SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-340
District Docket No. XIV-07-492E

IN THE MATTER OF	
CARL D. GENSIB	
AN ATTORNEY AT LAW	

Corrected
Decision

Argued: February 17, 2011

Decided: April 5, 2011

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Robert Zullo appeared on behalf of respondent.

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

This matter was before us on a recommendation for a censure filed by the District VIII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.5(b) (failure to provide a written fee agreement) and RPC 8.4(c) (conduct

involving dishonesty, fraud, deceit or misrepresentation). We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1990. In 2005, he was reprimanded for improperly acknowledging the signatures of his clients on several documents in connection with a real estate closing, when they had not appeared before him. In addition, respondent knew that one client had signed the other's name. In re Gensib 185 N.J. 345 (2005).

The facts of this disciplinary matter are as follows:

Respondent's practice focuses on residential real estate transactions. He acknowledged that he failed to prepare written fee agreements in a number of real estate matters, claiming that it was not "practical" because of the urgency of the three-day attorney review period and the pressures of the market. At times, clients would call and respondent would quote a fee over the phone. In respondent's experience, fee agreements are not the norm in residential real estate transactions.

For an undisclosed time, in real estate transactions utilizing Weichert title insurance, respondent charged a $300 mark-up to his clients on their bill to cover payment requests he received from Weichert after the closing. The HUD-1

reflected a sum $300 higher for title insurance than Weichert's invoice amount. According to respondent, he inflated the charge to avoid being placed in the awkward position of asking his client for additional funds to cover Weichert's post-closing bill.[1] Respondent thought about telling the clients about the overcharge but he did not do so because "most of them would have objected." He maintained that he intended to refund the $300 to the clients minus any amount that he would have to pay Weichert.

Respondent deposited the $300 received from clients in his business account. He explained that his reason for not depositing the $300 in his trust account was two-fold. First, he had been the subject of a prior random audit by the Office of Attorney Ethics (OAE), which had revealed that he had ledgers with funds in his account for over a year.[2] Second, his practice was receiving eighty to one hundred deposits a month and he was writing 400-500 checks a month. He conceded that the money should have been deposited in his trust account, but stated that

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[1] Respondent testified that, if he stopped using Weichert title services, he would not receive business from Weichert agents.

[2] It generally took over a year, after a closing, to receive the title policy.

it would have been impossible to reconcile his accounts, if he had added hundreds of ledger cards with $300 balances. He did not advise Weichert about the mark-ups, but did discuss Weichert's billing practices with the company.

This matter came to light when a Weichert customer, Niranjana Gowdra, whom respondent had represented, contacted Weichert complaining about the title charges. In August 2007, John Lanahan, associate general counsel for Weichert Realtors, who testified at the ethics hearing, sent a letter to the Department of Banking and Insurance, after learning of Gowdra's letter. Respondent was not copied on that letter. In turn, the Department of Banking and Insurance referred the matter to the OAE. Again, respondent was not copied on that letter.

In 2007, all of the affected clients received their $300 back. Respondent sent them refund checks in two batches, in July and November 2007.

When respondent's counsel asked what had prompted him to write the checks in July 2007, respondent replied, "Well, I had been meaning to do it. Then in the Gowdra situation, the complaint arose, and I said, you know, maybe this wasn't the right way to handle things. And at that point I started

sending the checks out."[3] Later, when the presenter asked if Gowdra's complaint had been the impetus for sending the refunds, respondent answered, "I don't know if it was the impetus. It was a long time ago. As I think I told you in my statement, I don't know exactly what went on in that time. It was a contributing factor, of course."[4] When the presenter asked why all of the payments had not been made at once, respondent said that he had been busy.[5]

In early 2008, the OAE conducted a demand audit of respondent's attorney books and records for the period from

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[3] According to Lanahan, at the Gowdra closing, he had mentioned something to respondent about the title insurance charges. Gowdra's closing occurred in mid-June 2007, three weeks before respondent issued the first batch of refund checks. Respondent would have been advised of the OAE's investigation in September 2007, after he sent out the first batch of checks.

[4] A review of the HUD-1 forms in evidence where the record also contains a corresponding July 2007 refund check, shows that one client received the refund slightly over a year after the closing. Other refunds were issued within one to eight months after the closing.

[5] Before issuing the refunds, respondent did not check his records to determine if there had been additional charges from Weichert that should have been deducted from the clients' money. He did not have the time to do so.

January 1, 2006 to July 31, 2007.[6] Steven Harasym, the OAE disciplinary auditor who conducted the review of respondent's records, testified that respondent did not perform the required reconciliations or maintain receipts or disbursement journals. Harasym found no fee agreements in respondent's real estate files.

The OAE found twenty-seven Weichert closings where title costs had been marked up. In each, the $300 overage had been deposited in respondent's business account. Respondent explained to Harasym that, due to Weichert's poor practices, he frequently received invoices after the closings were completed. In such situations, he added, it was difficult to go back to the clients for additional money.[7] Respondent admitted that the clients did not know about the extra $300. He told Harasym,

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[6] The OAE reviewed the subject files in this matter in November 2007, and later requested that respondent provide his trust and business account records for the period January 1, 2006 to July 31, 2007. Respondent complied with that request in January 2008.

[7] Lanahan conceded that, from time to time, Weichert did send out invoices for additional funds, after the closings were completed.

however, that it had always been his intention to refund the money to the clients. He acknowledged to Harasym that, in hindsight, he should have put the money in his trust account.

Harasym reviewed respondent's business account balances to determine if the clients' funds remained intact until the refunds. He determined that at times, the balance in the business account had dipped below what respondent should have been holding for those clients.

Respondent, on the other hand, denied that his balance was below what it should have been. The following exchange took place between respondent and the presenter:

> Q. You heard Mr. Harasym testify that your balance in the business account went below 8,000 on more than one occasion while you were holding these so-called escrows. Is it fair to say that you used some of those escrows for your own personal firm's expenses?
>
> A. The balance never went below those amounts.
>
> Q. Mr. Harasym testified at one point that the balance was as low as $5,000. We have agreed now that the figure is $8,000 in overcharges. That's a $3,000 difference. How did that happen?
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> A. That is the bank's balance; that is not the reconciled balance. The reconciled

balance is higher than that, because it takes into consideration deposits that were made and not credited on that day.

[T72-21 to T73-14.][8]

Later, the following exchange took place between respondent and his counsel:

Q. I refer you to your Verified Answer, specifically paragraphs 11 and 12, which relate to the — [the presenter's] question regarding not having adequate funds in your business account to cover the amounts of the cumulative $300 charges.

And I guess I would like to just read from the Complaint. Paragraph 11, "For example, as of April 20th, 2007, respondent should have maintained $6,000 in 'escrowed markups' in his attorney business account, but on April 20th, 2007, the actual balance in respondent's attorney business account was only $2,470.62." Would you agree with that?

A. No.

Q. Would you tell the panel why not.

A. Because on that same day a $16,700.41 deposit was made in my attorney trust account and was credited the next day.

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[8] T refers to the transcript of the DEC hearing on March 24, 2010.

Q. I am sorry. Did you say attorney trust account?

A. I am sorry. It went into my attorney business account.

Q. Thank you. Paragraph 12, "Moreover, on May 31st, 2007, respondent should have maintained $6,900 in 'escrowed markups' in his attorney business account, but on May 31, 2007, the actual balance was only $3,947.35." Would you agree with that?

A. No. There was a $9,489.50 deposit into the account.

Q. Thank you. No further questions.

. . .

EXAMINATION BY [THE PRESENTER]

Q. Mr. Gensib, isn't it accurate to say that these deposits in transit that you are talking about were made after your balance fell below that escrowed amount you should have been holding?

A. I don't know when the bank produces that statement, so I can't tell you that.

[T80-19 to T82-11.]

Harasym agreed that his calculations did not take into account "deposits in transit."

The DEC found that respondent did not violate RPC 1.5(b) (failure to memorialize the rate or basis of the fee).[9] The DEC accepted respondent's testimony that the common practice in the real estate field was to not have a writing for the fee and that the nature of the real estate market was not conducive to preparing such writings. Further, the DEC found that respondent's failure to prepare a writing did not, in these cases, have the potential to harm respondent's clients or the public and that even if the fee had been memorialized, the mark up would not have been included because respondent's clients would have objected.

The DEC found, however, that respondent violated RPC 8.4(c). The DEC found "compelling" respondent's testimony as to why he had not advised his clients about the $300 mark-up ("I thought about it, but most of them would have objected"), as well as his admission that he should have deposited the money in

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[9] The DEC noted that, even if a violation of RPC 1.5(b) had been found, it would not have, in and of itself, warranted discipline.

his trust account, rather than his business account. In the DEC's view,

> [i]f nothing else, these two statements evidence an acknowledgement that something was amiss in how these transactions were being conducted. While there was no admission that he intended to deceive or be dishonest, the testimony from the Respondent himself, creates a real question as to the honesty and transparency with which he was conducting the Weichert real estate transactions
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> [HPR9.][10]

The DEC also considered that Harasym's testimony "was not adequately rebutted;" that the documents showing the discrepancies in what should have been in respondent's business account were also "compelling;" and that, although there was testimony that the documents failed to take into account transactions in transit, respondent had presented no evidence to rebut what the DEC deemed clear and convincing. The evidence, along with respondent's failure to advise his clients about the mark-ups, led to the DEC's conclusion that his conduct was unethical. The DEC went on to state that

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[10] HPR refers to the hearing panel report.

> [t]he Respondent had indicated from the inception of the audit/investigation that it was always his intention to return the money. While the discrepancies in the attorney business account do not necessarily belie those assertions, it certainly casts serious doubt upon them. This coupled with his failure to tell clients of the markup value, recognizing that they would object, establishes conduct that is dishonest in violation of RPC 8.4(c).
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> [HPR10.]

The DEC disagreed with the OAE's recommended suspension, finding that a censure was appropriate. In mitigation, the DEC noted that all of respondent's clients had received a $300 refund; that a number were given even before respondent knew about the investigation into this matter; and that he was cooperative with the OAE. The DEC also considered, as a minor mitigating factor, that respondent only engaged in this practice in Weichert closings. In the DEC's view, that respondent's actions were not intended to deceive a court or administrative agency weighed against a suspension.

In aggravation, the DEC noted that, although no financial harm had befallen the clients, respondent's conduct evidenced a pattern that, over time, was repeated on twenty-seven occasions.

Following a de novo review of the record, we are satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence. Contrary to the DEC, however, we find that respondent did violate RPC 1.5(b). That rule requires an attorney who has not regularly represented a client to convey to the client, in writing, the basis or rate of the fee, reasonably after the beginning of the representation. Time constraints and pressure of the real estate market notwithstanding, the rule must be followed.

As to respondent's violation of RPC 8.4(c), we find that his conduct was dishonest when he failed to advise his clients that he was inflating the cost of their title insurance to cover possible later charges from Weichert. Respondent speculated that the clients would have objected, had he asked for the additional funds. We find this explanation insufficient. That the clients might have objected did not relieve him from his duty of candor toward them. Instead of apprising the clients of the circumstances, he opted for lack of disclosure.

We are aware that, in collecting the additional $300, respondent was approximating what the final charges would be.

Attorneys performing closings often approximate, for instance, water and sewer charges that are not known at the time of the closing. The difference is that "the world" knows that those sums are estimates. Here, respondent was estimating the cost of the title insurance, but represented that the number on the HUD-1 was the actual cost. Instead, he should have listed the title insurance accurately on the HUD-1 and, then, elsewhere on the form, indicated an additional $300 escrow for possible future charges.

The discipline imposed for misrepresentations on closing documents has varied greatly, depending on the number of misrepresentations involved, the presence of other ethics infractions, and the attorney's disciplinary history. Reprimands are usually imposed when the misrepresentations are unaccompanied by additional instances of misconduct. See, e.g., In re Spector, 157 N.J. 530 (1999) (attorney concealed secondary financing to the lender through the use of dual RESPA statements, "Fannie Mae" affidavits, and certifications) and In re Sarsano, 153 N.J. 364 (1998) (attorney concealed secondary financing from the primary lender and prepared two different RESPA statements).

A suspension is warranted only when other serious unethical acts are added to the misrepresentation. See, e.g., In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two settlement statements that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by representing both the second mortgage holders and the buyers); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false RESPA statements, affidavits of title, and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); and In re Newton, 157 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading RESPA statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions).

Before we reach the question of discipline, we must address several remaining issues. In his December 16, 2010 letter-brief to us, the presenter stated: "The OAE elected not to charge respondent with knowing misappropriation because this case is one

of first impression. The OAE determined that guidance is needed as to how to prosecute such matters in the future."

As indicated previously, the presenter contended that the balance in respondent's business account dipped below what he should have been holding for the affected clients. Respondent, in turn, denied this contention, explaining that deposits in transit had not been factored in the OAE's analysis of his records. Regardless of whom is correct, the presenter or respondent, the complaint does not permit consideration of this case as a misappropriation one. Specifically, the complaint states:

> 11. For example, as of April 20, 2007, respondent should have maintained $6,000.00 in "escrowed" mark-ups in his attorney business account, but on April 20, 2007, the actual balance in respondent's attorney business account was only $2,470.63, ($3,529.37) below the level he should have maintained if indeed these funds were being "escrowed."
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> 12. Moreover, on May 31, 2007, respondent should have maintained $6,900.00 in "escrowed" mark-ups in his attorney business account, but on May 31, 2007, the actual balance in respondent's attorney business account was only $3,947.35, ($2,952.65) below the required balance.
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> . . .

> 17. Respondent's misconduct violated RPC 1.5(b) failure to have written fee agreement) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, and misrepresentation).

The word "misappropriation" does not appear anywhere in the complaint. Moreover, even if a charge of misappropriation could be inferred, the complaint does not make clear whether respondent was being charged with negligent or knowing misappropriation. Either way, due process constrains us from finding that respondent misappropriated client funds. Under R.1:20-4(b), the complaint "shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated."

Another issue that was raised in these proceedings had to do with a possible violation of RPC 1.5(a) (unreasonable fee). In his letter-brief to us, the presenter stated that, "[i]n essence, respondent collected an unearned and unstated fee. . . ." For his part, respondent's counsel, during his summation, stated that, at worst, respondent was guilty of overreaching, if it were found that he never intended to refund

the clients' money. In his answer, respondent admitted that the failure to disclose the excess charges to the clients may have violated RPC 1.5(a).

Regardless of what respondent may have conceded, he was not charged with either overreaching or collecting an unreasonable fee. Therefore, we are unable to find respondent guilty of such an offense.

Finally, it is undisputed that respondent did not deposit the excess funds in his trust account, where clients' funds must be placed. In this regard, then, he failed to safeguard client trust funds. Although he was not charged with a violation of RPC 1.15(a) for this conduct, he admitted that the funds were deposited in his business account, rather than his trust account, and also acknowledged that they should have been placed in his trust account. We, thus, find no violation of due process to consider respondent's failure to safeguard clients' funds as an aggravating factor.

We now turn to the issue of discipline. In a sense, respondent's misconduct was not as serious as that displayed in the above reprimand and suspension cases. There, the attorneys' actions harmed or had the potential to harm the lenders. That

was not the case here. On the other hand, the OAE's investigation of respondent's activities uncovered twenty-seven instances of mark-ups of title insurance costs. On balance, thus, a reprimand would be the appropriate measure of discipline for respondent's misrepresentations. Even adding to the RPC 8.4(c) violation his failure to convey the rate of his fee to his clients, in writing, conduct that, ordinarily, results in an admonition, see, e.g., In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) and In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007), we find that a reprimand would still be sufficient discipline in this case.

What takes this case out of a reprimand realm is that respondent also failed to safeguard client funds and that he has had a prior run-in with the disciplinary system – a reprimand for improperly witnessing a document. We, therefore, determine that a censure is the suitable sanction for the totality of respondent's conduct and aggravating factors.

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 Carl D. Gensib
Docket No. DRB 10-340

Argued: February 17, 2011

Decided: April 5, 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:			9			

Julianne K. DeCore
Chief Counsel