SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-054
District Docket No. IIB-07-0041E

IN THE MATTER OF	:
DANIEL DAVID HEDIGER	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 15, 2010

Decided: May 26, 2010

David Edelberg appeared on behalf of the District IIB Ethics Committee.

Joseph Castiglia appeared on behalf of respondent.

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

This matter came before us on a recommendation for a three-month suspension filed by the District IIB Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.1(b) (pattern of neglect) and RPC 1.3 (lack of diligence) for failing to record a deed for fifteen months. We determine that a censure is the proper discipline for respondent.

Respondent was admitted to the New Jersey and the New York bars in 1995 and to the Connecticut and the Pennsylvania bars in 1996. He currently maintains a law office in Edgewater, New

Jersey. Respondent has been the subject of discipline on several occasions. In a 2004 default, he was reprimanded for gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities. In re Hediger, 179 N.J. 365 (2004).

On July 17, 2007, respondent was censured twice. In one matter, he was found guilty of lack of diligence, negligent misappropriation of client funds, failure to promptly deliver funds to a third person, improper use of a firm name, and failure to cooperate with disciplinary authorities. In re Hediger, 192 N.J. 105 (2007).

On the same day, respondent received another censure for lack of diligence, failure to communicate with a client, recordkeeping violations, and failure to cooperate with disciplinary authorities. In re Hediger, 192 N.J. 108 (2007).

Both of the 2007 Court's orders imposed conditions on respondent's practice. They required respondent to provide proof to the Office of Attorney Ethics ("OAE") that all outstanding balances in his attorney trust account had been reconciled; that he submit to the OAE, for a two-year period, quarterly reconciliations of his trust accounts, prepared by a certified public accountant approved by the OAE; and that, for the same two-

year period, he practice under the supervision of an OAE-approved proctor.

In 2008, the Court imposed a reprimand for respondent's practicing law while ineligible and failure to communicate with a client. The Court directed respondent to continue to comply with the supervision requirements imposed on July 17, 2007. In re Hediger, 197 N.J. 21 (2008).

The current matter arises from respondent's failure to record a deed for approximately fifteen months, following a closing in which he represented the purchaser of property located in West New York, New Jersey. Jalvaro Alonso represented the seller/grievant, Karla Albuja. Albuja filed a grievance against respondent on September 18, 2007. The deed was recorded fewer than two weeks later, on October 1, 2007.

Respondent contended that, following the closing, he had sent the deed for recording on two occasions, before it was successfully recorded. Each time the deed had been returned by the county registrar because the realty transfer tax did not correspond with the purchase price reflected on the deed. Respondent ultimately attributed the discrepancy to a seller's concession that caused a mistake in the actual purchase price.

Prior to the scheduled July 14, 2006 closing, Alonso, the seller's attorney, had forwarded the closing documents to

respondent. At the DEC hearing, Alonso pointed out that it is the buyer's attorney's responsibility to have the documents recorded. Alonso and Albuja did not attend the closing.

The contract of sale listed a price of $659,200, which had been crossed off and replaced with $640,000. Thereafter, the parties signed an addendum/rider to the contract, increasing the purchase price to $652,000 and providing for a $12,000 seller's concession.[1]

At the closing, $13,040 was withheld for the seller's potential tax liabilities to the State of New Jersey for an out-of-state resident fee. Also, because the seller had not yet obtained the homeowner's warranty and certificate of occupancy, an additional $10,000 was escrowed at the closing.

Albuja claimed that she learned of a problem with the deed approximately one year after the closing. She began receiving telephone calls from "collectors" about taxes that were owed on the property that she had sold. Her husband then informed Alonso about the unpaid taxes and their inability to obtain copies of the closing documents from respondent because they could not "get in touch" with him.

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[1] The parties did not execute a new contract. According to Alonso, the contract was amended by way of correspondence and a rider.

Afterwards, Alonso had oral and written communications with respondent to try to resolve the problems, to no avail. On August 28, 2007, Alonso wrote to respondent, unaware that the deed had not yet been recorded. Despite their prior conversations, respondent had not informed Alonso about any problems recording the deed. More than one year after the closing, Alonso wrote to respondent:

> As you know, closing of title in the above reference transaction took place on July, 14, 2006. Since then I have made repeated requests, both in writing and verbally, for the immediate release of the $10,000 escrow. To date, you have failed to return the escrow to my client. In addition, by letter dated July 21, 2007 I had requested proof of payment of the non-resident tax which was made with the filing of the Deed. I also spoke to you by telephone at which time you assured me that you would provide me with the necessary document. As with the escrow payment, same has not been received by my office.
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> [Ex.P2.]

Alonso's letter cautioned respondent that, if he did not comply with his requests, Alonso would institute litigation.

Alonso's efforts to obtain a copy of the recorded deed from respondent were unavailing. He, therefore, telephoned the county registrar's office and the title company, only to discover that respondent had not recorded the deed.

On September 11, 2007, Alonso again wrote to respondent to confirm their earlier telephone conversation regarding the outstanding escrow and to notify him that his client would seek reimbursement from him, if his failure to timely file the deed and pay the non-resident tax resulted in negative tax consequences to her. Alonso wrote:

> During our telephone conversation you indicated that the Deed had not been filed even though closing of title took place on July 14, 2006. You indicated that the Deed was initially returned by the Hudson County Register [sic] because the amount of your check was incorrect. You then indicated that the Deed was returned a second time by the Register's [sic] Office because the Consideration stated on the Deed was incorrect. To date, you have not sent the Deed for recording. However, you have indicated that you will be stopping by my office today in order to obtain a new Deed with the correct consideration. A review of my file indicates that the Deed provided to you at closing did in fact have the correct consideration. In any event, please provide my office with a copy of [the] transmittal letter to the County Register [sic] as well as the checks issued for the filing of the Deed and the payment of the non-resident tax.
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> [Ex.P1.]

Respondent's failure to promptly pay the non-resident tax resulted in accrued interest and penalties totaling more than $300, for which he ultimately assumed responsibility.

According to respondent, when he had first submitted the deed for recording, he had calculated the realty transfer fee on the $652,000 sale price reflected in the closing statement, because the contract had been amended to reflect the increase in the purchase price. However, the "formal contract" showed a $640,000 purchase price. He had sent a $5,736.20 realty transfer tax the first two times he had submitted the deed for recording. The deed had been twice rejected for filing because, he claimed, the sale price was incorrect.

Sometime after Alonso's September 11, 2007 letter, respondent went to Alonso's office to obtain a new deed showing the correct consideration. The deed was finally recorded on October 1, 2007, almost fifteen months after the closing.

Respondent explained that, in July 2006, when he first tried to record the deed, he did not use a transmittal letter to forward it to the Hudson County Registrar's Office, but believed that the registrar's office had received it sometime that month. At that time, it was not his practice to use cover letters when sending documents for filing.[2] Respondent explained that "the

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[2] By contrast, respondent admitted that, when transmitting a pay-off check to a "preexisting" mortgage company, his practice has always been to use a cover letter that includes the account number and the amount of the check being forwarded for the pay-off. He also includes the mortgage endorsed for cancellation or

(Footnote cont'd on next page)

deed is sent in for recording without a cover letter, because the clerk, of course, knows what to do with it, when they receive it." He changed his practice in January or February 2007, when he hired a new paralegal.

Respondent believed that he had first tried to record the deed within a few days or, at most, a week after the closing. He assumed that he had sent it either by mail or through New Jersey Lawyers' Service. After more than two months, the deed had been returned unrecorded.

Respondent could not locate a letter from the Hudson County Registrar's Office returning the deed, even though he claimed that one had been sent. He maintained that the letter returning the deed had stated that the check for the realty transfer tax was incorrect. He had then reviewed the deed and the settlement statement, which listed two amounts for the realty transfer tax: one amount was the buyer's obligation; the other was the seller's obligation. The total of the two was the amount of the check that he had submitted. Respondent concluded that he had forwarded the correct amount.

(Footnote cont'd)

discharge. Exhibit P11 is a July 19, 2006 cover letter enclosing the pay-off for the mortgage in this matter.

Respondent alleged that, not too long after the deed had been returned, he had resubmitted it to the county registrar. According to respondent, he had sent "the same check with their cover letter with a notation . . . back to them, to the registrar's office." He explained that his practice is to return transmittal letters to the registrar so that it knows why the deed was rejected and resubmitted. Although respondent adknowledged that he has a copy machine in his office, he had no copies of the transmittal letters to and from the registrar's office for his alleged first attempt to record the deed.

Respondent claimed that, when he had attempted to record the deed a second time, he had forwarded it under a transmittal letter dated March 13, 2007, almost eight months after the closing. Respondent admitted that he had not sent a copy of the transmittal letter to Alonso, nor had he informed Alonso of the problems he had encountered in recording the deed.

Respondent could not recall when the deed had been returned for the second time, but believed that "a considerable amount of time" had elapsed, "a number of months." According to respondent, the registrar's office had returned the deed with a transmittal letter, which he had seen, but could not locate in his file. According to respondent, the letter had stated "that the deed was -- had the wrong consideration, the wrong purchase

price, that it wasn't an issue with the clerk that the deed had -- that [the] check did not correspond to the consideration on the deed, words to that effect."

Respondent added that, when he had reviewed his file again, he had realized that the deed recited an incorrect purchase price; and that the transfer fee corresponded to a higher purchase price. Thereafter, within days, a week at most, he had contacted Alonso to inform him of the problem and to obtain a new deed, "a revised deed or corrected deed." Respondent could not recall when he had obtained the corrected deed from Alonso, but knew that it had been in late September 2007.

Respondent's reply to the grievance indicated that, on September 27, 2007, he had "personally" gone to Alonso's office to pick up the new deed. Alonso testified, however, that when he had reviewed the deed, the consideration listed on it was correct. According to respondent, after obtaining the deed from Alonso, he had sent it for recording, by courier, on the next business day. Respondent testified that, although he had used the same check the first two times, when he had attempted to file the deed on his third attempt he had sent a different check. He did not have copies of any of the checks, however.

The deed and mortgage were ultimately recorded on October 1, 2007. By letter dated December 7, 2007, respondent's office

forwarded the recorded mortgage to the lender. Respondent speculated that he had received the recorded documents from the registrar's office a couple of days earlier.

At the DEC hearing, the presenter requested that both deeds in evidence be viewed side-by-side. The presenter noted that Alonso's signatures on the two deeds appeared to be different. He asked the panel to draw its own conclusion about the differences.

Based on respondent's ethics history, the presenter's position was that a six-month suspension was in order. Counsel for respondent, in turn, argued that respondent's lack of diligence, absent an ethics history, would result in an admonition and that his ethics history should not increase the discipline to more than a reprimand.

The DEC did not find clear and convincing evidence of a pattern of neglect. It did, however, find that respondent lacked diligence in handling the matter. The DEC cited a number of factors to support this finding, including the almost fifteen-month delay in recording the deed and respondent's "overall handling" of the matter throughout that time period. Specifically, when the registrar's office had first returned the documents and check to respondent, he had done little to determine why the deed had been rejected, other than to verify

the amount of the realty transfer tax and then resend the documents with the same check. The DEC noted that, "if there was a problem with the recordation of the Deed the first time," respondent should have followed up with the registrar's office shortly after he had re-filed the documents to ensure that the problem had been resolved.

The DEC found that, even though there was ample communication between respondent and Alonso after the closing, respondent failed to notify Alonso of the problems with recording the deed. The DEC pointed out that respondent also failed to timely pay the seller's non-resident taxes, which resulted in the assessment of a penalty.

The DEC found that, after Alonso informed respondent that the non-resident tax had not been paid, respondent should have known that the deed had not been recorded and he should have taken immediate steps to resolve the problem. Yet, despite his knowledge of problems with the deed, he did not obtain a corrected deed from Alonso until September 27, 2007. Moreover, he was less than forthcoming in his post-closing communications with Alonso. The DEC determined that respondent had a responsibility to advise Alonso about the problems with deed.

The DEC also found that respondent's March 13, 2007 letter resubmitting the documents appeared to be a standard cover

letter used to send "original documents immediately following a closing." The DEC noted that the transmittal letter was inconsistent with respondent's testimony. Specifically, respondent testified that the buyer and seller owed a total of $5,736.20 for the realty transfer fee ($127.20 and $5,609, respectively), as shown on the settlement statement. Yet, his March 13, 2007 transmittal letter to the registrar showed that his firm had enclosed a check for only $5,736.20, which represented $127.20 for filing fees and $5,609.20 for the realty transfer fee. The DEC concluded that respondent must have omitted a check for the out-of-state resident taxes ($13,040) and the filing fees for the deed and two mortgages because the amount sent was only enough to cover the amount of the realty transfer fee.

The DEC rejected counsel's argument that RPC 1.3 was inapplicable here because the grievant was not respondent's client. The DEC found that respondent also represented the grievant's interests, in that he was responsible for paying off her closing obligations. The DEC concluded that, by failing to finalize the transaction for almost fifteen months, respondent lacked diligence in representing the grievant as well as his own client. Based on respondent's ethics history, the DEC recommended a three-month suspension.

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

The DEC properly dismissed RPC 1.1(b) (pattern of neglect), given that there must be at least three instances of neglect to sustain a finding of a pattern of neglect. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip op. at 12-16). Respondent was found guilty of gross neglect only once before, in his 2004 default matter. He was charged only with lack of diligence here. We, therefore, dismiss the charged violation of RPC 1.1(b).

It is undeniable, however, that respondent lacked diligence. RPC 1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client. Although respondent represented the buyers, he had a fiduciary duty to both buyer and seller in the transaction. A lawyer has an obligation to ensure that a deed is recorded promptly to guarantee that harsh consequences do not result from a failure to properly transfer title. Fortuitously, respondent's failure to promptly record the deed resulted only in accrued interest and penalties assessed against Albuja. We find that his failure to record the deed for almost fifteen months and failure to follow up with the registrar's office, after his communications

with Alonso about the unpaid taxes and after the alleged return of the deed, clearly and convincingly establish a violation of RPC 1.3.

Discipline for conduct similar to respondent's generally is either an admonition or a reprimand. See, e.g., In the Matter of Thomas S. Capron, DRB 04-294 (October 25, 2004) (admonition for failure to discharge a mortgage of record for eight years); In the Matter of Diane K. Murray, DRB 98-342 (September 26, 2000) (admonition for failure to record a deed and to obtain title insurance for fifteen months and two and one-half years after the closing, respectively; the attorney also failed to reply to the client's numerous requests for information about the matter and to reconcile her trust account records in a timely fashion); In the Matter of Charles Deubel, III, DRB 95-051 (May 16, 1995) (admonition for failure to record a deed for fifteen months after the closing of title); In re Stoller, 183 N.J. 24 (2005) (reprimand for attorney who, for a period of almost five years, failed to record mortgages and deeds in two real estate matters and, in addition, failed to maintain records of the transactions for a period of seven years; the attorney's cavalier attitude toward circumstances that he created and failure to take remedial action were considered aggravating factors militating against lesser discipline); In re Jodha, 174 N.J. 407 (2002) (reprimand

for attorney who did not promptly complete post-closing procedures; the attorney did not record the deed, pay the title insurance premium, pay the real estate taxes or refund escrow funds to his client until nine-to-twenty months after the closing; the attorney also failed to correct accounting deficiencies noted during a 1998 random audit by the OAE); and In re Mandle, Jr., 167 N.J. 609 (2001) (reprimand for attorney who, while practicing law under the supervision of a proctor, failed to represent a client diligently by not recording a deed and mortgage for five months after the closing and not properly disbursing the closing funds, instead allowing them to remain stagnant in his trust account; the attorney also failed to cooperate with the investigation of the ethics matter; the attorney had received two prior reprimands).

Respondent, however, has an extensive ethics history: a 2004 reprimand (default matter – gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with disciplinary authorities); a 2007 censure (lack of diligence, negligent misappropriation, failure to promptly deliver funds, improper use of firm name, and failure to cooperate with disciplinary authorities); another 2007 censure (lack of diligence, failure to communicate with client, recordkeeping violations, and failure to cooperate with

disciplinary authorities); and a 2008 reprimand (practicing law while ineligible and failure to communicate with client).

Had respondent's misconduct in this matter occurred at the same time as his misconduct in the matters for which he received censures, then, arguably, no additional discipline would be warranted. That is not the case, however. In fact, when the closing occurred in this matter (July 14, 2006), respondent was on notice that his failure to conform his practices to the standards required of members of the bar had caused him ethics troubles. He had already been reprimanded (2004). As for the two 2007 censures, the DEC hearing in In re Hediger, 192 N.J. 105 (2007), had already taken place (October 18, 2005, ten months before the Albuja closing). In fact, the DEC report recommending discipline was issued on April 12, 2006, three months before the closing. In the other disciplinary case, In re Hediger, 192 N.J. 108 (2007), although the DEC had not yet held a hearing, the grievances against respondent had already been filed at the time of the Albuja closing: one on April 8, 2005, fifteen months before the Albuja closing, and the other on June 16, 2005, thirteen months before the closing. Obviously, then, respondent had not learned from his prior mistakes at the time of the closing.

While respondent's conduct in this matter, standing alone, would ordinarily warrant only an admonition, his ethics history and his failure to learn from prior mistakes require increased discipline. We find that a censure is appropriate for the totality of the circumstances.

Member Baugh voted to impose a reprimand. Member Wissinger did not participate.

We also determine that respondent should continue to practice under the supervision of an OAE-approved proctor until the Court releases him from that obligation.

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 Daniel David Hediger
Docket No. DRB 10-054

Argued: April 15, 2010

Decided: May 26, 2010

Disposition: Censure

Members	Disbar	Censure	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:		7	1			1

Julianne K. DeCore
Chief Counsel