

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-176

IN THE MATTER OF :
HARVEY L. WEISS :
AN ATTORNEY AT LAW :

Decision

Argued: July 17, 1996

Decided: September 16, 1996

Andrew A. McDonald, Esq. appeared on behalf of the District VB Ethics Committee.

Anthony P. Ambrosio, Esq. 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 on a recommendation for discipline filed by the District VB Ethics Committee (DEC). Respondent was charged with a violation of RPC 1.8 (prohibited business transactions with clients). The charge was amended at the

DEC hearing to include a violation of RPC 1.7(a) (a lawyer shall not represent a client if the representation of that client will be directly adverse to another client); and RPC 1.7(b) (a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client, third person or by the lawyer's own interests).

Respondent was admitted to the New Jersey bar in 1963. He maintains a law office in Maplewood, New Jersey. Respondent previously received a six-month suspension for gross negligence in safeguarding client funds. In re Weiss, 118 N.J. 577 (1990).

* * *

The DEC limited the testimony in this matter to the conflict of interest issue.

The grievant in this matter, Lorena Murphy, was referred to respondent by a church minister, who was familiar with respondent's legal services. Murphy initially retained respondent in 1989 to assist her with a judgment that had been entered against her in the amount of \$26,848.09 and the subsequent writ of execution on her property. In addition to the writ entered against Murphy in November 1988, she had several other debts that needed attention.

During their initial meeting on February 6, 1989, respondent advised Murphy to obtain a second mortgage on her property to pay off her debts. He told her that he knew of a mortgage company that she could use. They did not discuss, at that time, what the interest rate would be. Murphy claimed that respondent never told

her that he would get her the best interest rate available. She explained to the DEC that she trusted him and that any rate would have been acceptable to her. During their initial meeting, respondent gave Murphy a form letter and application for a mortgage with Rosemont Mortgage, Inc. (Rosemont). Apparently Murphy completed the application and respondent thereafter determined that she needed a \$60,000 loan. According to Murphy, she felt that respondent had taken a personal interest in her as a friend. She trusted him and heeded his advice on how to deal with her creditors.

Unbeknownst to Murphy at that time, Rosemont, a company that offers second mortgage loans, was solely owned by respondent's wife, Alice Weiss. Mrs. Weiss purportedly ran the company from the Weiss residence. All of the loan closings took place at respondent's office. Respondent also kept Rosemont applications, form letters and the like in his office. Mrs. Weiss never attended any of the loan closings. Respondent's accountant obtained, at respondent's law office, all necessary information for the preparation of respondent and his wife's joint tax returns.

Respondent did not explain to Murphy, at their initial meeting, that Rosemont was owned and operated by his wife. He did not urge her to obtain separate counsel. However, the Rosemont form letter that accompanied the loan application stated, in relevant part:

You are hereby notified that if your loan application is granted a closing will be scheduled. You are further notified that you have a right to retain an attorney of your own choosing to represent you in this matter with

respect to your application and any matters concerning your application for the secondary mortgage loan, and also you have the right to retain an attorney of your own choosing to represent you in this matter at the time of closing.

[Exhibit G-5]

The letter included a line for signature by "ALICE WEISS, President." Underneath the signature line was the following language:

The undersigned acknowledge that they have been advised of their right to retain an attorney of their own choosing to represent them in this matter with respect to the loan application and with respect to the matters related to the application or the closing of the loan. . . .

Murphy signed the letter, which was dated January 9, 1989.

Murphy testified that respondent never explained (1) his relationship to Rosemont, (2) his representation of Rosemont or (3) the conflict of interest inherent in respondent's dual representation of Rosemont and Murphy. Murphy claimed that she did not learn until the closing that Rosemont would charge her twenty-two percent interest on the loan. It was not until the closing that respondent purportedly disclosed to Murphy his relationship to Rosemont and the conflict of interest that arose from the dual representation. Respondent prepared an affidavit for Murphy's signature and presented it to her for the first time at the closing. The affidavit provided as follows:

14. Attorney advised me that Attorney is the Attorney for a second mortgage company known as Rosemont Mortgage Inc. [sic] Attorney advised me that Rosemont Mortgage Inc. is a Corporation of the State of New Jersey and is a licensed secondary mortgage loan company. Attorney advised me that Rosemont Mortgage Inc. is owned by Alice Weiss, who is the husband [sic] of my attorney, Harvey L. Weiss.

* * *

16. I make this Affidavit so as to confirm that I have been fully advised by Attorney, Stern & Weiss, that Rosemont Mortgage Inc. is a Corporation of the State of New Jersey owned by Alice Weiss, who is the husband [sic] of my attorney, Harvey L. Weiss. I confirm that I have been fully advised of this relationship between Stern & Weiss, Harvey L. Weiss, his wife, Alice Weiss, and Rosemont Mortgage Inc.

17. I further make this Affidavit to confirm and acknowledge that I have been advised by Attorney of this relationship between Attorney and Rosemont Mortgage Inc. I further confirm and acknowledge that I have been advised by Attorney that with respect to the Application for a Secondary Mortgage Loan to Rosemont Mortgage Inc, [sic] and with respect to the closing of the actual loan itself, that I am entitled to an attorney of my own choosing to represent me.

18. I further confirm and acknowledge that I am fully aware of my right to have a lawyer of my own choosing independent of the law firm of Stern & weiss [sic] to represent me with respect to the application for a Secondary Mortgage Loan to Rosemont Mortgage Inc. and with respect to the closing of said loan and acknowledge and agree that I did not choose to have an independent lawyer represent me and do not choose to obtain one and have, in fact, requested Attorney, that is, the Law Firm of Stern & Weiss, consisting of Morris J. Stern and Harvey L. Weiss, to represent me with respect to the closing of the Secondary Mortgage Loan to Rosemont Mortgage Inc.

19. I confirm and acknowledge that I have been advised by Attorney and am fully aware that Attorney represents the mortgagee, Rosemont Mortgage Inc., with respect to the loan that Rosemont Mortgage Inc. is giving to me. I acknowledge and agree that I understand the loan will be a second mortgage on Premises. I acknowledge, agree and confirm that I am fully aware that Lawyer represents Rosemont Mortgage Inc., the mortgagee, with respect to the Secondary Mortgage Loan and is going to represent me with respect to the closing of the Secondary Mortgage Loan to Rosemont Mortgage Inc. Attorney has explained to me that by representing both the mortgagee, Rosemont Mortgage Inc., and myself, as mortgagor, there is a possible conflict of interest which may result from such dual representation. I certify, acknowledge and agree that I discussed with Attorney the question of having another attorney represent me with respect to the

Secondary Mortgage Loan to be executed to Rosemont Mortgage Inc.

I confirm, acknowledge and agree that I am fully aware of and understand that I am entitled to use another attorney, independent of the law firm of Stern & Weiss, to represent me and I fully understand the possibility of a potential conflict of interest by attorney representing both the mortgagee, Rosemont Mortgage Inc., and me, as the mortgagor.

With this full knowledge and understanding I confirm, acknowledge and agree that I still desire to be represented by Attorney, even though Attorney represents the mortgagee, Rosemont Mortgage Inc., and even though Harvey L. Weiss, my attorney in this matter, is the husband of Alice Weiss, who is the owner of and President of Rosemont Mortgage Inc. and I hereby do, in fact, request Attorney to represent me with respect to the closing of the Secondary Mortgage Loan on Premises.

20. I again acknowledge, confirm and agree that I am executing this Affidavit because Attorney has explained to me that there is a potential conflict of interest, which may result from the representation by Attorney of both Rosemont Mortgage Inc., as the mortgagee, and of me, as the Mortgagor.

21. Attorney has explained to me that in closing the Secondary Mortgage Loan, he must protect both the interest of Rosemont Mortgage Inc., as Mortgagee, and the interest of myself. Attorney has further explained to me that Attorney must see to it that the mortgage of Rosemont Mortgage Inc. is a valid and second mortgage loan on Premises. I further acknowledge, confirm and agree that attorney has advised me that because of this potential conflict of interest, Attorney cannot, in any way, negotiate on my behalf, any of the terms and conditions of the Secondary Mortgage Loan. The terms and conditions of the Secondary Mortgage Loan are as above set forth and are fixed by the custom and policy of Rosemont Mortgage Inc. and I confirm and acknowledge, that attorney has advised that attorney cannot negotiate any of the terms and conditions with respect to same.

I acknowledge and agree and confirm that I fully understand this and I have been advised as to the terms and conditions of the loan. In fact, I hereby state that I am aware that I am executing this Affidavit on the date of the closing of the Secondary Mortgage Loan. I acknowledge, confirm and agree that I have executed this Affidavit after I have read and reviewed it and all of

the documents which I have been requested to sign to close the Secondary Mortgage Loan and to obtain the Secondary Mortgage Loan funds. I execute this Affidavit because Attorney has advised me that Attorney must protect himself with respect to this potential conflict of interest, as aforesaid, and must fully advise me as to this potential conflict of interest, which may result from this dual representation; that is, the representation of Rosemont Mortgage Inc., as Mortgagee, and me, as Mortgagor. I confirm, acknowledge and agree that Attorney has advised me as to this potential conflict of interest, which conflict of interest include the fact that Attorney owes allegiance both to Rosemont Mortgage Inc. and to me, with respect to the Secondary Mortgage Loan.

22. I again confirm, acknowledge and agree that Attorney advised that he cannot negotiate with Rosemont Mortgage Inc. the terms of the Secondary Mortgage Loan, because Attorney would then be subject to a potential conflict of interest in not getting Rosemont Mortgage Inc. the best terms and conditions that can be obtained. The fact that Attorney represents both parties puts him in a position that he cannot negotiate to the benefit of either party.

23. Therefore, I do again confirm, agree and acknowledge that I have been advised by Attorney that Rosemont Mortgage Inc. will dictate the terms and conditions of the Secondary Mortgage Loan. I acknowledge, confirm and agree that I have been fully advised of the terms and conditions of the Secondary Mortgage Loan. I acknowledge, confirm and agree that I have read the documents that I have been requested to sign for the purpose of executing and completing the Secondary Mortgage Loan and I am satisfied with same.

24. I again acknowledge, confirm and agree that I want Attorney to represent me with full knowledge that he also represents Rosemont Mortgage Inc. and that there is a potential conflict of interest in this dual representation. I, in fact, do hereby request Attorney to represent me with respect to the closing of the Secondary Mortgage Loan to Rosemont Mortgage Inc., with full knowledge and understanding of the documents that I have been requested to sign and with full knowledge and understanding of the aforesaid potential conflict of interest. [Emphasis supplied].

[Exhibit G-3]

Murphy testified that she never saw the affidavit prior to the closing and was not given an opportunity to read it at the closing.

According to Murphy, at the closing, respondent presented her with a stack of documents for her signature. He slid the papers over to her and told her to sign them. He did not review the affidavit or the other closing documents with her and did not explain to her their content or meaning prior to obtaining her signature. He just passed her the documents, which she signed without reading. Afterwards, respondent failed to supply Murphy with copies of the loan closing documents. Murphy testified that, had she known of respondent's relationship to Rosemont, she would have hired another attorney to represent her.

* * *

Murphy's son, Kevin Murphy, and Murphy's daughter's boyfriend, Naim Abdul Samad, attended the loan closing with Murphy. Both testified at the DEC hearing and confirmed that the loan closing was brief and that Murphy signed a number of documents without reading them and without obtaining an explanation from respondent. Kevin testified that his mother did not receive copies of the loan documents before leaving the closing.

According to Abdul Samad, who was there for moral support, he did not remain in the room for the entire closing because respondent became "irritated" with him. Abdul Samad questioned Murphy as to whether she understood the content of the documents, since she was not reading them prior to executing them. Abdul Samad also questioned the high interest rate and questioned

respondent as to whether Murphy should be represented by an attorney. He and respondent had a somewhat heated discussion regarding Murphy's need for another attorney. However, because Abdul Samad was concerned that, if he "ruffled [respondent's] feathers," Murphy would not get the loan, he left the closing.

Apparently within a year of the closing, Murphy paid off the Rosemont Mortgage by refinancing her mortgage through another company, this time without respondent's assistance. She was represented by a different attorney in that transaction. Sometime later, however, she encountered more financial difficulties and needed another loan. She approached respondent because she felt he was her friend and she trusted him. In fact, Murphy claimed that respondent had given her cash before the first loan to pay off her mortgage arrearages prior to the closing. Murphy, thus, believed that respondent had her best interests in mind. She requested that respondent obtain in her behalf another \$60,000 loan from Rosemont, with the same terms and the same interest rate. The closing took place at respondent's office on August 29, 1991. At that time, respondent had Murphy execute a document acknowledging that respondent represented only Rosemont in the transaction, not Murphy, that respondent advised her of her right to retain her own attorney and that she declined to obtain another attorney. Exhibit G-13.

Sometime after the closing, Murphy fell behind in her payments to Rosemont. Thereafter she received a notice that Rosemont was going to start foreclosure proceedings on her property. Although

Murphy tried to contact Rosemont in order to work out a payment plan, she could not find a listing for Rosemont in the telephone directory. She then tried to contact respondent to help her out, but was unable to speak with him despite her repeated attempts.

Eventually, Murphy wrote the following to the DEC:

[Respondent] even had a hand in foreclosing on my home, which was the whole reason I went to him and paid him to help me - to avoid losing my home - which, no matter what I signed should not be allowed.

[Rosemont] is not listed in the phone book. It doesn't advertise or have an office besides [respondent's] office. Yet there were 14 foreclosures filed by Rosemont in a 2year [sic] period, as shown in the attached printout from the Chancery Division Clerk. I believe [respondent] has done what he did to me to other clients. I believe that Rosemont is in the foreclosure business, not the mortgage business.

[Exhibit G-4]

* * *

Respondent, in turn, claimed that he did not have a financial interest in Rosemont, other than being married to its owner. He contended that, prior to the closing (presumably through the application form he had given Murphy to complete and the accompanying cover letter), he had "disclosed" to Murphy his "wife's name" and advised Murphy that she had the right to retain an attorney. Respondent maintained that Murphy had not wanted another attorney. Respondent went on to say that at the closing he went over some, but not all, of the closing documents. As to the second transaction, respondent asserted that, because Murphy was already familiar with the closing process, he advised her that he

represented only Rosemont in the transaction. He did not suggest to Murphy that she might be able to obtain a loan with more favorable terms elsewhere, rather than at the interest rate of twenty-two percent charged by Rosemont.

As noted above, eventually Murphy lost her house through foreclosure. Robert Elkinson, Rosemont's attorney, initiated the foreclosure proceedings in Rosemont's behalf. Respondent testified that he did not employ Elkinson, but that Elkinson merely shared office space with him, as well as the same telephone number. A sheriff's sale ensued. According to respondent, because Rosemont did not have first priority against Murphy's property (there was already a first mortgage on the property) Rosemont did not receive any benefit from the foreclosure sale.

* * *

The DEC found clear and convincing evidence that respondent's preparation of an affidavit for Murphy's signature, which was presented for the first time at the loan closing, did not constitute "a full disclosure of the circumstances' and did not include an explanation of the implication of the common representation and the advantages and risks involved," in violation of RPC 1.7(b). The DEC found that the affidavit was presented to Murphy with a stack of papers, all of which needed to be signed in order for Murphy to obtain the needed loan. The DEC

concluded that the manner in which the affidavit was presented to Murphy precluded any meaningful review by her.

The DEC also found that respondent knowingly acquired a pecuniary interest adverse to his client, by virtue of his wife's sole ownership of Rosemont and their filing of joint tax returns. The DEC found that respondent's denial of any relationship to Rosemont was "transparent." The DEC, thus, found that respondent's conduct also violated RPC 1.8(a).

While the DEC found violations of RPC 1.7 and RPC 1.8 as to the first loan closing, it did not find any ethics violations as to the second closing, "by virtue of the imputed and actual knowledge" obtained by Murphy of any potential conflict of interest and of respondent's wife ownership of Rosemont.

The DEC recommended that respondent be given a reprimand.

* * *

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 supported by clear and convincing evidence. Respondent's conduct clearly violated RPC 1.7. Murphy best summed up respondent's conduct in this matter in her letter to the DEC, stressing that her fundamental problem with respondent was that she had gone to him for legal advice on her debts:

Instead of giving me good advise [sic] as to how to deal with my problems, he acted as a mortgage broker for Rosemont Mortgage Company. I thought he was advising me

to do the best possible thing for me, when in fact he was advising me to do the best possible thing for Rosemont.
[Exhibit G-4]

RPC 1.7 states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:

(1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and

(2) each client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after a full disclosure of the circumstances and consultation with the client

Clearly, respondent's obligations to Murphy were severely limited by respondent's obligations to Rosemont. This was underscored by the affidavit prepared by respondent, stating that respondent could not negotiate the terms of the secondary mortgage loan because of a conflict of interest. Here, there was a clear conflict of interest that was not waived by Murphy, given her lack of knowledge of the true circumstances of respondent's relationship to Rosemont and respondent's failure to discuss the risks involved in the dual representation.

As noted above, the application form had a signature line with respondent's wife's name on it. Respondent's argument was seemingly that this reference to his wife's name, coupled with the vague language in the cover letter about Murphy's right to retain

an attorney was sufficient disclosure under RPC 1.7. Respondent also maintained that Murphy had not wanted an attorney of her own. Disclosure, however, is more than a passing mention of a possible conflict of interest. It involves the attorney's obligation to explain to the client, in detail, the possible consequences of the multiple representation in order to make the client aware of the facts so that he or she can make an informed decision as to whether to proceed with the representation. Merely flagging the problem to the client is never enough. Here, respondent had the duty to reveal to Murphy his wife's involvement in the transaction and the potential adverse consequences to Murphy flowing from the dual representation as well as the duty to urge her — as opposed to simply advising her — to consult with independent counsel. This he did not do. Under these circumstances, it cannot be said that Murphy was aware of the perils inherent in respondent's dual representation of her interests and his wife's or that she knowingly consented thereto. Respondent's conduct was a clear violation of RPC 1.7.

The same applies with equal force to the second transaction. Even viewed in the light most favorable to respondent, the fact that Murphy arguably might have been aware of respondent's wife's role in the deal and of her right to have an attorney of her own choosing does not exonerate respondent. For he had already represented her in the first transaction — with favorable results, at least from Murphy's then-existing perception — and she obviously trusted him, viewing him as a friend. Under this

scenario, it was reasonable for her to expect respondent to protect her interests responsibly by virtue of his mere status as an attorney and, moreover, as her former attorney.

As to the finding of a violation of RPC 1.8, the Board is unable to agree with the DEC. RPC 1.8 provides as follows:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms that should have reasonably been understood by the client, (2) the client is advised of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

While the circumstances here make it clear that Mrs. Weiss' ownership of Rosemont made it improper for respondent to entangle Rosemont's business concerns with those of his client without the safeguards of RPC 1.7, the Board cannot find, based on the record before it, that respondent derived a pecuniary interest through Murphy's transaction with Rosemont. Accordingly, the charge of a violation of RPC 1.8(a) is dismissed.

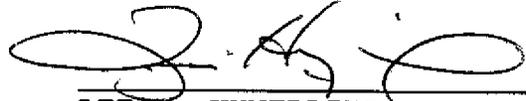
Generally, in cases involving a conflict of interest, without more, and absent egregious circumstances or serious economic injury to clients, a reprimand constitutes appropriate discipline. In re Berkowitz, 136 N.J. 134 (1994). See In re Carney, 138 N.J. 43 (1994) (public reprimand for violation of RPC 8.4(c) where attorney

failed to reveal to a client that the financial consultant to whom respondent referred her for advice, regarding the investment of a substantial settlement, was the attorney's wife). The Court, however, has not hesitated to impose a period of suspension when an attorney's conflict of interest has caused serious economic injury to clients. See In re Butler, 142 N.J. 460 (1995) (three-month suspension for representation of buyer and seller in a complex real estate transaction, negotiating a modification to the contract and withholding relevant information from the sellers in negotiating the modification); In re Guidone, N.J. (1994) (three-month suspension where attorney deliberately concealed his involvement in a partnership that was purchasing a parcel of property from a club that was selling property; the attorney represented the sellers in the transaction); In re Dato, 130 N.J. 400 (1992) (one-year suspension where attorney purchased a client's property at below-fair-market price); In re Gallop 85 N.J. 317 (1981) (six-month suspension where attorney took a deed to his housekeeper's real property to her disadvantage); and In re Hurd, 69 N.J. 316 (1976) (three-month suspension where attorney convinced client to transfer title to real property to attorney's sister for twenty percent of property's value).

In light of the foregoing, a five-member majority voted to impose a reprimand. Three members voted for a three-month suspension. One member did not participate.

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

Dated: 9/16/96



LEE M. HYMERLING
Chair
Disciplinary Review Board