SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-060
District Docket No. XIV-2010-2002E

IN THE MATTER OF	
ANTHONY P. MONZO	
AN ATTORNEY AT LAW	

Decision

Argued: September 19, 2013

Decided: September 30, 2013

Ralph A. Jacobs appeared on behalf of the Office of Attorney Ethics.

Robert Ramsey appeared on behalf of respondent.

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

This matter was before us on a disciplinary stipulation between respondent and the Office of Attorney Ethics (OAE). Respondent stipulated that he violated RPC 1.8 (conflict of interest: business transactions with current clients).

The parties urged us to impose a reprimand. We agree that a reprimand is the appropriate discipline in this case.

Respondent was admitted to the bars of New Jersey and Pennsylvania in 1987. He has no prior discipline.

The facts that gave rise to this matter are as follows: Beginning in approximately April 2003 and continuing until at least November 2006, respondent and his law firm represented Edmond F. Niemann, Jr. in various personal and business matters, including legal advice and litigation involving Niemann's construction company, Niemann Construction LLC, (Niemann Construction or the company) and the preparation of wills for Niemann and his wife. Niemann is an experienced builder with approximately twenty years of experience, having acted as general contractor on approximately forty modular homes during that time. Respondent and Niemann were social acquaintances or friends for many years, prior to 2003.

This matter arose from respondent's purchase of a parcel of unimproved real estate from the Niemanns, the subsequent construction of respondent's home on that lot, and the role of Niemann and his construction company in that project. The lot in question was originally part of a larger parcel that the Niemanns had previously purchased. The Niemanns built their own home on another lot in the larger parcel. After the Monzos'

purchase of their lot and the construction of their home, the two families became next door neighbors.[1]

The Agreement to Purchase the Lot

In 2003, prior to the existence of an attorney client relationship between respondent and Niemann, respondent entered into an oral agreement to purchase the parcel of unimproved real estate from the Niemanns. According to the stipulation, "[t]he Niemanns hand-picked the Monzos to be their neighbors." At the time of the oral agreement, the larger parcel had not yet been subdivided into individual lots.

The oral agreement provided that respondent would purchase the lot for $350,000 and that closing would be held at some unspecified date in the future. The oral agreement did not address any deposit or payment schedule. Niemann established the purchase price, which price he said was fair.

Between the oral purchase agreement, in 2003, and the closing on the property, in April 2006, respondent made several payments to the Niemanns, not on any particular schedule and in varying amounts. The payments were to be credited to the

[1] The Monzos refers to respondent and his wife.

purchase price of the lot at closing. At the time of the payments, the Niemanns were clients of respondent and his firm.

The Construction of the Monzos' House

At some point after respondent had entered into the oral agreement to purchase the lot, the Monzos decided to build a house on the lot, using a modular or "factory built" home from a manufactured home builder, Excel Homes (Excel). Excel did not deal directly with ultimate homeowners, but worked through local construction contractors, who would participate in the design and ordering process for the factory-built house, perform preliminary site work at the home site, set the house on the foundation on delivery from the factory, and perform finish work on the house, after it had been delivered. In the past, Niemann and his company had served in this general contractor role for other buyers of Excel's houses.

In the year leading up to the April 2006 closing, Niemann and his company performed work for respondent on the intended home site, in preparation for respondent's eventual purchase and construction of the Excel home. Niemann and his company also played a role in the process by which respondent designed and ordered the house from Excel, although the precise extent of

Niemann's role was a subject of dispute in ensuing civil litigation between the Monzos and the Niemanns. The Niemanns contended that the arrangement was that Niemann and his company would act as an informal advisor to respondent in his dealings with Excel and would also arrange, supervise, and pay for preliminary site work, for which respondent would reimburse him. Once the house was delivered, respondent would act as his own general contractor for the remaining work that had to be done on the house. In turn, the Monzos contended that Niemann would take on all of the responsibilities of general contractor throughout the project.

The work Niemann and his company agreed to perform for the Monzos included the foundation work at the site, in preparation for the delivery of the manufactured house. Niemann Construction arranged for the foundation to be done by a sub-contractor that the company ordinarily used for foundation work for other factory-built homes. Niemann Construction paid the sub-contractor directly for that work, which was done from June through November 2005. The preliminary construction work that Niemann and his company performed on the intended home site was a separate transaction from the original oral agreement for the Monzos to purchase the real estate. At the time that Niemann

agreed to perform preliminary site work for respondent and at the time the work was actually performed, the Niemanns and their company were clients of respondent's firm.

Neither at the time that Niemann and his company agreed to perform preliminary site work for respondent, nor prior to or during the time when the site work was actually performed and paid for, did respondent set forth, in writing, the details of the work to be performed, the compensation to be paid, the timing or terms of payment, the warranties, if any, or other specific responsibilities of Niemann Construction or any other details of that business transaction.

In 2005 and 2006, the Monzos made a series of payments to Niemann Construction for construction work related to the house. Those payments were in addition to the partial payments the Monzos had made towards the purchase of the house. Exhibit A to the stipulation is a list prepared by Kathleen Niemann, showing the dates and amounts of the payments by the Monzos and the manner in which the Niemanns allocated the payments to either the purchase of the lot or to the house. The Monzos did not see this document at the time it was prepared. In subsequent litigation, they disputed some of the Niemanns' allocations of payments. Exhibit B consists of copies of the Monzos' checks to

the Niemanns. Exhibit C is a list and accounts payable ledger of the vendor payments and other expenses paid by Niemann Construction in connection with the company's work done for the Monzos. These documents were not provided to the Monzos until after litigation began.

On the day of the April 2006 closing, Niemann Construction executed a written construction agreement with the Monzos. Respondent prepared that document.[2] The construction agreement was the first signed writing that purported to spell out the terms of the work to be performed by Niemann Construction in connection with the Monzos' house. The agreement was substantially similar to a form of agreement that respondent had previously prepared in his role as counsel for Niemann Construction for the company's use with other home owners.

In the ensuing litigation, Niemann asserted that the construction agreement did not accurately reflect his arrangement with respondent and had been signed at respondent's

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[2] At the closing, Niemann executed a disclaimer prepared by Dune Abstract Company, Inc., in which he acknowledged that he had been told that it was desirable that the Niemanns have a lawyer to give them advice and protect their interests. The Niemanns chose to proceed without getting the advice of a lawyer.

request because the mortgage lender required that a construction contractor be involved "and for the purposes that the Monzos deal directly with Excel." Respondent denied those assertions.

The Litigation

Shortly after the April 2006 closing, the Excel house was delivered to the site. The Monzos experienced significant problems with the house, which they attributed not only to Excel's manufacturing deficiencies, but also to Niemann's failure to take steps they assert he should have taken, as the general contractor. The Monzos ultimately commenced litigation against Excel and Niemann Construction for the asserted problems with the house.

Other disputes arising out of these transactions resulted in other lawsuits, including a case filed by the Niemanns against the Monzos and another filed by the Monzos against the Niemanns. The litigation included a dispute about the location of the driveway in the deed that respondent prepared for the lot he purchased and a dispute over which of the Monzos' pre-closing payments to the Niemanns went toward the purchase price of the lot and which were for the construction work.

The lawsuits were consolidated and ultimately settled. Respondent paid the Niemanns the documented costs for the site work, delivery and set of the Excel modular home. Respondent's law firm's insurance carrier reimbursed the Niemanns for their legal expenses. The comprehensive settlement agreement is exhibit G to the stipulation. As a result of the settlement, the Niemanns were fully paid for the price of the lot, all documented costs, and legal fees.

The stipulation set out the language of RPC 1.8, which governs business dealings with a client, followed by facts supporting the conclusion that respondent violated RPC 1.8. Specifically, from at least as early as April 2003, Niemann was a client of respondent and his law firm, for purposes of RPC 1.8. Respondent's series of payments to Niemann, prior to the April 13, 2006 closing, constituted business transactions within the meaning of the rule. Those payments to Niemann resulted in the creation of pecuniary interests on the part of respondent, which were adverse to Niemann, within the meaning of the rule.

According to the stipulation, the construction work that Niemann and his company performed for respondent on the intended home site, prior to April 13, 2006, constituted a business transaction within the meaning of the rule. Neither the terms

of the payments made by respondent, prior to April 13, 2006, nor the terms of the construction work performed by Niemann for respondent, prior to April 13, 2006, were set forth or transmitted in writing to Niemann, prior to the payments to be made or the work to be performed. Similarly, Niemann was not advised, in writing, of the desirability of seeking independent counsel and did not consent, in writing, to the essential terms of the transactions or to respondent's role in the transactions. Prior to Niemann's performance of the preliminary construction work, in 2005, respondent did not take any steps to document the terms of their understanding regarding such work or to provide the written RPC 1.8 warnings or to obtain Niemann's written consent to the transaction.

During the litigation, respondent alleged that, "[d]uring the summer of 2005, Defendants Edmond Niemann and Niemann Construction constructed the foundation for the house and garage and informed Plaintiff the cost was $30,000.00." Thus, by respondent's own admission, Niemann, his then-client, did construction work for him, in 2005. The stipulation stated that there was no prior writing setting forth the terms of that transaction, contrary to the requirements of RPC 1.8.

The parties stipulated that the transactions at issue were not exempted from RPC 1.8, as

> "standard commercial transactions" within the meaning of the comments to the ABA Model Rules. This comment is intended to carve out transactions that are so routine or standardized or otherwise removed from the possible impact of the lawyer-client relationship that the policies behind Rule 1.8 are not implicated. The transactions at issue in this matter were individually negotiated deals, not the purchase by a lawyer of a manufactured item off the shelf from a retailer-client, or a lawyer utilizing the services of a physician-client or a utility company client. The "standard commercial transaction" Comment does not apply to this matter.
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> [S¶46.][3],[4]

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[3] S refers to the stipulation.

[4] The requirements of RPC 1.8(a) do not

> apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions . . . are unnecessary and impracticable.
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> [Kevin H. Michels, New Jersey Attorney Ethics §27:2-3 at 643 (Gann 2012), citing

(footnote cont'd on next page)

Following a de novo review of the record, we are satisfied that the stipulation clearly and convincingly establishes that respondent's conduct was unethical and in violation of RPC 1.8. That rule states, in relevant part:

> (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:
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> (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 a manner that can be understood by the client;
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> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
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> (3) the client gives informed consent in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction,

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(footnote cont'd)

> ABA Model Rules of Professional Conduct Rule 1.8 comment (2000).]

> including whether the lawyer is representing the client in the transaction.

Respondent entered into a business transaction with a client, without following the required safeguards, specifically, advising his client to seek the advice of independent legal counsel, reducing the terms of their transaction to writing, and obtaining the client's written consent to the terms of the transaction and to the lawyer's role in the transaction. True, Niemann was not a novice in this business deal. It is likely that he had far more experience in transactions such as this one than respondent did. Nevertheless, the rule does not provide for an exception if the client is the more experienced party.

Even if respondent had not been acting as an attorney in this transaction, the conflict-of-interest rules might still apply:

> All that is necessary is that the parties relate "to each other generally as attorney and client. . . . [I]t is the substance of the relationship, involving as it does a heightened aspect of reliance, that triggers the need for the rule's prescriptions of full disclosure and informed consent. . . . Thus, if the parties had an attorney-client relationship at any time prior to entering into a business relationship, the attorney may be unable to claim that he or she is acting only as a businessperson with respect to the transaction between them and is

> therefore not subject to RPC 1.8(a). [Citations omitted.]
>
> [Kevin H. Michels, New Jersey Attorney Ethics §27:3 at 644 (Gann 2012).]

Here, respondent was Niemann's friend and represented him and his company, when the transaction between them was ongoing. It is likely that Niemann looked to respondent to protect his interests, even though respondent was not acting as his attorney. We have found attorneys who did not technically represent certain individuals violated the conflict-of-interest rules. See, e.g., In re Turco, 196 N.J. 154 (2008) (the attorney a close, long-time friend of an elderly widow, advised the widow to invest in a company, although the attorney was not acting in the context of an attorney-client relationship at the time); In re Gold, 149 N.J. 23 (1997) (in the absence of a formal attorney-client relationship, it was reasonable for the putative clients "to assume that [the attorney] was representing their interests;" the wife of the putative client was the attorney's secretary); and In re Chester, 127 N.J. 318 (1992) (where a secretary, though not strictly a client, had reason to rely on her attorney-employer in representing her interests in a loan that, upon the attorney's solicitation, she agreed to make to one of his clients).

We now turn to the issue of discipline for this respondent.

Since 1994, it has been a well-established principle that a reprimand is the measure of discipline imposed, when an attorney engages in a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). Accord In re Pellegrino, 209 N.J. 511 (2010) and In re Feldstein, 209 N.J. 512 (2010) (companion cases; reprimands imposed where the attorneys simultaneously represented a business that purchased tax-lien certificates from individuals and entities for whom the attorneys prosecuted tax-lien foreclosures; the attorneys also failed to memorialize the basis or rate of the legal fee charged to the business); In re Ford, 200 N.J. 262 (2009) (reprimand where attorney filed an answer to a civil complaint against him and his client and then tried to negotiate separate settlements of the claim against him, to the client's detriment; prior admonition and reprimand); In re Mott, 186 N.J. 367 (2006) (reprimand where attorney prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest in the company to the buyers, the attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a

written waiver of the conflict of interest from them); and In re Poling, 184 N.J. 297 (2005) (reprimand where attorney engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned – a fact that he did not disclose to the buyers, in addition to his failure to disclose that title insurance could be purchased elsewhere). But see In re Bjorklund, 200 N.J. 273 (2009) (admonition for attorney who engaged in a conflict of interest when he represented two criminal defendants in unrelated matters, with the potential that each of the defendants could be a witness against the other; compelling mitigation considered, including the possibility that the attorney might not have been aware of the circumstances that gave rise to the conflict, the absence of a disciplinary record in his twenty-three years at the bar, the passage of thirteen years since the infraction, and his acknowledgement of the impropriety in representing criminal defendants with potentially competing interests; although the disciplinary action proceeded as a default, the discipline was not enhanced because of lack of clear and convincing evidence that the attorney's failure to file an answer was not a mistaken understanding on his part that an answer was not required

because he had indicated to the OAE's attorney assigned to his case that he did not intend to contest the charges); In the Matter of Cory J. Gilman, 184 N.J. 298 (2005) (attorney admonished for an imputed conflict of interest (RPC 1.10(b)), among other violations, based upon his preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; in imposing only an admonition, we noted the following "compelling mitigating factors": this was his "first brush with the ethics system; he cooperated fully with the OAE's investigation, and, more importantly, he was a new attorney at the time (three years at the bar) and only an associate"); and In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (attorney admonished for, among other things, engaging in a conflict of interest (RPC 1.7(b)) when she collected a real estate commission upon her sale of a client's house; in mitigation, the Board considered the attorney's unblemished fifteen-year career, her unawareness that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the client, and the passage of six years since the ethics infraction).

If an attorney's conflict of interest involves "egregious circumstances" or results in "serious economic injury to the clients involved," then discipline greater than a reprimand is warranted. In re Berkowitz, supra, 136 at 148. See also In re Guidone, 139 N.J. 272, 277 (1994) (reiterating Berkowitz and noting that, when an attorney's conflict of interest causes economic injury, discipline greater than a reprimand is imposed; the attorney, who was a member of the Lions Club and represented the Club in the sale of a tract of land, engaged in a conflict of interest when he acquired, but failed to disclose to the Club, a financial interest in the entity that purchased the land, and then failed to (1) fully explain to the Club the various risks involved with the representation and (2) obtain the Club's consent to the representation; the attorney received a three-month suspension because the conflict of interest "was both pecuniary and undisclosed"). Accord In re Welaj, 170 N.J. 408 (2002) (three-month suspension for former assistant prosecutor in Somerset County who engaged in conflicts of interests that adversely affected the administration of justice by representing more than 120 criminal defendants in that county, while his former law partner was the prosecutor in that county; he also engaged in several business ventures with the Somerset

County prosecutor knowing that it created an impermissible conflict of interest); In re Patel, 159 N.J. 527 (1999) (three-month suspension for attorney who engaged in multiple conflicts of interest, failed to maintain an attorney trust account, failed to maintain proper trust and business account records, and failed to provide his client with a closing statement after settling a matter); In re Hurd, 69 N.J. 316 (1976) (three-month suspension where attorney advised his client to transfer title to property to attorney's sister for twenty percent of the property's value); and In re LaRusso, (190 N.J. 225 (2007) (censure where attorney engaged in conflict of interest by representing forty-five clients with interests directly adverse to other client and for failing to comply with the disclosure requirements of RPC 1.7(b)(1)).

Here, there are no mitigating factors to justify reducing the measure of discipline to an admonition. There is also nothing in the record to justify elevating this matter above a reprimand. Respondent has no disciplinary history. In addition, although the stipulation noted that the litigation was "acrimonious, time-consuming and expensive," it appears that Niemann was made whole in the settlement agreement. Thus, the "egregious circumstances" or "serious economic injury" that

triggers censure or suspension are not present. We find that a reprimand is appropriate discipline in this case.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie Frost, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony P. Monzo
Docket No. DRB 13-060

Argued: September 19, 2013

Decided: September 30, 2013

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Disqualified	Did not participate
Frost			X		
Baugh			X		
Clark			X		
Doremus			X		
Gallipoli			X		
Yamner			X		
Zmirich			X		
Total:			7		

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel