SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-187
District Docket No. XIV-2010-0307E
(formerly VII-2011-0903E)

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

Decision

Argued: September 20, 2012

Decided: October 24, 2012

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

David H. Dugan, III 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 discipline (one- to three-month suspension) filed by the District VIII Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.4(c), mistakenly cited as RPC 1.4(d) (failure to explain a matter to the extent necessary for the client to make informed decisions about the representation),

RPC 1.5(b) (failure to communicate the basis or rate of the fee in writing), and RPC 1.15(b) (failure to turn over funds that a client or third party is entitled to receive).

The OAE's position is that respondent's disciplinary history requires a three-month suspension. For his part, respondent's counsel argued that an admonition is sufficient for respondent's sole violation, RPC 1.5(b). We determine that a censure is the more appropriate discipline in this case.

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

In 2011, respondent received a censure for failing to advise his real estate clients that he was inflating the cost of their title insurance to cover potential additional charges by the title insurance company and for failing to memorialize the basis or rate of his fee. In re Gensib, 206 N.J. 140 (2011).

Most recently, in 2012, respondent was suspended for six months for falsely certifying that HUD-1 statements that he had prepared in five real estate closings were an accurate accounting of the funds deposited and disbursed in connection

with each closing. In addition, he failed to communicate the basis or rate of his fee, in writing. In re Gensib, 209 N.J. 421 (2012). He remains suspended from practice.

The facts that gave rise to this disciplinary matter are as follows:

In January 2007, respondent was the settlement agent in a real estate closing in which he represented the buyer, Kevin Salerno. Respondent had not regularly represented Salerno, although he had acted as his attorney in a prior closing. He did not communicate the basis or rate of his fee to Salerno, in writing. Salerno met respondent through Joseph Zicaro (Zicaro), the seller of the property, along with his wife.

The purchase price for the property was $310,000, with a seller's concession of $8,154.07. The total amount of the settlement charges due from Salerno was $9,978.34, of which $2,025 was payable to Property Transfer Services (PTS) for title insurance. Respondent wrote a check for the title insurance due to PTS. The HUD-1, which respondent prepared, reflected the payment to PTS.

At the time of the transaction, Zicaro was employed by Gateway Mortgage and had arranged for financing for Salerno. Zicaro also had a professional relationship with PTS.

Zicaro advised respondent that, because of his relationship with PTS, he could obtain the title insurance as a courtesy. At Zicaro's request, respondent voided the original check and wrote another check for the same amount, payable to Maryrose and Joseph Zicaro.[1] When this conversation with Zicaro took place and whether Salerno knew about it are at the heart of this matter.

Respondent testified that the conversation with Zicaro occurred at the closing table, in the presence of Salerno. According to respondent, because of the proximity of the parties at the table, Salerno had to have heard the conversation. Contrarily, Salerno testified that he was unaware that respondent had not made the payment to PTS, that he had issued a check to the Zicaros instead, and that Zicaro was receiving a "courtesy of services" from PTS.

Respondent acknowledged that Salerno had not specifically authorized him to give the $2,025 to the Zicaros, but he did not recall Salerno's objecting to the change. He was confident that Salerno would be getting title insurance, as, based on a number of prior dealings with Zicaro, he "had no reason to doubt him."

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[1] Respondent testified that, in "similar situations where there was a person who had a relationship with a title insurance company" he has voided a check to a title insurance company and issued it to someone else.

The week after the closing, Zicaro asked respondent to reissue the $2,025 check, making it payable to him only. Respondent did so.[2] Salerno was not present, when respondent issued this check.

The complaint charged that, even if Zicaro was receiving a courtesy from PTS, the $2,025 should have been returned to Salerno. Respondent, in turn, took the position that changing the payee on the check "had no impact on [Salerno] in any way:" Salerno paid the sum that he was obligated to pay and, in exchange, received title insurance.

Respondent explained his conduct in the following exchange with the presenter:

> Q. Did not that 2,025 dollars belong to Mr. Salerno?
>
> A. No.
>
> Q. Did it not come out of his proceeds as the borrower?
>
> A. Yes.
>
> Q. As you placed on the HUD form?
>
> A. Yes.
>
> Q. How did that money not then go back to Mr. Salerno?

[2] For reasons not addressed in the record, the check to Zicaro is dated February 5, 2007, nearly two weeks after the January 23, 2007 closing.

A. Because it was supposed to go to Property Transfer Services. And there it would have been a cost. He would have been - it was acquired by the lender. The fact that Mr. Zicaro had a relationship with them, and it was his personal home that was being sold, and he said he worked out something with Property Transfer Services. Had nothing to do with Mr. Salerno.

Q. Even though that disbursement was made under Mr. Salerno's column on the HUD form?

A. Mr. Salerno paid no more or less as a result of anything that happened.

Q. So did Mr. Salerno authorize you to void that check to Property Transfer Service?

A. He didn't specifically authorize me but he was there when I did it.

[T34-1 to T35-1.][3]

When questioned by a panel member about his communication with Salerno, respondent answered as follows:

Q. It's a traditional real estate transaction. You're a C.P.A. You understand about the disclosure and transparency and things of that nature.

Did you not feel the need at this point because the essence of what was originally captured on the HUD form was changing because you were voiding the check that was going to Transaction [sic] Services -- Property Service. To the title insurance to an individual, did that in your mind change the essence of the real estate transaction

[3] T refers to the transcript of the DEC hearing on December 21, 2011.

such that you should have a conversation or disclose, affirmatively disclose, that and not assume that Mr. -- your client understood what was going on?

A. I don't know that there's a standard that requires me to do that. It was done right in front of him. He saw what was happening. I don't think Mr. Salerno -- he wasn't a first time buyer. He testified he had prior transactions. So it wasn't affecting -- it wasn't costing him any money. And it was [sic] wasn't impacting on him. It was done in front of him. I thought that was sufficient level of disclosure.

[T37-14 to T38-12.]

Later, respondent explained his actions to another panel member:

Q. Then you all signed [the HUD-1] at this time? Everybody signs it and there's an understanding that this 2,025 dollars is going to the Property Transfer Service?

There's no notation. I mean you guys didn't go over and say, hey, this is going to -- instead of this we're going to cross this out; we're going to give this personally to Mr. Zicaro but -- right?

A. The change took place after everything had been done.

Q. I'm sorry?

A. In other words, the closing was - the statement was prepared. The check had been written. Everything was signed. And then it happened afterwards.

Q. If you wanted to change this document and put it in you crossed out [sic]? 2,025. And you could subtract that

from the total charges. Be pretty simple [sic]?.

A. Then Mr. Salerno wouldn't have paid the money for title insurance.

Q. But he didn't really pay for title insurance. He ended up paying the money to Mr. Zicaro.

A. It cost him 2,025 dollars to get title insurance coverage on the purchase. Mr. Zicaro worked out an arrangement where he'd get exactly the same coverage that he was supposed to get but that he wouldn't be charged with it.

And Mr. Zicaro would end up getting the money because Mr. Zicaro had a business relationship with Property Transfer Service. He referred them a lot of business. And title insurance business is a profitable business. And title insurance agents take care of people who refer them business.

So Mr. Zicaro -- I mean Salerno. Excuse me. Paid exactly what he was going to pay one way or the other. And received exactly what he was supposed to receive.

Q. It's like a seller's concession time. Situation where they get back money from the mortgage.

A. You could look at it like that.

[T46-3 to T47-23.]

Although Salerno ultimately obtained title insurance, because an old $80,000 mortgage on the Zicaros' property that had been paid off in 1998 had not been discharged, the title insurance was not timely issued. Salerno and the Zicaros signed a disclosure, indicating their awareness of the lien on the

property and the Zicaros' intent to secure its discharge. There are no allegations of impropriety on respondent's part in connection with this issue, which he resolved.

The title insurance was issued, although the precise date is not revealed in the record. However, correspondence between disciplinary authorities and respondent shows that, during the ethics investigation of this matter, in mid-2010, the title insurance question was still unresolved. The reason for this delay is not known. Respondent testified that, because he never received any communication about a problem with the payment of the insurance premium, he had no reason to believe there were any outstanding issues. He told the hearing panel that it was not unusual for a title insurance policy to take years to be issued.

At the conclusion of the ethics hearing, the DEC found that respondent violated RPC 1.4(c), RPC 1.5(b), and RPC 1.15(b), as charged in the complaint.

As to RPC 1.4(c), the DEC found that respondent failed to inform Salerno that the payee of the check intended for title insurance would change, did not obtain Salerno's authorization to change the payee, and did not apprise Salerno that the "essence" of the HUD-1 would change. The DEC noted that, although there was a dispute as to whether the check to the

Zicaros had been written in Salerno's presence, respondent admitted that the third check, payable to Zicaro, had been written outside of Salerno's presence, weeks after the closing. Respondent also admitted that he did not have Salerno's authorization to change the payee on the check, and did not change the HUD-1, which still showed a check for title insurance to PTS.

As to RPC 1.5(b), respondent admitted that he did not communicate the basis or rate of his fee to Salerno, in writing.

Finally, as to RPC 1.15(b), the DEC concluded that

> [r]espondent received funds from his client for the purpose of purchasing title insurance. Therefore, any and all applicable discounts should have been for the benefit of the buyer. Thus, any overage was due to the buyer. Here buyer did not obtain any benefits, in fact the title insurance was not purchased and it was later discovered that an old mortgage remained of record.[4]
>
> [HPR6.][5]

The DEC noted respondent's recent six-month suspension and recommended that he be suspended for one-to-three months. Two panel members believed that the suspension should be for at least three months.

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[4] As indicated previously, the title insurance was issued, albeit late.

[5] HPR refers to the hearing panel report.

Following a de novo review of the record, we find that, with one exception, the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

As to RPC 1.4(c), Salerno's and respondent's testimony was at odds. Respondent testified that Salerno was present at the closing, when Zicaro had mentioned the "courtesy" from PTS and had asked respondent to write the check to him instead. Therefore, respondent concluded, Salerno had to know what transpired. Salerno, however, denied any knowledge that the check had been made out to Zicaro, as opposed to PTS. In finding that Salerno was unaware of the change in the payee of the check, the DEC gave more weight to Salerno's testimony. Because the DEC "hears the case, sees and observes the witnesses, and [hears] them testify, it has a better perspective than a reviewing [tribunal] in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)). We, therefore, defer to the DEC with respect to "those intangible aspects of the case not transmitted by the written record, such as, witness credibility . . . ." Dolson v. Anastasia, 55 N.J. 2, 7 (1969).

Unquestionably, respondent should have ensured that Salerno was fully aware of the "trade-off" and, more importantly, had

agreed to it. Had Salerno been consulted, he might have posed an objection, such as, for instance, the absence of a mechanism to enforce Zicaro's promise to get him the insurance. By not explaining the situation to Salerno, in detail, respondent deprived him of the opportunity to make an informed decision on how to proceed. The better practice would have been for respondent to send the check to PTS and let PTS forward it to Zicaro. Like the DEC, thus, we find that respondent violated RPC 1.4(c).

As to RPC 1.5(b), although respondent had represented Salerno on one prior occasion, the basis or the rate of a fee need not be communicated to a client, in writing, only when the lawyer has regularly represented the client. That was not the case here. We, therefore, find a violation of RPC 1.5(b) as well, a violation that respondent conceded.

It is not so clear, however, that respondent violated RPC 1.15(b). That rule requires a lawyer to promptly deliver to the client funds that the client is entitled to receive. Under the circumstances, we are unconvinced that the $2,025 for the payment of title insurance should have been returned to Salerno.

As respondent argued, Salerno paid for and received title insurance. Respondent testified, without challenge, that, because of Zicaro's professional relationship with PTS, PTS had

agreed to provide title insurance to Zicaro at no charge. Zicaro chose to avail himself of this benefit at the time that he was selling the house to Salerno. Zicaro so informed respondent and offered to use his professional "perk" to obtain title insurance for Salerno, in exchange for the amount due by Salerno, $2,025. Essentially, Zicaro transferred his benefit (free title insurance) to Salerno for the actual market value, $2,025. That was the amount of the premium quoted by PTS to Salerno and which Salerno, as the buyer, had already agreed to pay PTS for title insurance that he was obligated to obtain.[6]

Significantly, the OAE provided no evidence (testimonial or documentary) to even suggest that Zicaro's arrangement with PTS, or respondent's testimony about that arrangement, was fabricated to obtain for Zicaro an extra $2,025. Respondent testified, again without challenge, that he had no reason to doubt Zicaro's good faith and had been involved in at least one prior closing, where the same situation occurred.

In view of the foregoing, we cannot find clear and convincing evidence that Salerno was entitled to a refund of the $2,025 and that respondent violated RPC 1.15(b) by not returning

[6] It is important to remember that the delay in the issuance of the title insurance policy was not due to issues related to payment or non-payment of the premium.

those funds to him. To find otherwise would be to say that Salerno was entitled to the free benefit that PTS conferred on Zicaro by way of professional courtesy.

Generally, an RPC 1.5(b) violation leads to an admonition, even if accompanied by other, non-serious improprieties. See, e.g., In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (attorney failed to memorialize the rate or basis of his fee and, in another client matter, failed to promptly deliver funds to a third party); In the Matter of Alfred V. Gellene, DRB 09-068 (June 9, 2009) (in a criminal appeal, attorney failed to furnish the client with a writing setting forth the basis or rate of his fee; the attorney also lacked diligence in the matter); In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007) (in an estate matter, the attorney failed to provide the client with a writing setting forth the basis or rate of his fee); In the Matter of Carl C. Belgrave, DRB 05-258 (November 9, 2005) (attorney was retained to represent the buyer in a real estate transaction and failed to state in writing the basis of his fee, resulting in confusion about whether a $400 fee was for the real estate closing or for a prior matrimonial matter for which the attorney had provided services without payment; recordkeeping violations also found); In the Matter of William J. Brennan, DRB 03-101 (May 23, 2003) (attorney did not memorialize

the rate or basis of his fee in a criminal matter); and In the Matter of Louis W. Childress, Jr., DRB 02-395 (January 6, 2003) (attorney did not reduce to writing the rate or basis of his fee in real estate matters).

Attorneys who fail to adequately communicate with their clients, too, typically are admonished. See, e.g., In the Matter of David A. Tykulsker, DRB 12-040 (April 24, 2012) (attorney failed to inform his client that the court had denied a motion to vacate an order dismissing the client's claim; the client did not learn of this development until he called the attorney, twelve days later, to inquire about the outcome; the attorney also failed to comply with the client's multiple requests for a copy of the court's orders until several months later, when the client appeared at his office to obtain them); In the Matter of Neil George Duffy, III, DRB 09-311 (March 10, 2010) (attorney orally informed client that he would no longer represent him but thereafter failed to dispel the client's continuing belief that he was represented by the attorney, as evidenced by the client's sporadic telephone calls to the attorney inquiring about the status of his case); In the Matter of Shelley A. Weinberg, DRB 09-101 (June 25, 2009) (for a one-year period, attorney failed to advise his client about important aspects of a Social Security disability matter; the attorney erroneously advised the

client that his claim had been denied and then failed to explain his error; he also failed to notify the client that he had terminated the representation and had retained the "excess" portion of his fee while exploring avenues of appeal); In the Matter of Marc A. Futterweit, DRB 08-356 (March 20, 2009) (attorney failed to keep his client informed about the case and failed to reply to the client's requests for information about the matter; the attorney admitted his wrongdoing); and In the Matter of Edward G. O'Byrne, DRB 06-175 (October 27, 2006) (attorney did not inform his client about court-imposed costs against the client and delayed notifying him of a motion subsequently filed by the adversary for the collection of those costs).

On the other hand, if the attorney has a disciplinary record, a reprimand may result. See, e.g., In re Wolfe, 170 N.J. 71 (2001) (failure to communicate with client; reprimand imposed because of the attorney's ethics history: an admonition, a reprimand, and a three-month suspension).

Here, respondent's prior discipline -- a reprimand, a censure, and a six-month suspension -- requires enhancement of the otherwise appropriate discipline for his infractions. The question is by how much. In assessing the suitable level of

sanction in this case, we are guided by the following considerations.

The record does not reflect any mitigating factors, only aggravating factors. First, respondent has been disciplined three times. It is true that he had been disciplined only once (the 2005 reprimand), before the 2007 incident that gave rise to this matter. The reprimand stemmed from his improper acknowledgement of his clients' signature on closing documents. Thus, it cannot be said that he has failed to learn from similar mistakes. Nevertheless, that this is his fourth disciplinary matter and the third involving misdeeds in a real estate transaction shows that he has an inclination for not following the rules and regulations of the profession, particularly the ones governing real estate transactions.

Second, respondent did not amend the HUD form to reflect that the payment had not gone to PTS. His signing the settlement agent's certification stating that the HUD-1 was accurate constituted a misrepresentation.

That being said, what is the appropriate discipline here? Respondent's violation of RPC 1.4(c) and RPC 1.5(b) would ordinarily merit only admonition. Because of the above aggravating factors, however, a seven-member majority determines

that a censure is the appropriate quantum of discipline in this case.

Members Gallipolli and Yamner voted for a three-month suspension.

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 12-187

Argued: September 20, 2012

Decided: October 24, 2012

Disposition: Censure

Members	Disbar	Three-month suspension	Censure	Dismiss	Did not participate
Pashman			X		
Frost			X		
Baugh			X		
Clark			X		
Doremus			X		
Gallipoli		X			
Wissinger			X		
Yamner		X			
Zmirich			X		
Total:		2	7		

Julianne K. DeCore
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Chief Counsel