SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-297

IN THE MATTER OF

MARK D. CASWELL,

AN ATTORNEY AT LAW

Decision

Argued: September 17, 1998

Decided: December 11, 1998

Joan Adams appeared on behalf of the District IV 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 IV Ethics Committee ("DEC"). The one-count complaint charged respondent with violations of RPC 1.4(b) (failure to explain matter to extent reasonably necessary to permit client to make informed decision regarding the representation); RPC 1.7(a) (representing a client when the representation of that client is directly adverse to another client); RPC 1.7(b) (representing a client when the representation is materially limited by the

lawyer's responsibilities to another client); RPC 1.7(c) (representing a client when it creates an appearance of impropriety, rather than an actual conflict); and RPC 1.8(a) (entering into a business transaction with a client). These charges stem from respondent's advice to a client to invest money in a company owned by another client.

Respondent was admitted to the New Jersey bar in 1980. At the relevant times, he maintained a law office in Cherry Hill, New Jersey. Respondent has no history of discipline.

The facts in this matter are not in dispute. The grievant, Carolyn Johnson, initially retained respondent in the spring of 1995, after her husband passed away, to handle some matters involving his estate. According to Johnson, she paid respondent $500 to represent her, but never received a retainer agreement. Johnson's testimony suggested that respondent did little, if anything, for which he had been retained. At some unknown point, Johnson obtained the proceeds from her husband's life insurance policy in the amount of $120,000.

Aware of Johnson's receipt of the proceeds, respondent contacted her about an investment opportunity. Respondent and Johnson had previously discussed the fact that Johnson needed approximately $2,000 a month for her living expenses. Respondent had informed her that she would be unable to obtain that type of a return from investing the life insurance proceeds in a standard fashion. Respondent had also informed her that a high yield investment would carry with it high risks. Prior to this discussion, Johnson had met with representatives from her bank, who informed her that they had no investment opportunities available that would generate her desired rate of return.

In mid-August 1995 respondent contacted Johnson to inform her of an investment opportunity with a company called Environ Water Management ("Environ"), owned by his friend, Rudolf Kizitaff. The company installed water filtration systems in schools. Respondent did not disclose to Johnson that Environ was also his client. Because Environ was not in a financial position to pay respondent for his legal services, respondent was promised either future payment for his services and/or future stock ownership in the company. At the time that respondent represented both Environ and Johnson, he did not have an ownership interest in the company.

Respondent told Johnson that he believed Environ was a good investment and that it would yield a high rate of return. Respondent also led Johnson to believe that she might be able to obtain a job with the company. After their initial discussion, respondent set up a meeting among Kizitaff, Johnson and himself. The meeting took place on August 14, 1995. It was Johnson's understanding that Environ needed some money immediately to "keep its doors open" until they were able to obtain money "allocated from the school board." She understood that, at the next school board meeting, the board would release the funds to Environ. She anticipated that the money would be released within ninety days of her meeting with respondent and Kizitaff.

Initially, Johnson had contemplated investing $10,000 in the company. However, respondent suggested that she invest $20,000, which she agreed to do. At that meeting, Johnson wrote a check to Environ. It was not until the next day that respondent provided Johnson with a promissory note setting forth the terms of the agreement. The interest rate

was set at five percent per month. Respondent did not review the terms of the agreement with Johnson. It was Johnson's understanding, prior to obtaining the note, that she would receive $1,000 a month in interest on her $20,000 investment. Afterwards, at her option, she would either be paid in full in ninety days or would continue to receive $1,000 a month until she requested, in writing, the return of the principal.

During the August 14, 1995 meeting, neither respondent nor Kizitaff told Johnson about Environ's poor financial condition. Respondent never told her that he represented the company, that the company had other creditors and that the company could not even afford to pay for his legal services.

The first payment due under the promissory note was September 15, 1995. The note indicated that the term of the loan was for three months, ending on November 15, 1995. It further stated that the note "shall [be] due in full[,] sixty (60) [days] after receipt by Borrower of written demand for Lender for payment." Exhibit C-2. Although respondent admitted at the DEC hearing that the sixty-day waiting period was not in Johnson's best interests, he stated that he had inserted the sixty-day clause based on a practical standpoint, believing that it would take the company that long to come up with the money.

The note also had the following provision:

> The Borrower shall not be permitted to make partial payments of Principal without the consent of the Lender. The Borrower may pay the entire Principal at any time after November 15, 1995, together with all accrued interest, even though prior to any demand for payment by Lender.

This provision was contrary to Johnson's understanding that it was her option to either continue receiving interest payments or to have the loan paid in full after three months.

The promissory note also stated that, in the event of a default, Environ would reimburse Johnson for any and all out-of-pocket costs incurred in attempting to collect on the promissory note, including attorney's fees and court costs.

Environ never made any interest payments to Johnson or satisfied the $20,000 loan. Moreover, respondent never advised Johnson about her recourse in the event of non-payment, never obtained for Johnson or suggested to her that she should obtain a personal guarantee from Kizitaff and never discussed with her the possibility of obtaining a lien or security interest in the company.

According to Johnson, after Environ failed to make the first interest payment on September 15, 1995, respondent told her that the money had not yet come through from the school board. He led her to believe, however, that the money was still forthcoming.

According to respondent's testimony, problems had arisen in connection with one of Environ's projects. As a result of the problems, the school board determined that it would not go forward with future projects with Environ. Respondent did not inform Johnson that the school board had not authorized payment on the project. In fact, as late as August 1996, respondent wrote to Johnson informing her that Environ still intended to honor its obligations to her under the promissory note. Exhibit C-7. It is not clear, however, that at that time respondent knew of the school board's decision and, thus, intended to deceive Johnson that the school board's monies would be forthcoming. It could be logically inferred from the

letter that Johnson would be paid through other sources.

Eventually in May 1996, Johnson wrote to Environ demanding payment, to no avail. Thereafter, respondent took no action to recover her funds from Environ. He also failed to inform Johnson that Environ had been sued by other creditors.

It is undisputed that respondent did not advise Johnson to consult with other counsel about the loan. Respondent explained at the DEC hearing that the only advice that mattered to Johnson was whether it was "the Lord's will" for her to loan the money; what was important to her was that the three of them, respondent, Johnson and Kizitaff, share the same religious beliefs.

Respondent gave the following testimony at a the DEC hearing:

> And when everything was said and done it was just presented that this is the situation, that I personally brought the two of you together [Kizitaff and Johnson] because you're two Christian friends of mine who seem to have complementary needs, and I wanted to know what she thought about the situation, she being Mrs. Johnson.
>
> We both reiterated to her on more than one occasion that because of our shared Christian point of reference in dealing with Life's issues that we were not interested in her being involved in this [transaction] at all unless she understood quite clearly and accepted it as being the Lord's will for her to do this. This was more important to us than anything else in this entire discussion. We had both respected her apparent . . . . relationship with the Lord and her maturity and her ability to discern what God's will is for her in her life.
>
> [T71-72][1]

[1] T denotes the transcript of the April 3, 1998 DEC hearing.

Respondent testified that he is no longer practicing law and that his license is currently inactive. He stated that he was pursuing other avenues. He indicated that nothing like this had ever happened to him before and that he was not sure if he would ever practice law again. He also stated that he felt that it was time to "move on to something else."

* * *

The DEC found that respondent violated RPC 1.4(b) by failing to explain the matter to his client to the extent reasonably necessary for her to make an informed decision about the representation. The DEC noted that Johnson received nothing in writing regarding the financial health of Environ and the risks associated with her investment.

The DEC also found that respondent was representing two entities whose interests were adverse from the beginning. The DEC concluded that respondent's representation of one could not help but limit his ability to represent the other. The DEC, thus, found violations of RPC 1.7(a), (b) and (c).

The DEC also found that respondent violated RPC 1.8(a) by entering into a business transaction with Environ. The DEC noted that, while respondent had not been paid by Environ or received any stock, he had been promised future stock when the company was able to issue stock. The DEC found that, because of Environ's financial obligation to respondent, respondent had an economic interest in the company that was adverse to Johnson's interests.

Based on the foregoing violations, the DEC recommended a three-month suspension. The DEC also recommended that respondent practice under the supervision of a proctor for a one-year period.

* * *

Following 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 supported by clear and convincing evidence.

Respondent failed to protect Johnson's interest in the transaction. Unquestionably, the conflict was clear from the start. Notwithstanding respondent's claim that he was not representing Environ in the transaction with Johnson and that he conveyed that information to both, it is obvious that at least Johnson believed that respondent was acting as her attorney. It is equally obvious that respondent put Environ's interests above Johnson's. The terms of the promissory note favored Environ, not Johnson, who was not properly apprised of Environ's poor financial situation. Respondent failed to comply with the requirements of RPC 1.7 that each client consent to the representation after full disclosure of the circumstances. Clearly, full disclosure was not made to Johnson.

Another of respondent's actions that favored Environ was respondent's failure to protect Johnson's interests by not securing the loan. Because of respondent's dealing with Environ, he was well aware of the company's financial hardship. He knew that Environ had

other creditors. First, he should have advised Johnson of the desirability of seeking the advice of independent counsel. Having failed to do so, he should have either obtained a personal guarantee from Kizitaff or devised some other method to protect Johnson's interest in this transaction, but failed to do so.

Because of respondent's misconduct, Johnson suffered considerable financial harm. In fact, her economic injury was doubled because of respondent's advice that she invest $20,000, instead of $10,000. To compound matters, respondent misrepresented to Johnson that the money from the school board was forthcoming, when in reality he knew that the school board had decided to halt Environ's project. Respondent's conduct, thus, violated RPC 1.7(a) and (b). RPC 1.7(a) states as follows:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:
>
> (1) the lawyer reasonably believes representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after a full disclosure of the circumstances and consultation with the client.

RPC 1.7(b) states that a lawyer shall not represent a client if the representation of a client may be materially limited by the lawyer's responsibilities to another client or to the lawyer's own interests. Here, respondent compromised Johnson's interests by putting not only Environ's interests above Johnson's, but also his own because respondent was slated to be paid for his work for Environ in company stock.

Although the DEC found a violation of RPC 1.7(c), this subsection is inapplicable, as there was more than "an appearance of impropriety" in this matter.

In sum, despite respondent's claim that he did not represent Environ in the transaction, the circumstantial proofs demonstrate otherwise. His allegiance was clearly to Environ, not Johnson. In addition, RPC 1.4(b) was also violated, because respondent failed to explain the matter to Johnson to the extent reasonably necessary to allow her to make an informed decision about the representation.

The DEC found that there was a violation of RPC 1.8(a). The DEC based its finding on the fact that respondent entered into a business transaction with a client, Environ, by knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to Johnson and by failing to advise her of the desirability of seeking independent counsel. That rule is inapplicable. The DEC seemed to misconstrue this rule to apply to Johnson and respondent. In actuality, the conflict under RPC 1.8(a) would arise between respondent and Environ. Here, there was none because, obviously, a conflict under RPC 1.8 does not arise when clients pay legal fees to their attorneys; there would be nothing improper in respondent's receipt of a fee from Environ. A fee payment may be made in cash or take other forms as well, including an interest in the client's business. At that time, though, the attorney acquires a proprietary interest in the business that has the potential of being adverse to the client's interests. Under these circumstances, the attorney must comply with all the requirements of RPC 1.8 if the attorney and the client choose to continue with their professional relationship. Here, respondent never received stock ownership in Environ. Hence, a conflict never arose between the two. Therefore, the Board did not find a violation of RPC 1.8 (business transaction with client). As noted earlier, more properly the Board

found that, by acquiring an interest in Environ, respondent placed himself in a conflict-of-interest situation with Johnson, whose interests were clearly adverse to Environ's and, hence, to respondent's. RPC 1.7(b).

Generally, in cases involving conflict of interest, absent egregious circumstances or serious economic injury to clients, reprimands have been imposed. In re Berkowitz, 136 N.J. 134 (1994). Here, more than a reprimand is required. Because of Johnson's reliance on respondent's representations, she suffered economic injury: she lost $20,000. Respondent's conduct was aggravated by the fact that he misrepresented to Johnson that her funds were coming, knowing they were not. Moreover, he encouraged her to invest in Environ, knowing of Environ's poor financial condition. Respondent's conduct in this regard was particularly repugnant because he was aware of Johnson's dire financial condition at the time and of her income requirements.

The Court has imposed severe discipline when an attorney has concealed an adverse pecuniary interest from a client or induced one client to invest in a debt-ridden venture of another client. See In re Humen, 123 N.J. 289 (1991) (two-year suspension where attorney loaned $40,000 to a client without informing her that he was the mortgagee, acquiring a pecuniary interest adverse to his client without advising her to seek independent counsel and deceiving the client and misrepresenting the mortgage situation to her); and In re Harris, 115 N.J. 181 (1989) (two-year suspension for inducing one client to lend a large sum to another client of whom respondent was a judgment-creditor without informing first client of the financial difficulties of the borrowing client). Here, respondent's conduct is not as egregious

because there is no evidence that he personally benefited from his conduct.

The Board has considered respondent's claim that he is no longer practicing law and that his license is inactive. The Board has determined that a period of suspension is, nonetheless, required to protect the public from further harm and to address the seriousness of respondent's ethics offenses. Based on the foregoing, the Board unanimously determined that a six-month suspension is sufficient discipline for respondent's misconduct.

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

Dated: 1-11-08

By: _____
LEE ~~M.~~ HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD VOTING RECORD

In the Matter of Mark D. Caswell
Docket No. DRB 98-297

Argued: September 17, 1998

Decided: December 11, 1998

Disposition: Six-Month Suspension

Members	Disbar	Six-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali		x					
Huot		x					
Cole		x					
Lolla		x					
Maudsley		x					
Peterson		x					
Schwartz		x					
Thompson		x					
Total:		9					

Robyn M. Hill 12/22/98
Robyn M. Hill
Chief Counsel