SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-355
District Docket No. VC-2009-0020E

IN THE MATTER OF	
KENNETH C. STRAIT, JR.	
AN ATTORNEY AT LAW	

Decision

Argued: January 20, 2011

Decided: March 1, 2011

Peter A. Gaudioso appeared on behalf of the District VC Ethics Committee.

Gerard E. Hanlon 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 at our September 16, 2010 session, on a recommendation for an admonition filed by the District VC Ethics Committee (DEC). At that time, we determined to treat it as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4).

The complaint charged respondent with violating RPC 1.8(a) (conflict of interest – prohibited business transaction with a

client). We determine that a reprimand is the appropriate sanction for respondent's actions.

Respondent was admitted to the New Jersey bar in 1990. He maintains a law office in Montclair, New Jersey. He has no history of discipline.

The undisputed facts are that respondent and grievant Gloria Hemphill had been close personal friends for many years, at least since 1984, before respondent was admitted to the practice of law. Over the span of approximately twenty-five years, they developed a very close personal relationship, akin to that of a mother and son. They were present for the milestones in each others' lives. Hemphill referred to respondent as her son, on several occasions during her testimony at the DEC hearing, and stated that she still loved him, despite having filed a grievance against him. At the time of the DEC hearing, April 6, 2010, Hemphill was seventy-six years old and legally blind.

The conduct that gave rise to this disciplinary matter was as follows:

In or around 1993 to 1995, respondent represented Hemphill in a personal injury matter. Hemphill had been hit by a car, while crossing the street. Respondent was the only attorney that Hemphill knew and, at that time, she never considered finding

another attorney. Respondent settled Hemphill's matter without filing a complaint, did not charge her a fee, and gave her all of the settlement proceeds.

In August 2003, respondent was embroiled in his own divorce, which left him without any credit cards for emergencies. At that time, Hemphill considered respondent to be her friend, as well as her attorney. As a result of their relationship, Hemphill offered to obtain and did obtain for respondent's use a companion card to her American Express Blue Card account, an account that she was not using. It was a revolving account with interest charged on any amounts that were carried. Hemphill understood that, if respondent did not pay the credit card bills, she would be responsible for the payments, as she was acting as respondent's guarantor.

Respondent testified that she would not have lent respondent the card if they had not been friends. She also testified that, even though respondent was not actively representing her at the time, she considered him to be her lawyer. She believed that respondent, as both someone close to her and as her lawyer, would pay the credit card bills, when they became due. She believed that he would protect her interests.

Respondent, in turn, testified that he did not consider Hemphill as his client, when he accepted the credit card from her. He thought of her as his "surrogate mother."

The companion card was for respondent's sole use and was issued directly to him. All of the bills for the account were mailed directly to respondent, who agreed to pay all of the charges to the account. Hemphill never saw any of the bills. They were addressed to her at respondent's Bloomfield, New Jersey address. Hemphill never used the card or made any payments toward it. Respondent used the card for a variety of personal and business reasons.

Respondent never informed Hemphill, in writing, about the terms of their agreement for his use of the credit card and he did not recommend to her, in writing, that she seek independent counsel to review their arrangement. While respondent conceded that he probably should have done so, he reiterated that he did not consider her as his client.

In April 2005, for a nominal fee and at Hemphill's request, respondent drafted her last will and testament. According to

Hemphill, she requested that respondent act as her executor, which he agreed to do.[1] The will stated, in relevant part:

> I direct my Executor/Executrix to pay my funeral and administration expenses, the expenses of my last illness, taxes and all of my just debts as soon as may be practical after my demise.
>
> [Ex.E.]

At the time that respondent drafted the will, he was carrying a balance of more than $18,000 in principal and interest on the credit card, which he did not disclose to Hemphill.

Hemphill stated that, had she known of the amount of respondent's debt, she would have taken back the credit card until he had paid down the debt. Hemphill also stated that, because of their relationship, she would have expected respondent to divulge the existence of the debt.

In August 2006, respondent drafted a power-of-attorney (POA) for Hemphill, in which he was named the agent/attorney-in-fact. Hemphill, through her POA, appointed respondent to

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[1] Hemphill's testimony at the DEC hearing differed somewhat from the grievance she filed. According to her grievance, respondent did not think that Hemphill's children would be suitable choices as executor and, "[t]herefore, he named himself as my executor." She added that she had agreed to it because, at that time, she believed that it was customary for an attorney to act as the executor for an older person with a small family.

> do each and every act which I could personally do for myself including but no [sic] limited to:
> 1. Endorsing checks from my checking, saving and money market accounts and signing checks.
>
> **Powers.** I give all the power and authority which I may legally give to you. You may not appoint a new Agent in your place. I approve and confirm all that You may lawfully do on my behalf.
>
> [Ex.F.]

At that time, he owed more than $41,000 in principal and interest on the companion credit card. He did not disclose this information to Hemphill.

Hemphill never anticipated that respondent would exceed the limits of the companion credit card, $36,000, which the credit card company later increased to $50,000. At the time that respondent drafted the POA, he did not inform Hemphill that he had exceeded the $36,000 limit. In addition, he never advised her that, as a result of the debt, their interests were in conflict, given that she was the guarantor on the credit card. According to Hemphill, had she known that respondent had exceeded the limits of the credit card, she would have asked him to either pay it off or to give up the card.

In the summer of 2008, both Hemphill and respondent began receiving collection calls from American Express about the past due balance on the companion credit card. Prior thereto,

Hemphill had not known about a past due amount. When Hemphill informed respondent about the collection calls, he admitted being behind on the bill, apologized, and told her that he would submit a payment to make it current. Hemphill, however, continued to receive calls from American Express, causing her concern that the debt would wipe out her life's savings. In fact, her credit rating was downgraded by at least one credit agency (TransUnion) to fair.

Hemphill's efforts to obtain information from American Express about the past due amount and balance on the account were unavailing because she could not respond to the security questions that respondent had established. Although Hemphill tried to contact respondent at his office and home on numerous occasions about the continuing collection calls and the status of the balance on the credit card, respondent did not return her calls. In fact, respondent admitted "dodging" her calls. He claimed that he had no money to pay off the bills and that he could not face Hemphill with that information.

At some point, Hemphill retained another attorney for assistance with the American Express credit card problem. That attorney learned that respondent had incurred a $49,230 balance on the companion credit card. The attorney then secured the return of Hemphill's credit card from respondent. Ultimately,

Hemphill's and respondent's attorneys worked out an agreement for respondent's satisfaction of the debt. Since that time, Hemphill revoked the POA in which respondent had been named the agent and executed another will.

According to Hemphill, she filed the grievance because of her and her attorney's inability to communicate with respondent about the credit card debt.

As of the date of the DEC hearing, April 6, 2010, respondent thought that he had paid off the entire amount owed on the American Express card. In March 2009, he had sent a $10,000 money order to Hemphill's attorney and, thereafter, paid the credit card company $2,000 per month. At the DEC hearing, however, he learned that a "small amount of interest" was still outstanding on the account, which, according to the hearing panel report, the attorneys were trying to negotiate.

Respondent conceded that, throughout his use of the companion credit card, he never fully disclosed to Hemphill, in writing, their agreement over his use of it, never advised her about the desirability of seeking advice from independent counsel, and never received from Hemphill written, informed consent for the transaction.

Respondent also admitted that when he drafted Hemphill's will and the POA, he did not disclose to Hemphill the amount of the outstanding balance on the credit card.

In mitigation, respondent submitted a number of character letters, attesting to his integrity, dependability, honesty, generosity, loyalty, morality, humility, and professionalism.

At the DEC hearing, respondent's counsel argued that Hemphill's loaning the credit card to respondent was an act of friendship, not a result of their incidental attorney-client relationship (three minor matters over the course of twenty-five years), and that no attorney-client relationship existed at the time that Hemphill loaned respondent the credit card. Counsel maintained that respondent's conduct was wrong, but in "a moral sense," that is, respondent abused his friendship with Hemphill.

The DEC determined that respondent was not required to make disclosure, under RPC 1.8(a), at the time that Hemphill gave him the credit card in 2003, because she had given it to him as a result of their close relationship. The DEC found, however, that a lawyer-client relationship existed when respondent drafted Hemphill's will naming him as the executor of the estate and when he drafted the POA naming him as the agent. The DEC found it significant that, during those periods, respondent carried large balances on the companion credit card, without so

informing Hemphill. The DEC found that, during that period, the existence of the significant balance on the credit card made respondent's pecuniary interests adverse to Hemphill's.

The DEC noted that, as the executor of Hemphill's estate, respondent "held the power and responsibility" to pay all of Hemphill's estate's debts and obligations. The DEC pointed out that respondent could have used his power as the executor to pay off the balance of the companion credit card from Hemphill's residuary estate. Similarly, in his role as the agent under the POA, respondent could have used Hemphill's personal assets to pay off his credit card debt.

The DEC found that respondent violated RPC 1.8(a) by failing to memorialize the agreement for the use of the credit card but, nevertheless, drafting the will and POA for Hemphill; failing to advise Hemphill of the desirability of seeking independent legal counsel; and failing to obtain Hemphill's informed written consent to the terms of their agreement for the use of the credit card.

In assessing the proper quantum of discipline, the DEC considered that respondent has an unblemished ethics record; that he was remorseful; that he provided Hemphill with free legal services; and that the two had a close personal relationship spanning more than twenty years, "referred to each

other as a second mother and second son and considered each other family members," and that they supported each other through numerous triumphs and travails over their twenty-five-year friendship. The DEC found no evidence that respondent intentionally violated RPC 1.8(a). The DEC determined that an admonition was ample punishment, given respondent's "experience of being a respondent in an ethics proceeding," and that his conduct jeopardized one of his closest lifetime relationships.

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

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). His pecuniary interests were clearly adverse to his client's. He borrowed Hemphill's credit card, exceeded its limit, which was $36,000, fell into arrears on the payments, and did not advise Hemphill that her credit rating had been compromised. Respondent failed to comply with the provisions of RPC 1.8(a) at three critical points: when he obtained the credit card, when he drafted Hemphill's will naming him as the executor, and when he drafted Hemphill's POA naming him as her agent.

The DEC properly pointed out the existence of the adverse pecuniary interests between Hemphill and respondent, when respondent began using the credit card and then gained control over Hemphill's assets (as the executor of her will and as the agent/attorney-in-fact under the POA), leaving open the possibility that he could use Hemphill's assets to pay his own debts.

It is true that, when Hemphill offered respondent the use of the companion American Express credit card, in or around 2003, he was not representing her. She, nevertheless, had a reasonable expectation, based on their longstanding personal and professional relationship, that he would protect her interests. Respondent failed to do so. He also failed to keep her apprised

of the debt that he had incurred on her credit card and of his inability to keep current the payments on her account.

The Court has long held that "the fiduciary obligation of a lawyer applies to persons who, although not strictly clients, he has or should have reason to believe rely on him." In re Hurd, 69 N.J. 316, 330 (1976). Hurd was suspended for three months after he arranged for a loan transaction to transfer real property from his longtime friend and neighbor to Hurd's sister for approximately twenty percent of its value.

In In re Epstein, 143 N.J. 332 (1996), the Court rejected the attorney's argument that RPC 1.8 did not apply, when she obtained a loan from a friend, the grievant. Epstein's relationship with the grievant started strictly as attorney-client. Over time, the relationship evolved into a friendship. When the attorney borrowed the money, she was not representing the grievant and did not comply with the dictates of RPC 1.8. In the Matter of Helene L. Epstein, DRB 95-116 (October 2, 1995) (slip op. at 10). In our decision, we stated:

> It is precisely because of the special relationship that sometimes is formed between a client and an attorney that the attorney must proceed with extreme caution in entangling his or her business concerns with those of a client's. The closer the relationship between the parties, the greater the need for safeguards because, in those circumstances, there is a higher expectation on the part of the client that

> the attorney will represent his or her interest with the utmost fidelity.
>
> It must be noted that, even if grievant was not technically a client at the time of the loan transaction, as suggested by [Epstein, Epstein's] ethical obligations to grievant would have remained unchanged.
>
> [Ibid.]

Epstein's conduct in the entire transaction was found to be serious and potentially grievous to her client. Luckily, the client did not suffer any economic injury. Epstein's actions were not limited to entering into a business transaction with her client without complying with the requirements of RPC 1.8. She also concealed the existence of a second mortgage on her own refinancing application and on the affidavit of title and lacked diligence in recording a second mortgage. For the totality of her misconduct, Epstein received a one-year suspension.

Like Epstein, respondent had represented Hemphill in the past. Although respondent was not representing Hemphill at the time she gave him access to her credit card, he clearly had a duty to protect her interests, not only because of their lengthy, special relationship, but also because she considered him as her lawyer. That duty became more apparent once he drafted her will and, again, when he drafted the POA, while the debt continued to mount and even surpassed the card's limit.

Discipline was imposed in another context where an attorney failed in his duty to protect the interests of a third party in a business transaction. In In re Chester, 127 N.J. 318 (1992), the Court imposed a public reprimand on an attorney who assured his secretary that he would protect her interests in a loan transaction between her and the attorney's client. The attorney knew that the client did not have sufficient funds at the time to repay the loan. Although there was no attorney/client relationship between the attorney and the secretary, the secretary had reason to rely on the attorney's representation that he would protect her interests.[2]

In sum, respondent breached his ethics obligations at three stages: when he received the credit card, when he drafted the will, and when he drafted the POA. His failure to comply with the requirements of RPC 1.8(a) was particularly repugnant because of Hemphill's vulnerability (her advanced age and disability) and the trust reposed in respondent, stemming from their extremely close relationship.

Respondent's conduct was further aggravated by his failure to keep Hemphill apprised of the debt he had accumulated on her

[2] The attorney also drew a trust account check against undeposited funds and his ethics history included two private reprimands and a six-month suspension for the willful failure to file a federal income tax return.

credit card. She first learned about it when she received a collection call from American Express. Afterwards, respondent assured her that he would make the account current, but failed to do so. Hemphill, therefore, continued to receive collection calls. Respondent then did not return the numerous telephone calls that Hemphill placed about the credit card company's continuing collection efforts. As a result, Hemphill was forced to hire another attorney to ascertain the status of the debt that respondent had incurred. This attorney's calls to respondent, too, were not returned, prompting the filing of the grievance against respondent.

The only question left for determination is whether an admonition is sufficient discipline for respondent's violation of RPC 1.8(a), in light of the aggravating circumstances present in this case, or whether greater discipline is required.

It is well-settled that a reprimand is the proper measure of discipline for an attorney who engages in a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," then discipline greater than a reprimand is warranted. Ibid. See also In re Guidone, 139 N.J. 272, 277 (1994) (reiterating Berkowitz and noting that, when an attorney's conflict of

interest causes economic injury, discipline greater than a reprimand is imposed; the attorney, who was a member of the Lions Club and represented the Club in the sale of a tract of land, engaged in a conflict of interest when he acquired but failed to disclose to the Club a financial interest in the entity that purchased the land and then failed to (1) fully explain to the Club the various risks involved with the representation and (2) obtain the Club's consent to the representation; the attorney received a three-month suspension because the conflict of interest "was both pecuniary and undisclosed").

In special situations, admonitions have been imposed on attorneys who have violated the conflict of interest rules post-Berkowitz and Guidone. See, e.g., In the Matter of Walter A. Lesnevich, DRB 10-174 (July 28, 2010) (attorney who represented a husband in a personal injury action and his wife in a per quod claim represented the husband in their subsequent divorce action; in mitigation, it was noted that the attorney had an unblemished ethics history of thirty-eight years and that the incident had occurred eight years earlier); In the Matter of Cory J. Gilman, 184 N.J. 298 (2005) (imputed conflict of interest (RPC 1.10(b)), among other violations, based upon the attorney's preparation of real estate contracts for buyers

requiring the purchase of title insurance from a company owned by his supervising partner; compelling mitigating factors included that it was his first brush with the ethics system, that he cooperated fully with the OAE's investigation, and that he was a new attorney at the time (three years at the bar) and only an associate); In the Matter of Frank Fusco, DRB 04-442 (February 22, 2005) (attorney who represented the buyer and seller in a real estate transaction without their consent "did not technically engage in a conflict of interest situation" because no conflict ever arose between the parties to the contract; in mitigation, it was considered that the attorney did not negotiate the terms of the contract but merely memorialized them; that the parties wanted a quick closing "without lawyer involvement on either side;" that the attorney was motivated by a desire to help friends; that neither party was adversely affected by the attorney's misconduct; that the attorney did not receive a fee for his services; and that he had no disciplinary record); In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (among other violations, attorney engaged in a conflict of interest by collecting a real estate commission upon her sale of a client's house; mitigation included the attorney's unblemished fifteen-year career; her unawareness that she could not act simultaneously as an attorney and collect a real estate

fee, thus negating any intent on her part to take advantage of the client; and the passage of six years since the ethics infraction); and In the Matter of Andrys S. Gomez, DRB 03-203 (September 23, 2003) (attorney, among other things, engaged in a conflict of interest (RPC 1.7(b), RPC 1.9(a)(1)) when he represented both driver and passengers in a motor vehicle accident; mitigating circumstances included the significant measures taken by the attorney to improve the quality of his practice).

The aggravating factors in this case, respondent's failure to inform Hemphill about the debt; his false assurance to her that he would make the account current; his failure to return her numerous telephone calls, when she continued to receive collection calls, a circumstance that eventually drove her to retain another attorney; and the advantage that he took of his close relationship to this vulnerable client and friend far outweigh the mitigating factors (respondent's otherwise unblemished ethics history, professed remorse, and the lack of evidence that Hemphill suffered monetary harm). Unlike the DEC, we do not consider that the dissolution of respondent's long-term relationship with Hemphill should mitigate harsher discipline.

We find that respondent's conflict of interest and poor treatment of his client/friend, at a time when she was being pursued by the credit card company for a debt that respondent had incurred for his own benefit, warrant the imposition of a reprimand.

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: Isabel Frank
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kenneth C. Strait, Jr.
Docket No. DRB 10-355

Argued: January 20, 2011

Decided: March 1, 2011

Disposition: Reprimand

Members	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