SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-322
District Docket No. IIIA-2007-0024E

IN THE MATTER OF	:
H. ALTON NEFF	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 21, 2010

Decided: April 5, 2010

Stacey Kerr appeared on behalf of the District IIIA Ethics Committee.

Carl D. Poplar 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 based on a recommendation for an admonition by the District IIIA Ethics Committee ("DEC"), which we determined to treat as a recommendation for discipline greater than an admonition. R. 1:20-15(f)(4). In essence, respondent engaged in a conflict of interest by simultaneously

representing the buyers (Dennis and Dorothy McKenna) and the seller (Ronald Cherry), in a real estate transaction. The complaint charged respondent with violating RPC 1.4(c), RPC 1.7(a)(2), RPC 4.2, RPC 8.4(c), and RPC 8.4(d). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1967. On December 31, 1987, he received a private reprimand for a conflict of interest. In that matter, respondent continued to represent a client/shareholder of a corporation owning real estate frontage adjacent to respondent's land-locked parcel. When the corporation dissolved, respondent drafted the dissolution documents. He also turned down an offer to purchase the company's frontage for $75,000, later seeking to purchase it through an assignment and foreclosure. Respondent permitted his personal financial interests to cloud his professional judgment, thereby violating disciplinary rules equivalent to RPC 1.7 and RPC 1.12. In the Matter of H. Alton Neff, DRB 86-075 (December 31, 1987).

On October 18, 2005, respondent received a censure for his actions at a July 2003 real estate closing. There, respondent seized the other attorney's file, took documents from it, and refused to identify the items taken or to return them to the

other attorney. He called off the closing and told the police to either remove the other attorney from his building or to arrest him for trespass. In re Neff, 185 N.J. 241 (2005).

As noted earlier, the complaint in this matter charged respondent with having violated RPC 1.4(c) (failure to explain the matter to the extent reasonably necessary for the client to make informed decisions about the representation), RPC 1.7(a)(2) (conflict of interest), RPC 4.2 (communicating about the subject of the representation with a person the lawyer knows is represented by counsel, without the consent of counsel), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).[1]

Prior to the DEC hearing, the parties entered into a joint statement of stipulated facts, which was executed on the hearing date, December 11, 2008.

Respondent stipulated that he had previously represented the McKennas and their affiliated companies in various matters and had also represented Cherry in two matters. In fact, Cherry

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[1] At the inception of the hearing, the presenter withdrew the "4.2 and 8.4 charges," on the basis that they could not be proven by clear and convincing evidence.

was employed by McKenna, who recommended that Cherry retain respondent to address Cherry's personal financial difficulties. The first matter in which respondent represented Cherry was a 1999 foreclosure action involving Cherry's property in Bayville.

In February 2003, hoping to further forestall the still active foreclosure action, respondent filed a motion asserting a "dower" interest by Cherry's wife in the Bayville house. In March 2003, the court ruled against the Cherrys, allowing the foreclosure to go forward. As a result of the adverse court determination, respondent represented Cherry in a chapter 13 bankruptcy petition the following month.

When, in July 2003, the bankruptcy court dismissed Cherry's petition, he faced immediate foreclosure and eviction. It was then that McKenna offered to buy Cherry's house for $250,000. Under the terms of an oral agreement of sale, Cherry, his wife, and their two children would then lease the premises back on a monthly basis.

McKenna testified that he had agreed to purchase the house because Cherry was a trusted and valuable employee who had personal financial problems. He sought to help Cherry and his wife, whose two children had learning disabilities. The family desperately sought to keep the children in the house to keep

them in the local school system. He noted that Cherry had also tried to sell the house on his own, but was unsuccessful. McKenna testified that Cherry had become "more and more depressed," in 2002 and 2003, and that the depression had adversely affected Cherry's work.

McKenna also stated that he had not wanted to tie up such a large sum of his own money to buy the house, but had agreed to do so in order to assist Cherry, who was like family.

Also in July 2003, respondent prepared the contract of sale, which the parties executed on July 26, 2003. The contract included a mortgage contingency clause, with McKenna then procuring a $200,000 mortgage loan from Shrewsbury State Bank. The bank's appraisals returned a valuation for the house of between $253,000 and $257,500.[2]

Respondent testified that, a week or so prior to the October 24, 2003 closing date, Cherry had appeared at his office and had implored him to represent him at the closing, as well as McKenna, because he had little money and other attorneys with whom he had spoken charged a high fee. Respondent initially

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[2] Cherry's first mortgage pay-off amount was $213,087.23. Respondent paid off the mortgage at closing.

resisted the dual representation because he knew that it presented a conflict of interest. Ultimately, he agreed to do so because he felt sorry for Cherry. Respondent knew that Cherry had two children with learning disabilities and that the family wanted to stay in the house for attendance at the local school. Respondent charged Cherry a "minimum fee" of $550 for the representation.[3]

Respondent stipulated that he represented both the McKennas and Cherry at the closing, which was conducted at his office. He acknowledged that the interests of buyers and sellers in real estate transactions are directly adverse, within the meaning of RPC 1.7(a)(1). Notwithstanding those adverse interests, the stipulation stated, a lawyer may engage in such a dual representation, so long as the requirements of RPC 1.7(b)(1), dealing with informed consent, are observed. Respondent did not do so, however.

In addition to orally agreeing that Cherry and his family could remain and lease the property back after the sale, the parties agreed that $29,096.31, Cherry's "seller proceeds,"

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[3] Respondent received an additional $750 from McKenna, according to the RESPA, which reflected both fees.

would be held for him by McKenna.[4] This was accomplished at closing by subtracting $29,096.31 from the "cash from borrower" amount of $53,880.84. Thus, McKenna was only required to bring $24,784.53 to the closing for the purchase of the property.

Although respondent knew that the agreement between the parties contained these post-closing obligations, including the lease and holdback arrangements, he failed to memorialize them or to provide any written explanation to his clients about the risks associated with such unwritten obligations, including the risks attendant to enforcing them, if the parties' relationship deteriorated prior to full performance. Respondent stipulated that his actions in this regard amounted to a failure to explain the matter to the extent reasonably necessary for the client to make informed decisions about the representation (RPC 1.4(c)).

Respondent also stipulated that he failed to cure the conflict of interest by not obtaining a written waiver of conflict from his clients, a violation of RPC 1.7(a)(1).

About a year after the closing, McKenna terminated Cherry's employment, having suspected that Cherry had embezzled funds and

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[4] McKenna testified that Cherry had asked him to hold the monies because Cherry was afraid that his wife would spend it.

used McKenna's crews, materials, and equipment to do secret "side jobs."

According to McKenna, after terminating Cherry's employment, the parties engaged in litigation about numerous issues, only one of which was the $29,000 that McKenna had agreed to hold for Cherry. McKenna had placed those funds in court, pending the outcome of the litigation. According to McKenna, Cherry's brother ultimately purchased the house.

The DEC recommended an admonition, without supporting case law. The DEC noted, however, that it was "troubling to the panel that respondent has been involved in prior disciplinary actions that are real estate related and certainly his experience in the field should not have resulted in these charges."

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

The stipulation supports a finding that respondent violated the cited RPCs. When faced with an obvious conflict of interest by representing both buyer and seller in a real estate transaction, respondent failed to heed the conflict interest rules (RPC 1.7(a) and (b)).

RPC 1.7(a) states:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

The Advisory Committee on Professional Ethics ("ACPE"), in Opinion 243 (November 9, 1972), held that a concurrent conflict of interest exists when an attorney represents both the buyer and seller in connection with the preparation and execution of a real estate transaction. The ACPE used language "that indicates that the consent of the parties will not remedy the conflict" (Michels, New Jersey Attorney Ethics (Gann, 2009) at 426)).

In In re Lanza, 65 N.J. 347 (1974), the Supreme Court approved Opinion 243, albeit in a case in which the attorney did not prepare or negotiate the contract of sale. Id. at 352. In effect, under Opinion 243 and Lanza, an attorney may represent both the buyer and seller, with waivers under RPC 1.7(b), and only after the contract is negotiated and prepared. Prior to

that stage of a transaction, the attorney may not do so, even with the parties' consent.

Here, respondent prepared the July 2003 contract of sale, apparently only for McKenna. He was no longer actively representing Cherry in any matters, the bankruptcy having been concluded that same month. Respondent agreed to represent Cherry in the real estate sale only after McKenna and Cherry had executed the sale agreement. Thus, the dual representation did not present a non-waivable conflict of interest under RPC 1.7(a).

RPC 1.7(b) addresses the requirements that must be observed in waivable conflict situations. Under that paragraph, an attorney may overcome a concurrent conflict when representing two clients with adverse interests in the same matter, if:

> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
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> 2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

> 3) the representation is not prohibited by law; and
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> 4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal.

Respondent conceded that McKenna's and Cherry's interests were conflicting before the closing and that he failed to obtain written waivers from both, a violation of RPC 1.7(b). Indeed, Cherry agreed to lease the house back from McKenna, after the sale, for an agreed upon monthly payment. This lessor/lessee relationship was fraught with all of the potential problems inherent in any landlord/tenant relationship. Also, McKenna agreed to hold Cherry's roughly $29,000 settlement funds, so that they would not be "unwisely" spent.

In addition, respondent failed to explain the matter to the extent reasonably necessary for his clients to make informed decisions about the representation, as it pertained to the lease and the holdback of settlement funds. His conduct in this context violated RPC 1.4(c).

Since 1994, it has been a well-established principle that a reprimand is the standard measure of discipline imposed when an attorney engages in a conflict of interest. In re Berkowitz, 136 N.J. 148 (1994). Accord In re Mott, 186 N.J. 367 (2006)

(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 the 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) (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; the attorney also failed to disclose that title insurance could be purchased elsewhere).

If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," discipline greater than a reprimand is warranted. Berkowitz, supra, 136 N.J. 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").

In special situations, admonitions have been imposed post-Berkowitz and Guidone. See, e.g., In re Bjorklund, 200 N.J. 273 (2009) (attorney 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 matter 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

Standing alone, respondent's dual representation of clients with conflicting interests would warrant a reprimand. We are aware that respondent's two prior encounters with the disciplinary system should enhance the reprimand to a censure. Because, however, the record conveys a sense that respondent was moved by a desire to help his clients in achieving what they believed to be a fair, compassionate solution to the Cherry family's predicament, we believe that this mitigating factor allows the discipline to remain at the reprimand level.

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
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of H. Alton Neff
Docket No. DRB 09-322

Argued: January 21, 2010

Decided: April 5, 2010

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			x			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			

Julianne K. DeCore
Chief Counsel