

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-332
District Docket No. XIV-09-503E

IN THE MATTER OF
MARK GERTNER
AN ATTORNEY AT LAW

:
:
:
:
:
:
:

Decision

Argued: January 20, 2011

Decided: March 1, 2011

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

David H. Dugan appeared on behalf of respondent.

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

This matter was previously before us on May 23, 2009, as a stipulation. Respondent had stipulated to violating RPC 1.15(a) (commingling personal and trust funds), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), and RPC 1.8, presumably (a) (conflict of interest - improper business transaction with a client). At our May 2009 session, we found that the stipulation was deficient and remanded it to the Office of Attorney Ethics (OAE) for further action.

By complaint dated October 20, 2009, the OAE charged respondent with violating RPC 1.8(a) (conflict of interest - improper business transaction with a client) and RPC 1.15(a) (failure to safeguard trust funds by issuing checks against uncollected funds).¹ Respondent admitted the allegations of the complaint.

The matter was heard by a District VB Ethics Committee (DEC) panel, which recommended that respondent be reprimanded. The OAE recommended either a reprimand or a censure. We agree with the DEC that a reprimand is the appropriate discipline for respondent's conduct.

Respondent was admitted to the New Jersey bar in 1982. He maintains a law practice in South Orange, New Jersey. He has no history of discipline.

The root of respondent's transgressions was his use of trust account checks to finance his purchase of foreclosed properties, followed by his deposit of personal funds to cover the trust account checks. This impropriety came to light after a shortage in respondent's trust account prompted an audit by the OAE. The audit, which took place on November 9, 2007, initially

¹ As seen below, at the start of the June 10, 2010 DEC hearing, the complaint was amended, on motion by the OAE, to include charges of negligent misappropriation. Respondent's counsel did not object to the OAE's motion.

revealed that, on March 16, 2005, respondent had deposited \$80,000 into his trust account for a real estate transaction. The bank, however, had mistakenly "encoded" only \$8,000 to the account. On April 6, 2005, the bank corrected the error.

The OAE's further investigation uncovered that, on twenty-six occasions, from January 23, 2004 to May 13, 2005, respondent and his business partner, Emad Sedhom, a non-lawyer, had used respondent's trust account to purchase foreclosed properties at sheriff's sales.

Prior to respondent's and Sedhom's business association, a realtor, Cassandra, (last name unknown) had referred Sedhom to respondent for a closing on property in Montclair, New Jersey. Respondent had also represented Sedhom in the purchase of a restaurant.

At an unknown point, Cassandra discovered that respondent had purchased, for resale, a foreclosed property. She informed respondent that Sedhom wanted to "participate" with him in fixing up the property for resale. Thereafter, respondent and Sedhom began purchasing other foreclosed properties. Respondent went weekly to the sheriff's office for a listing of foreclosed properties. He gave the list to Sedhom, who examined the condition of the properties to see if they were worth purchasing. Sedhom testified that he and respondent were able to

compromise on decisions for their venture. He considered respondent a friend and business partner, with whom he maintained a very good relationship.

Once respondent and Sedhom determined to bid on a property, they both attended the sheriff's sale. If their bid was successful, Sedhom would give respondent his share of the bid on the same day. Afterwards, Sedhom lined up the contractors and negotiated the prices for repairs to the properties. Sedhom also set the resale prices.

Initially, respondent and Sedhom listed the properties for sale with Cassandra. Later, however, Sedhom obtained his real estate license. The properties were then listed with his real estate firm. They stopped purchasing houses when the real estate market soured.

According to respondent, they did not purchase all of the twenty-six properties on which they placed bids. If a sale did not go through, the sheriff would return the deposit. At first, Sedhom and respondent each brought certified checks from their respective banks for the deposits. At some unspecified point, respondent learned that the sheriff accepted trust account checks. They then began using respondent's trust account for convenience, to avoid using certified bank checks. When they successfully bid on a property, respondent wrote a trust account

check to the sheriff and, immediately thereafter, deposited personal funds into the trust account to cover the check.

Respondent and Sedhom each used their respective lines of credit to replenish respondent's trust account. According to respondent, Sedhom understood that the trust account funds had to be replaced immediately. Respondent believed that client funds would never be in jeopardy because he knew that the funds from their individual lines of credit were good funds.

According to respondent, he never anticipated that the deposits to his trust account would be made after the trust account checks used to buy the property had cleared. While preparing for the DEC hearing, however, he discovered that, on four occasions, he had issued checks from his trust account that had cleared the account one day before the corresponding funds had been deposited. As a result, client trust funds were invaded on four occasions.²

Respondent testified that his receptionist was responsible for depositing his firm's checks. He discovered, however, that she was not making daily deposits, as he had believed, and that

² Although this invasion was not originally charged in the complaint, respondent's counsel brought this information to the OAE's attention. As indicated previously, at the DEC hearing, the OAE moved to amend the complaint to include a charge of negligent misappropriation. Respondent did not oppose the motion.

she had not done so on the four instances when the checks to the sheriff had cleared ahead of the deposits. Respondent accepted responsibility for the employee's inaction.

Prior to entering into a business venture with Sedhom, respondent never informed him of the desirability of seeking independent counsel for their transactions, nor did he transmit the terms of the transactions to Sedhom, in writing, or obtain a writing from Sedhom consenting to its terms.

Sedhom told the OAE investigator that, even though he and respondent did not have a written agreement, he understood that he was free to consult with and obtain independent counsel. Moreover, at the DEC hearing, he testified that respondent had told him that they could hire another lawyer to handle the closing, but that they had agreed that Sedhom would take care of refurbishing the properties, while respondent would take care of the legal end, rather than hire another lawyer. Respondent admitted that he did not comply with the requirements of RPC 1.8(a).

At the DEC hearing, respondent's counsel conceded that the four instances in which client funds were invaded increased the seriousness of respondent's offense by "a notch," that is, from merely drawing against uncollected funds to "an impairment of client funds." Counsel stated that respondent's plan was to have

the personal money deposited promptly into his trust account, acknowledging that it was respondent's responsibility to ensure that the task was done correctly and promptly. Counsel argued that the invasion of other client funds was purely inadvertent.

As to respondent's business transaction with his client, counsel argued that respondent and Sedhom had engaged in a cooperative venture, that Sedhom was a "knowing and willing participant," and that they had worked together to achieve the same goal -- acquire properties as cheaply as possible, fix them up, and sell them for as much as they could.

Counsel argued that respondent's violation of RPC 1.8(a) was merely technical in nature because, although respondent failed to advise Sedhom, in writing, of the desirability of seeking independent counsel and although Sedhom did not provide respondent with written consent to the terms of the transaction and to respondent's representation, Sedhom was fully aware of the details of the transactions, was a full participant in them, and was very satisfied with his dealings with respondent. Counsel added that Sedhom's sole "unhappiness" was that the real estate market had "dried up" and that he and respondent could not continue with their venture. Otherwise, counsel stated, Sedhom was very satisfied with his relationship with respondent

and had benefited from their arrangement, which was not at all adversarial.

Counsel offered, as mitigation, that respondent's violations were minor; that, in respondent's twenty-eight years at the bar, he had no ethics history; that respondent fully cooperated with the OAE; and that respondent disclosed to the OAE the information that had led to the complaint's amendment.

The OAE, in turn, noted that respondent had engaged in a pattern of behavior, not just an isolated instance, and that, on four occasions, there had been a negligent misappropriation of client trust funds. The OAE stressed that, each time that respondent issued a check from his trust account, he placed client trust funds at risk because unforeseen circumstances could have prevented him from depositing corresponding funds into his account.

The DEC found that respondent violated RPC 1.15(a) and RPC 1.8(a). It found, as mitigation, that Sedhom had expressed confidence in respondent, whom he considered a friend. The DEC considered that, although Sedhom never received the required written notification under RPC 1.8, he trusted respondent; in addition, all of their transactions had been productive and conducted fairly. The DEC also considered that respondent had cooperated fully with the OAE investigation and had brought to

its attention the four occasions when trust account checks had been invaded, although to no clients' detriment.

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

The DEC properly found that respondent violated RPC 1.8(a) and RPC 1.15(a). RPC 1.8(a) provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The record clearly and convincingly establishes that respondent violated RPC 1.8(a). Respondent entered into a business transaction with his client without (1) transmitting in writing the terms of the transaction; (2) advising his client in writing of the desirability of seeking independent counsel; and

(3) obtaining the client's informed written consent to the essential terms of the transaction. That said, Sedhom was a knowledgeable business man, who had recently obtained a realtor's license. He was aware of the terms of the transaction, consented to them, was satisfied with them, and was aware of his right to obtain independent counsel, but opted not to do so. Thus, respondent's conduct was not an egregious violation of RPC 1.8(a).

Respondent also violated RPC 1.15(a). By drawing checks on his trust account against uncollected funds, he placed client trust funds in jeopardy and, on four occasions, invaded other clients' trust funds. The only issue left for determination is the proper quantum of discipline for this respondent.

In general, a reprimand is the discipline imposed for a conflict of interest, absent egregious circumstances or serious economic injury to clients. In re Berkowitz, 136 N.J. 134, 148 (1994). If special mitigation is present, an admonition might be imposed. See, e.g., In the Matter of Frank J. Shamy, DRB 07-346 (April 15, 2008) (attorney made small, interest-free loan to three clients, without advising them to obtain separate counsel; the attorney also completed an improper jurat; significant mitigation considered) and In the Matter of April Katz, DRB 06-190 (October 5, 2006) (attorney received a \$1500 loan from a

client while representing him in a matrimonial matter; mitigating factors considered, among others, were that at the time of the loan the purpose of the representation had been largely fulfilled and that the borrowed funds had been repaid).

Here, too, had this been respondent's only violation, an admonition would have been sufficient discipline given Sedhom's understanding of his right to independent counsel and of the terms and consequences of the transactions. However, respondent was also guilty of making disbursements against uncollected funds and negligent misappropriation of client trust funds.

Generally, a reprimand is imposed when an attorney, in making disbursements against uncollected funds, also negligently misappropriates funds. See, e.g., In re Ambrosio, 200 N.J. 434 (2009) (attorney guilty of disbursing against uncollected funds, negligently misappropriating client trust funds, and recordkeeping violations); In re Broder, 184 N.J. 294 (2005) (as the closing agent in a real estate matter, the attorney immediately wrote trust account checks against funds that had not been collected; he was also guilty of negligently misappropriating client trust funds and recordkeeping violations); and In re Colby, 172 N.J. 37 (2002) (attorney accepted a company check from a client and disbursed funds against it, resulting in negligent misappropriation of other

clients' trust funds when the check was returned for insufficient funds; the shortage in the attorney's trust account remained for seventeen months; the attorney was also guilty of recordkeeping violations; mitigation included the client's repeated assurances that he would make good on the check, the attorney's prior dealings with the client, and the attorney's deposit of his own funds to cover the shortfall in the trust account).


While the totality of respondent's conduct might support greater discipline, we find that mitigating circumstances justify the imposition of only a reprimand. Specifically, no clients were harmed from the very brief invasion of client funds; Sedhom was a knowledgeable business man, who owned restaurants, had a real estate license, knew of his entitlement to independent representation but chose not to take advantage of it, and benefited from his partnership with respondent; and respondent voluntarily apprised the OAE of the four instances in which he invaded other clients' funds.

Member Baugh recused herself.

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: 

 Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

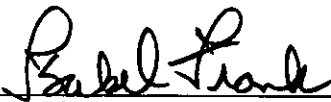
In the Matter of Mark Gertner
Docket No. DRB 10-332

Argued: January 20, 2011

Decided: March 1, 2011

Disposition: Reprimand

<i>Members</i>	Disbar	Suspension	Reprimand	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	


by Julianne K. DeCore
Chief Counsel