SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-418
District Docket No. IIB-2010-0013E

IN THE MATTER OF

HOWARD L. EGENBERG

AN ATTORNEY AT LAW

Decision

Argued: February 16, 2012

Decided: May 15, 2012

Christopher J. Koller appeared on behalf of the District IIB Ethics Committee.

Ellyn Freiberg Essig appeared on behalf of respondent.

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

This matter came before us on a disciplinary stipulation between respondent and the District IIB Ethics Committee (DEC). The DEC recommends the imposition of a reprimand for respondent's stipulated violations of RPC 1.7(a) (conflict of

interest), RPC 4.1(a) (knowingly making a false statement of material fact or law to a third person), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent requests an admonition. For the reasons discussed below, we determine to impose a reprimand on respondent for his stipulated violations.

Respondent was admitted to the New Jersey bar in 1974. At the relevant times, he maintained an office for the practice of law in North Arlington, New Jersey. He has no disciplinary record.

According to the stipulation, in approximately April 1997, default was entered against Charles and Melinda Widom, in a foreclosure proceeding against their East Brunswick home. The Widoms were the parents of Staci Portee.

On May 8, 1997, Staci consulted with respondent, who had represented her husband, Joseph, in the purchase and sale of an unrelated Jersey City property. Respondent explained to Staci the various options available to the Portees and to the Widoms.

At some point after the meeting, Staci advised respondent that the Portees and the Widoms had agreed that, if the Portees could secure financing, they would purchase the home from the Widoms.

According to the stipulation, respondent obtained forbearance from the Widoms' two mortgage holders, prepared a contract of sale, and referred the Portees to Central Jersey Mortgage so that they could obtain financing and purchase the Widoms' home. The $190,000 purchase price was calculated so that the Portees could obtain sufficient financing to pay off the Widoms' first and second mortgages and avoid private mortgage insurance. To carry out the plan, the Widoms gave the Portees a $40,000 "gift of equity," which allowed them to obtain a $150,000 mortgage, which, presumably, was sufficient to satisfy the Widoms' first and second mortgages.

The closing took place on June 20, 1997. According to the stipulation, respondent represented the Portees in the transaction. Although, prior to that date, respondent had sent all written communications about the transaction to the Portees and the Widoms, it was Staci with whom he had communicated orally.

At some point prior to the closing, "it was determined that the Widoms should have their own counsel for the closing." Nevertheless, at the closing, the only individuals in attendance were the Portees, the Widoms, respondent, and counsel for the lender. The RESPA identified respondent as the Portees'

attorney, for which he was paid a $650 fee.[1] According to the stipulation, "all trust funds were disbursed, the liens and closing bills were paid[,] and all closing documents were recorded and processed."

The stipulation identified misrepresentations that were made on the RESPA. First, according to the RESPA, the Widoms received $4,571.78 in proceeds from the sale when, in fact, they had received nothing. Second, attorney Nicholas DePalma was identified as the Widoms' attorney, for which he was paid a $500 counsel fee.[2] However, DePalma never communicated with the Widoms and did not represent them in the transaction. Although respondent offered to pay DePalma $500 after the closing, he declined and told respondent to keep the money.

After the closing, the Portees and the Widoms lived together at the East Brunswick property until 2003, when a breakdown in their relationship led to a restraining order

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[1] One year later, respondent represented the Portees in the refinancing of the East Brunswick property.

[2] Only the first page of the RESPA is included as an exhibit. DePalma's name does not appear on that page.

requiring the Widoms to vacate the property. The Widoms sued the Portees, seeking, among other things, enforcement of an oral agreement requiring the Portees to pay $30,000 to the Widoms "at the time of the sale of the house," to reimburse the Widoms for the cost of any capital improvements to the premises, and to sell the property back to the Widoms, if they had regained their financial footing and were capable of purchasing it. Respondent was unaware of this agreement, which was never reduced to writing. The lawsuit was settled, with the Portees paying $75,000 to the Widoms, or the fair market value of the equity in the premises at the time of the 1997 sale.

Two years later, the Widoms and the Portees sued respondent and DePalma for malpractice. The claims against DePalma were dismissed on summary judgment on the basis that there was no attorney-client relationship between him and the Widoms. The claims against respondent were settled.

The grievance in this matter was filed by Joseph Portee, on April 12, 2010.

Respondent stipulated to having violated RPC 1.7(a), in that "he represented all parties involved in a real estate transaction without obtaining a written acknowledgment or waiver of a conflict of interest, or express consent of all parties."

In addition, he stipulated to having violated RPC 4.1(a) and RPC 8.4(c), in that the RESPA identified DePalma as the Widoms' attorney, when that was not the case, and stated that he had received a $500 fee, whereas it was respondent who had actually received the money. The stipulated violations do not include the misrepresentation on the RESPA that the Widoms had received $4500 at the closing.

According to the stipulation, there were no aggravating factors. Four mitigating factors were identified: (1) respondent's unblemished record of thirty-seven years; (2) his cooperation with the DEC investigator; (3) the unlikelihood that he would repeat the conduct; and (4) the conduct was limited to an "isolated incident."

Following a review of the record, we are satisfied that the stipulation clearly and convincingly establishes that respondent's conduct was unethical.

In this case, respondent violated RPC 1.7(a), inasmuch as he represented the Portees and the Widoms at the Widom-to-Portee real estate closing, without first obtaining their informed, written consent, after full disclosure and consultation. Moreover, respondent's representation on the RESPA that DePalma

represented the Widoms and that he was paid $500 for doing so was false and, therefore, violated RPC 4.1(a) and RPC 8.4(c).

The discipline imposed for misrepresentations on closing documents and conflict of interest has ranged from a censure to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other mitigating or aggravating factors. In re Gahwyler, 208 N.J. 253 (2011) (censure imposed on attorney who made multiple misrepresentations on a HUD-1, including the amount of cash provided and received at closing; the attorney also represented the putative buyers and sellers in the transaction, a violation of RPC 1.7(a)(1) and (b); mitigating factors included his unblemished disciplinary record of more than twenty years, his civic involvement, and the lack of personal gain); In re Soriano, 206 N.J. 138 (2011) (censure for attorney who assisted a client in a fraudulent real estate transaction by preparing and signing a RESPA statement that misrepresented key terms of the transaction; the attorney also engaged in a conflict of interest by representing both the sellers and the buyers and failed to memorialize the basis or rate of his fee; the attorney had received a reprimand for

abdicating his responsibilities as an escrow agent in a business transaction, thereby permitting his clients (the buyers) to steal funds that he was required to hold in escrow for the purchase of a business and for misrepresenting to the sellers that he held the escrow funds); In re Frohling, 205 N.J. 6 (2011) (censure for an attorney who in three "flip" real estate transactions falsely certified on the settlement statements that he had received the necessary funds from the buyers and that all funds had been disbursed as represented on the statements; the attorney's misrepresentations, recklessness, and abdication of his duties as closing agent facilitated fraudulent transactions; the attorney also engaged in conflicts of interest by representing both parties in the transactions and was found guilty of gross neglect and failure to supervise a nonlawyer employee; prior reprimand); 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 arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Swidler, 205 N.J. 260 (2011) (six-month suspension imposed in a default matter; in a

real estate transaction in which the attorney represented both parties without curing a conflict of interest, the attorney acted dishonestly in a subsequent transfer of title to property; specifically, in the first transaction, the buyer, Rai, gave a mortgage to Storcella, the seller; the attorney, who represented both parties, did not record the mortgage; later, the attorney represented Rai in the transfer of title to Rai's father, a transaction of which Storcella was unaware; the attorney did not disclose to the title company that there was an open mortgage of record; the attorney was also guilty of grossly neglecting Storcella's interests, depositing a check for the transaction in his business account, rather than his trust account, and failing to cooperate with disciplinary authorities; prior reprimand and three-month suspension); 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).

This case is analogous to In re Gahwyler, supra, 208 N.J. 253, and In re Soriano, supra, 206 N.J. 138, in which the attorneys, like respondent, represented both the buyers and sellers in a real estate transaction and also made misrepresentations on the RESPA. In Gahwyler, distressed

homeowners, who were in the midst of a foreclosure proceeding, agreed to sell their property to a third party investor, who would permit them to remain there, while paying him $5000 per month. In the Matter of William E. Gahwyler, DRB 11-054 (August 2, 2011) (slip op. at 3). The goal was for the sellers to restore their credit and to buy the home back from the investor. Ibid. Gahwyler acted as settlement agent at the investor's request. Id. at 4.

At closing, Gahwyler represented the buyer and sellers and completed a RESPA that contained significant misrepresentations. Ibid. Specifically, the RESPA stated that the investor had provided more than $187,000 in cash at the closing and that the sellers had received more than $287,000. In fact, the investor paid nothing and, instead, walked away with more than $84,000. The sellers received only $15,000. Id. at 5. These misrepresentations led to litigation in a bankruptcy court proceeding between the sellers, the investor, and Gahwyler, which, in our view, caused the waste of judicial resources. Id. at 20.

Second, at the closing, Gahwyler drafted an agreement between the buyer and the sellers, obligating the buyer to pay any and all fees necessary to satisfy the sellers' bankruptcy

plan, up to $46,000. Id. at 8. However, he never set aside any escrow funds to meet the potential obligation. Ibid. As it turned out, more than $46,000 was required to satisfy the plan, and the buyer never paid it. Id. at 9. Moreover, although the sellers paid the investor the agreed upon $5000 per month, he defaulted on the mortgage loan, and foreclosure proceedings were instituted against him. Ibid.

Notwithstanding the seriousness of Gahwyler's transgressions, we imposed a "strong censure," citing the following mitigation: his unblemished disciplinary record of more than twenty years, his civic involvement, the lack of venality in his actions, and the absence of personal gain (other than receipt of a fee). Id. at 27.

Soriano involved a fraudulent sale whereby the sellers conveyed their property to a family friend, for no consideration. In the Matter of William J. Soriano, DRB 10-369 (April 8, 2011) (slip op. at 2). The parties agreed that the sellers would remain in the property and restore their credit, by making the mortgage payments and paying other expenses associated with the running of a household. Once their credit was restored, they would buy their house back from the family friend.

Soriano, the only attorney involved with the transaction, prepared an addendum to the agreement of sale, noting that the sellers had granted the buyer an $88,000 "gift of equity." Id. at 2-3. The RESPA, however, did not identify this gift. Id. at 3. Moreover, according to the RESPA, the buyer paid more than $86,000 at closing, instead of the actual amount of $0. Ibid. Further, the RESPA stated that the sellers had received nearly $130,000 when, in fact, they had "actually received much less." Ibid.

A successor mortgage company filed a foreclosure action, and the sellers were never able to repurchase their house. Ibid.

In choosing to censure Soriano, we observed that the buyer had suffered harm as a result of the transaction because, after the purchase, the sellers' failure to make the mortgage payments resulted in a foreclosure proceeding being instituted against her. Id. at 14. Further, we noted, Soriano never drafted a document confirming the parties' agreement that the sellers would be able to buy the property back from the buyer after they had rehabilitated their credit history. Id. at 15. Moreover, he had certified to the accuracy of the RESPA, which he conceded had contained false information. Id. at 17. He also engaged in

other dishonest conduct pertaining to the buyer's loan application, which misrepresented that the property would be her primary residence. Ibid. Finally, the attorney had been reprimanded previously for having abdicated his responsibilities as an escrow agent in a business transaction and for misrepresenting to the sellers that he held the escrow funds. Id. at 24.

The facts of this case are not as egregious as those in Gahwyler and Soriano. Here, there was no evidence of fraud in the determination of the sale price; the parties were parents and children, and, after the transaction, both families lived together in the home; respondent was unaware of the side agreement between the Widoms and the Portees; and there was no evidence that either the Widoms or the Portees suffered any harm as the result of the transaction.

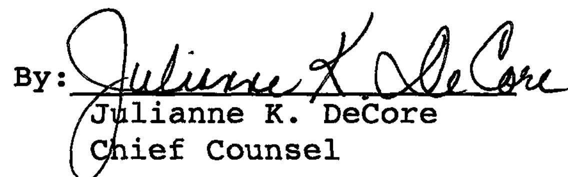
Moreover, respondent's misrepresentation on the RESPA was limited to the identification of DePalma as the Widoms' attorney and the payment of a $500 fee to him. This pales in comparison to the misrepresentations of the attorneys in Gahwyler and Soriano, who misrepresented the amount of money paid by the buyers and the amount of money received by the sellers by many thousands of dollars.

Even if we consider the $4500 misrepresentation on the RESPA to be an aggravating factor, we believe that a reprimand is sufficient discipline for respondent's conflict of interest and misrepresentations on the RESPA. We find of great significance respondent's unblemished career of twenty-three years at the time of the transaction. In addition, another thirteen years, without incident, transpired between the date of the transaction and the filing of the grievance against respondent, in 2010.

Chair Pashman did not participate. Members Gallipoli and Zmirich voted to impose a censure.

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
Bonnie C. Frost, Vice-Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

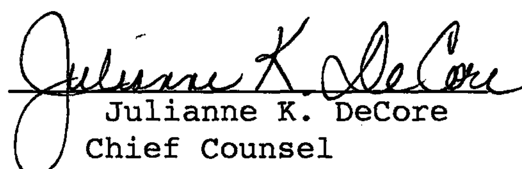
In the Matter of Howard L. Egenberg
Docket No. DRB 11-418

Argued: February 16, 2012

Decided: May 15, 2012

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Censure	Did not participate
Pashman					X
Frost			X		
Baugh			X		
Clark			X		
Doremus			X		
Gallipoli				X	
Wissinger			X		
Yamner			X		
Zmirich				X	
Total:			6	2	1



Julianne K. DeCore
Chief Counsel