Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-082

IN THE MATTER OF

STEPHEN H. ROSEN,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 18, 1994

Decided: October 31, 1994

Thomas S. Cosma appeared on behalf of the District VC Ethics Committee.

C. Robert Sarcone appeared on behalf of respondent.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District VC Ethics Committee (DEC). The amended complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.7 (conflict of interest) and RPC 8.4(c) (fraud, deceit or misrepresentation) in the Schulman matter; RPC 1.15(b) and (c) (failure to safeguard property) in the Fisher matter and RPC 1.4 (a) and (b) (failure to communicate), and RPC 8.4(c) in the Steel matter. The complaint further charged respondent with a violation of RPC 1.1(b) (pattern of neglect).

Respondent was admitted to the New Jersey bar in 1982. He has been in private practice in Glen Ridge, Essex County, and formerly maintained an office in Montclair, Essex County. Respondent has no

history of discipline.

The Steel Matter

In February 1989, David Steel, the owner of Infospec Inc., a systems auditing firm, consulted with respondent about a collection matter. The debtor owed Infospec $10,000. Steel had hired a collection agency in Florida that, without his authorization, had settled the matter for $6,500 and subsequently absconded with the funds. During a second meeting, also in February 1989, Steel provided respondent with relevant documentation to pursue his claim. (According to respondent, he had at least one additional meeting with Steel (1T128).)[1]

On February 22, 1989, Steel forwarded a check to respondent for $1,000, although he was apparently unclear about the fee arrangement (1T48). Respondent failed to provide Steel, a new client, with a written fee agreement. (Respondent was not charged with a violation of RPC 1.5.) Respondent testified that his fee arrangement required a $1,000 flat fee plus filing costs (1T122).

Steel testified that respondent was to pursue legal action in New Jersey against the debtor and one of its employees and, in Florida, against the collection agency. According to Steel, respondent had represented to him that he was also a member of the Florida bar (1T11, 42). Respondent, in turn, denied having so represented to Steel. (Respondent is not a Florida attorney.)

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[1] 1T refers to the hearing before the District VC Ethics Committee on October 14, 1993. 2T refers to the hearing on October 20, 1993. 3T refers to the hearing on October 29, 1993. 4T refers to the hearing on November 2, 1993.

Instead, respondent explained, he had told Steel that he had friends in Florida who would assist him. In fact, respondent spoke with a friend in Florida who agreed, for a $500 fee, to file suit on Steel's behalf (1T129). Respondent also denied that he had told Steel that he would pursue the matter against the debtor, explaining that there was no basis for such an action (1T121-122).

Respondent unquestionably performed some work on Steel's claim against the Florida collection agency. Through family members and friends in Florida, he attempted to find the offices of the collection agency and made several telephone calls. When respondent concluded that the agency could not be located, he stopped pursuing the matter. He did not so inform Steel, however.

According to respondent, because this was a flat fee arrangement, he did not keep billing records, which would have reflected his efforts and the time spent on Steel's behalf (1T131).

Steel testified that, despite numerous telephone calls to respondent's office, he actually had only two or three conversations with respondent. Susan Tauber, respondent's former secretary, testified that she took a number of telephone calls from Steel, during which she informed him that respondent was unable to talk with him. Respondent testified that he had at least three or four telephone conversations with Steel (1T130) and that, on more than one occasion, he had notified Steel that he was having difficulty locating the collection agency (1T148).

Frustrated by his inability to contact respondent and obtain information on his case, by letter dated August 15, 1989, Steel

asked for the return of his file and the $1,000 fee. Steel hired another attorney, Eugene Brinn, Esq., to pursue his claim and to obtain a refund of his fee from respondent. Brinn sent two letters to respondent to that effect, dated September 25, 1989 and October 6, 1989. Respondent and Brinn had only one conversation thereafter, at which time respondent told Brinn that he had been ill and unable to comply with his requests. On October 13, 1989, respondent sent Brinn a check, drawn on his business account, in the amount of $1,000. The full amount of the fee was refunded, despite the fact that respondent had performed some work and that, according to respondent, the fee was non-refundable. The file was also forwarded along with the check. Respondent's refund check, however, was returned for insufficient funds when it was presented for payment, in November 1989. By letter dated November 17, 1989, Brinn again demanded the return of the fee. It was not until July 1990 that respondent forwarded a second check to Brinn.

Despite Brinn's efforts to pursue Steel's claim, including hiring an investigator to locate the company, Brinn was also unable to obtain any recovery for Steel.

The complaint charged respondent with violation of RPC 1.4(a) and (b) and RPC 8.4(c) (the latter was charged for the lack of sufficient funds to cover respondent's check). The DEC determined that respondent violated RPC 1.4(a) and (b), by failing to keep Steel reasonably informed as to the status of his claim, which prevented Steel from making informed decisions as to the matter. However, the DEC dismissed the charge of violation of RPC 8.4(c),

finding no evidence of any intentional misconduct when the $1,000 check was dishonored. Further, the DEC questioned whether the rule should apply to the business account.

The DEC also determined that respondent violated RPC 1.1(b), when this matter was considered in conjunction with the Fisher matter, infra.

The Fisher Matter

Respondent represented David and Karen McCrostie in the purchase of a house from Richard and Mary Beth Norman. The Normans were represented by William B. Fisher, Esq. Respondent obtained a title report and title insurance commitment from Ticor Title Insurance Co. ("Ticor"). Ticor appointed respondent as the approved attorney in connection with the closing.

The title search revealed two mortgages on the property: one to Howard Savings Bank ("Howard") and another to First United Mortgage Company, which had been assigned to United First Mortgage Company ("United First"). By letters dated November 19, 1986, Fisher requested payoff figures for the two mortgages. By letter dated December 8, 1986, Howard replied that its payoff figure was $23,372.18. The payoff figure for the second mortgage, $32,079.77, was communicated to Fisher by notice dated November 21, 1986. Closing of title took place on December 17, 1986. Because of a scheduling conflict, however, Fisher did not attend the closing. Christopher Barrett, Esq., appeared in his place.

Two problems arose at the closing. First, respondent raised

an objection with regard to one of the mortgage payoffs. In particular, by then the United First mortgage had been assigned to Glenfed Mortgage Company, which, in turn, was associated with Merrill Lynch Mortgage Corp. However, there was no proof of the assignment, to respondent's satisfaction, in the title binder (1T91). In fact, respondent stated that he had not heard of Glenfed until he arrived at the closing (3T49). Therefore, respondent refused to issue the $32,000 check to Glenfed or Merrill Lynch when the title report indicated that United First was the lienholder, until he became satisfied as to the chain of events relating to the assignment. Respondent believed that he was being cautious for his clients' benefit and also as the agent for the title company. (Respondent testified that, prior to the McCrosties' closing, he had done fewer than half-a-dozen real estate transactions. 4T14-15.)

During the closing, respondent spoke with a Glenfed representative and a representative of Ticor to determine how the check could be made out, so that it was acceptable to both Glenfed and Ticor. Respondent forwarded a check for $32,079.77 to Glenfed on December 18, 1986. By telephone communication, on December 31, 1986, Glenfed indicated that it would not accept the payoff check, as written. Glenfed also indicated that there would be an additional month's interest charged – approximately $770 (3T62). (Respondent explained that, because the Normans had an FHA mortgage, if the payment was one day late, the entire month's additional interest was owed. 3T93.) To pay the additional $770,

respondent utilized other funds he was still holding from the closing, approximately $300 for taxes and $485 for Fisher's fee (3T65).

There ensued a series of communications between respondent, Glenfed and Ticor. See Exhibit RF-2. Ultimately, respondent sent a new payoff check to Glenfed, on January 31, 1987. On February 16, 1987, Merrill Lynch/Glenfed forwarded a canceled "New Jersey Mortgage Bond" to respondent. Apparently, this was insufficient to satisfy respondent and/or Ticor regarding the discharge of the lien.

Respondent ultimately sought help from Ticor to obtain the discharge. Respondent testified that Ticor's counsel was satisfied that he had done all he could to obtain the discharge (3T78). Ticor obtained the canceled mortgage from Glenfed in June 1988 (3T77).

With regard to the Howard mortgage, the day after the closing, December 18, 1986, respondent hand-delivered the payoff check for the Howard mortgage. Respondent testified that, when he did not receive the canceled original mortgage from Howard, he prepared and forwarded a discharge of mortgage to Howard on March 8, 1988 (3T68-69). Respondent did not have an explanation for the delay (4T54-55). Ticor's counsel had no explanation for why the two mortgages were not canceled until 1988, stating that it was "unusual." He noted that Sussex County had significant recording delays between 1986 and 1989 (3T33-34).

Fisher testified that, in January 1987, the Normans began

receiving foreclosure notices and late payment penalty notices, which alerted him to the fact that respondent had failed to pay off the mortgages (1T92). Thus began a series of letters and telephone calls between Fisher and respondent in 1987 through 1989, regarding, among other things, the payoff of the mortgages and the payment of the 1987 first quarter taxes.

According to Fisher, he received little by way of reply from respondent (1T93-95). In fact, there were no written replies from respondent introduced into the record. Respondent testified, however, that he and Fisher had several telephone conversations regarding the post-closing disputes. Respondent testified that neither Fisher nor Barrett (the attorney that had appeared at the closing) did anything to assist him in having the two mortgages canceled (4T63).

A second problem also arose at the closing. Respondent claimed that he ran out of trust account checks and did not have sufficient temporary checks to disburse all funds at the closing, including Fisher's fee and other items on the closing statement. Respondent contended that he had an upcoming closing and needed to have spare checks available for that matter (3T59). The DEC found this testimony to be incredible and contradicted by the documentary evidence, including respondent's trust account ledger sheet, bank statement and the checks themselves. In addition, respondent's canceled checks indicated that he did not have another closing until at least December 29, 1986, twelve days after the McCrostie closing and that at least eight temporary checks would have been

available to him for the next closing.

Although a check was allegedly written for Fisher's fee on December 18, 1986, as was promised at the closing, it was shown as voided on the account statement (4T20). A check for the taxes was also drafted and voided on December 18, 1986. Respondent did not have any explanation for these voided checks (4T19, 59). There was some testimony that a check might have been forwarded to Fisher in January 1987 and then lost by Fisher (1T100-101). Respondent contended that he did not forward a check prior to the end of January 1987 because he was waiting until he had additional checks in his office (3T82). As of the date of the DEC hearing, October 1993, Fisher still had not been paid.

Respondent's second reason for not paying Fisher was that he blamed Fisher and/or the Normans for the problem with Glenfed. However, this would explain only respondent's post-January 1, 1987, behavior. Fisher's fee could have been disbursed between December 17 and 31, 1986, when the dispute with Glenfed arose and respondent became aware of the need for additional funds. Respondent admitted that, during that period of time, he "anticipated no problems" (4T59). When asked why no check had been forwarded the day after the closing, respondent answered, "I don't recall what happened. I don't recall. I think I may have discovered that there was some confusion with the numbers. I don't know and I don't recall" (4T45). Although, as noted above, respondent apparently used the money held for Fisher's fee and the taxes for the additional interest and, therefore, had insufficient funds for the

disbursements, the record indicates that respondent might have taken his own fee against an unsatisfactorily explained $500 item on the bank statement (4T47). Respondent admitted that he was paid $360.75 (4T43).

In addition to the above difficulties with the closing, the record reveals that the $507 owed to Ticor for title insurance was not paid until March 1988. Respondent had no explanation for the delay (3T83-84). However, it appears that the insurance could not be issued until the problems regarding the discharge of the mortgage liens were resolved, in March 1988. The deed and mortgage from the December 17, 1986 closing were to be recorded by respondent shortly thereafter. They were not recorded until May 29, 1987 (3T28).

The testimony on this matter led the DEC to conclude that, although respondent may not have been as diligent as he could have been in his attempts to resolve this matter, part of the blame rested with Glenfed or Fisher, who did not assist him in resolving the situation. Therefore, the DEC found no reason to conclude that respondent was at fault for the delay in paying and obtaining a discharge of the Glenfed mortgage. Similarly, the DEC found the record too inconclusive to hold respondent responsible for the additional tax liabilities. Thus, the DEC did not find clear and convincing evidence of violation of RPC 1.15(b) with respect to the payoff of the Howard or Glenfed mortgages. However, the DEC determined that the same rule had been violated with respect to respondent's failure to turn over Fisher's fee and to promptly pay

the first quarter taxes for 1987.

The DEC found insufficient evidence that respondent had violated RPC 1.15(c), which requires an attorney to segregate disputed funds. The DEC did not reach any conclusions regarding the failure to pay Ticor promptly, the failure to promptly record the deed or mortgage or the failure to promptly discharge the Howard mortgage as being in violation of RPC 1.15(b) or (c). The DEC concluded, however, that respondent's conduct in this regard had violated RPC 1.1(b).

The Schulman Matter

In 1978, Michael Schulman founded a company known as Restaurant Control Systems ("RCS"). In 1984, Schulman met respondent socially. The relationship developed into a business association. In late 1984 or early 1985, respondent represented Schulman in a collection matter and provided general legal advice for RCS (2T12-13). By late 1984, Schulman had developed severe financial problems, including an IRS lien, and sought respondent's assistance. Although respondent worked out a payment schedule with the IRS, Schulman needed a loan to resolve a cash flow problem. He had been turned down for a second mortgage by several banks (4T67).

Respondent represented another client, Joel Levin, who, along with a companion, Amy Fairstone, had formed JLAF Trust ("JLAF"). The funds from the trust were available for loans. In late 1984, respondent introduced Levin and Schulman and they, without respondent's input, worked out a loan agreement from JLAF at twenty

percent interest. (4T120). Schulman was aware that Levin was also a client of respondent (2T25). The agreement was that Levin would give respondent funds to place in respondent's trust account and pay Schulman (4T115). Schulman, in turn, would make payments to respondent, whereupon the funds would be placed in his trust account and then paid back to Levin or to another party, at Levin's instruction (4T92).

Respondent testified that he informed both parties that, unless he had their permission, he would be unable to represent them in the transaction, jointly or severally, because of the potential conflict of interest between borrower and lender (4T121). Respondent testified that he further advised them that, should a conflict arise, he could not represent either of them (4T81, 122).

During a foreclosure proceeding arising out of this transaction, Levin corroborated respondent's testimony that respondent had told Levin and Schulman that he could not represent both of them or, if he did, that he needed a waiver. Levin understood that respondent would be representing Schulman (4T84). Contrarily, Schulman testified that, although respondent was present at his first meeting with Levin, he did not mention his inability to represent either of them. Although respondent did not state that he would be representing one party, as opposed to the other, in conversations he implied that he was representing Schulman (2T22). Schulman believed that respondent was representing him because he had obtained the funds on his behalf (2T37) and because Schulman had paid respondent's fee in connection

with the loan transactions. Schulman's belief was also based on the fact that respondent had continued to represent RCS between 1985 and 1988. Schulman did not recall any occasion where respondent, in his presence, had told Levin to obtain another attorney (2T44). In fact, although respondent testified that Levin was then represented by a New York attorney, Sandy Blackman, Esq., he admitted that Levin continued to consult with him for advice on other matters, for which he was billed, even after he and Schulman entered into the loan agreement (4T93-94).

Between December 1984 and February 1985, Schulman executed four promissory notes. Respondent then disbursed $100,000 from the Levin funds to Schulman. The notes indicated that Schulman would subsequently execute a mortgage on his house to secure the notes (2T31-32). Schulman testified that it was his understanding, when he signed those notes, that in the future he would secure the notes with a mortgage on his house (2T 113). On March 6, 1985, the original notes were canceled and six new notes were executed, totaling $120,000. There was no reference to a mortgage clause because, according to respondent, a mortgage document was executed simultaneously. (See Answer). The record reveals that Schulman was planning to attempt to obtain a second mortgage from a lending institution and there was concern over his ability to obtain it if the indebtedness to Levin was recorded (4T77). Therefore, Levin agreed to advance funds to Schulman prior to the recordation of the mortgage given to Levin to secure the loan. Levin further agreed that his mortgage would be subordinated to any second mortgage

Schulman obtained (4T71). Further, respondent testified that "Mr. Levin wanted no mortgage of record in his name anywhere that could be found in public records. He didn't want anything even associated with him on public records" (4T111). Of course, Schulman remained in a better position while the mortgage remained unrecorded.

By October 1985, Schulman's payments to JLAF were two months in arrears. On October 31, 1985, nine months after the loan agreement was made, respondent prepared a memorandum, which was signed by Schulman, wherein $4,000.08 in Schulman's funds was transferred from respondent's trust account to the JLAF account (Exhibit GMS-3). The funds, obtained from Schulman's second mortgage, paid the two-month arrearage due at that time (2T41-42). The agreement stated, in pertinent part:

> I recognize and reaffirm the fact that you cannot represent both Mr. Levin and myself and cannot represent either of us should a conflict arise based on the business relationship between us.
>
> You have clearly explained this both to myself and Mr. Levin in each other [sic] presence prior to us entering into any relationship.
>
> [Exhibit GMS-3]

Schulman testified that he probably did not read the memorandum carefully. He denied that he had been advised about a conflict of interest (2T75-76, 99-101). It was his belief that respondent had been representing both of them from the beginning of the business relationship in late 1984 (2T101). But see 2T22, 37.

Subsequently, Schulman defaulted on the loan. Apparently, he stopped his payments in order to force Levin to renegotiate the

interest rate (2T49-50). Ultimately, on July 26, 1988, respondent recorded the mortgage, at Levin's instructions. According to respondent, part of the original agreement was that he would hold the mortgage and file it when instructed to do so by Levin (4T105). A foreclosure action was instituted on November 22, 1988. Respondent testified that he had had no professional relationship with Levin since the foreclosure action. Another attorney represented Levin in the foreclosure action. Schulman stated that, when he received a notice of default, he spoke with respondent, who indicated that Levin wanted his money and that Levin was "pushing [respondent] to take whatever legal action [respondent] had to take" (2T51). Schulman indicated that he understood from respondent that Levin would sue him. However, he did not realize that he would hire another attorney to do so (2T108). According to respondent, when Schulman attempted to discuss the foreclosure proceeding with him, he advised Schulman to obtain another attorney (4T81).

Of particular note in this matter is a letter, dated September 22, 1988, from respondent to Schulman. That letter states, in part, "[w]e [JLAF and Levin] are demanding payment in full" (Exhibit GMS-2, Exhibit Q). Respondent testified that this was a form letter, mistakenly used by his secretary. Respondent contended that it was his intent to send a letter to Schulman warning him of Levin's position. A few weeks later, on October 17, 1988, respondent sent Schulman another "erroneous" letter on behalf of JLAF/Levin. In his answer to the ethics complaint, respondent

did not assert that the letters were sent in error. When asked why, respondent stated, "[b]ecause -- I don't recall. I don't know. I couldn't tell you" (4T132).

The DEC found clear and convincing evidence that respondent violated RPC 1.7, by representing two parties whose interests were obviously adverse from the beginning of the borrower/lender relationship. The DEC concluded that, although respondent contended that he had sent Levin to another attorney, the record demonstrated that respondent had continued to represent him. The DEC specifically found that respondent violated RPC 1.7(a)(1) and (2), in that he had to know that his representation of one party would have adversely affected his representation of the other. The DEC further found no clear and convincing evidence that Levin ever waived the conflict of interest. Also, the DEC noted that, even if there was a waiver, it was ineffective because the rule required respondent's reasonable belief that there would be no adverse impact on the other client. At that time, there had to be an adverse impact because the interests of his two clients were already in conflict.

## CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The Board, however, disagrees, in part, with the DEC's findings.

In sum, the DEC found respondent guilty of violations of RPC 1.4(a) and (b) in Steel; RPC 1.15(b) in Fisher, and RPC 1.7 in Schulman (the alleged violation of RPC 1.1(a) in Schulman was not discussed). Further, the DEC found a violation of RPC 1.1(b) in Fisher and Steel.

With regard to Steel, respondent evidently made it clear to his client that he was having difficulty in locating the Florida collection agency. However, Steel apparently had no idea that respondent had stopped his efforts to locate them. Clearly, respondent should have so advised his client to enable him to pursue the matter through another venue or retain another attorney if he so desired. His conduct in this regard violated RPC 1.4(a) and (b).

In Fisher, the DEC did not make any specific findings with regard to respondent's failure to pay off the other closing expenses. Rather, a finding was made of a violation of RPC 1.1(b), encompassing those violations. The Board is unable to agree with that finding. In the Board's view, a minimum of three cases is required for a finding of a pattern of neglect. Here, two matters were considered, Fisher and Steel. The Board, instead, finds a violation of RPC 1.3 in Fisher. Although a violation of RPC 1.3 was not specifically charged in the complaint, the extensive record contains sufficient proof that respondent was not as diligent as he should have been in this matter with regard to the post-closing payments. Further, respondent had no reasonable explanation for the significant delays in obtaining the canceled mortgages and

recording the new mortgage and deed.

The Board cannot agree with the DEC's finding that respondent violated RPC 1.15, in that he failed to promptly (or otherwise) pay Fisher and further failed to pay the first quarter taxes.

The Board agrees with the DEC that respondent did not violate RPC 1.15(c). There is no allegation that the funds in question were not safeguarded by respondent. Instead, certain funds were utilized for a necessary expense, the $770 interest charge, prior to the existence of any dispute. Because respondent had not handled many real estate transactions, he did what he believed appropriate to protect his clients' interests (See 4T50-51). Of course, the fact that he paid his own fee and not Fisher's removes some measure of understanding for his conduct.

There is no question that respondent represented both parties in the Schulman matter, in violation of RPC 1.7. There is no clear and convincing evidence, however, that respondent violated RPC 1.1(a) (gross neglect).

* * *

Respondent testified as to an illness that forced his hospitalization in 1989 and, ultimately, the closing of his Montclair law office (1T133-134). His secretary, Susan Tauber, confirmed that respondent had become ill. However, respondent presented no documentary evidence of his illness. Further, as the DEC noted, respondent's illness occurred from July 1989 through March 1990. Therefore, his medical condition fails to explain why he was unresponsive to Steel between February and July 1989, why he

undertook representation creating a conflict of interest situation in 1985 and why he was not diligent in the Fisher matter from 1986 to 1988.

In sum, the Board finds that respondent violated RPC 1.4(a) and (b) (failure to communicate) in the Steel matter, RPC 1.3 (lack of diligence) in the Fisher matter, and RPC 1.7 (conflict of interest) in the Schulman matter. Taking into account that respondent was a new attorney at the time that some of these infractions occurred, a public reprimand is sufficient discipline for his misconduct. The Board, by a requisite majority, so recommends. See, e.g., In re Chase, 68 N.J. 392 (1975) (where the attorney was publicly reprimanded for lending the funds of one client to another client without informing the former of the relationship and making the disclosure required under RPC 1.7). Although it is true that respondent also violated RPC 1.3 and RPC 1.4, the nature of his misconduct was not so serious as to necessitate increased discipline. One member dissented, believing that respondent's misconduct warranted a three-month suspension. Two members did not participate.

The Board further recommends that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 10/31/94

By: Elizabeth L. Buff
Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board