

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-149
District Docket No. IIB-99-045E

IN THE MATTER OF :
:
STEPHEN J. VASAK :
:
AN ATTORNEY AT LAW :
:
:

Corrected Decision

Argued: June 17, 2004

Decided:

Jay Rubenstein 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 (three-month suspension) filed by the District IIB Ethics Committee ("DEC"). The six-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.7 (b) (conflict of interest), RPC 1.15(b) (failure to safekeep property), RPC 2.2 (improperly acting as an intermediary), RPC 8.1(b) (failure to cooperate with the DEC investigation), and

RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

At the DEC hearing, the presenter withdrew the charges of RPC 1.7(b), RPC 2.2, and RPC 8.1(b), stating that he was unable to prove the charges by clear and convincing evidence. The presenter also made a motion to have the charged violations of RPC 1.15(b) and RPC 8.4(c) amended to conform to the proofs to the violations of RPC 1.15(d) (recordkeeping violations) and RPC 8.4(d) (conduct prejudicial to the administration of justice). Prior to the DEC hearing, respondent had entered into a stipulation admitting violations of RPC 1.1(a), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), and RPC 8.4(d).

Respondent was admitted to the New Jersey bar in 1971. At the relevant times, he maintained a law practice in Fort Lee, New Jersey.

In 2000 and 2001, respondent was ineligible to practice law in New Jersey for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection ("the Fund"). He registered with the Fund as retired in 2002 and 2003. According to respondent's brief, in 2003, he was employed outside the United States in a federal position, carrying diplomatic status and, as of the date of the DEC hearing, was awaiting a new assignment, most likely in the Middle East. Respondent could not guarantee that he will not practice law in the future, but

agreed that, if he does so, he will take courses in recordkeeping practices.

Prakash Donde was respondent's client. Before and after the transaction at issue, respondent represented Donde in a number of transactions involving loans to third parties.

In March 1996, a financial adviser for Pedro Arbulu-Mimbela ("Arbulu"), contacted respondent to inquire whether respondent could refer Arbulu to a potential lender. Arbulu and a company in which he was involved, South Pacific Investments of Connecticut, LLC ("South Pacific"), were looking for financing for a proposed casino in Connecticut. Respondent had not known Arbulu or Donde prior thereto.

Respondent contacted one of his clients, DePowers Funding ("DePowers"), which declined to provide financing to Arbulu, but suggested that respondent contact Donde, who was one of DePowers' investors. According to the stipulation, sometime in March 1996, DePowers gave respondent Donde's telephone number, and respondent, in turn, referred Arbulu to Donde.

As of April 1996, respondent was holding in his trust account certain funds belonging to DePowers. In early April 1996, DePowers informed respondent that it was no longer dealing with Donde and that the balance of its funds, in respondent's trust account, belonged to Donde. In late April or May 1996,

Donde instructed respondent to continue holding the funds in his trust account.

On Friday, May 17, 1996, Donde telephoned respondent and informed him that he had made a "deal" with Arbulu that he wanted to close the following Monday, May 20, 1996. Respondent claimed that he was not involved in the decision-making process on the loan or the discussions regarding its terms. He did, however, represent Donde in the preparation of certain loan documents and at the closing, although he did not charge Donde any legal fees.

Donde informed respondent about the terms of the loan that he had negotiated with the borrowers. Among others, the terms included that the loan amount was \$30,000; South Pacific was the borrower; Arbulu and Samuel Molina, Jr., a contractor, were the guarantors; the term of the note was one year; the interest rate was seventeen per cent; and the loan was to be secured by property owned by Molina at 99 Putney Drive, West Haven, Connecticut. At Donde's direction, and based on this information, respondent prepared a promissory note dated May 17, 1996.

Respondent told Donde that he could not complete the closing on such short notice, three days, because there was not enough time to finalize a title search on the Connecticut property that was to serve as collateral for the loan. Donde,

nevertheless, informed respondent that the closing had to take place the next Monday because Arbulu and Molina needed the money immediately.

Respondent acknowledged that he failed to memorialize his conversation with Donde and that he did not receive written authorization or instructions from Donde. Respondent also conceded that he should have sent a letter to Donde confirming that Donde's interests might not be protected without a title search on the property, and that he should have obtained a written acknowledgment from Donde that he wanted to proceed with the transaction despite his knowledge of the risks involved. Although respondent represented that he informed Donde about the risks involved in proceeding without a title search, Donde could not recall whether he was given this warning. Because the presenter could not prove otherwise by clear and convincing evidence, he accepted as true respondent's statement that he had warned Donde.

Respondent recalled that, on May 20, 1996, Donde brought with him an agreement stating that, if the loan was not repaid within sixty days, Donde, as the lender, would be entitled to file a mortgage deed on the Connecticut property. Donde left respondent's office before the closing was completed, but instructed respondent to deliver the funds to the borrower upon

the execution and delivery of the promissory note guaranteed by Arbulu and Molina.

Later that day, Arbulu and Molina signed the promissory note, personal guarantees, and the agreement. Molina, however, did not produce a signed mortgage deed for the Connecticut property, claiming that his attorney had not had time to prepare it. As a result, respondent told Arbulu and Molina that he could not release the loan proceeds to them.

Respondent telephoned Donde to inform him that Molina had not produced the mortgage deed. Afterwards, Arbulu and Molina spoke to Donde. Following that telephone conversation, Donde instructed respondent to release the funds. Respondent neither obtained written authorization from Donde to release the funds, nor did he memorialize his conversation with Donde. Respondent believed, however, that he was authorized to release the loan proceeds. Respondent acknowledged that he should have confirmed, in writing, the advice he had given Donde: that his interests might not be protected if the loan proceeds were disbursed without receipt of the intended collateral security, and that, once the funds were disbursed, Molina might never provide the collateral. Respondent conceded that he should have obtained Donde's written acknowledgement that he wanted to proceed despite his knowledge of the risks involved.

Arbulu, the principal of South Pacific, instructed respondent to issue a check for \$10,000 to Molina, who requested respondent to wire-transfer \$20,000 to Lionhawk, Molina's construction company, on May 21, 1996. Respondent complied with these directives.

After the loan proceeds were disbursed, on three separate occasions (July 8, September 26, and October 28, 1996), respondent sent Molina a form of mortgage deed to be completed and signed. Molina never signed or returned the completed deed.

At some point not specified in the stipulation, the debtors defaulted on the loan. Thereafter, in April 1998, respondent arranged for Donde to meet with a Connecticut attorney about filing suit on the promissory note, against the debtor/guarantors. The attorney conducted a title search on the Connecticut property and discovered that Molina did not own it and that no mortgage deed had ever been filed against the property in Donde's behalf. As a result, the attorney suggested that Donde apply for a pre-judgment attachment on other property owned by Molina. The attorney also informed Donde that he might have a malpractice claim against respondent for failing to obtain a title search prior to the closing. According to respondent, Donde thought it was too inconvenient to sue Arbulu in Connecticut; instead, Donde wanted to sue respondent for his

losses. The stipulation does not disclose whether Donde filed a malpractice suit against respondent.

Respondent admitted that he should have advised Donde to consult with independent counsel about his rights and potential claims against him.

According to the stipulation, on several occasions between June and November 1998, Arbulu informed respondent that he would pay off the loan to Donde. Respondent conveyed these promises to Donde. Respondent mistakenly believed that Arbulu had wired funds to respondent's bank, and so informed Donde. However, no such credit had been made to respondent's account. In October 1998, Arbulu wrote to respondent, promising to pay the note, but failed to do so.

In November 1998, based on Arbulu's promises, respondent offered to advance monies to Donde on account of the debt, because he believed that Arbulu would eventually pay off the loan. According to respondent, he had planned to obtain an assignment of the note from Donde, but never did so; he, therefore, decided to personally repay Donde to buy himself "piece of mind" because Donde started "harassing" him and "threatening to destroy [him] and [his] family."

In the winter of 1999, respondent made three payments to Donde, totaling \$7,000. On March 3, 1999, respondent informed Donde that Arbulu was expecting to receive money from a closing,

which would be used to pay Donde in full. Respondent further indicated that he planned to attend the closing; the closing never took place, however.

In May and June 1999, respondent communicated with Donde about funds he anticipated receiving, from which he would make further payments to Donde. However, respondent never received the anticipated funds.

After Donde filed a grievance in this matter, Arbulu notified the DEC, by letter dated March 1, 2000, that respondent was never his attorney, and that he had spoken with Donde on May 20, 1996, and believed that Donde had consented to the release of funds.

Respondent acknowledged that he grossly neglected the Donde transaction.

During the course of the DEC investigation, respondent was requested to produce his attorney trust account records from February 1, 1997 forward. Respondent produced bank account statements, cancelled checks, wire-transfer confirmations, client ledger sheets, and account ledger sheets for the period from February 1, 1997 to August 10, 1999. Although the DEC did not perform an audit of respondent's records, the records revealed a number of deficiencies.

Respondent admitted that his attorney trust account records did not comply with the requirements of R. 1:21-6. Specifically,

respondent did not keep a separate receipts journal; he failed to identify the purpose of each disbursement in the client ledgers; failed to note in the client ledgers the source of all funds deposited into his trust account; failed to maintain a running balance in the client ledgers; failed to perform monthly reconciliations of his accounts; and improperly rounded off entries to the nearest whole dollar "without regard for the accuracy of the account."

The stipulation further stated that respondent improperly commingled his fees and client funds in his attorney trust account. Moreover, on at least one occasion, earned fees left in the attorney trust account were used to cover a deficit in a client account designated as Evergreen. Although respondent disbursed funds on Evergreen's behalf, there were insufficient funds on deposit to cover such disbursements.

Respondent admitted that he failed to keep his attorney trust account records in accordance with R. 1:21-6 and that he violated RPC 1.15(d).

Respondent also stipulated that his gross neglect in the Donde matter and his recordkeeping violations constituted conduct prejudicial to the administration of justice.

The DEC dismissed the charged violations of RPC 1.7(c), RPC 2.2, and RPC 8.1(b). The DEC determined, however, that the stipulated facts established, by clear and convincing evidence,

that respondent was grossly negligent in his handling of the Donde transaction; that he improperly commingled his fees and client funds; that he did not maintain his records in accordance with R.1:21-6; and that his conduct was prejudicial to the administration of justice. The DEC concluded that a three-month suspension was the appropriate discipline for respondent's ethics infractions.

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

In the Donde transaction, the stipulation established that only Donde was respondent's client, and that respondent prepared the promissory note in connection with the loan transaction. Respondent closed the loan on short notice, without first obtaining a title search on the property that was to be used as collateral, and without obtaining a signed "mortgage deed" on that property. Had respondent obtained the title search, he would have discovered that Molina was not the rightful owner of the property. The undisputed evidence established that respondent warned Donde about the dangers of proceeding without a title search and disbursing the funds to the borrower, on that, Donde insisted that the closing proceed as scheduled.

On the date of the closing, once again, respondent advised his client that the funds should not be disbursed, because the

borrowers had not presented him with a "mortgage deed" on the Connecticut property. Donde ignored respondent's advice and directed him to disburse the funds.

Because this matter proceeded by way of stipulated facts, there is nothing in the record to refute respondent's assertions about his advice to Donde. In fact, the presenter accepted them as true. Nevertheless, respondent admitted violating RPC 1.1(a), and we so find. Regardless of Donde's desire to complete the transaction even after respondent explained its pitfalls, respondent should have refused to proceed. He knew he was closing a mortgage loan for his client, secured by the debtor's real property, with absolutely no objective evidence that the debtor owned that collateral. The very basis for this transaction had not been established. Respondent, thus, was grossly negligent when he agreed to facilitate the transaction without first obtaining a title search, a mortgage deed or some other assurance that his client's loan was secured. Respondent knew the dangers of going forward without these crucial documents. To protect his client's interest, despite his client's wishes, respondent should have declined to proceed with the transaction. Respondent's negligence resulted in the loss of Donde's entire investment.

The stipulated facts also support a finding that respondent violated RPC 1.15(d), because his records did not comport with

the requirements of R. 1:21-6. In addition, he commingled fees and client funds, and disbursed funds on behalf of a client without sufficient funds on deposit to cover the disbursements. Because the DEC did not conduct an audit of respondent's records, there is no evidence that respondent knowingly invaded any client funds.

Finally, the stipulated facts do not support a finding that respondent engaged in conduct prejudicial to the administration of justice. We, therefore, dismiss that charge. We are left, thus, with violations of RPC 1.1(a) and RPC 1.15(d).

Generally, in matters involving similar violations, reprimands have been imposed. See In re Kessler, 178 N.J. 71 (2003) (reprimand where attorney commingled personal and client funds in his trust account, failed to maintain proper records, and failed to cooperate with disciplinary authorities; he had a prior private reprimand and a reprimand); In re Balint, 172 N.J. 408 (2002) (reprimand where, in two matters, the attorney engaged in gross neglect, negligent misappropriation of trust funds, and recordkeeping violations); and In re Cheek, 162 N.J. 98 (1999) (attorney reprimanded for gross neglect, failure to communicate with a client, and recordkeeping violations).

Because respondent has not actively practiced law since 1999, and because this matter occurred approximately eight years ago, we determine that a reprimand is appropriate discipline for

respondent's misconduct. Vice-Chair, William O'Shaughnessy, Esq., did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel