

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-400
District Docket No. XIV-2013-0028E

IN THE MATTER OF
CHARLES B. DALY
AN ATTORNEY AT LAW

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Decision

Argued: March 20, 2014

Decided: May 6, 2014

Jason D. Saunders appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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 the Office of Attorney Ethics (OAE) and respondent. Respondent stipulated to having violated RPC 1.7(a) (concurrent conflict of interest) and RPC 1.7(b)(1) (failure to obtain informed, written consent to the representation, after full disclosure and consultation with independent counsel). The OAE recommended the imposition of a censure because of respondent's

disciplinary history, an aggravating factor. For the reasons expressed below, we agree with the OAE's recommendation.

Respondent was admitted to the New Jersey bar in 1971. He maintains a law practice in Middletown, New Jersey.

In 2008, respondent received a reprimand for lack of diligence and failure to communicate with a client whom he represented on drug charges. In re Daly, 195 N.J. 6 (2008).

Also in 2008, respondent was suspended for eighteen months, retroactive to the date of his temporary suspension, February 23, 2005,¹ for his guilty plea to an information charging him with conspiracy to submit false statements to mortgage lenders, a violation of 18 U.S.C.A. §371. Specifically, respondent was one of the closing attorneys involved in a mortgage fraud scheme, although not the instigator of the scheme. The object of the conspiracy was to buy and sell residential properties by, among other things, submitting settlement statements containing materially false information, designed to influence the lender to fund the purchases. Respondent prepared false documents in at least four transactions. Mitigating factors included that respondent cooperated significantly with the government, during its investigation and prosecution of others, was remorseful,

¹ The temporary suspension is reported at 182 N.J. 422 (2005).

and, at the time, was caring for his "long ailing" wife. In re Daly, 195 N.J. 12 (2008).

This matter was initiated by a referral from the Executive Director of the New Jersey Real Estate Commission (the Commission). By letter dated January 9, 2013, the Director informed the OAE that respondent had filed an answer to the Commission's order to show cause (OTSC) filed against James Brown and Jeffrey Booker. However, even though respondent had prepared the August 30, 2012 answer on behalf of both Brown and Booker, when he appeared at the November 27, 2012 hearing before the Commission, he informed the hearing panel that he was not representing Booker. Because Booker was not present, the hearing was continued to give Booker an opportunity to be heard.

According to the November 27, 2012 hearing transcript, respondent informed the panel that, when he met with Brown the day before, he called Booker to advise him to attend the hearing. Booker informed respondent that he had been injured and asked him to seek a continuance. Respondent then called the regulatory officer involved in the matter to inform her that Booker had requested a continuance and that he would not be representing Booker at the proceedings, "[b]ecause it puts us in a kind of an awkward position where I clearly have a conflict

with Mr. Booker in representing Mr. Brown, based upon some things that may or may not come out."

At the Commission hearing, respondent reiterated that he did not represent Booker and that, even though he had filed an answer on his behalf, Booker was aware that he was not representing him at the hearing. At that hearing, respondent conceded that he should have advised the panel earlier that Booker was planning to appear pro se, in light of the "potential for the conflict of interest between Booker and Brown."

Respondent represented Brown at the January 9, 2013 continuation of the Commission hearing. Brown appeared pro se.

Respondent's representation of Brown began as the result of the Commission's August 13, 2012 OTSC against Brown, a "formerly licensed New Jersey real estate broker," and Booker, a licensed broker. The OTSC ordered Brown and Booker to file written answers to the charges, within twenty days of the service of the order.

According to the OTSC, Brown's real estate license had been revoked in January 1990. Nevertheless, he conducted business under the name of Thunder Bay, LLC and advertised himself as doing business in mortgages, real estate, and credit score improvement. Booker, a licensed New Jersey real estate broker, was the broker of record for Homequest Realty. Brown and Thunder

Bay, LLC, maintained and conducted business out of the offices of Homequest Realty. Brown's business was physically housed in the rear of Homequest Realty.

Respondent and Brown were acquainted before the filing of the OTSC. According to the OAE investigator's report, which was made a part of the record, respondent spoke to Booker about the OTSC only by telephone. Booker informed respondent that he did not know how to proceed with the OTSC and was not certain whether he would even reply to it. Respondent, thus, offered to file an answer on behalf of both Booker and Brown, free of charge.

The basis for the OTSC was Brown's involvement with Alice and Maajiid Akbar. The Akbars had replied to Brown's internet advertisement. Brown represented to the Akbars that he could help them find a house and obtain financing. Although no contract was executed, the Akbars gave Brown a \$500 cash escrow deposit and a \$300 application fee for a mortgage. Brown did not turn over the \$500 escrow to Booker.

The Akbars were unable to find suitable financing and, at some point, requested a refund of their \$500 escrow deposit and \$300 mortgage application fee. Neither Brown nor Booker returned the requested funds until after the Akbars filed a complaint with the Commission.

Brown asserted that he had placed the money in a file for a Homequest employee to retrieve. Booker claimed that he did not know anything about the money, that, when he reviewed the file, there was no money in it, and that he learned of the \$500 escrow only when Brown mentioned it to him. Brown ultimately reimbursed the \$500 to the Akbars by way of a money order.

The OTSC alleged that Booker, as the broker of record, was responsible for all of the activities that occurred at Homequest Realty. It charged Brown with various violations of N.J.S.A. 45:15-1 et seq., for engaging in real estate brokerage activities without a real estate license; making substantial misrepresentations to members of the public, by representing himself as a real estate licensee, when he did not hold such a license; and demonstrating fraud and dishonest dealing, by holding himself out to the public as a real estate licensee and by misappropriating the funds of others, in a real estate transaction.

Both Brown and Booker were charged for Brown's occupancy of office space in a licensed New Jersey real estate broker's office, when Brown's license had been revoked. Booker was charged with a violation of N.J.A.C. 11:5-4.2, for failing to properly supervise the activities in the office of Homequest Realty.

Among other things, Brown's and Booker's answer acknowledged that, in the past, Brown had shared office space with Booker, which space they no longer shared. Their answer stated that neither one of them realized that the office arrangement was a violation of the New Jersey Real Estate Commission rules, given that Brown "had been convicted over 20 years ago."²

According to the stipulation, respondent interviewed both Brown and Booker, before preparing and filing the answer to the OTSC with the Commission. His initial investigation revealed a conflict of interest between Booker and Brown, as it related to the handling of the \$500 cash escrow.

On February 19, 2013, respondent acknowledged the conflict, in a written statement to the OAE, stating, "[c]learly the potential for conflicts was just too great." During the OAE interview, respondent also acknowledged the conflict between the two as to the "money trail."

² After the Commission hearing concluded, the panel went into executive session and voted to find Brown guilty of various charges, to fine him \$10,000, and to impose a cease and desist order, preventing him from having any affiliation with or presence in any real estate or brokerage office in New Jersey and from holding himself out in any manner that might give an appearance that he is a real estate agent or broker. The panel voted to find Booker guilty of various charges, to impose a \$1,000 fine, and to direct him to re-take the broker's pre-licensure course.

Respondent did not seek written informed consent from Booker and Brown about the simultaneous representation, before he filed the answer on their behalf.

The OAE and respondent stipulated that respondent's conduct did not result in serious economic injury to either Booker or Brown, that he derived no pecuniary interest from the proposed real estate transaction with the Akbars, that he did not charge either Booker or Brown a fee to file the answer, and that his dual representation of Booker and Brown, although unethical, was not "undisclosed," as both parties were aware that respondent was filing the answer on their behalf. Nevertheless, according to the stipulation, "respondent could not ethically prepare an answer to the complaint on behalf of both clients," because of the factual differences between their statements (relating to the Akbars' funds).

Respondent stipulated to having violated RPC 1.7(a), by representing two clients who had a concurrent conflict of interest, and RPC 1.7(b), by failing to obtain informed consent from both clients, in writing, after full disclosure and consultation with independent counsel.

In recommending a censure, the OAE relied on, among other cases, In re Porro, 134 N.J. 524 (1993) (reprimand for attorney who engaged in a conflict of interest by representing a

developer operating in a municipality where the attorney was both the municipal attorney and the attorney for the sewer authority; at the same time, an associate in his firm served as counsel to the planning board that approved the developer's subdivision). The OAE pointed out that, even though the conflict of interest in which respondent engaged did not cause serious economic injury to anyone, his ethics history was an aggravating factor requiring a greater degree of discipline.

At oral argument before us, respondent argued that discipline no greater than an admonition is appropriate. He remarked that Booker did not take the OTSC seriously, that Booker was not planning to reply to it, that he filed the answer on Booker's behalf only as a "place holder," and that he never intended to represent Booker before the Commission. Moreover, respondent asserted that he was unfamiliar with the proceedings before the Commission and expected that there would have been an interim step between filing the answer to the OTSC and the Commission hearing.

Following a full review of the record, we are satisfied that the stipulation clearly and convincingly establishes that respondent's conduct was unethical.

RPC 1.7 provides that

- (a) . . . a lawyer shall not represent a client if the representation involves a

concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client

. . . .

(b) Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if: (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation

Respondent's preparation of the answer on behalf of both Brown and Booker created a concurrent conflict of interest, in light of their diverging accounts about the path of the \$500 received from the Akbars. Respondent's continuing representation of Brown at the Commission hearing was also improper. Once the conflict developed, he had an obligation to obtain written consent, after full disclosure and consultation with independent counsel. As indicated earlier, respondent stipulated that his conduct violated RPC 1.7(a) and (b).

It is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). In some situations, a reprimand may result even if the attorney commits other ethics improprieties. See, e.g., In re Hunt, 215 N.J. 300 (2013) (attorney found guilty of a concurrent conflict of interest by agreeing to represent Essex County while


still retained to pursue a claim against the county on behalf of a client; he was also guilty of engaging in gross neglect and lack of diligence, failing to communicate with the client and failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions about the representation, recordkeeping violations, and making misrepresentations to disciplinary authorities and to a client; mitigating factors included the attorney's lack of a disciplinary history in his twenty-eight years at the bar and his acknowledgement of wrongdoing by stipulating to the misconduct); In re Pellegrino, 209 N.J. 511 (2010) and In re Feldstein, 209 N.J. 512 (2010) (companion cases; 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 violated RPC 1.7(a) and RPC 1.7(b); the attorneys also violated RPC 1.5(b) by failing to memorialize the basis or rate of the legal fee charged to the business); In re Ford, 200 N.J. 262 (2009) (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); and In re Soto, 200 N.J. 216 (2009) (attorney represented the driver and the passenger in a

personal injury action arising out of an automobile accident; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with one of the clients, and failure to prepare a contingent fee agreement; no ethics history).

Here, there were no egregious circumstances or serious economic injuries to anyone, as a result of respondent's simultaneous representation of Brown and Booker. Therefore, a reprimand would be the appropriate measure of discipline, were it not for respondent's disciplinary record (a reprimand and an eighteen-month suspension). We find that that aggravating factor requires discipline greater than a reprimand - a censure.

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 C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

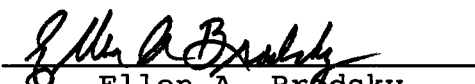
In the Matter of Charles B. Daly
Docket No. DRB 13-400

Argued: March 20, 2014

Decided: May 6, 2014

Disposition: Censure

| Members | Disbar | Suspension | Censure | Disqualified | Did not participate |
|----------------|--------|------------|---------|--------------|---------------------|
| Frost | | | X | | |
| Baugh | | | X | | |
| Clark | | | X | | |
| Doremus | | | X | | |
| Gallipoli | | | X | | |
| Hoberman | | | X | | |
| Singer | | | X | | |
| Yamner | | | X | | |
| Zmirich | | | X | | |
| Total: | | | 9 | | |


Ellen A. Brodsky
Chief Counsel