SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-411
District Docket No. VA-2008-019E

IN THE MATTER OF

WILLIAM ENRIQUE AGRAIT

AN ATTORNEY AT LAW

Decision

Argued: March 17, 2011

Decided: May 26, 2011

Sheila A. Woolson appeared on behalf of the District VA Ethics Committee.

Respondent appeared pro se.

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

This matter came before us on a recommendation for a reprimand filed by the District VA Ethics Committee (DEC), based on respondent's conflict of interest in representing both the

buyer and the seller in a 2003 real estate transaction, without making full disclosure and obtaining written waivers, and subsequently representing the seller in litigation instituted against her by the buyer. The complaint charged violations of RPC 1.7 and RPC 1.9. The complaint also charged respondent with conduct prejudicial to the administration of justice (RPC 8.4(d)) for offering to reimburse the buyer for his payment of a pre-existing tax lien on the property, in exchange for a release and hold harmless agreement.

For the reasons set forth below, we determine to censure respondent for the conflict of interest violations. Like the DEC, we find no clear and convincing evidence of a violation of RPC 8.4(d).

Respondent was admitted to the New Jersey bar in 1984. He maintains an office for the practice of law in Newark.

In 1995, respondent received an admonition for negligent misappropriation of client funds (RPC 1.15(a)) in two matters and recordkeeping violations (RPC 1.16(d)). In re Agrait, 142 N.J. 427 (1995). In 2002, he received a reprimand for gross neglect (RPC 1.1(a)) and misrepresentation (RPC 8.4(c)) in a real estate matter. There, he failed to abide by a contractual requirement to hold a deposit in escrow and then certified, on

the closing statement, that the deposit had been tendered. In re Agrait, 171 N.J. 1 (2002).

In this matter, on August 29, 2003, Christopher Cummings purchased from Paula Rosa a Newark property, located at 204-206 Eastern Parkway (the Eastern Parkway property). At some point after Cummings' purchase, he transferred title to the property to Cummings Properties-Eastern Parkway, LLC (Cummings Properties).

Prior to the 2003 Eastern Parkway transaction, Cummings did not know Paula Rosa. He did, however, know Michael Rosa (Rosa), her husband and a real estate broker, whom he met when he purchased two other Newark properties from other sellers. Rosa was the broker. Respondent represented Cummings in the transactions. Cummings testified that he trusted respondent, had a good relationship with Rosa, and did not believe that either one of them would harm him.

According to Cummings, after he bought those Newark properties, Rosa told him that the Eastern Parkway property was for sale. Initially, Cummings believed that he was purchasing the property directly from Rosa, with whom he negotiated the purchase price. According to Cummings, Rosa "wrote all the stuff" in the June 26, 2003 agreement of sale.

Rosa testified that, when he and Mrs. Rosa decided to sell the Eastern Parkway property, they did not list it with an agency, including his own. Rosa, who had been a real estate broker for about eight years at the time that he negotiated the sale price, explained that he used a Realtor® form contract of sale for the Eastern Parkway property only because, as a broker, he was not permitted to use any other form. Rosa later testified, however, that he was the broker for the transaction. Indeed, Cummings recollected that, "at the very end" of the transaction, Mrs. Rosa was brought in as a "formality" so that Rosa could "put it through . . . the company, until he's paid a commission."

Cummings testified that he believed that Rosa and respondent had an arrangement, whereby Rosa would refer business to him. Cummings based his belief on the fact that, even though Rosa had given him the names of three attorneys, including respondent, Rosa had expressly stated that respondent "was the best." For his part, Rosa explained that, if a client asked him to recommend an attorney, he would give the client a list of attorneys with whom he is familiar. He added that, if respondent did not have a good reputation, his name would not be among those given to buyers and sellers, when requested. Rosa

estimated that, within the eight-year period that he was a broker, he and respondent had worked together on three-to-five transactions.

As indicated previously, Cummings testified that respondent represented him in the Eastern Parkway transaction. The issue here is whether respondent also represented Mrs. Rosa. Specifically, respondent prepared, on behalf of Mrs. Rosa, an affidavit of title and a deed. According to the HUD-1, Mrs. Rosa paid respondent $250 for this work. Mrs. Rosa signed those two documents at the closing, in Cummings' presence.

Even though respondent did not testify at the DEC hearing and was not, therefore, placed under oath, when asked by one of the panel members, he stated that he represented only Cummings in the transaction. He maintained that position at oral argument before us.

Before the DEC, however, Cummings testified that he believed that respondent was representing him and Mrs. Rosa at the closing, because respondent was the only attorney present and because respondent had prepared closing documents for Mrs. Rosa. Cummings denied that he had consented to respondent's preparation of those documents on her behalf. Moreover,

Cummings did not know that respondent was compensated for the preparation of the documents.

According to Cummings, respondent did not explain his obligations to Mrs. Rosa or any limitations on his representation of Cummings. Instead, respondent simply informed Cummings that he wanted to "put some documents together" for Mrs. Rosa.

Mrs. Rosa testified through an interpreter. She asserted that she did not have any conversations with respondent about the sale of the Eastern Parkway property and that she did not pay him to prepare the affidavit of title. She did not remember having signed the affidavit of title, although she speculated that respondent "must have explained it." She did not remember ever being asked to sign a waiver of any conflict.

At the DEC hearing, Rosa denied that respondent had represented both Cummings and Mrs. Rosa in the Eastern Parkway transaction. Rather, he claimed, "we" had an understanding that respondent would prepare the affidavit of title and the deed for closing. It was Rosa who requested respondent to prepare these documents for Mrs. Rosa. Rosa explained:

> I didn't look at it as being him representing it, because all I needed was

> the document typed in, and prepared a standard document that, I believe, that [sic] most attorneys would have on a computer system. I asked if he could just have his secretary prepare it, so that we can review it and hand it over to the buyer, so I did not look at him representing us. I looked at having someone instead of us preparing it, having someone do it who is a professional, because I did not — I did not look in terms of help, actually representing us, because I didn't think that this is anything other than something standard that I possibly could have pulled out from a computer. I just figured it was easier, since he was involved in the transaction, to have it typed up, so that we can just review it and give it over to the buyer.
>
> [T193-9 to 25.][1]

In an attempt to further establish a dividing line, Rosa claimed that, if there had been a problem with the affidavit of title, he would not have complained to respondent but, rather, would have blamed himself. When asked by the panel whose interests respondent was serving, when he prepared the affidavit of title, Rosa answered: "I think he was working in the interest of the transaction going well."

---

[1] "T" refers to the transcript of the DEC hearing on March 16, 2010.

Like Cummings, Rosa testified that, when respondent agreed to prepare the affidavit of title for Mrs. Rosa, respondent did not explain to either Mrs. Rosa or to Cummings any limitations on his representation of either party. According to Rosa, it was always Mrs. Rosa's understanding that respondent was representing Cummings only. Rosa added that, although respondent did not make it clear to him and to his wife that preparing the affidavit of title would place him in a conflict of interest, respondent did make it clear to them that he was not representing Mrs. Rosa.

As to the $250 payment to respondent, Rosa explained that fairness dictated that respondent be compensated for his time and professional services, in preparing the affidavit of title for the transaction. Rosa refused to concede that the mere payment of $250 for the document preparation meant that respondent had represented Mrs. Rosa.

After the closing, it came to light that the property was encumbered by a tax lien, a circumstance unknown to Cummings. He testified that he had relied on the affidavit of title prepared by respondent, in believing that he was buying a property with clear title. As it turned out, that was not the case.

On May 28, 2003, the Couch Braunsdorf Title Agency (Couch Braunsdorf) issued the title insurance commitment on behalf of Chicago Title Insurance Company (Chicago Title). Schedule B, Section 1 ("Requirements") of the commitment stated that certain requirements had to be satisfied. Requirement 11 stated: "Tax Sale Certificate sold to Joseph Laryea, recorded 4/29/1988, in Mortgage Book 5571, Page 889, Certificate No. 63396." No lien was identified as an "exception" in Section 2 of Schedule B.

On August 6, 2003, some three weeks before the closing, Certified Municipal Searchers, Inc. (Certified) carried out a title search. On the certificate of current property tax and assessment status for the property, next to "Liens," the document read "None." Under "Other," the document stated: "Lien #983394 was redeemed on 4/25/99." Certified's title search was made a part of the binder issued by Couch Braunsdorf.

According to Cummings, at the time of the purchase, he did not understand what a title binder was. Respondent neither informed him of any requirements or exceptions to the title insurance commitment nor did Cummings review the document. Indeed, Cummings did not recall having received the title insurance commitment from respondent, stating that the first time he saw it was at the ethics hearing.

Rosa testified that, prior to Mrs. Rosa's purchase of the Eastern Parkway property, they were not aware of an unpaid tax lien. He asserted that Mrs. Rosa had bought the Eastern Parkway property with clear title, that no lien had appeared in that title search, that that title insurance policy had listed no lien exceptions and that, therefore, he believed that his wife had clear title when the property was conveyed to Cummings.

Rosa also testified that, at the time of the sale to Cummings, respondent had not told either his wife or him that there was a tax lien on their property. According to Rosa, he did not learn of the lien until after the closing, sometime before Cummings instituted a lawsuit against his wife.

As it happened, there was, in fact, a 1988 lien against the Eastern Parkway property, which pre-existed Mrs. Rosa's purchase. Cummings testified that respondent made no effort to resolve the tax lien when the title binder was issued in anticipation of the 2003 closing. Likewise, respondent did not inform him that the lien could have any adverse effect on the title.

According to Cummings, he learned of the lien in 2005, when he sold the property. At that closing, Cummings paid the lien, totaling $7,180.34. He then filed a claim under his Chicago

Title insurance policy. Chicago Title did not honor Cummings' claim, asserting that the lien had been listed as an exception to the policy, when Cummings had purchased it.

Attorney Nancy Newman Brown, vice-president and state claims counsel for First American Title Insurance Company (First American), testified that the title policy issued by First American to Mrs. Rosa did not identify the tax lien as an exception to the policy. Moreover, she pointed out, Certified's title search showed no outstanding lien.

Attorney Robert C. Kermizian, general counsel to Couch Braunsdorf, testified that he had thirty-six years of experience in the title insurance industry. In terms of the conflict between Certified's conclusion that there was no tax lien and the binder's representation that there was a lien, Kermizian stated that it was up to the seller's and buyer's attorneys to resolve that discrepancy.

After Cummings sold the Eastern Parkway property and paid the lien, he sued Mrs. Rosa to recover the $7000. Prior to filing suit, Cummings approached Rosa about the lien. He complained that he was "very hurt," when Rosa offered to pay only half the amount. Rosa, however, justified his offer by saying that it was First American, Mrs. Rosa's title company,

that should have made Cummings whole. According to Rosa, respondent attempted to persuade the title company to pay the lien, but, in the interim, Cummings had filed suit against Mrs. Rosa.

Respondent, who was not named a defendant in the litigation filed by Cummings, represented Mrs. Rosa in that matter. Mrs. Rosa explained that she had retained respondent to represent her because he had prepared the affidavit of title and had handled the closing.

Both Cummings and Rosa were in agreement that respondent had not mentioned a conflict of interest in acting as Mrs. Rosa's attorney in the suit. Cummings testified that he never waived any conflict of interest with respect to respondent's representation of Mrs. Rosa in the lawsuit, either orally or in writing. He was adamant in this position. At the DEC hearing, respondent showed Cummings the court's opinion in the Rosa litigation, stating that Cummings had waived any conflict or claim against respondent in terms of the real estate transaction.

Specifically, the opinion stated:

> On August 28, 2003, Ms. Rosa sold the property to plaintiff, Christopher Cummings (Mr. Cummings). The tax lien was not liquidated at the closing. Attorney William Enrique Agrait represented the plaintiff at the closing and prepared a deed and affidavit for Ms. Rosa. The plaintiff has waived any conflict of interest claim against Mr. Agrait as to this matter.
>
> [Ex.P7p.2.]

According to Cummings, he was not aware that the court had made this finding. He was certain that he had not told his attorney that he wanted to waive any conflict of interest and did not know whether his lawyer had stated, during a conference in the judge's chambers, that he had waived any conflict of interest.

The court eventually disqualified respondent from representing Mrs. Rosa, on the ground that his representation of Cummings in the 2003 real estate transaction and his representation of Mrs. Rosa in the litigation represented an impermissible conflict of interest.

At some unidentified date, the court dismissed Cummings' lawsuit against Mrs. Rosa. Cummings testified that he had not prevailed in the lawsuit because, after he had bought the

property, he had transferred title to the property to Cummings Properties.[2]

On January 24, 2008, Cummings filed a grievance against respondent, hoping to be reimbursed for the tax lien. On June 19, 2008, six months after the filing of the grievance, respondent wrote to Cummings "to resolve the issue of the unpaid tax lien." Cummings did not reply to respondent's letter.

On October 15, 2008, respondent sent another letter to Cummings:

> On June 19, 2008, this firm wrote to you as to resolve the issue of the unpaid tax lien. Specifically, without any admission of culpability and said transmission being protected as protected under New Jersey Rule of Evidence 408 and unethical conduct, the offer is initial $1,000.00 payment upon receipt of this executed correspondence and $500.00 monthly thereafter for the amount of $7,500.00.
>
> Please execute below and return in the self stamped addressed envelope which is enclosed.
>
> [Ex.P8.]

[2] Respondent did not prepare that deed.

Under respondent's signature, the following was set forth:

> I, Christopher Cummings, hereby agree to the payment outlined above and further release and hold harmless William Enrique Agrait, Esq. as his legal representation on August 29, 2003, when I purchased 204-206 Eastern Parkway, Newark, New Jersey. Said full payment will constitute consideration for this release.
>
> [Ex.P8.]

Cummings ignored this letter, too, which he interpreted to mean that respondent would pay him $7500, in exchange for the dismissal of his grievance. Cummings testified that, prior to his receipt of respondent's October 2008 letter, he had not made any claim for reimbursement from respondent, respondent never said that he would pay $7500 to Cummings if he dismissed the grievance, and prior to the filing of the grievance, respondent never offered to pay the lien.

The DEC found that respondent had acted as Mrs. Rosa's attorney at the 2003 closing, because he had prepared the affidavit of title and deed on her behalf and had charged her a fee. Despite his role as Mrs. Rosa's attorney, respondent had not explained to either party "the potential pitfalls of the dual representation or seek an informed waiver of the conflict in writing." The DEC remarked that respondent's failure to

obtain the waiver was "compounded" by his failure to notice the tax lien and his preparation of the affidavit of title, which affirmed that the title was clear. The DEC concluded that respondent had violated RPC 1.7, presumably (a) and (b), by virtue of this conduct.

The DEC also concluded that respondent had violated RPC 1.9, presumably (a), when he had represented Mrs. Rosa in the lawsuit instituted by Cummings. The DEC found that Mrs. Rosa's interests in the litigation were "directly and materially adverse" to respondent's because the subject of the litigation was the defect in the affidavit of title. According to the DEC, the conflict was "so obvious" that the court had disqualified respondent from representing Mrs. Rosa in the litigation.

On the other hand, the DEC found no clear and convincing evidence that respondent's offer to reimburse Cummings for the lien was an attempt to have the grievance against him withdrawn.

As indicated previously, the DEC recommended the imposition of a reprimand for respondent's violations of RPC 1.7 and RPC 1.9.

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

The DEC correctly concluded that respondent violated RPC 1.7(a) and (b) and RPC 1.9(a). The evidence clearly and convincingly demonstrates that respondent represented both Cummings and Mrs. Rosa in the Eastern Parkway real estate transaction and then represented Mrs. Rosa in the litigation that Cummings instituted against her.

RPC 1.7(a) and (b)(1) provide:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) Each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include

> an explanation of the common representation and the advantages and risks involved[.]

In this case, it is undisputed that respondent represented Cummings in the Eastern Parkway real estate transaction. The question is whether his preparation of the affidavit of title and deed on behalf of Mrs. Rosa placed him in the position of representing her as well. We find that it did.

A deed and affidavit of title are documents of conveyance that the seller is required to provide to the buyer at closing. In re Opinion 26 of the Advisory Committee on the Unauthorized Practice of Law, 139 N.J. 323 (1995) (Opinion 26). These documents are prepared either by the attorney for the seller (if the seller has retained one) or, if the seller is unrepresented, by an attorney selected by either the broker or the title company involved in the transaction. Id. at 336-38. See also Cape May County Bar Association v. Ludlam, 45 N.J. 121, 125 (1965) (the drafting of legal documents necessary to convey title to property is permitted only by licensed attorneys).

In this case, the deed and affidavit were not prepared by either Rosa or the title company. They were prepared by respondent, for a $250 fee paid by Mrs. Rosa, the seller. Rosa's statement that respondent did not prepare these documents

on behalf of either his wife, as seller, or him, as broker, is undercut by the evidence.

Indeed, the HUD-1 form shows that Mrs. Rosa paid respondent $250 for document preparation. Moreover, Rosa was identified as the broker in an addendum to the agreement of sale. In either case, whether respondent was chosen by Mrs. Rosa, the seller, or Rosa, the broker, respondent was certainly not acting as Cummings' lawyer when he prepared the deed and affidavit of title for the seller's benefit. In Cape May Cty. Bar Ass'n v. Ludlam, 45 N.J. 121, 124 (1965), the Supreme Court observed that "[t]he practice of law embraces the art of conveyancing." The term "conveyancing," according to the Court, is defined as "'the science and art of transferring titles to real estate from one man to another.'" Id. at 124-25 (citing Black, Law Dictionary (4th ed. 1951)).

In Ludlam, the Court affirmed a summary judgment that permanently enjoined the defendant, a non-lawyer who owned a "conveyancing business," from "engaging in the practice of law by drawing bonds, mortgages, deeds, warrants, releases of mortgages, affidavits and other legal instruments." Id. at 123, 126. The Court explained that the "preparation of legal

instruments for others is "within the exclusive realm of the legal profession." Id. at 126. The Court continued:

> The exercise of judgment in the proper drafting of legal instruments, or even the selecting of the proper form of instrument, necessarily affects important legal rights. The reasonable protection of those rights, as well as the property of those served, requires that the persons providing suchservices be licensed members of the legal profession.
>
> [Ibid.]

Thus, when respondent prepared the deed and affidavit of title for Mrs. Rosa, he did not act as a mere scrivener, who was simply facilitating the transaction. Rather, he was engaged in the practice of law, on behalf of Mrs. Rosa. It matters not that respondent or the Rosas believed the contrary. When respondent agreed to prepare the deed and affidavit of title on Mrs. Rosa's behalf, he owed a duty of loyalty to her. Tartaglia v. UBS PaineWebber,Inc. 197 N.J. 81, 111 (2008). "From that duty issues the prohibition against representing clients with conflicting interests." Ibid.

We are aware that compensation is not necessarily dispositive of this issue. See, e.g., In re Gold, 149 N.J. 23 (1997) (in the absence of a formal attorney-client relationship, conflict of interest rules applied when it was reasonable for

the putative clients "to assume that [the attorney] was representing their interests;" the wife of the putative clients was the attorney's secretary; six-month suspension for this and other misconduct) and In re Chester, 127 N.J. 319 (1992) (secretary, though not strictly a client, had reason to rely on her attorney-employer in representing her interests in a connection with a loan that, upon the attorney's solicitation, she agreed to make to one of his clients; [public] reprimand for this and other misconduct). Nevertheless, that respondent accepted compensation for his services bolsters our conclusion that he also acted as attorney for Mrs. Rosa in the transaction.

The representation of both the buyer and the seller in a real estate transaction is a conflict of interest and a violation of RPC 1.7(a), if certain requirements are not met. See, e.g., In the Matter of Frank Fusco, DRB 04-442 (February 22, 2005) (admonition imposed on attorney who represented the buyer and the seller in a real estate transaction, a violation of RPC 1.7(a)). Here, respondent violated RPC 1.7(a)(2), in that there was "a significant risk" that his representation of Cummings would be "materially limited by [his] responsibilities to another client," that is, Mrs. Rosa, or his responsibilities to "a third person," that is, Rosa, who referred clients to him.

The conflict became even more apparent when respondent "failed" to notice a tax lien encumbering the property, causing Cummings to have to satisfy the $7500 lien.

This having been said, the conflict of interest, in and of itself, did not preclude respondent from representing Cummings and Mrs. Rosa. Under RPC 1.7(b)(1), respondent could have engaged in a dual representation if he had made full disclosure to and consulted with both parties and then obtained their informed, written consent, as required by RPC 1.7(a)(2) and RPC 1.7(b)(1). He did not. Accordingly, he violated both of these sections of the rule.

In his defense, respondent relied on Opinion 26 for the proposition that the parties to a real estate transaction are not required to have counsel. He also pointed out that Opinion 26 allows a broker to direct an attorney to prepare the deed and affidavit of title for the seller and that is exactly what Rosa did in this transaction. Respondent asked us to clarify what is permissible under Opinion 26, when a party chooses not to be represented at a real estate closing. He also argued that he should not be disciplined in this matter because this is a case of first impression, arisen due to a lack of clarity with respect to whether the attorney for the buyer may draft

documents of conveyance for the seller, when the seller is unrepresented in the transaction.

Although, as respondent asserted in his brief to us, the parties to a real estate transaction are not required to have counsel, when they do choose to be represented by counsel, counsel's conduct is governed by the RPCs. Respondent's claim that the law is not clear as to whether it is unethical for counsel for the buyer to draft documents of conveyance for the seller misses the mark. Opinion 26, which is consistent with RPC 1.7, is clear on the subject.

In Opinion 26, supra, 139 N.J. at 326, the Supreme Court was charged with determining whether certain activities of "South Jersey" real estate brokers and title company officers constituted the unauthorized practice of law and, if so, whether those activities should be prohibited. Ultimately, the Court decided that many of the activities did, in fact, constitute the unauthorized practice of law, but concluded that "the public interest" did not require prohibition of those activities. Ibid. Accordingly, the parties to residential real estate transactions were free to decide whether, in proceeding without counsel, the money they would save in legal fees was worth the risk of not having lawyers to advise them in the transaction.

Id. at 328. Moreover, brokers and title officers were free to continue with certain activities that are considered to be the practice of law, albeit with conditions. Ibid.

With respect to deeds, in particular, the Court cited Ludlam, supra, 45 N.J. 121 (1965), and noted that its decisions "clearly require" that those documents of conveyance be drafted by the seller's attorney. Opinion 26, supra, 139 N.J. at 336. However, in Opinion 26, the Court characterized the purpose of its ruling in Ludlam as "to assure competent counsel in the drafting of such a uniquely legal document," noting that "'competent' always meant counsel who understood the entire transaction." Ibid.

Because the Court in Opinion 26 was evaluating the South Jersey practice, where parties often proceed without attorneys in residential real estate transactions, its decision described the practice in this part of the State. With respect to the drafting of affidavits of title and deeds, the Court noted that, when the seller is unrepresented, either the broker or the title company retains an attorney to complete the task on the seller's behalf. Id. at 336, 338. However, the Court ruled that "an attorney retained by a title company or a real estate broker may not prepare conveyance documents for a real estate transaction

except at the specific written request of the party on whose behalf the document is to be prepared." Id. at 332. Moreover, the attorney must "personally consult[] with the seller." Id. at 359. Finally, "any attorney retained by the broker for that purpose, or any attorney acting for the title company, may draft any of the documents involved in the transaction upon written request of the party, be it buyer, seller, lender, mortgagee, bank, or others." Ibid.

We note, on the one hand, that, in a case such as this, where the buyer is represented by counsel and the seller is not, efficiency and simplicity are, theoretically, well-served by having the buyer's attorney prepare the affidavit of title and deed on behalf of the seller. Nevertheless, Opinion 26 does not and cannot justify what respondent did in this case.

Opinion 26 addresses real estate transactions where neither party is represented by counsel. In such situations, it is the practice in South Jersey for either the real estate broker or the title company to find an attorney to prepare conveyance documents. Under those circumstances, Opinion 26 permits that attorney to prepare documents for any and all parties to the transaction, so long as the parties make a written request of

the attorney, and the attorney personally consults with them. That is not what happened in this case.

In the transaction at issue here, only the seller, Mrs. Rosa, chose to proceed without counsel. Cummings did not. He retained respondent to represent him in the transaction and he paid respondent for his services. By doing so, Cummings had decided that saving money was not worth the risk of not having a lawyer to advise him. Opinion 26, supra, at 328. For his part, respondent, in agreeing to represent Cummings, had a duty of loyalty to him that could not be divided.

Under Opinion 26, if Mrs. Rosa and Cummings were both unrepresented, Rosa was free to direct respondent to prepare the necessary documents on both of their behalf, provided the conditions of Opinion 26 were satisfied. As a matter of convenience, however, respondent, the buyer's attorney, was asked to prepare the deed and affidavit of title. Although we understand the logic of this decision, it was impermissible under Opinion 26 and the RPCs.

For the reasons stated above, the facts of this case are not governed by Opinion 26. They are governed by RPC 1.7. Under this rule, it was permissible for respondent to prepare the documents of conveyance on behalf of Mrs. Rosa, if he had

made full disclosure to Cummings and to her, consulted with both of them, and obtained written consent from them. He did not. Thus, he violated RPC 1.7(a)(2). Opinion 26 does not excuse his unethical conduct.

Respondent's brief focused on his innocence in failing to discover the lien. Yet, this disciplinary matter is not about any negligence on his part; it is about the conflict of interest in which he immersed himself. However, it should be noted that, because the lien was listed as a "requirement," respondent was under an obligation to have it removed from the property, lest it then become an "exception" to the policy.

Finally, respondent's brief argued against the existence of a conflict in the litigation, on the ground that Cummings' and Mrs. Rosa's interests were the same, that is, the payment of the lien. Their interests were not common, however. They were unquestionably adverse. Cummings' interest was to recover the cost of the lien from Mrs. Rosa. Mrs. Rosa had no interest in doing so, personally, so she sued her title insurance company.

We find, thus, that respondent also violated RPC 1.9, which governs conflicts of interest involving former clients. The applicable provision of that rule states:

> (a) A lawyer who has represented a client in a matter shall not thereafter:
>
> (1) represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation with the former client[.]

Here, the litigation involved a substantially-related matter, inasmuch as it had to do with a pre-existing lien on the premises conveyed by Mrs. Rosa to Cummings. In N.J. Advisory Comm. On Prof'l Ethics Opinion 212, 94 N.J.L.J. 553 (1971), the ACPE determined that an attorney who represents both the buyer and the seller in a real estate transaction may not continue to represent either party if a controversy arises between them. More specifically, "[a]n attorney who has acted for a client may not render services professionally against him where to do so might injuriously affect his former client in any matter in which he formerly represented him." Ibid.

Despite the proofs of conflicts in this case, we find insufficient evidence to sustain a finding that respondent offered a $7500 settlement to Cummings, in exchange for Cummings' dismissal of the ethics grievance against him. Respondent was susceptible to a lawsuit, based on his failure to

detect the conflicting reports on the status of liens against the property. The language in his October 2008 letter is so general, so vague, that a determination cannot be made as to whether it encompassed both a release from malpractice and the dismissal of the ethics grievance. Therefore, the charged violation of RPC 8.4 (d) cannot be sustained. Only the conflict-of-interest charges, thus, were amply supported by the proofs.

Since 1994, it has been a well-established principle that a reprimand is the ordinary measure of discipline when an attorney engages in a conflict of interest. In re Berkowitz, 136 N.J. 148 (1994). Accord 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 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 Poling, 184 N.J. 297 (2005) (attorney engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance

from a title company that he owned – a fact that he did not disclose to buyers, in addition to his failure to disclose that title insurance could be purchased elsewhere).

If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," discipline greater than a reprimand is warranted. Berkowitz, supra, 136 N.J. at 148. Accord In re Olivo, 189 N.J. 304 (2007); In re Mott, 186 N.J. 367 (2006); In re Poling, 184 N.J. 297 (2005); In re Schnepper, 158 N.J. 22 (1999); In re Kessler, 152 N.J. 488 (1998); and 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 Cory J. Gilman, 184 N.J. 298 (2005) (attorney guilty of an imputed conflict of interest (RPC 1.10(b)), among other violations, based upon his preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; in imposing only an admonition, we noted the following "compelling mitigating factors": this was his "first brush with the ethics system; he cooperated fully with the OAE's investigation, and, more importantly, 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) (single violation of RPC 1.7(a), where we noted that the 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; special circumstances were (1) the attorney did not negotiate the terms of the contract but merely memorialized them; (2) the parties wanted a quick closing "without lawyer involvement on either side;" (3) the attorney was motivated by a desire to help

friends; (4) neither party was adversely affected by his misconduct; (5) the attorney did not receive a fee for his services; and (6) he had no disciplinary record); In the Matter of Anton Muschal, DRB 99-381 (February 4, 2000) (attorney represented a client in the incorporation of a business and renewal of a liquor license and then filed a suit against her on behalf of another client); and In the Matter of Jeffrey E. Jenkins, DRB 97-384 (December 2, 1997) (attorney engaged in a concurrent non-litigation conflict-of-interest by continuing to represent husband and wife in a bankruptcy matter after the parties had developed marital problems and had retained their own matrimonial lawyers).

The facts of this case do not warrant a deviation from the standard form of discipline for conflicts of interest, that is, a reprimand. This otherwise appropriate degree of discipline, however, must be taken to the next level, a censure, because of the presence of aggravating factors. Specifically, respondent willingly embroiled himself in two conflict of interest situations. Moreover, there are aggravating factors to consider. As a result of respondent's failure to either notice the lien or to disclose it to Cummings, Cummings suffered serious financial injury – the satisfaction of a $7000 lien

encumbering his property. In addition, respondent has a disciplinary record (an admonition and a reprimand). The otherwise appropriate discipline for respondent's conflicts of interest (a reprimand) should, thus, be enhanced to a censure.

Member Doremus did not participate.

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
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William Enrique Agrait
Docket No. DRB 10-411

Argued: March 17, 2011

Decided: May 26, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	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

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel