Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-319

IN THE MATTER OF :
MARTIN A. GENDEL, :
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: October 26, 1995

Decided: February 26, 1996

Richard H. Greenstein appeared on behalf of the District XII Ethics Committee.

Thomas Raimondi 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 discipline filed by the District XII Ethics Committee (DEC). Respondent was charged in a three-count complaint with violations of RPC 1.4 (failure to communicate) and RPC 1.16(d)(failure to refund an advanced payment of an unearned fee) (count one); RPC 1.7(conflict of interest) and RPC 1.15(failure to promptly deliver funds that client is entitled to receive)(count two); and RPC 8.1(b)(failure to respond to request for information from a disciplinary authority)(count three).

Respondent was admitted to the New Jersey bar in 1972. He maintains an office in Paterson, New Jersey. Respondent has no prior ethics history.

The grievance in this matter arose from three separate transactions with the grievant, Cleo Trapp, and her husband.

The Bankruptcy

Grievant Cleo Trapp and her husband owned three pieces of property: one in Passaic (their residence) and two in Paterson. Grievant's mother lived in one of the Paterson properties, while the other property was a rental unit.

Grievant met with respondent in or about June 1991, when she was experiencing severe financial problems. The mortgage payments on at least one property were in arrears and foreclosure proceedings had been filed against grievant by the California Federal Savings and Loan Association. Exhibit R-3. Prior to retaining respondent, another attorney had instituted bankruptcy proceedings in grievant's behalf, apparently in order to stay the foreclosure action against her. It seems that the attorney failed to file a bankruptcy plan, whereupon the petition was dismissed.

Grievant retained respondent to start bankruptcy proceedings again. She paid him $750 to file the petition, but there was no retainer agreement. Initially, respondent advised grievant against filing a petition and counselled her to sell two of her properties. Respondent told grievant that with the proceeds from the sales she would be able to pay the arrearage on her other property and perhaps purchase another house as her residence. Respondent put grievant in contact with a real estate agent, John Susani, who was employed by Urban Real Estate at that time. Respondent and Susani

had known one another for approximately eight years (T116[1]) and had been involved in a number of real estate transactions together.

At some unspecified point, grievant and her husband signed a listing agreement with Susani for two of their properties. Susani claimed that grievant had informed him that, because of her financial problems, she needed to sell her properties quickly. He advised her that, in order to do so, she would have to pay some of the closing costs. Apparently grievant agreed, but she did not understand what the closing costs were. While grievant claimed that she signed an additional agreement for the payment of the extra costs, Susani contended that the agreement was oral. T27, 113.

Subsequently, grievant's financial situation worsened. She repeatedly advised respondent that she was getting deeper in debt. She told respondent that she had to file a bankruptcy petition until her house was sold. After repeated calls from grievant, respondent eventually informed her that he had already filed a bankruptcy petition. According to grievant, respondent told her, "[a]nd when, you know, I get finished with everything that I have to do, I can rescind it, you know . . . . But for now that will keep people away from you." T12.

Unbeknownst to grievant, respondent never filed the petition. Eventually, grievant's car was repossessed. Thereafter, still believing that the petition had been filed, grievant continued to call respondent to get the bankruptcy file number because the bank

---

[1] T denotes the transcript of the September 22, 1994 DEC hearing.

had advised her that her car would be released if she provided it with the file number. T13. Grievant repeatedly called respondent or went to his office. She testified that, at times, respondent would tell her that he was taking care of things; at other times, she was unable to talk to respondent.

Respondent never filed a bankruptcy petition and never refunded grievant's fee. Although respondent acknowledged that he was required to return the retainer to grievant, he claimed that he had been advised by the DEC not to make any refunds during the pendency of the ethics proceedings.

The Closing

As a result of Susani's efforts, a contract of sale was executed on or about August 30, 1991 between the Trapps, as sellers, and Perlina Taylor and Arthur Helton, as buyers, for a property located at 145 North 2nd Street, Paterson, New Jersey. Ms. Taylor had been grievant's tenant in the property and Mr. Helton, her son, was required to co-sign for the mortgage loan.

The contract of sale listed the sale price as $79,900, with an initial $200 deposit. Prior to closing, the buyers were to deposit an additional $2,000. Apparently the buyers did not deposit either amount with the realtor.

Respondent represented both buyers and sellers at the closing. Respondent claimed that the parties had consented to the dual representation, although he had not obtained a written waiver from them. Grievant, however, testified that respondent failed to

discuss the dual representation with her. Grievant did not realize, at the time of the closing, that it was improper for respondent to represent both parties to the transaction without obtaining a waiver.

Prior to the closing, grievant repeatedly attempted to obtain the "closing figures" from respondent. She did not want to sell the property if she would be unable to save her other properties by utilizing the proceeds from the sale. Grievant felt that she was better off keeping the property and living in it because it was less expensive to maintain than her other properties. Respondent claimed that he was unable to provide grievant with the closing figures because he had not yet received them from the mortgage company. Apparently grievant had tried to obtain the closing figures as late as one hour before the scheduled closing. Grievant testified that, at that time, Susani had told her, "if you back down now this is going to blow up in our faces." She was "upset and confused and didn't know what to do." She, therefore, went to the closing and was "very sorry" that she did. T25.

Grievant believed that she would realize $18,038.27 from the sale of the property, as indicated on the HUD-1 settlement statement (RESPA) at line 603 (cash to seller). Exhibit C-1. However, she only received approximately $12,000 after the buyers' "closing costs" were deducted. Grievant did not understand what the "buyers' closing costs" were. All settlement charges, which were to be paid at closing by the buyers, were actually deducted from the sellers' funds. Grievant had never been told in advance

that the buyers did not have the money available for the closing. T54. According to grievant, it was only after the closing and after the buyers had left the closing that respondent informed her that the closing costs had been deducted from her funds. T57. Grievant then told respondent that she did not want to go through with the deal. Respondent advised her that it was too late; all of the closing documents had already been signed. T58.

Respondent claimed that it was only after he received the mortgage commitment — but before the closing — that he learned that the buyers did not have the $5,600 balance to be paid at closing. T169. At that point, he learned that the sellers were going to "pick up" all of the buyers' closing costs and that "obviously" the amount would have to be subtracted at the closing. T170. Respondent claimed that he did not memorialize the agreement because he did not "make the arrangements;" Susani had negotiated the arrangement and grievant had indicated to respondent that "that was the situation . . . ." T171. In short, respondent claimed that grievant had agreed to pay the buyers' costs.

Respondent testified that he gave grievant the figures for the closing costs, although he did not break them down. T174. From his testimony it is not clear when he did so: before or at the closing, or before or after all the closing papers were signed.

Respondent did not believe that his representation of both sellers and buyers gave rise to a conflict of interest situation. He testified that he had disclosed the dual representation with all parties prior to the closing and had obtained their approval. He

claimed that "[i]t's done all the time." He added that, in the future, he will obtain the parties' consent in writing, as opposed to "taking someone's word." T199.

Respondent did not believe that his actions were improper. He claimed that he had looked at the "whole picture," that is, grievant's financial trouble, and that he believed that there was a chance that she would lose her house in Passaic and possibly the property in Paterson through foreclosure. T170. He, therefore, felt that he could expedite the sale by representing both parties. T183.

Respondent admitted that, as the buyers' attorney, it was his responsibility to determine whether the buyers had sufficient funds to proceed with the sale. T198. He claimed, however, that he had relied on Ms. Taylor's representation that her son had the funds for the closing. Respondent was apparently not familiar with the buyers' financial condition. He, nevertheless, prepared the RESPA statement indicating that the buyers would bring $5,600.98 to the closing. In fact, these sums were deducted from the sellers' funds, a circumstance that respondent did not disclose to the mortgage company. T185. Notwithstanding that the RESPA statement contained false information, respondent signed the acknowledgement attesting that the RESPA gave an accurate accounting of the funds to be disbursed at closing. T185-186. Respondent signed the RESPA despite the warning on the form that "it is a crime to knowingly make false statements."

Respondent admitted that, if he had revealed to the mortgage

company that the buyers had insufficient funds to close, there would not have been a transaction and grievant would have lost her house.[2] Respondent further admitted that it was improper not to disclose to the mortgage company the true origin of the funds. T195-196.

In connection with the transaction, respondent had held certain monies in escrow to pay off a $3,500 mortgage held by the Commonwealth Mortgage Company (line 514), which mortgage had not been canceled. Respondent had also escrowed $1,200 for a water bill (line 519). Exhibit C-1. Grievant testified that, although the closing occurred in March 1992, she did not receive her refund from the water escrow until after she filed her grievance with the DEC. T206.

With regard to the Commonwealth Mortgage Company escrow, the funds were set aside at closing because, although grievant had paid off the mortgage, it had never been canceled of record. Therefore, it appeared as a lien in the title search of the property. At some point, Commonwealth had gone into receivership and the lien had to be traced by either respondent, grievant or both to the Resolution Trust Corporation (RTC). According to respondent, he prepared and

---

[2] One point that was not explored at the hearing was the fact that the buyers obtained a mortgage from Mercury, Inc., in the amount of $80,652, to purchase the property from the Trapps for $79,900. The buyers apparently financed the premium for PMI (private mortgage insurance — also referred to in the record and in the RESPA as "MIP") in the amount of $2,952.60, as well as, one-hundred percent of the purchase price less the $2,000 deposit. There is nothing in the record to ascertain whether this was improper or whether there were misstatements made in the mortgage application similar to those contained in the RESPA statement.

attempted to file a complaint and order to show cause against Commonwealth, in the summer of 1992, to cancel the mortgage. However, when the court learned that Commonwealth had been taken over by the RTC, it refused to assign a return date on the order to show cause because the relief sought by respondent was inappropriate. Thereafter, respondent apparently made a few telephone calls, drafted a couple of letters and obtained a quitclaim release, on or about December 30, 1992, to cancel the mortgage. Exhibit R-8. Respondent did not, however, return the balance of the escrow to grievant at that time. It was not until March 28, 1994, more than one year after the lien was discharged, that respondent finally prepared a bill for his legal fees for these services. He then withdrew his fee ($1,595) from the escrow funds without first obtaining the Trapps' consent. He forwarded the $1,905 balance to the Trapps on April 27, 1994, sixteen months after the discharge of the lien. Exhibit R-1.

Respondent explained that he delayed returning the balance of the escrow because, after the discharge of the mortgage, grievant had become dissatisfied with his services. He claimed: "quite frankly, I wasn't sure what to do. And then it just sat and sat and then I got the ethics complaint." The formal ethics complaint was filed on March 9, 1994. Thereafter, respondent claimed that Mr. Trella, the Secretary of the DEC, suggested that he should get the money out of [his] trust account where it had been sitting." T164.

The Second Mortgage

This transaction was not fully developed at the DEC hearing. It appears that, at some unspecified point in 1990, Mrs. Trapp applied for a second mortgage on one of her properties with Trinity Mortgage Company (Trinity). She and her husband realized that the rate was too high and, therefore, under a three-day rescission clause, chose to cancel the mortgage transaction. Trinity apparently provided grievant with the note and mortgage stamped "canceled". Two years later, however, grievant discovered that someone had cashed the check made out to her and her husband and that Trinity still had a lien on her property.

In July 1992, grievant met with respondent about this matter. Grievant believed that respondent would sue Trinity in her behalf and that he would contact the prosecutor's office to institute criminal proceedings against the malfeasor. Respondent requested a $2,500 retainer, but accepted $1,000 to start the action. He agreed to bill grievant for the balance, at the rate of $150 per hour. T145. There was no retainer agreement. Respondent, however, gave grievant a receipt indicating that there was a balance due of $1,500.

According to grievant, respondent failed to take any action in the matter, other than to send a letter to the mortgage company. Grievant believed that the letter was sent to the wrong address and she was, therefore, uncertain that it had been received by the mortgage company. Grievant claimed that she continued to "hound" respondent regarding the matter. Respondent assured grievant that,

if he did not hear from the company within a specific time period, he would institute legal proceedings. However, he kept extending the time when be planned to sue the company, and informed grievant that he could not just "jump up and sue them." T16. Apparently, at some point Trinity either went out of business or was taken over by Providence Saving Bank.

Grievant continued to call respondent about the matter. At times, respondent would not reply to her inquiries; at other times, he would "give her the run-around." Eventually, grievant contacted both the Passaic and Middlesex County Prosecutor's Offices.

Respondent never filed an action in grievant's behalf. He claimed that he made telephone calls and wrote a couple of letters to Trinity, to no avail. Respondent was finally advised that Trinity did not have any papers in the matter and that everything had been forwarded to Providence Savings Bank. T145. Thereafter, respondent started communicating with Providence Savings Bank. Respondent claimed as follows:

> Then I got calls from attorneys in New Jersey who represent the bank, and we went back and forth a couple [sic] times on that. I do have some letters. I believe they were attached to my answer which was submitted. And it got to the point where they were supposed to retrieve the file and get it back to me, you know, copies to me so then I could put it in a suit. And during the course of our relationship, obviously, Mrs. Trapp was dissatisfied with my work and obviously I didn't proceed.
> [T146]

Respondent testified that he stopped working on the matter once an ethics grievance was filed against him. T178. Respondent kept the retainer in the matter and forwarded an itemized bill to

the Trapps in the amount of $587.50. The bill to the Trapps, dated March 28, 1994, showed November 3, 1992 as the last date he provided services in the matter: "Correspondence to Providence Savings Bank". Exhibit R-4.

Respondent admitted that he owed the Trapps the balance of the retainer in the amount of $412.50. He claimed, however, that the DEC secretary advised him "not to do anything" because of the pending ethics proceedings. T148.

Failure to Cooperate with Disciplinary Authorities

The formal complaint charged respondent with failure to reply to two inquiries from the DEC investigator for "further" information crucial to the investigation, in violation of RPC 8.1(b): respondent had belatedly replied to the grievance by letter dated April 10, 1993 to the DEC secretary. Thereafter, the matter was assigned to an investigator. That investigator testified at the DEC hearing that, by letter dated July 27, 1993, he sent respondent a copy of the complaint and also requested certain specific information from him. When respondent failed to reply, the investigator sent him a second letter, dated October 8, 1993, informing him that, if the information was not received within two weeks, the investigative report would be prepared without it. Exhibit C-2. Respondent did not reply. He did, however, file an answer to the formal complaint, which included some of the information that had been requested by the investigator.

* * *

The DEC found that, although grievant paid respondent $750 to file a bankruptcy petition in her behalf, respondent failed to do so. The DEC noted that, although respondent did give grievant some advice, her car was repossessed and could not be reclaimed because respondent had not filed the petition.

The DEC also found that respondent accepted a $1,000 fee in the Trinity matter without a proper written retainer. The DEC found that respondent was "less than cooperative with the grievant's request for [the status of her claim]". The DEC concluded that, while respondent did some work in the matter, he never submitted a bill for those services until several years after work on the file was completed. The DEC also found that respondent failed to reply to the investigator's inquiries. The DEC, therefore, found violations of RPC 1.4, RPC 1.16(d) and RPC 8.1(b).

Finally, the DEC found that respondent's dual representation of buyer and seller, without first obtaining a written waiver, as well as his failure to withdraw as counsel once it became apparent that there was a conflict of interest, violated RPC 1.7. The DEC also found that respondent's failure to promptly release the escrow funds in connection with the sale of property was a violation of RPC 1.15.

* * *

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 DEC properly found violations of RPC 1.4, RPC 1.7, RPC 1.15, and RPC 1.16(d). Respondent was not charged with a violation of RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation). There is, however, sufficient evidence that respondent misled grievant to believe that a bankruptcy petition had been filed in her behalf and also that he made false and misleading representations in the RESPA statement. Accordingly, the complaint is deemed amended to conform to the proofs. See In re Logan, 70 N.J. 222 (1976).

Respondent's violations in this matter were serious. Among them, respondent engaged in the dual representation of buyer and seller without observing the safeguards of RPC 1.7. Notwithstanding respondent's claim that he received the verbal consent of both parties to the dual representation, grievant's claim that she did not consent appears genuine. She testified that she was not aware that the dual representation was improper until she realized, while waiting in respondent's office, that there were two attorneys involved in another closing that respondent was also handling. Grievant's testimony that she did not consent to the representation is, therefore, believable. Moreover, once it became

apparent that the buyers had insufficient funds to close, the conflict between the clients became insurmountable. Even assuming that respondent had properly obtained consent to the dual representation, at that point he was required to terminate representation of both clients since he could not fulfill his duty to represent either client with undivided loyalty. Nevertheless, respondent pressed on with the closing, possibly to the detriment of both clients: one who could ill afford to purchase the property and the other, grievant, who failed to receive the full amount she anticipated. Moreover, grievant ended up paying unexpected costs, including both closing fees to respondent.

Respondent was not charged with a violation of RPC 1.5(a) (duty to charge a reasonable fee) or RPC 1.5(b) (preparing a written retainer agreement). Respondent did not provide grievant with a retainer agreement in either the bankruptcy matter or the Trinity matter. Though not explored in the record, his failure to prepare a retainer agreement became even more significant in the real estate transaction, where grievant paid dual fees. During the course of this transaction, grievant paid respondent an additional fee to discharge the Commonwealth Mortgage. The record is silent as to whether she agreed to pay this fee or whether she even realized that there would be an additional amount charged to clear title to the property. Very disturbing is the fact that respondent charged grievant for the preparation of an unnecessary complaint and order to show cause. While the above violations may be deemed technical, they put into question respondent's motivations in his

representation of grievant.

While the complaint is silent in this regard, respondent's conduct during the course of his representation of grievant supports a finding of a violation of RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence). Here, too, the complaint is deemed amended to conform to the evidence.

Finally, respondent's failure to cooperate with the DEC investigator reflects his disregard for his ethics obligations.

* * *

Generally, in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to clients, a reprimand constitutes appropriate discipline. See In re Berkowitz, 136 N.J. 134(1994).

Although respondent claimed that he was trying to help his client by ensuring that the real estate transaction was consummated, his true motives are questionable. After all, respondent earned a dual fee at the expense of grievant. Similarly, his longtime acquaintance in real estate matters, John Susani, earned a commission after the deal went through. While respondent's conduct may not be akin to the line of cases dealing with conflict of interest violations that have caused serious economic injury to clients, his ethics infractions were, nevertheless, serious. Respondent's conduct was exacerbated by his

failure to perform services for which he was retained, failure to turn over escrow funds, failure to return unearned fees, failure to keep his client informed about the status of her matters and misrepresentations both to his client and in the RESPA statement. See In re Dato, 130 N.J. 400(1992)(one-year suspension where attorney purchased client's property at below fair market price); In re Gallop, 85 N.J. 317(1981) (six-month suspension where attorney took deed to housekeeper's real property to her disadvantage); In re Hurd, 69 N.J. 316 (1976) (three-month suspension where attorney counseled client to transfer titled to real property to attorney's sister for twenty percent of property's value).

Based on the foregoing, the Board unanimously determined that a three-month suspension is sufficient discipline for respondent's infractions. Two members did not participate and one member recused himself.

The Board further directed respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 2/26/96

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board