SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-309
District Docket No. IIB-2012-0029E

IN THE MATTER OF	:	
THOMAS ALAN BLUMENTHAL	:	
AN ATTORNEY AT LAW	:	Decision

Argued: January 20, 2015

Decided: March 26, 2015

Adam Schwartz appeared on behalf of the District IIB 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 us on a recommendation for discipline (reprimand) filed by the District IIB Ethics Committee (DEC). The complaint charged respondent with violations of RPC 1.7 (conflict of interest) and RPC 3.4(a) (unlawfully obstructing another party's access to evidence) and/or (c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists). For the reasons set forth below,

we determine that a censure is the appropriate form of discipline in this case.

Respondent was admitted to the New York bar in 1968 and to the New Jersey bar in 1988. He has no history of discipline.

Over the course of twenty-five years, respondent represented Adel Michael in various legal matters, the bulk of which were real estate transactions. On March 9, 2004, Michael brought grievant Jean DeFilippi to respondent's office to consummate a real estate transaction. Michael came with DeFilippi for the signing of the contract, but DeFilippi was otherwise alone at the meeting with respondent. DeFilippi was about to lose her house to foreclosure and had agreed to sell to Michael the redemption rights to her mortgage. Michael agreed that DeFilippi could remain in the house for a short time. He also agreed to pay some of her bills and to help her move, when the time came.

Respondent prepared the agreement between Michael and DeFilippi and witnessed its execution in his office. He did not recall if DeFilippi had asked any questions at the time, but was confident that he would not have let her sign any documents, without first explaining them to her. He added that, if she had asked him any questions, he would have answered them.

Until the date of the closing on the sale of her redemption rights, attorney Bert Binder had represented DeFilippi. Binder was trying to avoid the looming foreclosure through the refinance of DeFilippi's mortgage. Respondent first testified that he "thought" that, at the signing of the contract, he was aware of Binder's representation. Later, however, he told the DEC that he did not remember if he had that knowledge on that date. He recalled thinking that Binder was charging too much and getting nothing done.

Although respondent denied representing DeFilippi at the signing of the agreement with Michael, he admitted that he represented her, post-transaction, by attempting to recover some monies from Binder, drafting a will for her with a health care proxy, and addressing issues with DeFilippi's son, including removing him from her house and, ultimately, from her life. According to respondent, DeFilippi had hired him after the transaction with Michael had closed.

On March 11, 2004, two days after the closing, respondent sent a letter to Binder, informing him that DeFilippi had sold the property and that she would not be in need of a mortgage loan refinance. He also directed Binder to cease all contact with DeFilippi and her son and to send all communications pertaining to them to his office. On March 18, 2004, respondent

sent a second letter to Binder, terminating Binder's representation and designating himself as DeFilippi's attorney.

Respondent was, in fact, successful in recovering some monies from Binder, on behalf of DeFilippi, and did complete her will. He told the DEC that he never had a retainer agreement with DeFilippi, because Michael was paying for her representation, including the will. He also told the DEC that he had no retainer agreement with Michael, because Michael had been a client for years and always paid what he was billed.

In June 2009, attorney Daniel Hoberman filed a malpractice claim against respondent, on behalf of DeFilippi. On February 11, 2010, during his deposition in connection with that suit, respondent admitted that he had represented DeFilippi at the closing of the sale of the redemption rights. At the DEC hearing, however, respondent testified that he had said so only because he wanted Hoberman to stop asking him the same questions repeatedly. Despite answering "yes" to Hoberman's multiple consecutive questions as to whether he had represented DeFilippi at the closing, respondent told the DEC that he was not being truthful at the deposition and that the request to become DeFilippi's lawyer had come up after the March 9, 2004 closing and before his March 11, 2004 letter to Binder.

During the prosecution of that malpractice claim, respondent did not provide notice of the complaint to his malpractice carrier, because, he claimed, he believed the suit to be without merit and he did not want his malpractice premiums to rise. In reply to an interrogatory that Hoberman served in the malpractice action, which sought to identify respondent's malpractice carrier, respondent answered "Unknown."

At his deposition, respondent was asked to name his malpractice carrier and replied that he believed it began with an "A". When asked, at his deposition, if he had provided notice to his carrier of the malpractice complaint, he answered, "Probably."

Hoberman eventually filed a motion seeking the identity of respondent's malpractice carrier. The motion was granted. Hoberman also had to file a motion to have respondent notify his carrier of the malpractice suit. That motion, too, was granted. On June 8, 2010, respondent notified Arch Insurance Company, his malpractice carrier, of DeFilippi's claim.

Arch eventually denied coverage and was brought into the malpractice action as an additional defendant. Arch then filed a motion for summary judgment, on the basis that it had not been given timely notice of the claim. In support of that motion, respondent filed a certification, stating that he understood the policy language to clearly say that coverage applied only to

claims that were made and reported within the policy period or the extended reporting period. He further certified that he "purposefully, knowingly, and intentionally did not report the claim to Arch during the policy period or extended reporting period because I did not want my malpractice premiums to increase as a consequence of what I believe to be frivolous and meritless claims."

Arch's motion for summary judgment was granted and the claims against it were dismissed. Respondent settled the malpractice action for $5,000.

Respondent stipulated to the ethics complaint's allegations that he had failed to produce his malpractice policy information to Hoberman and to file a timely notice of claim with his carrier, adding that he now knows that he was wrong in not having done so. He explained to the DEC that he settled the malpractice claim only because he thought it was the right thing to do, that is, he had created the problem with regard to the insurance carrier issues and, as a result, he felt that DeFilippi was entitled to something.

Finally, referring back to the dual representation and in an effort to mitigate his behavior, respondent offered that this was not a situation where a client appeared in his office for half an hour, signed some papers, and walked out, never to be

seen again. He urged the DEC to consider that he had tried to help DeFilippi and that Michael had put no financial restrictions on what he could do to assist DeFilippi. Respondent told the DEC that he is the only one to blame for being the subject of this disciplinary action, which, he believes, would not have happened if he had not been so aggravated by Hoberman's questions and had not falsely represented that he had acted as DeFilippi's attorney at the closing.

Respondent testified that he had neither disclosed the conflict to the parties nor received written consent from them to represent both of them at the closing.[1]

The DEC found clear and convincing evidence that respondent violated RPC 1.7 by representing both parties to a real estate transaction, without disclosure of the conflict and without obtaining the written consent of both parties. It also found clear and convincing evidence that respondent violated RPC 3.4 by intentionally withholding from Hoberman the identity of his

[1] Presumably, respondent did not think that was necessary, inasmuch as he maintained that he had not represented DeFilippi, only Michael.

malpractice carrier and not being truthful with him in discovery responses.[2]

The DEC found that respondent had engaged in a "pattern of untruthful and obstructionist behavior." The DEC found untrue respondent's statement, in his answer to the complaint, that he did not know his carrier's name, at the time of the deposition.

The DEC also noted that respondent was untruthful in his correspondence with the ethics investigator/presenter, on August 7, 2012, which the DEC viewed as respondent's effort to thwart the DEC's search for the truth. In that correspondence, presumably respondent's reply to the grievance, respondent stated that the allegations of the "complaint" are not true and that, at his deposition, he had admitted representing DeFilippi only because he was aggravated by opposing counsel and wanted to move on. The DEC found this position to defy common sense and concluded that the record of the deposition clearly demonstrated respondent's dual representation of Michael and DeFilippi.

Based on the foregoing and with no mention of aggravating or mitigating factors, the DEC recommended a reprimand. At oral argument before us, the presenter, too, recommended a reprimand.

---

[2] The DEC did not indicate which subsection of RPC 3.4 respondent violated.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The record contains clear and convincing evidence that respondent violated RPC 3.4(a) and (c). In addition to respondent's admission to these violations, the record is replete with examples of respondent's avoidance of his obligation to provide his carrier information to Hoberman. In fact, in his certification in support of his carrier's summary judgment motion, respondent stated that he had intentionally decided not to notify his carrier of the malpractice suit to avoid an increase in his premiums. In the process, he knowingly concealed the carrier's name from Hoberman, thereby violating the discovery rules.

The record also contains clear and convincing evidence that respondent violated RPC 1.7(a), by representing both the buyer and the seller in a real estate transaction, admittedly without observing the safeguards of RPC 1.7(b). Respondent admitted that he would not have allowed DeFilippi to sign any documents, without explaining them to her. That explanation constituted legal work. In fact, respondent admitted, multiple times at his deposition, under oath, that he had represented DeFilippi at the closing. His explanation that he had said so only because he

was irritated with Hoberman's repeated inquiries is not believable. The DEC, which had an opportunity to observe respondent's demeanor under oath, did not find him credible.

Typically, we defer to the DEC's findings with respect to a respondent's credibility. In Dolson v. Anastasia, 55 N.J. 2, 7 (1969), the Supreme Court observed that a court will defer to a tribunal's findings with respect to those intangible aspects of the case not transmitted by the written record, such as witness credibility, "'demeanor evidence,' and the intangible 'feel of the case' which [is] gained by presiding over the trial." Here, the DEC had the opportunity to observe the demeanor of the witnesses. Accordingly, it had a "better perspective" than we do, "in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988); In the Matter of Thomas DeSeno, DRB 08-367 (May 12, 2009) (slip op. at 25).

Cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients, ordinarily result in a reprimand. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994). See, e.g., In re Pellegrino, 209 N.J. 511 (2010), and In re Feldstein, 209 N.J. 512 (2010) (companion cases; the attorneys simultaneously represented a business that purchased tax-lien certificates from individuals and entities for whom the

attorneys prosecuted tax-lien foreclosures; the attorneys violated RPC 1.7(a) and RPC 1.7(b); the attorneys also violated RPC 1.5(b) by failing to memorialize the basis or rate of the legal fee charged to the business); In re Ford, 200 N.J. 262 (2009) (attorney filed an answer to a civil complaint against him and his client and then tried to negotiate separate settlements of the claim against him, to the client's detriment; prior admonition and reprimand); In re Mott, 186 N.J. 367 (2006) (attorney prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest in the company to the buyers, the attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a written waiver of the conflict of interest from them); and In re Poling, 184 N.J. 297 (2005) (attorney engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned – a fact that he did not disclose to the buyers, in addition to his failure to disclose that title insurance could be purchased elsewhere).

At times, a reprimand may still result if, in addition to engaging in a conflict of interest, the attorney displays other,

non-serious unethical behavior. See, e.g., In re Soto, 200 N.J. 216 (2009) (attorney represented the driver and the passenger in a personal injury action arising out of an automobile accident; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with one of the clients, and failure to prepare a contingent fee agreement; no ethics history).

Here, respondent also knowingly disobeyed an obligation under the rules of a tribunal and obstructed another party's access to evidence (the production of his insurance carrier information, during discovery). Recently, an attorney who committed the same violations in similar circumstances received a censure. In re Powell, 212 N.J. 557 (2013).

Powell ignored his adversary's requests for information on his malpractice carrier, until the court ordered him to produce it, within fourteen days of the order. Even then, Powell provided information about his coverage for the year 2006, despite being asked for it for the year 1999. Powell argued that the incident had been filed in 2006 and that his adversary had not specified that he wanted information for 1999.

At his deposition, Powell testified that, when he was served with the malpractice complaint, he decided to defend it himself, instead of submitting it to his carrier, so as to avoid

an increase in his premiums for what he believed to be a frivolous complaint. In the Matter of Wayne Powell, DRB 12-180 (November 27, 2012) (slip op. at 6-7). In reality, at the time that Powell testified about his intention to represent himself, he knew that his carrier had denied his claim, because he did not have coverage for 1999. Powell eventually admitted as much. Id. at 8.

Powell was found to have violated RPC 3.4 and RPC 8.4(d), for being disingenuous in not producing his carrier information in response to reasonable discovery demands and then disobeying a court order to do so. Id. at 23. Powell was also found to have violated RPC 7.5(c) for continuing to use his law partner's name on letterhead, even though his partner had been appointed to the court and no longer practiced law. Id. at 19.

Powell received a censure for his transgressions. We noted that his failure to provide his malpractice carrier information, coupled with the other violation, would likely have resulted in a reprimand. Powell, however, had an extensive ethics history -- three reprimands and a three-month suspension. We noted that Powell had failed to learn from his past mistakes and that prior discipline had been escalated for this very reason.

In this matter, respondent breached his duty to provide his carrier information to his adversary and for much the same

reason as Powell did. He also represented both parties during a real estate transaction. His conflict of interest (generally, a reprimand), however, is offset by Powell's misleading letterhead and violation of a court order (also, typically, a reprimand). It is true that respondent has no ethics history and that Powell had received three reprimands and a three-month suspension. But a significant aggravating factor here counterbalances Powell's disciplinary record.

Specifically, this record demonstrates respondent's pattern of false statements and half-truths. On multiple occasions during discovery, including in his answer to an interrogatory and during his testimony at his deposition, under oath, respondent misled Hoberman. He first indicated that the name of his carrier was "unknown" to him. Then he testified that the name of the carrier began with an "A" and that he "probably" had notified his carrier of the malpractice claim. As to the latter statement, respondent told the DEC that he had made a conscious decision not to give notice of the suit to his carrier, because he considered it to be frivolous and he did not want his insurance premiums to increase. Also, at his deposition, he testified that he had represented DeFilippi at the closing, only to tell the DEC that his testimony had been untrue and that it had been prompted by his irritation at Hoberman's repeated

questions about that topic. This conflicting statement demonstrates that respondent either lied at the deposition or lied to the DEC.

A significant mitigating factor here is respondent's spotless disciplinary record in New York, where he was admitted forty-six years ago, and in New Jersey, where he was admitted twenty-six years ago, strongly suggesting that his conduct in this matter was aberrational or out-of-character.

All in all, however, the circumstances in Powell and here seem to be properly balanced, making the discipline imposed in Powell -- a censure -- appropriate here as well. We so determine.

Member Rivera 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: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Thomas A. Blumenthal
Docket No. DRB 14-309

Argued: January 15, 2015

Decided: March 26, 2015

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera						X
Singer			X			
Zmirich			X			
Total:			7			1

Ellen A. Brodsky
Chief Counsel