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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-006

IN THE MATTER OF :
GERALD LEVY :
AN ATTORNEY AT LAW :

Decision

Argued: March 20, 1996

Decided: November 18, 1996

Charles E. Reuther appeared on behalf of the District X Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter was before the Board based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.2(a) (failure to abide by client's decisions); RPC 1.3 (failure to act diligently); RPC 1.4 (failure to promptly comply with reasonable requests for information); RPC 1.7(b) (conflict of interest); RPC 1.8(a) (entering into prohibited business transactions with client); RPC 8.1(b) (failure to cooperate with a disciplinary investigation); RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 1.15(b) (failure to promptly deliver client funds). At the DEC hearing, the presenter withdrew partial charges of violations of RPC 8.1(b) and RPC 1.15(b). Essentially, these charges were narrowed in time.

Respondent was admitted to the New Jersey bar in 1965. He has no prior disciplinary history.

Respondent did not testify at the DEC hearing, claiming a Fifth Amendment privilege.

In or about 1985, respondent was retained by Karin Olsen ("Olsen"), the grievant in this matter, to represent her in the sale of her business: a restaurant, hotel and bar. Respondent had represented Olsen and her husband in many transactions, beginning in 1972, when he helped them form a corporation ("BOS") for the purchase and operation of the business. Following Mr. Olsen's death in 1978, Olsen consulted respondent on many occasions for assistance in various personal and business matters. She described her relationship with respondent as a very long and trusting one. Olsen struggled both before and after her husband's death to keep the business afloat. There came a time, however, when that was no longer feasible. She, therefore, decided to sell the business and retained respondent to represent her in that transaction.

The closing on the business occurred in August 1985. The net closing proceeds amounted to approximately $110,000. The buyer's attorney held in escrow approximately $1,000 in order to cover any outstanding taxes owed on the business. Respondent and Olsen agreed that respondent should hold the closing proceeds in his trust account until issues on certain business expenses were resolved.

From time to time following the closing, between 1985 and 1988, Olsen instructed respondent to pay certain expenses from the sale proceeds. The total disbursements amounted to approximately $50,000, leaving a balance of $50,000 to $60,000. Respondent routinely complied with Olsen's disbursement requests, with one exception. For some unexplained reason, respondent repeatedly did not pay heed to Olsen's instructions to pay Gordon Vreeland for accounting services related to the sale of the business. Eventually, respondent's refusal to abide by Olsen's instructions in this regard prompted her to visit respondent's office on March 29, 1989.

Prior to their March 29, 1989 meeting, however, sometime in 1988, Olsen wrote to respondent asking him to seek the release of the $1,000 funds held in escrow by the buyers' attorney since 1985 so that she could pay Vreeland's bill. She also directed respondent to give Kramer Financial Associates ("Kramer"), a private mortgage lender, $50,000 in sale proceeds to invest in what she believed would be secured short-term mortgages and to invest the remaining proceeds in "interest earning something that will give me income every month ASAP . . . " (Exhibit C-1). Subsequently, however, respondent persuaded Olsen to delay the Kramer investment until she was able to complete a refinancing of the mortgage on her residence. Thereafter, in or about April 1988, respondent telephoned Olsen and asked to borrow $7,000 from the escrowed sale proceeds. Olsen orally authorized that loan. According to Olsen, respondent did not advise her to consult with

independent counsel and did not explain to her the terms of the transaction. The only writing about the transaction consisted of a promissory note from respondent, dated April 13, 1988 (Exhibit C-2). Although the note did provide for the payment of interest, the loan was completely unsecured. Respondent ultimately paid that loan, albeit one and one-half years late. Aside from a copy of the note itself, respondent produced no documents at the DEC hearing, such as a canceled trust account check or a monthly statement, indicating when he actually took the loan.

By the end of 1988, Olsen was still receiving bills from Vreeland. She again telephoned respondent to insist that he pay the bill and to ask him for an accounting of her funds. Respondent promised her that he would attend to Vreeland's bill. At some point after that telephone conversation, however, Olsen again received a bill from Vreeland, which prompted her aforementioned visit to respondent's office in March 1989.

It is not clear what exactly transpired at that meeting. It appears, however, that on that day Olsen signed a document authorizing respondent to invest the closing proceeds, at his discretion. Exhibit C-6 is such document, dated March 29, 1989. Olsen was not altogether certain, however, whether she had signed the document on March 29, 1989 or July 26, 1989. The significance of the latter date is explained below.

That document read as follows:

> The undersigned hereby authorizes GERALD LEVY to invest on my behalf in his absolute discretion such funds as I tender to him. I understand that you will attempt to invest or otherwise utilize this money, for various

purposes, and will tender to me at regular intervals principal and/or interest on these funds. The sum of $49,000.00 is tendered herewith.

[Exhibit C-6]

Olsen testified that, during their meeting, she again asked respondent to give her an accounting of her funds. In response to her request, respondent forwarded her a rough handwritten accounting (Exhibit C-3) containing no dates or check numbers. Olsen testified that the accounting was accompanied by a copy of the check to Vreeland. A review of that accounting shows an attorney fee to respondent in the amount of $5,600, apparently for respondent's services in connection with the sale of the business and the purchase of a house in 1986. Although respondent did not give Olsen an itemized bill and did not obtain her consent before the removal of the fees from the sale proceeds, she had no objection to either the amount of the fee or the unauthorized withdrawal from the funds entrusted to respondent.

Respondent's accounting also showed a disbursement for a "loan" in the amount of $14,000, with the notation, "11% interest only, 3 years – 30 years payout balloon." The accounting did not identify the recipient of that loan and Olsen had no knowledge about the meaning of the reference. As noted earlier, the accounting showed no dates for these transactions. Finally, the accounting showed a disbursement to Kramer in the amount of $35,000. Next to that item was the notation, "10% – 11%, 15 yrs." Olsen testified that she did not know the meaning of that entry, of

which she had no knowledge.

In reaction to the accounting, Olsen wrote to respondent on July 17, 1989. That letter read:

> At this point, I am no longer upset, I'm livid!!
> You [sic] asked for and got the copy of your list. You did say a check had come in and Trish didn't know what to do with it. I've been more than patient.
> After discussing this with Eric and Gordon, I now feel I must insist on copies of all contracts regarding these loans/investments. I don't care if you are the one who borrowed the money, I want a contract signed with conditions of payments. I have nothing to prove I ever had the money in the first place. What if something happens to me? I expect a response from you within 10 days (and a check for the interest earned and a check for the balance left).
> I also expect that you will contact Gordon Vreeland and get this BOS finished now. Because of the delay by your office in providing him with necessary papers, finance charges on this account have amounted to over $300.00 again, and I feel that you should pay it.
> If I don't get a decent response this time, I have no choice but to engage another attorney to retrieve my money, and I will do that. I don't want to, Gerry, really, come on. We've been friends for years now, but this is making me very nervous and I'm getting the feeling that there are some irregularities here. Please let me be wrong and take care of this immediately.

[Exhibit C-8]

On July 26, 1989, shortly after Olsen forwarded that letter, respondent visited her at her home. At that time, he presented her with two promissory notes, both signed by him as trustee. It is not known for whom he was acting as trustee. It was then that Olsen learned for the first time that the note in the amount of $14,000 (Exhibit C-4) represented a personal loan to respondent. Olsen testified that respondent never sought her authorization for that loan, much less advised her to consult with independent counsel. The promissory note for that loan was dated six months

earlier, January 1, 1989. Olsen felt that it was useless to object to the loan, since it was an accomplished fact. Aside from a handwritten ledger sheet, apparently prepared by respondent at some unidentified point (Exhibit N), respondent produced no documentary evidence to establish when exactly he took the $14,000 loan from Olsen's trust funds. Therefore, it cannot be determined whether respondent borrowed the trust funds before or after Olsen signed the authorization to invest her funds or the letter advising respondent to invest them in monthly-income producers (Exhibit C-1). Olsen testified, however, that, when she instructed respondent to make sound investments in her behalf, she did not contemplate making personal loans to him. Like the $7,000 loan before it, the $14,000 loan to respondent was completely unsecured. Moreover, according to the accounting, the promissory note called for the payment of only interest for three years, with a balloon payment of the entire principal on January 1, 1992. See also Exhibit C-3.

At that meeting, respondent also gave Olsen another promissory note, in the amount of $35,000, payable to her defunct business (Exhibit C-4). That note, dated July 26, 1989, was signed by respondent as "trustee." For whom it is not known. It is possible that the designation "trustee" meant that respondent was the holder of grievant's trust funds, as opposed to trustee for the obligor on the note. The note bore the words, "interest herein @ 11%, with principal and interest payable monthly in sum of $397.81. This is a three year (3) note payable on a 15 year term basis. Balance of principal with interest to date due and payable August, 1992."

According to Olsen, respondent told her that the note represented funds that he had invested with Kramer in her behalf. Respondent advised her that many people he knew were profiting by their investments with Kramer and that he, too, was considering an investment of his own funds. Olsen had been somewhat familiar with Kramer, as she had previously obtained a "bridge loan" from it years earlier, in 1981, when she was remodeling the business premises. That, however, was the extent of her experience with and knowledge of the company. Respondent offered no other information regarding Kramer's financial stability.[1]

Aside from the $35,000 note, respondent did not give Olsen any other documents to reflect her loan to Kramer, either during their July 1989 meeting or at any point thereafter, despite Olsen's many subsequent requests for such documentation. Similarly, respondent did not explain to Olsen why the loan to Kramer was evidenced by a promissory note to her signed not by a Kramer representative, but by respondent as trustee.

In fact, unbeknownst to Olsen, respondent had entered into a loan transaction with Kramer on different terms, using the same $35,000 of her funds that formed the basis of respondent's note to her. That transaction was evidenced by a note (Exhibit P), as well as a letter to respondent from Kramer dated July 26, 1989, the same date of respondent's meeting with Olsen at her home and the same

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[1] Although the formal ethics complaint alleged that respondent had an ongoing business relationship with Kramer, thereby creating a potential conflict of interest for him, respondent denied any such relationship in his answer and no evidence to the contrary was offered

date appearing on respondent's promissory note to her (Exhibit C-5). The note called for a loan term of up to fifteen years (with an option to declare it due at the end of three years) and for an interest rate of 14%, not 11%, as represented on the promissory note signed by respondent. The note from Kramer further provided that the proceeds would be used to fund loans from Kramer to other borrowers, secured by mortgages on real estate. The note calculated each monthly installment to equal $466.11, to be applied in accordance with an accompanying amortization schedule (Exhibit R-1). That amount, of course, represented the monthly payment of both interest and principal. Respondent was the payee on the note, as "trustee."

Following their July 1989 meeting, in August 1989 Olsen began to receive from respondent monthly interest checks on a somewhat regular, albeit sometimes untimely, basis. (The record suggests that, prior thereto, although respondent had forwarded to Olsen a copy of an interest statement from a bank on one or two occasions, she had received no interest payments or other income on her trust funds since 1985). In any event, the monthly-income checks never came directly from Kramer. They were drawn on respondent's trust account. See Exhibits C-7 and C-9. Olsen believed that the dollar amount of the checks represented interest payments on both the $35,000 loan to Kramer and the $14,000 loan to respondent. Only two such checks were entered into evidence at the DEC hearing. According to Olsen, the dollar amount of the monthly payments remained constant, which she estimated to be in the neighborhood of

over $500 (unless two monthly payments were included in one check). See Exhibit C-7. In fact, one such check (Exhibit C-9) amounted to $534.41. It is unclear how exactly respondent arrived at that particular monthly figure of 534.41. He did not testify at the DEC hearing, invoking a Fifth Amendment right against self-incrimination. That information would reveal whether respondent paid Olsen only 11% on her loan to Kramer, as set forth in respondent's promissory note to her, or whether he gave her the 14% Kramer was actually paying on the loan.

Regardless of the basis of respondent's calculation of monthly payments to Olsen, it is clear that she was never aware of the note from Kramer providing for 14% interest on the principal, as opposed to the 11% rate shown on respondent's note to her. In fact, it was not until Olsen finally retained other counsel to investigate the status of her funds that she became aware of the Kramer note bearing the higher interest rate.

* * *

As earlier indicated, Olsen testified that the monthly checks from respondent were frequently late. On those occasions, she would either telephone respondent or write to him to remind him, in somewhat urgent terms, that she needed this monthly income as a means of support. Olsen not only had the normal day-to-day living expenses for herself, but she also had her adult daughter, who was afflicted with Down's Syndrome, living with her.

Between March 20, 1990 and April 6, 1993, Olsen wrote at least five letters to respondent (Exhibits C-10 through C-14), complaining of various deficiencies on his part. Specifically, on March 20, 1990, she wrote respondent a rather strong letter expressing her disappointment in the "arrangement" they had with her funds. First, Olsen expressed displeasure with the fact that she regularly had to telephone respondent to remind him to forward her monthly interest checks. Second, she demanded that respondent give her some documentation to support the existence of her loan to Kramer as well as her other funds. Third, she asked that respondent make arrangements to repay the $7,000 loan – already overdue – within sixty days, with a complete accounting of interest paid. Olsen also reminded respondent that she was still receiving bills from Vreeland, in spite of respondent's assurances that Vreeland would be paid from the $1,000 escrow the buyer's attorney presumably was holding. Olsen also ended her letter as follows:

> Somehow the events surrounding this situation do not seem completely aboveboard and I am extremely uncomfortable about it . . . . Do you have the faintest idea how upset and disappointed I am? If I died tomorrow, nobody would even know that there's approximately $50,000.00 of my money someplace.

[Exhibit C-10]

Olsen testified that, although respondent repaid the $7,000 loan shortly after the date of that letter, she received no response from him regarding her other requests.

On September 18, 1990, Olsen again wrote to respondent enclosing yet another statement from Vreeland. In that letter, she

informed respondent that she had contacted the buyer's attorney, who had told her that he had released the escrow funds to respondent six to twelve months earlier. Respondent had previously told Olsen that he had not received the escrow funds from the buyer's attorney. In that letter, Olsen also complained that she still had not received an accounting of the interest respondent had paid on the $7,000 loan.

At some point after August 1992, Olsen stopped receiving interest checks from respondent. By this time, the August 1992 payment was late and the $35,000 note was due. Moreover, respondent had not repaid the $14,000 personal loan, which had become due in January 1992. When Olsen telephoned respondent to again hasten disbursement, he told her that Kramer had not forwarded its payment on the $35,000 loan. Respondent promised to follow up with Kramer and to get back to her within a couple of days. After ten days passed without any word from respondent, Olsen again telephoned respondent, who announced to her that Kramer "was in Chapter 11" and that she would no longer receive monthly payments on that loan.

At some unidentified point, respondent explained certain bankruptcy procedures to Olsen. In addition, on or about February 16, 1993, respondent filed in Olsen's behalf a proof of claim with the bankruptcy trustee, in the amount of $32,433.00. On that same date, respondent filed a proof of claim in his and his wife's names in an amount ($32,394) very close to the amount claimed in Olsen's behalf. Both proofs of claim indicated that the loans were

unsecured. It appears that respondent filed Olsen's proof of claim only after she again wrote him a rather strong letter on January 13, 1993, demanding a status report on Kramer's bankruptcy and some documentation for her claim against Kramer. In that letter, Olsen wondered whether the reason why she had not received any such documentation thus far was that respondent had "represented [her money] as part of [his] investment" (Exhibit C-13). Olsen further complained that respondent had previously informed her that the principals of Kramer had personally guaranteed repayment of her loan and that her mortgage payments were in arrears, despite the fact that she was holding three jobs. Finally, Olsen noted that the $14,000 note was one year overdue and that she wanted respondent to honor it immediately. Respondent did not reply to this letter.

Olsen next wrote to respondent on April 6, 1993. That letter was somewhat more conciliatory in tone. Olsen asked respondent to settle the $14,000 loan by June 1, adding," I know you have had some setbacks, however [illegible] . . . and a loan that really I didn't know you had until after you gave me the promissory notes" (Exhibit C-14). Olsen also expressed concern that she had not seen any documentation on Kramer's bankruptcy showing her as a creditor. Rather, she had only seen respondent and his wife listed as such.

Olsen's last contact with respondent was sometime after June 23, 1993, after she became unemployed and visited respondent's office to try to obtain more information on Kramer's bankruptcy petition. Although respondent was unable to offer her any new

information in that regard at that time, he expressed his belief that he would be able to make good on his own personal note, assuming some expected good fortune. Respondent promised to contact Olsen within a few days. He did not. Thereafter, Olsen retained the services of another attorney, Charles Kannebecker, to assist her in tracking and recovering her funds.

The record does not clearly establish the exact amount Olsen lost in these transactions. She testified, however, that she was certain that some interest and principal remained outstanding on the $14,000 personal loan to respondent. In fact, it is likely that almost all of the principal remains due and owing inasmuch as respondent's note to Olsen, together with his handwritten "accounting," provided for monthly payments of interest only, with a balloon payment of the entire principal at the end of the loan term. Furthermore, Olsen testified that she believed that respondent might have characterized her loan to Kramer as an investment, making any recovery unlikely. The proof of claim filed by respondent in her behalf set her dollar loss at $32,433 and identified the transaction as a loan. That notwithstanding, Olsen apparently has not received any payments on that transaction from the bankruptcy trustee or from any other person or entity.

The record does not address the ultimate disposition of the $1,000 escrow released by the buyer's attorney.

* * *

Kannebecker testified that, beginning in July or August 1993, he telephoned respondent's office two or three times a week to request Olsen's real estate closing file, including a closing statement and information identifying the bank account in which her funds were placed. On those occasions, either respondent or his secretary would offer many excuses for not having already provided the file and would assure Kannebecker that it would be forthcoming. By early November 1993 when respondent still had not forwarded the file, Kannebecker wrote him a letter dated November 5, 1993, reminding him of the outstanding request for the file (Exhibit C-18). Kannebecker again wrote to respondent on November 19, 1993 to alert him that his office would contact respondent the following week to make arrangements for the file to be picked up.

Thereafter, respondent telephoned Kannebecker's office on at least two occasions to make arrangements for the delivery of the file. However, the file was never released to Kannebecker, in spite of the fact that Kannebecker sent a messenger to respondent's office for that purpose. By early 1994, Kannebecker advised Olsen to contact the disciplinary authorities for assistance in obtaining her file. Several months later, Kannebecker received Olsen's file, although he could not recall how he had obtained it. He was surprised that respondent had not previously produced the file, as it was relatively small and capable of being easily reproduced. Upon reviewing the documents provided, Kannebecker wrote to the DEC raising many questions for further investigation (Exhibit F). In a letter to respondent's counsel dated June 30, 1994, the DEC

investigator requested that respondent submit a reply to the various questions posed in Kannebecker's letter and, to the extent that they were not already provided, to produce "all financial records, trust account ledgers, books of account and investment funds of Mr. Levy that relate to the receipt and disbursement of the funds derived from the 1985 sale of Mr. Olsen's business." (The letter is not in evidence, but see investigative report at 4.) Through counsel, respondent refused to reply to the investigator's request or to produce any further documentation, asserting a Fifth Amendment privilege against self-incrimination (Exhibit I).

* * *

The DEC found respondent guilty of unethical conduct on several counts, as follows: respondent failed to keep Olsen reasonably informed about the status of her funds, to reply to her reasonable requests for information and to explain matters to her to the extent reasonably necessary to permit her to make informed decisions, all in violation of RPC 1.4; respondent entered into two separate loan transactions with Olsen without strict compliance with RPC 1.8; and respondent violated RPC 8.4(c) for entering into a transaction with Kramer, ostensibly in Olsen's behalf, at an interest rate higher than that reflected in his note to her. The DEC did not find respondent guilty of violations of RPC 1.2(a) and RPC 1.3. It concluded that respondent had paid the bills Olsen submitted to him, albeit not always in a timely manner. The DEC

made no findings with regard to the alleged violations of RPC 1.15 or RPC 8.1 (b).

* * *

Following 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.

Respondent failed to keep Olsen informed of the status of her funds or to appraise her of her investment options or financial status to the extent necessary to permit her to make informed decisions, in violation of RPC 1.4(b). Respondent also routinely ignored Olsen's requests for an accounting and for the status of certain outstanding bills, in violation of RPC 1.4(a). Unlike the DEC, the Board found sufficient evidence that respondent violated RPC 1.3 for his failure to pay in a timely manner the bills Olsen submitted to him. In the case of the Vreeland bill, respondent repeatedly ignored Olsen's disbursement requests over an extended period of time, ultimately causing substantial finance charges to her.

As to the $7,000 loan transaction, the DEC found that respondent's conduct in this transaction violated RPC 1.8(a). The Board agrees. Indeed, aside from a rather arcane promissory note (Exhibit C-2), respondent did not reduce to writing the terms of the transaction. Although the face of the note set the term for repayment and an interest rate, it cannot be determined how the

interest was to be calculated, or whether the terms called for monthly payments of principal and interest, monthly payments of interest only with a balloon payment of the entire principal at the end of the term, or a lump sum payment of principal and interest at the end of the term. Moreover, the note did not address the remedies available to Olsen in the event of default. In short, the "writing" itself was woefully inadequate. In addition, the loan was, on its face, completely unsecured by any collateral. Therefore, the fairness of the terms of the transaction is, at best, questionable. Finally, respondent did not instruct Olsen to seek the advice of independent counsel prior to entering into the transaction and did not obtain Olsen's written consent to the transaction. Respondent's long-standing professional relationship with Olsen did not relieve him of his responsibility to advise her to seek separate counsel. To the contrary, the importance of such independent advice is heightened where a client has complete faith and trust in her attorney of many years. See, e.g., In re Shelly, 140 N.J. 501, 517 (1995).

One more point is worthy of mention, although it was not addressed by the DEC. It is true that Olsen testified that respondent telephoned her in April 1988, ostensibly to ask for permission to borrow the money. It is equally true that the promissory note is dated April 13, 1988. However, because respondent refused to produce his trust account records (and because the DEC apparently never independently subpoenaed those records), it cannot be determined when, exactly, respondent took

the $7,000 for his own use. If the trust account records were to disclose that the disbursement occurred prior to April 1988, then the specter of knowing misappropriation would be raised.

With regard to the $14,000 loan transaction, as with the $7,000 loan transaction, the DEC properly concluded that respondent's conduct in this transaction violated RPC 1.8(a), substantially for the same reasons as those enumerated above. Although the "writing" (the promissory note) in this transaction was slightly more descriptive than that in the $7,000 transaction, respondent did not urge Olsen to seek the advice of independent counsel and did not obtain her written consent to the transaction. Moreover, the fairness of the terms of this transaction is even more questionable than those in the $7,000 loan transaction. Not only was this loan completely unsecured by any collateral, but the note called for a balloon payment of the entire principal at the end of the term. Had the note provided for monthly payments of the principal as well as interest or had an ancillary security instrument been executed, Olsen would not have suffered the loss she sustained when respondent ultimately defaulted on the loan. Of course, if Olsen had consulted with independent counsel, this transaction would never have occurred as structured. At a minimum, counsel would have insisted on security for the loan, especially when such a large balloon payment remained at the end of the term and especially when, at the time respondent took the loan, he had not yet satisfied the $7,000 loan.

The most troubling aspect of this transaction, however,

concerns the overtones of knowing misappropriation. Olsen testified that respondent never asked for her consent to borrow the $14,000. In fact, it was only at their July 1989 meeting that she learned that respondent had taken the $14,000 as a loan. In other words, according to Olsen, respondent presented the $14,000 transaction to her as an accomplished fact. Not only did respondent tell her that he had taken the $14,000 as a personal loan, but also the note he gave her to evidence that loan was dated January 1, 1989, almost seven months before their July 26, 1989 meeting and three months before the date of the somewhat broad investment authorization signed by her. In contrast, as previously noted, respondent's ledger sheet showed that the $14,000 disbursement occurred on July 26, 1989, the same date as their meeting. Because respondent never produced his trust account records and because the DEC never subpoenaed the records, it cannot be determined from this record when respondent actually took the $14,000. Simple bank records, however, might be able to provide the answer. If those records were to show that the $14,000 disbursement took place at any time before March 29, 1989 (assuming that to be the actual date that Olsen signed the authorization, assuming that the document was broad enough to support a personal loan to respondent as an "investment" and assuming further that Olsen contemplated that document to authorize such a loan) then respondent could be facing a charge of knowing misappropriation.

For this reason, the Board determined to remand that aspect of this matter to the Office of Attorney Ethics ("OAE") for an

investigation of respondent's conduct in connection with the $14,000 loan. To that end, the OAE should subpoena all relevant records, including respondent's attorney records. The contents of those records are not privileged because they are required to be kept by law (R. 1:21-6). In other words, the protection against self-incrimination afforded by the fifth amendment is inapplicable to attorney records, as they must be maintained by law. State v. Stroger, 97 N.J. 391, 400 (1984), citing Shapiro v. United States, 335 U.S. 1, 32-33, 68 S.Ct. 1375, 1391-1392, 92 L.Ed. 1787, 1807 (1948) and In re Grand Jury Empanelled March 19, 1980, 680 F. 2d 327, 328, 336 n.15 (3d Cir. 1982). (Other citations Omitted). The OAE should also investigate the disposition of the $1,000 escrow in order to resolve whether respondent knowingly misappropriated these funds.

After the OAE's investigation is concluded, the matter is to be assigned to a Special Master for hearing. The investigation, hearing and report to the Board shall be concluded within ninety days of the remand.

The knowing misappropriation issue aside, respondent's overall conduct in this transaction was troublesome. Olsen trusted respondent with her hard-earned nest egg to make sound investments in her behalf that would produce monthly income to support herself and her handicapped adult daughter. She never anticipated that respondent would borrow her money for his own purposes and certainly not without adequate collateral to secure her interest. Respondent knew that Olsen had struggled to earn the profit on the

sale of the business, that she relied upon the sale proceeds to produce monthly income for her own support and that of her daughter and that Olsen trusted and relied on him to represent her best interests. Knowing all that, he entered into two unsecured loan transactions, the terms of which were of highly questionable fairness, without once encouraging – much less insisting – that Olsen consult with independent counsel. Respondent then satisfied the first loan ($7,000) over one and one-half years late and took the second loan ($14,000) before paying off the first.

As to the $35,000 Kramer transaction, like the DEC, the Board found that respondent did not disclose to Olsen that Kramer had agreed to pay a higher interest rate than that reflected in respondent's note to Olsen. Although respondent denied, in his answer, any ill motives, several factors persuaded the Board otherwise. Specifically, respondent did nothing to disabuse Olsen of the notion that she was earning only 11% on her investment. Clearly, had he managed to negotiate a higher interest rate for his client, he would have wanted to advise her of that fact. Yet, not only did respondent fail to notify Olsen of the higher interest rate, but he never gave her the amortization schedule showing the higher interest rate, a document she clearly should have received. Moreover, instead of forwarding Kramer's checks to Olsen, respondent deposited them into his account and issued to her his own trust account check, which included his interest payment on the $14,000 personal loan, an impropriety in and of itself. Also significant is the existence of two separate notes for repayment of

the same $35,000 sum, bearing the same date, showing two different rates, two different terms and signed by two different people. The only logical conclusion from the foregoing is that respondent intended to hide the higher interest rate from Olsen.

Respondent's failure to testify, too, must be used to draw adverse inferences against him. Although it might be unfair to use an attorney's refusal to testify in a disciplinary proceeding as the sole basis for discipline — see Spevack v. Klein, 385 U.S. 511 (1967) (disbarment of New York attorney reversed as it was based solely on his refusal to testify or produce records on Fifth Amendment grounds) — in this case there is an abundance of evidence of grave misconduct on the part of respondent. Furthermore, other jurisdictions have held that, in disciplinary matters, an attorney must assert his privilege against self-incrimination on a question-by-question basis and must still answer those questions that would not elicit a criminally inculpatory response. See, e.g., In re Zisook, 430 N.E. 2d 1037 (Ill. 1982). In other proceedings, including judicial disciplinary proceedings, it has long been the rule that a respondent's failure to testify as to facts peculiarly within his or her knowledge and directly affecting him or her is an important circumstance for the fact-finder's consideration. See In re Peoples, 250 S.E. 2d 890, 915 (N.C. 1978); State v. Posterino, 193 N.W. 2d (Wis. 1972); Mariner Midland Bank v. Russo, 427 N.Y.S. 2d (1980) (Court of Appeals held that an attorney's failure to testify in his own behalf in a disciplinary proceeding may "count against him").

The Board concluded, thus, that respondent's conduct in not disclosing the 14% interest negotiated with Kramer was deliberate and violative of RPC 8.4(c). However, because of insufficient information in the record about the calculation of the amount of the monthly payments made to Olsen, the Board was unable to find that respondent, in fact, kept for himself the 3% differential between the two interest rates. Obviously, had he done so, graver consequences would have befallen him.

Lastly, respondent's refusal to testify based on constitutional grounds should not be viewed as a violation of RPC 8.1(b), a rule that contemplates knowing failure to cooperate with the disciplinary authorities.

* * *

The issue of the quantum of discipline remains for those charges that are clearly and convincingly supported by the record. Cases involving impermissible business transactions with clients have resulted in discipline ranging from a private reprimand (now an admonition) to disbarment. See In re Hughes, 114 N.J. 612 (1989) (public reprimand for improperly extracting a $22,500 loan from a client with whom attorney shared an intimate personal relationship; the loan was designed to finance a business venture in which respondent had an interest); In re Gallop, 85 N.J. 317 (1981) (six-month suspension imposed on an attorney who prepared and signed a trust agreement with his housekeeper without advising

her to retain separate counsel); In re Griffin, 121 N.J. 245 (1990) (one-year suspension for attorney who persuaded his paramour, who was also his client, an alcoholic saddled with heavy debts, to obtain a $20,000 mortgage on her house, her only asset, to satisfy her financial obligations and to benefit the attorney); In re Humen, 123 N.J. 289 (1991) (two-year suspension imposed on an attorney who created several serious conflict of interest situations by entangling his business concerns with those of his client, a longstanding friend, and by betraying his client's confidence and trust); In re Smyzer, 108 N.J. 47 (1987) (disbarment ordered for attorney who solicited money from several clients to invest in a corporation of which he was either sole shareholder or one of several shareholders and an officer).

Here, respondent's conduct was serious, causing his client substantial economic harm. Although the record does not disclose an exact figure, it appears that Olsen lost in the neighborhood of $50,000 at respondent's hands. For respondent's severe misconduct, the Board unanimously determined to impose a six-month suspension. Three members did not participate.

The Board retained jurisdiction on the issues partially remanded to the OAE.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for appropriate costs.

Dated: 11/18/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board