SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-235
District Docket No. VII-2010-0009E

IN THE MATTER OF	
ARTHUR E. SWIDLER	
AN ATTORNEY AT LAW	

Decision

Decided: November 1, 2010

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

This matter came before us on a certification of default filed by the District VII Ethics Committee (DEC), pursuant to R. 1:20-4(f). The five-count complaint charged respondent with violating RPC 1.1(a) (gross neglect); RPC 1.7, presumably (a) (concurrent conflict of interest); RPC 4.1(a)(2) (failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct or knowingly assisting or inducing another to do so); RPC 1.15, presumably (a) (failure to hold funds of third persons separate from the lawyer's own property);

RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

For the reasons expressed below, we determine that a consecutive six-month suspension is appropriate discipline for respondent.

Respondent was admitted to the New Jersey bar in 1985. At the relevant time, he maintained a law office in Trenton, New Jersey.

In 2007, respondent received a reprimand, in a default matter, for engaging in gross neglect in a foreclosure proceeding. After the client paid his retainer, respondent took no action on her behalf, ultimately resulting in an Order of Taking on her property. He was also guilty of failing to cooperate with disciplinary authorities. The Court ordered him to refund his client's retainer. In re Swidler, 192 N.J. 80 (2007).

In 2009, respondent was temporarily suspended, for less than a month, for failure to comply with a fee arbitration determination directing him to refund $700 to another client.

In another recent default matter, the Court suspended respondent for three months, effective August 13, 2010, for negligent misappropriation of client trust funds, numerous

recordkeeping deficiencies, failure to collect funds required in two separate closings, failure to make payments following one of the closings, and failure to cooperate with the Office of Attorney Ethics (OAE) during its investigation, thereby violating RPC 1.1(a), RPC 1.15(a), RPC 1.15(d), R. 1:21-6, and RPC 8.1(b). The Court ordered, that, for a two-year period and until further order, respondent submit to the OAE quarterly reconciliations of his attorney accounts prepared by an OAE-approved certified public accountant. In re Swidler, 202 N.J. 334 (2010).

Service of process was proper in this matter. On June 10, 2010, the DEC mailed copies of the ethics complaint to respondent's last known office address, 222 South Broad Street, Trenton, New Jersey 08608 by regular and certified mail. The certified mail receipt was returned with an illegible signature. The regular mail was not returned.

On July 6, 2010, the DEC sent a second letter to the same address by regular and certified mail. The letter informed respondent that, if he did not file an answer within the allotted time, 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 receipt was returned with an illegible signature. The regular mail was not returned. As of the date of the certification of the record, July 14, 2010, respondent had not filed an answer to the ethics complaint.

Respondent's conduct in this matter stemmed from his representation of a real estate client. In an August 2003 real estate transaction, he acted as the settlement agent and attorney for the buyer, First Horizon Management (FHM). FHM, whose president was Yogesh Rai, purchased property from grievant Diane Breccia Storcella.[1]

Respondent prepared the contract of sale and drafted the deed, promissory note, mortgage, and "all other related documents" to complete the transaction between the parties. Respondent was "responsible for recording all documents affecting title with the Mercer County Clerk, including the Mortgage which contained an indebtedness to [Breccia Storcella] in the amount of $50,000."

According to the contract of sale, the purchase price was $50,000, with an annual interest rate of 5.24%, to be paid over

[1] In its certification of the record, the DEC attached Exhibits A through U, "which would have been introduced had a hearing been held." Because there was no hearing and because the documents were not incorporated by reference into the complaint, we did not consider them.

a fifteen-year period, no later than August 1, 2018. The contract further provided that, if FHM was at least three payments behind, Breccia Storcella could "record a Deed in lieu of foreclosure." One of the documents that respondent prepared was a deed in lieu of foreclosure for Breccia Storcella to file with the court, if FHM defaulted in its mortgage payments.

Pursuant to the documents and agreements signed by the parties, Breccia Storcella was "the intended third-party beneficiary" of the legal services that respondent provided.

The complaint alleged that respondent's representation of FHM and Breccia Storcella, without obtaining their informed, written consent constituted a violation of RPC 1.7.

The contract of sale provided that, at the closing, Breccia Storcella was to give respondent a $200 check for the realty transfer fee; FHM was responsible for the recording fees and respondent's legal fees. Thereafter, respondent paid $260 to the Mercer County Clerk for the realty transfer fee and for the recording of the deed, but he failed to record the mortgage, which was Breccia Storcella's "security for the debt."

According to the complaint, respondent had a fiduciary obligation to record all necessary documents involved in the transaction that affected title to the property, including the mortgage.

The complaint charged that respondent's failure to record the mortgage constituted gross negligence (RPC 1.1(a)).

In January 2009, Rai stopped making payments to Breccia Storcella. When, pursuant to their agreement, she tried to transfer title back into her name with the previously executed deed in lieu of foreclosure, she discovered that, less than one year after her transaction with Rai, on July 29, 2004, FHM had transferred its ownership interest in the property to Rai's father, Sukhdev Rai, without satisfying the loan to her. The remaining balance on the mortgage was $37,000.

Respondent had not informed Sukhdev Rai's title company, Trusted Title, LLC, that there was an "open mortgage of record on the property."

According to the complaint, respondent's failure to disclose this material fact, to request proof of FHM's satisfaction of the mortgage, or to provide the title company with information and/or the payoff amount of the mortgage constituted dishonesty and perpetuated FHM's fraudulent act on Breccia Storcella, violations of RPC 4.1(a)(2), RPC 8.4(a), and RPC 8.4(c).

The complaint further charged that respondent's subsequent representation of FHM in the transaction with Rai's father

constituted another concurrent conflict of interest (RPC 1.7(a)).

At the closing, Breccia Storcella had given respondent a $202 check, payable to him, for the realty transfer fee. He deposited the check into his business account, rather than his trust account, a violation of RPC 1.15(a). Using a check drawn on his business account, respondent then paid $260 to the Mercer County Clerk for the realty transfer tax and for the recording of the deed only.

Once the DEC began its investigation of Breccia Storcella's grievance, respondent failed to comply with its repeated requests for copies of his file and his trust/escrow ledger for the transaction. He also failed to reply to the DEC's January 4, January 19, and February 18, 2010 letters, requesting a written reply to the grievance. On one occasion, the DEC investigator "approached" respondent "in person" and "informed" him about the grievance. Respondent, nevertheless, failed to reply to the DEC's subsequent requests for documents.

Respondent's failure to comply with the DEC's requests for information resulted in a lengthy delay in the preparation of the investigative report. The DEC investigator spent "an exorbitant amount of time" obtaining the necessary documents

from third persons. The complaint charged that respondent's conduct in this regard violated RPC 8.1(b).

We find that the facts recited in the complaint support the charges of unethical conduct. We deem respondent's failure to file an answer 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)(1).

The complaint establishes that respondent grossly neglected the matter by failing to file the mortgage (RPC 1.1(a)); improperly deposited Breccia Storcella's check into his business account instead of his trust account (RPC 1.15 (a)); and failed to reply to lawful demands for information from a disciplinary authority relating to the grievance and to file an answer to the complaint (RPC 8.1(b)). Respondent's defiant disregard of the disciplinary process resulted in the investigator spending "an exorbitant" amount of time attempting to obtain the documentation from third parties, thereby delaying the adjudication of the grievance against respondent.

As to the conflict of interest charge, it is well-established that the representation of the buyer and seller in a real estate transaction is permitted, so long as the attorney is not involved in the negotiation phase and in the preparation of the contract. It is at this juncture that disputes between the

parties frequently arise. If, however, the parties themselves have already ironed out the terms of the sale, then simultaneous representation is allowed. N.J. Advisory Committee on Professional Ethics Opinion 243, 95 N.J.L.J. 1145 (November 9, 1972) states in relevant part:

> [T]he representation of a buyer and a seller in connection with the preparation and execution of a contract of sale of real property is so fraught with obvious situations where a conflict may arise that one attorney shall not undertake to represent both parties in such a situation.

After the issuance of this opinion, the Supreme Court confirmed that it is permissible for an attorney to represent both parties, after the negotiation of the contract. In re Lanza, 65 N.J. 347 (1974). In Lanza, although the Court underscored the dangers in representing both the buyer and seller in a real estate transaction, it ruled that attorneys nevertheless may do so, under certain circumstances.

In that case, after the attorney was retained by the seller, he agreed to represent the buyer, without first advising the seller of the dual representation and without explaining to both parties the potential conflicts of interest that could develop. Later, when a dispute arose, the attorney did not withdraw from representation. The Court determined that, as long as the attorney advises both parties of the facts and areas of

potential conflict, an attorney may represent both buyer and seller. The Court, however, cautioned attorneys that they must withdraw when a conflict arises. Thus, although the potential for a conflict may exist, a mere potential does not necessarily bar an attorney's representation.

Here, respondent's representation of Rai and Breccia Storcella as the buyer and seller at the closing would have been permissible, so long as disclosure had been made and a waiver had been obtained. However, because respondent prepared the contract of sale, a concurrent conflict of interest existed. Moreover, because there is no evidence that he cured the conflict by complying with the provisions of RPC 1.7(b)(1), requiring him to obtain informed consent to the conflict, confirmed in writing, after full disclosure and consultation, he violated RPC 1.7(a).

Count three charged respondent with a second violation of RPC 1.7 for his "subsequent representation of FHM in the transaction with his father." However, the complaint failed to allege sufficient facts to support the charge. Therefore, we cannot find a conflict of interest in this regard.

The factual allegations also establish that respondent violated RPC 4.1(a)(2) (knowingly failing to disclose a material fact to a third person when disclosure is necessary to avoid

assisting a criminal or fraudulent act by a client), RPC 8.4(a) (knowingly assisting or inducing another to violate the Rules of Professional Conduct), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The complaint alleged that respondent represented Rai in the transfer of the property to his father, Sukhdev Rai, less than one year after the transaction with Breccia Storcella, and that he did not advise Sukhdev's title company that there was an open mortgage of record on the property. The mortgage was not "of record" because respondent failed to have it recorded. Having prepared the mortgage, respondent had to know of its existence. His failure to record the mortgage and to determine whether Rai had satisfied it, before he represented Rai in the transfer of the property to Sukhdev, perpetrated a fraud not only on Breccia Storcella, who, in essence, was the lender, but also on the title company, and possibly on others who believed that the property was unencumbered by prior liens. We, therefore, find that respondent violated RPC 4.1(a)(2), RPC 8.4(a) and RPC 8.4(c).

The only issue left for determination is the proper quantum of discipline for respondent's violations of RPC 1.1(a), RPC 1.7(a), RPC 1.15(a), RPC 4.1(a)(2), RPC 8.1(b), RPC 8.4(a), and RPC 8.4(c), given that this is respondent's third default. We

find the following cases helpful in fashioning the proper discipline for respondent.

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 Ford, 200 N.J. 262 (2009) (attorney filed an answer to a civil complaint filed against him and his client and then tried to negotiate separate settlements of the claim against him, to the client's detriment; attorney had a 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 Nadel, 147 N.J. 559 (1997) (attorney represented a driver in a suit against the driver of another vehicle and then represented the passenger in a suit against both drivers).

In Guidone, the attorney received a three-month suspension for representing the buyer and seller of a tract of land. The

attorney's conflict of interest caused economic injury to a client. Therefore, discipline greater than a reprimand was imposed. The attorney, who was a member of the Lions Club, represented the Club in the sale of a tract of land. He engaged in a conflict of interest when he acquired, but failed to disclose to the Club, his financial interest in the entity that purchased the land, and then failed to fully explain to the Club the various risks involved with the representation and to obtain the Club's consent to the representation. The Court imposed a three-month suspension because the conflict of interest "was both pecuniary and undisclosed."

Here too, Breccia Storcella suffered economic injury. Respondent's failure to record the mortgage left her without a lien on the property. At the time that Rai defaulted, there was still a remaining balance on the mortgage of $37,000. Thus, the economic injury to Breccia Storcella alone takes the discipline out of the reprimand range.

Respondent's failure to disclose the existence of the mortgage was akin to a misrepresentation to third parties, which generally results in the imposition of a reprimand. In re Lowenstein, 190 N.J. 59 (2007) (attorney failed to notify an insurance company of the existence of a lien that had to be satisfied out of the settlement proceeds; the attorney's intent

was to avoid the satisfaction of the lien) and In re Agrait, 171 N.J. 1 (2002) (despite being obligated to escrow a $16,000 deposit in a real estate transaction, the attorney failed to collect it but caused it to be listed on the RESPA as a deposit; the attorney also failed to disclose a prohibited second mortgage to the lender).

Reprimands have also been imposed in matters involving a failure to cooperate with disciplinary authorities, where there is an ethics history. See, e.g., In re DeBosh, 174 N.J. 336 (2002) (in addition to violating RPC 8.1(b), the attorney had a prior three-month suspension) and In re Devin, 172 N.J. 321 (2002) (attorney was reprimanded for violating RPC 8.1(b); he had a prior three-month suspension). But see In re Walsh, 192 N.J. 445 (2007) (six-month suspension for attorney guilty only of failure to communicate with a client in a custody hearing matter and failure to cooperate with disciplinary authorities; while typically his conduct would have warranted a reprimand, the principles of progressive discipline and the fact that it was the attorney's third default warranted enhancement to a six-month suspension).[2]

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[2] In default matters, the appropriate discipline for the found ethics violations is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating

(Footnote cont'd on next page)

While, for the most part, respondent's prior matters involved different types of misconduct, he engaged in gross neglect in each of the matters. We note that his actual misconduct in this matter occurred in 2003, when he failed to record the mortgage, and again the following year (2004), when he failed to notify the title company about the mortgage and allowed the transfer of property to proceed, without first ensuring that the mortgage had been paid off. Respondent's misconduct in his first two defaults occurred after the misconduct in this matter (the misconduct resulting in a reprimand took place from 2005 to 2006; the misconduct resulting in a three-month suspension related to a 2007 random compliance order). Thus, this is not a case where the attorney has not learned from prior mistakes. However, he has engaged in a pattern of neglect, an aggravating factor, and, more importantly, this is respondent's third default. We, therefore, determine that the discipline must be elevated to a higher degree than would ordinarily be appropriate.

(Footnote cont'd)

factor. In the Matter of Robert J. Nemshick, DRB 03-363, 03-365 and 03-366 (March 11, 2004) (slip op. at 6).

We find that respondent's multiple ethics infractions (RPC 1.1(a), RPC 1.7(a), RPC 1.15(a), RPC 4.1(a)(2), RPC 8.1(b), RPC 8.4(a), and RPC 8.4(c)), his ethics history (reprimand, temporary suspension, and three-month suspension), and his continuing disregard for the ethics system (three defaults), warrant the imposition of a six-month suspension, to be served at the expiration of the three-month suspension that began on August 13, 2010.

Vice-Chair Frost determined that a one-year suspension more properly addresses respondent's ethics transgressions and his significant ethics history, which includes two other defaults.

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
Louis Pashman, Chair

By: for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Arthur E. Swidler
Docket No. DRB 10-235

Decided: November 1, 2010

Disposition: Six-month Consecutive Suspension

Members	Disbar	Six-month Suspension	One year Suspension	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost			X			
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		8	1			

for Julianne K. DeCore
Chief Counsel