SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-256

LYNCH

IN THE MATTER OF :
JAMES E. LYNCH, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 16, 1992

Decided: December 3, 1992

Thomas J. Pryor appeared on behalf of the District VII Ethics Committee.

Philip J. Moran 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 VII Ethics Committee (DEC).

Respondent was admitted to the practice of law in New Jersey in 1987 and has been in private practice in Lawrenceville, Mercer County. He has been a member of the Pennsylvania bar since 1978. Respondent has no history of prior discipline.

The facts of this matter are as follows:

Shortly before January 27, 1989, Francesco Ramirez asked respondent to handle a real estate transaction in his behalf. Ramirez and his girlfriend, Zulma Cardona, who apparently were

separated by that time,[1] were the owners of property, identified as 27 Chase Street, which was to be sold to Ramirez' mother, Maria Diaz, and her boyfriend, Martin Carreras.[2] The testimony in the record conflicts as to whom respondent was representing in the transaction, whom the parties believed he was representing and whether notice was given to the parties regarding the conflict of interest.

It appears from the record that, although the parties agreed to the $7,000 sale price of the property, a controversy arose as to was responsible for the payment of taxes on the property[3] (See discussion, infra.) The closing of title took place on January 27, 1989. Neither Cardona, nor Casale, attended the closing, having not received notice of it. There was a great deal of conflict in the testimony as to whether respondent knew Cardona was represented by counsel and there was further conflict regarding who had been responsible for giving Cardona notice of the closing. Respondent indicated that he proceeded with the closing because it was "a family agreement" and he saw no reason to inconvenience everyone by having them return for a second time. The closing proceeded without Cardona's presence, at which time Diaz gave respondent $7,000 in cash, the price of the property, and $250 toward his fee.

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[1] Respondent stated that he did not know of the separation until Ramirez contacted him about representing him in a domestic dispute.

[2] Respondent had previously represented Ramirez and Carreras in other matters and had represented Carreras and Diaz in prior real estate transactions.

[3] It was the understanding of both Cardona and her attorney Charles Casale, Esq., that the buyers, Diaz and Carreras, would pay the taxes on the property and that, accordingly, Cardona's share of the proceeds was the full $3,500.

Respondent then disbursed $2,521.24 to Ramirez.[4] Respondent used the remaining proceeds of the sale to pay property taxes in the amount of $1,600 and held the balance for Cardona.[5] The parties who had been present at the closing apparently believed that respondent would contact Cardona and complete the transaction.

According to respondent, the remainder of the proceeds had first been kept in his desk and, later, had been transferred to his house, while some work was being undertaken in his office (T238). In his answer, respondent admitted that the money he was holding for Cardona should have been placed in his trust account, but contended that it had been held safely. It was his belief that Cardona would be appearing at his office either on the day of closing or shortly thereafter; when she did not, "it just got away" from him (T219). Respondent explained that he had not deposited the money into his trust account because he had told "people" that he was holding the cash and he believed it would look deceptive if he had placed it in his trust account (T238). Respondent conceded that he should not have disbursed any funds to Ramirez (T222).

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[4] Ramirez stated that he received less than $2,000 from the proceeds, contrary to respondent's testimony that he had disbursed $2,521.24 to Ramirez. However, Ramirez further testified that he owed respondent approximately $500 for representation in an earlier matter and that that sum had been deducted from the amount due him at the closing (T112-113, 117, 123) (Exhibit C-2). T refers to the transcript of the hearing before the DEC on March 18, 1991.

[5] Ramirez and Cardona are also the owners of property located at 23 Chase Street. According to respondent's records, on or about October 19, 1989, nine months after the closing that is the subject matter of this proceeding and four months after the June 1989 custody/support hearing discussed infra, he paid the City of Trenton $1,608.70 on an outstanding tax obligation on 23 Chase Street, believing he was paying outstanding taxes on the 27 Chase Street property. In his answer, respondent claimed that he had paid the taxes for the correct property, but that city officials credited the sum to the wrong property, since Ramirez and Cardona owned both pieces of real estate.

During the pendency of the real estate transaction, Cardona and Ramirez became involved in a custody/support dispute. Respondent represented Ramirez in that matter.

A hearing was held thereon on June 8, 1989, after the closing had already taken place, but before respondent had paid the $1,600 taxes on the property. Cardona and Casale were obviously unaware that the closing had already taken place and on that date believed they had reached an agreement on the real estate matter. Respondent did not make any attempt to correct their misapprehension -- and the court's -- that the closing was still pending. He also made no attempt to obtain Cardona's signature on the deed or to correct Casale's and Cardona's misunderstanding about the buyer's responsibility for the payment of the outstanding taxes. At the DEC hearing, Casale explained his understanding of the real estate transaction:

> Q. To the extent that the agreement that [respondent] had worked on, or the assumption he had worked on, on behalf of Mr. Ramirez, which was for seven thousand dollars gross, would you agree that the amount of money you would receive under the court order was in excess of Ms. Cardona's half share?
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> A. What do you mean that she would have received -- she would only receive half of seven thousand.
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> Q. That's right, but at the time of the closing, there was an assumption that taxes were being paid out of the gross fee received, correct?
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> A. No, no. [Respondent] has told me, absolutely, that he feels he was deceived because he was told that his client told him that the mother [Diaz] would pay the taxes. That apparently is what he is saying on the basis of which he made this agreement with me, that he believed. So there's no question that all four of us

> that day believed that the sales price was seven thousand dollars plus the accrued taxes, plus the accrued taxes. [T36-37]

Cardona, too, testified that an agreement reached at the family court hearing provided for her receipt of one-half of the $7,000 sales price (T83). At the DEC hearing, Cardona expressed her understanding of the responsibility for the payment of the taxes on the property:

> Q. Did anybody say to you Zulma, you're going to get thirty-five hundred dollars but first we have to take out whatever is owed for half of the taxes?
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> A. No, no, no, that's why we sold it so cheap. It was what, what's seven thousand dollars. It was like, we were just going to divide it half and half. [T69]

Casale prepared an order based upon the agreement reached at the hearing in the custody matter. Exhibit C-10. Although the proposed order was sent to respondent, he made no objections to it and, further, failed to explain that the transaction had already been completed (T13, 15).[6] The order, which was, in fact, the proposed order prepared by Casale, was signed on February 26, 1990 by the Honorable Philip S. Carchman, J.S.C.. It directed that Cardona was to receive $3,500 from the real estate transaction. The order also provided that the real estate transaction was to take place within ninety days.

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[6] In fact, Casale prepared and sent a deed to respondent on June 12, 1989 with a cover letter referring to the $3,500 due Cardona. Respondent still remained silent about the fact that the closing had already taken place.

Casale testified before the DEC as to his difficulties in communicating with respondent[7] and, significantly, as to his belief that he had been deceived by respondent's lack of disclosure, at the family court hearing, that the closing had already occurred:

> Well, you know, I don't know at what point that withholding information becomes a deception, and that's what bothers me here. It bothers me as I went there on the 8th of June and I thought I was talking about a course of events that was going to happen in the future, and I find out a year later that it happened six months before I was in court. I think I was entitled to know that number one the mother was, in fact, going to buy, I think I was entitled to know that this money had actually changed hands because then I would have expected performance alot [sic] sooner. My mental set was that this was a sale that's going to occur in the future, make a contract, get researches made, that's the mental set that I left the courthouse with, and I think I was deceived, frankly, as I've told [respondent].
> [T35-36]

Clearly, the amount owed to Cardona, under the terms of the order signed by Judge Carchman, was more than what respondent still held of the $7,000 ($2,271.36).[8] In addition, insufficient funds remained to pay the outstanding tax obligation on the property which was, as of January 27, 1989, $1,357.52.[9]

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[7] The parties to the transaction also testified about their difficulties in reaching with respondent.

[8] In his answer, respondent explained the disbursement of the funds as follows: "The proceeds of the attempted closing left proceeds of $5,042.48 after the payment of $1,357.52 and $249.88 in taxes totalling $1,607.40 [sic] and $100.00 in settlement charges and a pay-off figure of $500. The remaining balance of $2,271.36 are proceeds that are being held for Ms. Cardona, and adjustment of $249.88 to have been made in order to bring Ms. Cardona and Mr. Ramirez to and [sic] equal amount." (Answer, paragraph 10).

[9] As of July 11, 1990, the amount due was over $1,756.

Diaz and Carreras' new attorney, Martin Kline, testified before the DEC.[10] Kline sent a letter to respondent dated December 14, 1989, advising him of the representation and requesting a copy of the deed to the property. Respondent telephoned Kline on January 3, 1990, explaining what had transpired at the closing. Respondent advised Kline that all parties to the transaction, except Cardona, were present; that $7,000 was turned over by Diaz; that Ramirez was given his share of the proceeds, and that, subsequent to the closing, the domestic action had taken place. Respondent further informed Kline that the domestic action was close to being resolved and that Cardona should be signing the deed that month.

Subsequently, Carreras and Diaz sent respondent a letter dated March 15, 1990, requesting that the file be turned over to Kline. On April 16, 1990, Kline sent another letter to respondent, referring to the March letter and, again, requesting the file. A letter dated April 19, 1990 was allegedly sent to Kline by respondent, along with relevant documents. Kline testified that he never received that letter (T47). A meeting took place between Kline and respondent on September 5, 1990, at which time Kline asked that the liens on the property be removed and that a fully executed deed be provided to the sellers. Respondent did give some documents to Kline, but the latter did not feel that they constituted the entire file. Kline was aware that the taxes for

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[10] Kline testified that a civil action arising from the real estate transaction is currently pending.

several years were still owed and it was his understanding that, after the meeting, respondent would order tax searches on the property. On October 5, 1990, Kline wrote to respondent, noting that the taxes were still outstanding and restating his understanding that the sellers, Ramirez and Cardona, would be responsible for the payment of the taxes.

On or about May 17, 1990, Cardona signed a deed transferring her interest in the property to Ramirez for $3,500. Casale sent a copy of the deed to respondent on June 12, 1990. As of March 18, 1991, the date of the DEC hearing, respondent had not disbursed $3,500 to Cardona (Proposed Stipulated Facts, Exhibit C-19). Further, as of that date, respondent had not secured a fully executed deed from the sellers of the property.

* * *

The DEC found that respondent's representation of Ramirez, without disclosure to Diaz and Carreras, violated RPC 1.7 (conflict of interest). The DEC further determined that respondent violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate). The DEC also concluded that respondent's failure to place the money entrusted to him by Diaz and Carreras into his trust account violated RPC 1.15 and R.1:21-6(a)(1).[11]

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[11] Although the DEC made reference to respondent's failure to convey his entire file to Kline, after Diaz and Carreras' request that he do so, no specific finding was made in this regard.

The DEC recommended that respondent be suspended, be required to retake the Skills and Methods course and be subject to a mandatory audit of his trust and business accounts, prior to reinstatement.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence.

As to the conflict of interest, respondent testified that he was representing only the buyers, Diaz and Carreras. However, at the very least, the seller, Ramirez, believed respondent was representing him. Ramirez' belief was reasonable, particularly in light of the fact that respondent had previously represented him and Ramirez had initially contacted respondent regarding the transaction. If, in fact, it was respondent's intention to represent the buyers only, then he did not make that clear to the parties. Ramirez, Diaz and Carreras each testified that they believed that respondent was representing all three of them.

Opinion 100 of the Advisory Committee on Professional Ethics, 89 N.J.L.J. 696 (October 27, 1966), provides that the dual representation of buyer and seller is possible if express consent is given by all parties after full disclosure. Ramirez and the buyers testified that respondent had not explained the conflict of interest situation to them. Although respondent testified that he

informed Ramirez that he could consult with another attorney (T288), even assuming that respondent so advised Ramirez -- an assumption not supported by the other parties' testimony -- the fact remains that the consent of all three was never obtained. Accordingly, respondent violated RPC 1.7. Without more, this misconduct would ordinarily merit, at most, a public reprimand. See, e.g., In re Lanza, 65 N.J. 347 (1974) (where the attorney represented the buyer and seller of real estate, without having first advised them of the facts and areas of potential conflict; in addition, he failed to withdraw from the representation when a conflict arose between the parties. Lanza was publicly reprimanded).

As to respondent's handling of the proceeds of the sale, respondent admitted that the closing proceeds should have been placed in his trust account, rather than in his desk drawer. There is no information in the record, other than respondent's testimony, as to what happened to the balance of the cash after the disbursement to Ramirez on January 27, 1989. Respondent testified merely that it was held safely.[12] Accordingly, the Board finds that respondent violated RPC 1.15(a) and R.1:21-6(a)(1), in that he failed to safeguard client property.

Respondent also acted improperly when he held the closing without Cardona and disbursed funds to Ramirez without obtaining Cardona's signature on the deed. Even if respondent's testimony

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[12] While questions on this issue may exist, there is no evidence supporting a finding of misuse of those funds.

that he thought that Ramirez had notified Cardona of the closing is accepted, it is difficult to understand why he proceeded with the closing in Cardona's absence. The Board has determined that respondent's actions violated RPC 1.3 (lack of diligence), RPC 1.1(a) (gross negligence) and RPC 1.16 (failure to turn over the file to Kline when originally asked to do so by Diaz and Carreras),[13] and RPC 1.4(a) (failure to communicate with his clients).

Respondent's most serious impropriety occurred when he failed to disclose to Cardona and/or Casale and to Judge Carchman that the closing had already taken place. By failing to reveal what had occurred and allowing Cardona and Casale to proceed on mistaken assumptions, respondent violated RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336 (1984). More egregiously, by failing to advise Judge Carchman that the closing had already occurred, respondent violated RPC 8.4(c) and (d).[14]

The Court views misrepresentation to a court as extremely serious misconduct. "Even absent criminal intent, when an attorney perpetrates a fraud upon the court, that conduct poisons the stream of justice and can warrant disbarment." In re Yacavino, 100 N.J.

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[13] The DEC made this factual finding, but included it under the violation of RPC 1.1(a).

[14] As of the DEC hearing in March 1991, Cardona had still not received the $3,500.

50, 54 (1985),[15] citing In re Stein, 1 N.J. 228, 237-38 (1949). In In re Johnson, 102 N.J. 504 (1986), the Court stated that "[l]ying to a judge- no matter how white the lie- can never be lightly passed off. The destructive potential of such conduct to the justice system warrants stern sanction." Id. at 511.[16] See In re Mazeau, 122 N.J. 244 (1991) (public reprimand for knowingly making a false statement of material fact to a trial judge and failing to disclose to a trial court a material fact, knowing that the court might be misled by his failure). See also In re Whitmore, 117 N.J. 472 (1990).

The record does not clearly reveal why respondent failed to inform Cardona of the closing. It appears that, by the time of the custody/support hearing, he had placed himself in a situation from which he could not extricate himself and that his subsequent failure to inform Casale and the court that the closing had already taken place was designed to camouflage his earlier misconduct.

Regardless of his motivation, respondent's misconduct was serious. Accordingly, the Board unanimously recommends that respondent be suspended for a period of three months. The Board further recommends that respondent be required to complete the core courses of the Skills and Methods program offered by the Institute for Continuing Legal Education, within six months following his

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[15] Yacavino prepared two false orders for adoption and repeatedly misrepresented to status of the adoption proceeding to his clients. He was suspended for three years.

[16] Johnson misrepresented to the trial court that an associate was ill for the purpose of securing an adjournment. He received a three-month suspension.

reinstatement. In addition, it is recommended that respondent's trust and business accounts be audited by the Office of Attorney Ethics, prior to his reinstatement. Three members did not participate.

The Board further recommends that respondent be made to reimburse the Ethics Financial Committee for administrative costs.

Dated: 12/3/1992 By: [signature]
Raymond R. Trombadore
Chair
Disciplinary Review Board