SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-463

IN THE MATTER OF :
STEVEN P. HAFT, :
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: January 31, 1996

Decided: May 20, 1996

Richard V. Hollyer appeared on behalf of the District X Ethics Committee.

Respondent appeared pro se.

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 X Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.7(b) (representation of a client that is materially limited by the lawyer's own interests); RPC 1.8(a) (entering into a business transaction with a client); RPC 4.1 (truthfulness in statements to others) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1974. In 1984, he was publicly reprimanded after he failed to prepare an appellate brief in a matter involving a convicted murderer, despite the Appellate Division's repeated directions to do so.

Respondent and Alan Rosen became acquainted in the mid-1970s. Shortly thereafter, respondent began to represent Rosen in various matters. The two also became friends over the years. Rosen testified that respondent had helped him out of many "tight spots" over the years, which included co-signing a car loan at a time when he was experiencing financial difficulties. By 1988, however, Rosen's fortune had changed. He had been substantially successful in his new sports memorabilia business and was grossing between $300,000 and $500,000 per year in sales.

At some point prior to July 20, 1988, respondent approached Rosen for a personal loan in the amount of $100,000 to invest in the development of a piece of residential property, along with two other investors. Although it is not clear whether at that time respondent was actively handling any matters in Rosen's behalf, Rosen testified that respondent was the only attorney he had consulted since their acquaintance and the person whom he considered to be his attorney. Respondent, too, considered himself to be Rosen's attorney at all relevant times.

Recalling the instances when respondent had come to his aid, Rosen quickly decided to lend respondent the $100,000, despite contrary advice from his wife. Rosen forwarded respondent a check within one to two days of respondent's loan request. Although Rosen denied that respondent had ever advised him to retain independent counsel prior to entering into the transaction, Rosen had consulted with his accountant (who was also respondent's accountant), who urged him to obtain security for the loan. When

Rosen conveyed this advice to respondent, respondent offered to execute a note and to give Rosen a mortgage on his residence as security for the loan. Exhibits C-5 and C-6. Respondent prepared both documents and signed them on or about July 20, 1988, also the date of Rosen's check to him. The mortgage itself provided for full repayment within nine months, at an interest rate of ten percent per year. In addition, Rosen was to receive ten percent of the profits derived from the venture. He recalled that respondent had mailed him the executed mortgage and note long after he had sent respondent the check.

At the time that respondent executed the mortgage in Rosen's favor, he and his wife jointly owned the house as tenants by the entirety. Two other outstanding mortgages encumbered the house. According to Rosen, respondent did not tell him either that the mortgage was deficient – because it was not signed by respondent's wife – or that it was a third, as opposed to a first, mortgage on the property. Nor did respondent discuss with Rosen whether the equity in the property was sufficient to secure the loan. Furthermore, respondent never outlined the terms of the proposed transaction to Rosen prior to its consummation and did not advise him of the desirability of seeking guidance from independent counsel. Lastly, respondent did not reduce the terms of the transaction to writing or obtain Rosen's written consent to the representation.

Rosen testified that, at the time he entered into this transaction with respondent, he was unsophisticated in real estate

matters and relied completely on respondent to "handle all legal ends of this case." T22.[1] Therefore, it never occurred to Rosen that he should be represented by independent counsel. T23.

Eventually, respondent's investment took a turn for the worse, causing him a loss of approximately $180,000. In addition, and almost simultaneously, respondent's substantial real estate practice had begun to wane, apparently due to the declining real estate market. At some undisclosed point, Rosen filed suit against respondent for repayment of the loan. The record does not disclose the circumstances leading up to that event. On or about August 21, 1992, Rosen obtained a judgment against respondent in the amount of $135,752.24. A supplementary order for the assessment of counsel fees and costs in the amount of almost $8,000 was entered in or about November 25, 1992. Despite aggressive collection efforts on Rosen's part, he has recovered only $18,000 on the total debt to date. Rosen further contended that he spent $30,000 in legal fees to collect only a fraction of his money.

Respondent testified that, when he approached Rosen with a loan request, he believed that the proposed venture was sound. Respondent admitted that he failed to reduce the terms of the transaction to writing and to obtain Rosen's written consent to the representation. Respondent attributed this failure to the nature of his relationship with Rosen. However, respondent steadfastly maintained that he fully disclosed the terms of the transaction to

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[1] "T" denotes the DEC hearing transcript of August 22, 1995.

Rosen. Furthermore, he seemed to recall some discussions with Rosen about his right to have someone review the transaction.

Respondent remembered Rosen's statement to him about their accountant's advice to obtain security for the loan. It was respondent's recollection that Rosen had assured him that it did not matter to him whether respondent offered security for the loan. Respondent, nevertheless, drafted and executed a note and mortgage and forwarded the originals of both to Rosen, with the understanding that Rosen would record the mortgage whenever it was necessary. Respondent himself never recorded the mortgage. No specific testimony on this particular issue was elicited from Rosen.

Respondent testified that his wife did not sign the mortgage because, in his view, Rosen's loan to him created a personal obligation on his part, for which his wife was not responsible. Respondent contended that he and Rosen had specifically discussed that particular aspect of the transaction. However, that testimony is inconsistent with respondent's statement at a deposition over three years earlier (in connection with the civil action), wherein respondent admitted that he had not discussed with Rosen his wife's joint ownership of the mortgaged property. Although respondent could not recall whether he had explained to Rosen the legal and practical significance of having only his signature on the mortgage, in the face of joint ownership, respondent admitted that, at the time he executed the mortgage, he fully recognized that he

was offering Rosen only his survivorship rights and not the right of sale in the event of a default on the loan.

As it happened, respondent ultimately conveyed title to the mortgaged property to his wife in December 1991. In a supplementary proceeding deposition, respondent testified that he had conveyed title to his wife because he could not repay a $35,000 loan she extended to him, seemingly in connection with the same investment. (Respondent's wife had borrowed money from her mother to make the loan to respondent). There is no allegation that respondent made this transfer in anticipation of Rosen's suit for repayment, filed sometime in 1992. Although the record does not so specifically state, it would appear that Rosen never filed the mortgage or, by the time he decided to do so, respondent had already transferred his interest to his wife.

After respondent executed the mortgage in Rosen's favor, in or about July 1989 respondent and his wife submitted a mortgage refinance application to Huntington Mortgage Company (hereinafter "Huntington"). Respondent never disclosed on that application the existence of the mortgage given to Rosen, although he did reveal the existence of the two prior recorded mortgages. Respondent did not identify Rosen as a creditor on that application. Moreover, respondent specifically misrepresented on several documents incidental to the mortgage application, such as the affidavit of title, that, aside from the two recorded mortgages, the property was unencumbered. Obviously, because Rosen's mortgage had never been recorded, it did not surface during Huntington's title search.

When asked why he had not disclosed to Huntington the existence of the mortgage to Rosen, respondent replied that he thought of Rosen's loan as a business, as opposed to a personal, obligation. It is not clear why respondent considered that distinction relevant for purposes of disclosing the existence of encumbrances on the property offered for mortgage. Moreover, respondent unequivocally admitted that it was his intention to give Huntington a first mortgage on his residence.

In or about August 1989, Huntington granted respondent a mortgage loan in the approximate amount of $300,000. Although there is no indication that Huntington would not have approved the refinancing, had respondent disclosed the existence of Rosen's mortgage, the closing instructions required respondent to satisfy the two pre-existing mortgages on the residence, as a condition of approval. (Respondent satisfied these mortgages from the Huntington mortgage proceeds). There is no suggestion that Huntington would have treated Rosen's mortgage differently, had respondent revealed its existence.

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The DEC found that respondent violated RPC 1.7(b) because his representation of Rosen was materially limited by his own interests and by his responsibility to other persons. Moreover, the DEC

found that respondent had "failed to make full disclosure to Mr. Rosen as to the inadequacies of the mortgage which had been prepared, the impact of not recording that mortgage [and] the respondent's own personal financial affairs...." Hearing panel report at 7.

The DEC also found respondent guilty of a violation of RPC 1.8(a), "in that there was a clear conflict of interest between the Respondent and Mr. Rosen and the Respondent utterly failed to disclose this conflict of interest to Mr. Rosen; failed to advise Mr. Rosen of the desirability of his being represented by independent counsel; and failed to obtain Mr. Rosen's consent in writing. As indicated by the testimony, Mr. Rosen 'fully relied' on Mr. Haft to protect him while Mr. Haft was fostering his own personal interests...." Id. at 7.

Finally, the DEC found respondent guilty of a violation of RPC 8.4(c) for his failure to disclose to Huntington the existence of Rosen's mortgage. In conjunction with that finding, the DEC noted that respondent's failure to specifically direct Rosen to record the mortgage was more than a mistake or oversight. "One could reasonably reach the conclusion that Mr. Haft did not want the Mortgage recorded so as not to affect his ability to obtain further financing from the Huntington Mortgage Company." Hearing panel report at 1.

The DEC declined to find respondent guilty of a violation of RPC 4.1 on the basis that respondent's statements to Huntington (or omissions) had not been made in the course of representing a client.

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Upon a de novo review, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is clearly and convincingly supported by the record. Respondent entered into a business transaction with a client, the terms of which were of dubious fairness. Indeed, although the loan terms called for the payment of interest to Rosen as well as a small portion of the profits on the venture, the mortgage given to secure the loan was essentially worthless. Respondent neither advised Rosen to consult with independent counsel nor explained the pitfalls of the transaction to him. Respondent's assertion that he had disclosed to Rosen his wife's interest in the mortgaged property is not worthy of belief, particularly in light of his inconsistent deposition testimony three years earlier. Furthermore, it is inconceivable that Rosen would have accepted such worthless "security" given the fact that it was he who requested security for the rather sizeable loan. Moreover, respondent's nebulous advice to Rosen that he had the right to have someone review the

transaction does not approach satisfaction of his obligation under RPC 1.8. On more than one occasion, the Court has warned that attorneys who choose to venture into business transactions with their clients do so at their substantial risk. Such transactions are scrutinized closely and with a jaundiced eye to ensure that the client is treated with utmost fairness after complete disclosure. Given the particular circumstances, respondent should have insisted that Rosen consult with independent counsel or refused to consummate the transaction.

That Rosen consulted with his accountant prior to entering into the transaction did not relieve respondent of his responsibility to insist that Rosen retain independent counsel. First, although Rosen's accountant had the good sense to advise him to obtain security for the loan, there is no evidence to suggest that the accountant knew the type and nature of the security to be offered to enable him to explain to Rosen the legal ramifications of accepting that security (assuming that the accountant even had the legal acumen to do so). Second, Rosen's accountant was also respondent's accountant. It is questionable, therefore, whether he could have, ethically, advised Rosen on the acceptability of the security offered by respondent, even if he had the legal knowledge to do so, because he, too, was in a conflict situation. It is unreasonable for respondent to find any comfort whatever in Rosen's consultation with their mutual accountant under these circumstances.

Compounding respondent's egregious conduct vis-à-vis his client was respondent's misrepresentation to Huntington that, but for the two mortgages disclosed, the property remained unencumbered. Moreover, in an obvious attempt to hide from Huntington even the possibility of the existence of another mortgage, respondent failed to list on the mortgage application his indebtedness to Rosen. His attempt to "explain" his conduct was nothing more than an after-the-fact justification of what was clearly a calculated misrepresentation.[2] There is no reason in law or in fact to fail to disclose the existence of an encumbrance on a piece of property offered for mortgage merely on the basis of the nature of the transaction that gave rise to the encumbrance. Respondent, an attorney who had performed a substantial amount of real estate work in the past, certainly knew that he had an obligation to disclose that encumbrance. At a minimum, he knew that he was prohibited from actively misrepresenting that fact, for example, in the affidavit of title. There is no reasonable explanation for respondent's misrepresentation, other than that he knew Huntington would not have granted a mortgage loan, had it known that an additional mortgage existed that, when combined with the other two, far exceeded both respondent's equity in the property and the value of the property itself.

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[2] Respondent maintained at the Board hearing that he had, indeed, disclosed the Rosen balance of the loan on the mortgage application, albeit by a different name. This information was never offered at the DEC hearing and, in fact, is inconsistent with his testimony before the DEC on that very issue.

Again, in evaluating the severity of respondent's conduct, must be considered the extreme consequences visited upon Rosen. Rosen has suffered a net loss of over $130,000. Moreover, given respondent's somewhat bleak financial situation, at least as of the date of the supplementary proceeding deposition, complete satisfaction of the debt appears doubtful.

This case is analogous to In re Epstein, _____ N.J. ____ (1995). In that case, the Court suspended for one year an attorney for misconduct almost identical to that of respondent. Specifically, the attorney entered into a loan transaction with client, who was also the attorney 's friend. The attorney failed to comply with the requirements of RPC 1.8. Furthermore, although the attorney executed a mortgage on her house in behalf of the client, she failed to disclose to her client the existence of a first mortgage and failed to record the mortgage she had executed to secure her client's loan. Shortly after executing that mortgage, the attorney submitted an application to refinance the first mortgage on her house. She did not disclose the existence of her client's second mortgage on the application. Moreover, the attorney signed an affidavit of title, representing to the new mortgagee that there were no other liens or encumbrances on the property. The attorney's explanation for not disclosing the existence of the second mortgage on the refinance application was that she considered the loan from her client as a transaction between friends; as such, it would not have to be disclosed. Ultimately, the attorney made her client whole. See also In re

Griffin, 121 N.J. 245 (1990) (one-year suspension for persuading his paramour, who was also his client, to obtain a $20,000 mortgage on her house to satisfy her financial obligations and to benefit the attorney; no compliance with the requirements of RPC 1.8) and In re Pascoe, 113 N.J. 229 (1989) (attorney suspended for one year – and until reparation was made – for obtaining a loan from his clients without advising them to consult with independent counsel).

There is no substantial reason to treat respondent differently from attorney Epstein. The Board, therefore, unanimously determined to suspend respondent for one year for his violations of RPC 1.7(b), RPC 1.8(a) and RPC 8.4(c) and to require him to complete ten hours of ICLE professional responsibility courses. One member did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for appropriate costs.

Dated: _____ By: _____
Lee M. Hymerling
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