon receiving funds or other property in which his client or a third person had an interest, he did not promptly deliver to the client or third person funds they were entitled to receive (RPC 1.15(b)).

The complaint further charged that respondent violated RPC 1.7(a)(2) by engaging in a concurrent conflict of interest, in that there was a significant risk that his representation of one client would be materially limited by his responsibilities to another client.

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f).

It is undeniable that respondent violated RPC 1.15(a) and RPC 1.15(b). Although his October 21, 2005 letter to Gerrizzo stated that, after payment of the existing mortgage and other liens, the balance of the mortgage funds would be disbursed to Gary, the joint venture agreement that respondent subsequently prepared and that Gerrizzo signed clearly stated that respondent would hold the mortgage balance in trust to pay for the property

renovations. Respondent did not do so. Instead, he disbursed $93,222.99 to Gary, even before he paid off the existing PNC Bank mortgage. Moreover, respondent never discussed the indemnification agreement that he prepared with Gerrizzo to ascertain that Gerrizzo had agreed to the release of the balance of the loan proceeds to Gary. Respondent's release of the balance of the funds to Gary was, therefore, improper and it enabled Gary to "abscond" with them. In addition, respondent failed to give Gerrizzo $2,500, which the joint venture agreement required him to do.

As to the RPC 1.7(a) charge, although respondent's October 21, 2005 letter to Gerrizzo stated that he represented Gary (Maschuchi), he did represent both parties in the transaction, giving rise to a conflict of interest situation. Respondent agreed to handle the closing on the "equity loan." The loan was in Gerrizzo's name and the loan proceeds were sent to respondent, which he then disbursed. And he did so improperly, contrary to the settlement statement.[3] Gerrizzo relied on

[3] The complaint did not charge respondent with a violation of RPC 8.4(c) in this regard. Under R. 1:20-4(b), the complaint "shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifically the ethical rules alleged to have been violated." We, therefore, cannot find any impropriety in this context because of the lack of sufficient notice to respondent in the complaint.

respondent to keep the money in escrow for renovations. Clearly, respondent breached his fiduciary duty to Gerrizzo by disbursing the funds to Gary. Once Gary "absconded" with the funds, contrary to the joint venture agreement, Gerrizzo was on the hook to pay the mortgage. He was unable to do so on his fixed, "modest" income.

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.15(a), RPC 1.15(b), and RPC 1.7(a).

Where attorneys fail to properly deliver funds to clients or third persons, admonitions or reprimands are usually imposed. See, e.g., In the Matters of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012) (admonition for attorney who, in three personal injury matters, did not promptly notify his clients of his receipt of settlement funds and did not promptly disburse their share of the funds; the attorney also failed to properly communicate with the clients; mitigation considered); In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (admonition for attorney who failed to promptly deliver funds to a third party; he also failed to memorialize the rate or basis of his fee); In the Matter of Anthony Giampapa, DRB 07-178 (November 15, 2007) (admonition for attorney who did not promptly disburse to a client the balance of a loan that was refinanced; in

addition, the attorney did not adequately communicate with the client and did not promptly return the client's file); and In re Dorian, 176 N.J. 124 (2003) (reprimand imposed on attorney who failed to use escrow funds to satisfy medical liens and failed to cooperate with disciplinary authorities).

Similarly, when an attorney makes improper distributions of escrow funds, either an admonition or a reprimand is the likely form of discipline. See, e.g., In the Matter of Joseph Jerome Fell, DRB 10-328 (January 25, 2011) (attorney received an admonition for releasing $325,000 in escrow funds to his client, the seller of a one-third interest in a business, without verifying that the contracts and operating agreements had been signed by all of the parties and approved by the buyers' attorney; the attorney mistakenly believed that the contract had been properly executed; the attorney's acceptance of responsibility for his conduct, remorse, lack of self-interest, and spotless disciplinary record were viewed as mitigating factors; that the buyers never received the one-third interest in the business was considered an aggravating factor); In the Matter of Michael Landis, DRB 09-395 (March 19, 2010) (admonition for attorney who disbursed escrow funds to his client during an active dispute over entitlement to the funds; mitigation included the attorney's lack of disciplinary history,

his belief that his conduct was proper in light of the steps he had taken prior to releasing the funds, and the fact that he had handled only a handful of real estate matters); In the Matter of Thomas W. Moore, III, DRB 08-345 (March 4, 2009) (admonition for attorney who took his fee from escrow funds that were the subject of an active dispute among several creditors; mitigation included the firm's entitlement to the amount of the fees taken and the lack of a disciplinary history); In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold in trust a fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order); In re Milstead, 162 N.J. 96 (1999) (reprimand for attorney who disbursed escrow funds to a client, in violation of a consent order); In re Margolis, 161 N.J. 139 (1991) (reprimand where an escrow agreement required the attorney to hold settlement funds until settlement documents were completed, but the attorney used part of the funds for his fees, albeit with the client's consent); and In re Flayer, 130 N.J. 21 (1992) (reprimand for attorney who made unauthorized disbursements against escrow funds).

As to conflicts of interests, it is well-settled that, absent egregious circumstances or serious economic injury to the clients, such violations ordinarily result in a reprimand. In re

Hunt, 215 N.J. 300 (2013); In re Feldstein, 209 N.J. 512 (2010); In re Pellegrino, 209 N.J. 511 (2010); In re Ford, 200 N.J. 262 (2009); In re Guidone, 139 N.J. 272, 277 (1994); In re Mott, 186 N.J. 367 (2006); and In re Berkowitz, 136 N.J. 134, 148 (1994).

In special situations, admonitions have been imposed on attorneys who have engaged in a conflict of interest. See, e.g., In the Matter of Frank Fusco, DRB 04-442 (February 22, 2005) (attorney represented the buyer and seller in a real estate transaction without their informed consent, but no conflict ever arose between the parties to the contract; several mitigating factors were present) and In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (conflict of interest where the attorney collected a real estate commission upon her sale of a client's house; mitigation included the attorney's unblemished fifteen-year career, lack of knowledge that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the client, and the passage of six years since the ethics infraction).

In this case, although there was economic injury to Gerrizzo, he may have been made whole, once he pursued the parties in a civil suit. Therefore, a reprimand would be sufficient for respondent's conflict of interest alone. But he

also committed other ethics transgressions. In violation of the joint venture agreement that respondent himself prepared, he did not disburse $2,500 to Gerrizzo and, more egregiously, released the entire balance of the mortgage loan, $93,000, to Gary, who absconded with the funds, leaving Gerrizzo "stuck" with the mortgage payments that Gary knew he could not afford. The indemnification agreement that respondent prepared -- and, significantly, that held him harmless -- ultimately afforded Gerrizzo no protection from the economic harm that Gary inflicted on him. Troubling, too, was that respondent did not attempt to contact Gerrizzo, prior to the execution of the indemnification agreement. Gerrizzo told the Prosecutor's Office that he was unaware of the indemnification agreement.

When respondent's disciplinary record and the default nature of these proceedings are added to the mix of his ethics violations ("a respondent's default or failure to cooperate with the investigative authorities operates as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332, 342 (2008)), nothing less than a short-term suspension would be adequate here. We determine that respondent should be suspended for three months.

Member Doremus did not participate.

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: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph Lane
Docket No. DRB 13-264

Decided: February 7, 2014

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Doremus						X
Gallipoli		X				
Hoberman		X				
Singer		X				
Yamner		X				
Zmirich		X				
Total:		8				1

Isabel Frank
Acting Chief Counsel